THE AMERICAN LAW INSTITUTE

Submitted by the Council to the membership of
The American Law Institute
for consideration at the 2024 Annual Meeting on May 20-22, 2024

Restatement of the Law Third Torts: Miscellaneous Provisions

Tentative Draft No. 3

(April 2024)

SUBJECTS COVERED

MEDICAL MONITORING (§ __)
STATUTES OF LIMITATIONS AND STATUTES OF REPOSE (§§ 1-16)
NEGLIGENT MISREPRESENTATION CAUSING PHYSICAL HARM (§ 18 A)
WRONGFUL-DEATH AND SURVIVAL ACTIONS (§§ 70-72 (Approximately))
INTERFERENCE WITH FAMILY RELATIONSHIPS (§§ 48 F-48 K)
AIDING AND ABETTING NEGLIGENCE TORTS (§ __)
AGREEMENTS TO ENGAGE IN CONDUCT THAT IS NEGLIGENT OR RECKLESS (§ __)
FIREFIGHTER'S RULE
BAD-FAITH PERFORMANCE OF FIRST-PARTY INSURANCE CONTRACT (§ 20 A)
SPOLIATION (§§ __- __)
EQUITABLE ESTOPPEL AS A DEFENSE TO TORT LIABILITY (§ __)
TORT LIABILITY BASED ON ESTOPPEL
PRENATAL INJURY (§ __)
WRONGFUL PREGNANCY, BIRTH, AND LIFE (§§ __ - __)
LIABILITY FOR THE PROVISION OF ALCOHOL (§ __)
NEGLIGENCE LIABILITY OF PRODUCT SUPPLIERS (§§ __ - __)
APPENDIX A Black Letter of Tentative Draft No. 3
APPENDIX B Black Letter of Sections Approved by Membership

The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104
Telephone: (215) 243-1600
Email: ali@ali.org Website: www.ali.org

The American Law Institute

Restatement of the Law Third
Torts: Miscellaneous Provisions

Comments and Suggestions Invited

We welcome written comments on this draft. They may be submitted via the website project page or sent via email to RTMPcomments@ali.org. Comments will be forwarded directly to the Reporters, the Director, and the Deputy Director. You may also send comments via standard mail; contact information appears below.

Unless expressed otherwise in the submission, individuals who submit comments authorize The American Law Institute to retain the submitted material in its files and archives, and to copy, distribute, publish, and otherwise make it available to others, with appropriate credit to the author. Comments will be accessible on the website's project page as soon as they are posted by ALI staff. You must be signed in to submit or view comments.

Reporters
Professor Nora Freeman Engstrom
Stanford Law School
559 Nathan Abbott Way
Room N350, Neukom Building
Stanford, CA 94305-8602
Email: nora.engstrom@law.stanford.edu

Professor Michael D. Green
Visiting Professor
Washington University in St. Louis School of Law
1 Brookings Dr.
Anheuser-Busch Hall, Room 460
St. Louis, MO 63130-4862
Email: michael.g@wustl.edu

Associate Reporter
Mr. Guy Miller Struve
Davis Polk & Wardwell LLP (Retired)
450 Lexington Avenue, Room 2910
New York, NY 10017-3919
Phone: 212-450-4192
Email: guy.struve@davispolk.com

Director
The Hon. Diane P. Wood
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: director@ALI.org

Deputy Director
Ms. Eleanor Barrett
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: ebarrett@ALI.org

Reporters' Conflicts of Interest

The project's Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.

Restatement of the Law Third
Torts: Miscellaneous Provisions

(as of April 5, 2024)

JIM M. PERDUE, Perdue & Kidd, Houston, TX
PHILIP G. PETERS, JR., University of Missouri School of Law, Columbia, MO
ROBERT L. RABIN, Stanford Law School, Stanford, CA
CHRISTINA C. REISS, U.S. District Court, District of Vermont, Burlington, VT
ELLEN RELKIN, Weitz & Luxenberg, New York, NY
JULIUS N. RICHARDSON, U.S. Court of Appeals, Fourth Circuit, Columbia, SC
CHRISTOPHER JOHN ROBINETTE, Southwestern Law School, Los Angeles, CA
WILLIAM M. SAGE, Texas A&M University School of Law, Fort Worth, TX
NADIA N. SAWICKI, Loyola University Chicago School of Law, Chicago, IL
VICTOR E. SCHWARTZ, Shook, Hardy & Bacon, Washington, DC
MARC M. SELTZER, Susman Godfrey, Los Angeles, CA
JOANNA SHEPHERD, Emory University School of Law, Atlanta, GA
LAURA SIGMAN, Children's National Health System, Washington, DC
AMY J. ST. EVE, U.S. Court of Appeals, Seventh Circuit, Chicago, IL
LARRY S. STEWART, Stewart Tilghman Fox Bianchi & Cain (retired), West Palm Beach, FL
GUY MILLER STRUVE, Davis Polk & Wardwell (retired), New York, NY [to 2021]
DAVID STUDDERT, Stanford Law School, Stanford, CA
STEPHEN D. SUGARMAN, University of California, Berkeley School of Law, Berkeley, CA [deceased 2021]
THOMAS D. WATERMAN, Iowa Supreme Court, Des Moines, IA
MALCOLM E. WHEELER, Wheeler Trigg O'Donnell, Denver, CO
JOHN WITT, Yale Law School, New Haven, CT
JENNIFER WRIGGINS, University of Maine School of Law, Portland, ME
ALLISON ZIEVE, Public Citizen Litigation Group, Washington, DC
ADAM S. ZIMMERMAN, University of Southern California, Gould School of Law, Los Angeles, CA
BENJAMIN C. ZIPURSKY, Fordham University School of Law, New York, NY

LIAISONS

For the American College of Surgeons
PATRICK BAILEY, Washington, DC
For the American Medical Association
KYLE PALAZZOLO, Chicago, IL
For the American Property Casualty Insurance Association
LAURA A. FOGGAN, Washington, DC

MEMBERS CONSULTATIVE GROUP

Restatement of the Law Third, Torts: Miscellaneous Provisions
(as of April 12, 2024)

MARC T. AMY, Lafayette, LA
JAMES M. ANDERSON, Pittsburgh, PA
JOSÉ F. ANDERSON, Baltimore, MD
CHRISTOPHER EDWARD APPEL, Washington, DC
JAMES K. ARCHIBALD, Towson, MD
RONALD G. ARONOVSKY, Los Angeles, CA
MICHAEL F. AYLWARD, Boston, MA
TOM BAKER, Philadelphia, PA
STEVEN K. BALMAN, Tulsa, OK
JENNIFER S. BARD, Cincinnati, OH
WILLIAM T. BARKER, Chicago, IL
JAMES M. BECK, Philadelphia, PA
CHARLES L. BECKER, Philadelphia, PA
NEAL S. BERINHOUT, Atlanta, GA
MARY JANE BOWES, Pittsburgh, PA
THOMAS H. BOYD, Minneapolis, MN
STUART N. BROTMAN, Knoxville, TN
ARTHUR H. BRYANT, Oakland, CA
ELLEN M. BUBLICK, Phoenix, AZ
JOHN P. BURTON, Santa Fe, NM
KAREN K. CALDWELL, Lexington, KY
STEPHEN CALKINS, Detroit, MI
ELENA A. CAPPELLA, Philadelphia, PA
STEPHEN YEE CHOW, Boston, MA
GEORGE W. CONK, New York, NY
CHRISTINE NERO COUGHLIN, Winston-Salem, NC
CHRISTOPHER SCOTT D'ANGELO, Philadelphia, PA
KEITH L. DAVIDSON, Crystal Lake, IL
DEBORAH A. DEMOTT, Durham, NC
JOHN L. DIAMOND, San Francisco, CA
ANTHONY M. DILEO, New Orleans, LA
JAMES B. DOLAN JR., Boston, MA
JOHN FITZGERALD DUFFY, Charlottesville, VA
HOLLY A. DYER, Wichita, KS
JORDAN ELIAS, San Francisco, CA
RICHARD G. FEDER, Philadelphia, PA
JAY M. FEINMAN, Camden, NJ
ARTHUR NORMAN FIELD, New York, NY
JOHN F. FISCHER, Tulsa, OK
PAUL J. FRAIDENBURGH, San Diego, CA
DAVID R. GEIGER, Boston, MA
SHARON STERN GERSTMAN, Buffalo, NY
ELIZABETH BARROWMAN GIBSON, Dallas, TX
DONALD G. GIFFORD, Baltimore, MD
PHILIP S. GOLDBERG, Washington, DC
CARLOS GÓMEZ LIGÜERRE, Barcelona, Spain
JAMES GOUDKAMP, Oxford, England
VALERIE P. HANS, Ithaca, NY
PAUL T. HAYDEN, Los Angeles, CA
RICHARD CONRAD HENKE, Lansing, MI
STEPHEN J. HERMAN, New Orleans, LA
DANIEL EARLE HINDE, Houston, TX
SHARONA HOFFMAN, Cleveland, OH
ROGER F. HOLMES, Anchorage, AK
KEVIN D. JEWELL, Houston, TX
VINCENT R. JOHNSON, San Antonio, TX
ALLAN KANNER, New Orleans, LA
D. ARTHUR KELSEY, Richmond, VA
LESLIE CAROLYN KENDRICK, Charlottesville, VA
HAROLD H. KIM, Washington, DC
NANCY S. KIM, Chicago, IL
ERIK KNUTSEN, Kingston, Canada
PETER R. KOCHENBURGER, Baton Rouge, LA
CANDACE SAARI KOVACIC-FLEISCHER, Washington, DC
RONALD J. KROTOSZYNSKI, Tuscaloosa, AL
PETER B KUTNER, Norman, OK
JOSEPH H. LANG JR., Tampa, FL
JOHN P. LAVELLE JR., Philadelphia, PA
DOUGLAS LAYCOCK, Charlottesville, VA
STEVE LEBEN, Kansas City, MO
LAWRENCE C. LEVINE, Sacramento, CA
MICHAEL E. LEVINE, Miami, FL
WILLIAM PARKER LIGHTFOOT, Washington, DC
KYLE D. LOGUE, Ann Arbor, MI
WILLIAM CULLEN MACDONALD, Bethesda, MD
SOLANGEL MALDONADO, Newark, NJ
PATRICK A. MALONE, Washington, DC
D. PRICE MARSHALL JR., Little Rock, AR
LORELIE S. MASTERS, Washington, DC
THOMAS WM. MAYO, Dallas, TX
CHRISTOPHER J. MCFADDEN, Atlanta, GA
JAMES C. MCKAY JR., Washington, DC
STEPHANIE A. MIDDLETON, Greenbrae, CA
JIM A. MOSELEY, Dallas, TX
LUTHER T. MUNFORD, Ridgeland, MS
VALERIE M. NANNERY, Washington, DC
DONAL NOLAN, Oxford, England
JAMES M. OLESKE JR., Portland, OR
ROBERT M. PALUMBOS, Philadelphia, PA
STEPHEN PATRICK PATE, Houston, TX
ROBERT S. PECK, Washington, DC
E. FARISH PERCY, Oxford, MS
JEFFREY M. POLLOCK, Princeton, NJ
POLLY J. PRICE, Atlanta, GA
MARLON A. PRIMES, Cleveland, OH
ELLEN S. PRYOR, Dallas, TX
STUART A. RAPHAEL, Richmond, VA
MARGARET RAYMOND, Madison, WI
CLIFFORD A. RIEDERS, Williamsport, PA
ARMAND JAMES ROBERTSON II, San Francisco, CA
CHRISTOPHER T. ROBERTSON, Boston, MA
MICHAEL LINDSAY ROBINSON, Winston-Salem, NC
DANIEL B. RODRIGUEZ, Chicago, IL
JOSEPH SANDERS, Houston, TX
NATHAN A. SCHACHTMAN, New York, NY
MILTON R. SCHROEDER, Paradise Valley, AZ
ROBERT P. SCHUSTER, Jackson, WY
SUSAN SHARKO, Florham Park, NJ
KENNETH W. SIMONS, Irvine, CA
DOUGLAS G. SMITH, Chicago, IL
CARL A. SOLANO, Philadelphia, PA
SHANIN SPECTER, Philadelphia, PA
VICTOR P. STABILE, Harrisburg, PA
JANE STAPLETON, Glebe, Australia

MICHAEL K. STEENSON, Saint Paul, MN
JEFFREY W. STEMPEL, Las Vegas, NV
EVAN B. STEPHENSON, Denver, CO
JAMES Y. STERN, Williamsburg, VA
H. MARK STICHEL, Baltimore, MD
LAURA DENVIR STITH, Kansas City, MO
CATHERINE T. STRUVE, Philadelphia, PA
JOHN D. TAURMAN, Washington, DC
JEFFREY E. THOMAS, Kansas City, MO
DANIEL MACK TRAYNOR, Bismarck, ND
CARLA C. VAN DONGEN, Bloomington, IL
MOLLY S. VAN HOUWELING, Berkeley, CA
VICTOR D. VITAL, Dallas, TX
ELIZABETH WEEKS, Athens, GA
MERLE WEINER, Eugene, OR
STEVEN O. WEISE, Los Angeles, CA
W. BRADLEY WENDEL, Ithaca, NY
NICHOLAS J. WITTNER, East Lansing, MI
DOUGLAS P. WOODLOCK, Boston, MA
RICHARD W. WRIGHT, Evanston, IL
ERIC H. ZAGRANS, Columbus, OH

The bylaws of The American Law Institute provide that "Publication of any work as representing the Institute's position requires approval by both the membership and the Council."

Each portion of an Institute project is submitted initially for review to the project's Advisers and Members Consultative Group as a Preliminary Draft. As revised, it is then submitted to the Council as a Council Draft. After review by the Council, it is submitted as a Tentative Draft or Discussion Draft for consideration by the membership at an Annual Meeting.

Once it is approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute's position on the subject and may be cited in opinions or briefs in accordance with Bluebook rule 12.9.4, e.g., Restatement (Second) of Torts § 847A (AM. L. INST., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.

The drafting cycle continues in this manner until each segment of the project has been approved by both the Council and the membership. When extensive changes are required, the Reporter may be asked to prepare a Proposed Final Draft of the entire work, or appropriate portions thereof, for review by the Council and membership. Review of this draft is not de novo, and ordinarily is limited to consideration of whether changes previously decided upon have been accurately and adequately carried out.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and the membership, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

Restatements (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.

a. Nature of a Restatement. Webster's Third New International Dictionary defines the verb "restate" as "to state again *or* in a new form" [emphasis added]. This definition neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.

The law of the Restatements is generally common law, the law developed and articulated by judges in the course of deciding specific cases. For the most part Restatements thus assume a body of shared doctrine enabling courts to render their judgments in a consistent and reasonably predictable manner. In the view of the Institute's founders, however, the underlying principles of the common law had become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States. The 1923 report suggested that, in contrast, the Restatements were to be at once "analytical, critical and constructive." In seeing each subject clearly and as a whole, they would discern the underlying principles that gave it coherence and thus restore the unity of the common law as properly apprehended.

Unlike the episodic occasions for judicial formulations presented by particular cases, however, Restatements scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed. Restatements—"analytical, critical and constructive"—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute's founders envisioned a Restatement's black-letter statement of legal rules as being "made with the care and precision of a well-drawn statute." They cautioned, however, that "a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended." Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.

A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what Herbert Wechsler called "a preponderating balance of authority" but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went

the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a "law reform" organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.

A Restatement consists of an appropriate mix of these four elements, with the relative weighing of these considerations being art and not science. The Institute, however, needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.

An excellent common-law judge is engaged in exactly the same sort of inquiry. In the words of Professor Wechsler, which are quoted on the wall of the conference room in the ALI headquarters in Philadelphia:

> We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.

But in the quest to determine the best rule, what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law. The goals envisioned for the Restatement process by the Institute's founders remain pertinent today:

It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, *which it is proper for an organization of lawyers to promote* and which make the law better adapted to the needs of life. [emphasis added]

TABLE OF CONTENTS

Section *Page*

Project Status at a Glance xvii
Foreword xviii
Reporters' Memorandum xix

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

§ __. Medical Monitoring 1
Appendix to Reporters' Note. A State-by-State Table: Medical Monitoring Absent Present Physical Injury 40

STATUTES OF LIMITATIONS AND STATUTES OF REPOSE FOR COMMON-LAW TORT CAUSES OF ACTION

Introductory Note 47

PART 1
STATUTES OF LIMITATIONS

TOPIC 1
STATUTES OF LIMITATIONS IN GENERAL

§ 1. Definition of Statute of Limitations 47

TOPIC 2
WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN

§ 2. When the Statute of Limitations Begins to Run—All-Elements Rule 57
§ 3. When the Statute of Limitations Begins to Run—Discovery Rule 72
Scope Note for § 4 89
§ 4. When the Statute of Limitations Begins to Run—Continuing Torts 91

TOPIC 3
WHEN THE RUNNING OF THE STATUTE OF LIMITATIONS IS SUSPENDED (TOLLING)

Introductory Note: Rationale and Terminology 106

Section *Page*

§ 5. Statutory Tolling Rules 107
§ 6. Continuous Representation 108
§ 7. Continuous Medical Treatment 115
§ 8. Equitable Tolling 120

TOPIC 4
EFFECT OF DEFENDANT MISCONDUCT

§ 9. Equitable Estoppel 124
§ 10. Fraudulent Concealment 132

TOPIC 5
CONTRACTS SHORTENING OR LENGTHENING THE STATUTE-OF-LIMITATIONS PERIOD

§ 11. Contracts Shortening or Lengthening the Statute-of-Limitations Period 149

PART 2
STATUTES OF REPOSE

TOPIC 1
STATUTES OF REPOSE IN GENERAL

§ 12. Definition of Statute of Repose 154

TOPIC 2
WHEN THE STATUTE OF REPOSE BEGINS TO RUN

§ 13. When the Statute of Repose Begins to Run 159

TOPIC 3
THE STATUTE OF REPOSE IS NOT SUSPENDED BY COMMON-LAW TOLLING RULES

§ 14. The Statute of Repose Is Not Suspended by Common-Law Tolling Rules 161

TOPIC 4
EFFECT OF DEFENDANT MISCONDUCT

§ 15. Effect of Defendant Misconduct 164

Section *Page*

TOPIC 5
CONTRACTS SHORTENING OR LENGTHENING THE STATUTE-OF-REPOSE PERIOD

§ 16. Contracts Shortening or Lengthening the Statute-of-Repose Period 168

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

CHAPTER 3
THE NEGLIGENCE DOCTRINE AND NEGLIGENCE LIABILITY

§ 18 A. Negligent Misrepresentation Causing Physical Harm 171

CHAPTER 12
LIABILITY IN EVENT OF DEATH

§ 70 [Approximately]. Actions for Causing Death (Wrongful Death) 208
§ 71 [Approximately]. Survival of Tort Actions Upon the Death of the Victim 236
§ 72 [Approximately]. Survival of Tort Actions Upon the Death of the Tortfeasor 252

CHAPTER 8A
INTERFERENCE WITH FAMILY RELATIONSHIPS

§ 48 F. Spousal Abduction and Enticement Abolished 256
§ 48 G. Alienation of Betrothed's Affections Abolished 260
§ 48 H. Alienation of a Child's Affections Abolished 263
§ 48 I. Parental Claim for Seduction of a Minor Abolished 269
§ 48 J. Tortious Interference with Parental Rights 273
§ 48 K. Alienation of Parent's Affections Abolished 299
Other Provisions in the Restatement Second of Torts Determined to be "Obsolete." 302

AIDING AND ABETTING NEGLIGENCE TORTS

§ __. Aiding and Abetting Negligence Torts 304

§ __. Agreements to Engage in Conduct that is Negligent or Reckless 325

FIREFIGHTER'S RULE

Firefighter's Rule 349

Section *Page*

LIABILITY FOR ECONOMIC HARM

CHAPTER 3
INTERFERENCE WITH ECONOMIC INTERESTS

§ 20 A. Bad-Faith Performance of First-Party Insurance Contract 383

MISCELLANEOUS PROVISIONS

CHAPTER __
MISCELLANEOUS TORTS

TOPIC __
SPOLIATION

§ __. "Spoliation" Defined..... 418
§ __. Third-Party Spoliation of Evidence 421
§ __. First-Party Spoliation of Evidence..... 449

DEFENSES APPLICABLE TO ALL TORT CLAIMS

§ __. Equitable Estoppel as a Defense to Tort Liability 464

RULES APPLICABLE TO CERTAIN TYPES OF CONDUCT

Tort Liability Based on Estoppel 477

HARM BEFORE AND REGARDING BIRTH

§ __. Prenatal Injury..... 478

WRONGFUL PREGNANCY, BIRTH, AND LIFE

§ __. Wrongful Pregnancy 499
Introductory Note on "Parent" in Wrongful-Birth Claims 516
§ __. Wrongful Birth..... 516
§ __. Wrongful Life 536

Section *Page*

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

§ __. Liability for the Provision of Alcohol 541

NEGLIGENCE LIABILITY OF PRODUCT SUPPLIERS

Introductory Note 584
§ __. Negligence Liability of Product Suppliers 586
§ __. Negligence Liability of Independent Contractors that Manufacture, Rebuild, Repair, Maintain, Assemble, or Install Products 614
Other Provisions in Restatement Second of Torts, Division Two, Chapter 14 addressed in this Restatement 621

Appendix A. Black Letter of Tentative Draft No. 3 623
Appendix B. Black Letter of Sections Approved by Membership 635

PROJECT STATUS AT A GLANCE

Apportionment of Liability

Topic 6: Tort Claims for Economic Harm

§§ 27 through 37 (T.D. No. 1) – approved at 2022 Annual Meeting

Topic 1: Basic Rules of Comparative Responsibility

§§ 4 A and 4 B (T.D. No. 1) – approved at 2022 Annual Meeting

Liability for Physical and Emotional Harm

Chapter 11: Liability of Medical Professionals and Institutions

Introductory Note, §§ 1 through 3 (T.D. No. 1) – approved at 2022 Annual Meeting[*]

Chapter 8A: Interference with Family Relationships

§§ 48 D and 48 E (T.D. No. 1) – approved at 2022 Annual Meeting

Immunities

Special Note on Immunities (T.D. No. 1) – approved at 2022 Annual Meeting

Chapter 1: Intra-Family Immunities

§§ 1 through 4 (T.D. No. 1) – approved at 2022 Annual Meeting

Chapter 2: Miscellaneous Immunities

§§ 5 through 7 (T.D. No. 1) – approved at 2022 Annual Meeting

Chapter 3: Governmental Entities and Public Officials and Employees Immunities

§§ 9 and 10 (T.D. No. 1) – approved at 2022 Annual Meeting

Parental Standard of Care

§ 10A (T.D. No. 1) – approved at 2022 Annual Meeting

Liability for Physical and Emotional Harm

Chapter 8: Liability for Emotional Harm

Introductory Note, §§ 48 A through 48 C (T.D. No. 1) – approved at 2022 Annual Meeting

Sepulcher (Interference with Human Remains)

§§ 48 D through 48 F (T.D. No. 2) – approved at 2023 Annual Meeting

[*] This Note and §§ 1 through 3 are now part of Restatement Third, Torts: Medical Malpractice.

Foreword

At its January 2019 meeting, the ALI Council approved the launch of the final three components of the Restatement of the Law Third, Torts: Remedies; Defamation and Privacy; and Concluding Provisions. Since then, the Concluding Provisions component has undergone two changes: it was renamed "Miscellaneous Provisions" to reflect its content more accurately, and its Medical Malpractice Sections were spun off into a freestanding portion of the Restatement Third of Torts. With these four projects, the ALI will complete an effort that started more than three decades ago, when we began work on the Restatement Third of Torts: Products Liability. When these projects are completed, the ALI will have produced a body of work that entirely supersedes the Restatement Second of Torts.

In connection with the planning for this project, the Institute owes great thanks to Professor Michael D. Green, then of Wake Forest University, and the late Professor William C. Powers, Jr., of the University of Texas, who had already served the ALI admirably as the Reporters for Apportionment of Liability and Liability for Physical and Emotional Harm. Professors Green and Powers prepared a blueprint for how to bring the Restatement Third to a successful conclusion and developed the idea of a "miscellaneous torts" project to help avoid the possible confusion about the ALI's position on issues that otherwise would have been addressed by the Restatement Second but not the Restatement Third.

With this goal in mind, the Miscellaneous Torts project is coming to the Annual Meeting for the third time. In 2022, the membership approved material on Apportionment of Liability for Economic Harm, the Wrongful Acts Doctrine, Liability of Medical Professionals and Institutions (now incorporated into the Restatement Third of Torts: Medical Malpractice), Interference with Family Relationships, Immunities, the Parental Standard of Care, and Consortium; and in 2023, members approved Sections on the Right of Sepulcher. This year, the membership will be asked to consider for approval material on Medical Monitoring, Statutes of Limitations and Repose, Negligent Misrepresentation Causing Physical Harm, Wrongful-Death and Survival Actions, Interference with Family Relationships, Aiding and Abetting Negligence Torts, Agreements to Engage in Conduct that is Negligent or Reckless, the Firefighter's Rule, Bad-Faith Performance of First-Party Insurance Contract, Spoliation of Evidence, Equitable Estoppel as a Defense to Tort Liability, Tort Liability Based on Estoppel, Prenatal Injury, Wrongful Pregnancy, Wrongful Birth, and Wrongful Life, Liability for the Provision of Alcohol, and Negligence Liability of Product Suppliers.

Professor Green, now a professor at Washington University in St. Louis School of Law, and Professor Nora Freeman Engstrom of Stanford Law School serve as the Reporters on this project. The team also includes a terrific Associate Reporter, Guy Miller Struve of Davis Polk & Wardwell (retired). Professors Tanya D. Marsh and Mark A. Hall, both of Wake Forest University School of Law, have also served admirably as Associate Reporters, with Professor Hall now serving as a Reporter for Torts: Medical Malpractice. The Institute is grateful to them all.

DIANE P. WOOD
Director
The American Law Institute

April 11, 2024

REPORTERS' MEMORANDUM

April 2024

To: ALI Membership

From: Nora Freeman Engstrom and Michael D. Green

Re: "Miscellaneous Provisions" of the Restatement Third of Torts and this Tentative Draft No. 3

As we have explained in previous Reporters' Memoranda, this piece of the Restatement Third of Torts consists of an eclectic group of tort-law matters. Some of the subjects we address were addressed in the Second Restatement of Torts but have not yet been addressed in other Third Restatement of Torts projects. Other subjects were not addressed by the Second Restatement, sometimes because the particular tort is only of recent vintage.

We began the Miscellaneous Provisions project (initially called Concluding Provisions) in 2019, and over the past five years, we have made great progress, as reflected in the chart below. As the chart reflects, we are reaching the end of our to-do list, and we therefore hope that, barring unanticipated delays, we will be able to obtain approval for the last provisions in this project at the Annual Meeting in the spring of 2025.

At the May 2024 Annual Meeting, we are hoping to address numerous topics in the following order:

1) Medical Monitoring
2) Statutes of Limitations
3) Negligent Misrepresentation Causing Physical Harm
4) Wrongful-Death and Survival Actions
5) Children and Family Torts
6) Aiding and Abetting Negligence Torts
7) Agreements to Engage in Conduct that is Negligent or Reckless
8) Firefighter's Rule
9) Bad-Faith Performance of First-Party Insurance Contract
10) Spoliation
11) Equitable Estoppel as a Defense to Tort Liability
12) Tort Liability Based on Estoppel
13) Prenatal Injury
14) Wrongful Pregnancy, Wrongful Birth, and Wrongful Life
15) Liability for the Provision of Alcohol
16) Negligence Liability of Product Suppliers

You have seen many of these draft Sections before. In particular, Medical Monitoring, Negligent Misrepresentation Causing Physical Harm, Wrongful Death and Survival Actions, various Sections addressing Children and Family Torts, Aiding and Abetting Negligence Torts, the Firefighter's Rule, and Bad-Faith Performance of First-Party Insurance Contract all appeared in Tentative Draft No. 2. However, we did not discuss most of these draft provisions at last year's Annual Meeting due to time constraints. We did discuss Medical Monitoring at last year's Annual Meeting, and several votes were taken on related motions—but time ran out before that Section could be approved.

Below, we provide a list of subjects we currently believe Miscellaneous Provisions will contain and the status of our work on each. As always, we welcome your thoughts on any of the material contained herein—and we very much look forward to seeing you in San Francisco next month.

Miscellaneous Provisions/Subjects to Cover		
Subject	***Status***	***Next Step***
Alienation of Affections and Criminal Conversation	Approved at AM 2022	Complete
Apportionment of Liability for Economic Harm	Approved at AM 2022	Complete
Children and Family Torts	Approved by Council – January 2023 and January 2024	In T.D. No. 3
Aiding and Abetting Negligence Torts	Approved by Council – January 2023	In T.D. No. 3
Agreements to Engage in Conduct that is Negligent or Reckless	Approved by Council – January 2023	In T.D. No. 3
Consortium	Approved at AM 2022	Complete
Equitable Estoppel as a Defense to Tort Liability	Approved by Council – October 2023	In T.D. No. 3
Immunities (Family, Governmental, Charitable, and Miscellaneous)	Approved at AM 2022 (Some governmental material, including regarding employees, the public duty doctrine, and the federal government, remains outstanding.)	We aim to address outstanding material in P.D. No. 5.
Implied Rights of Action	After consultation with Advisers and Council, opted against treatment, given coverage in other projects of the Third Restatement.	Complete
Interference With a Right to Vote or Hold Office	Slated for P.D. No. 5	
Negligent Misrepresentation Causing Physical Injury	Approved by Council – October 2022	In T.D. No. 3

Miscellaneous Provisions/Subjects to Cover		
Subject	***Status***	***Next Step***
Negligence Liability of Product Suppliers [*]	Approved by Council January 2024	In T.D. No. 3
Parental Standard of Care	Approved at AM 2022	Complete
Prima Facie Tort	Slated for P.D. No. 5	
Privileges	After consultation with Advisers and Council, opted against treatment, given coverage in other projects of the Third Restatement.	Complete
Professional Standard of Care	Slated for P.D. No. 5	
Sepulcher (Interference with Human Remains)	Approved at AM 2023	Complete
Statutes of Limitations (covered lightly in R2)	Approved by Council January 2024	In T.D. No. 3
Wrongful Acts Doctrine	Approved at AM 2022	Complete
Wrongful-Death and Survival Actions	Approved by Council – January 2023	In T.D. No. 3

Subjects Not Included in the Second Restatement		
Subject	***Status***	***Next Step***
Vicarious Liability	Approved by Council – January 2023 (We intend to draft a new Section on vicarious liability for sexual assault and include that draft provision in P.D. No. 5.)	We aim to address outstanding material in P.D. No. 5.
Nondelegable Duties with Respect to Nonphysical Harm	Slated for P.D. No. 5	
Medical Malpractice	Now addressed as a separate Medical Malpractice project, slated for completion at the 2024 Annual Meeting.	

New Subjects Emergent Since the Second Restatement		
Subject	***Status***	***Next Step***
Exculpatory Agreements/Contractual Waivers of Liability	After consultation with Advisers and Council, opted against treatment, given coverage in other projects of the Third Restatement.	Complete
Liability for the Provision of Alcohol	Approved by Council – January 2023	In T.D. No. 3
Prenatal Injury (Harm Before and Regarding Birth)	Approved by Council – October 2023	In T.D. No. 3
Firefighter's Rule	Approved by Council – October 2022	In T.D. No. 3
Bad-Faith Performance of First-Party Insurance Contract	Approved by Council – January 2023	In T.D. No. 3

[*] The Products Liability Restatement was limited to the liability of commercial sellers based on product defect.

New Subjects Emergent Since the Second Restatement		
Subject	***Status***	***Next Step***
Government-Contractor Defense (state law)	Slated for P.D. No. 5	
Medical Monitoring	Approved by Council – October 2022	In T.D. No. 3
Spoliation of Evidence	Approved by Council – October 2023	In T.D. No. 3
Wrongful Pregnancy, Wrongful Birth, and Wrongful Life	Approved by Council – January 2024	In T.D. No. 3

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

§ __. Medical Monitoring

An actor is subject to liability to a person for the reasonable expenses of medical monitoring, even absent manifestation of present bodily harm, if all of the following requirements are satisfied:

(1) the actor exposed the person to a significantly increased risk of a particular serious future bodily harm;

(2) the actor, in exposing the person to a significantly increased risk of the particular serious future bodily harm, has acted tortiously;

(3) the actor's tortious conduct factually causes the person to be at a significantly increased risk of the particular serious future bodily harm, and the increased risk is within the actor's scope of liability;

(4) a medical monitoring regimen exists that makes expedited detection and treatment of the particular serious future bodily harm both possible and beneficial;

(5) the medical monitoring regimen is different from that normally recommended in the absence of the exposure; and

(6) the medical monitoring regimen is reasonably necessary, according to generally accepted contemporary medical practices, to enable expedited detection and treatment of the particular serious bodily harm, so as to prevent or mitigate the harm.

When an actor is liable for medical monitoring expenses, barring exceptional circumstances, monies should not be paid on a lump-sum basis. Instead, appropriate steps should be taken to ensure that funds earmarked for medical monitoring are used as intended and are not diverted to other purposes.

Comment:

a. History and scope.

b. Rationale and support.

c. Distinguishing medical monitoring from other grounds of liability.

d. Tortious conduct, factual cause, and scope of liability.

e. Tortious conduct, not only toxic exposure.

f. Significantly increased risk of serious future bodily harm.
g. Expedited detection and treatment both possible and beneficial.
h. Monitoring regimen different from that normally recommended in the absence of exposure.
i. Reasonably necessary, according to generally accepted contemporary medical practices.
j. Injury requirement.
k. Court-administered or -supervised fund.
l. Further restrictions to limit liability.
m. Terminology: freestanding cause of action or remedy.
n. Statutes of limitations.
o. Claim preclusion and issue preclusion.

a. History and scope. Neither the first nor Second Restatements of Torts addressed medical monitoring because such claims did not emerge until after the completion of the Second Restatement.

On occasion, a plaintiff's entitlement to recover for medical monitoring is governed by statute, rather than the common law. When a statute governs, its proper interpretation is a matter outside the scope of this Restatement.

b. Rationale and support. Courts and commentators recognize that, of those jurisdictions that have squarely considered the matter, approximately half endorse medical monitoring in some fashion, while approximately half do not. There is no clear trend either for or against acceptance.

Of jurisdictions that have endorsed medical monitoring, there is broad agreement as to medical monitoring's core requirements. There is thus a consensus that, in order to prevail, the plaintiff must prove that the defendant exposed the plaintiff to a significantly increased risk of serious future bodily harm. The plaintiff must also prove that, in so doing, the defendant acted tortiously, that the tortious conduct has factually caused the plaintiff to be at a significantly increased risk of serious future bodily harm, that the increased risk of serious future bodily harm to which the plaintiff has been subjected is the risk for which medical monitoring is sought, and that the increased risk of serious future bodily harm is within the actor's scope of liability (proximate cause). The plaintiff must further prove that the prescribed medical monitoring regimen is reasonably necessary—and that the regimen is also different from that normally recommended in the absence of exposure. The black letter of this Section captures these well-accepted prerequisites.

At the same time, of the jurisdictions that have endorsed medical monitoring, there is some disagreement as to the particulars. These points of divergence include, for example, whether medical monitoring is only available following exposure to a toxic substance, not another kind of

tortious conduct (Comment *e*); how significant the increased incremental risk must be in order for a defendant to be liable for medical monitoring (Comment *f*); whether medical monitoring constitutes a freestanding cause of action or a remedy (Comment *m*); and whether the plaintiff is required to show that medical monitoring is not only feasible but also beneficial (i.e., that the monitoring has the potential to improve the plaintiff's prognosis, alter the course of the plaintiff's illness, or mitigate the plaintiff's impairment or disability (paragraph (4) and Comment *g*)).

Cognizant of these differences, and recognizing that medical monitoring is not everywhere accepted, this Section endeavors to chart a middle and sensible path. It thus recognizes medical monitoring, while following the lead of those courts that have imposed meaningful limits on the circumstances in which it can be recovered. In so doing, this Section ensures that medical monitoring is available only in an appropriately narrow range of circumstances.

Beyond the requirements set forth in the Section's black letter, Comment *l* offers two additional steps courts may choose to take to further limit medical monitoring liability. (The many courts that have not yet considered whether (or how) to adopt medical monitoring may find Comment *l* especially useful.) In particular, as Comment *l* explains, courts may decide to deviate from the traditional collateral source rule to require the actor to pay medical monitoring expenses only to the extent that the cost of the relevant diagnostic testing has not been, or will not be, fully borne by insurance, the plaintiff's employer, a government fund, or another collateral source. Additionally or alternatively, courts may choose to create an affirmative defense to absolve the defendant from liability when the imposition of liability is wholly indeterminate and virtually unlimited or if the defendant is able to show that liability would so far reduce the defendant's resources and insurance coverage as to significantly jeopardize eventual recovery by those exposed persons who ultimately develop bodily harm.

Beyond bounding medical monitoring liability, this Section also takes other affirmative steps to address concerns voiced by more skeptical courts and commentators. For example, some courts have expressed hesitation about medical monitoring because of a concern that such payments may preclude the plaintiff's later recovery for bodily harm, in the event the harm later occurs. This concern is valid. But it can be (and here is) addressed in a narrow-gauge way. See Comment *o* below (clarifying that medical monitoring claims do not preclude actions for later-suffered bodily harm, initiated once that harm ultimately manifests). Similarly, other courts have expressed the concern that, if claims for medical monitoring are authorized, plaintiffs will squander

the resources they receive and will not use the funds to obtain appropriate care. This concern, too, is valid. But it can be—and here is—specifically addressed. See Comment *k* below (explaining, as specified in the black letter, that, barring exceptional circumstances, monies earmarked for medical monitoring should not be paid to plaintiff on a lump-sum basis).

Even while carefully restricting liability for medical monitoring, this Section adopts the position—taken by numerous courts—that tortfeasors are liable for the cost of medical monitoring. It does so for six reasons.

First, shifting the cost of diagnostic testing to the defendant advances sound policy objectives. In particular, as many courts have recognized, imposing liability for reasonable and necessary medical monitoring fosters access to beneficial diagnostic testing, which, in turn, promotes cost savings traceable to the early detection and timely treatment of disease, sometimes before progression or metastasis. These cost savings are in society's best interest, and the savings may ultimately redound to the defendant's benefit by reducing its liability for the plaintiff's bodily harm, if or when the harm ultimately manifests.

Second, shifting the cost of harm (here, in the form of expenses for reasonable and necessary medical monitoring) to the tortfeasor furthers tort's twin aims of compensation and deterrence. The cost of medical monitoring is a real cost occasioned by tortious conduct. In order to promote efficient deterrence, those expenses should be borne by the tortfeasor, rather than the victim.

Third, imposing liability under this Section furthers the goal of the traditional tort doctrine of "avoidable consequences." Long accepted in the United States, the doctrine of avoidable consequences requires plaintiffs to submit to medically advisable treatment for tortiously inflicted injury. Unreasonable failure to submit to that treatment restricts plaintiffs from recovering for conditions or complications they could have avoided had timely treatment been obtained. Restatement Third, Torts: Remedies § 8(a) (Tentative Draft No. 1, 2022). Thus, under the avoidable consequences doctrine, plaintiffs—if they are to recover fully from the tortfeasor—must generally take reasonable affirmative steps to mitigate future foreseeable harm. By transferring the cost of certain necessary testing to the tortfeasor, this Section facilitates those steps.

Fourth, permitting medical monitoring is consistent with Restatement Third, Torts: Liability for Economic Harm § 1. That provision explains that courts are generally reluctant to authorize recoveries for "pure" economic loss—and that this reluctance is rooted in two concerns: (1) a desire to avoid compensation for "indeterminate and disproportionate liability"; and

(2) "[d]eference to contract," since economic losses often arise in the course of contractual relationships and "[a] contract that allocates responsibility for such a risk" is generally preferable "to a judicial assignment of liability after harm is done." Id., Comment *c*. However, Comment *d* of the Economic Harm Restatement observes that, when the above concerns are absent, the traditional restriction on recovery for pure economic loss gives way. Or, as Comment *d* to § 1 puts it: "Courts recognize duties of care to prevent economic loss when the rationales stated in Comment *c* are weak or absent." Id., Comment *d*.

Both of the rationales stated in Comment *c* for limiting tort liability for pure economic loss are weak or nonexistent in the case of medical monitoring. Medical monitoring typically does not—and certainly need not—involve indeterminate or disproportionate liability (see Comment *l* below), and it is not realistic to expect that medical monitoring will be the subject of contractual bargaining between tortfeasors and their victims. Accordingly, even if the costs of medical monitoring are regarded as merely compensating for the victim's "pure" economic loss (and not also the associated physical invasion that certain kinds of monitoring, such as blood tests, mammograms, or endoscopies entail), the imposition of liability for medical monitoring is consistent with the Restatement Third, Torts: Liability for Economic Harm § 1.

Fifth, although some worry that medical monitoring will open the floodgates to liability, that concern appears to be overstated. Numerous states have long endorsed medical monitoring—including several states with very large populations. Yet, there is no evidence that those states have seen an avalanche of medical monitoring litigation.

Sixth and finally, although some courts have worried that, to endorse medical monitoring is to endorse liability without bona fide injury, in fact, imposing on another the need for medical monitoring is consistent with the definition of "injury," as set forth in the Second Restatement. Published in 1965, the Second Restatement of Torts § 7 defined an "injury" as "the invasion of any legally protected interest of another." If one accepts that long-established definition, it is self-evident that a person who satisfies this Section's rigorous requirements is, in fact, "injured" and entitled to relief. As one court has put it: "Just as an individual has a legally protected interest in avoiding physical injury, so too does an individual have an interest in avoiding expensive medical evaluations caused by the tortious conduct of others. . . . Even though a plaintiff may not have yet developed a diagnosable physical injury, it is not accurate to conclude that no compensable injury

has been sustained." Meyer v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007). For more on this injury requirement, see Comment *j* below.

c. Distinguishing medical monitoring from other grounds of liability. This Section imposes liability when an actor tortiously exposes another to a risk that can cause serious bodily harm, but the manifestation of harm is not immediately existent or evident. In the period between exposure and manifestation, the exposed individual may need medical oversight, including diagnostic testing, to assess whether the individual is becoming, or has become, ill or impaired. This Section provides that the tortfeasor, rather than the exposed individual, is responsible for the reasonable and necessary costs of that monitoring. The period during which medical monitoring is necessary may be quite short, as in Illustration 2 below, or it may persist for decades, as might be the case following exposure to a carcinogen.

This Section is distinct from, and does not address, actions seeking compensation for present bodily harm, for the enhanced risk of harm itself, or for the fear or apprehension of such future harm. The Restatement Third of Torts: Liability for Physical and Emotional Harm § 47, Comment *k*, addresses, and largely disapproves of, claims for emotional harm caused by the risk of contracting a disease or suffering other bodily harm in the future. For the definition of "bodily harm," see id. § 4. For a discussion of the preclusive effect of an action initiated under this Section, see Comment *o* below.

d. Tortious conduct, factual cause, and scope of liability. As Paragraphs (2) and (3) make plain, an actor is subject to liability for medical monitoring if and only if the actor has acted tortiously, the tortious conduct factually causes the person to be at a significantly increased risk of serious future bodily harm, the risk to which the plaintiff has been subjected is the particular risk for which medical monitoring is sought, and the risk is within the actor's scope of liability. For factual cause, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 26. For scope of liability, see id. § 29. The actor's conduct may be negligent, reckless, or intentional. Or the actor may be subject to liability under principles of strict liability or product liability law.

Illustration:

1. Bergin Chemical negligently contaminates a town's water supply with a chemical known to cause various diseases. Leslie, who lives in the town and has consumed the contaminated water, becomes worried about breast cancer, and she files a lawsuit seeking to hold Bergin responsible for more frequent mammograms. (She believes that, because of

the contamination, she should receive a mammogram every year, rather than every two years, as is generally appropriate for women her age.) However, Leslie proffers no qualified expert to testify that the particular chemical Bergin released causes breast cancer, much less substantially increases women's risk of breast cancer. Under this Section, Bergin Chemical is not liable for medical monitoring because Leslie has not proffered admissible evidence to permit a finding that its chemical contamination causes breast cancer—and, by extension, that its chemical contamination causes Leslie to need more frequent mammograms.

e. Tortious conduct, not only toxic exposure. As is clear from Illustration 2 (below), a plaintiff need not show that the defendant has exposed the plaintiff to a toxic or hazardous agent in particular. Although the great majority of medical monitoring cases involve toxic substances, exposure to a toxic substance is not necessary. What matters is that the defendant's tortious conduct subjects the plaintiff to a significantly increased risk of serious future bodily harm.

Illustration:

2. Infant passengers are flying on defendant's jet when, due to defendant's negligence, the jet suddenly loses altitude and decompresses. There is a significant risk that the sudden decompression triggered, in some of the infants, a treatable but serious neurological disorder. Comprehensive neurological testing is required to assess whether any infant passengers' brains were indeed affected. This neurological testing would not otherwise be warranted, and a timely determination of neurological injury would likely lead to beneficial medical intervention. Defendant is subject to liability for the costs of the infants' neurological testing.

f. Significantly increased risk of serious future bodily harm. Medical monitoring is available only to those exposed to a significantly increased risk of serious future bodily harm. Accordingly, medical monitoring is not available when (as paragraph (1) establishes and this Comment elaborates) the *increase in* risk attributable to the actor's tortious conduct is negligible or insignificant. Nor is medical monitoring available when the *total* risk of the occurrence is negligible or insignificant. Nor is medical monitoring available when (as paragraph (5) establishes and Comment *h* elaborates) the specific monitoring, surveillance, testing, or diagnostic regimen is the same as what was, or would have been, prescribed for the plaintiff, even absent the exposure in question.

Paragraph (1) establishes that a tortfeasor is subject to liability only if the tortfeasor exposes a person to a *significantly increased* risk of serious bodily harm. To satisfy this standard, the plaintiff must show both that (i) the tortfeasor's incremental contribution to the plaintiff's risk of harm is meaningful, and (ii) after that increase, the risk's absolute magnitude is significant. Even a doubling or tripling is properly considered "insignificant" if, after doubling or tripling, the risk of the occurrence remains minuscule. On the other hand, an increase of 30 or 40 percent might properly be considered "significant" if, after that incremental uptick, the risk of the occurrence is significant. No particular level of quantification is necessary to satisfy this "significance" requirement. And, consistent with the majority of courts to address this question, the plaintiff need not show that the occurrence of the harm is more-probable-than-not absent the preventive medical monitoring.

Illustrations:

3. Every day, Sandra stops by her local coffee shop, Grinders, to purchase a cup of coffee. In time, however, she learns that Grinders's unique coffee-bean-roasting method emits a chemical known to increase the risk of becoming afflicted with an extremely rare and serious kind of cancer. Indeed, because of her exposure to Grinders's fumes, Sandra's lifetime risk of being afflicted with that rare but serious kind of cancer increases, from 0.2 in 1 million to 0.6 in 1 million. Even if the other requirements of this Section are satisfied, Grinders is not liable to Sandra for medical monitoring because it has not exposed her to a *significantly increased* risk of serious bodily harm. Even after an increase of 200 percent, the risk of harm (Sandra's affliction with the extremely rare kind of cancer) remains negligible.

4. Same facts as Illustration 3, except that the cancer at issue is no longer extremely rare. Now, Sandra's lifetime risk of being afflicted with the particular cancer increases from 8 in 1000 to 20 in 1000—an increase of 150 percent. Whether Grinders has exposed Sandra to a significantly increased risk of serious bodily harm is a question for the factfinder: Sandra's increased risk of 2 in 100 is well above the threshold to create a genuine issue of material fact.

5. Leana, a 48-year-old woman, has a 35 percent lifetime risk of developing breast cancer, a serious affliction. Dykast Corp. negligently exposes Leana to a chemical that increases her lifetime risk of developing breast cancer to 55 percent. Whether Dykast Corp. has exposed Leana to a significantly increased risk of serious bodily harm is a question for the factfinder: The incremental boost in Leana's already substantial risk of breast cancer

(from 35 percent to 55 percent, which reflects an increase of 57 percent) is well above the threshold to create a genuine issue of material fact.

6. Like most other American females, Martinique had a 2 percent lifetime risk of developing non-Hodgkins lymphoma, a serious affliction. Clean Co. exposes Martinique to its popular but defectively designed household cleaner, and that exposure increases her lifetime risk of developing non-Hodgkins lymphoma by 10 percent (to 2.2 percent). Even if the other requirements of this Section are satisfied, Clean Co. is not, as a matter of law, liable to Martinique for medical monitoring because it has not exposed her to a *significantly increased* risk of serious bodily harm.

As noted above, to satisfy paragraph (1), the plaintiff must show both that the tortfeasor's incremental contribution to the plaintiff's risk of harm is meaningful, and, after that increase, the risk's absolute magnitude is significant. As Illustrations 3 through 6 demonstrate, in satisfying that two-prong requirement, a smaller increase in the probability of disease can suffice when the magnitude of the probability of the disease is greater. Thus, in Illustration 5, Leana's increased probability of breast cancer is only 57 percent, but, after that uptick, the probability that Leana will be diagnosed with breast cancer is large (55 percent), rendering Dykast's liability a matter for the factfinder. By contrast, in Illustration 3, involving Sandra, the increased probability of diagnosis with the serious but rare cancer is large: 200 percent. Yet, even after that uptick, Sandra's absolute probability of such a diagnosis remains miniscule: 0.6 in 1 million. Accordingly, in Illustration 3, Grinders is not liable for Sandra's medical monitoring.

Paragraph (1) also demands that the harm at issue must be "serious." Bodily harm is "serious" for purposes of this Section if, in its ordinary course, the harm may result in significant impairment or death.

Illustration:

7. Tanush, a 42-year-old man, has a 35 percent lifetime risk of developing male-pattern baldness. Dye-na Corp. negligently exposes Tanush to a chemical that increases his lifetime risk of developing male-pattern baldness to 70 percent. Although the incremental bump in Tanush's already substantial risk of male-pattern baldness (from 35 percent to 70 percent, which reflects a 100 percent increase) may be "significant," Dye-na Corp. is not, as a matter of law, liable to Tanush for medical monitoring because male-pattern baldness is not a "serious" affliction, as it is not one that "may result in significant impairment or death."

g. Expedited detection and treatment both possible and beneficial. As paragraph (4) makes clear, an actor is subject to liability for medical monitoring only if (i) a monitoring procedure exists that makes expedited detection of the disease or disorder possible, and (ii) that expedited detection has the potential to improve the plaintiff's prognosis, alter the course of the plaintiff's illness, or mitigate the plaintiff's impairment or disability. "Expedited" means that the monitoring regimen permits detection of the illness earlier than it would have been detected in the absence of the monitoring, at any stage during the latency period of the illness. Conversely, pursuant to paragraph (4), an actor is not liable for medical monitoring if the monitoring would not promote expedited detection—or if expedited detection would not have the potential to improve the plaintiff's prognosis, alter the course of the plaintiff's illness, or affect the plaintiff's impairment or disability.

h. Monitoring regimen different from that normally recommended in the absence of exposure. As paragraph (5) establishes, an actor is subject to liability for medical monitoring only if the prescribed monitoring regimen is different from that which would otherwise be recommended or prescribed for the plaintiff, in the absence of the defendant's tortious conduct. If the same monitoring regimen was prescribed for the plaintiff before exposure to the defendant's tortious conduct, or if it would have been recommended for the plaintiff even absent the defendant's tortious conduct, the defendant is not liable for the plaintiff's medical monitoring expenses.

Illustrations:

8. Raina is tortiously exposed to an asbestos-containing product, manufactured by Rabin, Inc. This exposure warrants an annual chest x-ray to review the condition of Raina's lungs. However, Raina smokes cigarettes and has been treated for tuberculosis. The well-recognized standard of care provides that Raina should have an annual chest x-ray for those conditions, even absent asbestos exposure. Rabin, Inc. is not, as a matter of law, liable to Raina for the cost of the annual x-ray.

9. Tristan ingests defendant Welk's hormone replacement therapy drug, Purpo, which is accompanied by an inadequate warning. Tristan takes Purpo to alleviate the symptoms of menopause. Purpo significantly increases Tristan's risk of breast cancer, a serious illness—and, given this elevated risk, medical authorities agree that it is advisable for Tristan to undergo a yearly mammogram and breast exam, performed by a breast specialist. Yet, given Tristan's age, even absent exposure to Purpo, medical authorities agree that it would be advisable for Tristan to undergo an annual mammogram and breast

exam, performed by a breast specialist. Even if the other requirements of this Section are satisfied, Welk is not, as a matter of law, liable to Tristan for medical monitoring because Welk's tortious conduct did not change the appropriate monitoring regimen. The same monitoring regimen (a yearly mammogram plus breast exam) would have been warranted, even absent Tristan's ingestion of Purpo.

i. Reasonably necessary, according to generally accepted contemporary medical practices. Pursuant to paragraph (6), a tortfeasor is subject to liability for medical monitoring only if generally accepted contemporary medical practices establish that the monitoring is reasonably necessary to enable expedited detection of a disorder or disease, in order to prevent or to mitigate future bodily harm. This means that, in order for a plaintiff to prevail, the plaintiff must show that a reasonably competent physician, adhering to a generally accepted standard of care, would order the medical monitoring for which the plaintiff seeks to recover. As such, a tortfeasor is not liable under this Section if the prescribed monitoring regimen is outside the standard of care. Nor is a tortfeasor subject to liability for medical monitoring if the monitoring regimen is of speculative or dubious medical value. For a discussion of the standard of reasonable medical care, see Restatement Third, Torts: Medical Malpractice § 5 (Tentative Draft No. 2, 2024).

Illustration:

10. Truman is tortiously exposed to a product manufactured by Chemical Co. that contains a toxic substance. This exposure significantly increases Truman's lifetime risk of colorectal cancer. Given this exposure, Truman's physician believes that Truman would "rest easier" if he had annual colonoscopies, rather than colonoscopies every three years, as recommended by the U.S. Preventive Services Task Force. At the ensuing trial, Chemical Co.'s expert witness explains that, even for those exposed to Chemical Co.'s toxic agent, annual colonoscopies are outside the well-recognized standard of care; colonoscopies every three years suffice. On cross-examination, Truman's physician (and only expert witness) concedes that point, while insisting that annual colonoscopies would nevertheless give Truman "helpful reassurance." Because the monitoring Truman seeks is outside the standard of care, even for exposed individuals, Chemical Co., is not, as a matter of law, liable to Truman for medical monitoring.

j. Injury requirement. This Section does not require the plaintiff to show that the defendant's tortious conduct has caused the plaintiff to suffer cognizable physical injury. Yet, it

would be inaccurate to say that this Section authorizes "no-injury" medical monitoring. Although, under this Section, a plaintiff need not show present *physical* injury, the plaintiff must still show *an injury*. Most notably, those authorized to obtain medical monitoring under this Section are "injured" insofar as they must obtain medical monitoring and incur the economic costs therefore. See Restatement Third, Torts: Liability for Economic Harm § 2 (defining "economic loss"). Likewise, it is clear that those entitled to medical monitoring under this Section are "injured" as the word "injury" is defined by the Second Restatement of Torts. See Restatement Second, Torts § 7 (defining an "injury" as "the invasion of any legally protected interest of another"). For further discussion, see Comment *b* above.

A handful of courts go further and predicate a claim for medical monitoring on the plaintiff's ability to prove a demonstrable presence of toxins in the plaintiff's bloodstream or some other cellular or subcellular change—even though, in the absence of a need for medical monitoring, courts have generally ruled that these unmanifested and clinically nondetrimental changes do not constitute legally cognizable harm on which a tort claim can be based. This Section does not impose such a requirement because the black letter's six prerequisites already sufficiently cabin medical monitoring. Further, whether a plaintiff is able to show the presence of toxins in the bloodstream or the existence of cellular or subcellular changes—based on current diagnostic technology—will sometimes be a matter of chance or the specific pathology of the particular disease. These serendipitous matters do not furnish a sound basis on which to impose, or decline to impose, tort liability.

k. Court-administered or -supervised fund. When a plaintiff seeks to impose liability on the defendant for the costs of future medical monitoring, barring exceptional circumstances (e.g., a situation where the plaintiff has already incurred the monitoring expense and seeks reimbursement), monies should not be paid to the plaintiff on a lump-sum basis. Instead, the defendant should be ordered to place sufficient monies in a court-administered or -supervised fund, to procure insurance for medical monitoring expenditures, or perhaps directly to supply medical monitoring. Mediating payments through a dedicated fund, program, or insurance policy ensures that monies furnished under this Section will, in fact, be used as intended and will not be diverted to other purposes. Furthermore, by taking such steps, the court conserves the defendant's resources, ensuring that the defendant pays no more than actually necessary to defray the costs of reasonable and necessary medical monitoring.

l. Further restrictions to limit liability. Beyond the restrictions above, courts may choose to take two additional steps to more tightly control a defendant's liability for medical monitoring. Neither limitation is particularly well supported in existing case law. But, by imposing one or both of these constraints, courts may further ensure that medical monitoring liability is neither disproportionate nor indeterminate.

First, courts may choose to limit liability for medical monitoring when the cost of the relevant diagnostic testing has been fully borne, or will be fully borne, by the plaintiff's insurance, the plaintiff's employer, a government fund, or another collateral source.

Second, a court may hold that a defendant whose conduct exposes a vast number of people to risk-creating agents or behaviors is not subject to liability for medical monitoring if the defendant is able to show that the imposition of medical monitoring liability would be wholly indeterminate and virtually unlimited or, alternatively, if the defendant is able to show that medical monitoring liability would so far diminish the defendant's resources and insurance coverage as to significantly jeopardize eventual recovery by those exposed persons who ultimately develop bodily harm. This limitation would be an affirmative defense, so the defendant would be required to plead and prove its elements. In the course of so doing, the fact that plaintiffs are seeking medical monitoring on a class-wide basis may be relevant to this inquiry because class actions, by definition, involve numerous plaintiffs. See Fed. R. Civ. P. 23(a)(1) (permitting the certification of a class only if the "class is so numerous that joinder of all members is impractical"). But the fact that plaintiffs are seeking medical monitoring on a class-wide basis is not determinative.

m. Terminology: freestanding cause of action or remedy. Some courts characterize medical monitoring claims as stand-alone causes of action. Other courts characterize medical monitoring claims as remedies for other (sometimes unidentified) causes of action, even in the absence of a present physical injury. When taking either tack, courts, either implicitly or explicitly, recognize that the need to obtain medical surveillance qualifies as a legally cognizable injury. See Comment *j*; Restatement Second, Torts § 7 (defining an "injury" as "the invasion of any legally protected interest of another").

Whichever conceptual approach a court takes may have implications when it comes to certain matters such as, for example, constructing jury instructions or assessing whether putative class members satisfy federal or state requirements for the certification of a class. But whichever approach is adopted does not affect the applicable statute of limitations, which accrues sometime

after exposure, when the need for medical monitoring arises (or when the plaintiff discovers the need for medical monitoring). Nor does it affect the elements that must be proven, which, as noted in paragraphs (2) and (3) and Comment *d*, include breach, factual cause, and that the plaintiff's need for medical monitoring falls within the actor's scope of liability, as well as the other requirements specified in this Section. Nor does it, more fundamentally, affect recognition of a person's right to obtain medical monitoring at the defendant's expense under this Section. As such, this Section takes no position as to which approach is preferable and leaves the matter to local convention and style.

n. Statutes of limitations. As noted in Comment *c*, the liability authorized by this Section is distinct from actions seeking compensation for present bodily harm, the enhanced risk of harm, or the apprehension of such future harm. The statute of limitations that governs liability under this Section may, as a consequence, be different from the statute that governs other tort causes of action, and the medical monitoring claim will likely accrue at a different time from the other claims identified above.

o. Claim preclusion and issue preclusion. As Comment *c* clarifies, the liability imposed in this Section is distinct from an action seeking compensation for present bodily harm—and as Comment *n* recognizes, a claim for present bodily harm and a claim for medical monitoring may accrue at different times. Accordingly, a judgment entered in an action authorized by this Section does not bar a subsequent action seeking compensation for present bodily harm. However, familiar principles of issue preclusion (sometimes called collateral estoppel) could preclude a subsequent bodily-harm claim if the plaintiff loses a medical monitoring suit against the defendant by a necessary adverse finding on an issue that would also defeat the plaintiff's subsequent claim. Correspondingly, under those same principles, resolution of an issue adverse to the defendant in the first suit could preclude the defendant from relitigating that same issue in a subsequent suit by the same plaintiff (and perhaps by other plaintiffs as well).

Illustrations:

11. Agastya is tortiously exposed to a cancer-causing agent because of Exxey's negligence, such that, pursuant to this Section, Agastya is entitled to, and obtains, a judgment against Exxey for appropriate medical monitoring. If Agastya ultimately develops cancer as a consequence of Exxey's negligence, Exxey would also be subject to liability for that separate injury. Pursuant to Comment *n*, Agastya's medical monitoring suit would not bar Agastya's subsequent action.

12. Mayhew brings suit against Exxey seeking to impose liability for medical monitoring. That suit fails, and, in the special-verdict form, the jury finds that Mayhew, who lives 27 miles from Exxey's factory, was never actually exposed to Exxey's cancer-causing agent—the basis for the jury finding for Exxey. If Mayhew ultimately develops cancer and asserts a cause of action against Exxey for his cancer, the jury's prior finding (of nonexposure) would preclude relitigation of the exposure question—and, in so doing, defeat Mayhew's claim, assuming that all of the other requirements for issue preclusion are satisfied.

REPORTERS' NOTE

Comment a. History and scope. This Section reflects developments since the Restatement Second of Torts (AM. L. INST. 1965, 1977, 1979). That Restatement did not address medical monitoring, as the first case to recognize such a claim, Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984), postdates the Second Restatement's publication. Since the Second Restatement, many courts have recognized this cause of action. See Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 571 (6th Cir. 2005) (applying Tennessee law) ("In recent years, tort plaintiffs have increasingly sought, and have regularly been awarded, medical monitoring costs in both toxic tort and product liability cases."); Elsea v. U.S. Eng'g Co., 463 S.W.3d 409, 416 (Mo. Ct. App. 2015) ("To deal with cases involving latent injury, tort law allows plaintiffs compensation for medical monitoring."); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 429 (W. Va. 1999) ("Over the past decade, a growing number of courts have recognized this cause of action as a well-grounded extension of traditional common-law tort principles."); see generally Allan L. Schwartz, *Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition*, 17 A.L.R.5th 327 (originally published in 1994) (collecting authority).

As Comment *a* notes, sometimes a plaintiff's entitlement to medical monitoring will be a matter of statute, rather than the common law. See, e.g., VT. STAT. ANN. tit. 12, § 7202 (establishing a statutory cause of action for medical monitoring). When a statute governs, its proper interpretation is a matter outside the scope of this Restatement. E.g., Sinclair v. Merck & Co., 948 A.2d 587, 588-589, 593 (N.J. 2008) (concluding that New Jersey's Product Liability Act is the "sole source of remedy for plaintiff's defective product claim" and interpreting the Act's specific statutory language to exclude the "remedy of medical monitoring when no manifest injury is alleged").

Comment b. Rationale and support. Numerous state high courts authorize suits for medical monitoring. See Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 823 (Cal. 1993); Exxon Mobil Corp. v. Albright, 71 A.3d 30, 60, 80 (Md. 2013); Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712, 718 (Mo. 2007) (en banc); Sadler v. Pacificare of Nev., 340 P.3d 1264, 1271 (Nev. 2014); Ayers v. Jackson Twp., 525 A.2d 287, 308-309 (N.J. 1987); Simmons v. Pacor, Inc., 674 A.2d 232, 239 (Pa. 1996); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 429 (W. Va. 1999); cf. VT. STAT. ANN. tit.

12, § 7202 (creating, by legislative action, a cause of action for medical monitoring); Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 901-903 (Mass. 2009) (authorizing medical monitoring when the plaintiff has suffered "[s]ubcellular or other physiological changes").

Numerous federal courts, predicting state law, have followed suit. See, e.g., Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824-825 (D.C. Cir. 1984) (applying District of Columbia law); Sullivan v. Saint-Gobain Performance Plastics Corp., 431 F. Supp. 3d 448 (D. Vt. 2019); Bell v. 3M Co., 344 F. Supp. 3d 1207, 1224 (D. Colo. 2018); Elmer v. S.H. Bell Co., 127 F. Supp. 3d 812, 825 (N.D. Ohio 2015); Stella v. LVMH Perfumes & Cosmetics USA, Inc., 564 F. Supp. 2d 833, 836 (N.D. Ill. 2008); In re Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 394 (S.D.N.Y. 2008) (applying Florida law); Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 265 (S.D. Fla. 2003); Carey v. Kerr-McGee Chem. Corp., 999 F. Supp. 1109, 1117-1121 (N.D. Ill. 1998); Day v. NLO, 851 F. Supp. 869, 870-882 (S.D. Ohio 1994); Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1477 (D. Colo. 1991); cf. Benoit v. Saint-Gobain Performance Plastics Corp., 959 F.3d 491, 501 (2d Cir. 2020) (applying New York law) (authorizing medical monitoring upon a showing of "clinically demonstrable presence of toxins" in the plaintiff's bloodstream); Baker v. Saint-Gobain Performance Plastics Corp., 232 F. Supp. 3d 233, 250 (N.D.N.Y. 2017) (recognizing that "a plaintiff may show an injury sufficient to seek medical monitoring damages through the accumulation of a toxic substance within her body"); see 1 MCLAUGHLIN ON CLASS ACTIONS § 5:18 (18th ed. 2021 update) ("[N]umerous federal courts have interpreted state law to permit medical monitoring claims without requiring the manifestation of physical injury.").

Notwithstanding the above support, other state high courts reject the action, whether generally or on particular grounds. These cases include: Hous. Cnty. Health Care Auth. v. Williams, 961 So. 2d 795, 810-811 (Ala. 2006); Baker v. Croda, Inc., 304 A.3d 191 (Del. 2023); Berry v. City of Chicago, 181 N.E.3d 679, 689 (Ill. 2020); Wood v. Wyeth-Ayerst Labs., Div. of Am. Home Prods., 82 S.W.3d 849, 854 (Ky. 2002); Henry v. Dow Chem. Co., 701 N.W.2d 684, 689 (Mich. 2005); Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 5-9 (Miss. 2007); Brown v. Saint-Gobain Performance Plastics Corp., 300 A.3d 949 (N.H. 2023); Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 14 (N.Y. 2013); Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 187 (Or. 2008). Likewise, in 1999, the Louisiana legislature disallowed medical monitoring damages in its amendment to Civil Code Article 2315. This enactment abrogated the Louisiana Supreme Court's prior decision in Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355 (La. 1998). Finally, in Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 444 (1997), the Supreme Court of the United States declined to endorse an "unqualified" medical monitoring cause of action under the Federal Employers' Liability Act.

Some federal courts, predicting state law, have also rejected the action. See, e.g., Trimble v. ASARCO, Inc., 232 F.3d 946, 963 (8th Cir. 2000) (applying Nebraska law); Ball v. Joy Techs., Inc., 958 F.2d 36, 39 (4th Cir. 1991) (applying Virginia law); Pickrell v. Sorin Grp. USA, Inc., 293 F. Supp. 3d 865, 868 (S.D. Iowa 2018); McCormick v. Halliburton Co., 895 F. Supp. 2d 1152, 1158 (W.D. Okla. 2011); Norwood v. Raytheon Co., 414 F. Supp. 2d 659, 668 (W.D. Tex. 2006); Nichols v. Medtronic, Inc., 2005 WL 8164643, at *11 (E.D. Ark. 2005); Mehl v. Canadian Pac.

Ry. Ltd., 227 F.R.D. 505, 518 (D.N.D. 2005); Parker v. Brush Wellman, Inc., 377 F. Supp. 2d 1290, 1302 (N.D. Ga. 2005).

All told, as many courts and commentators have recognized, of the jurisdictions in which state courts or federal courts (predicting state law) have expressly considered and taken a discernible stance on the issue, roughly half have authorized medical monitoring absent present injury (i.e., medical monitoring claims unaccompanied by a claim that the plaintiff has sustained tortiously inflicted present bodily harm), while approximately half of courts reject such claims. Furthermore, as of the time of this writing, case law remains in flux as "pro" and "con" opinions continue to be published.[1]

Like courts, commentators disagree on the desirability of allowing the plaintiff to recover for medical monitoring, absent present bodily harm. Compare Vincent R. Johnson, *Nanotechnology, Environmental Risks, and Regulatory Options*, 121 PENN ST. L. REV. 471, 486 (2016) ("Even if there is no proof that the exposure has already caused harm, monitoring the possible emergence of a diseased condition and the need for treatment is reasonable and prudent."), Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921 (2002) (arguing that a tort action should be available for reasonably necessary medical monitoring costs unless it would result in denying full recovery to plaintiffs who manifest physical harm), and Kenneth S. Abraham, *Liability for Medical Monitoring and the Problem of*

[1] The Appendix to the Reporters' Note endeavors to separate states into four categories: (1) those that accept or appear to accept medical monitoring, (2) those that reject or appear to reject medical monitoring, (3) those where the case law is undecided or uncertain, and (4) those that have taken no discernible position on the matter. In so doing, we recognize that case law "counts" are constantly in flux—and they are also notoriously complicated since, when it comes to classifying a particular state as "pro" medical monitoring or "undecided," for instance, reasonable minds may differ.

With that caveat, in tallying those states that endorse and decline to endorse "pure" medical monitoring, the Appendix to the Reporters' Note classifies a state on the "pro" side of the ledger—albeit with an explicit asterisk—if the state predicates relief on a showing, either that the plaintiff has sustained some cellular, subcellular, or subclinical injury or has a clinically demonstrable presence of toxins in the bloodstream. See, e.g., Benoit v. Saint-Gobain Performance Plastics Corp., 959 F.3d 491, 500 (2d Cir. 2020) (applying New York law); Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 901-902 (Mass. 2009). This classification is utilized because, as the court in In re Nat'l Hockey League Players' Concussion Injury Litig., 327 F.R.D. 245, 260 (D. Minn. 2018), observed, such a threshold requirement differs from traditional prerequisites. Indeed, in the Reporters' opinion, those courts that permit medical monitoring so long as plaintiff can show subcellular injury or the presence of toxins are opting to classify what would otherwise be noncognizable harm as cognizable harm in order to permit recovery for medical monitoring—while, simultaneously, bounding the initiation of such suits. Influencing that perspective is the fact that the mere existence of subcellular changes to, or presence of toxins in, the plaintiff's body traditionally do not qualify as compensable injuries; in fact, even arguably more substantial changes to one's physiology have, frequently, not sufficed. E.g., Paz v. Brush Engineered Materials, Inc., 555 F.3d 383, 395, 398 (5th Cir. 2009) (applying Mississippi law) (ruling that, although "[t]he evidence clearly establishes excessive exposure to beryllium provokes a physical change in the body," beryllium sensitization, caused thereby, "is not a compensable injury pursuant to Mississippi law"); In re Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (observing that "sub-clinical conditions such as pleural plaques or pleural thickening are not normally associated with physical impairment"); Simmons v. Pacor, Inc., 674 A.2d 232, 236 (Pa. 1996) (finding that "asymptomatic pleural thickening," defined as "calcified tissue on the pleura," which is "revealed on an x-ray" does not qualify as an injury); accord James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 831 (2002) (recognizing that "[m]ost courts" have declined to find "that pleural thickening qualifies as a physical injury").

Limits, 88 VA. L. REV. 1975, 1982-1983 (2002) (endorsing a limited cause of action for medical monitoring), with James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002) (arguing against "front-loaded" theories of tort recovery), and Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1057 (1999) (arguing that, "because of the complexities and significant public policy concerns inherent in allowing such awards, decisions about whether to permit medical monitoring should be made by legislatures and not by courts").

Given this contradictory authority, it is fair to say that courts and commentators are split on whether to accept or reject plaintiffs' claims that seek medical monitoring. See *Sullivan*, 431 F. Supp. 3d at 458 ("Courts are divided about whether there should be an equitable remedy to detect health problems which are not yet symptomatic but could be detected at an early stage through testing."); Almond v. Janssen Pharm., Inc., 337 F.R.D. 90, 95-97 (E.D. Pa. 2020) (cataloging the many cases that have accepted and rejected claims for medical monitoring); In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig., 314 F.R.D. 580, 604 (N.D. Ill. 2016) (explaining that, when it comes to medical monitoring, "[t]he laws of the various states differ"); Dougan v. Sikorsky Aircraft Corp., 251 A.3d 583, 591 (Conn. 2020) ("State appellate courts have been divided in the wake of *Buckley* with respect to whether to permit recovery for medical monitoring in the absence of the manifestation of a physical injury under their states' respective laws."); Perrine v. E.I. du Pont de Nemours & Co., 694 S.E.2d 815, 907 n.2 (W. Va. 2010) (recognizing a "split" in authority concerning the viability of a medical monitoring claim, absent "present physical injury"); see also Principles of the Law of Aggregate Litigation § 2.04, Comment *b* (AM. L. INST. 2010) ("The availability of medical monitoring as a remedy, or as an independent claim, in the absence of physical injury, is an issue that has divided the courts."); Victor E. Schwartz & Christopher E. Appel, *Perspectives on the Future of Tort Damages: The Law Should Reflect Reality*, 74 S.C. L. REV. 1, 17 (2022) ("The case law addressing medical monitoring is divided. Roughly one-third of states allow, or appear to allow, recovery of medical monitoring costs for unimpaired claimants in some form, while at least one-third of states reject or appear to reject it. The remaining states have either unclear or no case law on point . . . ."); Mark A. Behrens & Christopher E. Appel, *American Law Institute Proposes Controversial Medical Monitoring Rule in Final Part of Torts Restatement*, DEF. COUNS. J., Oct. 2020, at 1, 10 tbl. (2020) (providing a state-law survey and noting that "[t]he case law regarding the availability of medical monitoring absent present bodily harm is divided"); accord 3 LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 23:26 (2022 update) ("States are divided on the issue of recognition of medical monitoring claims."); Mark A. Geistfeld, *The Equity of Tort Claims for Medical Monitoring*, 52 SW. L. REV. __ (forthcoming 2024) ("Courts and commentators are deeply divided about whether tort law should recognize the medical monitoring cause of action . . . ."); 5 DIANE FENNER & JAMES A. MORRIS, JR., LITIGATING TORT CASES § 60:33 (2022 update) ("[T]here is presently a relatively even split between jurisdictions allowing and disallowing medical monitoring claims.").

Nor, in recent years, has there been a clear trend, whether in favor of, or against, approval. See Bell v. 3M Co., 344 F. Supp. 3d 1207, 1222-1223 (D. Colo. 2018) ("While there are persuasive arguments articulated by a number of state and federal courts on both sides of the debate, neither plaintiffs nor defendants are able to demonstrate an overwhelming surge of decisions that would indicate that there is a strong national trend one way or the other.").

This split both predates and postdates 1997, the year the Supreme Court of the United States declined to endorse an "unqualified" medical monitoring cause of action under the Federal Employers' Liability Act in Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 444 (1997). Indeed, although some suggest that *Buckley* turned the tide against medical monitoring, that contention is belied by the evidence. Since 1997, a number of state supreme courts, including the highest courts of Maryland, Massachusetts (albeit with the caveat reflected in footnote 1), Missouri, Nevada, and West Virginia, have endorsed medical monitoring. Also since 1997, federal courts sitting in diversity have predicted that numerous states, including those of Colorado, Florida, Illinois, New York (although also with the caveat reflected in footnote 1), Ohio, and Vermont would follow suit. Compare Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 620 (2015) (recognizing some recent judicial momentum "toward permitting medical monitoring claims"), with Principles of the Law of Aggregate Litigation § 2.04, Comment *b* (AM. L. INST. 2010) ("Initial acceptance of medical monitoring has waned, and the last decade has seen more states decline to recognize it than adopt it.").

Recognizing the fractured landscape, as Comment *b* explains, this Section endeavors to chart a middle path and, in particular, to provide a workable and sensible framework for the numerous courts that have not yet had the occasion to endorse or to reject claims for medical monitoring. In so doing, this Section heeds the concerns articulated in *Buckley*, 521 U.S. at 444, insofar as it declines to endorse unbounded liability for medical monitoring. See *Bell*, 344 F. Supp. 3d at 1222 (recognizing that *Buckley* "does not indicate that lower courts should deny medical monitoring claims absent present physical injury"; rather, in *Buckley*, the Supreme Court "indicated that it might approve of such claims, albeit not in such a broad and sweeping form"). At the same time, however, for the reasons set forth below, this Section declines to follow those courts that foreclose claims for medical monitoring altogether.

Medical monitoring is permitted, in at least some instances, because authorizing shifting the cost of diagnostic testing to the defendant advances sound policy objectives, is consistent with tort law's dual aims of compensation and deterrence, and complements the doctrine of avoidable consequences. Furthermore, many of the drawbacks courts and commentators associate with medical monitoring can be ameliorated, or even avoided altogether, by carefully defining the prerequisites for, and scope of, liability. Below, this Note first provides a fuller rationale and justification for medical monitoring. It then considers and responds to various objections.

For courts' recognition that medical monitoring fosters access to beneficial diagnostic testing, which, in turn, promotes cost savings traceable to the early detection and timely treatment of disease, sometimes before progression or metastasis, see, for example, Sutton v. St. Jude Med.

S.C., Inc., 419 F.3d 568, 575 (6th Cir. 2005) (applying Tennessee law) ("We . . . note there is something to be said for disease *prevention*, as opposed to disease *treatment*. Waiting for a plaintiff to suffer physical injury before allowing any redress whatsoever is both overly harsh and economically inefficient."); Sadler v. PacifiCare of Nev., Inc., 340 P.3d 1264, 1271 (Nev. 2014) ("If medical monitoring claims are denied, plaintiffs who cannot afford testing may, through no fault of their own, be left to wait until their symptoms become manifest, losing valuable treatment time."); Ayers v. Jackson Twp., 525 A.2d 287, 311 (N.J. 1987) ("Compensation for reasonable and necessary medical expenses is . . . consistent with the important public health interest in fostering access to medical testing whose exposure to toxic chemicals creates an enhanced risk of disease."); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 976 (Utah 1993) ("[M]edical surveillance damages promote early diagnosis and treatment of disease or illness resulting from exposure to toxic substances caused by a tortfeasor's negligence."). For further discussion of societal benefits that attend medical monitoring, see *Sadler*, 340 P.3d at 1271 ("[T]here are significant policy reasons for allowing a recovery for medical monitoring costs, not the least of which is that early detection can permit a plaintiff to mitigate the effects of a disease, such that the ultimate costs for treating the disease may be reduced."); accord Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1075-1076 (2002) (stating, about medical monitoring, "there is an arguable claim for reducing the overall social cost occasioned by a defendant's negligence").

Second, numerous courts have recognized that shifting the cost of harm (here, in the form of reasonable and necessary monitoring) to the tortfeasor furthers tort law's twin aims of compensation and deterrence. For a discussion of compensation, see Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 826 (D.C. Cir. 1984) (applying District of Columbia law) ("When a defendant negligently invades [an individual's legal] interest . . . it is elementary that the defendant should make the plaintiff whole by paying for the examinations."). For a discussion of deterrence, see id. at 825 ("A cause of action allowing recovery for the expense of diagnostic examinations recommended by competent physicians will, in theory, deter misconduct . . . ."); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824 (Cal. 1993) (recognizing that "there is a deterrence value in recognizing medical surveillance claims" in that "[a]llowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants") (quotation marks omitted); Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137, 145 (Pa. 1997) ("[Medical monitoring] furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure."). For a discussion of cost-internalization and efficient deterrence, see generally STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1988).

Third, as Comment *b* recognizes, this Section also furthers the goal of the traditional tort doctrine of "avoidable consequences." Long accepted in the United States, the doctrine of avoidable consequences historically required plaintiffs to submit to medically advisable treatment for tortiously inflicted injuries. Unreasonable failure to submit to that treatment barred plaintiffs from recovering for conditions or complications they could have avoided had timely treatment

been obtained. See Restatement Second, Torts § 918 (AM. L. INST. 1979) ("[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."); see also Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 319 (5th Cir. 1986) (Jones Act claim) ("[U]nder the 'avoidable consequences rule,' [the plaintiff] is required to submit to treatment that is medically advisable; failure to do so may bar future recovery for a condition he could thereby have alleviated or avoided."); Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444, 447 (Tex. 1967) ("An injured person is not entitled to recover damages from a wrongdoer for consequences of an injury which can be avoided by the exercise of ordinary care . . . ."). Today, a plaintiff's postaccident failure to treat or mitigate may still curtail the plaintiff's recovery. See Restatement Third, Torts: Remedies § 8(a) (AM. L. INST., Tentative No. 1, 2022); DAN B. DOBBS ET AL., HORNBOOK ON TORTS 403-406 (2d ed. 2016). Thus, owing to the avoidable consequences doctrine, plaintiffs—if they are to recover fully from the tortfeasor—must generally take reasonable affirmative steps to mitigate future foreseeable harm. By sharing, and, in some instances, transferring, the cost of this necessary testing and possible treatment to the tortfeasor, this Section facilitates those steps. For fuller discussion, see Allen T. Slagel, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849, 865-866 (1988); Mark A. Geistfeld, *The Equity of Tort Claims for Medical Monitoring*, 52 SW. L. REV. __ (forthcoming 2024) (explaining that a plaintiff's claim for medical monitoring "is analogous to the obligation a plaintiff faces to mitigate damages pursuant to the avoidable consequences doctrine").

Fourth, for the reasons set forth in Comment *b* and further explicated below, authorizing medical monitoring is consistent with the Restatement Third, Torts: Liability for Economic Harm § 1, Comments *c* and *d* (AM. L. INST. 2020).

Fifth and finally, for the reasons set forth in Comment *b* and further explicated below, permitting medical monitoring is consistent with the definition of "injury," as set forth in the Second Restatement. See Restatement Second, Torts § 7 (AM. L. INST. 1965) (defining an "injury" as "the invasion of any legally protected interest of another").

Notwithstanding the above, some courts decline to permit pure medical monitoring claims, and certain commentators promote this more skeptical stance. These courts and commentators raise four primary objections.

First, some suggest that endorsing medical monitoring claims will unleash a flood of lawsuits and may, in turn, deplete defendant's resources diverting them away from those who actually fall ill. See, e.g., Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 18 (N.Y. 2013) (refusing to permit "asymptomatic plaintiffs . . . to recover medical monitoring costs" because sanctioning such relief "would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure"); see also James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 850 (2002) (expressing concern that "uninjured claimants" asserting medical monitoring claims may "devour[] the defendants'

resources" and ultimately force defendants "into bankruptcy," which will, in turn, leave nothing for those who ultimately fall ill); Schwartz & Appel, supra at 17 (raising both of these concerns).

Second, some express concern that allowing an action for medical monitoring may preclude later recovery by claimants for bodily harm, in the event the harm ultimately develops. See, e.g., Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 858 (Ky. 2002) (expressing concern that claim preclusion will bar plaintiffs who succeed on early medical monitoring claims from later recovery should an injury manifest); Herbert L. Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DEPAUL J. HEALTH CARE L. 1, 26 (2009) (lamenting that "adoption of a medical monitoring claim absent physical injury runs the very real risk of harming the same plaintiffs that the claim purports to help").

Third, some worry that plaintiffs will squander the resources they receive and will not use the funds to obtain appropriate care. See, e.g., *Wood*, 82 S.W.3d at 857 ("Lump-sum awards might not actually be used for medical costs, especially if a recipient has insurance that will cover such expenses.").

Finally, some contend that permitting claims for medical monitoring is inconsistent with courts' general reluctance to impose tort liability for a stranger's "pure" economic loss. See, e.g., Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 186 (Or. 2008); accord Henderson & Twerski, supra at 846 (insisting that "judicial recognition of claims for preinjury medical surveillance threatens the conceptual integrity of the American common law of torts").

Upon close inspection, however, certain of these objections are overstated, while others can be allayed, or even answered, by bounding the requirements for, and contours of, medical monitoring liability, as this Section does.

The first objection—regarding floodgates and diversion—is significantly mitigated by various limitations contained in this Section. These limitations include: paragraph (1)'s requirement that an actor is subject to liability only if the actor exposes a person to a "significantly increased risk of a particular serious future bodily harm"; paragraph (5)'s requirement that the specific monitoring regimen must extend beyond what would have been prescribed for the plaintiff in the absence of the exposure in question; and Comment *l*'s suggested limitations (i.e., that liability is to be imposed only to the extent that the plaintiff has incurred, or will incur, the expense, alongside the denial of liability for medical monitoring in the case of "wholly indeterminate and virtually unlimited" or practically overwhelming liability). Accord Hansen v. Mountain Fuel Supply, 858 P.2d 970, 978 (Utah 1993) ("Mere exposure to an allegedly harmful substance, however, is not enough for recovery. Courts have set forth several criteria for determining whether a plaintiff is entitled to recover the costs of medical monitoring. Such criteria prevent unnecessary litigation and unwarranted recoveries.").

Furthermore, as the Reporters' Note to Comment *b* explains, numerous states—including states with very large populations such as California, Florida, New Jersey, Ohio, and Pennsylvania—have long permitted medical monitoring. And, there is simply no evidence that those states have seen a flood of claims. See Mark A. Geistfeld, *The Equity of Tort Claims for Medical Monitoring*, 52 SW. L. REV. __ (forthcoming 2024) (explaining that various jurisdictions

have long authorized medical monitoring and "[t]hese jurisdictions have not opened the floodgates"). Nor is there evidence that, in these states, monies have gone to pay medical monitoring claims, to the financial detriment of those plaintiffs who later manifest physical injuries.

Critics' second objection—regarding unwitting and inequitable claim preclusion—can similarly be addressed in a narrow-gauge way. Thus, although some have expressed concern that permitting the plaintiff to recover on a claim for medical monitoring will preclude the plaintiff's subsequent recovery should the harm ultimately manifest, that concern does not justify denying an action for monitoring costs when the criteria of this Section are satisfied. A better solution—expressly adopted in Comment *o*—is to treat the action for monitoring costs and the (potential) subsequent action for later-manifested bodily harm as two separate causes of action. This approach is not novel. In allowing medical monitoring claims, Petito v. A.H. Robins Co., 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999), Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 902 (Mass. 2009), Lamping v. Am. Home Prods., Inc., 2000 Mont. Dist. LEXIS 2580, at *12-13 (Mont. Dist. Ct. 2000), and Ayers v. Jackson Twp., 525 A.2d 287, 312 (N.J. 1987), all adopt this solution prospectively.

The Second Restatement of Judgments § 26(e), which addresses "exceptions to the general rule concerning splitting," similarly authorizes such a division. See Restatement Second, Judgments § 26(e) (AM. L. INST. 1982) (providing that "[f]or reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff . . . [may] sue once for the total harm, both past and prospective, or . . . sue from time to time for the damages incurred to the date of suit").

This approach is also consistent with how most courts have modified the single-judgment rule in the asbestos context, in which separate asbestos-related diseases (such as asbestosis, lung cancer, and mesothelioma) may manifest in the same individual at different times, and an individual may reasonably seek compensation for one ailment before being diagnosed with, or succumbing to, the next, more serious, ailment. In that context, as Professors Henderson and Twerski explain: "[T]he overwhelming majority of courts abandoned the single-action rule and now allow separate causes of action later, when a plaintiff actually develops asbestosis, lung cancer, or mesothelioma." James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 821 (2002). See, e.g., Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 520 (Fla. Dist. Ct. App. 1985); Daley v. A.W. Chesterton, Inc., 37 A.3d 1175, 1189 (Pa. 2012); Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 651-653 (Tex. 2000); Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 636-639 (Wis. 1999). For further discussion, see Kara L. McCall, Comment, *Medical Monitoring Plaintiffs and Subsequent Claims for Disease*, 66 U. CHI. L. REV. 969, 983-997 (1999).

Critics' fear that plaintiffs will divert monies awarded for medical monitoring, and use those monies for other purposes, is also valid. But that fear, too, can be addressed short of disallowing an action for medical monitoring altogether. The black letter specifies: "When an actor is liable for medical monitoring expenses, barring exceptional circumstances, monies should not be paid on a lump-sum basis." And, Comment *l* notes that courts may decide to limit liability under this Section to those occasions when, and to the extent that, "the cost of the relevant diagnostic testing has been fully borne, or will be fully borne, by the plaintiff's insurance, the plaintiff's

employer, a government fund, or another collateral source." Comment *k* further cautions that, instead of paying funds to plaintiff on a lump-sum basis, "defendant should be ordered to place sufficient monies in a court-administered or -supervised fund, to procure insurance for medical monitoring expenditures, or perhaps directly to supply medical monitoring." By taking one of these steps, courts can ensure—consistent with the black letter—that monies paid by the defendant for medical monitoring are, in fact, used for that purpose.

Also exaggerated is courts' and commentators' conceptual concern, traceable to their fear that recognizing medical monitoring is tantamount to blindly permitting recovery for "pure" economic harm. This concern is overstated for two reasons.

First, many courts and commentators have noted that plaintiffs who fulfill the criteria above—who have been exposed to harmful agents or activities, anticipate the manifestation of clear physical injury, and who must, as a consequence of defendants' tortious conduct, subject themselves to often invasive medical surveillance (such as blood draws, mammograms, x-rays, endoscopies, and CT-Scans)—have, in fact, sustained a traditional injury. See Restatement Second, Torts § 7 (AM. L. INST. 1965) (defining an "injury" as "the invasion of any legally protected interest of another"); see also Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 826 (D.C. Cir. 1984) (applying District of Columbia law) ("It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury."); Exxon Mobil Corp. v. Albright, 71 A.3d 30, 75-76 (Md. 2013) (reasoning that "exposure itself and the concomitant need for medical testing is the compensable injury for which recovery of damages for medical monitoring is permitted") (quotations omitted); Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007) ("As with any claim based in tort law, the injury underlying a medical monitoring claim is the invasion of a legally protected interest. Just as an individual has a legally protected interest in avoiding physical injury, so too does an individual have an interest in avoiding expensive medical evaluations caused by the tortious conduct of others. . . . Even though a plaintiff may not have yet developed a diagnosable physical injury, it is not accurate to conclude that no compensable injury has been sustained."); Sadler v. PacifiCare of Nev., 340 P.3d 1264, 1269 (Nev. 2014) (permitting a claim for stand-alone medical monitoring while relying on the Restatement Second of Torts § 7 to reason that "injury is generally not limited to physical injury"); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 (Utah 1993) ("Although the physical manifestations of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; the exposure itself and the concomitant need for medical testing constitute the injury.") (citations omitted). See also Restatement Third, Torts: Medical Malpractice § 8 ("lost chance") (Tentative Draft No. 2, 2024) (authorizing a lost chance cause of action in the medical negligence context and explaining that, in this context, a "provider's breach" that "significantly reduces the patient's chance for a substantially better outcome" qualifies as a "legally cognizable harm for which the provider is subject to liability").

Second, *even if* plaintiffs compelled to pay out-of-pocket for costly medical monitoring necessitated by the defendant's tortious conduct sustain only an economic loss—those "pure"

economic losses, in this context, are compensable. True, there is a general prohibition on recovery in tort for "pure" negligently inflicted economic loss. See Restatement Third, Torts: Liability for Economic Harm § 1(1) (AM. L. INST. 2020); see also S. Cal. Gas Leak Cases, 441 P.3d 881, 887 (Cal. 2019) (discussing the "general rule of no-recovery for negligently inflicted purely economic losses"). But, as previously explained, the two principal concerns animating that traditional prohibition—(1) the specter of rippling and uncontained liability, and (2) the fear of intruding upon, and interfering with, a contract between plaintiff and defendant—are inapplicable to medical monitoring liability, as medical monitoring liability is provided for herein. See Restatement Third, Torts: Liability for Economic Harm § 1, Comment *c* (AM. L. INST. 2020) (explaining that these are the two concerns that justify the traditional economic loss rule). In medical monitoring cases, there is no substantial risk of rippling and uncontained liability, as liability extends only to affected individuals, and, to the extent there *is* a specter of wholly indeterminate or overwhelming liability, that matter can be addressed by the affirmative defense set forth in Comment *l*. Nor is there a contract to invade, as the plaintiff and defendant are typically strangers. Courts generally recognize that, when the rationales that traditionally undergird the economic loss rule are "weak or absent," the rule does not apply. Id., Comment *d* (observing that "[c]ourts recognize duties of care to prevent economic loss when the rationales stated in Comment *c* [noted immediately above] are weak or absent"). So, too, here.

Beyond that, the prohibition on recovery for "pure" economic loss has never been set in stone—and, in fact, courts have already relaxed the rule in an analogous situation: asbestos abatement. Plaintiff property owners have long sought—and have long obtained—compensation from asbestos sellers for the costs of removing and replacing asbestos insulation. Faced with such claims, courts could have applied the economic loss rule narrowly and mechanically to hold that only the property's insulation was defective, and, as a consequence, only compensation for the defective insulation was due. But, taking a broader view, the vast majority of courts, instead, have authorized fuller recovery. As the Restatement Third of Torts: Products Liability § 21, Comment *e* (AM. L. INST. 1998) explains: "In the case of asbestos contamination in buildings, most courts have taken the position that the contamination constitutes harm to the building as other property. The serious health threat caused by asbestos contamination has led the courts to this conclusion. Thus, actions seeking recovery for the costs of asbestos removal have been held to be within the purview of products liability law rather than commercial law." See Restatement Third, Torts: Products Liability § 21, Reporters' Note to Comment *e* (AM. L. INST. 1998) (further outlining the majority approach); Richard C. Ausness, *Tort Liability for Asbestos Removal Costs*, 73 OR. L. REV. 505, 530 (1994) (explaining that, when faced with lawsuits seeking to defray the cost of asbestos abatement, "most courts have . . . freely allow[ed] property owners to sue in tort"); see, e.g., Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 131 (D.N.H. 1984) ("[W]here a defect in Defendant's product—i.e., the asbestos—creates a cognizable safety hazard, the resulting injury to property is as actionable in strict liability and negligence as personal injury resulting from the defect would be . . . That the measure of the Plaintiff's damages is economic does not transform the nature of his injury into a strictly economic loss. The gist of Plaintiff's strict

liability and negligence counts is 'not that the Plaintiff failed to receive the quality of product he expected, but that the Plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or his property.'") (citations omitted); Bd. of Educ. of City of Chi. v. A, C, & S, Inc., 546 N.E.2d 580, 588 (Ill. 1989) ("[I]t would be incongruous to argue there is no damage to other property when a harmful element exists throughout a building or an area of a building which by law must be corrected . . . ."); Sch. Dist. of City of Indep., Mo., No. 30 v. U.S. Gypsum Co., 750 S.W.2d 442, 457 (Mo. Ct. App. 1988) (affirming recovery for asbestos abatement because "[a] plaintiff . . . should not be forced to wait until disease manifests itself before being permitted to maintain an action in tort against the manufacturer whose product increases the risk of deadly disease or serious impairment of health").

Comment c. Distinguishing medical monitoring from other grounds of liability. The liability authorized by this Section is distinct from, and should not be confused with, actions seeking compensation for present bodily harm, for the enhanced risk of harm itself, or for the apprehension of such future harm. See In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 850 (3d Cir. 1990) (applying Pennsylvania law) (observing that "an action for medical monitoring seeks to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm, whereas an enhanced risk claim seeks compensation for the anticipated harm itself, proportionately reduced to reflect the chance that it will not occur"); Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1476 (D. Colo. 1991) ("A claim for medical monitoring is distinct from a claim for enhanced risk of future harm."); Petito v. A.H. Robins Co., 750 So. 2d 103, 105 (Fla. Dist. Ct. App. 1999) (explaining that "a claim for medical monitoring is wholly distinguishable from a claim for enhanced risk of disease"); Lewis v. Lead Indus. Ass'n, Inc., 793 N.E.2d 869, 874-875 (Ill. App. Ct. 2003) ("There is a fundamental difference between a claim seeking damages for an increased risk of future harm and one which seeks compensation for the cost of medical examinations. . . . Unlike a claim seeking damages for an increased risk of future harm, a claim seeking damages for the cost of a medical examination is not speculative and the necessity for such an examination is capable of proof within a 'reasonable degree of medical certainty.'"); accord Kara L. McCall, Comment, *Medical Monitoring Plaintiffs and Subsequent Claims for Disease*, 66 U. CHI. L. REV. 969, 987-988 (1999) (explaining how various causes of action are distinct).

Comment d. Tortious conduct, factual cause, and scope of liability. As paragraphs (2) and (3) and Comment *d* make clear, in order to hold the defendant liable under this Section, the plaintiff must show that defendant's conduct was tortious. Depending on the context, the defendant's tortious conduct may come in the form of negligent conduct, reckless conduct, intentional conduct, or under principles of strict liability or product liability law. Furthermore, the plaintiff must also show, by a preponderance of the evidence, that the defendant's tortious conduct caused the plaintiff's need for reasonable and necessary medical monitoring and that the plaintiff's need for medical monitoring falls within the defendant's scope of liability. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29 (AM. L. INST. 2010) (imposing and defining the scope-of-liability requirement). In practice, however, the scope-of-liability limitation rarely, if

ever, affects liability determinations. Id., Comment *a* ("Ordinarily, the plaintiff's harm is self-evidently within the defendant's scope of liability and requires no further attention.").

This requirement is very well supported. See, e.g., Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 433 (W. Va. 1999) ("Liability for medical monitoring is predicated upon the defendant being legally responsible for exposing the plaintiff to a particular hazardous substance. Legal responsibility is established through application of existing theories of tort liability.").

Comment e. Tortious conduct, not only toxic exposure. Comment *e* clarifies that, notwithstanding some contrary case law, a plaintiff need not show that the defendant has exposed the plaintiff to a toxic agent or substance. See, e.g., VT. STAT. ANN. tit. 12, § 7202(a)(1) (establishing, contrary to Comment *e*, that a plaintiff must show exposure "to a proven toxic substance"); Ratliff v. Mentor Corp., 569 F. Supp. 2d 926, 928-929 (W.D. Mo. 2008) (stating, contrary to Comment *e*, that Missouri Supreme Court's recognition of medical monitoring was limited by its terms to exposure to toxic substances). As Illustration 2 demonstrates, it is enough if the defendant's tortious conduct exposes a person to a significant risk of serious future bodily harm. Although it is true that most medical monitoring claims involve exposure to toxic agents, other such claims do not—and, indeed, the first decision to recognize medical monitoring claims, Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984), did not involve a toxic substance. There, the D.C. Circuit affirmed the trial court's creation of a $450,000 medical monitoring fund, in a lawsuit initiated by young orphans who were exposed to sudden explosive decompression and loss of oxygen in the midst of a plane crash, where the "crash proximately caused the need for a comprehensive diagnostic examination." Id. at 824-826.

Other medical monitoring cases are similar. E.g., Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 571 (6th Cir. 2005) (applying Tennessee law) (addressing claims of a plaintiff and a putative class who had undergone cardiac bypass surgery and who alleged that the aortic connector implanted during the surgery was defective and put them at greater risk of developing restenosis and occlusion of the bypass graft, necessitating medical monitoring); In re Nat'l Hockey League Players' Concussion Injury Litig., 327 F.R.D. 245, 249 (D. Minn. 2018) (addressing medical monitoring claims initiated on behalf of former National Hockey League players who allegedly sustained numerous concussive and subconcussive impacts in the course of their professional careers); Guinan v. A.I. duPont Hosp. for Child., 597 F. Supp. 2d 517, 539 (E.D. Pa. 2009) (applying Delaware law) (authorizing plaintiff's claim for medical monitoring, when the plaintiff had a medical device improperly inserted into her body), aff'd sub nom. M.G. ex rel. K.G. v. A.I. Dupont Hosp. for Child., 393 F. App'x 884 (3d Cir. 2010).

There is no principled reason to hold that plaintiffs exposed to toxic substances may recover, while similarly situated plaintiffs exposed to other tortious conduct are barred from doing so. Thus, to paraphrase the Nevada Supreme Court: The relevant inquiry is not whether the plaintiff was exposed to a toxic substance. The inquiry, instead, is whether the defendant's tortious conduct caused the plaintiff to have a bona fide need to undergo medical monitoring. See Sadler v. PacifiCare of Nev., 340 P.3d 1264, 1272 (Nev. 2014) (holding that negligently exposing patients to unsanitary injection practices that required medical testing sufficient to state a claim for medical monitoring).

Illustration 2, involving the jet, is based loosely on *Friends for All Children*, 746 F.2d at 824-826.

Comment f. Significantly increased risk of serious future bodily harm. To prevail under this Section, plaintiffs must show that they face "a significantly increased risk of a particular serious future bodily harm" due to the defendant's tortious conduct. Bodily harm is "serious" if, in its ordinary course, the harm may result in significant impairment or death. See Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) (establishing that, to recover for medical monitoring, the "plaintiff must prove that the illness, the risk of which has been increased by exposure to the toxin, is a serious one" and clarifying "[b]y this we mean an illness that in its ordinary course may result in significant impairment or death").

What it means to face a "significantly increased risk" of such harm is also defined. Comment *f* explains that a small uptick in one's risk of sustaining a serious harm will not give rise to liability for medical monitoring; nor will a significantly increased risk of harm give rise to medical monitoring liability if that underlying harm is, itself, inconsequential or trivial. See, e.g., In re Marine Asbestos Cases, 265 F.3d 861, 861 (9th Cir. 2001) (Jones Act) ("The courts that have awarded medical monitoring costs have adopted, with minor variations, a common set of elements that a plaintiff must establish in order to recover. In general, a plaintiff must prove . . . [among other things that] [a]s a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease."); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 788 (3d Cir. 1994) (applying Pennsylvania law) (demanding that plaintiffs "show significant exposure that causes a significantly increased risk to plaintiff of contracting a serious disease"); Coplin v. Fluor Corp., 220 S.W.3d 712, 718 (Mo. 2007) ("The general consensus that has emerged in these cases is that a plaintiff can obtain damages for medical monitoring upon a showing that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.") (quotation marks omitted); Redland Soccer Club, Inc. v. Dept. of the Army, 696 A.2d 137, 145-146 (Pa. 1997) (requiring the plaintiff to prove several "elements to prevail on a common law claim for medical monitoring" including that "as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease"); *Hansen*, 858 P.2d at 979 (holding that, "[t]o recover medical monitoring damages under Utah law, a plaintiff must prove" among other things, that the exposure to defendant's toxic substance resulted "in an increased risk . . . of a serious disease, illness, or injury"); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 433 (W. Va. 1999) (hinging liability on a showing that the "plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure"); see also VT. STAT. ANN. tit. 12, § 7202(a)(4) (entitling plaintiffs to medical monitoring if they can show, inter alia, "as a proximate result of the exposure, plaintiffs have suffered an increased risk of contracting a serious disease"); 1 MCLAUGHLIN ON CLASS ACTIONS § 5:18 (18th ed. 2021 update) (explaining that, to state a claim for medical monitoring, a plaintiff must generally demonstrate that "[a]s a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease").

That said, as Comment *f* emphasizes, no particular level of quantification is necessary to satisfy this requirement. *Bower*, 522 S.E.2d at 433 ("Importantly, '[n]o particular level of quantification is necessary to satisfy this requirement.'") (quoting *Hansen*, 858 P.2d at 979-980); Perrine v. E.I. du Pont de Nemours & Co., 694 S.E.2d 815, 880 (W. Va. 2010) ("All that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure, and no particular level of quantification is necessary to satisfy this requirement.") (quotation marks and alteration omitted). For a discussion of the peril of risk quantification in the medical monitoring context, see Kenneth S. Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88 VA. L. REV. 1975, 1982-1983 (2002).

Nor is the plaintiff obligated to show that the occurrence of the harm is more-probable-than-not, even absent the preventive monitoring. See, e.g., In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 851 (3d Cir. 1990) (applying Pennsylvania law) (clarifying that "the appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer harm in the future"); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824 (Cal. 1993) ("[R]ecovery of medical monitoring damages should not be dependent upon a showing that a particular cancer or disease is reasonably certain to occur in the future."); *Hansen*, 858 P.2d at 979 ("[T]he plaintiff need not prove that he or she has a probability of actually experiencing the toxic consequence of the exposure."); *Perrine*, 694 S.E.2d at 880 ("A plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure."); *Bower*, 522 S.E.2d at 431 (clarifying that a plaintiff need not "demonstrate the probable likelihood that a serious disease will result from the exposure").

Whether the prerequisite identified in Comment *f* exists is typically proven with expert testimony. See *In re Paoli R.R. Yard PCB Litig*., 916 F.2d at 852; Exxon Mobil Corp. v. Albright, 71 A.3d 30, 80 (Md. 2013); *Redland Soccer Club, Inc*., 696 A.2d at 146.

A further note relates to terminology—and particularly Comment *f*'s discussion of "risk of harm." Risk technically and commonly consists of two components: the magnitude of the adverse outcome (how serious that cancer is, for example) and its probability of occurring (how likely it is that a person will be afflicted with that kind of cancer). See National Institute of Standards and Technology, Computer Security Resource Center, Risk Definition, https://csrc.nist.gov/glossary/term/risk (explaining that risk is "typically a function of: (i) the adverse impacts that would arise if the circumstance or event occurs; and (ii) the likelihood of occurrence"). These two elements reflect the two variables famously employed by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (admiralty law): "P" reflects the probability that a loss will occur, and "L" reflects the magnitude of that loss.

In most medical monitoring cases, the relevant increase will be to the former; the defendant's tortious conduct will typically affect the plaintiff's probability of future harm, rather than its adverse impact. Nevertheless, this Section employs the broader term "risk" rather than the narrower term "probability" for two reasons. First, it is possible that some tortious exposures may increase the probability of one disease and also subject the plaintiff to the possibility of contracting a different, and more serious, disease. In that situation, "increased risk" is the term that is

technically accurate. Second, most courts addressing medical monitoring have used the term "risk" and have done so without any difficulty, notwithstanding the technicality described above.

For courts' usage of "risk," see, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 788 (applying Pennsylvania law) (demanding that plaintiffs "show significant exposure that causes a significantly increased risk to plaintiff of contracting a serious disease"); *Coplin*, 220 S.W.3d at 718 ("The general consensus that has emerged in these cases is that a plaintiff can obtain damages for medical monitoring upon a showing that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.") (quotation marks omitted); *Redland Soccer Club, Inc.*, 696 A.2d 137, 145-146 (Pa. 1997) (requiring the plaintiff to prove several "elements to prevail on a common law claim for medical monitoring" including that "as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease"); *Hansen*, 858 P.2d at 979 (holding that, "[t]o recover medical monitoring damages under Utah law, a plaintiff must prove" among other things, that the exposure to defendant's toxic substance resulted "in an increased risk . . . of a serious disease, illness, or injury"); *Bower*, 522 S.E.2d at 433 (predicating liability on a showing that the "plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure").

A few courts have used the word "probability" (or "chances" or "odds," which are analogous), apparently without a purpose to distinguish that usage from risk. See, e.g., Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824 (Cal. 1993) ("It bears emphasizing that allowing compensation for medical monitoring costs 'does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical monitoring is appropriate.'"); *Exxon Mobil Corp.*, 71 A.3d at 132 (explaining that "the plaintiff must present quantifiable and reliable medical expert testimony that indicates the individual plaintiff's particularized chances of developing the disease had he or she not been exposed, compared to the chances of the member of the public at large of developing the disease").

Sometimes, courts use both risk and probability (or its analogs) in the same passage, apparently intending the same meaning for both. E.g., *Exxon Mobil Corp.*, 71 A.3d at 132-133 ("To determine what is a "significantly increased risk of contracting a latent disease" for a particular plaintiff, the plaintiff must present quantifiable and reliable medical expert testimony that indicates the individual plaintiff's particularized chances of developing the disease.").

Comment g. Expedited detection and treatment both possible and beneficial. As paragraph (4) establishes, a defendant is subject to liability for medical monitoring, only if a monitoring procedure exists that makes expedited detection of the disease possible. See Redland Soccer Club, Inc. v. Dept. of the Army, 696 A.2d 137, 145-146 (Pa. 1997) (requiring the plaintiff to "prove" several "elements to prevail on a common law claim for medical monitoring" including that "a monitoring procedure exists that makes the early detection of the disease possible"); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 432-433 (W. Va. 1999) ("[I]n order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove [inter alia]

that . . . monitoring procedures exist that make the early detection of a disease possible."). As Comment *g* explains, for purposes of paragraph (4) of this Section, detection is "expedited," if "the monitoring regimen permits detection of the illness earlier than it would have been detected in the absence of the monitoring, at any stage during the latency period of the illness."

Like many, but not all, states, paragraph (4) and Comment *g* additionally demand that the plaintiff show that monitoring has the potential to alter the plaintiff's prognosis, the course of the plaintiff's illness, or the ultimate disability or impairment. If, conversely, expedited detection will have no effect on the course, trajectory, or severity of the plaintiff's affliction, then the plaintiff is not entitled to hold the defendant liable for medical monitoring, even if the Section's other prerequisites are satisfied. See In re Marine Asbestos Cases, 265 F.3d 861, 861 (9th Cir. 2001) (Jones Act) (holding that a prerequisite to medical monitoring is a showing that "[m]onitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial"); Abuan v. Gen. Elec. Co., 3 F.3d 329, 334 (9th Cir. 1993) (applying Guam law) ("In order to recover for costs of medical monitoring, a plaintiff must prove that: . . . Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial."); In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990) (applying Pennsylvania law) (predicting that Pennsylvania would only permit medical monitoring so long as the plaintiff proved, inter alia, that "[m]onitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial"); Exxon Mobil Corp. v. Albright, 71 A.3d 30, 81-82 (Md. 2013) (establishing that, in order to recover medical monitoring costs, the plaintiff must show, among other prerequisites, "that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial"), on reconsideration in part, 71 A.3d 150 (Md. 2013); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) (requiring plaintiffs to show that "early detection is beneficial," which means "a treatment exists that can alter the course of the illness"); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 22.74, at 425 (4th ed. 2004) ("Courts generally require plaintiffs to show that diagnostic tests exist . . . and that early detection can significantly improve treatment of the disease."); 3 LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 32:25 (2021 update) (explaining that, "[i]n order to collect medical monitoring damages, most courts require" the plaintiff to show, inter alia, "[m]onitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial"); Logan Glasenapp, *Judicially Sanctioned Environmental Injustice: Making the Case for Medical Monitoring*, 49 N.M. L. REV. 59, 90 (2019) ("It would be ultimately unfair for defendants to pay for medical monitoring when there would be no benefit wrought from early diagnosis of a disease."); Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 538 (2000) ("The majority of states explicitly require that a plaintiff demonstrate that early diagnosis will be beneficial.").

Whether the prerequisites identified in Comment *g* obtain is typically proven with expert testimony. See *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d at 852; *Exxon Mobil Corp.*, 71 A.3d at 80.

Comment h. Monitoring regimen different from that normally recommended in the absence of exposure. As paragraph (5) establishes, a defendant is subject to liability for medical monitoring only if the prescribed monitoring regimen is different from that that would have been prescribed for the plaintiff in the absence of tortious exposure. This requirement is significant, as, alongside Comment *f*, it ensures that the exposure at issue is meaningful. See Sadler v. PacifiCare of Nev., 340 P.3d 1264, 1271 (Nev. 2014) (requiring the plaintiff to prove "that the medical monitoring at issue is something greater than would be recommended as a matter of general health care for the public at large" and observing that this requirement ensures that courts will not be opened "to extensive new litigation from individuals exposed to everyday toxic substances").

For further doctrinal support for this important—and broadly accepted—restriction, see, for example, VT. STAT. ANN. tit. 12, § 7202(a)(5) (entitling plaintiffs to medical monitoring if they can show, inter alia, "the increased risk makes it medically necessary for the plaintiffs to undergo periodic medical examination different from that prescribed for the general population in the absence of exposure"); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 825 (Cal. 1993) (establishing that "toxic exposure plaintiffs may recover only if the evidence establishes the necessity, as a direct consequence of the exposure in issue, for specific monitoring beyond that which an individual should pursue as a matter of general good sense and foresight" and further cautioning "there can be no recovery for preventative medical care and checkups to which members of the public at large should prudently submit") (quotation marks and citations omitted); Petito v. A.H. Robins Co., 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999) (requiring a plaintiff to show, among other prerequisites, that "the prescribed monitoring regime is different from that normally recommended in the absence of the exposure"); Redland Soccer Club, Inc. v. Dept. of the Army, 696 A.2d 137, 145-146 (Pa. 1997) (requiring the plaintiff to "prove" several "elements to prevail on a common law claim for medical monitoring" including that "the prescribed monitoring regime is different from that normally recommended in the absence of the exposure"); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 980 (Utah 1993) (requiring "a particular plaintiff to prove that by reason of the exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe for her or him a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure"); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 432-433 (W. Va. 1999) ("[I]n order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove [inter alia] that . . . the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure. . . ."); 1 MCLAUGHLIN ON CLASS ACTIONS § 5:18 (18th ed. 2021 update) (explaining that, to state a claim for medical monitoring, a plaintiff must generally demonstrate that "[t]he prescribed monitoring regime is different from that normally recommended in the absence of exposure").

Whether the prerequisite identified in Comment *h* obtains is typically proven with expert testimony. See *Potter*, 863 P.2d at 824; Exxon Mobil Corp. v. Albright, 71 A.3d 30, 80 (Md. 2013).

Illustration 9, involving Purpo, is based on Albertson v. Wyeth, 2005 WL 3782970, at *7 (Pa. Ct. Com. Pl. 2005).

Comment i. Reasonably necessary, according to generally accepted contemporary medical practices. Pursuant to paragraph (6), an actor is subject to liability for medical monitoring only if the monitoring is "reasonably necessary" in order to prevent or to mitigate future bodily harm. As such, as the Sixth Circuit explains: "[F]or the Plaintiffs to prevail, there must be evidence that a reasonable physician would order medical monitoring for them." Hirsch v. CSX Transp., Inc., 656 F.3d 359, 363 (6th Cir. 2011) (applying Ohio law); see also, e.g., Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712, 718 (Mo. 2007) (explaining that, beyond showing that the plaintiff suffers from an "'increased risk of contracting a particular disease,'" the plaintiff must additionally "show that 'medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease'"); Redland Soccer Club, Inc. v. Dept. of the Army, 696 A.2d 137, 145-146 (Pa. 1997) (requiring the plaintiff to "prove" several "elements to prevail on a common law claim for medical monitoring" including that "the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles"); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 432-433 (W. Va. 1999) (requiring that, "in order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove [inter alia] that . . . the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations" and further explaining "[d]iagnostic testing must be 'reasonably necessary' in the sense that it must be something that a qualified physician would prescribe based upon the demonstrated exposure"); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 22.74, at 425 (4th ed. 2004) ("Courts generally require plaintiffs to show that diagnostic tests exist, that the increased risk has made testing reasonably necessary. . . .").

Whether the prerequisite identified in Comment *i* obtains is typically proven with expert testimony. See Dougan v. Sikorsky Aircraft Corp., 251 A.3d 583, 598 (Conn. 2020) ("In the absence of expert testimony demonstrating the necessity of future testing, a fact finder would be unable to accurately conclude whether a plaintiff should recover for medical monitoring.").

Comment j. Injury requirement. Many courts recognize that those who incur monitoring expenses have suffered a cognizable injury, even if there is not yet physical manifestation of such an injury. E.g., Exxon Mobil Corp. v. Albright, 71 A.3d 30, 75-76, on reconsideration in part, 71 A.3d 150 (Md. 2013) ("We agree now with other jurisdictions that recognize that exposure itself and the concomitant need for medical testing is the compensable injury for which recovery of damages for medical monitoring is permitted, because such exposure constitutes an 'invasion of [a] legally protected interest.'") (certain quotation marks and citations omitted, quoting Restatement Second, Torts § 7(1) (AM. L. INST. 1965)); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 (Utah 1993) ("Although the physical manifestations of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; the exposure itself and the concomitant need for medical testing constitute the injury. . . . This conclusion is consistent with the definition of 'injury' in the Restatement of Torts."); State v. Madden, 607 S.E.2d 772, 784-785 (W. Va. 2004) ("The injury that underlies a claim for medical monitoring—just as with any other cause of action sounding in tort—is the invasion of any legally protected interest." "The specific invasion of a legally protected interest in a medical monitoring claim[] consists of a significantly

increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.") (internal quotation marks omitted) (quoting Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 430 (W. Va. 1999) and Restatement Second, Torts § 7(1)); Logan Glasenapp, *Judicially Sanctioned Environmental Injustice: Making the Case for Medical Monitoring*, 49 N.M. L. REV. 59, 79 (2019) (explaining that "the injury in some cases of toxic exposure is the need to receive medical care one would otherwise not need"); cf. Barnes v. Am. Tobacco Co., 989 F. Supp. 661, 665 (E.D. Pa. 1997) ("The injury that a person claims under a medical monitoring cause of action is 'the cost of the medical care that will, one hopes, detect that injury.'") (quoting Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the U.S., 696 A.2d 137, 144 (Pa. 1997)).

Beyond the above, however, some other courts require evidence that the defendant's conduct has caused some discernible (albeit tiny) change in the plaintiff's body. E.g., Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 894, 901 (Mass. 2009) (finding that the plaintiffs may recover for medical monitoring when plaintiffs demonstrated "subclinical effects of exposure to cigarette smoke" while "leav[ing] for another day consideration of cases that involve exposure to levels of chemicals or radiation known to cause cancer, for which immediate medical monitoring may be medically necessary although no symptoms or subclinical changes have occurred"); accord Benoit v. Saint-Gobain Performance Plastics Corp., 959 F.3d 491, 501 (2d Cir. 2020) (applying New York law) (concluding that, under New York law, the plaintiff's allegation that he has in his body the "clinically demonstrable presence of toxins" is "sufficient to ground a claim for personal injury and that for such a claim . . . . the plaintiff may be awarded . . . the costs of medical monitoring"). This Section declines to impose such a requirement because some serious maladies do not leave a trace on the body that can be discerned until after death. And, if recovery depends on whether a physical change can be discerned using current technology, that creates the possibility that recovery will be a matter of fortuity (which affliction a plaintiff happens to have and which diagnostic tools have been invented to test for that affliction). Cf. Mayo Clinic, Chronic Traumatic Encephalopathy (CTE), Diagnosis, https://www.mayoclinic.org/diseases-conditions/chronic-traumatic-encephalopathy/diagnosis-treatment/drc-20370925 (explaining that a diagnosis of CTE "requires evidence of degeneration of brain tissue and deposits of tau and other proteins in the brain" which "can only be seen after death during an autopsy," although "researchers are actively trying to find a test for CTE that can be used while people are alive").

Comment k. Court-administered or -supervised fund. Recognizing that, in the medical monitoring context, the money paid is not fungible, the majority of courts take affirmative steps to ensure that monies awarded for medical surveillance will be used as intended. See Logan Glasenapp, *Judicially Sanctioned Environmental Injustice: Making the Case for Medical Monitoring*, 49 N.M. L. REV. 59, 87 (2019) ("A minority of courts have awarded lump sum damages to plaintiffs that can successfully bring a claim for medical monitoring. The vast majority have opted for a judicially administered monitoring fund to limit recovery to monitoring that is actually received.").

As Comment *k* explains, the preferred—and dominant—approach has been the creation of a fund, financed by the defendant and created and supervised by the court. See Sullivan v. Saint-

Gobain Performance Plastics Corp., 431 F. Supp. 3d 448, 462 (D. Vt. 2019) ("It is now largely accepted that a cash damage award paid directly to plaintiffs for future medical monitoring expenses is an inappropriate remedy."); Burns v. Jaquays Min. Corp., 752 P.2d 28, 34 (Ariz. Ct. App. 1987) (expressing a clear preference for a "court-supervised fund," as opposed to a "lump sum award"); Petito v. A.H. Robins Co., 750 So. 2d 103, 105 (Fla. Dist. Ct. App. 1999) ("Although we do not think that plaintiffs should be able to recover lump sum damages in anticipation of future diagnostic expenses, we do think it entirely proper for a court of equity to create and supervise a fund for the purpose of monitoring the condition of plaintiffs when it has been shown that such monitoring is reasonably necessary."); Exxon Mobil Corp. v. Albright, 71 A.3d 30, 80 (Md. 2013) ("We note with approval the recent tendency of many courts that award medical monitoring costs to do so by establishing equitably a court-supervised fund, administered by a trustee, at the expense of the defendant."); Ayers v. Jackson Twp., 525 A.2d 287, 314 (N.J. 1987) (explaining that "a fund would serve to limit the liability of defendants to the amount of expenses actually incurred"); see also VT. STAT. ANN. tit. 12, § 7202(b) (statutorily establishing: "If the cost of medical monitoring is awarded, a court shall order the defendant found liable to pay the award to a court-supervised medical monitoring program administered by one or more appropriate health professionals, including professionals with expertise in exposure to toxic substances or expertise with treating or monitoring the relevant latent disease or diseases."). For detailed discussions of how, exactly, a court can use its equitable power to create and administer such funds, see *Petito*, 750 So. 2d at 106-107; Lamping v. Am. Home Prods., Inc., 2000 Mont. Dist. LEXIS 2580, at *14-16 (Mont. Dist. Ct. 2000). For further discussion, see Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the U.S., 696 A.2d 137, 142 n.6 (Pa. 1997); George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 253-264 (1993); Victor E. Schwartz & Christopher E. Appel, *Perspectives on the Future of Tort Damages: The Law Should Reflect Reality*, 74 S.C. L. REV. 1, 21 (2022).

Notwithstanding the fact that a court-supervised or -administered fund likely involves greater transaction costs, as monies must be tracked and accounted for (or, if insurance is acquired, a dedicated insurance policy must be underwritten and maintained), such an approach has numerous advantages. These include the fact that such an approach ensures that monies expended are actually spent on medical surveillance, which serves the interests of fairness, evidentiary development, and public health. See Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the U.S., 696 A.2d 137, 142 n.6 (Pa. 1997) (expressing a preference for a medical monitoring trust, rather than lump-sum payments, because, inter alia: "A trust fund compensates the plaintiff for only the monitoring costs actually incurred. In contrast, a lump sum award of damages is exactly that, a monetary award that the plaintiff can spend as he or she sees fit."). In addition, the approach conserves the defendant's resources, by ensuring that the defendant pays no more than necessary. See Lewis v. Bayer AG, 66 Pa. D. & C.4th 470 (Ct. Com. Pl. 2004) ("Courts prefer that plaintiffs recover [monitoring] costs through a court supervised and administered trust fund instead of through [a] lump sum damage award because a trust fund compensates the plaintiff only for the monitoring costs actually incurred, limiting defendants' liability."); Schwartz & Appel, supra at 21

("[R]ecoveries should not be administered through 'lump sum' awards that abandon any measure of oversight over whether funds are used for purposes other than the intended monitoring. Medical monitoring through a court-supervised program imposes substantial burdens on a state's judiciary, but a program managed by an appointed medical professional with expertise in the disease at issue (who assumes a fiduciary responsibility) can at least help ensure proper disbursements.").

Indeed, as Comment *l* notes, courts may choose to offset defendants' liability by payments from collateral sources. In taking this tack, courts may recognize that medical monitoring suits are different from traditional tort lawsuits in that the money awarded to the plaintiff is earmarked from the get-go; it is paid by the defendant for a specific, clearly delineated purpose. As Kenneth Abraham has explained:

> In the ordinary tort case, money paid as compensation is fungible, so to speak, across different forms of consumption and saving by the plaintiff. In contrast, in the medical monitoring context there is no such fungibility. If the plaintiffs are permitted to use damages paid to them for medical monitoring costs in order to pay college tuition or take a vacation, the very purpose behind the imposition of liability is defeated.

Kenneth S. Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88 VA. L. REV. 1975, 1987 (2002).

These offsets (which essentially effect a reversal of the traditional collateral source rule) would be significant and would become even more significant over time if health insurance availability trends upward. See CDC, Health Insurance Coverage Under Age 65, https://www.cdc.gov/nchs/data/hus/2019/049-508.pdf (reporting that, in 2018, 11 percent of Americans under age 65 were uninsured, down from 17 percent in 2000). As such, the imposition of this restriction would likely meaningfully conserve the defendant's financial resources, avoid any possibility of a double recovery, and would also ensure that medical monitoring is restricted to those cases in which the expenditures are apt to be most beneficial. Cf. Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 442-443 (1997) (declining to authorize "traditional, full-blown" recoveries for medical monitoring because, among other difficulties, such recoveries "would ignore the presence of existing alternative sources of payment"). Doctrinal support for such a position exists—but is limited. See Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 822 n.7 (D.C. Cir. 1984) (refusing to compel the defendant to pay for the medical testing of non-French European plaintiffs because "the public health services in all European countries save for France were likely to pay for diagnostic examinations"); accord *Ayers*, 525 A.2d at 314 ("Although conventional damage awards do not restrict plaintiffs in the use of money paid as compensatory damages, mass-exposure toxic-tort cases involve public interests not present in conventional tort litigation. The public health interest is served by a fund mechanism that encourages regular medical monitoring for victims of toxic exposure. Where public entities are defendants, a limitation of liability to amounts actually expended for medical surveillance tends to reduce insurance costs and taxes . . . .").

Comment l. Further restrictions to limit liability. Comment *l* suggests additional steps courts may take to limit medical monitoring liability.

First, courts may choose to declare that monies for medical monitoring will not be awarded to the extent that "the cost of the relevant diagnostic testing has been fully borne, or will be fully borne, by the plaintiff's insurance, the plaintiff's employer, [or] a government fund." Second, pursuant to Comment *l*, courts "may hold that a defendant whose conduct exposes a vast number of people to risk-creating agents or behaviors is not subject to liability for medical monitoring if the defendant is able to show that . . . liability would so far [reduce] the defendant's resources and insurance coverage as to significantly jeopardize eventual recovery by those exposed persons who ultimately develop bodily harm." Cf. Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 442 (1997) (rejecting plaintiffs' medical monitoring claim where "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring" and where "that fact, along with uncertainty as to the amount of liability" threatened to unleash a "flood" of "unlimited and unpredictable" claims that would, in turn, deplete "resources better left available to those more seriously harmed") (quotation marks omitted); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 850 (2002) (disapproving of medical monitoring because, among other things, such claims, in the authors' view, threaten to "devour[] the defendants' resources" and plunge defendants "into bankruptcy leaving nothing for those" who eventually fall ill).

Beyond the limited authority above, this restriction is not well established in the case law regarding medical monitoring. However, in numerous other contexts, courts have altered traditional tort principles in order to avoid the imposition of "crushing" liability. See, e.g., Strauss v. Belle Realty Co., 482 N.E.2d 34, 36 (N.Y. 1985). For discussion, see Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1198-1203 (2009). For a critique, see Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 53-55 (1998).

Comment m. Terminology: freestanding cause of action or remedy. As noted in Comment *m*, courts differ somewhat in their conceptualization and/or description of medical monitoring claims. See Sadler v. PacifiCare of Nev., 340 P.3d 1264, 1269 (Nev. 2014) (recognizing this division); In re Nat'l Hockey League Players' Concussion Injury Litig., 327 F.R.D. 245, 261-262 (D. Minn. 2018) (same); 1 MCLAUGHLIN ON CLASS ACTIONS § 5:18 (18th ed. 2021 update) ("Courts . . . disagree on whether medical monitoring is an independent cause of action or simply a type of recovery once liability is established under a traditional cause of action."); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1081 n.88 (2002) ("There are ongoing disputes in the states on whether medical monitoring is a stand-alone claim or is simply a remedy for a tort suit."); Alexandra D. Lahav, *The Knowledge Remedy*, 98 TEX. L. REV. 1361, 1381-1382 (2020) ("There remains some dispute about whether medical monitoring is a remedy or an independent cause of action. Some courts have recognized medical monitoring as an independent cause of action, while others have treated it as

a remedy. There are plausible arguments both ways . . . ."); Victor E. Schwartz & Christopher E. Appel, *Perspectives on the Future of Tort Damages: The Law Should Reflect Reality*, 74 S.C. L. REV. 1, 18 (2022) ("Some courts have recognized medical monitoring as an independent tort cause of action for unimpaired claimants, while others have viewed medical monitoring costs as an item of recoverable economic damages for an existing tort . . . ."); Anita J. Patel, Note, *Medical Monitoring: Missouri's Welcomed Acceptance*, 73 MO. L. REV. 611, 611 (2008) ("Medical monitoring can be viewed as a cause of action or a form of relief. In both instances, the goal is to allow plaintiffs who have been exposed to toxins that enhance the plaintiffs' risk of disease to be compensated for periodic diagnostic testing in order to detect disease early.").

Some courts characterize medical monitoring claims as discrete freestanding causes of action. See Megan Noonan, *The Doctor Can't See You Yet: Overcoming the "Injury" Barrier to Medical Monitoring Recovery for PFAS Exposure*, 45 VT. L. REV. 287, 306-307 (2020) (reporting that "five states recognize medical monitoring as an independent cause of action"); e.g., Petito v. A.H. Robins Co., 750 So. 2d 103, 104 (Fla. Dist. Ct. App. 1999) ("The instant case presents [the question of] . . . whether or not Florida recognizes a cause of action for medical monitoring when the party seeking relief has yet to develop any identifiable physical injuries or symptoms. For the reason[s] set forth below, we answer this question in the affirmative . . . ."); Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the U.S., 696 A.2d 137, 143 (Pa. 1997) (clarifying the "elements of a claim for medical monitoring"); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 431 (W. Va. 1999) (concluding "that a cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortious conduct").

Other courts characterize medical monitoring claims as a remedy for other (sometimes unidentified) causes of action. See Noonan, supra at 306-307 (reporting that seven states recognize medical monitoring as a remedy); e.g., Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 823 (Cal. 1993) ("Recognition that a defendant's conduct has created the need for future medical monitoring does not create a new tort. It is simply a compensable item of damage when liability is established under traditional tort theories of recovery."); Moore v. Scroll Compressors, LLC, 632 S.W.3d 810, 819 (Mo. Ct. App. 2021) ("Missouri law does not recognize medical monitoring as a separate cause of action."); *Sadler*, 340 P.3d at 1270 ("[A] plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present *physical* injury.").

And, in at least one state, the resolution of the matter is not entirely clear. E.g., VT. STAT. ANN. tit. 12, § 7202(a) ("A person without a present injury or disease shall have a cause of action for the remedy of medical monitoring . . . .").

Whichever terminology a court uses or approach a court chooses may have implications when it comes to certain matters such as, for example, establishing appropriate statutes of limitations, the construction of appropriate jury instructions, or assessing whether putative class members satisfy class certification requirements. But it does not otherwise affect a person's ability to recover under this Section. Accord Dougan v. Sikorsky Aircraft Corp., 251 A.3d 583, 586 n.4 (Conn. 2020)

("Although there are some differences between the two approaches [i.e., viewing medical monitoring as a cause of action as compared to a remedy], the elements of proof for either approach to medical monitoring are the same.") (citing 1 J. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:18 (16th ed. 2019) (explaining, inter alia: "[T]he elements of proof for medical monitoring as a cause of action and as a remedy remain the same and must be established by the plaintiffs.")).

Comment n. Statutes of limitations. As the medical monitoring authorized in this Section is distinct from other causes of action (including those seeking compensation for present bodily harm, the enhanced risk of harm, or the apprehension of such future harm), see Comment *c*, the accrual of the statute of limitations may be distinct. For a discussion of statute-of-limitations issues in the medical monitoring context, see Blanyar v. Genova Prods. Inc., 861 F.3d 426, 432-433 (3d Cir. 2017) (applying Pennsylvania law); In re Burbank Envtl. Litig., 42 F. Supp. 2d 976, 982 (C.D. Cal. 1998); Hoyte v. Stauffer Chem. Co., 2002 WL 31892830, at *53-54 (Fla. Cir. Ct. 2002); State v. Madden, 607 S.E.2d 772, 785 (W. Va. 2004). For discussion in another somewhat similar context, see generally Pooshs v. Philip Morris USA, Inc., 250 P.3d 181 (Cal. 2011) (holding that an earlier-discovered disease does not trigger the statute of limitations for a lawsuit based on a later-discovered separate latent disease caused by the same tobacco use).

Comment o. Claim preclusion and issue preclusion. Liability under this Section does not bar actions seeking compensation for present bodily harm, if and when such harm manifests. See Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 902 (Mass. 2009) (holding that a medical monitoring claim will not preclude actions for present bodily harm or additional claims because such a rule would "act[] as a deterrent to persons seeking early detection of catastrophic disease, and it would expose both plaintiffs and defendants to far more serious consequences should the disease later manifest itself in an advanced stage"); Lamping v. Am. Home Prods., Inc., 2000 Mont. Dist. LEXIS 2580, at *12-13 (Mont. Dist. Ct. 2000) (recognizing that it would be permissible for a plaintiff to first file a "'medical monitoring' claim for pre-injury surveillance, and then upon discovery of actual physical injury . . . file a separate individual tort action seeking actual damages"); accord Restatement Second, Judgments § 26(e) (AM. L. INST. 1982); Francis C. Amendola et al., 50 C.J.S. *Judgments* § 979 (2022 update) ("A plaintiff who seeks future damages for medical monitoring based on exposure to a hazardous substance is not barred, under a single-controversy rule, from bringing a future action for damages in the event the plaintiff subsequently contracts cancer; the application of the rule in such instances would act as a deterrent to persons seeking early detection of catastrophic disease, and it would expose both plaintiffs and defendants to far more serious consequences should the disease later manifest itself in an advanced stage."); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1079-1080 (2002) ("[M]edical monitoring claimants have had no opportunity to seek compensatory damages, either ahead of time as a probabilistic matter, or subsequently. Therefore, as a matter of substantive law, there should be no preclusion of a subsequent tort claim."); Kara L. McCall, Comment, *Medical Monitoring Plaintiffs and Subsequent Claims for Disease*, 66 U. CHI. L. REV. 969, 970-971 (1999) (arguing that "[p]laintiffs should be encouraged—not discouraged—to sue first for medical monitoring and later for actual injury (if it

develops) rather than to sue preemptively for damages from a disease that may or may not occur" because such an approach promotes tort law's aims of compensation and deterrence); accord VT. STAT. ANN. tit. 12, § 7202(d)(2) (establishing medical monitoring by statute and noting: "nothing in this chapter shall be deemed to preclude the pursuit of any other civil or injunctive remedy or defense available under statute or common law, including the right of any person to seek to recover for damages related to the manifestation of a latent disease").

Of course, as Comment *o* emphasizes, if particular issues are conclusively resolved in a medical monitoring lawsuit, the resolution of those particular issues, whether against the plaintiff or the defendant, may preclude the subsequent relitigation of those same issues, through familiar principles of issue preclusion. See 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 4416-4426 (3d ed. 2022 update) (offering a primer on issue preclusion and its many particularized requirements).

Appendix to Reporters' Note

A State-by-State Table: Medical Monitoring Absent Present Physical Injury

States (plus the District of Columbia) that authorize or appear to authorize medical monitoring absent present injury:

State	Authority	Language
Arizona	Burns v. Jaquays Min. Corp., 752 P.2d 28, 33 (Ariz. Ct. App. 1987); In re Nat'l Hockey League Players' Concussion Injury Litig., 327 F.R.D. 245, 262 (D. Minn. 2018) (applying Arizona law).	"We believe . . . despite the absence of physical manifestation of any . . . diseases, that the plaintiffs should be entitled to such regular medical testing and evaluation . . . and its cost is a compensable item of damages." *Burns*, 752 P.2d at 33. Stating, in dicta, "[i]n Arizona, plaintiffs may recover medical monitoring where the plaintiff is at risk of developing an injury in the future." *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 327 F.R.D. at 262.
California	Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 800 (Cal. 1993).	"On the issue of medical monitoring costs, we hold that such costs are a compensable item of damages in a negligence action where the proofs demonstrate . . . that the need for future monitoring is a reasonably certain consequence of the plaintiff's . . . exposure and that the recommended monitoring is reasonable."
Colorado	Bell v. 3M Co., 344 F. Supp. 3d 1207, 1224 (D. Colo. 2018); Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1477 (D. Colo. 1991).	"As such, I reaffirm . . . [the] prediction that . . . the Colorado Supreme Court would . . . recognize a claim for medical monitoring absent present physical injury." *Bell*, 344 F. Supp. 3d at 1224. "Although Colorado has yet to do so, I conclude that the Colorado Supreme Court would probably recognize, in an appropriate case, a tort claim for medical monitoring." *Cook*, 755 F. Supp. at 1477.
District of Columbia	Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 825 (D.C. Cir. 1984) (applying D.C. law).	"[W]e believe that the District of Columbia Court of Appeals would recognize such a cause of action [medical monitoring without present injury]."

State	Authority	Language
Florida	Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 265 (S.D. Fla. 2003); Coffie v. Fla. Crystals Corp., 2020 WL 2739724, at *10 (S.D. Fla. 2020); Tillman v. C.R. Bard, Inc., 96 F. Supp. 3d 1307, 1350 (M.D. Fla. 2015); Petito v. A.H. Robins Co., Inc., 750 So. 2d 103, 104 (Fla. Dist. Ct. App. 1999).	"Plaintiffs' Complaint seeks recovery for medical monitoring, a cause of action recognized in Florida even absent a physical injury." *Perez*, 218 F.R.D. at 265. "In Florida: a trial court may use its equitable powers to create and supervise a fund for medical monitoring purposes [even absent present physical injury]." *Coffie*, 2020 WL 2739724, at *10. "The instant case presents an issue [of] . . . whether or not Florida recognizes a cause of action for medical monitoring when the party seeking relief has yet to develop any identifiable physical injuries or symptoms. For the reasoning set forth below, we answer this question in the affirmative." *Petito*, 750 So. 2d at 104.
Maryland	Exxon Mobil Corp. v. Albright, 71 A.3d 30, 75-76 (Md. 2013).	"We agree now with other jurisdictions that recognize that 'exposure itself and the concomitant need for medical testing' is the compensable injury for which recovery of damages for medical monitoring is permitted."
Massachusetts*	Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 901 (Mass. 2009).	"When competent medical testimony establishes that medical monitoring is necessary to detect the potential onset of a serious illness or disease . . . the element of injury and damage will have been satisfied and the cost of that monitoring is recoverable in tort . . . so long as there has been at least a corresponding subcellular change."
Minnesota*	In re Nat'l Hockey League Players' Concussion Injury Litig., 327 F.R.D. 245, 264 (D. Minn. 2018); Bryson v. Pillsbury Co., 573 N.W.2d 718, 721 (Minn. Ct. App. 1999).	"To succeed on their medical monitoring claim under Minnesota law, Plaintiffs must prove that they incurred cell damage (injury) as a result of being exposed to the hazard . . . ." *In re Nat'l Hockey*, 327 F.R.D. at 264. "[T]he court . . . [can] not rule as a matter of law that plaintiffs' alleged injuries are not 'real' simply because they are subcellular. The effect of volatile organic compounds on the human body is a subtle, complex matter. It is for the trier of fact, aided by expert testimony, to determine whether plaintiffs have suffered present harm." *Bryson*, 573 N.W.2d at 721.
Missouri	Meyer v. Fluor Corp., 220 S.W.3d 712, 718 (Mo. 2007).	"Even though a plaintiff may not have yet developed a diagnosable physical injury, it is not accurate to conclude that no compensable injury has been sustained . . . . Thus, the theory of recovery for medical monitoring damages is that the plaintiff is entitled, upon proper proof, to obtain compensation for an injury to the legally protected interest in avoiding the cost of reasonably necessary medical monitoring occasioned by the defendant's actions."
Nevada	Sadler v. PacifiCare of Nev., Inc., 340 P.3d 1264, 1272 (Nev. 2014).	"[W]e conclude that, in a negligence action for which medical monitoring is sought as a remedy, a plaintiff may satisfy the injury requirement for the purpose of stating a claim by alleging that he or she is reasonably required to undergo medical monitoring beyond what would have been recommended had the plaintiff not been exposed to the negligent act of the defendant."
New Jersey	Ayers v. Jackson Twp., 525 A.2d 287, 312 (N.J. 1987).	"Accordingly, we hold that the cost of medical surveillance is a compensable item of damages [absent present injury]."

State	Authority	Language
New York*	Benoit v. Saint-Gobain Performance Plastics Corp., 959 F.3d 491, 501 (2d Cir. 2020) (applying New York law); Burdick v. Tonoga, Inc., 110 N.Y.S.3d 219 (Sup. Ct. 2018), aff'd, 112 N.Y.S.3d 342 (App. Div. 2019); Baker v. Saint-Gobain Performance Plastics Corp., 232 F. Supp. 3d 233, 250 (N.D.N.Y. 2017).	Under New York law, the plaintiff's allegation that he has in his body the "clinically demonstrable presence of toxins" is "sufficient to ground a claim for personal injury and that for such a claim, if proven, the plaintiff may be awarded, as consequential damages for such injury, the costs of medical monitoring." *Benoit*, 959 F.3d at 501 (interpreting Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 14 (N.Y. 2013)). Plaintiffs have stated a "cognizable claim for medical monitoring based on a present injury, specifically, blood accumulation of PFOA." *Burdick*, 110 N.Y.S.3d 219. "[U]nder case law cited favorably by *Caronia*, a plaintiff may show an injury sufficient to seek medical monitoring damages through the accumulation of a toxic substance within her body." *Baker*, 232 F. Supp. 3d at 250.
Ohio	Hardwick v. 3M Co., 2019 WL 4757134, at *6 (S.D. Ohio 2019), reconsideration denied, 2020 WL 4436347 (S.D. Ohio 2020); Elmer v. S.H. Bell Co., 127 F. Supp. 3d 812, 825 (N.D. Ohio 2015); Day v. NLO, 851 F. Supp. 869, 879 (S.D. Ohio 1994).	In *Hardwick*, the court refused to dismiss a claim for medical monitoring when the plaintiff pled no injury other than exposure to a toxic substance leading to increased risk of disease. 2019 WL 4757134, at *6. "A plaintiff is not required to demonstrate physical injuries in order to obtain medical monitoring relief, but must show by expert medical testimony that [plaintiffs] have increased risk of disease which would warrant a reasonable physician to order monitoring." (citation and quotation omitted). *Elmer*, 127 F. Supp. 3d at 825. "[I]f the Plaintiffs can establish . . . an increased risk of disease, they will be entitled to medical monitoring." *Day*, 851 F. Supp. at 879.
Pennsylvania	Redland Soccer v. Dep't of Army, 696 A.2d 137, 195 (Pa. 1997).	"[W]e recognize[] medical monitoring [absent present injury] as a viable cause of action under Pennsylvania law."
Utah	Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993).	"To recover medical monitoring damages under Utah law, a plaintiff must prove the following: [the court lists numerous elements, none of which require proof of present injury]."
Vermont	VT. STAT. ANN. tit. 12, § 7202.	This statute, enacted in 2022, creates for those "without a present injury or disease . . . a cause of action for the remedy of medical monitoring."
West Virginia	Bower v. Westinghouse Electric Corp., 522 S.E.2d 424, 430 (W. Va. 1999).	"We now reject the contention that a claim for future medical expenses must rest upon the existence of present physical harm. The 'injury' that underlies a claim for medical monitoring—just as with any other cause of action sounding in tort—is 'the invasion of any legally protected interest.'"

* These jurisdictions require the plaintiff to submit proof of cellular, subcellular, or subclinical injury or the clinically demonstrable presence of toxins in the plaintiff's bloodstream. For discussion of these jurisdictional classifications, see footnote 1, supra.

States that reject or appear to reject medical monitoring absent present physical injury:

State	Authority	Language
Alabama	Hinton v. Monsanto Co., 813 So. 2d 827, 831 (Ala. 2001).	"We believe that Alabama law, as it currently exists, must be applied to balance the delicate and competing policy considerations presented here. That law provides no redress for a plaintiff who has no present injury or illness."
Arkansas	Nichols v. Medtronic, Inc., 2005 WL 8164643, at *11 (E.D. Ark. 2005).	"Arkansas has not clearly recognized a claim for medical monitoring and would not where no physical injury is alleged."
Delaware	Baker v. Croda, Inc., 304 A.3d 191 (Del. 2023).	Rejecting a claim for medical monitoring because, in the court's view, "an increased risk of harm only constitutes a cognizable injury when manifested by physical illness."
Illinois	Berry v. City of Chicago, 181 N.E.3d 679, 689 (Ill. 2020).	"[I]n a negligence action, an increased risk of harm is not an injury. A plaintiff who suffers bodily harm caused by a negligent defendant may recover for an increased risk of future harm as an element of damages, but the plaintiff may not recover solely for the defendant's creation of an increased risk of harm." (citation omitted).
Kentucky	Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 859 (Ky. 2002).	"[W]e are convinced that this Court has little reason to allow [medical monitoring] without a showing of present physical injury."
Louisiana	LA. CIV. CODE ANN. art. 2315.	"Damages do not include costs for future medical treatment . . . unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease."
Michigan	Henry v. Dow Chem. Co., 701 N.W.2d 684, 686 (Mich. 2005).	"Because plaintiffs do not allege a *present* injury, plaintiffs do not present a viable negligence claim [for medical monitoring] under Michigan's common law."
Mississippi	Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1, 3 (Miss. 2007).	"Creating a medical monitoring action would be contrary to Mississippi common law, which does not allow recovery for negligence without showing an identifiable injury."
Nebraska	Trimble v. ASARCO, Inc., 232 F.3d 946, 963 (8th Cir. 2000) (applying Nebraska law).	"[T]he court finds it improbable that the Nebraska courts would judicially fashion such a right or remedy [for medical monitoring without a present injury]."
New Hampshire	Brown v. Saint-Gobain Performance Plastics Corp., 300 A.3d 949 (N.H. 2023).	Answering a certified question, the New Hampshire Supreme Court held: "the mere existence of an increased risk of future development of disease is not sufficient under New Hampshire law to constitute a legal injury for purposes of stating a claim for the costs of medical monitoring as a remedy or as a cause of action in the context of plaintiffs who were exposed to a toxic substance but have no present physical injury."

State	Authority	Language
North Carolina	Curl v. Am. Multimedia, Inc., 654 S.E.2d 76, 81 (N.C. Ct. App. 2007); Nix v. Chemours Co. FC, LLC, 2019 WL 9101849, at *10 (E.D.N.C. 2019); In re Valsartan, Losartan, & Irbesartan Prod. Liab. Litig., 2021 WL 364663, at *25 & n.38 (D.N.J. 2021); Priselac v. Chemours Co., 2022 WL 909406, at *3 (E.D.N.C. 2022).	"Clearly, recognition of the increased risk of disease as a present injury, or of the cost of medical monitoring as an element of damages, will present complex policy questions. . . . Accordingly, we decline to create the new causes of action or type of damages urged by Plaintiffs." *Curl*, 654 S.E.2d at 81. In *Nix*, 2019 WL 9101849, at *10, the court interpreted *Curl* and, as a consequence, dismissed plaintiffs' "request for injunctive relief concerning medical monitoring." In *In re Valsartan*, 2021 WL 364663, at *25, the court observed: "the Court recognizes that North Carolina has rejected outright an independent medical monitoring claim as well as a medical monitoring claim as the measure of damages." In *Priselac*, 2022 WL 909406, at *3, the court likewise interpreted *Curl* to hold "that North Carolina law does not recognize medical monitoring as an independent cause of action or an element of damages absent a present physical injury."
North Dakota	Mehl v. Canadian Pac. Ry. Ltd., 227 F.R.D. 505, 518 (D.N.D. 2005).	"Accordingly, it is clear North Dakota requires a legally cognizable injury to be present before damages may be awarded. Given these basic principles of North Dakota tort law, a plaintiff would be required to demonstrate a legally cognizable injury to recover any type of damages in a newly recognized tort, including a medical monitoring claim."
Oklahoma	McCormick v. Halliburton Co., 895 F. Supp. 2d 1152, 1158 (W.D. Okla. 2011).	"[T]his Court finds . . . that the Oklahoma Supreme Court would decline to recognize medical monitoring [without present injury] as a remedy in the absence of any guidance from the Oklahoma legislature and would instead defer to the Oklahoma legislature to first recognize such a remedy."
Oregon	Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 187 (Or. 2008).	"[W]e hold that negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence."
South Carolina	Rosmer v. Pfizer, Inc., 2001 WL 34010613, at *5 (D.S.C. 2001).	"South Carolina has not recognized a cause of action for medical monitoring."
Tennessee	Weatherly v. Eastman Chem. Co., 2023 WL 5013823, at *11 (Tenn. Ct. App. 2023); Jones v. Brush Wellman, Inc., 2000 WL 33727733, at *8 (N.D. Ohio 2000) (applying Tennessee law).	In *Weatherly*, 2023 WL 5013823, at *11, the court expressly declined to recognize "such a cause of action for the first time." In *Jones*, 2000 WL 33727733, at *8, the court rejected plaintiff's claims to cover the cost of "testing," reasoning "[n]o Tennessee cases support a cause of action for medical monitoring in the absence of a present [physical] injury."
Texas	Norwood v. Raytheon Co., 414 F. Supp. 2d 659, 668 (W.D. Tex. 2006).	"[A]lthough some jurisdictions have recognized a medical monitoring tort, Texas appears unlikely to adopt medical monitoring as a cause of action if confronted with the issue. . . . Therefore, the Court is of the opinion that Plaintiffs' medical monitoring claims should be dismissed."
Virginia	Ball v. Joy Tech., Inc., 958 F.2d 36, 39 (4th Cir. 1991) (applying Virginia law).	"[Medical monitoring] is only available where a plaintiff has sustained a physical injury that was proximately caused by the defendant."
Wisconsin	Alsteen v. Wauleco, Inc., 802 N.W.2d 212, 223 (Wis. Ct. App. 2011).	"[W]e therefore refuse to 'step into the legislative role and mutate otherwise sound legal principles' by creating a new medical monitoring claim that does not require actual injury."

States with unclear or divided law with respect to medical monitoring:

State	Notes
Connecticut	The Connecticut Supreme Court recognized medical monitoring in workers' compensation claims. Doe v. City of Stamford, 699 A.2d 52, 54 (Conn. 1997). In Dougan v. Sikorsky Aircraft Corp., 251 A.3d 583 (Conn. 2020), the Connecticut Supreme Court addressed the question, at some length, in the tort context. The court, however, declined to rule on the propriety of such a claim, because the court found that there could be no liability for medical monitoring without a showing of reasonable necessity, and the plaintiffs' proffered evidence "establishes that there is no genuine issue of material fact as to whether medical monitoring is reasonably necessary for the plaintiffs." Id. at 586. Two trial-level state courts had previously rejected medical monitoring absent present injury with respect to tort common law. Dougan v. Sikorsky Aircraft Corp., 2017 WL 7806431, at *7 (Conn. Super. Ct. 2017) (affirmed on other grounds, as explained above); Bowerman v. United Illuminating, 1998 WL 910271, at *9-11 (Conn. Super. Ct. 1998).
Georgia	In Parker v. Brush Wellman, Inc., 377 F. Supp. 2d 1290, 1302 (N.D. Ga. 2005), aff'd, 230 F. App'x 878 (11th Cir. 2007), the district court observed: "This Court does not read Georgia law as permitting the establishment of a medical monitoring fund with respect to persons who have not endured a cognizable tort injury." Likewise, in In re Allergan Biocell Textured Breast Implant Products Liability Litigation, 537 F. Supp. 3d 679, 763 (D.N.J. 2021), relying on *Parker*, the court classified Georgia as a jurisdiction that "do[es] not allow a medical monitoring relief without a present physical injury." In 2019, however, the Georgia Supreme Court cast doubt on *Parker*'s prediction in a footnote. Collins v. Athens Orthopedic Clinic, P.A., 837 S.E.2d 310, 314 n.2 (Ga. 2019) ("[W]e express no opinion on the viability of [medical monitoring in the absence of current physical injury]").
Hawaii	The Hawaii District Court awarded special damages for medical monitoring despite "the evidence [being] uncontroverted that none of [the plaintiffs] are suffering from a functional impairment due to asbestos exposure." In re Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1573 (D. Haw. 1990). In Almond v. Janssen Pharms., Inc., 337 F.R.D. 90, 96 (E.D. Pa. 2020), the court observed that, in Hawaii, "no court has yet decided whether a plaintiff can bring a no-injury medical monitoring claim." Likewise, in In re Nat'l Hockey League Players' Concussion Inj. Litig., 327 F.R.D. 245, 262 (D. Minn. 2018), the court classified Hawaii as a state without "any court decisions that clearly address the issues related to medical monitoring."
Idaho	In Hepburn v. Bos. Sci. Corp., 2018 WL 2275219, at *5 (D. Idaho 2018), the court refused to dismiss the plaintiff's medical monitoring claim despite her lack of present injury. In Almond v. Janssen Pharms., Inc., 337 F.R.D. 90, 96 (E.D. Pa. 2020), the court observed that, in Idaho, "no court has yet decided whether a plaintiff can bring a no-injury medical monitoring claim." See also In re Nat'l Hockey League Players' Concussion Inj. Litig., 327 F.R.D. 245, 262 (D. Minn. 2018) (similar).
Indiana	Indiana authorized medical monitoring claims in nuisance suits without present injury or property damage. Gray v. Westinghouse Elec. Corp., 624 N.E.2d 49, 54 (Ind. Ct. App. 1993). Following *Gray*, the Southern District Court of Indiana predicted that the Indiana Supreme Court would authorize medical monitoring absent present injury in nuisance cases. Allgood v. Gen. Motors Corp., 2005 WL 2218371, at *7 (S.D. Ind. 2005); see also In re Zantac (Ranitidine) Prods. Liab. Litig., 2021 WL 2682659, at *8 (S.D. Fla. 2021) ("This Court predicts that the Indiana Supreme Court would recognize medical monitoring as a form of damages for negligence claims."); but cf. Hostetler v. Johnson Controls, Inc., 2020 WL 5543081, at *4 n.4 (N.D. Ind. 2020) ("It is unclear if Indiana would even recognize a claim for damages for medical monitoring based on an increased risk of future injury."). Regarding other tort claims, however, a state trial court and federal district court both found that Indiana does not recognize medical monitoring absent present injury. Johnson v. Abbott Labs., 2004 WL 3245947, at *3 (Ind. Cir. Ct. 2004); Hunt v. Am. Wood Preservers Inst., 2002 WL 34447541, at *1 (S.D. Ind. 2002).

State	Notes
Iowa	In Pickrell v. Sorin Grp. USA, Inc., 293 F. Supp. 3d 865, 868 (S.D. Iowa 2018), a federal court stated: "This court finds that the Iowa Supreme Court would be unlikely to adopt a medical monitoring cause of action rooted in a negligence theory, especially absent an actual injury." However, more recently, a court has recognized that the matter is unresolved in Iowa. See In re Valsartan, Losartan, & Irbesartan Prod. Liab. Litig., 2021 WL 364663, at *24 & n.36 (D.N.J. 2021) (explaining that "Iowa has not explicitly accepted or rejected medical monitoring as an independent cause of action or as a remedy").
Kansas	In Burton v. R.J. Reynolds Tobacco Co., the Kansas District Court resolved the case on other grounds and did not rule or discuss in any depth the issue of medical monitoring absent present injury. 884 F. Supp. 1515, 1523 (D. Kan. 1995).
Maine	In Higgins v. Huhtamaki, Inc., 2022 WL 2274876, at *10 (D. Me. 2022), the court declined to "authorize a medical monitoring cause of action." But, the court went on to suggest that, if the plaintiffs could show that they have suffered a "subclinical" or "microscopic" injury, then they may be entitled to a medical monitoring remedy. See id. at *11.
Montana	In Lamping v. Am. Home Prods., Inc., 2000 Mont. Dist. LEXIS 2580, at *14 (Mont. Dist. Ct. 2000), the court "conclude[d] that public policy dictates Montana's recognition of an independent cause of action for medical monitoring." However, more recently, in In re Zantac (Ranitidine) Prods. Liab. Litig., 2021 WL 2682659, at *9 (S.D. Fla. 2021), the court declined to recognize such a claim, citing insufficient guidance from the Montana Supreme Court.
Rhode Island	In Miranda v. DaCruz, 2009 WL 3515196, at *7-8 (R.I. Super. Ct. 2009), a Rhode Island Superior Court refused to impose liability for medical monitoring absent present injury but suggested that medical monitoring be granted when there is evidence of subcellular change.
Washington	In DuRocher v. Riddell, Inc., 97 F. Supp. 3d 1006, 1014 (S.D. Ind. 2015) (applying Washington law), the court observed that "the State of Washington does not recognize a standalone claim for medical monitoring," although the issue was not fully litigated as "Plaintiffs provided no response to Defendants' request that we dismiss this claim for medical monitoring with prejudice." In Krottner v. Starbucks Corp., 2009 WL 7382290, at *2 (W.D. Wash. 2009), aff'd in part, 628 F.3d 1139 (9th Cir. 2010), and aff'd in part, 406 F. App'x 129 (9th Cir. 2010), the court noted, in passing, that "Washington has never recognized a standalone claim for medical monitoring," but the discussion was dicta, as plaintiffs' suit sought compensation owing to the fact that plaintiffs faced "an increased risk of identity theft." In Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601, 608-609 (W.D. Wash. 2001), a federal district court predicted that Washington would not recognize medical monitoring absent present injury as an independent cause of action but found that "medical monitoring as a remedy to an established tort poses none of the same concerns." Because the plaintiff in *Duncan* alleged an existing injury, the court did not have to determine whether a present physical injury was necessary to sustain a traditional tort claim seeking recovery for medical monitoring. Id. at 609.
Wyoming	The District Court of Wyoming refused to dismiss the plaintiffs' claims seeking to impose liability for medical monitoring despite the plaintiffs having no present injuries. In re Copley Pharm., Inc., 161 F.R.D. 456, 469 (D. Wyo. 1995). The court explained that such damages should not be presented to the jury because medical monitoring constitutes an "equitable remedy." Id. Because this class-action lawsuit involved plaintiffs from all 50 states, it is unclear whether or how this case informs Wyoming law.

States where no court has discussed the issue:

Alaska

New Mexico

South Dakota

STATUTES OF LIMITATIONS AND STATUTES OF REPOSE FOR COMMON-LAW TORT CAUSES OF ACTION

Introductory Note: The first and Second Restatements of Torts each dealt with statutes of limitations in a single Section. See Restatement of Torts § 899; Restatement Second, Torts § 899. The final volume of the Second Restatement of Torts, published in 1979, addressed statutes of repose, which were then coming into widespread use, in a single Comment. See Restatement Second, Torts § 899, Comment *g*. In light of the importance of statutes of limitations and statutes of repose in tort cases, they are treated more fully in this Restatement. Because the rules applicable to statutes of limitations differ significantly from those that apply to statutes of repose, they are restated separately herein. Part 1 below addresses statutes of limitations, and Part 2 addresses statutes of repose. The rules restated herein are common-law rules, not constitutional provisions, statutes, or procedural rules. See § 1, Comments *c*, *d*, and *e*.

PART 1
STATUTES OF LIMITATIONS

TOPIC 1
STATUTES OF LIMITATIONS IN GENERAL

§ 1. Definition of Statute of Limitations

A statute of limitations is a statute that provides a plaintiff a legislatively defined period of time to sue on a cause of action against a defendant and that bars the cause of action after the legislatively defined period has expired without suit being brought.

Comment:

a. Scope and cross-references.
b. History of statutes of limitations.
c. Statutes of limitations are statutes, and the language of each statute controls.
d. Topics covered by this Part.
e. Topics not covered by this Part.
f. Purposes of statutes of limitations.

g. Statutes of limitations apply separately to each cause of action by each plaintiff against each defendant.
h. The role of federal law.
i. Statutes of limitations do not apply to defenses and recoupment.
j. Presumptions in favor of or against statutes of limitations.

a. Scope and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. For the definition of statutes of repose, see § 12. For the difference between statutes of limitations and statutes of repose, see § 12, Comment *a*. The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). The term "statute of limitations" is used to refer both to the statutes themselves and to the limitations periods established by those statutes, as in the title of Topic 2, "When the Statute of Limitations Begins to Run."

b. History of statutes of limitations. At common law, there was no counterpart of today's statutes of limitations. The first general statute of limitations was the English Limitation Act of 1623, 21 Jac. 1, c. 16. That statute formed the model for the statutes of limitations that are found throughout the United States today.

c. Statutes of limitations are statutes, and the language of each statute controls. The law restated by The American Law Institute's Restatements "is generally common law, the law developed and articulated by judges in the course of deciding specific cases." THE AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (rev. ed. 2015). Like the common law itself, every Restatement rule is subject to a statute that dictates a different result. Id. at 9. Here, as elsewhere, when a statute resolves the issue, that statute governs.

Certain subject matters dealing with statutes of limitations have been the subject of extensive common-law development. This Restatement focuses on the areas in which courts have developed common-law rules dealing with statutes of limitations, which are listed in Comment *d*. This Restatement does not include coverage of areas that are governed by constitutional provisions, statutes, or procedural rules, which are described in Comment *e*.

d. Topics covered by this Part. As explained in Comment *c*, the topics relating to statutes of limitations that are covered by this Part are the topics that have been developed by the courts as a matter of common law. These topics are as follows:

Topic 2 addresses the question of when statutes of limitations begin to run.

Topic 3 deals with the issue of when the running of statutes of limitations is suspended (or "tolled"). Most forms of tolling are creatures of statute; these statutory forms of tolling are briefly described, but not restated, in Topic 3. Some forms of tolling are matters of common law; these forms of tolling are restated in Topic 3.

Topic 4 concerns the effect of defendant misconduct on statutes of limitations, under the doctrines of equitable estoppel and fraudulent concealment.

Topic 5 deals with contracts shortening or lengthening the statute-of-limitations period.

e. Topics not covered by this Part. Coverage of statutes of limitations in this Part does not include topics relating to statutes of limitations that are governed by constitutional provisions, statutes, or procedural rules. Among the topics not covered are the following:

Jurisdictions typically have multiple statutes of limitations. Which statutes of limitations apply to which causes of action is a fertile source of litigation. The outcome of such litigation is highly dependent on the language of the statutes, and this Part makes no attempt to restate such issues.

As mentioned in Comment *d*, most forms of tolling of statutes of limitations are creatures of statute. Common statutory forms of tolling are listed in § 5, Comment *b*, but no attempt is made to restate them in this Part.

As noted in Comment *c*, this Restatement does not address constitutional questions relating to the establishment or modification of statutes of limitations. Nor does it discuss procedural questions, including what a plaintiff needs to do in order to bring an action within the limitations period, and what a plaintiff can do to correct procedural missteps or avoid their consequences.

Lastly, because this Restatement addresses the application of statutes of limitations to common-law torts, this Restatement does not cover the application of statutes of limitations to statutory causes of action, although some such cases are considered when they illustrate rules that also apply to common-law torts.

f. Purposes of statutes of limitations. Statutes of limitations reflect a legislative balancing of two conflicting purposes. On the one hand, statutes of limitations seek to afford plaintiffs a legislatively defined reasonable period of time in which to sue. On the other hand, statutes of

limitations seek to protect defendants against having to confront stale causes of action when memories may have dimmed and evidence may have been lost. They aim to achieve this goal by barring causes of action after the legislatively defined reasonable period of time has expired without suit being brought.

Both of these purposes of statutes of limitations have a public as well as a private dimension. The purpose of providing plaintiffs a reasonable opportunity to bring their causes of action is supported by the public interest in resolving cases on the merits and affording redress for violations of legal rights. The purpose of protecting defendants against stale causes of action reflects the public interest in avoiding the diversion of judicial and societal resources to the litigation of untimely causes of action and the public interest in the greater accuracy of decisionmaking when memories and evidence are fresh.

g. Statutes of limitations apply separately to each cause of action by each plaintiff against each defendant. As the black letter of this Section implies, each cause of action by each plaintiff against each defendant must be analyzed separately for statute-of-limitations purposes. A single transaction or occurrence may give rise to multiple causes of action. For example, a single transaction or occurrence may give rise to causes of action for fraud, negligent misrepresentation, professional malpractice, and breach of fiduciary duty. Each such cause of action must be analyzed separately for statute-of-limitations purposes. Different causes of action are often governed by statutes of limitations of different lengths, and the running of the statutes may start or be suspended at different times. As a result, depending on the facts and the applicable statutes, some causes of action arising from a transaction or occurrence may be time-barred, while others may not be.

The fact that each cause of action arising from a transaction or occurrence is considered separately for statute-of-limitations purposes contrasts with the broader definition of "claim" for purposes of claim preclusion under the Restatement of the Law Second, Judgments. Under that Restatement, the term "claim" includes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the claim arose." Id. § 24(1). The reason for this broader definition of "claim" in the Restatement of the Law Second, Judgments, is to avoid wasteful and unnecessary litigation by requiring that all claims arising from the same transaction or series of connected transactions be brought together, regardless of the legal theory on which such claims are based. Id. § 24, Comment *a*. In the case of

statutes of limitations, this rationale necessarily yields to the fact that statutes of limitations often treat different causes of action differently.

h. The role of federal law. When claims are brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), or under Section 1983, 42 U.S.C. § 1983, federal common law governs when the statute of limitations begins to run and the effect of defendant misconduct thereon. As a result, the federal courts in such cases act as another source of common law to be considered by the Institute in preparing this Restatement—a source entitled to respectful consideration, but not to determinative significance. This contrasts with situations in which the Institute is restating subjects governed *exclusively* by federal law, in which decisions of the Supreme Court of the United States are generally treated by the Institute as authoritative. For an example of a situation in which the rule adopted by this Restatement differs from the rule in the federal courts, see § 3, Comment *d* (addressing the facts that must be known by the plaintiff in order to start the running of the statute of limitations under the discovery rule restated in § 3).

i. Statutes of limitations do not apply to defenses and recoupment. Although a cause of action that has not been brought within the statute-of-limitations period may not be asserted as an independent basis for relief, such a cause of action may be asserted by way of a defense or counterclaim for recoupment in response to an action brought by the opposing party arising out of the same transaction or occurrence. In that scenario, the otherwise barred cause of action may be asserted solely as a partial or complete defense or offset to the opposing party's claim and not as a basis for affirmative relief against the opposing party.

Illustration:

1. Dogged Law Firm commits malpractice while representing Pinnacle LLC. Pinnacle is aware of the malpractice, and it therefore does not pay Dogged's bill. Dogged waits until the statute of limitations has expired on Pinnacle's malpractice cause of action and then sues Pinnacle for the unpaid bill. Pinnacle defends against Dogged's action by contending that Dogged committed malpractice. Pinnacle may use the time-barred malpractice cause of action as a defense or offset against Dogged's action, but Pinnacle may not obtain an affirmative recovery against Dogged on the time-barred malpractice cause of action.

j. Presumptions in favor of or against statutes of limitations. Courts in nine jurisdictions maintain that, when there is doubt about whether the statute of limitations bars the action, the

statute should be interpreted so as to enable the plaintiff to proceed on the merits. Courts in 11 states declare that statutes of limitations are favored and should be construed in favor of the defendant seeking to bar the claim. In at least one state, California, case law provides that statutes of limitations should be neither favored nor disfavored. The remaining states have not directly addressed the matter. Because neither of the two opposing presumptions enjoys more than limited support, and because the issue is one to be decided by each state based on its own standards of statutory construction, this Restatement takes no position on the matter.

REPORTERS' NOTE

Comment a. Scope and cross-references. For a representative judicial definition of a statute of limitations, see, e.g., Susman v. Kearney Towing & Repair Ctr., Inc., 970 N.W.2d 82, 89 (Neb. 2022) ("The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit may be brought upon causes of action which it affects.").

Statutes of limitations have received limited attention from text writers and commentators. The most recent treatise on statutes of limitations, CALVIN W. CORMAN, LIMITATION OF ACTIONS (1991), is largely descriptive rather than analytical and has not been kept up-to-date. The next most recent treatise on statutes of limitations, H. G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY (DeWitt C. Moore ed., 4th ed. 1916), is likewise primarily descriptive and belongs to a bygone era. A practical guide to statute-of-limitations issues in tort cases, written from an avowedly pro-plaintiff point of view, is ADOLPH J. LEVY, SOLVING STATUTE OF LIMITATIONS PROBLEMS (1987). A useful introduction to the subject can be found in 51 AM. JUR. 2D *Limitation of Actions* (2024 update). Statutes of limitations are addressed in DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1015-1041 (5th ed. 2019). Still valuable for its insights is a 1950 student note in the *Harvard Law Review*, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950). Articles on specific topics relating to statutes of limitations are cited in the pertinent Reporters' Notes.

Comment b. History of statutes of limitations. On the history of statutes of limitations, see, e.g., Wood v. Carpenter, 101 U.S. 135, 139 (1879) (applying Indiana statute of limitations) ("[T]he English statute of limitations of the 21st of James I. . . . was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country."); 1 H. G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY § 2 (DeWitt C. Moore ed., 4th ed. 1916); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177-1178 (1950).

Comment f. Purposes of statutes of limitations. For judicial recognition that statutes of limitations seek to balance the conflicting interests of plaintiffs and defendants, see, e.g., United States v. Kubrick, 444 U.S. 111, 117 (1979) (applying Federal Tort Claims Act) (explaining that statutes of limitations "although affording plaintiffs what the legislature deems a reasonable time to present their claims . . . protect defendants and the courts from having to deal with cases in

which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"); Hicks v. Hines Inc., 826 F.2d 1543, 1545 (6th Cir. 1987) (applying Jones Act) (stating that the purpose of statutes of limitations is to provide fairness to defendants, while preserving a reasonable period of time within which plaintiffs can present their claims); Long v. Holland Am. Line Westours, Inc., 26 P.3d 430, 434 (Alaska 2001) ("Statutes of limitations serve dual policies: to protect against prejudice from stale claims, and to ensure an adequate opportunity for filing a claim prior to the statutory bar.") (footnotes and citations omitted); Norgart v. Upjohn Co., 981 P.2d 79, 86-87 (Cal. 1999) (stating that the statute of limitations "has as a purpose to protect defendants from the stale claims of dilatory plaintiffs" and "a related purpose to stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion") (citations omitted); ISN Software Corp. v. Richards, Layton & Finger, P.A., 226 A.3d 727, 732 (Del. 2020) (stating that statutes of limitations "attempt to balance a plaintiff's right to seek a remedy with a defendant's right to avoid defending against stale claims"); Bandstra v. Covenant Reformed Church, 913 N.W.2d 19, 43 (Iowa 2018) (explaining that statutes of limitations are "best understood as an accommodation of competing interests," with "the plaintiff wish[ing] to have a reasonable time to bring the suit" and the defendant "seek[ing] to avoid having to defend against stale claims"); Pennwalt Corp. v. Nasios, 550 A.2d 1155, 1158 (Md. 1988) ("The statutes [of limitations] were enacted in an effort to balance the competing interests of potential plaintiffs, potential defendants, and the public."); Susman v. Kearney Towing & Repair Ctr., Inc., 970 N.W.2d 82, 89 (Neb. 2022) ("The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which suit may be brought upon causes of action which it affects."); Keeton v. Hustler Mag., Inc., 549 A.2d 1187, 1192 (N.H. 1988) (observing that statutes of limitations "represent the legislature's attempt to achieve a balance among State interests in protecting both forum courts and defendants generally against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action"); Snyder v. Town Insulation, Inc., 615 N.E.2d 999, 1002 (N.Y. 1993) ("Determining when limitations begin to run requires a balancing of policy considerations. On one side of the scale are the interests of injured parties. . . . Conversely, defendants are entitled to a fair opportunity to defend claims against them before their ability to do so has deteriorated.") (citations omitted); Ryan v. Roman Cath. Bishop of Providence, 941 A.2d 174, 181 (R.I. 2008) (stating that statutes of limitations "are the product of a balancing of the individual person's right to seek redress for past grievances against the need of society and the judicial system for finality—for a closing of the books"); S.V. v. R.V., 933 S.W.2d 1, 6 (Tex. 1996) (describing "the conflicting policies in statutes of limitations: the benefits of precluding stale or spurious claims versus the risks of precluding meritorious claims that happen to fall outside an arbitrarily set period"); Tadych v. Noble Ridge Constr., Inc., 519 P.3d 199, 203 (Wash. 2022) (describing "the policies underlying statutes of limitations generally: to allow sufficient time to investigate a claim while protecting against defending stale claims"); Spitler v. Dean, 436 N.W.2d 308, 310 (Wis. 1989) ("[T]he equitable principle underlying the statute of limitations . . . is to

allow plaintiffs their day in court, but also to protect defendants from having to deal with claims [the defense against which] may be seriously impaired by stale or lost evidence.").

For courts explaining that statutes of limitations involve a balancing of public as well as private interests, see, e.g., Lebanon Cnty. Emps.' Ret. Fund v. Collis, 287 A.3d 1160, 1201 (Del. Ch. 2022) ("On one side of the ledger are considerations associated with finality, including the advantages that repose has for the certainty of legal relationships, the savings of judicial and litigant resources that result from avoiding litigation over stale claims, and the improved reliability of results when evidence is fresh. On the other side of the ledger are considerations associated with access to justice, including the importance of providing plaintiffs with a fair opportunity to present their claims and the savings of judicial and litigant resources that result from avoiding premature lawsuits on issues that may never ripen into meaningful disputes."); Pennwalt Corp. v. Nasios, 550 A.2d 1155, 1158 (Md. 1988) ("[S]tatutes [of limitations] were enacted in an effort to balance the competing interests of potential plaintiffs, potential defendants, and the public. . . . Limitations statutes therefore are designed to (1) provide adequate time for diligent plaintiffs to file suit, (2) grant repose to defendants when plaintiffs have tarried for an unreasonable period of time, and (3) serve society by promoting judicial economy."); Ryan v. Roman Cath. Bishop of Providence, 941 A.2d 174, 181 (R.I. 2008) (stating that statutes of limitations "are the product of a balancing of the individual person's right to seek redress for past grievances against the need of society and the judicial system for finality—for a closing of the books"); Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990) ("Limitations statutes afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence . . . .").

Older decisions tended to take a more defendant-oriented view of the purposes of statutes of limitations. See, e.g., Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants."). While similar statements can still be found in many judicial opinions today, the modern trend of authority is in favor of the more balanced position articulated in Comment *f*.

For a collection of pronouncements about the purposes of statutes of limitations, see generally Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453 (1997). See also DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1039-1041 (5th ed. 2019).

Comment g. Statutes of limitations apply separately to each cause of action by each plaintiff against each defendant. The fact that statutes of limitations apply separately to each cause of action is generally presupposed rather than expressly discussed in judicial decisions. For a rare articulation of this basic principle, see Coe v. Proskauer Rose, LLP, 878 S.E.2d 235, 241-242 (Ga. 2022) (explaining that, although plaintiffs' claims arose from the same series of transactions, the claims feature different elements, and therefore each claim should be analyzed separately to determine when the right of action accrued for that particular claim).

Comment h. The role of federal law. On the role of federal law in resolving statute-of-limitations issues in cases brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), and

Section 1983, 42 U.S.C. § 1983, see, e.g., Wallace v. Kato, 549 U.S. 384, 387-388 (2007) (applying 42 U.S.C. § 1983) (holding that length of statute of limitations for 42 U.S.C. § 1983 is borrowed from state law while the accrual date is a matter of federal common law); United States v. Kubrick, 444 U.S. 111, 113, 118-125 (1979) (applying Federal Tort Claims Act) (treating accrual of tort claim against United States as question of federal law); Romualdo P. Eclavea, Annotation, *Statute of Limitations Under Federal Tort Claims Act (28 U.S.C. § 2401(b))*, 29 A.L.R. Fed. 482, at § 5(a) (originally published in 1976) (stating that most cases hold that accrual of cause of action under Federal Tort Claims Act is matter of federal law); B. H. Glenn, Annotation, *Federal Court's Adoption of State Period of Limitation, in Action to Enforce Federally Created Right, as Including Related or Subsidiary State Laws or Rules as to Limitations*, 90 A.L.R.2d 265, at § 2 (originally published in 1963) (time of accrual of cause of action to enforce a federal right is a federal question); id. at §§ 3-6, 7.5 (state tolling periods are generally followed); id. at § 7 (federal fraudulent concealment doctrine is generally applicable). See also DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1022-1023 (5th ed. 2019).

Comment i. Statutes of limitations do not apply to defenses and recoupment. On the inapplicability of statutes of limitations to defenses and recoupment, see, e.g., Bull v. United States, 295 U.S. 247, 262 (1935) ("[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely."); 51 AM. JUR. 2D *Limitation of Actions* §§ 98, 99 (2024 update).

Comment j. Presumptions in favor of or against statutes of limitations. The Reporters' research has disclosed nine jurisdictions that have expressed a preference disfavoring statutes of limitations. See Lee Houston & Assocs., Ltd. v. Racine, 806 P.2d 848, 854-855 (Alaska 1991) (stating that, although the defense of the statute of limitations is a legitimate one, it is generally disfavored); Montano v. Browning, 48 P.3d 494, 496 (Ariz. Ct. App. 2002) (noting that, "although dismissal of an action based on expiration of the statute of limitations is generally disfavored, claims that are clearly brought outside the relevant limitations period are conclusively barred"); Simpson v. D.C. Off. of Hum. Rights, 597 A.2d 392, 402 (D.C. 1991) ("[W]here two constructions as to the limitations period are possible, the courts prefer the one which gives the longer period in which to prosecute the action. . . . If there is any reasonable doubt in a statute of limitations problem, the [c]ourt will resolve the question in favor of the complaint standing and against the challenge."); Rock v. Warhank, 757 N.W.2d 670, 676 (Iowa 2008) (explaining that "statutes of limitations are disfavored"); Carter v. Haygood, 892 So. 2d 1261, 1268 (La. 2005) (stating that prescriptive statutes [the Louisiana civil-law counterparts of statutes of limitations] are strictly construed against prescription); Newell v. Richards, 594 A.2d 1152, 1157 (Md. 1991) (declaring that statute of limitations, as a defense that does not go to the merits, is disfavored in law and is to be strictly construed); Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co., 947 N.E.2d 672, 675 (Ohio 2011) (stating that "statutes of limitations are remedial in nature and are to be given a liberal construction to permit cases to be decided upon their merits, after a court indulges every reasonable presumption and resolves all doubts in favor of giving, rather than denying, the plaintiff an

opportunity to litigate"); Williams v. Lee Way Motor Freight, Inc., 688 P.2d 1294, 1297 (Okla. 1984) (expressing the view that doubt about which statute of limitation applied "should be resolved in favor of the application of the statute which contains the longest limitation"); accord Nelson v. Hughes, 625 P.2d 643, 646 (Or. 1981) (dictum categorizing statutes of limitations as disfavored).

The Reporters found 11 jurisdictions that take the opposite view. See Van Diest v. Towle, 179 P.2d 984, 989 (Colo. 1947) ("The modern tendency is to look with favor upon statutes of limitation, which are considered wise and beneficent in their purpose and tendency . . . ."); Morgan v. Benner, 712 N.E.2d 500, 502 (Ind. Ct. App. 1999) ("In Indiana, statutes of limitation are favored because they afford security against stale claims and promote the peace and welfare of society."); Nuccio v. Nuccio, 673 A.2d 1331, 1334 (Me. 1996) (asserting that statutes of limitations should be construed strictly in favor of the bar that the statute was intended to create); Ramsey v. Child, Hulswit & Co., 165 N.W. 936, 941 (Mich. 1917) ("'Statutes of limitations are . . . favored in the law.'") (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)); Kittson County v. Wells, Denbrook & Assocs., Inc., 241 N.W.2d 799, 801 (Minn. 1976) (expressing the general rule that favors statutes of limitations but making an exception for the one before the court for several reasons, a holding that was later overruled by Lietz v. N. States Power Co., 718 N.W.2d 865, 871 n.3 (Minn. 2006)); Langendoerfer v. Hazel, 601 S.W.2d 290, 290 (Mo. Ct. App. 1980) ("Because statutes of limitation are favored in the law, exceptions . . . are strictly construed."); Schmucker v. Naugle, 231 A.2d 121, 123 (Pa. 1967) ("Statutes of limitations are vital to the welfare of society and are favored in the law.") (quoting United States v. Oregon Lumber Co., 260 U.S. 290, 299 (1922)); Hardcastle v. Harris, 170 S.W.3d 67, 84 (Tenn. Ct. App. 2004) (asserting that statutes of limitations are favored because they promote the timely pursuit of legal rights by suppressing stale claims); Ferrer v. Almanza, 667 S.W.3d 735, 737 (Tex. 2023) (stating that statutes of limitations are "favored in the law") (quoting *Wood*, 101 U.S. at 139); Arrington v. Peoples Sec. Life Ins. Co., 458 S.E.2d 289, 290 (Va. 1995) ("Statutes of limitations are strictly enforced and exceptions thereto are narrowly construed."); Perdue v. Hess, 484 S.E.2d 182, 186 (W. Va. 1997) (stating that statutes of limitations are favored and "exceptions are strictly construed").

The California Supreme Court expressed neutrality on the question. See Norgart v. Upjohn Co., 981 P.2d 79, 87 (Cal. 1999) ("Perhaps, to speak more accurately, the affirmative defense based on the statute of limitations should not be characterized by courts as either 'favored' or 'disfavored.' The two public policies identified above—the one for repose and the other for disposition on the merits—are equally strong, the one being no less important or substantial than the other."). See also Leavenworth State Bank v. Beecher, 108 P.2d 345, 347 (Wash. 1940) ("While the plea of the statute of limitation is not now regarded by the courts with the disfavor with which it was once regarded, still the courts will not now indulge in any presumptions in its favor.") (quoting Paul v. Kohler & Chase, 144 P. 64, 66 (Wash. 1914)).

Certain jurisdictions have addressed the matter but hold positions that do not clearly fall into one of the camps identified above. E.g., Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, Inc., 712 S.W.2d 349, 351 (Ky. Ct. App. 1986) ("Although the previous rule in Kentucky was that statutes of limitations should be strictly construed, Newby's Adm'r v. Warren's Adm'r, . . . 126

S.W.2d 436 at 437 (1939), KRS 446.080 provides that '[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . . .'"); Regents of Univ. of N.M. v. Armijo, 704 P.2d 428, 429 (N.M. 1985) (stating "[g]enerally the right of action is favored over the right of limitation. Exceptions, however, to statutes of limitations are strictly construed in New Mexico," but concluding that, although minority tolling statute was ambiguous, it should be interpreted against personal representative bringing wrongful-death claim on behalf of deceased infant).

TOPIC 2

WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN

§ 2. When the Statute of Limitations Begins to Run—All-Elements Rule

Except as otherwise provided in § 3 (discovery rule) or § 4 (continuing torts), the statute of limitations begins to run on a cause of action when all of the necessary elements of the cause of action have occurred.

Comment:

a. History, cross-references, and support.
b. Rationale of the all-elements rule.
c. The injury rule: an imperfect substitute for the all-elements rule.
d. Latent or speculative injuries.
e. Occurrence of additional injury does not restart statute of limitations.
f. Applications of the all-elements rule.
g. Burden of proof.
h. Judge and jury.

a. History, cross-references, and support. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute. See § 1, Comment *c*. The rule of this Section is applied separately to each cause of action by each plaintiff against each defendant. See § 1, Comment *g*.

The rule that the statute of limitations starts to run when all elements of the cause of action have occurred enjoys overwhelming support. This Restatement uses the term "all-elements rule" as a shorthand for the rule.

As stated in the black letter, the all-elements rule is subject to the discovery rule (§ 3) and the special rules that address the narrow category of claims that are denominated "continuing torts" (§ 4).

b. Rationale of the all-elements rule. The all-elements rule is a straightforward consequence of the basic purposes of statutes of limitations. One of those purposes is to provide plaintiffs with a legislatively defined reasonable period of time within which to sue on their causes of action. See § 1, Comment *f*. This purpose can be achieved only if plaintiffs are able to sue on their causes of action during the period when the statute of limitations is running. If the statute of limitations were to begin to run before a plaintiff is able to sue, the result would be that plaintiffs would have less time in which to file suit than the legislature intended to allow, and, in some cases, plaintiffs could lose the right to bring a cause of action without ever having been able to bring it. The latter result is possible under statutes of repose (see § 12, Comments *b*, *d*), but not under statutes of limitations.

Many statutes and courts state that the statute of limitations begins to run on a cause of action when the cause of action "accrues." The primary meaning of the word "accrue" is "[t]o come into existence as an enforceable claim or right; to arise." BLACK'S LAW DICTIONARY (11th ed. 2019). Therefore, the statement that the statute of limitations begins to run when a cause of action accrues means that the statute of limitations begins to run when the cause of action becomes an enforceable claim, i.e., when all the necessary elements of the cause of action have occurred.

c. The injury rule: an imperfect substitute for the all-elements rule. With some frequency, courts say that the statute of limitations starts to run on a tort cause of action when the tort produces injury. Such courts often appear to believe that this injury rule is equivalent to the all-elements rule—which is frequently, but not inevitably, true.

The injury rule will produce the same results as the all-elements rule if and only if two conditions are satisfied: (1) injury is an essential element of the cause of action, and (2) injury is the last element to occur. If either of these conditions is not satisfied, the injury rule will not yield the same results as the all-elements rule.

An example of a tort for which condition (1) above is not satisfied is the tort of assault. Although anticipation of an imminent harmful or offensive contact is a necessary element of the

tort of assault, physical or emotional injury is not. See Restatement Third, Torts: Intentional Torts to Persons § 105, Comment *c* and Illustration 1 (Tentative Draft No. 1, 2015). Therefore, the statute of limitations starts to run when the tort of assault is committed, regardless of whether the tort has caused any injury. See Comment *f(2)* below. Under the injury rule, the statute of limitations would never run on an assault that produced no injury. That is not the law.

An example of a tort for which condition (2) above is not satisfied is the tort of malicious prosecution. A necessary element of the tort of malicious prosecution is a favorable termination of the underlying criminal prosecution. Restatement Third, Torts: Liability for Economic Harm §§ 21(d), 23. This element normally occurs long after the underlying criminal prosecution has started to injure the plaintiff. Under the all-elements rule, the statute of limitations does not start to run until the favorable termination of the underlying criminal prosecution. See Comment *f(4)* below. Under the injury rule, the statute of limitations would start to run (and perhaps run its full course) before the malicious prosecution action could be initiated.

Because the injury rule cannot be relied on to produce the same results as the all-elements rule, use of the injury rule should be avoided.

d. Latent or speculative injuries. In the case of so-called latent injuries, it may take years before a plaintiff who has been exposed to a harmful product or substance manifests a legally cognizable physical injury. In such a case, the statute of limitations does not start to run until the injury becomes sufficient to constitute a legally cognizable physical injury. This is not the result of a special rule for latent injuries. Instead, it represents a straightforward application of the all-elements rule.

Illustration:

1. Paolo is exposed to asbestos in 2005. Paolo first manifests sufficient injury from the asbestos exposure to allow him to sue for physical injury in 2020, when Paolo is diagnosed with asbestosis resulting from the exposure. The statute of limitations does not start to run on Paolo's asbestosis claim until 2020.

Similarly, the statute of limitations does not start to run on a tort cause of action for which injury is a necessary element at a time when no injury has occurred. This rule follows from the fact that the plaintiff cannot sue on such a cause of action when there has been no injury.

This rule often finds application in legal malpractice cases. See Restatement of the Law Third, The Law Governing Lawyers § 54, Comment *g*. For example, if a lawyer commits legal

malpractice by advising a client to enter into a transaction that exposes the client to unnecessary federal-income-tax liability, the statute of limitations does not start to run when the client enters into the underlying transaction, because, at that time, it remains speculative and unknowable whether the client will ever be subject to such additional tax liability. Instead, the statute of limitations begins to run at a time when it becomes foreseeable that the client will suffer an additional tax liability, such as when the client receives a notice of deficiency from the Internal Revenue Service. Similarly, in cases involving legal malpractice in an underlying litigation, the statute of limitations does not start to run until all appeals in the underlying litigation are exhausted or the matter is otherwise final. In addition, in cases involving legal malpractice, the continuous representation rule sometimes applies. For discussion, see § 6.

One specific application of the rule that speculative injury does not start the running of the statute of limitations is furnished by cases in which, at the time when the plaintiff first manifests sufficient symptoms of one disease to start the statute of limitations running with respect to causes of action concerning that disease, it is uncertain whether or not the plaintiff will later develop a separate and distinct disease resulting from the same exposure. If the plaintiff later develops that separate and distinct disease, the statute of limitations with respect to claims for *that* disease starts to run when that disease manifests itself sufficiently to allow an action to be brought on it, not from the earlier date when the first disease manifested itself.

Illustration:

2. Same facts as Illustration 1, except that, now, three years after he is diagnosed with asbestosis, in 2023, Paolo is diagnosed with mesothelioma, a separate and distinct disease. In 2020, when the statute of limitations began to run on Paolo's asbestosis claim, it was speculative and uncertain that Paolo would later develop mesothelioma. The statute of limitations did not start to run on Paolo's mesothelioma claim in 2020 when Paolo was diagnosed with asbestosis. Instead, the statute of limitations begins to run on Paolo's mesothelioma claim in 2023, when that illness is diagnosed.

e. Occurrence of additional injury does not restart statute of limitations. Once the statute of limitations has started to run on a tort cause of action because all the necessary elements of the cause of action have occurred, including some legally cognizable injury, the subsequent occurrence of additional injury resulting from the same tort does not restart the running of the statute of limitations. If the rule were otherwise, the statute of limitations would never expire so

long as additional injuries continued to occur. (As explained in Comment *d*, the rule described in this Comment does not apply to a cause of action for future injury of a separate and distinct type whose occurrence is speculative and uncertain at the time the statute of limitations starts to run on the initial injury.)

Illustration:

3. Same facts as Illustration 2, except that, now, one year after Paolo is diagnosed with mesothelioma, Paolo's mesothelioma dramatically worsens. Paolo's physical deterioration does not restart the statute of limitations. The statute of limitations began to run on the causes of action based on mesothelioma in 2023, at the time of Paolo's mesothelioma diagnosis.

The rule described in this Comment is closely related to the rule that damages in a tort case must include future damages as well as past damages. Restatement Third, Torts: Remedies § 5, Comment *f* (Tentative Draft No. 2, 2023). Given that well-established rule, future damages are recoverable, if at all, as soon as there is sufficient injury to support a tort cause of action, and the statute of limitations therefore starts to run at that time on future, as well as past, damages.

f. Applications of the all-elements rule. Some common applications of the all-elements rule are described below. This list is not intended to be exhaustive, and results in any particular jurisdiction may vary depending, among other things, on particularized statutory language, as well as the elements of the cause of action in the relevant jurisdiction.

(1) Negligence, strict liability, and products liability. Injury is an essential element of causes of action for negligence, strict liability, and products liability. See, e.g., Restatement Third, Torts: Liability for Physical and Emotional Harm § 4, Comment *b* (listing elements of cause of action for negligently caused physical harm); id. §§ 20(a), 21, 22(a), 23 (listing elements of strict liability causes of action); Restatement Third, Torts: Products Liability §§ 1, 9, 10(a), 11 (listing elements of products liability causes of action). In such cases, injury will usually be the last essential element (or one of the last essential elements) to occur. When this is the case, the statute of limitations begins to run at the time of injury. See Comment *c*.

(2) Intentional torts to persons. Injury is not a necessary element of the tort of assault. See Restatement Third, Torts: Intentional Torts to Persons § 105, Comment *c* and Illustration 1 (Tentative Draft No. 1, 2015). The statute of limitations therefore starts to run when

the defendant acts in a way that causes the plaintiff to apprehend imminent physical contact, regardless of whether the defendant's action has caused any injury. See Comment *c*.

A necessary element of the tort of battery is bodily harm or offense. See Restatement Third, Torts: Intentional Torts to Persons §§ 1(c), 3 (Tentative Draft No. 4, 2019). Thus, the statute of limitations generally starts to run when such bodily harm or offense occurs.

For the special rule governing the commencement of the running of the statute of limitations on a false-imprisonment cause of action, see § 4, Comment *g* below.

(3) Fraud. For the special rule governing the commencement of the running of the statute of limitations on a cause of action for fraud, see § 10, Comment *b* below.

(4) Malicious prosecution. As noted in Comment *c*, a necessary element of the tort of malicious prosecution is a favorable termination of the underlying criminal prosecution. Restatement Third, Torts: Liability for Economic Harm §§ 21(d), 23. This element normally occurs long after the underlying criminal prosecution has started to produce injury to the plaintiff. Under the all-elements rule, the statute of limitations does not start to run on a cause of action for malicious prosecution until the favorable termination of the underlying criminal prosecution. In many states, the same rule applies to a cause of action for legal malpractice by criminal defense counsel.

(5) Conversion. The statute of limitations on a cause of action for conversion of personal property begins to run when the defendant's possession of the property becomes wrongful, which happens immediately in the case of a defendant who initially takes possession wrongfully, and only when the plaintiff's demand for return of the property is refused if the defendant's initial possession was not wrongful. See Restatement Second, Torts § 899, Comment *c*. The operation of the all-elements rule in this instance has the paradoxical result that a defendant whose possession is wrongful from the outset enjoys the benefit of an earlier start date for the statute of limitations. This paradoxical result is often ameliorated by the discovery rule and the doctrines of equitable estoppel and fraudulent concealment. See § 3, Comments *b*, *d*, *e* and Illustration 1.

(6) Medical monitoring. Liability for medical monitoring requires the plaintiff to show that, owing to the defendant's tortious conduct, the plaintiff needs diagnostic surveillance or testing the plaintiff would not otherwise need (i.e., an economic harm), but it does not require a showing of present physical injury. See Restatement Third, Torts: Miscellaneous Provisions, Medical Monitoring § __, Comment *j* (Tentative Draft No. 3, 2024) (explaining medical monitoring's injury requirement). If the plaintiff subsequently suffers legally cognizable physical

injury that was speculative and unknowable at the time of the cause of action for medical monitoring, the statute of limitations on a claim for such physical injury begins to run when the physical injury becomes legally cognizable. See Comment *d* above. See also Restatement Third, Torts: Miscellaneous Provisions, Medical Monitoring § __, Comment *n* (Tentative Draft No. 3, 2024).

(7) Wrongful death. States are divided on the question of when the statute of limitations begins to run on a cause of action for wrongful death, along lines that largely mirror the states' differing views concerning the elements of the cause of action. Numerous states hold that, because the wrongful-death cause of action does not come into existence until the death of the victim, it is not barred even if the decedent's own cause of action for the injuries that resulted in death would be barred. A primary rationale in those states is that the wrongful-death claim does not belong to the deceased but is created and vests in the survivors at the moment of death. Many states, to the contrary, conclude that the wrongful-death cause of action is barred when the statute of limitations on the decedent's underlying personal-injury cause of action has expired. Viewing their wrongful-death cause of action as derivative, these states reason that the beneficiaries of the wrongful-death cause of action can sue only if the victim would still be in a position to sue if the victim were still alive. See generally Restatement Third, Torts: Liability for Physical and Emotional Harm § 70, Comment *k* (in Restatement Third, Torts: Miscellaneous Provisions (Tentative Draft No. 3, 2024)).

(8) Survival statutes. Survival statutes provide that preexisting tort causes of action may proceed despite the death of the victim or the tortfeasor. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 71, 72 (in Restatement Third, Torts: Miscellaneous Provisions (Tentative Draft No. 3, 2024)). Because the elements of the preexisting causes of action remain unchanged, the time when the statute of limitations begins to run under the all-elements rule is not changed by the death of the victim or the tortfeasor. See id. § 71, Comment *j*.

(9) Consortium. Causes of action for spousal, child, and parental consortium have elements in addition to those required for the underlying victims' causes of action. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 48 A-48 C (added by Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). As a result, statutes of limitations may start to run at different times for consortium causes of action than for the underlying victims' causes of action.

See id. § 48 A, Comment *m* (spousal consortium); § 48 B, Comment *n* (child consortium); § 48 C, Comment *n* (parental consortium).

(10) Vicarious liability. A cause of action for vicarious liability is based on the direct tortfeasor's commission of a tort and the relationship between the direct tortfeasor and the vicariously liable defendant. See Restatement Third, Torts: Miscellaneous Provisions, Vicarious Liability § 1, Comment *d* (Tentative Draft No. 2, 2023). The statute of limitations on a vicarious-liability cause of action therefore starts to run at the same time that the statute of limitations begins to run on the cause of action against the direct tortfeasor.

(11) Contribution and indemnity. A necessary element of a cause of action for contribution or indemnity is that the party seeking contribution or indemnity has paid to the underlying plaintiff the amount which it now seeks to recover in part (contribution) or in its entirety (indemnity) from the defendant. See Restatement Third, Torts: Apportionment of Liability §§ 22(a), 23(a); id. §§ 35(a), 36(a) (added by Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). Under the all-elements rule, the statute of limitations therefore does not start to run on a cause of action for contribution or indemnity until payment has been made to the underlying plaintiff. As a result, the statute of limitations may remain open on a cause of action for contribution or indemnity even when the statute of limitations has run on the underlying plaintiff's causes of action. See Restatement of the Law Third, Restitution and Unjust Enrichment § 23, Comment *g*.

g. Burden of proof. The burden of proof on the application of the all-elements rule is on the defendant relying on the statute of limitations.

h. Judge and jury. Whether the factual requirements of the all-elements rule have been met is a question for the factfinder.

REPORTERS' NOTE

Comment a. History, cross-references, and support. Cases supporting the overwhelming majority rule that a statute of limitations does not begin to run until all elements of the cause of action have occurred, so that the plaintiff can sue on the cause of action, include CTS Corp. v. Waldburger, 573 U.S. 1, 7-8 (2014) (construing 42 U.S.C. § 9658) (stating that, as a general matter, a statute of limitations begins to run when the cause of action "accrues"—that is, when the plaintiff can file suit and obtain relief); Wallace v. Kato, 549 U.S. 384, 388 (2007) (applying 42 U.S.C. § 1983) (explaining that the standard rule is that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief); Ray & Sons

Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co., 114 S.W.3d 189, 198 (Ark. 2003) ("A cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations commences to run from that time."); Norgart v. Upjohn Co., 981 P.2d 79, 88 (Cal. 1999) (declaring that the general rule for accrual of a cause of action "sets the date as the time when the cause of action is complete with all of its elements"); Hoffman v. Ins. Co. of N. Am., 245 S.E.2d 287, 288 (Ga. 1978) ("The statute of limitation begins to run on any given claim on the date the claim accrues—in other words, on the date that suit on the claim can first be brought."); West Am. Ins. Co. v. Sal E. Lobianco & Son Co., 370 N.E.2d 804, 806 (Ill. 1977) ("It seems well established that a cause of action based on tort accrues only when all elements are present—duty, breach and resulting injury or damage."); Skadburg v. Gately, 911 N.W.2d 786, 793 (Iowa 2018) (explaining that, generally, a cause of action accrues when the aggrieved party has a right to institute and maintain a suit); LCL, LLC v. Falen, 422 P.3d 1166, 1174 (Kan. 2018) (stating that, in general, a cause of action accrues, so as to start the running of the statute of limitations, as soon as the right to maintain a legal action arises); Williams v. Ford Motor Co., 342 A.2d 712, 714 (Me. 1975) ("It does not appear to us that our Court has ever departed from the basic position that accrual of a tort cause of action as used here means exactly what the legal term implies—the point at which a wrongful act produces an injury for which a potential plaintiff is entitled to seek judicial vindication."); Connelly v. Paul Ruddy's Equip. Repair & Serv. Co., 200 N.W.2d 70, 72-73 (Mich. 1972) ("Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run."); Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 916 N.W.2d 491, 496 (Minn. 2018) ("Accrual of a cause of action requires the existence of operative facts supporting each element of the claim."); Weathers v. Metro. Life Ins. Co., 14 So. 3d 688, 692 (Miss. 2009) (stating that the statute of limitations begins to run when all the elements of a tort, or cause of action, are present); Clark v. Robison, 944 P.2d 788, 789 (Nev. 1997) (stating that statute of limitations starts to run when cause of action accrues, and cause of action accrues when a suit may be maintained thereon); Therrien v. Sullivan, 891 A.2d 560, 562 (N.H. 2006) (explaining that a cause of action arises, thereby triggering the running of the statute of limitations, once all of the elements necessary for such a claim are present); Rosenau v. City of New Brunswick, 238 A.2d 169, 172 (N.J. 1968) (stating that a cause of action accrues on the date on which the right to institute and maintain the suit first arose); Snyder v. Town Insulation, Inc., 615 N.E.2d 999, 1000-1001 (N.Y. 1993) ("As a general proposition, the cause of action does not accrue until an injury is sustained. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint.") (citations omitted); Register v. White, 599 S.E.2d 549, 554 (N.C. 2004) (stating that a cause of action generally accrues when the right to institute suit arises); Dunford v. Tryhus, 776 N.W.2d 539, 541 (N.D. 2009) (reciting that a cause of action accrues when the right to commence an action comes into existence); Lee v. Phillips & Lomax Agency, Inc., 11 P.3d 632, 634 (Okla. 2000) (stating that the statute of limitations does not begin to run until a plaintiff can successfully prove the elements of a tort claim); Rice v. Rabb, 320 P.3d 554, 558 (Or. 2014) (explaining that a cause of action accrues when an action may be maintained thereon); Fine

v. Checcio, 870 A.2d 850, 857 (Pa. 2005) ("[T]he statute of limitations begins to run as soon as the right to institute and maintain a suit arises."); Brown v. Finger, 124 S.E.2d 781, 785 (S.C. 1962) (holding that a cause of action accrues and statute of limitations starts to run at the moment when the plaintiff has a legal right to sue on it); Hennekens v. Hoerl, 465 N.W.2d 812, 815-816 (Wis. 1991) ("A claim for relief accrues when there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it.").

In some jurisdictions, the basic rule governing when the statute of limitations starts to run is the discovery rule restated in § 3, which (as explained in § 3, Comment *c*) presupposes that the all-elements rule of § 2 has already been satisfied. Cases from these jurisdictions are cited in the second paragraph of the Reporters' Note to § 3, Comment *b.*

In some states, the all-elements rule is a matter of statute. Statutes embodying the all-elements rule include D.C. CODE § 12-301 (declaring that statute-of-limitations period runs "from the time the right to maintain the action accrues"); FLA. STAT. § 95.031(1) ("A cause of action accrues when the last element constituting the cause of action occurs."); MONT. CODE ANN. § 27-2-102(1)(a) ("[A] claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or agency is authorized to accept jurisdiction of the action.").

A small number of jurisdictions do not follow the all-elements rule, instead starting the running of the statute of limitations for some or all torts at the time of the occurrence of the tortious act. See, e.g., Moix-McNutt v. Brown, 74 S.W.3d 612, 613-615 (Ark. 2002) (refusing to depart from occurrence rule in legal malpractice actions, which court has followed since 1877); Murphy v. Merzbacher, 697 A.2d 861, 864-865 (Md. 1997) (stating that, ordinarily, the statute of limitations begins to "accrue" on the date of the wrong); Bogue v. Gillis, 973 N.W.2d 338, 342 (Neb. 2022) (stating that Nebraska follows the "occurrence rule" under which the statute of limitations begins to run upon the alleged act or omission causing injury); Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co., 947 N.E.2d 672, 675 (Ohio 2011) (stating that the general rule is that the statute of limitations starts to run as soon as a wrongful act is committed). Most jurisdictions that adhere to the occurrence rule have softened it by leavening it with the discovery rule. For discussion of the widely accepted discovery rule, see § 3.

Comment b. Rationale of the all-elements rule. Perhaps because the all-elements rule is so widely followed and perhaps also because it seems so natural that it needs no explanation, research has not located cases explaining its rationale. The explanations that courts have given for the rationale of the discovery rule, set forth in the Reporters' Note to § 3, Comment *b*, apply with equal force to the all-elements rule.

Comment c. The injury rule: an imperfect substitute for the all-elements rule. For examples of courts articulating an injury rule for the commencement of the running of the statute of limitations on a tort cause of action, see, e.g., CTS Corp. v. Waldburger, 573 U.S. 1, 8 (2014) (construing 42 U.S.C. § 9658) (stating that a claim accrues in a personal-injury or property-damage action when the injury occurred or was discovered); United States v. Kubrick, 444 U.S. 111, 120 (1979) (applying Federal Tort Claims Act) (stating that the general rule under the Federal Tort

Claims Act has been that a tort claim accrues at the time of the plaintiff's injury); ISN Software Corp. v. Richards, Layton & Finger, P.A., 226 A.3d 727, 732-733 (Del. 2020) (stating that, for tort claims, the cause of action accrues at the time of injury); Doe v. Medlantic Health Care Grp., Inc., 814 A.2d 939, 945 (D.C. 2003) (stating that a claim usually accrues when injury occurs); Frank v. Linkner, 894 N.W.2d 574, 584-586 (Mich. 2017) (saying that accrual occurs when defendant's breach harmed the plaintiff, regardless of whether or not calculable damages have occurred); Polanco v. Lombardi, 231 A.3d 139, 145-147 (R.I. 2020) (stating that cause of action accrues and statute of limitations starts to run at the time of injury); S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996) ("As a rule, we have held that a cause of action accrues when a wrongful act causes some legal injury . . . ."); St. George v. Pariser, 484 S.E.2d 888, 890 (Va. 1997) (stating that cause of action for personal injury accrues on the date an injury is sustained).

Judicial decisions that appear to assume that the injury rule is equivalent to the all-elements rule include McWilliams v. Union Pac. Res. Co., 569 So. 2d 702, 703 (Ala. 1990) (holding that statute of limitations begins to run as soon as plaintiff is entitled to maintain an action, i.e., at the time of the first legal injury); Snyder v. Town Insulation, Inc., 615 N.E.2d 999, 1000-1001 (N.Y. 1993) ("As a general proposition, the cause of action does not accrue until an injury is sustained. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint.") (citations omitted); Fine v. Checcio, 870 A.2d 850, 857 (Pa. 2005) ("[T]he statute of limitations begins to run as soon as the right to institute and maintain a suit arises. Generally speaking, in a suit to recover damages for personal injuries, this right arises when the injury is inflicted.") (citations omitted); VanSickle v. Kohout, 599 S.E.2d 856, 860 (W. Va. 2004) ("The statute of limitations ordinarily begins to run when the right to bring an action for personal injuries accrues, which is when the injury is inflicted.").

Comment d. Latent or speculative injuries. For cases holding that the statute of limitations does not start to run on a latent injury until the injury manifests itself sufficiently to allow the plaintiff to bring an action, see, e.g., Urie v. Thompson, 337 U.S. 163, 169-171 (1949) (applying Federal Employers' Liability Act) (holding that plaintiff is not "injured" so as to start running of statute of limitations until accumulated effects of deleterious substance manifest themselves); Griffin v. Unocal Corp., 990 So. 2d 291, 293 (Ala. 2008) (holding that "cause of action accrues only when there has occurred a manifest, present injury").

Illustration 1, involving a plaintiff suffering from asbestosis, is based on *Urie*, 337 U.S. at 169-171, except that the plaintiff's disease has been changed from silicosis to asbestosis and new dates have been supplied.

For cases holding that the statute of limitations starts to run on a cause of action for legal malpractice exposing the client to additional tax liability when it is no longer a matter of speculation whether or not the additional tax liability will materialize, see, e.g., Hillbroom v. PricewaterhouseCoopers LLP, 17 A.3d 566, 573-578 (D.C. 2011) (ruling that legal malpractice plaintiffs knew or should have known of their injury when they learned of the IRS's definitive position that their refund claims were untimely); Beane v. Dana S. Beane & Co., P.C., 7 A.3d 1284, 1289-1290 (N.H. 2010) (adopting majority rule that statute of limitations in accountant malpractice

case involving increased tax liability begins to run when taxpayer receives IRS notice of deficiency); Murphey v. Grass, 267 P.3d 376, 379-382 (Wash. Ct. App. 2011) (reviewing cases and holding that cause of action for malpractice accrues on date of formal tax assessment). See also Restatement of the Law Third, The Law Governing Lawyers § 54, Comment *g* and Reporters' Note thereto (AM. L. INST. 2000); 3 RONALD L. MALLEN, LEGAL MALPRACTICE § 23:34 (2024 update).

For cases addressing similar questions with respect to other types of legal malpractice, see, e.g., Wagner v. Sellinger, 847 A.2d 1151, 1154-1157 (D.C. 2004) (holding that legal malpractice statute of limitations does not begin to run until an actionable injury has occurred); Stokes-Craven Holding Corp. v. Robinson, 787 S.E.2d 485, 489-495 (S.C. 2016) (holding that cause of action for malpractice based on failure of underlying litigation does not accrue until after resolution of appeal when appeal results in stay pending appeal); Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991) ("[W]hen an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted."); cf. Morgan v. State Farm Mut. Auto. Ins. Co., 488 P.3d 743, 746-749 (Okla. 2021) (ruling that, when injury alleged in tort cause of action is an adverse judgment, injury is not certain and claim does not accrue until underlying judgment becomes final and nonappealable). But see, e.g., Jacobsen v. Haugen, 529 N.W.2d 882, 885-886 (N.D. 1995) (declining to toll legal malpractice statute of limitations until appellate process has been completed, when plaintiff had retained new counsel on appeal); Huff v. Roach, 106 P.3d 268, 269-271 (Wash. Ct. App. 2005) (holding that statute of limitations accrued when attorney missed the statute of limitations, not when the underlying action was later dismissed as untimely). See generally 3 RONALD L. MALLEN, LEGAL MALPRACTICE § 23:32 (2024 update). For cases addressing similar fact patterns under the continuous representation rule, see § 6, Reporters' Note to Comment *b*.

Cases holding that accrual of causes of action based on one disease does not result in accrual of causes of action based on a separate and distinct disease that was speculative and unknowable at the time of the first disease include: Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 112, 117-121 (D.C. Cir. 1982) (applying District of Columbia law) (ruling that time to commence litigation on separate and distinct disease does not commence until that disease becomes manifest); Wagner v. Apex Marine Ship Mgmt. Corp., 100 Cal. Rptr. 2d 533, 535-540 (Ct. App. 2000) (applying Jones Act) (citing cases and holding that each disease resulting from asbestos exposure triggers anew the running of the statute of limitations for that disease); Cleaveland v. Gannon, 667 S.E.2d 366, 377-380 (Ga. 2008) (ruling that, when negligent misdiagnosis of treatable kidney cancer later results in a new injury consisting of metastatic cancer affecting other organs, the statute of limitations for the new injury runs from date plaintiff first experienced symptoms of the new injury); Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 632-636 (Wis. 1999) (holding, in conformity with the majority of other jurisdictions, that diagnosis of nonmalignant asbestos-related lung pathology does not trigger statute of limitations with respect to later-diagnosed distinct malignant asbestos-related condition). While this rule is frequently applied in asbestos cases, it is not limited to such cases, as the *Cleaveland* case shows.

Illustration 2, involving a plaintiff diagnosed with mesothelioma after having been diagnosed with asbestosis, is based on *Sopha*, 601 N.W.2d at 632-636.

e. Occurrence of additional injury does not restart statute of limitations. For cases exemplifying the rule that, once the statute of limitations has started to run on a tort cause of action, the subsequent occurrence of additional injury resulting from the same tort does not restart the running of the statute, see, e.g., Highland Indus. Park, Inc. v. BEI Def. Sys. Co., 357 F.3d 794, 797 (8th Cir. 2004) (applying Arkansas law) ("[W]e know of no state whatever in which an injured party must know the full extent of the damages that it may recover before the statute of limitations begins to run on its claim. Indeed, the cases on this issue are legion."); Larson & Larson, P.A. v. TSE Indus., Inc., 22 So. 3d 36, 42-43 (Fla. 2009) (stating that the statute begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages has been ascertained); S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996) ("As a rule, we have held that a cause of action accrues when a wrongful act causes some legal injury . . . even if all resulting damages have not yet occurred."); St. George v. Pariser, 484 S.E.2d 888, 890 (Va. 1998) ("[T]he statute of limitations period begins to run whenever any injury, however slight, is caused by the negligent act, even though additional or more severe injury or damage may be subsequently sustained as a result of the negligent act.").

f. Applications of the all-elements rule

(1) Negligence, strict liability, and products liability. For cases noting that causes of action for personal injury or property damage usually accrue at the time of injury, see, e.g., CTS Corp. v. Waldburger, 573 U.S. 1, 8 (2014) (construing 42 U.S.C. § 9658) (stating that, under the general claim-accrual standard, a claim accrues in a personal-injury or property-damage action when the injury occurred or was discovered); St. George v. Pariser, 484 S.E.2d 888, 890 (Va. 1997) (stating that a cause of action for personal injury accrues on the date the injury is sustained).

(2) Intentional torts to persons. On the accrual of intentional-tort causes of action, see, e.g., Varnell v. Dora Consol. Sch. Dist., 756 F.3d 1208, 1215-1216 (10th Cir. 2014) (applying 42 U.S.C. § 1983) (holding that statute of limitations in offensive-battery case began to run on contact, even though there was no observable damage at the point of contact).

For cases concerning the commencement of the running of the statute of limitations on a false-imprisonment cause of action, see § 4, Reporters' Note to Comment *g* below.

(3) Fraud. On the commencement of the running of the statute of limitations on a cause of action for fraud, see § 10, Reporters' Note to Comment *b* below.

(4) Malicious prosecution. For cases holding that the statute of limitations does not start to run on a malicious-prosecution cause of action until there has been a favorable termination of the underlying criminal proceeding, see, e.g., McDonough v. Smith, 139 S. Ct. 2149, 2156-2161 (2019) (applying 42 U.S.C. § 1983) (holding that fabricated-evidence claim under 42 U.S.C. § 1983 does not accrue until criminal prosecution terminates in plaintiff's favor, by analogy to malicious-prosecution claim); id. at 2160 ("[T]he injury caused by a classic malicious prosecution likewise first occurs as soon as legal process is brought to bear on a defendant, yet favorable termination remains the accrual date."); Shulman v. Miskell, 626 F.2d 173, 175-176 (D.C. Cir. 1980) (applying

District of Columbia law) (reviewing cases, and holding that the statute of limitations for malicious prosecution begins to run when the underlying action is disposed of in favor of the malicious-prosecution plaintiff).

The Restatement of the Law Third, The Law Governing Lawyers § 53, Comment *d* (AM. L. INST. 2000) states: "As required by most jurisdictions addressing the issue, a convicted defendant seeking damages for malpractice causing a conviction must have had that conviction set aside when process for that relief on the grounds asserted in the malpractice action is available." In jurisdictions in which this requirement applies, most courts hold that the statute of limitations does not start to run on the malpractice cause of action until the underlying criminal conviction is set aside. See, e.g., Glaze v. Larsen, 83 P.3d 26, 30-33 (Ariz. 2004) (holding that cause of action for legal malpractice in defending criminal proceeding does not accrue until criminal conviction has been set aside); Trobaugh v. Sondag, 668 N.W.2d 577, 580-584 (Iowa 2003) (citing cases on both sides, and concluding that a claim for legal malpractice in the criminal-case context is not discovered and does not accrue until relief from a conviction is achieved); Mashaney v. Bd. of Indigents' Def. Servs., 355 P.3d 667, 672-677 (Kan. 2015) (discussing different judicial definitions of exoneration for purposes of accrual of claim for legal malpractice in defending criminal proceeding); Noske v. Friedberg, 670 N.W.2d 740, 742-746 (Minn. 2003) (ruling that legal malpractice claim against former criminal-defense attorney did not accrue until plaintiff received habeas corpus relief from criminal conviction); Clark v. Robison, 944 P.2d 788, 789-790 (Nev. 1997) (holding that statute of limitations does not begin to run in legal malpractice case arising from criminal defense until appellate or postconviction relief is granted from criminal conviction); Therrien v. Sullivan, 891 A.2d 560, 562-564 (N.H. 2006) (reviewing cases from other jurisdictions, and holding that action for legal malpractice in a criminal case does not accrue until plaintiff receives postconviction relief); Gray v. Skelton, 595 S.W.3d 633, 639-641 (Tex. 2020) (holding that statute of limitations for malpractice claim against criminal-defense counsel is tolled not only by direct appeal but also by postconviction proceedings).

For cases opting for the alternative "two-track" approach, under which a criminal defendant must file a malpractice action against the criminal-defense attorney within the limitations period after learning of the attorney's malpractice and resulting injury, see, e.g., Morrison v. Goff, 91 P.3d 1050, 1052-1058 (Colo. 2004) (reviewing cases from other jurisdictions and adopting two-track approach); Ereth v. Cascade County, 81 P.3d 463, 466-470 (Mont. 2003) (adopting two-track approach prospectively, after reviewing cases from other jurisdictions).

A different rule applies to causes of action for abuse of process, because such causes of action do not require favorable termination of the underlying proceeding. See Restatement Third, Torts: Liability for Economic Harm § 26 (AM. L. INST. 2020). The statute of limitations starts to run on an abuse-of-process cause of action when the abusive acts (such as discovery abuse) occur and produce injury. See, e.g., Cruz v. City of Tucson, 401 P.3d 1018, 1022-1023 (Ariz. Ct. App. 2017) (reviewing cases, and holding that abuse-of-process claim accrues when abuse occurs, not when underlying litigation is resolved); No Drama, LLC v. Caluda, 177 So. 3d 747, 751-752 (La. Ct. App. 2015) (holding that limitations period for abuse-of-process claim began to run when

allegedly improper petition was filed); Cunningham v. State, 422 N.E.2d 821, 822 (N.Y. 1981) (stating that "the accrual of a cause of action for abuse of process need not await the termination of an action in claimant's favor"); J. A. Bock, Annotation, *When Statute of Limitations Begins to Run Against Action for Abuse of Process*, 1 A.L.R.3d 953, at § 1 (originally published in 1965) ("[A] cause of action for abuse of process has been generally held to accrue, and the statute of limitations to commence to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued.").

(5) Conversion. On the application of statutes of limitations to causes of action for conversion, see, e.g., Republic of Turkey v. Christie's Inc., 425 F. Supp. 3d 204, 211-214 (S.D.N.Y. 2019) (ruling that claim for conversion accrues against bad-faith possessor immediately from time of wrongful possession, but it runs against good-faith possessor only from time of demand and refusal); Empiregas, Inc. of Palmyra v. Zinn, 833 S.W.2d 449, 450-451 (Mo. Ct. App. 1992) (holding that statute of limitations on action to recover leased fuel tank did not start to run until demand for property was made and refused).

(6) Medical monitoring. The application of statutes of limitations to medical monitoring causes of action is discussed in Restatement Third, Torts: Miscellaneous Provisions, Medical Monitoring § __, Reporters' Note to Comment *n* (AM. L. INST., Tentative Draft No. 3, 2024).

(7) Wrongful death. For an extensive analysis of the split of authority on the question of when the statute of limitations begins to run on a cause of action for wrongful death, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 70, Reporters' Note to Comment *k* (in Restatement Third, Torts: Miscellaneous Provisions (AM. L. INST., Tentative Draft No. 3, 2024)).

(8) Survival statutes. On the application of statutes of limitations to causes of action preserved by survival statutes, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 71, Reporters' Note to Comment *j* (in Restatement Third, Torts: Miscellaneous Provisions (AM. L. INST., Tentative Draft No. 3, 2024)), and authorities cited therein.

(9) Consortium. Concerning the application of statutes of limitations to consortium causes of action, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 A, Reporters' Note to Comment *m* (spousal consortium); § 48 B, Reporters' Note to Comment *n* (child consortium); § 48 C, Reporters' Note to Comment *n* (parental consortium) (added by Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (AM. L. INST., Tentative Draft No. 1, 2022)), and authorities cited therein.

(10) Vicarious liability. On the application of statutes of limitations to causes of action for vicarious liability, see, e.g., Tiemann v. SSM Reg'l Health Servs., 632 S.W.3d 833, 842-843 (Mo. Ct. App. 2021) (ruling that vicarious-liability claim is governed by same statute of limitations and exceptions as the underlying claim against the tortfeasor).

(11) Contribution and indemnity. On the accrual of causes of action for contribution, see, e.g., Reddy v. PMA Ins. Co., 20 A.3d 1281, 1289-1290 (Del. 2011) (holding that contribution claim does not accrue until joint tortfeasor pays more than proportionate share of settlement of underlying claim); Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to*

Run Against Claim for Contribution or Indemnity Based on Tort, 57 A.L.R.3d 867, at § 3(a) (originally published in 1974) (stating that the generally recognized rule is that claim for contribution does not accrue, and the statute of limitations does not start to run, until the time of payment of more than share of liability by the party seeking contribution).

Authorities addressing when a cause of action for indemnity accrues include Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co., 114 S.W.3d 189, 216 (Ark. 2003) ("[A]n action on a contract for indemnity accrues when the indemnitee is subjected to damage on account of its own liability."); Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc., 794 P.2d 11, 19 (Utah 1990) (holding that a common-law indemnity action does not arise when the underlying damage occurs; rather, it runs from the time of the payment of the underlying claim or the payment of a judgment or settlement); Brunner, supra at § 4(a) (stating that generally recognized rule is that claim for indemnity based on tort does not accrue, and the statute of limitations does not start to run, until the time of payment of the underlying claim by the party seeking indemnity).

Comment g. Burden of proof. For cases supporting the rule that the burden of proof on the application of the all-elements rule is on the defendant relying on the statute of limitations, see, e.g., California Sansome Co. v. U.S. Gypsum, 55 F.3d 1402, 1406 (9th Cir. 1995) (applying California law) ("[T]he defendant has the burden of demonstrating the complained of wrongdoing *and* harm occurred outside the limitations period."); Carvalho v. Raybestos-Manhattan, Inc., 794 F.2d 454, 456 (9th Cir. 1986) (applying Hawaii law) (ruling that a defendant has the burden of proving accrual when raising the statute of limitations as an affirmative defense); Listwon v. 500 Metro. Owner, LLC, 136 N.Y.S.3d 106, 108 (App. Div. 2020) (stating that defendant who seeks dismissal based on statute of limitations bears initial burden of proving, prima facie, that time in which to sue has expired).

Comment h. Judge and jury. For cases holding that whether the factual requirements of the all-elements rule have been satisfied is a question for the factfinder, unless the evidence is so clear that no reasonable factfinder could decide the question otherwise, see, e.g., Carvalho v. Raybestos-Manhattan, Inc., 794 F.2d 454, 456-457 (9th Cir. 1986) (applying Hawaii law) (remanding for jury determination as to when cause of action accrued using correct burden of proof); Weathers v. Metro. Life Ins. Co., 14 So. 3d 688, 694-695 (Miss. 2009) (concluding that the events triggering accrual could not be pinpointed as a matter of law); Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576, 585 (Mo. 2006) ("[W]hen contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question of fact for the jury to decide."); Tarnavsky v. McKenzie Cnty. Grazing Ass'n, 665 N.W.2d 18, 22 (N.D. 2003) ("The determination of when a plaintiff's cause of action has accrued is generally a question of fact, but if there is no dispute about the relevant facts, the determination is for the court.").

§ 3. When the Statute of Limitations Begins to Run—Discovery Rule

Even if the statute of limitations would otherwise begin to run on a cause of action pursuant to § 2 (the all-elements rule), the statute of limitations does not begin to run until

the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the existence of all of the necessary factual elements of the cause of action against the defendant.

Comment:

a. Sources and cross-references.
b. History, support, and rationale.
c. The discovery rule operates to postpone the time when the statute of limitations starts to run, not to accelerate it.
d. The discovery rule applies to all the factual elements of the cause of action.
e. The discovery rule applies to all torts.
f. The discovery rule does not require knowledge of the legal basis of the cause of action.
g. The discovery rule does not require knowledge of the full extent of the injury.
h. Each defendant must be individually considered.
i. Under the discovery rule, plaintiff is charged with knowledge both of the facts that the plaintiff actually knows and those that the plaintiff should know in the exercise of reasonable diligence.
j. Burden of proof.
k. Judge and jury.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute. See § 1, Comment *c*. The rule of this Section is applied separately to each cause of action by each plaintiff against each defendant. See § 1, Comment *g*.

b. History, support, and rationale. The final volume of the Restatement Second of Torts, published in 1979, observed that there had been "a wave of recent decisions" adopting the discovery rule in medical malpractice cases and "a number of instances" applying a similar rule to other types of professional malpractice, and it predicted that "the rule may thus become a general one." Id. § 899, Comment *e*. This prediction proved to be prescient. The discovery rule has now been adopted for some or all torts in a large majority of jurisdictions, by common-law decisions, statutes, or both.

Like the all-elements rule addressed in § 2, the discovery rule follows from the basic purposes of statutes of limitations. One of those purposes is to provide plaintiffs with a legislatively defined period of time within which to sue. See § 1, Comment *f*. This purpose cannot be achieved

if plaintiffs are unaware of and could not, with the exercise of reasonable diligence, have become aware of their causes of action during the period when the statute of limitations is running. By postponing the running of the statute of limitations until plaintiffs are aware, or in the exercise of reasonable diligence should have been aware, of all of the factual elements of their causes of action, the discovery rule helps to ensure that plaintiffs will be afforded the period of time allowed by the legislature to bring their causes of action.

Illustrations:

1. Orthodox Church, a religious organization, brings an action against Daniela, a gallery owner, to recover four sixth-century mosaics that were stolen from one of its churches. Daniela defends by arguing that the claim is time-barred; she insists that the statute of limitations has run, counting from the time when the mosaics were stolen. Orthodox Church establishes that, despite diligent efforts, it was unable to learn who possessed the mosaics until shortly before it brought the action. Orthodox Church's action is, as a matter of law, timely under the discovery rule.

2. Prentice is attacked and left for dead by three assailants who all wear masks to conceal their identities. Despite the exercise of reasonable diligence, Prentice is unable to discover the identities of the three assailants until they plead guilty to attempted murder, years after the tort statute of limitations had expired—and Prentice brings suit soon after learning the assailants' identities. Prentice's suit is, as a matter of law, timely under the discovery rule.

3. Pearl develops chronic back pain in 2018, but she does not know the cause. Five years after the pain's onset, in 2023, an x-ray reveals that there is a piece of a needle in her back. When Pearl is informed of this fact, she realizes that the needle (and the pain the needle caused) are traceable to a diagnostic lumbar puncture that Dr. Denniston, her physician, had performed in 2016. Pearl immediately sues Dr. Denniston for medical malpractice, and he defends, arguing that the two-year statute of limitations has run. Under the discovery rule, Pearl's medical malpractice claim accrued when Pearl knew, or in the exercise of reasonable diligence should have known, each of the following: (1) the cause of her injury—the piece of needle left in her back; (2) the party or entity responsible for her injury—Dr. Denniston; and (3) the facts on which a claim of malpractice would be based—that Dr. Denniston left a piece of needle, a foreign object, in her back.

c. The discovery rule operates to postpone the time when the statute of limitations starts to run, not to accelerate it. By stating that the plaintiff must know or have reason to know of the existence of all the elements of the cause of action, the discovery rule of this Section presupposes that all the elements of the cause of action are already in existence, i.e., that the all-elements rule of § 2 has already been satisfied. In other words, the discovery rule operates to extend the date on which the statute of limitations starts to run beyond the date that would be set by the all-elements rule. If the plaintiff knows that a tortious act has occurred, but the all-elements rule is not yet satisfied (because, for example, the tortious act has not yet produced a legally cognizable injury), the statute of limitations does not begin to run until all elements of the cause of action have occurred.

Illustration:

4. Prakash learns that his attorney, Dietrich, has committed malpractice that exposes Prakash to possible additional federal tax liability. Despite Prakash's discovery that Dietrich has committed malpractice, the statute of limitations does not start to run on Prakash's malpractice cause of action unless and until the all-elements rule of § 2 is satisfied, which will not occur unless and until it becomes foreseeable that Prakash will, in fact, suffer additional federal tax liability as a result of Dietrich's malpractice. See § 2, Comment *d*.

d. The discovery rule applies to all the factual elements of the cause of action. The majority rule among jurisdictions that apply the discovery rule is that, in order for the statute of limitations to begin to run, the plaintiff must know or have reason to know of the existence of *all the factual elements* of the cause of action. This Restatement adopts that majority rule. It is only when the plaintiff knows or has reason to know of the existence of all the factual elements of the cause of action that the discovery rule can perform its purpose of helping to ensure that the plaintiff will have the period of time allowed by the legislature to sue on the cause of action. See Comment *b*. This does not mean that the plaintiff must be aware of the legal significance of the facts; it is sufficient if the plaintiff knows or should know the *facts* supporting the cause of action. See Comment *f*.

One important application of this rule is that, in order for the discovery rule to apply, the plaintiff must know or have reason to know the defendant's identity. Again, this flows from the basic purpose of the discovery rule. If the plaintiff does not know whom to sue, the plaintiff has not been given a genuine opportunity to bring an action. If the discovery rule did not encompass the defendant's identity, the church from which the mosaics were stolen in Illustration 1, and the

victim attacked and left for dead in Illustration 2, would have no recourse to the discovery rule to defeat the defendants' reliance on the statute of limitations. Such a result would have nothing to commend it from the standpoint of justice or fairness.

In United States v. Kubrick, 444 U.S. 111, 118-125 (1979), the Supreme Court took a narrower view of what the plaintiff must know in order to start the running of the statute of limitations under the discovery rule. In *Kubrick*, the Court ruled that the discovery rule is satisfied if the plaintiff knows or has reason to know of the plaintiff's injury and its cause, and that the plaintiff need not also know or have reason to know that the injury was tortiously inflicted. The Court reasoned that a plaintiff who knows of the injury and its cause will be able to make inquiries that will disclose whether the injury was tortiously inflicted. Id. at 122-123. This Restatement adopts the position that this is a question of fact, not a proposition that is true as a matter of law in every case. Whether a plaintiff who knows or has reason to know the fact of the plaintiff's injury and its cause will, through the exercise of reasonable diligence, be able to learn whether the injury was tortiously inflicted and by whom is a question of fact to be determined by the factfinder based on the facts and circumstances of each individual case. See Comment *k*.

In states that permit plaintiffs to bring complaints against "John Doe" defendants whose identity is unknown, some courts have suggested that the availability of such complaints makes it unnecessary to extend the discovery rule to the identity of the tortfeasor. In view of the relatively limited prevalence of the "John Doe" defendant procedure, the Institute takes no position on the issue.

e. The discovery rule applies to all torts. A minority of the jurisdictions that employ the discovery rule apply it selectively, rather than to all torts. The torts most often selected include torts arising from construction defects, latent injuries, legal malpractice, and medical malpractice. These torts have in common that they are often thought to be particularly difficult to detect.

Most jurisdictions that employ the discovery rule, however, apply it to all torts. This Restatement adopts that broader, majority position. The requirements of the discovery rule—including, in particular, the requirement that the plaintiff must be unable to discover the factual elements of the cause of action by the exercise of reasonable diligence—will themselves weed out the cases in which the plaintiff does not reasonably require the assistance of the discovery rule. There is no need to adopt an *a priori* limitation on the torts covered by the discovery rule in order to accomplish this purpose. While some torts may be more likely to involve victims who are

unaware of their claims, the potential exists for all torts. And when such a situation obtains, as Illustrations 1 and 2 demonstrate, the discovery rule should be available.

f. The discovery rule does not require knowledge of the legal basis of the cause of action. Pursuant to the discovery rule, the statute of limitations starts to run when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, all the factual elements of the cause of action—when, in other words, the plaintiff knows or should know *facts* that support a legal cause of action. This means that a cause of action starts to run under the discovery rule even if the plaintiff does not discover the *legal basis* for the cause of action.

Illustration:

5. In 2016, Lisa Leong is held by LargeStore for one hour without any justification; when letting her go, a LargeStore manager apologizes for their "crossed wires" and "serious screw up." Then, eight years later, when in law school, Lisa learns that such detentions are actionable under the tort of false imprisonment. On connecting these dots, Lisa immediately initiates a tort action against LargeStore. Even though Lisa brings suit immediately after she discovers she has a cognizable cause of action, Lisa's suit for false imprisonment is time-barred as, in 2016, she knew the pertinent underlying facts.

g. The discovery rule does not require knowledge of the full extent of the injury. The discovery rule does not require that the plaintiff know, or in the exercise of reasonable diligence should know, the full extent of the injury. Similarly, just as is true of the all-elements rule (see § 2, Comment *e*), the later discovery of additional injury does not restart the running of the statute of limitations under the discovery rule.

Illustration:

6. In 2018, Lucie negligently drives into Jasmine, a pedestrian. Jasmine spends two days in the hospital suffering from abdominal injuries, but she takes no legal action. In 2023, Jasmine learns that the injuries suffered in the accident have intensified and become permanent. On learning this, Jasmine sues. Lucie defends, pointing to the jurisdiction's two-year statute of limitations, which she claims expired in 2020. Relying on the discovery rule, Jasmine insists she did not know the full extent of her injury until 2023. Jasmine's suit is time-barred as a matter of law. Even though Jasmine did not know the full extent of her injuries in 2018, as of 2018, she knew she had been tortiously injured by Lucie. Even though the pain has recently worsened, no separate and distinct injury has been sustained.

However, as explained in § 2, Comment *d*, if the plaintiff who is suffering from one injury later manifests a separate and distinct injury owing to the defendant's tortious conduct, and if that separate injury was speculative and unforeseeable at the time of the first injury, the statute of limitations on the second injury does not accrue until that second injury manifests. See § 2, Illustration 2.

h. Each defendant must be individually considered. If there are multiple defendants, the discovery rule applies separately to each individual defendant. The fact that the plaintiff knows or has reason to know of a cause of action against one defendant does not necessarily mean that the plaintiff knows or has reason to know of a cause of action against another defendant. Thus, under the discovery rule, the statute of limitations may begin to run at different times against different defendants.

i. Under the discovery rule, plaintiff is charged with knowledge both of the facts that the plaintiff actually knows and those that the plaintiff should know in the exercise of reasonable diligence. As the black letter of § 3 makes clear, the discovery rule does not delay the running of the statute of limitations beyond the point at which the plaintiff knows, or in the exercise of reasonable diligence should know, of the existence of the factual elements of the cause of action. This rule sets up two standards, both of which must be satisfied in order to defer the running of the statute of limitations under the discovery rule.

The first standard is a subjective one: what did the plaintiff actually know, and when did the plaintiff actually know it? If the plaintiff actually knows of the existence of the factual elements of the cause of action, the statute of limitations starts to run at that point.

Under the second standard, the requirement of reasonable diligence is objective. Pursuant to this standard, if, at a particular point, the plaintiff, in the exercise of reasonable diligence, should have known of the existence of the factual elements of the cause of action, the statute of limitations starts to run at that point.

If either the plaintiff does know, or, alternatively, the plaintiff reasonably should know, of the existence of the factual elements of the cause of action, the statute of limitations begins to run.

Courts often use the term "inquiry notice" to describe awareness of facts that, in the exercise of reasonable diligence, should trigger further investigation by the plaintiff that would disclose the facts that give rise to the cause of action. Under the discovery rule, the plaintiff is then charged with knowledge of the facts that such further investigation would have revealed. For this reason, judicial

decisions often discuss whether the facts known by the plaintiff constituted "inquiry notice." But "inquiry notice" is merely a way station to the plaintiff's further investigation to find the requisite facts. The ultimate question remains whether, and when, the plaintiff would have discovered the necessary facts had the plaintiff acted with reasonable diligence under all the circumstances.

Illustration:

7. Paul is treated in a Veterans Administration hospital for injuries suffered when his leg is crushed in an automobile accident. Paul is told by his physicians that he can expect severe pain and complications but that his wounds will eventually heal. As a result, Paul does not seek a second opinion for three years, despite the fact that he experiences severe pain and complications, including the loss of his heel and the top of his foot. When Paul seeks a second opinion, he is told that he is the victim of medical malpractice. Whether Paul has exercised reasonable diligence is a question of fact for the factfinder. Ultimately, the factfinder must determine when Paul, in the exercise of reasonable diligence, should have known of the existence of the facts underlying the cause of action.

j. Burden of proof. The burden of proof is on the plaintiff seeking to invoke the discovery rule. Thus, a plaintiff seeking to defeat the defendant's statute-of-limitations defense has the burden of proving that the plaintiff had not discovered, and in the exercise of reasonable diligence could not have discovered, the existence of all of the necessary factual elements of the cause of action against the defendant.

k. Judge and jury. Whether the requirements of the discovery rule have been met is a question for the factfinder. See Illustration 7.

REPORTERS' NOTE

Comment b. History, support, and rationale. As stated in the Comment, the discovery rule restated in this Section is followed for some or all torts in a large majority of jurisdictions.

In some jurisdictions, the basic rule governing when the statute of limitations starts to run on a tort cause of action is the discovery rule. See, e.g., Cameron v. State, 822 P.2d 1362, 1366 (Alaska 1991) (holding that "a cause of action accrues when a person discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action"); Doe v. Roe, 955 P.2d 951, 960 (Ariz. 1998) (stating that, under the discovery rule, "a cause of action does not accrue until the plaintiff knows or with reasonable diligence should know the facts underlying the cause" of action); Catz v. Rubenstein, 513 A.2d 98, 100-103 (Conn. 1986) (holding that "injury" within the meaning of CONN. GEN. STAT. § 52-584 requires "actionable harm," i.e., that plaintiff discovered or in the exercise of reasonable care should have discovered "essential elements" of

the cause of action, including a causal relationship between the defendant's alleged negligence and the harm); Kaho'ohanohano v. Dep't of Hum. Servs., State of Haw., 178 P.3d 538, 591 (Haw. 2008) ("In a negligence action, the claim for relief does not accrue until plaintiff knew or should have known of defendant's negligence."); Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992) ("We hold that the cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another."); Strassburg v. Citizens State Bank, 581 N.W.2d 510, 514 (S.D. 1998) (stating that a claim accrues when the plaintiff can commence an action and that the statute of limitations ordinarily begins to run when the plaintiff either has actual notice of a cause of action or is charged with constructive notice); Wyatt v. A-Best, Co., Inc., 910 S.W.2d 851, 855 (Tenn. 1995) (explaining that cause of action in tort does not accrue until plaintiff discovers or reasonably should have discovered facts which would support an action for tort against the tortfeasor); Earle v. State, 743 A.2d 1101, 1108 (Vt. 1999) (stating that limitations period begins to run when a plaintiff "had information, or should have obtained information, sufficient to put a reasonable person on notice that a particular defendant may have been liable for the plaintiff's injuries") (quotation omitted); Killian v. Seattle Pub. Schs., 403 P.3d 58, 63 (Wash. 2017) (stating that generally the court applies the discovery rule, under which "a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action: duty, breach, causation, and damages") (quotation omitted); Alden v. Kirchhefer, 357 P.3d 1118, 1124 (Wyo. 2015) ("Wyoming is a discovery jurisdiction, which means that a statute of limitations is triggered when a plaintiff knows or has reason to know of the existence of a cause of action.").

In addition to the decisions cited in the preceding paragraph from jurisdictions in which the discovery rule is the basic accrual rule for tort causes of action, decisions following the discovery rule for some or all torts include Skwira v. United States, 344 F.3d 64, 73-75 (1st Cir. 2003) (applying Federal Tort Claims Act) (ruling that discovery rule applies outside the medical malpractice and latent disease contexts); Ware v. United States, 626 F.2d 1278, 1283-1285 (5th Cir. 1980) (applying Federal Tort Claims Act) (ruling that statute of limitations did not start to run until plaintiff obtained knowledge of negligent misdiagnosis that led the government to destroy his cattle); Coleman v. PricewaterhouseCoopers, LLC, 854 A.2d 838, 842 (Del. 2004) (stating that the discovery rule does not apply "absent concealment or fraud, or unless the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of"); Corp. of Mercer Univ. v. Nat'l Gypsum Co., 368 S.E.2d 732, 732-733 (Ga. 1988) (holding that the discovery rule applies to cases involving bodily injury which develops only over an extended period of time, but not property damage); Knox Coll. v. Celotex Corp., 430 N.E.2d 976, 979-981 (Ill. 1981) (holding that, under the discovery rule, statute of limitations starts to run when a person knows or reasonably should know of his injury and that it was wrongfully caused); Mormann v. Iowa Workforce Dev., 913 N.W.2d 554, 566-567 (Iowa 2018) (explaining that the court has adopted the discovery rule in a variety of settings "based upon the common sense notion that a potential claim should not be barred when the failure to bring a timely action arises from the

plaintiff's lack of knowledge about key facts that are unknown to the plaintiff and cannot reasonably be discovered by the plaintiff even in the exercise of due diligence"); LCL, LLC v. Falen, 422 P.3d 1166, 1174 (Kan. 2018) (explaining that there are two inquiries relevant to determining when the statute of limitations on a negligence claim begins to run: (1) when did the plaintiff "suffer an actionable injury—i.e., when were all the elements of the cause of action in place? and (2) when did the existence of that injury become reasonably ascertainable to" the plaintiff?); Wilson v. Paine, 288 S.W.3d 284, 286 (Ky. 2009) ("[W]hen the complained of injury is not immediately discoverable, courts steer away from the unfairness inherent in charging a plaintiff with slumbering on rights not reasonably possible to ascertain."); Jordan v. Emp. Transfer Corp., 509 So. 2d 420, 423-424 (La. 1987) (ruling that prescription [the Louisiana civil-law counterpart of a statute of limitations] did not begin to run until plaintiffs had a reasonable basis to pursue a claim against a specific defendant); Johnston v. Dow & Coulombe, Inc., 686 A.2d 1064, 1066 (Me. 1996) ("We have limited the application of the discovery rule to three discrete areas: legal malpractice, foreign object and negligent diagnosis medical malpractice, and asbestosis.") (footnotes and citations omitted); Doe v. Maskell, 679 A.2d 1087, 1090 (Md. 1996) (recounting how court developed the discovery rule, which holds that cause of action accrues when plaintiff knew or should have known that actionable harm had been done to him, and noting that the discovery rule initially arose in context of medical malpractice, but was ultimately expanded to all civil suits); O'Keeffe v. Snyder, 416 A.2d 862, 868-870 (N.J. 1980) (describing history of judicial adoption of the discovery rule and applying the discovery rule to an action by Georgia O'Keeffe to recover three allegedly stolen paintings); Roberts v. Sw. Cmty. Health Servs., 837 P.2d 442, 449 (N.M. 1992) ("The great weight of authority, both in decisions and commentary, today recognizes some form of the 'discovery rule,' i.e., that the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists."); Dunford v. Tryhus, 776 N.W.2d 539, 542 (N.D. 2009) ("The discovery rule is meant to balance the need for prompt assertion of claims against the policy favoring adjudication of claims on the merits and ensuring that a party with a valid claim will be given an opportunity to present it."); Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co., 947 N.E.2d 672, 675-678 (Ohio 2011) (explaining that discovery rule provides that cause of action does not arise until the plaintiff knows, or by the exercise of reasonable diligence should know, that plaintiff has been injured by the conduct of the defendant); Calvert v. Swinford, 382 P.3d 1028, 1034 (Okla. 2016) (describing conditions for application of discovery rule); Rice v. Rabb, 320 P.3d 554, 561 (Or. 2014) (holding that cause of action accrues when plaintiff knows or reasonably should know of elements of cause of action); Fine v. Checcio, 870 A.2d 850, 858 (Pa. 2005) (stating that "[t]he discovery rule originated in cases in which the injury or its cause was neither known nor reasonably knowable" and that "the salient point giving rise to [the rule's] application is the inability of the injured, despite the exercise of reasonable diligence, to know that he is injured and by what cause"); Polanco v. Lombardi, 231 A.3d 139, 145-147 (R.I. 2020) (stating that the discovery rule applies only in certain defined factual situations, such as medical malpractice, drug product liability, and improvements to real property); BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 65-66 (Tex. 2011) (explaining that discovery rule is a very limited exception applicable to categories of claims

in which the nature of the injury incurred is "inherently undiscoverable" and the evidence of injury is objectively verifiable); Childs v. Haussecker, 974 S.W.2d 31, 37 (Tex. 1998) (citing cases and stating that "almost every jurisdiction applies some formulation of the discovery rule, either legislatively or judicially, in latent injury and disease cases"); VanSickle v. Kohout, 599 S.E.2d 856, 860 (W. Va. 2004) (explaining that, under the discovery rule, the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim); Hansen v. A.H. Robins, Inc., 335 N.W.2d 578, 579-583 (Wis. 1983) (adopting discovery rule for all tort actions other than those already governed by legislatively created discovery rule).

Statutes providing for a discovery rule include 42 U.S.C. § 9658 (requiring that statutes of limitations for state-law claims for personal injury or property damage caused or contributed to by exposure to any hazardous substance, pollutant, or contaminant from a CERCLA-covered facility must begin to run no earlier than when the plaintiff knew or reasonably should have known that the personal injury or property damages were caused or contributed to by the hazardous substance, pollutant, or contaminant); COLO. REV. STAT. § 13-80-108(1) ("Except as provided in subsection (12) of this section, a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence."); CONN. GEN. STAT. § 52-584 (providing that action for injury to person or property must be brought "within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered and . . . no such action may be brought more than three years from the date of the act or omission complained of"); FLA. STAT. § 95.11(3)(c), (4)(a), (b), (e), (f) (prescribing discovery rule for certain torts); MONT. CODE ANN. § 27-2-102(3) ("The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if (a) the facts constituting the claim are by their nature concealed or self-concealing, or (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause."); N.Y. C.P.L.R. § 214-a (providing discovery rule for medical, dental, and podiatric malpractice); id. § 214-b (providing discovery rule for phenoxy herbicides); id. § 214-c(2) (setting forth discovery rule for latent effects of exposure to any substance or combination of substances); N.C. GEN. STAT. § 1-52(16) ("Unless otherwise provided by law, for personal injury or physical damage to claimant's property, the cause of action, except in causes of action referred to in G.S. 1-15(c) . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs."); S.C. CODE ANN. § 15-3-535 (providing that actions for personal injury "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action"); id. § 15-3-545(A) (enacting three-year discovery rule for medical malpractice actions, subject to six-year statute of repose).

Decisions declining to adopt a discovery rule in the absence of statute include Davis v. Monahan, 832 So. 2d 708, 709-712 (Fla. 2002) (ruling that delayed discovery rule does not apply

to actions to recover property, which are not one of the legislatively enumerated classes of cases to which the rule applies); Trentadue v. Gorton, 738 N.W.2d 664, 669-673 (Mich. 2007) (holding that discovery rule is limited to classes of cases specified by statute, and overruling prior cases recognizing common-law discovery rule); Cooley v. Pine Belt Oil Co., Inc., 334 So. 3d 118, 128 (Miss. 2022) (reaffirming that, except for statutory discovery rule for latent injuries, discovery rule is not recognized in Mississippi); Newton v. Mercy Clinic E. Cmties., 596 S.W.3d 625, 629 (Mo. 2020) (noting "the legislature's and this Court's longstanding rejection of the discovery rule in medical negligence actions"); Snyder v. Town Insulation, Inc., 615 N.E.2d 999, 1002-1003 (N.Y. 1993) ("[W]e have consistently stated that the responsibility for balancing the equities and altering Statutes of Limitations lies with the Legislature.").

For decisions discussing the rationale of the discovery rule, see, e.g., Doe v. Roe, 955 P.2d 951, 960 (Ariz. 1998) ("One does not sleep on his or her rights with respect to an unknown cause of action."); Mormann v. Iowa Workforce Dev., 913 N.W.2d 554, 566-567 (Iowa 2018) (explaining that the court adopted the discovery rule in a variety of settings "based upon the common sense notion that a potential claim should not be barred when the failure to bring a timely action arises from the plaintiff's lack of knowledge about key facts that are unknown to the plaintiff and cannot reasonably be discovered by the plaintiff even in the exercise of due diligence"); Wilson v. Paine, 288 S.W.3d 284, 286 (Ky. 2009) ("[W]hen the complained of injury is not immediately discoverable, courts steer away from the unfairness inherent in charging a plaintiff with slumbering on rights not reasonably possible to ascertain."); Dunford v. Tryhus, 776 N.W.2d 539, 542 (N.D. 2009) ("The discovery rule is meant to balance the need for prompt assertion of claims against the policy favoring adjudication of claims on the merits and ensuring that a party with a valid claim will be given an opportunity to present it."); Calvert v. Swinford, 382 P.3d 1028, 1033 (Okla. 2016) ("The purpose of the [discovery] rule is to exclude the period of time during which the injured party is reasonably unaware that an injury has been sustained so that people in that class have the same rights as those who suffer an immediately ascertainable injury."). See generally DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1023-1033 (5th ed. 2019).

Illustration 1, involving the stolen mosaics, is based on Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 287-290 (7th Cir. 1990) (applying Indiana law).

Illustration 2, concerning the plaintiff who is attacked and left for dead, is based on Weaver v. Firestone, 155 So. 3d 952, 957-968 (Ala. 2013). There, the court held that under Alabama law (contrary to this Restatement) the discovery rule and the fraudulent concealment doctrine (§ 10) did not apply to the concealment of the identities of the defendants, requiring the court to rely on the doctrine of equitable tolling (§ 8) to preclude the defendants from benefiting from the expiration of the statute of limitations.

Illustration 3, involving the piece of a needle left in the plaintiff's back, is based on Shillady v. Elliot Cmty. Hosp., 320 A.2d 637, 638-639 (N.H. 1974).

Comment c. The discovery rule operates to postpone the time when the statute of limitations starts to run, not to accelerate it. For decisions recognizing that the discovery rule operates to postpone the time when the statute of limitations would otherwise start to run under the all-elements rule, not to accelerate it, see, e.g., Norgart v. Upjohn Co., 981 P.2d 79, 88 (Cal. 1999) (stating that discovery rule "postpones accrual of cause of action until plaintiff discovers, or has reason to discover, the cause of action"); Queensway Fin. Holdings Ltd. v. Cotton & Allen, P.S.C., 237 S.W.3d 141, 148 (Ky. 2007) (stating that "by its very nature, the discovery limitations period cannot begin to run until the accrual period begins"); Ehrman v. Kaufman, Vidal, Hileman & Ramlow, PC, 246 P.3d 1048, 1051 (Mont. 2010) (ruling that statute of limitations does not begin to run until both discovery rule and accrual rule are satisfied).

Comment d. The discovery rule applies to all the factual elements of the cause of action. Cases holding that the discovery rule applies to all the factual elements of the cause of action include Cameron v. State, 822 P.2d 1362, 1364-1368 (Alaska 1991) (holding that a cause of action accrues when a person discovers, or reasonably should have discovered, the existence of all elements of the cause of action); Doe v. Roe, 955 P.2d 951, 960 (Ariz. 1998) (stating that under the discovery rule, "a cause of action does not accrue until plaintiff knows or with reasonable diligence should know the facts underlying the cause" of action); Murry v. GuideOne Specialty Mut. Ins. Co., 194 P.3d 489, 492 (Colo. App. 2008) ("The point of accrual requires knowledge of the facts essential to the cause of action . . . ."); Catz v. Rubenstein, 513 A.2d 98, 100-103 (Conn. 1986) (holding that "injury" within the meaning of CONN. GEN. STAT. § 52-584 requires "actionable harm," i.e., that plaintiff discovered or in the exercise of reasonable care should have discovered essential elements of the cause of action, including a causal relationship between the defendant's alleged negligence and the harm; reviewing cases from multiple jurisdictions); LCL, LLC v. Falen, 422 P.3d 1166, 1174 (Kan. 2018) (explaining that there are two inquiries relevant to determining when the statute of limitations on a negligence claim begins to run: (1) when did the plaintiff "suffer an actionable injury—i.e., when were all the elements of the cause of action in place? and (2) when did the existence of that injury become reasonably ascertainable" to the plaintiff?); Rice v. Rabb, 320 P.3d 554, 561 (Or. 2014) (holding that cause of action accrues when plaintiff knows or reasonably should know of elements of cause of action); Strassburg v. Citizens State Bank, 581 N.W.2d 510, 514 (S.D. 1998) (stating that claim accrues when plaintiff can commence an action, and statute of limitations ordinarily begins to run when plaintiff either has actual notice of cause of action or is charged with constructive notice); Wyatt v. A-Best, Co., Inc., 910 S.W.2d 851, 855 (Tenn. 1995) (explaining that cause of action in tort does not accrue until plaintiff discovers or reasonably should have discovered facts which would support an action for tort against the tortfeasor); Killian v. Seattle Pub. Schs., 403 P.3d 58, 63 (Wash. 2017) (stating that generally court applies the discovery rule, under which a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action: duty, breach, causation, and damages); Spitler v. Dean, 436 N.W.2d 308, 310 (Wis. 1989) ("We have consistently recognized the injustice of commencing the statute of limitations before a claimant is aware of all the elements of an enforceable claim.").

Cases ruling that the discovery rule does not require that the plaintiff know or have reason to know of the existence of all elements of the cause of action include Rathje v. Mercy Hosp., 745 N.W.2d 443, 462-463 (Iowa 2008) (explaining that nearly all jurisdictions apply the discovery rule to statutes of limitations in medical malpractice cases, although they reach different results on whether discovery of causation involves relationship between injury and factual cause or relationship between injury and negligent conduct, and holding that discovery of relationship between injury and factual cause is sufficient); Wilson v. El-Daief, 964 A.2d 354, 363-369 (Pa. 2009) (recognizing that most state courts have required at least some knowledge that conduct of physician was negligent or wrongful to trigger the discovery rule, but holding that knowledge of some form of significant harm and factual cause linked to physician's conduct is sufficient); Burke v. Union Pac. Res. Co., 138 S.W.3d 46, 60-61 (Tex. App. 2004) (ruling that accrual of cause of action for injury to property does not require discovery of cause of injury).

Among the cases holding that the discovery rule requires that the plaintiff know or have reason to know the identity of the defendant are Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 287-290 (7th Cir. 1990) (applying Indiana law) (holding that discovery had to include identity of holder of stolen property); Walk v. Ring, 44 P.3d 990, 996 (Ariz. 2002) ("[I]t is not enough that a plaintiff comprehends a 'what'; there must also be reason to connect the 'what' to a particular 'who' in such a way that a reasonable person would be on notice to investigate whether the injury might result from fault."); Wilson v. Paine, 288 S.W.3d 284, 286 (Ky. 2009) ("The knowledge necessary to trigger the statute is two-pronged. One must know: (1) he has been wronged; and (2) by whom the wrong has been committed."); Jordan v. Emp. Transfer Corp., 509 So. 2d 420, 423-424 (La. 1987) (ruling that prescription [the Louisiana civil-law counterpart of a statute of limitations] did not begin to run until plaintiffs had a reasonable basis to pursue a claim against a specific defendant); Harrington v. Costello, 7 N.E.3d 449, 454-455 (Mass. 2014) (reviewing cases, and holding that "[k]nowledge of the responsible person's identity seems implicit in the requirement that a plaintiff know that the defendant's conduct caused him harm; without such knowledge, the plaintiff does not know whom to sue"); Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co., 947 N.E.2d 672, 676 (Ohio 2011) (noting that discovery "rule entails a two-pronged test"— "not just that one has been injured but also that the injury was caused by the conduct of the defendant"); Earle v. State, 743 A.2d 1101, 1108 (Vt. 1999) (stating that limitations period begins to run when a plaintiff had information, or should have obtained information, sufficient to put a reasonable person on notice that a particular defendant may have been liable for the plaintiff's injuries); Spitler v. Dean, 436 N.W.2d 308, 308-311 (Wis. 1989) (holding that discovery rule requires that the plaintiff knew, or in the exercise of reasonable diligence should have discovered, the injury, its cause, and the identity of the defendant).

For cases holding, contrary to Comment *d*, that the discovery rule does not require that the plaintiff know or have reason to know the identity of the defendant, see, e.g., Weaver v. Firestone, 155 So. 3d 952, 957-968 (Ala. 2013) (relying on equitable tolling (§ 8) rather than discovery rule in case in which perpetrators of murderous assault concealed their identities); Norgart v. Upjohn Co., 981 P.2d 79, 88-89 (Cal. 1999) (stating that plaintiff "may discover, or have reason to discover,

the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant"); Queensway Fin. Holdings Ltd. v. Cotton & Allen, P.S.C., 237 S.W.3d 141, 151 (Ky. 2007) (ruling that discovery rule does not toll statute of limitations to allow plaintiff to discover identity of wrongdoer unless there is fraudulent concealment or a misrepresentation by defendant of his role in causing plaintiff's injuries); Crawford on Behalf of C.C.C. v. OSU Med. Tr., 510 P.3d 824, 830-832 (Okla. 2022) (holding that discovery rule did not apply to identity of the defendant physician's employer, which was not the hospital in which the physician treated the plaintiff); Nowotny v. L & B Cont. Indus., Inc., 933 P.2d 452, 456-459 (Wyo. 1997) (reviewing cases and ruling that discovery rule does not require knowledge of defendant's identity).

For courts that have suggested that the ability of plaintiffs to bring complaints against "John Doe" defendants whose identity is unknown makes it unnecessary to extend the discovery rule to the identity of the tortfeasor, see, e.g., Bernson v. Browning-Ferris Indus., 873 P.2d 613, 616 (Cal. 1994) ("Although never fully articulated, the rationale for distinguishing between ignorance of the wrongdoer and ignorance of the injury itself appears to be premised on the commonsense assumption that once the plaintiff is aware of the injury, the applicable limitations period (often effectively extended by the filing of a Doe complaint) normally affords sufficient opportunity to discover the identity of all the wrongdoers."); Parrillo v. R.I. Hosp., 202 A.3d 942, 949-950 (R.I. 2019) (ruling that wrongful-death statute of limitations started to run when plaintiff knew or should have known of wrongful act and stating that plaintiff could have, inter alia, employed a John Doe pleading when plaintiff was unaware of identities of responsible parties). In view of the relatively limited prevalence of the "John Doe" defendant procedure, the Institute, as stated in Comment *d*, takes no position on the correctness of these cases.

Comment e. The discovery rule applies to all torts. Citations to cases and statutes from the jurisdictions that follow the discovery rule are contained in § 3, Reporters' Note to Comment *b*. The parentheticals accompanying the citations state whether the jurisdictions in question apply the discovery rule to all torts, or only to certain selected torts. As can be seen from those parentheticals, consistent with the position of Comment *e*, the jurisdictions that apply the discovery rule to all torts outnumber those that apply the discovery rule only to a limited number of torts.

Like all common-law rules relating to statutes of limitations, the discovery rule is subject to contrary statutes. An example is the tort of conversion of checks and other negotiable instruments, where courts have held that application of the discovery rule would contravene the goals of the Uniform Commercial Code. See, e.g., Rodrigue v. Olin Emps. Credit Union, 406 F.3d 434, 444-446 (7th Cir. 2005) (applying Illinois law) (following majority of jurisdictions in declining to apply discovery rule to actions for conversion of negotiable instruments, on ground that discovery rule would contravene Uniform Commercial Code's goals of certainty of liability, finality, predictability, uniformity, and efficiency in commercial transactions); Pero's Steak & Spaghetti House v. Lee, 90 S.W.3d 614, 622-625 (Tenn. 2002) (observing that "vast majority" of courts have held that, in the absence of fraudulent concealment, discovery rule does not apply to action for conversion of negotiable instruments, and following majority rule).

Comment f. The discovery rule does not require knowledge of the legal basis of the cause of action. Cases holding that the discovery rule does not require that the plaintiff realize that the facts would support a legal cause of action include Murry v. GuideOne Specialty Mut. Ins. Co., 194 P.3d 489, 492 (Colo. App. 2008) ("The point of accrual requires knowledge of the facts essential to the cause of action, not knowledge of the legal theory supporting the cause of action."); Hays v. City and County of Honolulu, 917 P.2d 718, 723-726 (Haw. 1996) (holding that plaintiff's lack of knowledge of a legal duty on the part of the defendant will not justify application of the discovery rule); Franzen v. Deere & Co., 377 N.W.2d 660, 662 (Iowa 1985) ("[T]he statute of limitations does not begin to run until the injured person has actual or imputed knowledge of . . . . the facts [that] would support a cause of action. It is not necessary that the person know they are actionable."); Harrington v. Costello, 7 N.E.3d 449, 457 (Mass. 2014) ("[T]he discovery rule is not delayed until a plaintiff learns that he was *legally* harmed."); Maestas v. Zager, 152 P.3d 141, 147 (N.M. 2007) (clarifying that action accrues when plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that the facts are enough to establish a legal cause of action); Snell v. Columbia Gun Exch., Inc., 278 S.E.2d 333, 334 (S.C. 1981) (ruling that discovery rule does not defer running of statute of limitations until "advice of counsel is sought or a full-blown theory of recovery developed"); Killian v. Seattle Pub. Schs., 403 P.3d 58, 63 (Wash. 2017) (clarifying that the key consideration under the discovery rule is the factual, not the legal, basis for the cause of action).

Comment g. The discovery rule does not require knowledge of the full extent of the injury. Cases holding that the statute of limitations begins to run under the discovery rule even though the plaintiff does not know or have reason to know the full extent of the injury include Goodhand v. United States, 40 F.3d 209, 212 (7th Cir. 1994) (applying Federal Tort Claims Act) ("The statute of limitations begins to run upon the discovery of the injury, even if the full extent of the injury is not discovered until much later."); Maestas v. Zager, 152 P.3d 141, 147-148 (N.M. 2007) (holding that plaintiff need not be aware of full extent of injury for statute of limitations to begin to run under discovery rule); Wyatt v. A-Best, Co., Inc., 910 S.W.2d 851, 855 (Tenn. 1995) (holding that plaintiff is not entitled to wait until all injurious effects or consequences of actionable wrong are actually known); Anderson v. Bauer, 681 P.2d 1316, 1321 (Wyo. 1984) (stating that the discovery rule applies "although the damage is slight, continues to occur, or additional damage caused by the same wrongful act may result in the future").

Comment h. Each defendant must be individually considered. For cases holding, consistent with Comment *h*, that knowledge of the identity of one tortfeasor does not necessarily trigger the running of the statute of limitations with respect to another still-unknown tortfeasor, see, e.g., Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 923-925 (Cal. 2005) (ruling that, under the discovery rule, a product liability cause of action against medical-device manufacturer may accrue at a different time from a medical malpractice cause of action against physician); Diamond v. Davis, 680 A.2d 364, 380-381 (D.C. 1996) (ruling that plaintiff's knowledge of wrongdoing by one defendant does not cause accrual of action against another, unknown wrongdoer, unless the two defendants are closely connected); Ben Elazar v. Macrietta Cleaners, Inc., 165 A.3d 758, 764-769

(N.J. 2017) (ruling that, when plaintiff knows that injury is the fault of another, but is reasonably unaware that a third party may also be responsible, the accrual clock does not begin ticking against the third party until the plaintiff has evidence that reveals the third party's possible complicity). For contrary holdings, see, e.g., Doe v. Roman Cath. Diocese of Charlotte, N.C., 775 S.E.2d 918, 923 (N.C. Ct. App. 2015) (ruling that, when a plaintiff is abused by priest affiliated with a particular diocese, that triggers duty to investigate the diocese; citing cases); Crawford on Behalf of C.C.C. v. OSU Med. Tr., 510 P.3d 824, 830-832 (Okla. 2022) (holding that discovery rule does not apply to identity of employer); Wiggins v. Edwards, 442 S.E.2d 169, 170 (S.C. 1994) (holding that if, on the date of injury, a plaintiff knows or should know that the plaintiff has a claim against someone, the statute of limitations begins to run for all claims based on that injury, including claims against someone else).

Comment i. Under the discovery rule, plaintiff is charged with knowledge both of the facts that the plaintiff actually knows and those that the plaintiff should know in the exercise of reasonable diligence. Charging the plaintiff with knowledge of the facts that reasonable diligence would have disclosed is appropriate, because the statute of limitations embodies important legislative purposes (see § 1, Comment *f*), making it fitting to apply a standard of reasonable diligence if the running of the statute of limitations is to be deferred under the discovery rule.

For cases illustrating the application of the standard of reasonable diligence under the discovery rule, see, e.g., Rispoli v. United States, 576 F. Supp. 1398, 1401-1403 (E.D.N.Y. 1983) (ruling that, when a patient had been told to expect postoperative pain, and the physician had assured the patient that the wound would heal, the patient could only be deemed to have knowledge after a sufficient period of time had passed to alert the patient that treatment was unsuccessful), aff'd without opinion, 779 F.2d 35 (2d Cir. 1985); Malek v. Chuhak & Tecson, P.C., 2023 WL 220723, at *1-2 (Ill. App. Ct. 2023) (determining that plaintiff wife, who was aware of her husband's alleged scheme to defraud her of marital assets, failed to exercise reasonable diligence to discover that her husband's attorneys orchestrated the alleged scheme); Riley v. Presnell, 565 N.E.2d 780, 785-786 (Mass. 1991) (holding that standard is that of "a reasonable person" who has been subjected to the conduct alleged in plaintiff's complaint); Cole v. Sunnyside Marketplace, LLC, 160 P.3d 1, 6-8 (Or. Ct. App. 2007) (ruling that there was an issue of fact as to whether plaintiff knew or should have known the identity of defendant); Gehrke v. CrafCo, Inc., 923 P.2d 1333, 1336-1337 (Or. Ct. App. 1996) (holding that discovery rule did not apply when plaintiff knew that store had caused her alleged injury but failed to exercise due diligence to determine legal identity of owner of store); Snell v. Columbia Gun Exch., Inc., 278 S.E.2d 333, 334 (S.C. 1981) ("[R]easonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claims against another party might exist.").

For cases explaining that "inquiry notice" simply identifies the point at which the facts would have prompted a reasonably diligent plaintiff to begin investigating, but that the statute of limitations does not start to run until the plaintiff discovers, or a reasonably diligent plaintiff should have discovered, the elements of the cause of action, see, e.g., Merck & Co., Inc. v. Reynolds, 559

U.S. 633, 651-653 (2010) (applying Securities Exchange Act § 10(b)); Greene v. Legacy Emanuel Hosp. & Health Care Ctr., 60 P.3d 535, 538-539 (Or. 2002).

Illustration 7, involving the plaintiff alleging medical malpractice by the Veterans Administration, is based on *Rispoli*, 576 F. Supp. at 1401-1403.

Comment j. Burden of proof. For cases supporting the rule that, if the defendant has sustained the burden of establishing that the statute of limitations has started to run under the all-elements rule of § 2 (see § 2, Comment *g*), the burden of proof with respect to the discovery rule is on the plaintiff seeking to invoke the discovery rule, see, e.g., Mormann v. Iowa Workforce Dev., 913 N.W.2d 554, 570-571 (Iowa 2018) (pointing to general agreement in the case law that the burden of proof for asserting equitable tolling, including the discovery rule, is on the party asserting it); Riley v. Presnell, 565 N.E.2d 780, 785 (Mass. 1991) (stating that once a defendant pleads the statute of limitations as a defense and establishes that the action was brought beyond the limitations period, the burden of proving facts that take the case outside the impact of the statute falls to the plaintiff); Strassburg v. Citizens State Bank, 581 N.W.2d 510, 513 (S.D. 1998) ("[W]here the defendant asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden then shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations."); Tipton v. Brock, 431 S.W.3d 673, 677 (Tex. App. 2014) ("A party asserting the discovery rule at trial to avoid the statute of limitations bar must prove all elements of the rule.").

Comment k. Judge and jury. Cases holding that whether the requirements of the discovery rule have been satisfied is a question for the factfinder, unless the evidence is so clear that no reasonable factfinder could decide the question otherwise, include Riley v. Presnell, 565 N.E.2d 780, 786-787 (Mass. 1991) (reviewing cases on both sides of issue, and applying majority rule that "where, as here, the plaintiff has claimed a trial by jury, any disputed issues relative to the statute of limitations ought to be decided by the jury"); Cole v. Sunnyside Marketplace, LLC, 160 P.3d 1, 7-8 (Or. Ct. App. 2007) (ruling that there was an issue of fact as to whether plaintiff knew or should have known identity of defendant before the expiration of the limitations period); In re Risperdal Litig., 223 A.3d 633, 641 (Pa. 2019) (stating that "discovery rule determinations are fact-intensive inquiries that should typically be left for juries to decide").

Scope Note for § 4: Repeated or continuous tortious conduct by a defendant against a plaintiff raises the question of when the statute of limitations begins to run. Ordinarily, the rules of §§ 2 and 3 apply for each tort in a series of similar torts or for each day of continual tortious conduct. See Illustration 1. The rules of §§ 2 and 3 also apply when a discrete injury manifests as the result of continued exposure. See Illustration 2. However, in a narrow class of cases

denominated "continuing torts," the statute of limitations is modified from that provided in §§ 2 and 3 and is addressed in § 4. See Illustrations 3, 4, and 5.

Illustrations:

1. David pitches a tent in Joe's backyard each night and sleeps there, departing each morning. David's conduct is not a continuing tort for purposes of this Section because each night David occupies Joe's property gives rise to a separate and identifiable injury. Accordingly, the statute of limitations for each night's trespass accrues at the later of the times specified in §§ 2 and 3. The application of the general rules of §§ 2 and 3 to repeated and continuous tortious conduct is discussed in Comments *c* and *e(1)* below.

2. Charlie, employed by a cleaning company, performs daily maintenance work at Chemco. While at Chemco, he is, on a daily basis, negligently exposed to unsafe concentrations of benzene. Charlie is diagnosed with the discrete harm of leukemia 23 years into his employment, while he is still working for the cleaning company and performing daily maintenance work at Chemco, and, at that time, he also learns that the leukemia was caused by his exposure to Chemco's benzene. Leukemia is a disease whose severity, once it develops, is unaffected by further exposure. Charlie brings suit five years later, at a time when the statute of limitations has run measured from the date of Charlie's diagnosis but has not run measured from Charlie's last exposure to benzene at Chemco. Because Charlie's leukemia is a nonprogressive disease that manifested at a discrete point in time, Charlie's claim is not for a continuing tort under this Section, and so the special rules of § 4(a), (b), and (c) do not apply. Instead, accrual of the statute of limitations is determined by §§ 2 and 3. Under §§ 2 and 3, the statute of limitations began to run on the date of Charlie's diagnosis, which is when Charlie's cause of action became legally cognizable and was discovered. Thus, Charlie's suit is untimely.

3. While building her new home, Tristan lays the concrete foundation so that it encroaches six inches into Buster's property. Tristan's conduct constitutes a permanent trespass, a continuing tort for purposes of § 4(a). Accordingly, the statute of limitations begins to run for all of Tristan's trespassing at the time specified in §§ 2 and 3 for the initial trespass. The application of § 4(a) is discussed in Comments *d* and *e* below.

4. Sam, Marjorie's coworker, taunts, criticizes, and humiliates her at work nearly every day for six years, and this extreme and outrageous conduct causes Marjorie's mental

and physical health gradually to deteriorate. No part of Marjorie's diminution of physical health or emotional tranquility can be attributed to any particular act by Sam. Sam's tort is a continuing tort for purposes of § 4(b), and the statute of limitations does not begin to run until after the cessation of Sam's tortious conduct. The application of § 4(b) is discussed in Comment *f* below.

5. Woodley is shopping at Greyson Mini Mart, and a Mini Mart employee falsely accuses him of shoplifting. Mini Mart proceeds to hold Woodley in its store "interrogation area" for two days. Woodley's claim against Greyson Mini Mart for false imprisonment is a continuing tort for purposes of § 4(c). Pursuant to § 4(c), Woodley's claim for false imprisonment only accrues when the false imprisonment ends. The application of § 4(c) is discussed in Comment *g* below.

§ 4. When the Statute of Limitations Begins to Run—Continuing Torts

Certain repetitive or continuous conduct by a defendant against a plaintiff gives rise to a "continuing tort." In such cases, special rules, other than those set forth in §§ 2 and 3, govern when the statute of limitations accrues. These special rules apply in the following narrow circumstances:

(a) If a rule of law requires all damages resulting from repeated or continuous tortious conduct to be sought in a single action, the statute of limitations begins to run as soon as the statute of limitations begins to run for any tort that is part of the continuing tort.

(b) If the plaintiff's injury is a cumulative and progressive result of repeated or continuous tortious conduct, none of which separately causes identifiable discrete cognizable injury, and if further exposures to the defendant's tortious conduct incrementally exacerbate the plaintiff's condition, the statute of limitations does not begin to run until after the cessation of the tortious conduct affecting the plaintiff.

(c) If the cause of action is for false imprisonment, the statute of limitations begins to run only after the cessation of the false imprisonment.

Comment:

a. Sources and cross-references.

b. This Section addresses continuing torts, not continuing injury from a completed tort.

c. Recurring and continuous torts not specified in Subsections (a), (b), and (c) are subject to the normal accrual rules of § 2 (all-elements rule) and § 3 (discovery rule).
d. Subsection (a): statute of limitations starts to run for the entire series as soon as it starts to run for any tort in the series.
e. Applications of Subsection (a).
f. Subsection (b): no single tort in the series separately causes identifiable discrete injury.
g. Subsection (c): false imprisonment.
h. Effect of plaintiff's discovery of the tort.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. In particular, this Section supersedes § 899, Comment *d*. The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute. See § 1, Comment *c*. The rules in this Section are applied separately to each cause of action by each plaintiff against each defendant. See § 1, Comment *g*.

b. This Section addresses continuing torts, not continuing injury from a completed tort. The rules stated in this Section are limited to continuing torts, as specified in Subsections (a), (b), and (c). They do not apply to cases involving continuing or ongoing injury from a completed tort. Such cases are governed instead by the rules stated in § 2, Comment *e* and § 3, Comment *g*. Pursuant to those rules, once the statute of limitations has started to run on a tort cause of action, the subsequent deterioration of the plaintiff's condition does not restart the running of the statute of limitations.

Illustration:

6. Priscilla's knee is injured in a collision with an automobile driven by Dean. In the years after the collision, Priscilla's injury to her knee repeatedly flares up and morphs into chronic arthritis, traceable to the accident. This is not a continuing tort within the meaning of Subsections (a), (b), and (c). Priscilla has a single cause of action against Dean for all of her injuries resulting from the collision, and the statute of limitations starts to run on that cause of action at the later of the times specified by § 2 (all-elements rule) or § 3 (discovery rule).

However, as explained in § 2, Comment *d* and § 3, Comment *g*, if the plaintiff who is suffering from one injury later manifests a separate and distinct injury owing to the defendant's

tortious conduct, and if that separate injury was speculative and unforeseeable at the time of the first injury, the statute of limitations on the second injury does not accrue until that second injury manifests.

c. Recurring and continuous torts not specified in Subsections (a), (b), and (c) are subject to the normal accrual rules of § 2 (all-elements rule) and § 3 (discovery rule). If a tort is not a continuing tort pursuant to Subsections (a), (b), and (c), the statute of limitations on that tort begins to run anew each time a new tortious act inflicts injury or each day in which wrongful conduct takes place continuously, at the later of the times specified by § 2 (all-elements rule) or § 3 (discovery rule). Subsections (a), (b), and (c) specify what constitute continuing torts, and if a repeated or continuous tort does not fall within those Subsections, accrual is not affected by this Section. See Illustrations 1, 2, 7, 8, and 9. Unless encompassed in the narrow categories addressed in Subsections (a), (b), and (c), torts are not deemed "continuing" for purposes of this Section and are, instead, treated in exactly the same way for statute-of-limitations purposes as they would be treated if they were not part of a series. In such cases, the plaintiff's claim can encompass all the torts in the series that are still open under the statute of limitations, but it cannot encompass those for which the statute of limitations has run.

Illustrations:

7. April realizes that she can squat in Tomika's beach house during the winter. So, each winter in 2018, 2019, and 2020, April does just that. In 2022, Tomika sues April for damages for trespass. When April defends, citing the jurisdiction's two-year statute of limitations, Tomika claims that the trespass qualifies as a "continuing tort." Tomika is wrong. Although April did occupy the beach house for extended periods of time, the tort was not a continuing tort as specified in Subsections (a), (b), and (c) because, inter alia, each day of home occupation caused actionable injury, and the occupation could have been ended at any time. Because this is not a continuing tort, the statute of limitations begins to run anew for each day of trespass at the later of the times specified by § 2 (all-elements rule) or § 3 (discovery rule). Tomika's action for trespass can only encompass those acts of trespass that are still open under the statute of limitations.

8. Karen, a meat inspector employed by the government, is assigned to work at Flubem, a chicken-processing plant. In 2023, Karen files suit against Flubem alleging that, from 2010 through 2023, Flubem periodically exposed her to toxic smoke and that the toxic

mix caused her to develop pancreatic cancer, a discrete harm whose severity is unaffected by post-disease exposure. Karen was first diagnosed with pancreatic cancer in 2014 when she was told the cancer was due to her toxic-smoke exposure at Flubem. Karen's cause of action based on pancreatic cancer is not a continuing tort under this Section. It accrued in 2014, and the statute of limitations for her cancer began to run at that time pursuant to §§ 2 and 3, such that it had expired by the time Karen brought her suit.

d. Subsection (a): statute of limitations starts to run for the entire series as soon as it starts to run for any tort in the series. In certain exceptional situations in which a rule of law requires that all damages from repetitive or continuous torts be sought in a single action, as described in Subsection (a), the statute of limitations starts to run for the entire series of continuing torts as soon as it starts to run for any tort in the series. This rule has dramatic implications. It means that, as soon as the statute of limitations has run on the first tort in the series to accrue, it has run on all torts in the series—even if those torts, considered individually, would still be within the statute-of-limitations period, and even if the torts have not been committed yet. In effect, the rule of Subsection (a) gives the defendant a license to continue to commit the same torts into the indefinite future, simply because the statute of limitations has run on the first tort in the series (subject only to the possibility that injunctive relief might be permitted by the doctrine of laches restated in Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024)).

Such a result should be countenanced only when there is a very strong justification for it. Thus, the rule of Subsection (a) is limited to situations in which the cause of action is governed by a rule that requires all damages from the continuing tort to be sought in a single action. In order for Subsection (a) to apply, it is not enough that it would be *possible* to bring a single action for all damages resulting from a continuing tort. Subsection (a) applies only when the rule of law governing the cause of action *requires* that all damages from the continuing tort must be sought in a single action.

Subsection (a) does not apply to recurring or continuous torts resulting in personal injury. Such torts are governed either by the normal accrual rules of § 2 (all-elements rule) and § 3 (discovery rule) (see Comment *c*) or by the special rule of Subsection (b) (see Comment *f*).

e. Applications of Subsection (a)

(1) Permanent versus continuing nuisance and trespass. In applying the statute of limitations to causes of action for nuisance and trespass, courts distinguish between permanent and

continuing nuisance and trespass. The factors most often used by courts to determine whether nuisance and trespass are permanent are: whether or not the nuisance and trespass are of a physically permanent character, and whether or not they can be abated at a reasonable cost. If nuisance and trespass are determined to be permanent, the law requires that all resulting damages must be sought in a single action and that such an action must be brought within the statute-of-limitations period following the first accrual of the cause of action. In other words, permanent nuisance and trespass constitute a continuing tort within the meaning of Subsection (a), and therefore the statute of limitations starts to run on all claims for damages as soon as it starts to run for any portion of the permanent nuisance and trespass. This result reflects the importance of predictability and settled expectations in the context of property relationships.

Continuing nuisance and trespass, by contrast, are subject to the ordinary accrual rules, under which actions can be brought at any time for torts that are still open under the statute of limitations. (The terms "continuing nuisance" and "continuing trespass" have been used by the courts since the 19th century to describe nuisance and trespass causes of action that are, nevertheless, subject to the general statute-of-limitations accrual rules. In order to avoid any possible confusion, it should be noted that continuing nuisance and trespass are not "continuing torts" within the meaning of this Section.)

Illustrations:

9. From time to time, Dashawn trespasses on Purdy's property and cuts and removes timber. Each of Dashawn's trespasses causes separately identifiable actionable injury, and the trespasses could be stopped at any time. None of the three categories in Subsections (a), (b), and (c) apply, and so although Dashawn's intrusions constitute a continuing trespass, they are not a continuing tort as defined by this Section. Because Dashawn's intrusions are not a continuing tort, the general statute of limitations applies. Under that rule, the statute of limitations begins to run separately for each act of trespass at the later of the times specified by § 2 (all-elements rule) or § 3 (discovery rule). Purdy can bring an action at any time for all acts of trespass on which the statute of limitations has not run at that time. See also Illustration 7.

10. Dogged Development Company constructs a 40-story office tower. The tower encroaches by six inches on neighboring property owned by Peerless Real Estate LLC. Abating the encroachment would require destroying and rebuilding the tower, at a cost

many times in excess of the damages to which Peerless is entitled. Therefore, the case is one of permanent trespass—and it is a continuing tort pursuant to Subsection (a). Under Subsection (a), Peerless must bring an action for all of its damages at the later of the times specified by § 2 (all-elements rule) or § 3 (discovery rule), measured from Peerless's first actionable injury. (This Illustration does not address the availability of injunctive relief, an issue which is discussed in Restatement Third, Torts: Remedies §§ 50, 53 (Tentative Draft No. 3, 2024).) See also Illustration 3.

(2) Single publication rule in defamation cases. Under the single-publication rule applied in defamation cases, "[a] radio or television broadcast, edition of a book or newspaper, exhibition of a movie or video, or posting on an online site" is treated as "a single publication so long as it remains substantially unaltered." See Restatement Third, Torts: Defamation and Privacy § 5(3) (Preliminary Draft No. 4, 2024). Only a single "action for damages may be maintained" for such a single publication, "regardless of the number of copies distributed." Id. § 5(4)(a). The single-publication rule "protects defendants from the prospect of excessive damages and from the multiplicity of actions that might otherwise result." Id. § 5, Comment *c*. "[C]ourts often indicate that a purpose of the single-publication rule is to prevent endless retriggering of the statute of limitations for a defamation action." Id. § 5, Comment *i*. Under the single-publication rule, most courts rule that the statute of limitations begins to run at the time of the first publication, regardless of how many subsequent publications are also included in the single publication. Id. Thus, under the single-publication rule, defamation is a continuing tort as defined by Subsection (a).

(3) Trade secret misappropriation. The Uniform Trade Secrets Act, enacted in 48 states, provides that a continuing trade secret misappropriation constitutes a single claim for which the statute of limitations starts to run when the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. UNIF. TRADE SECRETS ACT § 6 (UNIF. L. COMM'N 1979) (amended 1985). The federal Defend Trade Secrets Act contains a similar provision. See 18 U.S.C. § 1836(d). Under these statutes, trade secret misappropriation is a continuing tort as defined by Subsection (a). This rule discourages prospective plaintiffs from adopting a wait-and-see approach in order to determine whether the misappropriation of their trade secrets will be commercially successful before deciding whether to bring an action.

f. Subsection (b): no single tort in the series separately causes identifiable discrete injury. Subsection (b) applies to cases in which the plaintiff's injury is the *cumulative result* of a series of

continuing torts no one of which separately causes identifiable actionable injury and in which further exposure to the defendant's tortious conduct incrementally exacerbates the plaintiff's condition. In such instances, pursuant to Subsection (b), the statute of limitations does not start to run on *any* of the torts in the series until after the continuing torts against the plaintiff have ceased.

Illustration:

11. Same facts as Illustration 8, except that, in addition to pancreatic cancer, Karen alleges that, in negligently exposing her to toxic smoke, Flubem also caused her to suffer a breathing ailment, which is progressive such that additional exposure exacerbates the severity of her breathing disease. In her suit commenced in 2023, Karen still cannot recover for the pancreatic cancer because that claim is time-barred, but she can recover for the breathing ailment caused by exposure to toxic smoke because that is a continuing tort pursuant to Subsection (b).

As the black letter of Subsection (b) indicates, Subsection (b) operates only to defer the accrual of a cause of action that might otherwise be argued to accrue before the cessation of the tortious conduct; it does not accelerate the accrual of a cause of action that has not yet accrued at the time of the cessation of the tortious conduct. The function of the Subsection (b) exception is to allow the limitations period to stretch backward to cover the entire period of a continuing tort when the causation of the plaintiff's injury cannot be assigned to any particular time within that period. Subsection (b) is not intended to cause, and does not cause, the premature accrual of a cause of action that has not yet accrued at the time of the cessation of the tortious conduct—a situation that may occur, for example, because the plaintiff does not yet know of the injury or because no legally cognizable injury has yet occurred. See Illustration 12.

Illustration:

12. Same facts as Illustration 4, involving employment harassment for six years. The abuse occurs from 2014 until 2020, when Marjorie leaves her employment and no longer suffers Sam's abuse. In 2023, as a result of the accumulated abuse she previously suffered from Sam, Marjorie is diagnosed with stress cardiomyopathy. Marjorie suffered a continuing tort for purposes of this Section, but Marjorie's claim for stress cardiomyopathy did not accrue in 2020, at the time Marjorie left her employment. Instead, pursuant to §§ 2 and 3, Marjorie's claim for stress cardiomyopathy did not accrue until she was diagnosed with it.

Subsection (b) frequently finds application in medical malpractice cases in which the defendant has treated the plaintiff over a period of time, and the plaintiff's injury cannot be separately traced to any single act of malpractice.

Illustration:

13. Daniel, a physician, treats Patricia over a period of more than 20 years. During the course of treatment, Daniel allegedly commits medical malpractice by continuously prescribing a habit-forming drug to which Patricia becomes addicted. Patricia suffers injury, including movement disorders, as a cumulative result of Daniel's entire course of treatment; no portion of Patricia's injury can be separately identified as a result of any particular act of malpractice, and each act by Daniel incrementally exacerbated Patricia's condition. Pursuant to Subsection (b), Daniel's tort is a continuing tort, and the statute of limitations does not start to run on Patricia's claim for medical malpractice against Daniel until after the entire course of treatment ends. (This Illustration tables the question whether Patricia's cause of action against Daniel may also be affected by the continuous treatment rule, addressed in § 7.)

Subsection (b) also finds application in cases of intentional infliction of emotional distress in which the plaintiff's cause of action is based on the cumulative result of the defendant's entire course of conduct.

Illustration:

14. Over a period of more than 10 years, Derek subjects his wife, Pauline, to a pattern of verbal and physical abuse, until the marriage finally ends in divorce. Soon after the divorce, Pauline sues Derek for intentional infliction of emotional distress. Pauline's cause of action is a continuing tort pursuant to Subsection (b) because it is based on the cumulative effect of Derek's abusive conduct during the marriage, not on any particular abusive act, and each abusive action caused Pauline to suffer incremental emotional distress. Pursuant to Subsection (b), the statute of limitations did not start to run on Pauline's claim of intentional infliction of emotional distress until after the conduct ended. See also Illustration 4.

g. Subsection (c): false imprisonment. False imprisonment is a continuing tort pursuant to Subsection (c). As such, the statute of limitations does not start to run on a cause of action for false imprisonment until the false imprisonment ends. See Illustration 5. Accepted by the vast majority

of states, this rule recognizes the reality that in many, if not most, cases, a plaintiff subjected to false imprisonment may face serious obstacles to bringing an action while confined.

h. Effect of plaintiff's discovery of the tort. Some courts have stated that the plaintiff's discovery of the tort terminates the effect of any continuing tort rule. This Section rejects any such limitation. This Section's rules are not based upon the plaintiff's ability or inability to discover the plaintiff's cause of action. The rules set forth in Subsections (a), (b), and (c) therefore govern the continuing torts specified in those Subsections, regardless of any discovery.

REPORTERS' NOTE

Comment a. Sources and cross-references. For a colorful expression of judicial frustration with the state of the law on the application of statutes of limitations to continuing torts, see Nesti v. Vt. Agency of Transp., 2022 WL 1242673, at *6 n.4 (Vt. Super. Ct. 2022) ("[P]erhaps the defining characteristic of the 'continuing tort doctrine' is its signal lack of clear, articulable principles to guide future decision. Thus, in most respects, it is the antithesis of legal doctrine, a wild, riderless horse that responds unpredictably, if at all, to any attempt to rein it in through clear doctrinal commands."), aff'd, 296 A.3d 729, 741-742 (Vt. 2023). This Section attempts to provide the clear, articulable rules that the *Nesti* court found to be lacking.

For surveys of the application of statutes of limitations to continuing torts, see Lebanon Cnty. Emps.' Ret. Fund v. Collis, 287 A.3d 1160, 1196-1201 (Del. Ch. 2022) (stating that, when deciding on accrual method, "commentators recommend considering the gravamen of the claim and the nature of the harm, the accrual method's ability to maximize the equities and efficiencies of litigation, and the extent to which the method appropriately balances the policy considerations associated with statutes of limitations"); Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 326 (2007) (concluding that courts should consider "whether treating the claim as continuing in nature will promote equity or efficiency interests more effectively than the application of other accrual and tolling options"). See also DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1015-1022 (5th ed. 2019).

A series of decisions in Michigan exemplifies the confusion engendered by the use of the term "continuing torts rule" and its synonyms. In the first decision in the series, the Michigan Supreme Court abrogated the "continuing violations doctrine" (by which it meant the exception restated in Subsection (b) of the present Section). Garg v. Macomb Cnty. Cmty. Mental Health Servs., 696 N.W.2d 646, 655-659 (Mich. 2005). This led an intermediate appellate court to hold that it could no longer apply the general rule described in Comment *c* to recurring nuisance and trespass. Marilyn Froling Revocable Living Tr. v. Bloomfield Hills Country Club, 769 N.W.2d 234, 255-251 (Mich. Ct. App. 2009). The Michigan Supreme Court subsequently clarified that its prior holding did not apply to situations governed by Comment *c*. Twp. of Fraser v. Haney, 983 N.W.2d 309, 313-314 (Mich. 2022). To reduce the risk of this kind of confusion, this Restatement

does not use the term "continuing torts rule" or any other term that implies that there is a single rule governing the application of statutes of limitations to continuing torts.

Comment b. This Section addresses continuing torts, not continuing injury from a completed tort. For cases holding, consistent with Comment *b*, that the statute-of-limitations rules applicable to continuing torts do not apply to continuing injury from a completed tort, see, e.g., Smith v. State, 282 P.3d 300, 304-305 (Alaska 2012) (ruling that continuing tort doctrine applies to an "ongoing series of incidents," not to "an initial violation that causes alleged permanent harm"); Woodward v. Olson, 107 So. 3d 540, 544-545 (Fla. Dist. Ct. App. 2013) (ruling that continuing tort doctrine does not apply to ongoing effects of completed torts); No Drama, LLC v. Caluda, 177 So. 3d 747, 752 (La. Ct. App. 2015) (declining to apply continuing tort doctrine to abuse-of-process claim, because continuing tort doctrine does not apply to ongoing effects of original tort); Cooley v. Pine Belt Oil Co., Inc., 334 So. 3d 118, 127-128 (Miss. 2022) (reaffirming that continuing tort doctrine does not apply to continuing effects of completed tortious act); State v. Erie MetroParks, 923 N.E.2d 588, 594-595 (Ohio 2010) (holding that continuing tort doctrine does not apply to continuing effects of past act); Brandt v. County of Pennington, 827 N.W.2d 871, 876 (S.D. 2013) ("[I]n order for a tort to be a continuing tort, all of the elements of the tort must continue, not just the damages from the tort."); Pinder v. Duchesne Cnty. Sheriff, 478 P.3d 610, 626 (Utah 2020) (holding that continuing tort doctrine does not apply to continuing harm resulting from single tortious act).

Comment c. Recurring and continuous torts not specified in Subsections (a), (b), and (c) are subject to the normal accrual rules of § 2 (all-elements rule) and § 3 (discovery rule). Cases applying the general accrual rules, and distinguishing situations covered by the exceptional rules of Subsections (a), (b), and (c), include Rodrigue v. Olin Emps. Credit Union, 406 F.3d 434, 440-444 (7th Cir. 2005) (applying Illinois law) (ruling that continuing tort doctrine applies when a cause of action arises not from individually identifiable wrongs but from a series of acts considered collectively, so that conversion of hundreds of embezzled checks over a period of years gave rise to a separate cause of action for each conversion, to which statute of limitations would be applied individually); Chakra 5, Inc. v. City of Miami Beach, 254 So. 3d 1056, 1065 (Fla. Dist. Ct. App. 2018) (explaining that "[a] continuing tort is thus perhaps best understood as a tort in which the wrong cannot be described as a discrete event," and "[t]he fact that multiple discrete acts occurred over a period of time does not convert those acts into a continuing tort," so claims based on injuries prior to limitations period are untimely); Davies v. West Pub'g Co., 622 N.W.2d 836, 841-842 (Minn. Ct. App. 2001) (holding that continuing tort doctrine did not apply to series of distributions, each of which was a separate and distinct act that could have been challenged by plaintiffs, and limiting recovery to damages for distributions made within limitations period); Alston v. Hormel Foods Corp., 730 N.W.2d 376, 381-384 (Neb. 2007) (ruling that claim for damages caused by continuing tort can be maintained for damages caused by conduct within the limitations period, and stating that, seen in this light, "continuing tort doctrine" is not a separate doctrine so much as a straightforward application of basic principles); Covington v. Walker, 819 N.E.2d 1025, 1028 (N.Y. 2004) (explaining that, under continuous wrong doctrine, "repeated offenses are treated as separate rights of action and the limitations period begins to run as to each upon its commission");

Quality Built Homes Inc. v. Town of Carthage, 813 S.E.2d 218, 226 (N.C. 2018) ("[T]he 'continuing wrong' doctrine does nothing more than provide that the applicable limitations period starts anew in the event that an allegedly unlawful act is repeated").

The majority of courts limit the meaning of "continuing torts" to those torts subject to the special rules of Subsections (a), (b), and (c). See, e.g., Kovacs v. United States, 614 F.3d 666, 676 (7th Cir. 2010) (applying Illinois law) ("The [continuous tort] doctrine applies when 'a tort involves a continued repeated injury' and 'the limitation period does not begin until the date of the last injury or when the tortious act ceased.'"); Sunrise Resort Ass'n Inc. v. Cheboygan Cnty. Rd. Comm'n, 999 N.W.2d 423, 430 (Mich. 2023) ("As we recently explained, the continuing-wrongs doctrine provided plaintiffs a method to 'reach back to recover for wrongs that occurred outside the statutory period of limitations' when there were distinctive wrongs within a continuing series."). But see, e.g., Alston v. Hormel Foods Corp., 730 N.W.2d 376, 383 (Neb. 2007) ("[The] 'continuing tort doctrine' is not a separate doctrine, or an exception to the statute of limitations, as much as it is a straightforward application of the statute of limitations: It simply allows claims to the extent that they accrue within the limitations period.").

Comment d. Subsection (a): statute of limitations starts to run for the entire series as soon as it starts to run for any tort in the series. As described in the Reporters' Note to Comment *e*, the cases that apply the rule of Subsection (a) generally involve causes of action that require all damages from a continuing tort to be brought in a single action, as stated in Subsection (a). The Missouri Supreme Court held in Davis v. Laclede Gas Co., 603 S.W.2d 554, 556 (Mo. 1980), relying on *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1205-1206 (1950), that the same rule should apply whenever all damages from a continuing tort, past and future, are capable of ascertainment in a single action, but this extension of the rule has not been generally followed, and this Restatement does not adopt it, for the reasons stated in Comment *d*.

Comment e. Applications of Subsection (a)

(1) Permanent versus continuing nuisance and trespass. On nuisance and trespass generally, see Restatement of the Law Fourth, Property Volume 2, Division I, §§ 1.1, 1.3-1.5 (AM. L. INST., Tentative Draft No. 2, 2021) (trespass); id. §§ 2.1-2.4 (AM. L. INST., Tentative Draft No. 3, 2022) (private nuisance); id. §§ 1.2A-1.2F (AM. L. INST., Tentative Draft No. 4, 2023) (trespass).

For examples of the extremely voluminous case law distinguishing between permanent and continuing nuisance and trespass for statute-of-limitations purposes, see, e.g., Beatty v. Wash. Metro. Area Transit Auth., 860 F.2d 1117, 1122-1126 (D.C. Cir. 1988) (applying District of Columbia law) (finding issue of fact as to whether nuisance arising from vibrations caused by subway trains was permanent or continuing); Whittle v. Weber, 243 P.3d 208, 216-217 (Alaska 2010) (holding that, under theories of continuing trespass or nuisance, each harmful act constitutes a new cause of action for statute-of-limitations purposes, and a nuisance is continuing if it can be discontinued or abated); Starrh & Starrh Cotton Growers v. Aera Energy LLC, 63 Cal. Rptr. 3d 165, 170-171 (Ct. App. 2007) (explaining that "[a] permanent trespass is an intrusion on property under circumstances that indicate an intention that the trespass will be permanent," in which case the "cause of action accrues and the statute of limitations begins to run at the time of entry"); Oglethorpe

Power Corp. v. Forrister, 711 S.E.2d 641, 643-646 (Ga. 2011) (determining that statute of limitations barred recovery for nuisance, consisting of noise and vibration that had increased only in degree since power plant began operation); Ray v. Ashland Oil, Inc., 389 S.W.3d 140, 148-149 (Ky. Ct. App. 2012) (holding that, when the injury to the land is permanent and cannot be remedied at an expense reasonable in relation to the damage, only a one-time recovery brought within the limitation period is allowed); Jacques v. Pioneer Plastics, Inc., 676 A.2d 504, 506-508 (Me. 1996) (ruling that abatability is deciding factor in determining whether nuisance or trespass is permanent or continuing); Christian v. Atlantic Richfield Co., 358 P.3d 131, 140-146 (Mont. 2015) (holding that whether trespass or nuisance is permanent or continuing depends on standard of reasonable abatability); Russo Farms, Inc. v. Vineland Bd. of Educ., 675 A.2d 1077, 1084-1086 (N.J. 1996) (ruling that a nuisance is continuing when it is result of a condition that can be physically removed or legally abated and permanent when it cannot physically be removed); Hager v. City of Devils Lake, 773 N.W.2d 420, 430 (N.D. 2009) ("When the cause of the injury is a permanent structure and injunctive relief is not appropriate or practical, the injury gives rise to only one cause of action, not a series of actions."); Sustrik v. Jones & Laughlin Steel Corp., 197 A.2d 44, 46-47 (Pa. 1964) (holding that, "[i]f a nuisance at the time of creation is a permanent one, the consequences of which in the normal course of things will continue indefinitely, there can be but a single action," and the statute of limitations runs "from the time it first occurred" or "should reasonably have been discovered"); Forest Lakes Cmty. Ass'n, Inc. v. United Land Corp. of Am., 795 S.E.2d 875, 881-884 (Va. 2017) (stating that when recurring injuries to property, "in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action"); Taylor v. Culloden Pub. Serv. Dist., 591 S.E.2d 197, 203-205 (W. Va. 2003) (explaining distinction between permanent and temporary nuisance in terms of abatability and permanence of injury). But see Wise Bus. Forms, Inc. v. Forsyth County, 893 S.E.2d 32, 37-38 (Ga. 2023) (stating that when a nuisance is by its nature continuing, the plaintiff has the option to treat the nuisance as temporary or permanent). See generally Eric C. Surette, Annotation, *Accrual of Claims for Continuing Trespass or Continuing Nuisance for Purposes of Statutory Limitations*, 14 A.L.R.7th Art. 8 (originally published in 2016).

(2) Single-publication rule in defamation cases. On the application of the statute of limitations to defamation causes of action governed by the single-publication rule, see, e.g., Shively v. Bozanich, 80 P.3d 676, 685 (Cal. 2003) (explaining that, under single-publication rule, statute of limitations for defamation cause of action based on a publication generally is said to accrue on the "first general distribution of the publication to the public") (quotation omitted); Timothy L. Ashford, PC LLO v. Roses, 984 N.W.2d 596, 612-615 (Neb. 2023) (applying single-publication rule to internet posting); Arthaud v. Fuglie, 987 N.W.2d 379, 381-382 (N.D. 2023) (following cases from other jurisdictions and holding that the single-publication rule bars application of the discovery rule when the alleged defamatory communication was made to the public); Restatement Third, Torts: Defamation and Privacy § 5, Reporters' Note to Comment *i* (AM. L. INST., Preliminary Draft No. 4, 2024) (reviewing cases and analyzing in detail the standards used by different courts to determine when the statute of limitations begins to run for a

single publication); Robert A. Brazener, Annotation, *What Constitutes "Publication" of Libel in Order to Start Running of Period of Limitations*, 42 A.L.R.3d 807, at § 4 (originally published in 1972) (collecting cases and describing single-publication rule followed by many courts).

(3) Trade secret misappropriation. For an extended discussion of the application of the statute of limitations under the Uniform Trade Secrets Act, see Gognat v. Ellsworth, 259 P.3d 497, 500-505 (Colo. 2011) (observing that the Uniform Act "has the clear effect of precluding an injured party from delaying until the misuse of his trade secret has become sufficiently profitable to make his resort to legal action economically worthwhile"). The same rule has been held to apply under the federal Defend Trade Secrets Act. See Houser v. Feldman, 569 F. Supp. 3d 216, 225-226 (E.D. Pa. 2021). For a contrasting decision in one of the two states that have not adopted the Uniform Trade Secrets Act, see Andrew Greenberg, Inc. v. Svane, Inc., 830 N.Y.S.2d 358, 362 (App. Div. 2007) (holding that continuing covert use of trade secrets for commercial advantage is a continuing tort).

Comment f. Subsection (b): no single tort in the series separately causes identifiable discrete injury. For decisions applying the Subsection (b) exception, see, e.g., Limestone Dev. Corp. v. Village of Lemont, Ill., 520 F.3d 797, 801 (7th Cir. 2008) (applying federal law) ("The [function] of the misnamed [continuing violation] doctrine is to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought. It is thus a doctrine not about a continuing, but about a cumulative, violation.") (citation omitted); Heard v. Sheahan, 253 F.3d 316, 319-320 (7th Cir. 2001) (applying 42 U.S.C. § 1983) (stating that a violation is deemed "continuing," signifying that plaintiff can reach back to its beginning even if that beginning lies outside limitations period, when it would be unreasonable to require or even permit plaintiff to sue separately over every incident of defendant's unlawful conduct, and distinguishing cases in which repeated events give rise to discrete injuries); Page v. United States, 729 F.2d 818, 820-823 (D.C. Cir. 1984) (applying Federal Tort Claims Act) (holding that, in case involving gradual injury from cumulative impact of years of allegedly tortious treatment, statute of limitations did not accrue until treatment was terminated); Garneau v. Bush, 838 N.E.2d 1134, 1143 (Ind. Ct. App. 2005) (explaining that the continuing tort doctrine applies when "entire course of conduct combines to produce" a single injury, and "[w]hen this doctrine attaches, the statutory limitations period begins to run at the end of the continuing wrongful act"); Jeffries v. Mills, 995 P.2d 1180, 1188-1189 (Or. Ct. App. 2000) (characterizing alleged legal malpractice as a continuing tort because the plaintiff alleged "a single harm . . . that [was] the consequence of several allegedly negligent acts and omissions; . . . [not] a series of harms, any one or several of which might have been actionable at the time that the individual acts or omissions occurred"); Holland v. City of Geddes, 610 N.W.2d 816, 818 (S.D. 2000) (explaining that "[t]he primary rationale" for the continuing tort rule "is that when no discrete occurrence in continually wrongful conduct can be singled out as the principal cause of damage, the law regards the cumulative effect as actionable, and allows the limitations period to begin when the wrongful conduct ends"). Compare, e.g., Reynolds v. Great N. Ins. Co., 539 P.3d 930, 933 (Colo. Ct. App. 2023) (stating that application of continuing violation doctrine has been limited to discrimination cases in Colorado).

Cases applying the Subsection (b) exception to causes of action for medical malpractice include Ewing v. Beck, 520 A.2d 653, 661-665 (Del. 1987) (stating that, when treatment over time was "inexorably related so as to constitute one continuing wrong," statute of limitations ran from date of last negligent act); Cunningham v. Huffman, 609 N.E.2d 321, 324-326 (Ill. 1993) (ruling that, when injury is caused by cumulative results of continuing course of negligent medical treatment, statute starts to run on termination of treatment); Fedrick v. Quorum Health Res., Inc., 45 So. 3d 641, 642-643 (Miss. 2010) (ruling that nursing home's alleged negligent failure to provide needed feeding assistance fit within definition of continuing tort as one inflicted over a period of time, so that statute of limitations would run from date when feeding assistance was provided); Pitt-Hart v. Sanford USD Med. Ctr., 878 N.W.2d 406, 415 (S.D. 2016) (explaining that, in the context of medical malpractice, continuing tort "doctrine applies when harm is the cumulative effect of several treatments rather than the result of a single act," and statute of limitations commences when wrong terminates); Peteler v. Robison, 17 P.2d 244, 249 (Utah 1932) (permitting a medical malpractice plaintiff to recover for the entire course of treatment because "[f]rom the time [defendant] undertook to treat the case until he ceased to treat it he, as alleged, did so in a negligent . . . manner," so that whole course of treatment constituted but one cause of action); Caughell v. Grp. Health Coop. of Puget Sound, 876 P.2d 898, 901-906 (Wash. 1994) (ruling that, when plaintiff asserts claim for continuing negligent medical treatment, the statute of limitations starts to run at the time of the last negligent act).

Illustration 13, involving a course of medical treatment lasting more than 20 years, is based on *Caughell*, 876 P.2d at 901-906. The *Caughell* court went on to hold that, if the plaintiff discovered that the treatment had been negligent, the plaintiff's recovery would be limited to harm caused by negligence within the statute-of-limitations period prior to suit. Id. at 908-910. As explained in Comment *h*, this Restatement takes the contrary position.

Among the cases applying the Subsection (b) exception to causes of action for intentional infliction of emotional distress are Curtis v. Firth, 850 P.2d 749, 752-755 (Idaho 1993) (ruling in case of alleged continuing spousal abuse that concept of continuing tort originally applied in property cases should be extended to apply in other limited contexts, including, particularly, intentional infliction of emotional distress); Feltmeier v. Feltmeier, 798 N.E.2d 75, 86-88 (Ill. 2003) (holding that spousal abuse constituting intentional infliction of emotional distress constitutes a continued whole for prescriptive purposes, so that prescription does not begin to run until conduct terminates); Bustamento v. Tucker, 607 So. 2d 532, 537-542 (La. 1992) (finding in case involving intentional infliction of emotional distress through sexual harassment that the continuous nature of the alleged conduct has the dual effect of rendering such conduct tortious and delaying the commencement of prescription [the Louisiana civil-law counterpart of the statute of limitations]); Pierce v. Cook, 992 So. 2d 612, 618-620 (Miss. 2008) (stating that, when a tort involves continuing or repeated injury, the limitations period begins to run from date of last injury or when tortious acts cease and finding that plaintiff's claim for intentional infliction of emotional distress did not accrue until the date of the divorce decree); Barrington v. Sandberg, 991 P.2d 1071, 1073-1074 (Or. Ct. App. 1999) (holding that jury could regard defendant's improper sexual actions as a continuing tort

because "the incidents did not cause [the plaintiff] emotional distress at the time that they occurred," but rather "their full effect came out" and caused severe emotional distress during the limitations period). Compare, e.g., Davis v. Bostick, 580 P.2d 544, 547-548 (Or. 1978) (holding that continuing tort doctrine did not apply to claim against divorced husband for intentional infliction of emotional distress when plaintiff was harmed by each discrete act in series of acts).

Illustration 14, involving a pattern of verbal and physical spousal abuse, is based on *Feltmeier*, 798 N.E.2d at 86-88.

The rule of Subsection (b) is frequently applied in employment discrimination cases under Title VII of the Civil Rights Act of 1964. See, e.g., Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 301-306 (2007) (summarizing Title VII cases). Because this Restatement does not address the application of statutes of limitations to statutory causes of action (see § 1, Comment *e*), the Title VII cases are not treated in this Restatement.

A minority of decisions have reached the result stated in Subsection (b) in cases that fall outside the exceptional circumstances described in Subsection (b). See, e.g., Davis v. Farrell Fritz, P.C., 163 N.Y.S.3d 82, 86 (App. Div. 2022) (stating that, under continuing tort doctrine, statute of limitations began to run from date of last fraudulent act); Beavers v. Walters, 537 N.W.2d 647, 650 (N.D. 1995) (ruling that repeatedly receiving and retaining royalties known to belong to another is a continuing tort and that statute of limitations for a continuing tort does not begin to run until the tortious acts cease). Such decisions are not followed by this Restatement.

Comment g. Subsection (c): false imprisonment. For cases applying the well-established rule that the statute of limitations does not start to run on a claim for false imprisonment until the false imprisonment ends, see, e.g., Wallace v. Kato, 549 U.S. 384, 389-390 (2007) (applying 42 U.S.C. § 1983) (recognizing and applying distinctive rule that limitations period begins to run on an action for false imprisonment when the false imprisonment ends); McCabe v. Craven, 188 P.3d 896, 899-900 (Idaho 2008) (following *Wallace*); Dunn v. Felty, 226 S.W.3d 68, 70-74 (Ky. 2007) (following *Wallace*); Prince George's County v. Longtin, 19 A.3d 859, 872-877 (Md. 2011) (following the general rule); Green v. State, 109 N.Y.S.3d 839, 842 (Ct. Cl. 2019) (stating that "the purpose of measuring accrual of a wrongful confinement cause of action from the claimant's release from confinement is to recognize the legal difficulty a confined claimant faces in interposing a claim"). But see Eaglin v. Eunice Police Dep't, 319 So. 3d 225, 227-230 (La. 2018) (ruling that under Louisiana civil law, unlike the common law, period of prescription [the Louisiana civil-law counterpart of a statute of limitations] runs from commencement of false imprisonment). See generally M. C. Dransfield, Annotation, *When Statute of Limitations Begins to Run Against Action for False Imprisonment or False Arrest*, 49 A.L.R.2d 922 (originally published in 1956).

Claims based on abduction of a child from parental custody (see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 J (in Restatement Third, Torts: Miscellaneous Provisions (Tentative Draft No. 3, 2024)) have evoked differing responses from the courts, with some decisions holding that the statute of limitations does not start to run until the interference with parental custody ends, see, e.g., Montgomery v. Crum, 161 N.E. 251, 257-259 (Ind. 1928) (holding that actions of former husband and his parents in kidnapping daughter and keeping her

from her mother for nine years constituted one continuous wrong for which statute of limitations did not begin to run until cessation of acts constituting the wrong), while other decisions hold that the statute of limitations starts to run as soon as the interference begins, see, e.g., Leonhard v. United States, 633 F.2d 599, 613-614 (2d Cir. 1980) (applying 42 U.S.C. § 1983) (declining to apply continuing wrong doctrine to concealment of children pursuant to government witness-protection program, because government is virtually committed to continue protection for some period of time, so continuation should not give rise to new or renewed causes of action); Tinker v. Abrams, 640 F. Supp. 229, 231-233 (S.D.N.Y. 1986) (holding that abduction of children by noncustodial parent did not constitute continuing wrong and that statute of limitations ran from time of abduction). Depending on the facts, arguments can be made for both of these results. This Restatement does not attempt to state a rule to govern such cases.

Comment h. Effect of plaintiff's discovery of the tort. For cases holding, in accord with Comment *h*, that plaintiff's discovery of the tort does not terminate the operation of the rules described herein, see, e.g., Pugliese v. Superior Ct., 53 Cal. Rptr. 3d 681, 686-687 (Ct. App. 2007) (refusing to invoke discovery rule because a continuing tort is viewed as a whole, and the cause of action accrues upon the defendant's cessation of the tortious conduct); Feltmeier v. Feltmeier, 798 N.E.2d 75, 89 (Ill. 2003) (declining to apply discovery rule to a cumulative continuing tort); Coulon v. Witco Corp., 848 So. 2d 135, 138 (La. Ct. App. 2003) ("The continuous tort doctrine has no element of knowledge by the plaintiff in order to decide when prescription [the Louisiana civil-law counterpart of the statute of limitations] will begin to run."); Litz v. Maryland Dep't of Env't, 76 A.3d 1076, 1090 n.9 (Md. 2013) (stating that "the continuing harm doctrine tolls the statute of limitations regardless of a potential plaintiff's discovery of the wrong"); Alston v. Hormel Foods Corp., 730 N.W.2d 376, 384-387 (Neb. 2007) (holding that, regardless of when tort is discovered, the statute of limitations begins to run with respect to successive tortious acts at the time they each accrue, because otherwise "the tortfeasor would be free to continue behaving tortiously, without consequence"). For contrary decisions, see, e.g., Harvey v. Merchan, 860 S.E.2d 561, 568-569 (Ga. 2021) (determining that continuing tort theory applies only when the wrong and the injury are unknown to the plaintiff, as in case of continuing exposure to unknown hazard resulting from failure to warn); Markwardt v. Texas Indus., Inc., 325 S.W.3d 876, 894 (Tex. App. 2010) ("[T]he continuing-tort doctrine is rooted in a plaintiff's inability to know ongoing conduct is causing her injury . . . thus, the rationale for the doctrine no longer applies if the claimant has discovered her injury and its cause and the statute commences to run upon discovery.").

TOPIC 3

WHEN THE RUNNING OF THE STATUTE OF LIMITATIONS IS SUSPENDED (TOLLING)

Introductory Note: Rationale and Terminology

a. Rationale of tolling rules.

b. Terminology: varying usages of the term "tolling."

a. Rationale of tolling rules. Like the accrual rules of § 2 (all-elements rule) and § 3 (discovery rule), tolling rules are designed to give effect to one of the fundamental purposes of statutes of limitations, which is to provide plaintiffs with a reasonable legislatively defined period of time within which to bring an action. See § 1, Comment *f*; § 2, Comment *b*; § 3, Comment *b*. Tolling rules recognize that, even after the statute of limitations would otherwise start to run, circumstances may exist or arise that impair a plaintiff's ability to assert the plaintiff's claims. Tolling rules suspend the running of statutes of limitations in certain cases while such circumstances persist.

Most tolling rules are statutory. Common types of statutory tolling rules are listed, but not restated at length, in § 5. Certain tolling rules have been developed by the courts as common-law rules. These common-law tolling rules are restated in §§ 6 through 8.

b. Terminology: varying usages of the term "tolling." This Restatement reserves the term "tolling" for rules that suspend the running of the statute of limitations after the statute has begun to run. Some courts also use the term "tolling" more broadly—including when discussing certain accrual rules, such as the discovery rule (restated in § 3), and also when discussing doctrines such as equitable estoppel and fraudulent concealment (restated in §§ 9 and 10) that preclude the application of the statute of limitations in cases of defendant misconduct. Varying judicial usages of the term "tolling" may have practical consequences for, among other things, the amount of time available to plaintiffs to bring an action once the impediment to doing so has been removed.

§ 5. Statutory Tolling Rules

Most tolling rules are created by statute. This Restatement does not restate statutory tolling rules.

Comment:

a. Sources and cross-references.

b. Common types of statutory tolling rules.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. In particular, this Section supersedes § 899, Comment *f*, which

addressed certain statutory tolling rules. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024).

b. Common types of statutory tolling rules. Because Restatements generally restate common-law rather than statutory rules (see § 1, Comment *c*), and because statutory tolling rules vary considerably from one jurisdiction to another, this Restatement does not restate statutory tolling rules. Common types of statutory tolling rules include:

(1) Rules tolling the claims of minors;

(2) Rules tolling the claims of persons with certain mental disabilities; and

(3) Rules tolling claims against persons who are not subject to service of process or are otherwise not amenable to suit.

§ 6. Continuous Representation

The running of the statute of limitations on a client's cause of action against a lawyer or law firm for legal malpractice is tolled for any period of time during which the lawyer or law firm continues to represent the client with respect to the same or a substantially related matter.

Comment:

a. Sources and cross-references.
b. The continuous representation rule: support and rationale.
c. The continuous representation must be with respect to the same or a substantially related matter.
d. The continuous representation rule applies even if the client is aware of the malpractice.
e. Continuous representation rule distinguished from continuing legal malpractice.
f. Effect of lawyer's failure to disclose malpractice.
g. Application of the continuous representation rule to other professions.
h. Burden of proof.
i. Judge and jury.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. The American Law Institute approved the continuous representation rule in Restatement of the Law Third, The Law Governing Lawyers § 54, Comment *g*, and this Section carries forward that rule. For the analogous continuous treatment rule applicable to medical professionals and institutions, see § 7. For the doctrine of laches applicable to suits for

injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute. See § 1, Comment *c*.

b. The continuous representation rule: support and rationale. The continuous representation rule, which has been adopted by a majority of states, rests on the commonsense judgment that the law should not force a client to sue the client's lawyer or law firm for legal malpractice while the lawyer or law firm is representing the client with respect to the same or a substantially related matter. By tolling the statute of limitations while such representation continues, the continuous representation rule avoids the adverse impact that bringing a legal malpractice action would have on the continuing lawyer–client relationship, and it gives the lawyer or law firm an opportunity to mitigate or cure the adverse effects of the malpractice on the client. The continuous representation rule also avoids giving aid and comfort to the client's adversaries by revealing to them the extent to which the malpractice may have prejudiced the client's position.

Some courts view the continuous representation rule as no more than an application of the discovery rule restated in § 3. This view is unduly narrow. Even if the client is aware of the malpractice, the continuous representation rule serves an important function by allowing the lawyer or law firm the opportunity to attempt to avert the consequences of the malpractice, while preserving the client's right to sue for malpractice if the attempt is not wholly successful.

The continuous representation rule is most often applied in the context of legal malpractice. For that reason, this Section's black letter and Comments focus principally on the lawyer–client context. However, as Comment *g* explains, this Section is not limited to that relationship. The rule stated herein also applies to certain other professionals.

c. The continuous representation must be with respect to the same or a substantially related matter. In order for the continuous representation rule to apply, the continuous representation must be with respect to the same or a substantially related matter. It is not sufficient that the lawyer–client relationship is ongoing with respect to other unrelated matters. If the lawyer–client relationship has ended with respect to the subject matter of the malpractice, the reasons for the continuous representation rule, as described in Comment *b*, no longer apply. Whether two legal matters qualify as the same or substantially related can, of course, blur at the margin. However, beyond recitation of the general principle, the cases do not permit a more detailed definition of

what constitutes the same or a substantially related matter for purposes of the continuous representation rule.

Illustrations:

1. Accumulation Corporation regularly acquires other corporations. Regular Law Firm usually represents Accumulation Corporation in such acquisitions, and also gives ongoing legal advice to Accumulation Corporation on various topics. In the course of representing Accumulation Corporation in its acquisition of Acquired Company, Regular Law Firm commits malpractice. After Regular Law Firm's representation of Accumulation Corporation in that acquisition has been completed, the continuous representation rule does not toll the statute of limitations for Regular Law Firm's malpractice in that acquisition, despite the fact that Regular Law Firm continues to represent and advise Accumulation Corporation with respect to other unrelated matters, including its acquisition of other corporations.

2. Same facts as Illustration 1, except that, after the closing of Accumulation Corporation's acquisition of Acquired Company, Regular Law Firm continues to represent Accumulation Corporation in making efforts to mitigate or cure the results of Regular Law Firm's malpractice in that acquisition. The continuous representation rule tolls the statute of limitations for that malpractice so long as Regular Law Firm continues to make such efforts.

d. The continuous representation rule applies even if the client is aware of the malpractice. Some courts reason that the continuous representation rule no longer applies if the client is aware of the lawyer's malpractice. As explained in Comment *b*, this reasoning is unpersuasive. Even if the client is aware of the malpractice, the basic rationale of the continuous representation rule continues to be valid: The client should not be forced to sue the lawyer or law firm while the lawyer or law firm is representing the client with respect to the same or a substantially related matter.

e. Continuous representation rule distinguished from continuing legal malpractice. Although they both incorporate a version of the word "continue," continuing legal malpractice and the continuous representation rule are different. Continuing legal malpractice affects when the statute of limitations starts to run, while the continuous representation rule tolls the statute of limitations when it would otherwise have begun to run.

Continuing legal malpractice may be a continuing tort within the meaning of § 4(b). In such a case, the statute of limitations starts to run after the conclusion of the continuing legal malpractice. See Illustration 3.

By contrast, the continuous representation rule addressed in this Section does not address when the statute of limitations *begins* to run, but instead *tolls* the running of the statute of limitations after the statute would otherwise have begun to run. See Illustration 4.

Illustrations:

3. Same facts as Illustration 1. Accumulation Corporation's acquisition of Acquired Company is a complicated and protracted transaction lasting three years. Regular Law Firm's malpractice continues during that entire period, and no specific act of malpractice produces separately identifiable actionable injury. Regular Law Firm's malpractice is, thus, a continuing tort within the meaning of § 4(b). Under § 4(b) the statute of limitations does not begin to run until after the acquisition has been completed. After that point, the continuing tort rule of § 4(b) no longer applies.

4. Same facts as Illustration 3. As in Illustration 2, after the closing of Accumulation Corporation's acquisition of Acquired Company, Regular Law Firm continues to represent Accumulation Corporation in making efforts to mitigate or cure the results of Regular Law Firm's malpractice in that acquisition. As stated in Illustration 2, the continuous representation rule tolls the statute of limitations for that malpractice so long as Regular Law Firm continues to make such efforts. The continuous representation rule applies while Regular Law Firm is making such efforts, even though the continuing tort rule of § 4(b) no longer applies after the acquisition has been completed.

f. Effect of lawyer's failure to disclose malpractice. As § 10, Comment *f* explains, "[i]f the lawyer's conduct of a matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client." Restatement of the Law Third, The Law Governing Lawyers § 20, Comment *c*. As a result, even if the statute of limitations would otherwise start to run on a client's cause of action against the lawyer for malpractice after taking account of this Section's continuous representation rule, pursuant to § 10, Comment *f*, the statute of limitations on a legal malpractice claim does not start to run until the lawyer discloses the arguable malpractice to the client or until facts that the client knows or reasonably should know clearly indicate that

malpractice may have occurred. Restatement of the Law Third, The Law Governing Lawyers § 54, Comment *g*.

g. Application of the continuous representation rule to other professions. For the analogous continuous treatment rule applicable to medical professionals and medical institutions, see § 7. Most courts that have ruled on the question have applied the continuous representation rule to accountants and architects, and this Restatement adopts that position. Because of insufficient development in the case law, this Restatement takes no position on whether the continuous representation rule should be extended to other professions.

h. Burden of proof. The burden of proof is on the plaintiff seeking to invoke the continuous representation rule. Thus, a plaintiff seeking to defeat the defendant's statute-of-limitations defense has the burden of proving that the attorney–client relationship continued with respect to the same or a substantially related matter.

i. Judge and jury. Whether the requirements of the continuous representation rule are met is a question for the factfinder.

REPORTERS' NOTE

Comment b. The continuous representation rule: support and rationale. The continuous representation rule is the majority rule. See 3 RONALD L. MALLEN, LEGAL MALPRACTICE § 23:45 (2024 update) ("A substantial majority of courts has embraced the doctrine."). For cases supporting the continuous representation rule, see, e.g., DeLeo v. Nusbaum, 821 A.2d 744, 748-751 (Conn. 2003) (joining majority of states that have adopted continuous representation rule, modified to apply when plaintiff can show "(1) that the defendant continued to represent [the plaintiff] with respect to the same underlying matter, and (2) either that plaintiff did not know of the alleged malpractice, or that the attorney could still mitigate the harm caused by the alleged malpractice during the continued representation period"); Murphy v. Smith, 579 N.E.2d 165, 167-168 (Mass. 1991) (adopting continuous representation rule in attorney malpractice cases); Mullin v. Pendlay, 982 N.W.2d 330, 334 (N.D. 2022) (stating that legal malpractice claim accrues upon discovery (actual or constructive) of basis for claim or termination of representation, whichever is later); Smith v. Conley, 846 N.E.2d 509, 512 (Ohio 2006) (applying rule that legal malpractice statute of limitations starts to run on later of two dates: (1) when client should have known client may have injury caused by attorney, and (2) when attorney–client relationship terminated). See generally George L. Blum, Annotation, *Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R.5th 473, at § 4(a) (originally published in 2001) (citing cases).

A minority of states have declined to apply the continuous representation rule. These include, for example, Moix-McNutt v. Brown, 74 S.W.3d 612, 613-615 (Ark. 2002) (refusing to adopt discovery rule or continuous representation rule in the legal malpractice context); Larson & Larson,

P.A. v. TSE Indus., Inc., 22 So. 3d 36, 46-48 (Fla. 2009) (holding that continuous representation doctrine is inconsistent with Florida statutes and does not apply in Florida); Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 507 S.E.2d 411, 415 (Ga. 1998) (declining to adopt continuous representation rule); Channel v. Loyacono, 954 So. 2d 415, 420-421 (Miss. 2007) (stating that Mississippi does not follow the continuous representation rule); Clark v. Stover, 242 A.3d 1253, 1256 (Pa. 2020) (declining to apply the continuous representation rule because, as a tolling doctrine, it is most appropriately viewed as being within the province of the legislature); Epstein v. Brown, 610 S.E.2d 816, 818-820 (S.C. 2005) (refusing to adopt continuous representation rule in place of discovery rule set forth by the legislature); Story v. Bunstine, 538 S.W.3d 455, 465-469 (Tenn. 2017) (rejecting continuous representation doctrine, while acknowledging that it has been adopted by a majority of jurisdictions). See generally Blum, supra at §§ 4(b)-4(c) (citing cases).

Other cases reach results similar to the continuous representation rule in some situations by holding that the statute of limitations does not begin to run with respect to malpractice committed in a legal proceeding until the final determination of the underlying proceeding. See § 2, Comment *d*, and cases cited in the Reporters' Note thereto. See also John Peter Lee, Ltd. v. Eighth Jud. Dist. Ct. of State, 2016 WL 327869, at *2-3 (Nev. 2016) (declining to adopt continuous representation rule in place of litigation malpractice tolling rule, which operates in like manner and arrives at similar result).

Results similar to the continuous representation rule can also be achieved by means of a tolling agreement between the client and the lawyer or law firm (see § 11, Comment *c*), if the lawyer or law firm is willing to enter into a tolling agreement and the malpractice insurer permits it. These conditions, however, are not always satisfied.

Decisions explaining the rationale of the continuous representation rule include Shumsky v. Eisenstein, 750 N.E.2d 67, 70-73 (N.Y. 2001) (stating that continuous representation rule, like its medical malpractice counterpart, the continuous treatment rule, "recognizes that a person seeking professional assistance has a right to repose confidence in a professional's ability and good faith"; further appreciating the client's dilemma if the client were required to sue the attorney in the course of representation) (quotation omitted); VanSickle v. Kohout, 599 S.E.2d 856, 859-860 (W. Va. 2004) (explaining that the continuous representation rule "is designed, in part, to protect the integrity of the professional relationship by permitting the allegedly negligent attorney to attempt to remedy the effects of the malpractice" and to prevent the attorney from waiting out the statute-of-limitations period by continuing to represent the client until the limitations period has expired) (quotation omitted).

Comment c. The continuous representation must be with respect to the same or a substantially related matter. For cases illustrating the well-established proposition that the continuous representation rule requires continuous representation with respect to the same or a substantially related matter, see, e.g., Michaels v. Greenberg Traurig, LLP, 277 Cal. Rptr. 3d 1, 20-22 (Ct. App. 2021) (explaining that, under the continuous representation rule, the inquiry is not whether the attorney–client relationship still exists, but when representation in the specific matter terminated); Dondlinger v. Nelson, 942 N.W.2d 772, 779 (Neb. 2020) (stating that the continuous

representation rule requires "continuity of the relationship and services for the same or related subject matter") (quotation omitted). The case law does not provide a basis for more detailed standards for determining when matters are substantially related for purposes of the continuous representation rule. See generally 3 RONALD L. MALLEN, LEGAL MALPRACTICE § 23:48 (2024 update).

Comment d. The continuous representation rule applies even if the client is aware of the malpractice. As stated in 3 RONALD L. MALLEN, LEGAL MALPRACTICE § 23:44 (2024 update): "The policy reasons are as compelling for allowing an attorney to continue efforts to remedy a bad result, even if some damages have occurred and even if the client is fully aware of the attorney's error."

Cases holding (contrary to Comment *d*) that the continuous representation rule does not apply if the client is aware of the malpractice are based on the view (rejected in Comment *b*) that the continuous representation rule is nothing more than an application of the discovery rule. See, e.g., Skadburg v. Gately, 911 N.W.2d 786, 795-797 (Iowa 2018); Lyons v. Nutt, 763 N.E.2d 1065, 1070-1071 (Mass. 2002); Dondlinger v. Nelson, 942 N.W.2d 772, 779 (Neb. 2020); cf. Beane v. Dana S. Beane & Co., P.C., 7 A.3d 1284, 1290-1291 (N.H. 2010) (declining to adopt the continuous representation doctrine because the case did not involve innocent reliance by a client which doctrine seeks to protect).

Comment g. Application of the continuous representation rule to other professions. On the application of the continuous representation rule to accountants, see, e.g., Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 356-359 & n.6 (Ind. Ct. App. 2006) (extending continuous representation rule to accountants and citing cases in other jurisdictions); Stokoe v. Marcum & Kliegman LLP, 24 N.Y.S.3d 267, 268 (App. Div. 2016) (applying continuous representation doctrine to accountants based upon mutual understanding that accountants could be called upon to justify their audit findings in a government investigation); Ackerman v. Price Waterhouse, 683 N.Y.S.2d 179, 196-197 (App. Div. 1998) (stating that it is "beyond dispute" that continuous representation doctrine applies to accountants and finding "ample evidence" to support its application in this case).

Regarding the application of the continuous representation rule to architects, see, e.g., N. Mont. Hosp. v. Knight, 811 P.2d 1276, 1279-1281 (Mont. 1991) (applying continuing relationship rule to architects); N.Y. City Sch. Constr. Auth. v. Ennead Architects, LLP, 49 N.Y.S.3d 462, 463 (App. Div. 2017) (applying continuous representation rule to architects' attempts to remedy faulty design of etched-glass windows).

On the application of the continuous representation rule to other professions, see, e.g., Messmer v. KDK Fin. Servs., Inc., 83 N.E.3d 774, 779-781 (Ind. Ct. App. 2017) (declining to extend continuous representation rule to financial-services sector).

Comment h. Burden of proof. For the rule that the burden of proof is on the party seeking to invoke the continuous representation rule, see, e.g., DeLeo v. Nusbaum, 821 A.2d 744, 749-750 (Conn. 2003) (holding that plaintiff may invoke continuous representation rule when plaintiff can show "(1) that the defendant continued to represent [the plaintiff] with respect to the same underlying matter, and (2) either that plaintiff did not know of the alleged malpractice, or that the

attorney could still mitigate the harm caused by the alleged malpractice during the continued representation period").

Comment i. Judge and jury. Cases holding that whether the requirements of the continuous representation rule are satisfied is a question for the factfinder, unless the evidence is so clear that no reasonable factfinder could decide the question otherwise, include Michaels v. Greenberg Traurig, LLP, 277 Cal. Rptr. 3d 1, 20-22 (Ct. App. 2021) (finding genuine issue of fact as to when representation on specific subject matter terminated); Murphy v. Smith, 579 N.E.2d 165, 168 (Mass. 1991) (finding question of fact as to when defendant's representation began and when it was terminated); Mullin v. Pendlay, 982 N.W.2d 330, 335 (N.D. 2022) (ruling that there was a genuine issue of fact as to when defendant's representation terminated).

§ 7. Continuous Medical Treatment

The running of the statute of limitations on a patient's cause of action against a medical professional or medical institution for medical malpractice is tolled for any period of time during which the medical professional or medical institution continues to treat the patient for the same or a substantially related condition.

Comment:

a. Sources and cross-references.
b. The continuous treatment rule: support and rationale.
c. The continuous treatment must be for the same or a substantially related condition.
d. The continuous treatment rule applies even if the patient is aware of the malpractice.
e. The continuous treatment rule distinguished from continuing medical malpractice.
f. Burden of proof.
g. Judge and jury.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. The continuous treatment rule is the medical counterpart of the continuous representation rule, which The American Law Institute approved in Restatement of the Law Third, The Law Governing Lawyers § 54, Comment *g*, and which is carried forward in § 6. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute. See § 1, Comment *c*.

b. The continuous treatment rule: support and rationale. The continuous treatment rule (sometimes called the "continuing care exception"), which tolls the statute of limitations for

medical malpractice while the patient is being treated by the same medical professional or medical institution for the same or a substantially related condition, is the majority rule among courts that are not precluded from adopting it by legislation.

The rationale of the continuous treatment rule is the same as the rationale of the analogous continuous representation rule, which applies to legal malpractice claims and which is described in § 6. It would be incongruous to require a patient to sue a medical professional or medical institution for medical malpractice while the medical professional or medical institution is still treating the patient for the same or a substantially related condition. By tolling the statute of limitations during the course of such treatment, the continuous treatment rule avoids the adverse impact that bringing a medical malpractice action would have on the ongoing relationship between the patient and the medical professional or medical institution, and it gives the medical professional or medical institution an opportunity to mitigate or cure the adverse effects of the malpractice on the patient.

c. The continuous treatment must be for the same or a substantially related condition. In order for the continuous treatment rule to apply, the ongoing treatment must be for the same or a substantially related condition. It is not sufficient that the medical professional or medical institution continues to provide general care to the patient, or continues to provide treatment for other conditions. Whether two medical conditions qualify as the same or substantially related can, of course, blur at the margin. However, beyond recitation of the general principle, the cases do not permit a more detailed definition of what constitutes the same or a substantially related condition for purposes of the continuous treatment rule.

d. The continuous treatment rule applies even if the patient is aware of the malpractice. For the same reasons as in the case of the continuous representation rule which applies to legal malpractice (see § 6, Comment *d*), the continuous treatment rule addressed in this Section applies even if the patient is aware of the malpractice. Even if the patient is aware that the medical professional or medical institution has tortiously inflicted injury, the basic rationale of the continuous representation rule continues to apply: The patient should not be forced to sue the medical professional or medical institution while the professional or institution is still treating the patient for the same or a substantially related condition.

e. The continuous treatment rule distinguished from continuing medical malpractice. Although they both incorporate a version of the word "continue," continuing medical malpractice and the continuous treatment rule are different. Continuing medical malpractice affects when the

statute of limitations starts to run, while the continuous treatment rule tolls the statute of limitations when it would otherwise have begun to run.

Continuing medical malpractice may be a continuing tort within the meaning of § 4(b). In such a case, the statute of limitations does not begin to run until after the conclusion of the continuing medical malpractice. See Illustration 1.

By contrast, the continuous treatment rule addressed in this Section does not address when the statute of limitations *begins* to run, but instead *tolls* the statute of limitations after the statute would otherwise have begun to run. See Illustration 2.

Illustrations:

1. Daniel, a physician, treats Patricia over a period of more than 20 years. During the course of treatment, Daniel allegedly commits medical malpractice by continuously prescribing a habit-forming drug to which Patricia becomes addicted. Patricia suffers injury, including movement disorders, as a cumulative result of Daniel's entire course of treatment, and no portion of Patricia's injury can be separately identified as a result of any particular act of malpractice. Pursuant to § 4(b), Daniel's tort is a continuing tort, and the statute of limitations does not start to run on Patricia's claim for medical malpractice against Daniel until after the entire course of negligent treatment ends.

2. Same facts as Illustration 1, except that, after 15 years, Daniel stops prescribing the drug to which Patricia became addicted. However, for five additional years, Daniel continues to treat Patricia for conditions, including movement disorders, caused by Patricia's prior use of the drug. Because the alleged malpractice has ceased, the continuing tort rule of § 4(b) no longer applies. However, as a matter of law, the continuous treatment rule tolls the statute of limitations for as long as Daniel continues to treat Patricia for conditions caused by her prior use of the drug.

f. Burden of proof. A plaintiff seeking to defeat the defendant's statute-of-limitations defense bears the burden of showing an entitlement to the continuous treatment rule. Thus, the plaintiff has the burden of proving that the medical professional or medical institution continued to treat the patient for the same or a substantially related condition.

g. Judge and jury. Whether the requirements of the continuous treatment rule are met is a question for the factfinder.

REPORTERS' NOTE

Comment b. The continuous treatment rule: support and rationale. As stated in the Comment, the continuous treatment rule is the majority rule among courts that are not precluded from adopting it by legislation. For cases applying the continuous treatment rule, see, e.g., Cefaratti v. Aranow, 138 A.3d 837, 843-849 (Conn. 2016) (explaining and applying the continuous treatment rule); Parr v. Rosenthal, 57 N.E.3d 947, 957-960 (Mass. 2016) (adopting continuous treatment rule for medical malpractice actions); Borgia v. City of N.Y., 187 N.E.2d 777, 778-779 (N.Y. 1962) (adopting continuous treatment rule); Horton v. Carolina Medicorp, Inc., 472 S.E.2d 778, 780-781 (N.C. 1996) (adopting continuing course of treatment rule and stating that it is a tolling, not an accrual, doctrine); Frysinger v. Leech, 512 N.E.2d 337, 339-341 (Ohio 1987) (holding that medical malpractice statute of limitations starts to run "(a) when patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury, or (b) when physician–patient relationship for that condition terminates, *whichever occurs later*"). For cases applying more limited versions of the continuous treatment rule, see, e.g., Pledger v. Carrick, 208 S.W.3d 100, 103-104 (Ark. 2005) (explaining that the continuous treatment rule provides that, "[i]f treatment by the doctor is a continuing course" and patient's condition "is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment" for the patient's particular condition "has terminated," unless patient learns or should learn of doctor's negligence) (quotation omitted); Harrison v. Valentini, 184 S.W.3d 521, 523-525 (Ky. 2005) (adopting continuous course of treatment rule for medical malpractice cases, limited by a requirement of patient good faith); Mitchell v. Baton Rouge Orthopedic Clinic, L.L.C., 333 So. 3d 368, 378 (La. 2021) (clarifying that, in order for continuing treatment rule to suspend prescriptive period [the Louisiana civil-law counterpart of a statute of limitations], there must be showing (1) "that the physician provided continued treatment to the patient that is related to the alleged act of malpractice and that is more than perfunctory," and (2) "that the physician's subsequent conduct classifies as behavior" designed to prevent the plaintiff from asserting a claim, whether it be in the form of concealment, misrepresentation, fraud, or ill practices); Newton v. Mercy Clinic E. Cmties., 596 S.W.3d 625, 627-628 (Mo. 2020) (explaining that, under continuing care exception, medical malpractice statute of limitations does not begin to run if physician's care is continuing and essential to recovery); see also Ralph V. Seep, Annotation, *Accrual of Cause of Action for Purposes of Statute of Limitations in Medical Malpractice Actions Under Federal Tort Claims Act—Post*-Kubrick *Cases*, 101 A.L.R. Fed. 27, at §§ 13(a)-13(b) (originally published in 1991).

Courts refusing to apply the continuous treatment rule frequently do so on the ground that they are precluded from applying the rule by legislation that specifically governs the statutes of limitations for medical malpractice actions. See, e.g., Ewing v. Beck, 520 A.2d 653, 658-661 (Del. 1987) (ruling that continuous treatment rule is not accepted in Delaware because the legislature did not include it in the state's 1976 medical malpractice legislation); Cunningham v. Huffman, 609 N.E.2d 321, 324 (Ill. 1993) (rejecting continuous course of treatment rule in view of legislative inaction); Bonin v. Vannaman, 929 P.2d 754, 772-775 (Kan. 1996) (declining to recognize continuous treatment doctrine in view of legislative omission of continuous treatment rule from

medical malpractice statute of limitations); Edwards v. Andrews, Davis, Legg, Bixler, Milsten & Murrah, Inc., 650 P.2d 857, 860 (Okla. 1982) ("[T]he limitation period in medical malpractice actions as determined by statutory authority negates the application of the continuous treatment doctrine in Oklahoma."); Harrison v. Bevilacqua, 580 S.E.2d 109, 112-114 (S.C. 2003) (holding that adoption of continuous treatment doctrine would run afoul of clearly stated legislative policy); Stanbury v. Bacardi, 953 S.W.2d 671, 674-677 (Tenn. 1997) (ruling that common-law continuing medical treatment doctrine has been abrogated by judicial and legislative adoption of discovery rule in medical malpractice cases). Other cases reject the continuous treatment rule without relying on legislative action or inaction. See, e.g., Bogue v. Gillis, 973 N.W.2d 338, 342-349 (Neb. 2022) (ruling that continuous treatment doctrine applies only when there is a continuing course of negligent treatment and overruling prior inconsistent cases).

For the rationale justifying the continuous treatment rule, see Cefaratti v. Aranow, 138 A.3d 837, 845 (Conn. 2016) (explaining that the continuous treatment doctrine exists to "avoid creating a dilemma for the patient, who must choose between silently accepting continued corrective treatment from the offending physician, with the risk that [the patient's] claim will be time-barred or promptly instituting an action, with the risk that the physician-patient relationship will be destroyed") (quotation omitted); Newton v. Mercy Clinic E. Cmties., 596 S.W.3d 625, 627 (Mo. 2020) (explaining that the rule's purpose is to ensure that a patient "is not faced with the impossible choice of either disturbing a course of treatment by initiating suit against a caregiver or losing a viable cause of action"); Borgia v. City of N.Y., 187 N.E.2d 777, 779 (N.Y. 1962) ("It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent or by filing a notice of claim in the case of a city hospital."); Frysinger v. Leech, 512 N.E.2d 337, 341 (Ohio 1987) (stating that the continuous treatment rule "encourages the parties to resolve their dispute without litigation, and stimulates the physician to mitigate the patient's damages").

Comment c. The continuous treatment must be for the same or a substantially related condition. For cases holding that, in order for the continuous treatment rule to apply, the continuous treatment must be for the same or a substantially related condition, see, e.g., Cefaratti v. Aranow, 138 A.3d 837, 844 (Conn. 2016) (explaining that for purposes of the continuous treatment doctrine "the medical condition for which the patient received ongoing treatment must be connected to the injury of which the plaintiff complains"); Young v. N.Y. City Health & Hosps. Corp., 693 N.E.2d 196, 198-200 (N.Y. 1998) (ruling that continuous treatment doctrine did not apply when continuing visits to physician were for illnesses unrelated to alleged malpractice). As stated in the Comment, the cases do not permit a more detailed definition of what constitutes the same or a substantially related condition.

Comment d. The continuous treatment rule applies even if the patient is aware of the malpractice. For cases holding (contrary to Comment *d*) that the continuous treatment rule does not apply if the patient is aware of the malpractice, see, e.g., Ratcliff v. Graether, 697 N.W.2d 119, 123-125 (Iowa 2005) (holding that continuous treatment doctrine does not apply when plaintiff is on inquiry notice and declining to decide whether to reject the doctrine outright); Parr v. Rosenthal,

57 N.E.3d 947, 960-964 (Mass. 2016) (ruling that continuous treatment tolling ends once plaintiff has actual knowledge that physician's negligence was the cause of plaintiff's injury). These cases are contrary to the many cases holding that the basic rationale of the continuing treatment doctrine is that, even when the plaintiff knows that malpractice has occurred, it would be inappropriate to require the patient to sue while treatment is still ongoing. See Reporters' Note to Comment *b*.

Comment e. The continuous treatment rule distinguished from continuing medical malpractice. Illustration 1, involving a course of medical treatment lasting more than 20 years, is based on Caughell v. Grp. Health Coop. of Puget Sound, 876 P.2d 898, 901-906 (Wash. 1994). The *Caughell* court went on to hold that, if the plaintiff discovered that the treatment had been negligent, the plaintiff's recovery would be limited to the statute-of-limitations period prior to suit. Id. at 908-910. As explained in § 4, Comment *h*, this Restatement takes the contrary position.

Comment f. Burden of proof. For cases supporting the rule that the burden of proof is on the plaintiff seeking to invoke the continuous treatment rule, see, e.g., Pledger v. Carrick, 208 S.W.3d 100, 102 (Ark. 2005) (applying in a continuous treatment case the general rule that "once it is clear from the face of the complaint that the action is barred by the applicable statute of limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled"); Cefaratti v. Aranow, 138 A.3d 837, 843-844 (Conn. 2016) (stating that "a plaintiff is required to prove" the elements of the continuous treatment rule); Horton v. Carolina Medicorp, Inc., 472 S.E.2d 778, 781 (N.C. 1996) ("To benefit from this doctrine, a plaintiff must show both a continuous relationship with a physician and subsequent treatment from that physician.").

Comment g. Judge and jury. Cases holding that whether the requirements of the continuous treatment rule are satisfied is a question for the factfinder, unless the evidence is so clear that no reasonable factfinder could decide the question otherwise, include Cefaratti v. Aranow, 138 A.3d 837, 844 (Conn. 2016) (holding that genuine issues of material fact precluded summary judgment on application of continuous course of treatment doctrine); Newton v. Mercy Clinic E. Cmties., 596 S.W.3d 625, 628-629 (Mo. 2020) (affirming summary judgment for defendants because there was no genuine issue of material fact concerning inapplicability of continuing care exception).

§ 8. Equitable Tolling

Equitable tolling suspends the statute of limitations when both of the following conditions are satisfied:

(a) The plaintiff has been diligently pursuing the plaintiff's rights, and

(b) Some extraordinary circumstance prevents the plaintiff from bringing a timely action.

Comment:

a. Sources and cross-references.

b. The extraordinary circumstances under which equitable tolling applies are not amenable to restatement by general rules.

c. Equitable tolling is not a substitute for more specific statute-of-limitations rules.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. The black letter of this Section is derived from the rule of equitable tolling formulated by the Supreme Court of the United States as a matter of federal common law. The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute. See § 1, Comment *c*.

b. The extraordinary circumstances under which equitable tolling applies are not amenable to restatement by general rules. Because equitable tolling applies only in extraordinary circumstances, the specific circumstances under which equitable tolling applies are not amenable to restatement, and no attempt is made to restate those circumstances herein.

Illustration:

1. Prentice is attacked and left for dead by three assailants who all wear masks to conceal their identities. Despite the exercise of reasonable diligence, Prentice is unable to discover the identities of the three assailants until they plead guilty to attempted murder, years after the tort statute of limitations had expired—and Prentice brings suit soon after learning the assailants' identities. In the relevant jurisdiction (and contrary to this Restatement), the discovery rule (§ 3) and the doctrine of fraudulent concealment (§ 10) do not apply to concealment of the identities of the defendants. The court may determine that this case presents an extraordinary circumstance that justifies the application of the doctrine of equitable tolling to preclude defendants from relying on the statute of limitations to defeat Prentice's suit.

Many of the circumstances in which equitable tolling has been applied involve plaintiffs who have filed a timely action but in the wrong venue or tribunal. As explained in § 1, Comment *e*, such procedural matters are outside the scope of this Restatement.

c. Equitable tolling is not a substitute for more specific statute-of-limitations rules. Equitable tolling is not a substitute for the more specific statute-of-limitations rules restated

elsewhere in Part 1. If a case falls within the subject matter of a more specific statute-of-limitations rule, that rule is applied. For example, if a defendant's conduct misleads a plaintiff into missing the statute-of-limitations deadline, the rules to be applied are those found in § 9 (equitable estoppel) and § 10 (fraudulent concealment). If the requirements of more specific rules are not satisfied, equitable tolling—which is something of a catch-all—may be considered, but the mere fact that the more specific rules are not satisfied is not in itself an extraordinary circumstance justifying the application of equitable tolling.

REPORTERS' NOTE

Comment a. Sources and cross-references. As stated in Comment *a*, the black letter of this Section is derived from the rule of equitable tolling formulated by the Supreme Court of the United States as a matter of federal common law. See, e.g., Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (involving federal habeas corpus petition) ("Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.").

Numerous states have formulated the requirements for equitable tolling in similar terms. Many of the situations in which equitable tolling has been applied to suspend the statute of limitations would be addressed under this Restatement by more specific provisions of Part 1, including the discovery rule (§ 3), equitable estoppel (§ 9), and fraudulent concealment (§ 10). See, e.g., Weaver v. Firestone, 155 So. 3d 952, 957-963 (Ala. 2013) (ruling that plaintiff who was attacked and left for dead by defendants who wore masks to conceal their identities alleged type of extraordinary circumstances to which equitable tolling applies); Dean Witter Reynolds, Inc. v. Hartman, 911 P.2d 1094, 1099 (Colo. 1996) ("[E]quitable tolling of a statute of limitations is limited to situations in which either the defendant has wrongfully impeded the plaintiff's ability to bring the claim or truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts."); Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988) (explaining that, generally, equitable tolling has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum); Clay v. Kuhl, 727 N.E.2d 217, 223 (Ill. 2000) ("Equitable tolling of a statute of limitations may be appropriate if the defendant has actively misled the plaintiff, or if the plaintiff has been prevented from asserting his or her rights in some extraordinary way, or if the plaintiff has mistakenly asserted his or her rights in the wrong forum."); Williams v. Hawkins, 594 S.W.3d 189, 193-194 (Ky. 2020) (distinguishing equitable tolling from equitable estoppel and stating that equitable tolling applies when plaintiff pursues his rights diligently, but some extraordinary circumstance prevents him from bringing a timely action); Brantl v. Curators of Univ. of Mo., 616 S.W.3d 494, 501 (Mo. Ct. App. 2020) ("[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.") (quotation

omitted); Fausto v. Sanchez-Flores, 482 P.3d 677, 681-682 (Nev. 2021) (explaining that the court has required plaintiffs seeking equitable tolling to demonstrate at least that, despite their exercise of diligence, "extraordinary circumstances beyond their control prevented them from timely filing their claims"); Polanco v. Lombardi, 231 A.3d 139, 155-156 (R.I. 2020) (stating that equitable tolling requires either "a plaintiff who was not able to discover his or her injury despite diligent efforts or extraordinary circumstances that prevented a plaintiff from complying with the deadline despite using reasonable diligence"); Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 687 S.E.2d 29, 32-34 (S.C. 2009) (describing equitable tolling as judicially created tolling doctrine typically applied "in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control") (quotation omitted).

For alternative formulations of the requirements for equitable tolling, see, e.g., St. Francis Mem'l Hosp. v. State Dep't of Pub. Health, 467 P.3d 1033, 1040-1041 (Cal. 2020) (stating that equitable tolling applies in carefully considered situations "when three elements are present: (1) timely notice and (2) lack of prejudice, to defendant, and (3) reasonable and good faith conduct on the part of the plaintiff") (quotation omitted); In re Am. Int'l Grp., Inc., 965 A.2d 763, 812 (Del. Ch. 2009) ("[T]he doctrine of equitable tolling stops the statute of limitations from running while a plaintiff has reasonably relied upon the competence and good faith of a fiduciary. No evidence of actual concealment is necessary in such a case . . ."), aff'd on other grounds sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP, 11 A.3d 228 (Del. 2011); Trentadue v. Gorton, 738 N.W.2d 664, 679-680 (Mich. 2007) (stating that equitable tolling is limited to cases in which courts themselves have created confusion about the proper procedure for plaintiffs to follow); In re Fuchs, 900 N.W.2d 896, 905-906 (Neb. 2017) (explaining that the court has applied equitable tolling when the claimant alleged that it was enjoined from bringing a claim by another court or governmental authority); Binder v. Price Waterhouse & Co., L.L.P., 923 A.2d 293, 298 (N.J. Super. Ct. App. Div. 2007) ("Equitable tolling has generally been applied in three circumstances: (1) where the complainant has been induced or tricked by the adversary's misconduct into allowing the filing deadline to pass; (2) where a plaintiff has in some extraordinary way been prevented from asserting his rights; and (3) where a plaintiff has timely asserted his rights mistakenly by either defective pleading or in the wrong forum."); Bailey v. Gardner, 154 S.W.3d 917, 920 (Tex. App. 2005) ("Equitable tolling applies in situations where a claimant actively pursued his judicial remedies but filed a defective pleading during the statutory period, or where a complainant was induced or tricked by his adversary's conduct into allowing filing deadlines to pass.") (quotation omitted).

For decisions rejecting the doctrine of equitable tolling, see, e.g., Stubbs v. Hall, 840 S.E.2d 407, 419-422 (Ga. 2020) (noting that Georgia Supreme Court has never endorsed or applied doctrine of equitable tolling and declining to adopt doctrine for habeas corpus petitions in Georgia); Norton v. Everhart, 895 S.W.2d 317, 321 (Tenn. 1995) (declining to adopt doctrine of equitable tolling in civil cases, because existing doctrine of equitable estoppel, which requires a showing of defendant misconduct, strikes a more appropriate balance).

Comment b. The extraordinary circumstances under which equitable tolling applies are not amenable to restatement by general rules. Illustration 1, involving the plaintiff who was

attacked and left for dead by three masked assailants, is based on Weaver v. Firestone, 155 So. 3d 952, 957-963 (Ala. 2013).

Cases in which equitable tolling has been applied to save the claims of plaintiffs who filed an action timely but in the wrong venue or tribunal are among the cases cited and described in the Reporters' Note to Comment *a*. In many states, situations of this kind are addressed by savings statutes, which furnish such plaintiffs a legislatively fixed period of time to refile their action in a proper venue or tribunal.

TOPIC 4

EFFECT OF DEFENDANT MISCONDUCT

§ 9. Equitable Estoppel

If a defendant, by words or conduct, or by silence when the defendant has a duty to speak, causes a plaintiff not to bring a timely action, and the plaintiff's reliance on the defendant's words, conduct, or silence in forbearing to bring a timely action is reasonable, equitable estoppel bars the application of the statute of limitations until after the plaintiff's reasonable reliance has ceased.

Comment:

a. Sources and cross-references.
b. History, rationale, and support.
c. Equitable estoppel does not require intentional misconduct by the defendant.
d. Equitable estoppel requires reasonable reliance by the plaintiff.
e. Equitable estoppel and the discovery rule.
f. Length of time allowed for plaintiff to sue.
g. Burden of proof.
h. Judge and jury.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). For the use of equitable estoppel as a defense to tort liability, see Restatement Third, Torts: Miscellaneous Provisions § __ (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute.

See § 1, Comment *c*. The rule of this Section is applied separately to each cause of action by each plaintiff against each defendant. See § 1, Comment *g*.

b. History, rationale, and support. The application of equitable estoppel to bar resort to the statute of limitations when the defendant's own words or conduct, or silence when the defendant has a duty to speak, have led the plaintiff reasonably to forbear from bringing a timely action, is based on the fundamental principle that no one should benefit from their own wrong. The use of equitable estoppel for this purpose has been established at least since the 19th century. Today, virtually all jurisdictions recognize the availability of equitable estoppel as a bar to the statute of limitations when the plaintiff has reasonably relied on the defendant's misleading words or conduct, or silence when the defendant has a duty to speak, in failing to bring a timely action.

Illustrations:

1. Paul brings an action against his employer, Dauntless Terminal, based on an industrial disease that he contracted while working on Dauntless's premises and that is not covered by workers' compensation. At the time when Paul brings his action, the three-year statute of limitations has run. Paul alleges, however, that he was told by agents of Dauntless that he had seven years in which to sue, and, based on those assurances, his action is timely. If the factfinder finds that Dauntless's agents made those assurances to Paul and that Paul reasonably relied on those assurances, equitable estoppel prevents Dauntless from relying on the statute of limitations.

2. Dana, an employee of the federal government, is involved in an automobile accident with Porter. At the scene of the accident, Dana tells Porter that she was performing government duties at the time of the accident. Under the Westfall Act, 28 U.S.C. § 2679(b)(1), if Dana was performing government duties at the time of the accident, the sole tort remedy would be against the government. Accordingly, Porter sues the government but does not sue Dana. After the statute of limitations has run on an action against Dana, she testifies in her deposition that she was actually engaged in personal business at the time of the accident. If the factfinder finds that Porter reasonably relied on Dana's prior statement that she was performing government duties at the time of the accident, equitable estoppel precludes Dana from relying on the statute of limitations to defeat Porter's claim.

3. Neesha, a property owner, suffers property damage from an oil spill, caused by a leak from Dragon Oil Company's tanks. In a letter to Neesha, Dragon apologizes for the

contamination and promises that it will do whatever is necessary to rectify the situation and clean up her property, and Neesha, based on that representation, does not bring a timely suit against Dragon. If the factfinder finds that Neesha reasonably relied on Dragon's representation, Dragon is estopped from relying on the statute of limitations.

c. Equitable estoppel does not require intentional misconduct by the defendant. Although some courts have held that a showing of fraud or other intentional misconduct by the defendant is required in order to invoke equitable estoppel to preclude the application of the statute of limitations, most courts have not required such a showing. This Restatement adopts the majority rule. If the defendant's actions have led the plaintiff reasonably to forbear from bringing a timely action, the defendant should be estopped from taking advantage of the untimeliness that the defendant's own actions have caused, even if the defendant did not foresee or intend that result.

Illustration:

4. Same facts as Illustration 1. It does not matter to the result whether Dauntless Terminal's agents misstated the applicable statute-of-limitations period intentionally, negligently, or innocently. If the factfinder finds that Paul reasonably relied on the misstatement, equitable estoppel will prevent Dauntless from relying on the statute of limitations.

d. Equitable estoppel requires reasonable reliance by the plaintiff. The cases are uniform in requiring a showing of reasonable reliance by the plaintiff in order to invoke equitable estoppel to bar defendant's reliance on the statute of limitations. This requirement is parallel to the requirement of reasonable diligence under the discovery rule (see § 3) and the doctrine of fraudulent concealment (see § 10). All of these requirements are appropriate in light of the fact that the statute of limitations serves important legislative purposes, see § 1, Comment *f*, and should not be lightly set aside, see § 3, Comment *i*; § 10, Comment *g*.

Illustrations:

5. Planetary Corporation sues Darrell, its former counsel, alleging malpractice resulting in the dismissal of a case in which Darrell represented Planetary. Planetary's suit is untimely even after taking account of the continuous representation rule (§ 6) and other applicable rules, but Planetary contends that equitable estoppel bars Darrell from relying on the statute of limitations because, as an attorney, Darrell had a duty to disclose his possible malpractice (see § 10, Comment *f*). Darrell responds that Planetary failed to show

reasonable reliance because its two principal officers failed to read the lower-court decisions dismissing the litigation, which criticized Darrell for the alleged deficiencies in presenting the case that form the basis for the malpractice cause of action, although they and other members of Planetary's board of directors were aware of and discussed the decisions. Whether Planetary has shown reasonable reliance is a question of fact for the factfinder. See Comment *h*.

6. Precision Corporation retained Dunmore Law Firm for patent law advice concerning a new product it planned to sell. Dunmore advised Precision that the product did not infringe any existing patent. Thereafter, Tercel Corporation sued Precision for patent infringement. Dunmore continued to advise Precision that its legal position was sound. Precision won in the trial court, but, on appeal, Precision was held liable for patent infringement. Precision promptly sues Dunmore for malpractice, and Dunmore argues that the suit is time-barred because the malpractice cause of action accrued no later than the time when Precision was sued by Tercel. Equitable estoppel bars Dunmore's statute-of-limitations argument. As a matter of law, Precision was entitled to rely on its counsel's repeated assurances. Precision was not required to seek a second opinion merely because it had been sued by Tercel. (This Illustration takes no position on whether Dunmore, in fact, committed malpractice, when the malpractice cause of action accrued, or whether the continuous representation rule, as restated in § 6, applies.)

e. Equitable estoppel and the discovery rule. The doctrine of equitable estoppel and the discovery rule may lead to identical results in a particular case, but they are independent of each other, and each can apply when the other does not. Equitable estoppel can apply even when the plaintiff has full knowledge of the elements of the cause of action, if the plaintiff has reasonably relied on misleading conduct by the defendant in failing to bring a timely action. See Illustrations 1 and 3. Conversely, the discovery rule can apply even in the absence of misleading conduct by the defendant, if the plaintiff has not discovered, and in the exercise of reasonable diligence could not have discovered, all the necessary factual elements of the cause of action. See § 3, Illustration 3.

f. Length of time allowed for plaintiff to sue. No general rule can be stated as to how long the plaintiff has to bring an action after the plaintiff's reasonable reliance ends. Depending on the jurisdiction and the circumstances, the plaintiff may be allowed a reasonable time to bring an action—or the plaintiff may be entitled to the full statute-of-limitations period, running from the

date when the plaintiff's reasonable reliance ends. A given jurisdiction's choice between these alternatives may be influenced by whether or not the jurisdiction regards equitable estoppel as a tolling doctrine. See Introductory Note to Part 1, Topic 3, Comment *b*.

g. Burden of proof. The burden of proof is on the plaintiff seeking to employ the doctrine of equitable estoppel to defeat the application of a statute-of-limitations defense. Generally, then, this means that the plaintiff must establish that the plaintiff reasonably relied on the defendant's misleading words, conduct, or silence when the defendant had a duty to speak, in forbearing from bringing a timely action.

h. Judge and jury. Whether the requirements of the doctrine of equitable estoppel have been met is a question for the factfinder.

REPORTERS' NOTE

Comment b. History, rationale, and support. On the history of the application of equitable estoppel to statutes of limitations, see John P. Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1, 2-3 (1935). For a general discussion of equitable estoppel as a bar to statutes of limitations, see DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1038-1039 (5th ed. 2019).

The term "equitable estoppel," while firmly established in judicial usage, is misleading to the extent that it suggests that the application of equitable estoppel was limited to courts of equity before the merger of law and equity. See Dawson, supra at 2-3 ("Unlike 'fraud' and 'fraudulent concealment,' estoppel did not require the intercession of the Chancellor to establish its claim to social position. In no case has it been suggested that equitable actions can be saved from extinction more readily than legal actions. In New Jersey, it is true, the circuitous device is employed of an injunction in equity against the plea of the statute at law. In other states estoppel operates directly to strike down a plea of the statute without any distinction whatever between legal and equitable actions.") (footnotes and citations omitted). As a historical matter, the doctrine of estoppel originated in the common-law courts; it was then broadened by the courts of equity, and by the 18th century the common-law courts had adopted the broader equitable version of estoppel. See T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 21 REV. OF LITIG. 377, 385-387 (2008) (recounting this history).

The most-often-quoted statement of the rationale for applying equitable estoppel to statutes of limitations is found in Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-233 (1959) (applying Federal Employers' Liability Act) (footnotes with citations omitted): "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

Although courts vary somewhat on the doctrine's particulars, it is well established that equitable estoppel can serve to bar the defendant's successful invocation of a statute-of-limitations defense. See, e.g., Mauian Hotel, Inc. v. Maui Pineapple Co., 481 P.2d 310, 315 (Haw. 1971) (quoting Hornblower v. Geo. Wash. Univ., 31 App. D.C. 64, 75 (1908)) ("We think it is a well-settled principle that a defendant cannot avail himself of the bar of the statute of limitations, if it appears that he has done anything that would tend to lull the plaintiff into inaction, and thereby permit the limitation prescribed by statute to run against him."); Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd., 134 N.E.3d 370, 383 (Ind. 2019) (stating that equitable estoppel is typically linked to claims of fraudulent concealment, but doctrine also applies to other conduct that lulls a party into inaction); Nuccio v. Nuccio, 673 A.2d 1331, 1334-1335 (Me. 1996) (explaining that equitable estoppel applies when defendant's conduct actually induces plaintiff not to take timely action on claim; doctrine should be carefully and sparingly applied, and requires clear and satisfactory proof); Murphy v. Merzbacher, 697 A.2d 861, 866 (Md. 1997) (stating that equitable estoppel will not toll statute of limitations unless "the defendant held out any inducements not to file suit or indicated that limitations would not be pleaded," and plaintiff brought action within reasonable time after the conclusion of events giving rise to the estoppel) (quotation omitted); N. Petrochem. Co. v. U.S. Fire Ins. Co., 277 N.W.2d 408, 410 (Minn. 1979) (explaining that, to establish claim of estoppel from asserting statute of limitations, "plaintiff must prove that defendant made representations or inducements, upon which plaintiff reasonably relied, and that plaintiff will be harmed if the claim of estoppel is not allowed"); Weiss v. Rojanasathit, 975 S.W.2d 113, 120-121 (Mo. 1998) (stating that party is estopped to plead statute of limitations only if party made positive efforts to avoid bringing of suit or misled claimants); Tice v. Pennington, 30 P.3d 1164, 1169-1171 (Okla. Civ. App. 2001) (ruling that hospital's concealment of fact that kidney of wrong blood type was implanted gave rise to equitable estoppel against invoking statute of limitations); Fahrner v. SW Mfg., Inc., 48 S.W.3d 141, 146 (Tenn. 2001) (explaining that discovery rule applies whenever, and for whatever reason, plaintiff could not reasonably know he was injured, while equitable estoppel applies only when defendant has taken steps to affirmatively prevent plaintiff from filing timely action, as when defendant promises not to plead statute of limitations). See generally George L. Blum, Annotation, *Estoppel to Assert Statute of Limitations or Statute of Repose in Action for Malpractice of Health Care Provider*, 45 A.L.R.7th Art. 3, at § 2 (originally published in 2019); Annotation, *Estoppel Against Defense of Limitation in Tort Actions*, 77 A.L.R. 1044, at § II (originally published in 1932).

Equitable estoppel is a broad concept that finds application in many areas of the law, and the application of equitable estoppel in other areas of the law may differ in some particulars from its application to statutes of limitations.

Illustration 1, involving the worker suffering from an industrial disease, is based on Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-233 (1959) (applying Federal Employers' Liability Act).

Illustration 2, concerning the driver who stated that she was performing government duties at the time of the accident, is based on Jantz v. Allstate Ins. Co., 2018 WL 1040025, at *3-5 (Md. Ct. Spec. App. 2018).

Illustration 3, involving the oil spill, is loosely based on Holdgrafer v. Unocal Corp., 73 Cal. Rptr. 3d 216, 231-233 (Ct. App. 2008).

Comment c. Equitable estoppel does not require intentional misconduct by the defendant. While some jurisdictions require a showing of fraudulent or intentional misconduct by the defendant in order for equitable estoppel to preclude reliance on the statute of limitations, see, e.g., Park v. Spayd, 509 P.3d 1014, 1020-1021 (Alaska 2022), most jurisdictions (consistent with Comment *c*) do not require such a showing. A number of decisions affirmatively state that such a showing is not required. See, e.g., Mason v. Mobile County, 410 So. 2d 19, 21 (Ala. 1982) (stating that if defendant either innocently or fraudulently misleads plaintiff into believing that plaintiff can postpone bringing action until statute of limitations has expired, defendant may be estopped from raising bar of statute of limitations); Lantzy v. Centex Homes, 73 P.3d 517, 533 (Cal. 2003) (stating that "estoppel may arise although there was no designed fraud on the part of the person sought to be estopped"); Witherell v. Weimer, 421 N.E.2d 869, 875-876 (Ill. 1981) (explaining that equitable estoppel may arise from unintentional deception); L. Ruth Fawcett Tr. v. Oil Producers Inc. of Kan., 507 P.3d 1124, 1144-1145 (Kan. 2022) (stating that party asserting equitable estoppel need not show "other party intended to deceive, defraud, or mislead the moving party"); Baglio v. N.Y. Cent. R.R. Co., 180 N.E.2d 798, 801 (Mass. 1962) (explaining that estoppel does not require proof of actual fraud, but may be found when "one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow," and holding that jury could find estoppel based on statements by defendant's claim agents that they would settle plaintiff's claim) (quotation omitted); Hedgepath v. Am. Tel. & Tel. Co., 559 S.E.2d 327, 338 (S.C. Ct. App. 2001) (stating that equitable estoppel does not require intentional misrepresentation).

The fact that a showing of intentional misconduct by the defendant is not required is consistent with the rule applied when equitable estoppel is used as a defense to tort liability. See Restatement Third, Torts: Miscellaneous Provisions § __, Comment *f* and Reporters' Note thereto (AM. L. INST., Tentative Draft No. 3, 2024).

Illustration 4, like Illustration 1, is based on Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-233 (1959) (applying Federal Employers' Liability Act). The *Glus* court quoted the plaintiff's allegation that the defendant's agents "fraudulently or unintentionally" misstated the statute-of-limitations period, without suggesting that the result would be different if the misstatements were unintentional. 359 U.S. at 232 n.2.

Comment d. Equitable estoppel requires reasonable reliance by the plaintiff. It is well established that a showing of reasonable reliance by the plaintiff is required in order for equitable estoppel to bar resort to the statute of limitations. See, e.g., City of Birmingham v. Cochrane Roofing & Metal Co., Inc., 547 So. 2d 1159, 1167-1168 (Ala. 1989) (ruling that equitable estoppel

requires reasonable reliance, and that no reasonable person would have allowed statute of limitations to run in reliance on defendants' efforts to repair leaky roof); Putter v. N. Shore Univ. Hosp., 858 N.E.2d 1140, 1142-1143 (N.Y. 2006) (ruling that equitable estoppel was inappropriate as a matter of law based upon alleged misstatement by defendant's chief of infectious diseases because plaintiff had sufficient information available to require plaintiff to investigate whether there was a basis for a medical malpractice action, which plaintiff did not); Commc'ns Network Int'l, Ltd. v. Mullineaux, 187 A.3d 951, 960-965 (Pa. Super. Ct. 2018) (ruling that corporate officers failed to exercise due diligence to discover legal malpractice as a matter of law when they failed to read court opinions in underlying litigation). Compare, e.g., Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 633 N.E.2d 627, 631-632 (Ill. 1994) (holding that defendant law firm was equitably estopped from relying on statute-of-limitations defense when it assured client threatened with patent infringement action that its position was legally valid, and stating that "[i]t would be a strange rule if every client were required to seek a second legal opinion whenever it found itself threatened with a lawsuit").

According to Restatement Third, Torts: Miscellaneous Provisions § __, Comment *h* (AM. L. INST., Tentative Draft No. 3, 2024), reasonable reliance is required when equitable estoppel is used as a defense to tort liability, except in cases of intentional misrepresentation.

Illustration 5 is based on *Commc'ns Network Int'l, Ltd.*, 187 A.3d at 960-965, with a change in result. The court in that case held as a matter of law that the plaintiff failed to show reasonable reliance, but the Illustration concludes that this is a question of fact for the factfinder.

Illustration 6 is loosely based on *Jackson Jordan, Inc.*, 633 N.E.2d at 631-632.

Comment e. Equitable estoppel and the discovery rule. On the differences between equitable estoppel and the discovery rule, see Fahrner v. SW Mfg., Inc., 48 S.W.3d 141, 146 (Tenn. 2001) (explaining that discovery rule applies whenever, and for whatever reason, plaintiff could not reasonably know he was injured, while equitable estoppel applies only when defendant has taken steps affirmatively to prevent plaintiff from filing timely action).

Comment g. Burden of proof. For cases supporting the rule that the burden of proof is on the plaintiff seeking to employ the doctrine of equitable estoppel to defeat the application of a statute of limitations, see, e.g., N. Petrochem. Co. v. U.S. Fire Ins. Co., 277 N.W.2d 408, 410 (Minn. 1979) (explaining that, to establish claim of equitable estoppel from asserting statute of limitations, "plaintiff must prove that defendant made representations or inducements, upon which plaintiff reasonably relied, and that plaintiff will be harmed if the claim of estoppel is not allowed"); Zumpano v. Quinn, 849 N.E.2d 926, 929 (N.Y. 2006) ("It is therefore fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit.").

Comment h. Judge and jury. Cases applying the rule that whether the requirements of equitable estoppel have been satisfied is a question for the factfinder, unless the evidence is so clear that no reasonable factfinder could decide the question otherwise, include Baglio v. N.Y. Cent. R.R. Co., 180 N.E.2d 798, 801 (Mass. 1962) ("We think that, if the jury believed that the defendant's agents made the statements attributed to them, they could properly find that the

plaintiff was thereby induced to refrain from taking legal action."); Putter v. N. Shore Univ. Hosp., 858 N.E.2d 1140, 1143 (N.Y. 2006) ("Although the question of whether a defendant should be equitably estopped is generally a question of fact, here, given [plaintiff's] level of awareness and subsequent inaction, equitable estoppel is inappropriate as a matter of law."); Hedgepath v. Am. Tel. & Tel. Co., 559 S.E.2d 327, 339 (S.C. Ct. App. 2001) ("Whether the defendant's actions lulled the plaintiff into a false sense of security is usually a question of fact. However, summary judgment is proper where there is no evidence of conduct on the defendant's part warranting estoppel.") (quotation marks omitted).

§ 10. Fraudulent Concealment

If a defendant, by words or conduct, or by silence when the defendant has a duty to speak, commits fraud that causes a plaintiff not to bring a timely action, the doctrine of fraudulent concealment bars the application of the statute of limitations until after the plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, the defendant's fraud.

Comment:

a. Sources and cross-references.
b. History, rationale, and support.
c. The rules applicable to a cause of action for fraud generally also apply to fraudulent concealment.
d. Fraudulent concealment applies to concealment of all types of information that the plaintiff requires in order to bring a timely action.
e. Fraudulent concealment applies to fraudulent concealment before, during, or after a tortious act.
f. Nondisclosure by fiduciaries and others having a duty to disclose.
g. The plaintiff is charged with knowledge both of the facts that the plaintiff actually knows and of the facts that the plaintiff should know in the exercise of reasonable diligence.
h. Fraudulent concealment and the discovery rule.
i. Fraudulent concealment and equitable estoppel.
j. Length of time allowed for plaintiff to sue.
k. Burden of proof.
l. Judge and jury.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. The terms "plaintiff" and "defendant" include potential

plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute. See § 1, Comment *c*. The rule of this Section is applied separately to each cause of action by each plaintiff against each defendant. See § 1, Comment *g*.

b. History, rationale, and support. Like the doctrine of equitable estoppel (see § 9, Comment *b*), the doctrine of fraudulent concealment is based on the fundamental principle that no one should benefit from their own wrong. The doctrine of fraudulent concealment originated in courts of equity, and, by the 19th century, it had been adopted in courts of law. The doctrine that fraud bars the running of the statute of limitations until the fraud is discovered, or could have been discovered through the exercise of reasonable diligence, was first applied in cases in which the cause of action itself sounded in fraud. It was later extended to cases in which the existence of a cause of action other than fraud was concealed by fraud. Today most jurisdictions recognize the availability of fraudulent concealment as a bar to the statute of limitations.

c. The rules applicable to a cause of action for fraud generally also apply to fraudulent concealment. The rules applicable to a cause of action for fraud, as restated in Restatement Third, Torts: Liability for Economic Harm §§ 9-15, generally also apply to fraudulent concealment. (An important exception to this generalization, discussed in Comment *g*, is that a plaintiff alleging fraudulent concealment must meet a standard of reasonable diligence instead of justifiable reliance.)

Among the rules governing fraud causes of action that also apply to fraudulent concealment are the following:

(1) An actor commits fraud when the actor "fraudulently [as defined in the next paragraph] makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting." Restatement Third, Torts: Liability for Economic Harm § 9. In the case of fraudulent concealment, the defendant's purpose is generally to induce a plaintiff not to file a timely action.

(2) A misrepresentation is fraudulent "only if (a) the maker of it knows or believes that it is false, (b) the maker of it knowingly states or implies a false level of confidence in its accuracy, or (c) the maker of it knowingly states or implies a basis for the representation that does not exist." Id. § 10.

(3) A failure to disclose material information may be fraudulent if the actor has a duty to speak, including when "(a) the actor has made a prior statement and knows that it will likely mislead another if not amended, even if it was not misleading when made; [or] (b) the actor is in a fiduciary or confidential relationship that obliges that actor to make disclosures." Id. § 13(a), (b).

(4) A false statement of opinion may be fraudulent only when "(a) the parties are in a fiduciary or confidential relationship; or (b) the defendant claims to have expertise or other knowledge not accessible to the plaintiff and offers the opinion to provide the plaintiff with a basis for reliance." Id. § 14.

(5) A statement of the speaker's intention to perform a promise may be fraudulent "only if the intention does not exist at the time the statement is made." Id. § 15.

As the black letter of this Section states, fraudulent concealment may be carried out not only through words, but also through conduct that prevents the discovery of the facts necessary to bring a cause of action. Affirmative acts of concealment are required; mere passive failure to disclose does not suffice unless there is a duty to disclose. See Comment *f*. Examples of conduct that may amount to fraudulent concealment include destruction of evidence, alteration of evidence, concealment of the tortious act, and concealment of the identity of the tortfeasor.

The words or conduct on which a finding of fraudulent concealment is based must be those of the defendant or someone whose words or conduct are attributable to the defendant under principles such as actual authority, apparent authority, or respondeat superior. See Restatement Third, Torts: Miscellaneous Provisions, Vicarious Liability §§ 3, 6 (Tentative Draft No. 2, 2023); Restatement of the Law Third, Agency §§ 7.04, 7.07, 7.08. Words or conduct of a third party do not suffice, even if they have the effect of concealing the cause of action from the plaintiff.

d. Fraudulent concealment applies to concealment of all types of information that the plaintiff requires in order to bring a timely action. The doctrine of fraudulent concealment applies to all types of fraudulent concealment that cause a plaintiff not to bring a timely action, including, among other things, concealment of the tortious act itself, concealment of the wrongful nature of the tortious act, concealment of the resulting injury, and concealment of the defendant's identity. Some decisions state that concealment of the defendant's identity does not trigger the doctrine of fraudulent concealment, but this Restatement adopts the contrary position, because, logically, without knowing the identity of the defendant, the plaintiff is unable to bring an action against the

defendant. Compare § 3, Comment *d* (stating the same position in the context of the discovery rule).

Illustrations:

1. Patrick becomes ill with hepatitis A. Despite exercising reasonable diligence to find out how he was infected, Patrick learns only after the statute of limitations has run that 13 cases of hepatitis A were traced to Delicious Restaurant, at which Patrick had eaten dinner before he became ill. An employee of Delicious Restaurant was diagnosed with hepatitis A 12 days after Patrick ate there, but the restaurant manager instructed the restaurant staff not to discuss the infection with anyone, and he falsely told the health department that the infected employee had followed good hygiene. Based on these facts, the factfinder may conclude that Delicious Restaurant's fraudulent concealment bars reliance on the statute of limitations, because Delicious Restaurant's actions prevented Patrick from learning the identity of the defendant despite Patrick's exercise of reasonable diligence.

2. Donald, an attorney, represents Peter in a divorce proceeding. After the divorce is finalized, Peter sues Donald for legal malpractice for failing properly to advise Peter of the tax consequences of the property settlement in the divorce proceeding. Donald defends, claiming that, under the state's statute of limitations applicable to legal malpractice actions, the suit is time-barred. Peter proves that Donald fraudulently billed Peter for tax research and consultation with tax experts that did not in fact occur. The factfinder may conclude that Donald's fraudulent billing constituted fraudulent concealment that precludes Donald from relying on the statute of limitations to defeat Peter's cause of action for legal malpractice.

e. Fraudulent concealment applies to fraudulent concealment before, during, or after a tortious act. Many courts—perhaps even a majority—state that fraudulent concealment requires acts of concealment subsequent to and separate and distinct from the tortious act itself. This Restatement adopts the contrary position: the necessary acts of fraudulent concealment can occur before, during, or after the tortious act. Fraudulent concealment is equally blameworthy regardless of when it occurs. And, whenever it occurs, fraudulent concealment can prevent the plaintiff from filing a timely action despite the exercise of reasonable diligence. Whenever that is the case, the fundamental rationale of the doctrine of fraudulent concealment—that defendants should not benefit from their own wrong—applies, and the doctrine of fraudulent concealment should be applied to bar the defendant from claiming that the plaintiff's lawsuit is time-barred.

Illustration:

3. Prentice is attacked and left for dead by three assailants who all wear masks to conceal their identities. Despite the exercise of reasonable diligence, Prentice is unable to discover the identities of the three assailants until they plead guilty to attempted murder, years after the tort statute of limitations had expired—and Prentice brings suit soon after learning the assailants' identities. Prentice's suit is not time-barred. Fraudulent concealment bars the application of the statute of limitations despite the fact that the assailants engaged in no acts of fraudulent concealment subsequent to the tort itself.

f. Nondisclosure by fiduciaries and others having a duty to disclose. Fraudulent concealment generally requires affirmative words or conduct amounting to fraud (see Comment *c*), but mere failure to disclose is enough if the defendant has a duty to disclose. Fiduciaries such as trustees have a duty to disclose, and others may have such a duty depending on the circumstances. See Comment *c(3)* above and Restatement Third, Torts: Liability for Economic Harm § 13.

Lawyers are fiduciaries for their clients. See Restatement of the Law Third, The Law Governing Lawyers § 16, Comment *b*. Therefore, "[i]f the lawyer's conduct of a matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client." Id. § 20, Comment *c*. As a result, and consistent with the doctrine of fraudulent concealment, even if the statute of limitations would otherwise start to run on a client's cause of action against the lawyer for malpractice after taking account of the discovery rule (§ 3), the continuous representation rule (§ 6), and other applicable rules, the statute does not start to run until the lawyer discloses the arguable malpractice to the client or until facts that the client knows or reasonably should know clearly indicate that malpractice may have occurred. Restatement of the Law Third, The Law Governing Lawyers § 54, Comment *g*.

Illustration:

4. Diana, a lawyer, represents Penny in her divorce proceeding. As part of the divorce settlement, Penny receives title to her residence. However, Diana negligently fails to record Penny's title, resulting in financial loss to Penny when a judgment creditor levies on Penny's residence to satisfy a judgment against her ex-husband. Just after the limitations period has run, Diana informs Penny that Diana has an unwaivable conflict of interest because of Penny's possible malpractice cause of action against Diana. Diana's nondisclosure of the conflict of interest until after the statute of limitations has expired

constitutes fraudulent concealment, which will preclude Diana from asserting a statute-of-limitations defense.

Some courts hold that, like lawyers, medical professionals are fiduciaries who owe their patients a duty to disclose possible malpractice. However, The American Law Institute has determined in the Restatement Third, Torts: Medical Malpractice that the Institute takes no position on whether, or the extent to which, medical professionals are subject to liability for breach of fiduciary duty distinct from the duties and bases for liability specified in that Restatement. See id. § 3, Comment *c* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). The Restatement Third, Torts: Medical Malpractice does not specify a duty to disclose possible malpractice to patients. As a consequence, the Institute takes no position on whether, or the extent to which, a physician's silence on the heels of a medical error may constitute fraudulent concealment that precludes reliance on the statute of limitations. Of course, a physician, like any other actor, may commit fraudulent concealment by affirmative words or conduct. In addition, in some instances involving medical professionals or institutions, the continuous treatment rule tolls the running of the statute of limitations. For that rule and its application, see § 7.

g. The plaintiff is charged with knowledge both of the facts that the plaintiff actually knows and of the facts that the plaintiff should know in the exercise of reasonable diligence. Under the doctrine of fraudulent concealment, the plaintiff is charged with knowledge both of the facts that the plaintiff actually knows and of the facts that the plaintiff should know in the exercise of reasonable diligence. The standard of reasonable diligence under the doctrine of fraudulent concealment is the same as the standard of reasonable diligence under the discovery rule of § 3, which is described in § 3, Comment *i*. The term "reasonable diligence" embodies courts' expectation that a reasonable plaintiff will act with diligence to investigate whether there is a cause of action. In applying the standard of reasonable diligence, courts recognize that, in the absence of facts to the contrary, parties have a right to rely on the representations or silence of trusted professionals and fiduciaries. See Comments *f*, *h*.

Illustration:

5. Portia retains David, a lawyer, to represent her as a plaintiff in two separate actions involving two separate automobile collisions that caused injury to Portia's neck. David settles the first of the two actions without settling the second. As Portia is being prepared

by David's associate, Nada, for her deposition in the second action, Nada tells Portia that she believes that David might have committed malpractice by settling the first action without settling the second, because this staggered approach set the stage for the defendant in the second case to employ an "empty chair" defense and thereby blame all or most of Portia's neck injury on the first accident. Despite this statement, Portia does nothing to investigate the possibility of a malpractice action against David until after the limitations period has expired. As a matter of law, even if David committed fraudulent concealment by failing to reveal his possible malpractice, Portia cannot invoke the doctrine of fraudulent concealment because Nada's statement put Portia on inquiry notice of the possible malpractice, and Portia failed to act with reasonable diligence to investigate it. (This Illustration takes no position on whether David, in fact, committed malpractice. Nor does this Illustration address whether the continuous representation rule, restated in § 6, applies.)

The standard of reasonable diligence applicable to plaintiffs invoking fraudulent concealment stands in contrast to the standard of justifiable reliance applicable to plaintiffs asserting a cause of action for fraud, which simply "amounts to freedom from recklessness." Restatement Third, Torts: Liability for Economic Harm § 11, Comment *d*. These applicable standards differ for two reasons—one historical and the other founded on principle. The historical explanation is that the doctrine of fraudulent concealment originated in the courts of equity, and the equity courts insisted on a showing of reasonable diligence in order to invoke the doctrine. The principled explanation, here as in the case of the discovery rule, is that the statute of limitations embodies important legislative purposes, see § 1, Comment *f*, making it fitting to apply the more demanding standard of reasonable diligence if the plaintiff's failure to file within the statutorily prescribed time period is to be excused, see § 3, Comment *i.*

h. Fraudulent concealment and the discovery rule. Because both the doctrine of fraudulent concealment and the discovery rule of § 3 operate to prevent the running of the statute of limitations until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the elements of the cause of action, the doctrine of fraudulent concealment and the discovery rule will often yield identical results. There are two principal types of situations in which this is not the case.

First, if the discovery rule in a given jurisdiction does not apply to all elements of a tort cause of action or to all types of torts—contrary to the position adopted in this Restatement (see

§ 3, Comments *d* and *e*)—then the doctrine of fraudulent concealment may apply even though the discovery rule does not. In such an instance, the doctrine of fraudulent concealment may prevent the plaintiff's suit from being time-barred, even if the discovery rule would not.

Second, when the doctrine of fraudulent concealment applies, there will always be material facts that have been misrepresented by the defendant (or concealed despite a duty to disclose), while the discovery rule need not involve any misrepresentation or concealment by the defendant. When the defendant misrepresents or conceals material facts, it is less likely that the plaintiff will be found to have failed to exercise reasonable diligence for failing to uncover those facts. This is particularly true if the misrepresentation or omission is committed by a trusted fiduciary or professional.

i. Fraudulent concealment and equitable estoppel. A comparison of the elements of fraudulent concealment (§ 10) with those of equitable estoppel (§ 9) makes clear that a case that satisfies the requirements of fraudulent concealment will also satisfy the requirements of equitable estoppel (although the converse does not hold). This fact suggests that a jurisdiction might choose to use equitable estoppel to deal with cases of fraudulent concealment, without employing a separate doctrine of fraudulent concealment, and indeed, a few jurisdictions take this approach. Most jurisdictions, however, recognize separate doctrines of equitable estoppel and fraudulent concealment, and this Restatement follows those jurisdictions. Because equitable estoppel may involve less blameworthy conduct on the part of the defendant than fraudulent concealment (see § 9, Comment *c*), it is appropriate to distinguish between the two doctrines.

j. Length of time allowed for plaintiff to sue. No general rule can be stated as to how long the plaintiff, who has the benefit of this Section, has to bring an action after the plaintiff learns, or with reasonable diligence should have learned, of the existence of the elements of the cause of action. Depending on the jurisdiction and the circumstances, the plaintiff may be allowed a reasonable time to bring an action, or may be allowed the full statute-of-limitations period running from the date when the plaintiff learned or should have learned of the existence of the elements of the cause of action. A given jurisdiction's choice between these alternatives may be influenced by whether or not the jurisdiction regards fraudulent concealment as a tolling doctrine. See Introductory Note to Part 1, Topic 3, Comment *b*.

k. Burden of proof. The burden of proof is on the plaintiff seeking to employ the doctrine of fraudulent concealment to defeat the application of a statute-of-limitations defense. Accordingly,

the plaintiff generally has the burden to prove the elements of fraudulent concealment, as well as the plaintiff's exercise of reasonable diligence.

l. Judge and jury. Whether the requirements of the doctrine of fraudulent concealment have been met is a question for the factfinder.

REPORTERS' NOTE

Comment b. History, rationale, and support. The Supreme Court of the United States explained in Wood v. Carpenter, 101 U.S. 135, 139 (1879) (applying Indiana statute of limitations), that the doctrine of fraudulent concealment "was originally established in equity, and has since been made applicable in trials at law." The doctrine that fraud vitiates the statute of limitations originated in cases in which the cause of action itself sounded in fraud. See Bailey v. Glover, 88 U.S. (21 Wall.) 342, 347-350 (1874) (applying federal bankruptcy law) (reviewing English and American authorities in both law and equity, and holding that "when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him"). See also, e.g., Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 644-645 (2010) (applying Securities Exchange Act § 10(b)) (recounting history of the fraud rule); John P. Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 MICH. L. REV. 591, 597-606 (1933) (same). The fraudulent concealment doctrine was subsequently applied to cases in which the existence of a cause of action other than fraud was concealed by fraud. See id. at 619-621; John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, 875-877 (1933); see generally DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1033-1038 (5th ed. 2019).

For cases recognizing the availability of the doctrine of fraudulent concealment to preclude defendants from relying on the statute of limitations to bar the plaintiff's cause of action, see, e.g., DGB, LLC v. Hinds, 55 So. 3d 218, 224-228 (Ala. 2010) (holding that discovery rule in fraud statute of limitations applies to fraudulent concealment of existence of cause of action, because a party cannot benefit by the party's own wrong); West Brook Isles Partner's 1, LLC v. Com. Land Title Ins. Co., 163 So. 3d 635, 639 (Fla. Dist. Ct. App. 2015) (observing that fraudulent concealment focuses on subsequent actions "to keep the improper conduct shrouded from sight," and that, generally, plaintiff must show successful concealment of a cause of action and fraudulent means to achieve that concealment) (quotations omitted); Gittings v. Deal, 109 N.E.3d 963, 973 (Ind. 2018) (explaining that fraudulent concealment requires a showing that "either (1) the alleged wrongdoer actively concealed the cause of action and the claimant exercised due diligence to discover the cause of action, or (2) the parties' relationship—such as a fiduciary relationship—imposed on the alleged wrongdoer a duty to disclose the cause of action to the claimant"); Queensway Fin. Holdings Ltd. v. Cotton & Allen, P.S.C., 237 S.W.3d 141, 151 (Ky. 2007) (ruling that discovery rule does not toll the statute of limitations to allow plaintiff to "discover the identity of wrongdoer unless there is

fraudulent concealment or a misrepresentation by the defendant of his role in causing the plaintiff's injuries") (quotation omitted); DeCosse v. Armstrong Cork Co., 319 N.W.2d 45, 50-51 (Minn. 1982) (describing generally accepted doctrine that fraud tolls the statute of limitations); State v. McKenzie, 484 S.W.3d 320, 325 (Mo. 2016) ("The essence of a fraudulent concealment action is that a defendant, by his or her post-negligence conduct, affirmatively intends to conceal from plaintiff the fact that the plaintiff has a claim against the defendant."); Fine v. Checcio, 870 A.2d 850, 860 (Pa. 2005) (stating that the doctrine of fraudulent concealment "provides that the defendant may not invoke the statute of limitations, if through fraud or concealment, [defendant] causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts"); Borderlon v. Peck, 661 S.W.2d 907, 908-909 (Tex. 1983) ("Texas courts have long adhered to the view that fraud vitiates whatever it touches, and have consistently held that a party will not be permitted to avail himself of the protection of a limitations statute when by his own fraud he has prevented the other party from seeking redress within the period of limitations.").

In some states, statutes embody the doctrine. Examples include: CONN. GEN. STAT. § 52-595 ("If a person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."); HAW. REV. STAT. § 657-20 ("If any person who is liable to any of the actions mentioned in this part or section 663-3, fraudulently conceals the existence of the cause of action or the identity of any person who is liable for the claim from the knowledge of the person entitled to bring the action, the action may be commenced at any time within six years after the person who is entitled to bring the same discovers or should have discovered, the existence of the cause of action or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations."); 735 ILL. COMP. STAT. 5/13-215 ("If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards."); MASS. GEN. LAWS ch. 260, § 12 ("If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action."); MICH. COMP. LAWS § 600.5855 ("If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations."); MISS. CODE ANN. § 15-1-67 ("If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.").

In justifying the doctrine, courts frequently point to the fact that a party should not be permitted to take advantage of the party's own wrong. See, e.g., Pashley v. Pac. Elec. Co., 153 P.2d 325, 328 (Cal. 1944) ("[T]he defendant, having by fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong."); Harralson v. Monger, 206 S.W.3d 336, 340 (Ky. 2006) ("It is clearly not good public policy to allow a person who presents inaccurate information to benefit from the misrepresentation."); Masquat v. DaimlerChrysler Corp., 195 P.3d 48, 54-55 (Okla. 2008) ("[A] party who wrongfully conceals material facts and thereby prevents a discovery of his wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud.").

Comment c. The rules applicable to a cause of action for fraud generally also apply to fraudulent concealment. For cases describing the type of conduct that constitutes fraudulent concealment, see, e.g., Balog v. Ctr. Art Gallery-Hawaii, Inc., 745 F. Supp. 1556, 1572-1573 (D. Haw. 1990) (ruling that art dealer's actions in "repeatedly sending the plaintiffs the certificates of authenticity" and assuring them that their artworks were appreciating in value "effectively prevented the plaintiffs from discovering their cause of action" for forged artworks within the statute of limitations); Curry v. Thornsberry, 128 S.W.3d 438, 441-443 (Ark. 2003) (holding that, in order to toll the statute of limitations, there must be evidence of "some positive act of fraud . . . to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself") (quotation omitted); Coe v. Proskauer Rose, LLP, 878 S.E.2d 235, 244 (Ga. 2022) (stating that, in order to establish fraudulent concealment, a plaintiff must make three showings: "first, that the defendant committed actual fraud; second, that the fraud concealed the cause of action from the plaintiff, such that the plaintiff was debarred or deterred from bringing an action; and third, that the plaintiff exercised reasonable diligence to discover his cause of action, despite his failure to do so within the statute of limitation"); Emberton v. GMRI, Inc., 299 S.W.3d 565, 571-575 (Ky. 2009) (ruling that fraudulent concealment tolled statute of limitations when defendant ordered its employees not to discuss hepatitis A infections during health-department investigation and stating that "bad faith, evil design, or an intent by the wrongdoer to deceive or mislead or defraud in the technical sense is not essential") (quotation omitted); Brownell v. Garber, 503 N.W.2d 81, 85-86 (Mich. Ct. App. 1993) (ruling that, if plaintiff could prove that defendant attorney fraudulently misrepresented that attorney conducted tax research and consulted with tax experts and fraudulently billed plaintiff for such services, jury could conclude that such action was intended to fraudulently conceal cause of action for attorney's malpractice in failing to do so); DeCosse v. Armstrong Cork Co., 319 N.W.2d 45, 51 (Minn. 1982) (determining that asbestos manufacturers' lack of candor concerning potentially deleterious effects of asbestos exposure may rise to level of tortious fraudulent concealment); Cellupica v. Bruce, 853 N.Y.S.2d 190, 191-192 (App. Div. 2008) (rejecting claim of fraudulent concealment because there was no evidence that defendant intentionally misrepresented facts to plaintiff); Fine v. Checcio, 870 A.2d 850, 860 (Pa. 2005)

("The doctrine does not require fraud in the strictest sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception.").

For cases holding that fraudulent concealment may be accomplished through conduct that prevents the discovery of the facts necessary to bring a cause of action, see, e.g., In re Korean Ramen Antitrust Litig., 281 F. Supp. 3d 892, 905 (N.D. Cal. 2017) (applying federal and California antitrust laws) ("Generally, the sorts of affirmative acts described in the preceding pages—public pretextual statements, destruction or alteration of documents, and evidence that employees used methods to communicat[e] sensitive information that would not leave a 'trail'—are sufficient to support fraudulent concealment tolling statutes of limitations."); ChinaCast Educ. Corp. v. Chen Zhou Guo, 2016 WL 6645792, at *7 (C.D. Cal. 2016) (ruling that defendants' concealment of their alleged conversion by using a front man and shell company to carry out transaction sufficiently alleged fraudulent concealment tolling statute of limitations); Norris v. Bakker, 899 S.W.2d 70, 72 (Ark. 1995) (stating that there must be some positive act of fraud, "something so furtively planned and secretly executed" as to keep plaintiff's cause of action concealed, or perpetrated in such a way that it conceals itself) (citation omitted); De Haan v. Winter, 241 N.W. 923, 924 (Mich. 1932) ("Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent."); Roth v. Farner-Bocken Co., 667 N.W.2d 651, 659-660 (S.D. 2003) (finding sufficient evidence that defendant engaged in affirmative acts to prevent discovery of plaintiff's invasion of privacy cause of action); Robinson v. Baptist Mem. Hosp., 464 S.W.3d 599, 611-615 (Tenn. Ct. App. 2014) (ruling that, if physician's alteration of report to change original diagnosis was violation of standard of care, factfinder could infer fraudulent concealment); Watts v. Mulliken's Est., 115 A. 150, 153 (Vt. 1921) (holding that surreptitious withdrawal of money from another's bank account constituted fraudulent concealment: "It would be a manifest perversion of the [fraudulent concealment] statute to say that the carefully laid plan by which he acquired the money and escaped detection for more than six years was not a fraudulent concealment of the cause of action, and that, having thus kept his victim out of his rights, the statute of limitations could be successfully invoked for his protection.").

On the point that words or conduct of a third party do not suffice to establish fraudulent concealment by the defendant, see, e.g., Parrillo v. R.I. Hosp., 202 A.3d 942, 950 n.9 (R.I. 2020) (stating that it is not sufficient that one defendant has acted to conceal a cause of action against another defendant).

Comment d. Fraudulent concealment applies to concealment of all types of information that the plaintiff requires in order to bring a timely action. For decisions applying the doctrine of fraudulent concealment to cases in which the identity of the defendant was fraudulently concealed, see, e.g., Bernson v. Browning-Ferris Indus., 873 P.2d 613, 615-620 (Cal. 1994) (ruling that defendant that intentionally conceals its identity may be equitably estopped from asserting statute-of-limitations defense when the plaintiff is unable to discover defendant's identity by exercising reasonable diligence); Emberton v. GMRI, Inc., 299 S.W.3d 565, 571-575 (Ky. 2009) (ruling that fraudulent concealment tolled statute of limitations when defendant ordered its employees not to

discuss hepatitis A infections during health-department investigation); Harralson v. Monger, 206 S.W.3d 336, 337-340 (Ky. 2006) (holding that defendant who provided inaccurate exculpatory information to police officer investigating automobile accident was barred from relying on statute of limitations).

For decisions that, contrary to Comment *d*, decline to apply the doctrine of fraudulent concealment to concealment of the defendant's identity, see, e.g., Weaver v. Firestone, 155 So. 3d 952, 957 (Ala. 2013) (holding that statutory fraudulent concealment discovery rule applied to discovery of cause of action, not discovery of tortfeasor's identity); Int'l Bhd. of Carpenters & Joiners of Am., Local 1765 v. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local No. 803, 341 So. 2d 1005, 1006-1007 (Fla. Dist. Ct. App. 1976) (ruling that concealment of identity of liable party cannot be deemed the same as concealment of cause of action for purposes of fraudulent concealment); Baxter v. Gardere Wynne Sewell LLP, 182 S.W.3d 460, 464 (Tex. App. 2006) (holding that fraudulent concealment requires concealment of cause of action, not merely identity of defendant).

Illustration 1, concerning the plaintiff who contracts hepatitis A, is based on *Emberton*, 299 S.W.3d at 571-575.

Illustration 2, involving the attorney who fraudulently claims to have conducted tax research, is based on Brownell v. Garber, 503 N.W.2d 81, 85-86 (Mich. Ct. App. 1993).

Comment e. Fraudulent concealment applies to fraudulent concealment before, during, or after a tortious act. For cases that, consistent with this Comment, state that the doctrine of fraudulent concealment applies to conduct before or during, as well as after, a tortious act, see, e.g., Norris v. Bakker, 899 S.W.2d 70, 72 (Ark. 1995) (stating that fraudulent concealment may include acts "furtively planned and secretly executed . . . or perpetrated in a way that it conceals itself"); Frederick Rd. Ltd. P'ship v. Brown & Sturm, 756 A.2d 963, 975-976 (Md. 2000) (explaining that fraud "initially committed" is sufficient to preclude limitations defense to legal malpractice cause of action under doctrine of fraudulent concealment); Hall v. Pa. R. Co., 100 A. 1035, 1039 (Pa. 1916) ("But where some affirmative act of concealment takes place it is not material whether the concealment takes place previous, or subsequent, to the beginning of the cause of action."); Watts v. Mulliken's Est., 115 A. 150, 152 (Vt. 1921) ("While some material fact must be concealed by positive or affirmative act as distinct from mere silence . . . it is immaterial whether the concealment precedes, is concurrent with, or subsequent to, the beginning of the cause of action."). See also John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, 881 nn.15, 16 (1933) (citing other cases holding that fraudulent concealment may precede or accompany original wrongdoing). For a statute to the same effect, see MONT. CODE ANN. § 27-2-102(3)(b) (stating that fraudulent concealment may apply if "before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause").

As noted, contrary to Comment *e*, many courts, perhaps a majority, hold that the doctrine of fraudulent concealment applies only to fraudulent concealment that occurs after a tortious act. Examples include West Brook Isles Partner's 1, LLC v. Com. Land Title Ins. Co., 163 So. 3d 635,

639 (Fla. Dist. Ct. App. 2015) (stating that "[f]raudulent concealment . . . focuses on subsequent actions to keep the improper conduct shrouded from sight"); Downing v. Grossmann, 973 N.W.2d 512, 519-522 (Iowa 2022) (explaining that fraudulent concealment must be independent of and subsequent to the underlying tort); Heart of Am. Council, Boy Scouts of Am. v. McKenzie, 484 S.W.3d 320, 325 (Mo. 2016) ("The essence of a fraudulent concealment action is that a defendant, by his or her post-negligence conduct, affirmatively intends to conceal from plaintiff the fact that the plaintiff has a claim against the defendant.") (quotation omitted).

Illustration 3, concerning the plaintiff who is attacked and left for dead, is based on Weaver v. Firestone, 155 So. 3d 952, 957-968 (Ala. 2013). There, the court held (contrary to this Restatement) that under Alabama law the discovery rule (§ 3) and the fraudulent concealment doctrine did not apply to the concealment of the identities of the defendants, requiring the court to rely on the doctrine of equitable tolling (§ 8) to preclude the defendants from benefiting from the statute of limitations.

Comment f. Nondisclosure by fiduciaries and others having a duty to disclose. For when nondisclosure constitutes fraudulent concealment, see, e.g., Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215, 241-242 (1st Cir. 2005) (applying Massachusetts law) (holding that defendant's denials of misappropriation of certain trade secrets raised issue of fact as to fraudulent concealment and that if defendant had a fiduciary duty of disclosure, it would be required to prove that plaintiff had actual knowledge of misappropriations in order to defeat the claim of fraudulent concealment); Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 507 S.E.2d 411, 414 (Ga. 1998) (clarifying that "a confidential relationship" between the parties "imposes a greater duty on a defendant to reveal what should be revealed, and a lessened duty on the part of a plaintiff to discover what should be discoverable through the exercise of ordinary care," but the "fraud itself—the defendant's intention to conceal or deceive—still must be established, as must the deterrence of a plaintiff from bringing suit"); DeLuna v. Burciaga, 857 N.E.2d 229, 246 (Ill. 2006) (reaffirming principle "that a *fiduciary* who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of a cause of action, has fraudulently concealed that action, even without affirmative acts or representations"); Skadburg v. Gately, 911 N.W.2d 786, 798-799 (Iowa 2018) (explaining that, "[w]hen a fiduciary relationship exists, mere silence supplies the affirmative-act requirement" of fraudulent concealment); Lomont v. Bennett, 172 So. 3d 620, 625-635 (La. 2015) (concluding that attorney's failure to advise client of attorney's malpractice and conflict of interest until shortly after the peremptive period [the Louisiana civil-law counterpart of a statute of repose] had expired constituted fraudulent concealment, despite contrary finding of trial court); Watkins v. Hedman, Hileman & Lacosta, 91 P.3d 1264, 1270 (Mont. 2004) (stating that "if [the attorney] committed the underlying acts of malpractice, and if in each instance, she actively concealed her malpractice, then that should not inure to her benefit").

For examples of cases holding that medical professionals have a duty to disclose possible malpractice to patients, see Cunningham v. Huffman, 609 N.E.2d 321, 325 (Ill. 1993) ("If the treating physician should discover his or her own negligence, it is that physician's duty to fully disclose the negligence and its ramifications."); Blackford v. Welborn Clinic, 172 N.E.3d 1219,

1229-1231 (Ind. 2021) (ruling that fraudulent concealment based on "passive concealment" by fiduciary ends when fiduciary relationship is terminated); Strong v. Univ. of S.C. Sch. of Med., 447 S.E.2d 850, 852 (S.C. 1994) (ruling that fraudulent concealment defense to statute of limitations flows from physician–patient relationship, and "[w]hen the relationship ends, the duty to disclose, which is the basis of fraudulent concealment claim, ceases to exist absent extenuating circumstances such as the withholding or altering of plaintiff's medical records"); cf. Tice v. Pennington, 30 P.3d 1164, 1169-1171 (Okla. Civ. App. 2001) (ruling that hospital's concealment of fact that kidney of wrong blood type was implanted gave rise to equitable estoppel against invoking statute of limitations). Other cases involving medical providers proceed on the basis that affirmative words or conduct must be shown to establish fraudulent concealment. See, e.g., Robinson v. Baptist Mem. Hosp., 464 S.W.3d 599, 611-615 (Tenn. Ct. App. 2014) (ruling that, if physician's alteration of report to change original diagnosis was violation of standard of care, factfinder could infer fraudulent concealment).

Illustration 4, concerning the attorney who fails to disclose a conflict of interest to the client, is based on Lomont v. Bennett, 172 So. 3d 620, 625-635 (La. 2015).

Comment g. The plaintiff is charged with knowledge both of the facts that the plaintiff actually knows and of the facts that the plaintiff should know in the exercise of reasonable diligence. For thoughtful decisions holding that the standard of reasonable diligence is the same under the discovery rule and the doctrine of fraudulent concealment, see Diamond v. Davis, 680 A.2d 364, 378 (D.C. 1996) ("We think that a focus on the plaintiff's diligence, rather than on the defendant's misconduct, is more appropriate given the purpose of statutes of limitation to protect defendants from stale claims . . . ."); Fine v. Checcio, 870 A.2d 850, 860-861 (Pa. 2005) (ruling that the standard of reasonable diligence which applies under discovery rule should also apply to fraudulent concealment). Although no other decisions have been found that expressly address the issue, other decisions implicitly assume that the standard of reasonable diligence is the same in both cases.

On the historical insistence by courts of equity that a plaintiff must act with reasonable diligence in order to benefit from the doctrine, see, e.g., Stearns v. Page, 48 U.S. (7 How.) 819, 828-829 (1849) (applying Maine statute of limitations) (stating that courts of chancery exercise great caution in cases alleging fraudulent concealment or mistake to extend the statute of limitations, "[a]nd especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made"). This insistence represented an application of the principle that "equity aids the vigilant, not those who slumber on their rights," a principle discussed in 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 418 (John Norton Pomeroy, Jr. ed., 4th ed. 1918).

For cases illustrating the application of the requirement of reasonable diligence under the doctrine of fraudulent concealment, see, e.g., Walsh v. Swapp Law, PLLC, 462 P.3d 607, 617-620 (Idaho 2020) (determining that plaintiff was put on inquiry notice of legal malpractice claim when defendant's associate attorney "alluded to the possibly negligent nature" of defendant attorney's advice); Regjovich v. First W. Invs., Inc., 997 P.2d 615, 619-620 (Idaho 2000) (ruling that

misstatement of ownership of property by defendant's insurer did not give rise to estoppel when plaintiff "had the time and means to discover the identity of the owner with reasonable diligence"); Mann v. Arnos, 186 N.E.3d 105, 117-120 (Ind. Ct. App. 2022) (stating that Indiana law requires the plaintiff to act with reasonable care and due diligence in order to benefit from doctrine of fraudulent concealment and holding as a matter of law that plaintiffs failed to meet the standard in investigating fatal shooting); Redwing v. Cath. Bishop for Diocese of Memphis, 363 S.W.3d 436, 465-467 (Tenn. 2012) (holding that plaintiff's alleged inquiry and defendant's alleged misleading response provided basis for reasonable factfinder to conclude both that defendant engaged in fraudulent concealment and that plaintiff exercised reasonable diligence).

Illustration 5, involving the client who fails to investigate after being told that the attorney might have committed malpractice, is based on *Walsh*, 462 P.3d at 617-620.

Comment h. Fraudulent concealment and the discovery rule. For cases making the point that a plaintiff is less likely to be found lacking in reasonable diligence by reason of failing to uncover facts that have been fraudulently concealed, especially by a trusted fiduciary or professional, see, e.g., Kilbourn v. Sunderland, 130 U.S. 505, 519 (1889) ("We hold that the complainants moved with sufficient promptness upon discovering the fraud, and that although reposing confidence in their agents, they may have neglected availing themselves of some source of knowledge they might have sought, the defendants cannot be allowed to say that complainants ought to have suspected them, and are chargeable with what they might have found out upon inquiry aroused by such suspicion."); Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 507 S.E.2d 411, 415 (Ga. 1998) (clarifying that "[a] confidential relationship between the parties imposes a greater duty on a defendant to reveal what should be revealed, and a lessened duty on the part of a plaintiff to discover what should be discoverable through the exercise of ordinary care"); Christy v. Miulli, 692 N.W.2d 694, 703 (Iowa 2005) (stating that a physician who misrepresents facts is in no position to fault patient who reasonably relies on those misrepresentations).

Comment i. Fraudulent concealment and equitable estoppel. For examples of courts using equitable estoppel to deal with cases involving fraudulent concealment, see, e.g., Park v. Spayd, 509 P.3d 1014, 1020-1021 (Alaska 2022) (stating that, to establish equitable estoppel, "a plaintiff must produce evidence of fraudulent conduct upon which [the plaintiff] reasonably relied when forbearing from suit") (quotation omitted); Gen. Stencils, Inc. v. Chiappa, 219 N.E.2d 169, 170-171 (N.Y. 1966) (ruling that former head bookkeeper was equitably estopped from pleading limitations defense to former employer's action to recover amounts which former head bookkeeper converted from petty-cash funds and fraudulently concealed thereafter, and stating: "Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing—a carefully concealed crime here—which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.").

The doctrine of equitable estoppel requires reasonable reliance on the part of the plaintiff in order to preclude the defendant from invoking the statute of limitations (§ 9), while the doctrine of fraudulent concealment requires reasonable diligence on the part of the plaintiff (§ 10). The

Reporters' research has unearthed no decision analyzing the differences (if any) between the standards of reasonable reliance and reasonable diligence in this context. The few decisions that have touched on the question imply that the standards are equivalent. See, e.g., Pizzitolo v. Biomet Orthopedics, Inc., 2017 WL 1133622, at *6 (N.D. Ind. 2017) ("[Plaintiff's] discussion with his treating surgeon about the cause of his injury demonstrated reasonable diligence and his reasonable reliance on his surgeon's opinion tolls the statutes of limitations."); Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 516 (S.D. Tex. 2001) ("The statute of limitations is tolled until the fraud is discovered or could have been discovered with reasonable diligence. This is equivalent to a requirement of reasonable reliance, because once the plaintiff knows or should have known of the deceit, reliance is no longer reasonable.") (inner quotations and citations omitted).

Comment k. Burden of proof. For cases supporting the rule that the burden of proof is on the plaintiff seeking to employ the doctrine of fraudulent concealment to defeat the application of a statute of limitations, see, e.g., DGB, LLC v. Hinds, 55 So. 3d 218, 226 (Ala. 2010) (holding that the burden is upon those claiming the benefit of the fraudulent concealment statute to show that they are entitled to the doctrine's protection); West Brook Isles Partner's 1, LLC v. Com. Land Title Ins. Co., 163 So. 3d 635, 639 (Fla. Dist. Ct. App. 2015) (stating that "plaintiff must show both successful concealment of the cause of action and fraudulent means to achieve that concealment"); Coe v. Proskauer Rose, LLP, 878 S.E.2d 235, 244 (Ga. 2022) (outlining showings plaintiff is required to make in order to toll limitation period under fraudulent concealment statute); Gittings v. Deal, 109 N.E.3d 963, 973 (Ind. 2018) ("The party alleging fraudulent concealment bears the burden to prove that tolling applies.").

Comment l. Judge and jury. Cases holding that whether the requirements of the doctrine of fraudulent concealment have been satisfied is a question for the factfinder, unless the evidence is so clear that no reasonable factfinder could decide the question otherwise, include Mann v. Arnos, 186 N.E.3d 105, 117-120 (Ind. Ct. App. 2022) (holding as a matter of law that plaintiffs failed to meet the standard of reasonable diligence in investigating fatal shooting of decedent); Brownell v. Garber, 503 N.W.2d 81, 85-86 (Mich. Ct. App. 1993) (ruling that jury could conclude that defendant's conduct was intended to fraudulently conceal plaintiff's cause of action); DeCosse v. Armstrong Cork Co., 319 N.W.2d 45, 51 (Minn. 1982) (ruling that whether asbestos manufacturers' lack of candor concerning potentially deleterious effects of asbestos exposure rose to level of tortious fraudulent concealment was a question for the factfinder); Redwing v. Cath. Bishop for Diocese of Memphis, 363 S.W.3d 436, 465-467 (Tenn. 2012) (holding that plaintiff's alleged inquiry and defendant's alleged misleading response provided basis for reasonable factfinder to conclude both that defendant engaged in fraudulent concealment and that plaintiff exercised reasonable diligence).

TOPIC 5
CONTRACTS SHORTENING OR LENGTHENING THE STATUTE-OF-LIMITATIONS PERIOD

§ 11. Contracts Shortening or Lengthening the Statute-of-Limitations Period

(a) A plaintiff and a defendant may agree by an otherwise valid contract to shorten the statute-of-limitations period applicable to a present or future cause of action by the plaintiff against the defendant, provided that the contract affords the plaintiff a reasonable opportunity to bring an action.

(b) A plaintiff and a defendant may agree by an otherwise valid contract to lengthen the statute-of-limitations period applicable to a present or future cause of action by the plaintiff against the defendant.

(c) If either the plaintiff or the defendant is a consumer, any contract shortening or lengthening the statute-of-limitations period is governed by the rules restated in Restatement of the Law, Consumer Contracts (Revised Tentative Draft No. 2, 2022).

Comment:

a. Sources and cross-references.
b. Contracts shortening the statute-of-limitations period.
c. Contracts lengthening the statute-of-limitations period.
d. Consumer contracts.
e. Other types of contracts.

a. Sources and cross-references. This Section and the other Sections in Part 1 supersede Restatement Second, Torts § 899. The Restatement of the Law Second, Contracts, does not specifically address contracts shortening or lengthening the statute-of-limitations period. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 1 are subject to the contrary terms of any applicable statute. See § 1, Comment *c*. The rules in this Section are applied separately to each cause of action by each plaintiff against each defendant. See § 1, Comment *g*.

The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. The words "an otherwise valid contract" mean a contract that

satisfies the requirements for enforcement of a contract, such as capacity to contract, offer, acceptance, consideration or a substitute therefor, and the Statute of Frauds, and that is not subject to any valid defenses, including unconscionability or violation of public policy. The term "consumer" is used as defined in Restatement of the Law, Consumer Contracts § 1(a)(1) (Revised Tentative Draft No. 2, 2022), namely, "[a]n individual acting primarily for personal, family, or household purposes."

b. Contracts shortening the statute-of-limitations period. It is well established that a plaintiff and a defendant may agree to shorten the statute-of-limitations period applicable to a present or future cause of action, provided that, under the terms of the contract, the plaintiff is afforded a reasonable opportunity to bring an action. However, such contracts are appropriately struck down as unreasonable or unconscionable if they unreasonably shorten the statute-of-limitations period, or if they unreasonably abrogate protections such as the discovery rule (§ 3), equitable estoppel (§ 9), or fraudulent concealment (§ 10).

c. Contracts lengthening the statute-of-limitations period. A plaintiff and a defendant may agree to lengthen the statute-of-limitations period applicable to a present or future cause of action. A minority of courts have taken the position that a contract extending the statute-of-limitations period for a future cause of action is against public policy, on the ground that the statute of limitations is intended to protect the public, as well as defendants, against stale claims. This position reflects an unduly one-sided view of the purposes of statutes of limitations. As explained in § 1, Comment *f*, statutes of limitations are intended to protect both plaintiffs and defendants, and there are public interests on both sides. For that reason, contracts extending the statute of limitations are, as a general matter, no more violative of public policy than contracts shortening the statute of limitations.

Even courts that decline to enforce contracts extending the statute-of-limitations period for future causes of action agree that parties may contract to extend the limitations period for causes of action that have already accrued. Such contracts, often called "tolling agreements," play an important role in preventing needless litigation by permitting parties to agree to defer litigation of their causes of action until it becomes clear that litigation cannot be avoided.

d. Consumer contracts. Subsection (c) serves as a reminder that contracts with consumers—including contracts shortening or lengthening the statute-of-limitations period—are governed by the rules in Restatement of the Law, Consumer Contracts (Revised Tentative Draft

No. 2, 2022). For this purpose, a "consumer" is defined as "an individual acting primarily for personal, family, or household purposes." Id. § 1(a)(1). A few of the most pertinent provisions of the Restatement of the Law, Consumer Contracts, are summarized briefly below.

Provisions in consumer contracts shortening or lengthening the limitations period are typically "standard contract terms," defined by Restatement of the Law, Consumer Contracts § 1(a)(5) (Revised Tentative Draft No. 2, 2022) as terms "drafted prior to the transaction for use in multiple consumer contracts." A standard contract term is adopted as part of a consumer contract if the business demonstrates that the consumer manifested assent to the transaction after receiving reasonable notice of the term and of the intent to include the term in the consumer contract and a reasonable opportunity to review the term. Id. § 2(a). Standard contract terms are construed against the business using them and are interpreted in the manner that best effectuates the consumer's reasonable expectations. See id. § 4(b), (d).

Beyond that, it is well established that an unconscionable contract term is unenforceable. Id. § 6(a). In determining whether a contract term is unconscionable, a court examines both substantive and procedural unconscionability. Id. § 6(b)(1), (2). A contract term is substantively unconscionable, inter alia, if it "unreasonably limits the consumer's ability to pursue or express a complaint or seek reasonable redress for a violation of a legal right." Id. § 6(c)(3). A term is procedurally unconscionable if "a reasonable consumer in the circumstances is not aware of the term or does not understand or appreciate the implications of the term, and as a result does not meaningfully account for the term in making the contracting decision." Id. § 6(d). "In appropriate circumstances, a sufficiently high degree of [either substantive or procedural unconscionability] is sufficient to establish unconscionability." Id. § 6(b).

e. Other types of contracts. Sometimes, provisions in other kinds of contracts, such as standard-form employment contracts and standard-form insurance contracts, also purport to extend or limit statute-of-limitations periods. Considerations similar to those governing consumer contracts may also apply to these other contract types. See generally, e.g., Restatement of the Law Second, Contracts §§ 200-204 (rules of contract interpretation); id. § 205 (duty of good faith and fair dealing); id. § 206 (interpretation against the drafter); id. § 208 (unconscionable contract or term); Restatement of the Law, Liability Insurance §§ 2-4 (rules of insurance policy interpretation).

REPORTERS' NOTE

Comment b. Contracts shortening the statute-of-limitations period. For cases illustrating the general rule that contracts shortening the statute-of-limitations period are valid, as long as the plaintiff is afforded a reasonable opportunity to bring an action, see, e.g., Mo., Kan. & Tex. Ry. Co. v. Harriman Bros., 227 U.S. 657, 672-673 (1913) (applying Interstate Commerce Act) (stating that "there is nothing in the policy or object of such statutes [of limitations] which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short" and upholding 90-day limit for claim of loss under bill of lading); Charnay v. Cobert, 51 Cal. Rptr. 3d 471, 481 (Ct. App. 2006) (explaining that parties may agree to shorten statute of limitations, provided that period selected "is not in itself unreasonable or is not so unreasonable as to show imposition or undue advantage") (quotation omitted); Zerjal v. Daech & Bauer Constr., Inc., 939 N.E.2d 1067, 1074-1075 (Ill. App. Ct. 2010) (stating that parties to a contract may agree on a shortened contractual limitations period to replace a statute of limitations, as long as it is reasonable, and ruling that a two-year limitations period in a home-inspection contract was reasonable); New Welton Homes v. Eckman, 830 N.E.2d 32, 34-36 (Ind. 2005) (stating that contractual provisions that shorten time to commence suit are enforceable, at least so long as a reasonable time is afforded, and that discovery rule does not apply); Ceccone v. Carroll Home Servs., LLC, 165 A.3d 475, 477 (Md. 2017) (holding that "contractually-shortened limitations periods . . . are valid only if (1) there is no statute to the contrary; (2) the provision is not the result of fraud, duress, misrepresentation, or the like; and (3) the provision is reasonable in light of all pertinent circumstances"); Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC, 300 P.3d 124, 127-129 (Nev. 2013) (holding that parties may contract to shorten limitations period so long as "there is no statute to the contrary," the shortened "limitations period is reasonable," and subject to normal contracting defenses including unconscionability and violation of public policy, and citing cases from other jurisdictions); Zannini v. Phenix Mut. Fire Ins. Co., 234 A.3d 269, 273-276 (N.H. 2019) (ruling that parties may validly agree to shorten period of limitations); John J. Kassner & Co., Inc. v. City of N.Y., 389 N.E.2d 99, 103-104 (N.Y. 1979) (stating that parties may shorten statute of limitations by agreement specifying a shorter but reasonable period provided it is in writing); Hampden Coal, LLC v. Varney, 810 S.E.2d 286, 295-297 (W. Va. 2018) (applying general rule that parties may contractually agree to a shortened limitations period, so long as the truncated period is reasonable); NuHome Invs., LLC v. Weller, 81 P.3d 940, 944-947 (Wyo. 2003) (reviewing cases from multiple jurisdictions and holding that "contractual periods of limitations are prima facie valid and will be enforced absent a demonstration by the party opposing enforcement that the clause is unreasonable or based upon fraud or unequal bargaining positions"). But see Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 31 (Mich. 2005) (overruling prior decisions refusing to enforce contracts providing for shortened period of limitations on basis of judicial assessments of "reasonableness"); Intervision Sys. Techs., Inc. v. InterCall, Inc., 872 N.W.2d 794, 799 (Neb. Ct. App. 2015) ("[S]tatute of limitations clauses are disfavored due to the public harm of allowing private parties to modify a court's ability to hear claims."). See generally B. H. Glenn, Annotation, *Validity of Contractual*

Time Period, Shorter Than Statute of Limitations, for Bringing Action, 6 A.L.R.3d 1197 (originally published in 1966).

For cases invalidating contracts providing for unreasonably short limitations periods, see, e.g., Long v. Holland Am. Line Westours, Inc., 26 P.3d 430, 435-437 (Alaska 2001) (invalidating contractual provision shortening statute-of-limitations period to one year as overreaching and unnecessary to protect defendant from prejudice); Adler v. Fred Lind Manor, 103 P.3d 773, 786-788 (Wash. 2004) (holding that 180-day limitations period for arbitration of discrimination claim was unconscionable).

For cases declining to enforce contracts that deprive plaintiffs of protections such as the discovery rule (§ 3), equitable estoppel (§ 9), or fraudulent concealment (§ 10), see, e.g., Moreno v. Sanchez, 131 Cal. Rptr. 2d 684, 694-698 (Ct. App. 2003) (ruling that "the law will not tolerate contractual nullification" of the delayed discovery rule when the discovery rule would otherwise apply); Creative Playthings Franchising, Corp. v. Reiser, 978 N.E.2d 765, 768-771 (Mass. 2012) (ruling that contractual limitations periods shorter than legislatively defined statute-of-limitations periods are permissible, provided they are reasonable, but that a contract that abrogates the discovery rule would be unreasonable and therefore invalid).

Perhaps not surprisingly, courts are more likely to find such provisions reasonable in contracts negotiated between sophisticated parties. See, e.g., Brisbane Lodging, L.P. v. Webcor Builders, Inc., 157 Cal. Rptr. 3d 467, 474-480 (Ct. App. 2013) (upholding provision abrogating discovery rule in construction contract between sophisticated parties); Minn. Laborers Health & Welfare Fund v. Granite Re, Inc., 844 N.W.2d 509, 517-519 (Minn. 2014) (stating that sophisticated parties could have included provision in contractual limitations provision excluding fraudulent concealment but ruling that, in the absence of such a provision, fraudulent concealment barred enforcement of limitations provision).

Comment c. Contracts lengthening the statute-of-limitations period. For cases upholding contracts extending the statute-of-limitations period, see, e.g., Brownrigg v. deFrees, 238 P. 714, 715-719 (Cal. 1925) (holding that contract waiving statute of limitations for 99 years was valid); Kobbeman v. Oleson, 574 N.W.2d 633, 639-640 (S.D. 1998) (citing cases, and holding that parties to a lawsuit or potential lawsuit may agree to extend a statutory period of limitations); Godoy v. Wells Fargo Bank, N.A., 575 S.W.3d 531, 537-540 (Tex. 2019) (upholding contract lengthening statute of limitations for a specific and reasonable period).

For cases holding, contrary to Comment *c*, that contracts that extend the statute-of-limitations period are unenforceable as against public policy, see, e.g., John J. Kassner & Co., Inc. v. City of N.Y., 389 N.E.2d 99, 103-104 (N.Y. 1979) (holding that advance agreement to lengthen statute of limitations is unenforceable because the statute is founded in public policy); see also Melissa DiVincenzo, *Repose vs. Freedom—Delaware's Prohibition on Extending the Statute of Limitations by Contract: What Practitioners Should Know*, 12 DEL. L. REV. 29, 40-42 (2010) (citing Delaware lower-court cases to the same effect).

For cases striking down advance agreements purporting to waive statutes of limitations in their entirety, see, e.g., Haggerty v. Williams, 855 A.2d 264, 268-269 (Conn. App. Ct. 2004)

(holding that advance permanent waiver of statute of limitations is against public policy and citing cases from other jurisdictions); West Gate Vill. Ass'n v. Dubois, 761 A.2d 1066, 1071 (N.H. 2000) (ruling that parties cannot validly make an advance agreement that the statute of limitations shall be inoperative).

On the value of tolling agreements extending the statute-of-limitations period for causes of action that have already accrued, see, e.g., Lewis v. Taylor, 375 P.3d 1205, 1212 (Colo. 2016) ("[V]oluntary tolling agreements serve the public interest. They improve judicial economy by allowing litigants time to develop their claims and negotiate settlements, which reduces unnecessary and costly litigation."). In some jurisdictions, tolling agreements may be subject to requirements imposed by statutes or regulations, such as restrictions on how long the parties may extend the statute-of-limitations period.

d. Consumer contracts. Cases addressing consumer contracts shortening the statute-of-limitations period are cited extensively in the Reporters' Note to Comment *b*.

PART 2

STATUTES OF REPOSE

TOPIC 1

STATUTES OF REPOSE IN GENERAL

§ 12. Definition of Statute of Repose

A statute of repose is a statute that provides a plaintiff a legislatively defined period of time running from the date of a specified event, such as a tortious act, the sale of a product, or the completion of a building project, to sue on a cause of action against a defendant, and that bars the plaintiff's cause of action after the legislatively defined period has expired without suit being brought, regardless of whether the plaintiff could have sued during that period.

Comment:

a. Sources and cross-references.

b. History and functioning of statutes of repose.

c. Statutes of repose are statutes, and the language of each statute controls.

d. Purpose of statutes of repose.

e. Statutes of repose apply separately to each cause of action by each plaintiff against each defendant.

f. Topics not covered by this Restatement.

a. Sources and cross-references. This Section and the other Sections in Part 2 supersede Restatement Second, Torts § 899, Comment *g*. For the definition of statutes of limitations, see § 1. The essential difference between a statute of limitations and a statute of repose is that a statute of limitations does not start to run before a plaintiff can sue on a cause of action (see §§ 1, 2), while a statute of repose may run even if the plaintiff is not able to sue, as stated in this Section. The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024).

b. History and functioning of statutes of repose. Statutes of repose were enacted beginning in the 1960s and 1970s in response to increasing numbers of cases filed years, and sometimes decades, after the tortious acts were committed, either through the operation of the discovery rule (§ 3) or through the application of the all-elements rule (§ 2) to situations in which legally cognizable injury took years after the tortious conduct to develop. Such "long-tail" liabilities posed a significant problem for defendants and their insurers. Statutes of repose are designed to mitigate this problem by cutting off liability after a legislatively defined period of years, regardless of whether the statute of limitations has run. But they do so at a significant cost, because they bar causes of action regardless of whether plaintiffs ever had a chance to sue on their causes of action.

Statutes of repose typically do not apply to all torts, but only to certain categories of torts—frequently, those for which the long-tail liability problem is deemed particularly acute, such as medical malpractice, legal malpractice, products liability, building construction, and toxic torts. In the field of medical malpractice, statutes of repose were part of the wave of legislation enacted in many states during what were described by some as the medical malpractice insurance crises of the 1970s and 1980s.

Statutes of repose generally do not replace statutes of limitations; rather, they add an additional requirement by providing an outer limit beyond which actions cannot be brought even if the statute of limitations has not yet run. As a result, a cause of action is time-barred if it is barred *either* by the statute of limitations or by the statute of repose.

Illustration:

1. A 25-year-old apartment building collapses, killing numerous occupants. The collapse of the building resulted from negligence on the part of the architects and building contractors who designed and constructed it. The jurisdiction in which the building was

located has a five-year statute of limitations and a 10-year statute of repose (measured from the completion of the building) for causes of action for physical injury or wrongful death based on negligence in designing and constructing a building. Shortly after the building collapses, certain beneficiaries assert causes of action for wrongful death. The statute of limitations, which, in this case, began to run from the date of death, does not bar the wrongful-death causes of action. See § 2. However, the statute of repose does bar such causes of action, because more than 10 years had passed since the building's completion.

c. Statutes of repose are statutes, and the language of each statute controls. As is the case with statutes of limitations (see § 1, Comment *c*), statutes of repose are statutes, and the terms of the statutes control. The rules stated in this Topic, like the rules in Topic 1, are common-law rules that apply unless a statute provides otherwise.

d. Purpose of statutes of repose. As described in Comment *b*, the purpose of statutes of repose is to protect defendants and their insurers against "long-tail" liabilities by cutting off liability after a legislatively defined period of years following a specified event, such as a tortious act, the sale of a product, or the completion of a building project, regardless of whether the statute of limitations has run.

e. Statutes of repose apply separately to each cause of action by each plaintiff against each defendant. Each cause of action by each plaintiff against each defendant must be analyzed separately for purposes of statutes of repose. As a result, some causes of action arising from a single transaction or occurrence may be barred by a statute of repose, while other causes of action arising from the same transaction or occurrence may not be barred. For the application of a similar rule with respect to statutes of limitations, see § 1, Comment *g*.

f. Topics not covered by this Restatement. Statutes of repose have been challenged on constitutional grounds—and some courts have ruled that statutes of repose are constitutionally infirm. This Restatement does not address these constitutional questions. Nor does this Restatement address matters relating to statutes of repose that are governed by statutes or procedural rules. Nor, finally, does this Restatement address the application of statutes of repose to causes of action created by statutes.

REPORTERS' NOTE

Comment a. Sources and cross-references. For representative judicial definitions of statutes of repose, see, e.g., CTS Corp. v. Waldburger, 573 U.S. 1, 8 (2014) (construing 42 U.S.C.

§ 9658) (stating that a statute of repose "puts an outer limit on the right to bring a civil action . . . . measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant"); J.H. Westerman Co. v. Fireman's Fund Ins. Co., 499 A.2d 116, 119 (D.C. 1985) ("A statute of repose differs from an ordinary statute of limitations in that the specified time period begins to run not from the date on which a right of action accrues, but from another ascertainable date . . . .").

Comment b. History and functioning of statutes of repose. For an analysis of the problems posed for liability insurers and their insureds by long-tail liabilities, see Restatement of the Law, Liability Insurance § 33, Comment *g* (AM. L. INST. 2019).

California furnishes an especially clear example of the connection between the adoption of the discovery rule (§ 3) and the enactment of a statute of repose. In Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 424-432 (Cal. 1971), the California Supreme Court adopted the discovery rule for legal malpractice claims and observed that the legislature could pass a statute of repose to cabin the resulting long-tail liability, which the legislature promptly did in CAL. CIV. PROC. CODE § 340.6(a). See Gordon v. Law Offs. of Aguirre & Meyer, 83 Cal. Rptr. 2d 119, 122 (Ct. App. 1999).

Numerous courts have observed that medical malpractice statutes of repose were enacted as part of the legislative response to what were described by some as the medical malpractice insurance crises of the 1970s and 1980s. See, e.g., Anderson v. Wagner, 402 N.E.2d 560, 562 (Ill. 1979) ("It is generally agreed that in the early 1970's what has been termed a medical malpractice insurance crisis existed in most jurisdictions in this country."); id. at 564-566 (citing statutes of repose passed in various states); Rathje v. Mercy Hosp., 745 N.W.2d 443, 454-455 (Iowa 2008) (describing "drumbeat of tort reform sweeping the country, predicated on claims of a mounting malpractice crisis" and resulting in the enactment of statutes of repose); Hill v. Fitzgerald, 501 A.2d 27, 32 (Md. 1985) (explaining that Maryland's five-year medical malpractice statute of repose "is a response to the so-called crisis in the field of medical malpractice claims"). For an analysis of the causes of alternating cycles of high and low premium rates in the medical malpractice insurance market, see Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393 (2005). Medical malpractice statutes of repose have been enacted in 32 states. Robin Miller, Annotation, *Effect of Fraudulent or Negligent Concealment of Patient's Cause of Action on Timeliness of Action Under Medical Malpractice Statute of Repose*, 19 A.L.R.6th 475, at § 2 (originally published in 2006).

Among the most widespread statutes of repose are those covering tort claims related to building projects, which had been enacted in more than 40 jurisdictions by 1969. See J.H. Westerman Co. v. Fireman's Fund Ins. Co., 499 A.2d 116, 120-121 (D.C. 1985). Most of these statutes were based on a model statute endorsed by the American Institute of Architects. Id. at 121.

Citations to statutes of repose dealing with products liability can be found on the website of the American Tort Reform Association. See www.atra.org//issue/product-liability.

As stated in the Comment, most statutes of repose do not apply to all torts, but only to certain categories of torts such as medical malpractice, legal malpractice, products liability,

building construction, and toxic torts. There are only a few exceptions to this generalization. Connecticut has a two-year statute of limitations with a discovery rule and a three-year statute of repose, applicable to all torts. See CONN. GEN. STAT. § 52-577 ("No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."); id. § 52-584 (establishing that an action for injury to person or property must be brought "within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered and . . . no such action may be brought more than three years from the date of the act or omission complained of . . ."). North Carolina and Oregon have statutes of repose applicable to causes of action for injury to person or property. See N.C. GEN. STAT. § 1-52(16) ("Except as provided in G.S. 130A-26.3 or G.S. 1-17(d) and (e), no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action."); OR. REV. STAT. § 12.115(1) (providing that "[i]n no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.").

As is also stated in the Comment, statutes of repose generally do not replace statutes of limitations, but rather provide an outer limit beyond which actions cannot be brought even if the statute of limitations has not yet run. In the words of the Supreme Court of the United States: "The pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits. The two periods work together. The discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability." Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 582 U.S. 497, 506 (2017).

Illustration 1, concerning the building collapse, is not based on an actual case. It has been drafted to illustrate the manner in which statutes of limitations and statutes of repose are applied.

Comment d. Purpose of statutes of repose. On the purpose of statutes of repose, see, e.g., CTS Corp. v. Waldburger, 573 U.S. 1, 8 (2014) (construing 42 U.S.C. § 9658) (stating that statutes of limitations and statutes of repose have "distinct purposes" and are "targeted" at different actors; "[s]tatutes of limitations require plaintiffs to pursue diligent prosecution of known claims," while "[s]tatutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time") (internal quotation marks omitted).

e. Statutes of repose apply separately to each cause of action by each plaintiff against each defendant. For examples of the importance of careful analysis of the applicability of a statute of repose to each cause of action by a plaintiff against a defendant, see, e.g., ADOLPH J. LEVY, SOLVING STATUTE OF LIMITATIONS PROBLEMS §§ 3.03-3.10 (1987).

Comment f. Topics not covered by this Restatement. As stated in the Comment, this Restatement does not include coverage of areas that are governed by constitutional provisions, statutes, or procedural rules. For the grounds on which some courts have held statutes of repose to be unconstitutional, see, e.g., ADOLPH J. LEVY, SOLVING STATUTE OF LIMITATIONS PROBLEMS §§ 3.11-3.24 (1987); Martha Ratnoff Fleisher, Annotation, *Validity, as to Claim Alleging Design or Building Defects, of Statute Imposing Time Limitations Upon Action Against Architect,*

Engineer, or Builder for Injury or Death Arising Out of Defective or Unsafe Condition of Improvement to Real Property, 5 A.L.R.6th 497, at §§ 5, 6, 8, 10, 12, 13, 15, 17 (originally published in 2005); Robin Miller, Annotation, *Validity of Medical Malpractice Statutes of Repose*, 5 A.L.R.6th 133, at §§ 5, 8, 10 (originally published in 2005).

TOPIC 2

WHEN THE STATUTE OF REPOSE BEGINS TO RUN

§ 13. When the Statute of Repose Begins to Run

The statute of repose begins to run on a cause of action by a plaintiff against a defendant on the date of the event specified in the statute of repose, such as a tortious act, the sale of a product, or the completion of a building project, regardless of whether the plaintiff is yet able to sue on the cause of action.

Comment:

a. Sources and cross-references.
b. Purpose.
c. The all-elements rule does not apply to statutes of repose.
d. The discovery rule does not apply to statutes of repose.
e. Application of statutes of repose to continuing torts.

a. Sources and cross-references. This Section and the other Sections in Part 2 supersede Restatement Second, Torts § 899, Comment *g*. The terms "plaintiff" and "defendant" include potential plaintiffs and defendants for an action that has not yet been brought. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 2 are subject to the contrary terms of any applicable statute. See § 12, Comment *c*. The rule of this Section is applied separately to each cause of action by each plaintiff against each defendant. See § 12, Comment *e*.

b. Purpose. Statutes of repose are designed to provide an outer limit to long-tail tort liabilities, based on the running of a legislatively defined period of time following the date of a statutorily specified event, such as a tortious act, the sale of a product, or the completion of a building project, regardless of whether the plaintiff is able to sue on the cause of action subject to the statute of repose. See § 12, Comments *b*, *d*.

c. The all-elements rule does not apply to statutes of repose. Because the purpose of the all-elements rule applicable to statutes of limitations under § 2 is to ensure that the plaintiff will be able to sue when the statute of limitations starts to run (see § 2, Comment *b*), and because statutes of repose begin to run regardless of whether the plaintiff is able to sue (see § 12, Comments *b*, *d*), the all-elements rule does not apply to statutes of repose.

d. The discovery rule does not apply to statutes of repose. Because the purpose of the discovery rule applicable to statutes of limitations under § 3 is to ensure that the plaintiff will be able to sue when the statute of limitations starts to run (see § 3, Comment *b*), and because statutes of repose begin to run regardless of whether the plaintiff is able to sue (see § 12, Comments *b*, *d*), the discovery rule does not apply to statutes of repose. For the contrasting rule that the doctrines of equitable estoppel and fraudulent concealment do apply to statutes of repose, see § 15.

e. Application of statutes of repose to continuing torts. Many statutes of repose (other than those relating to building projects and products liability) begin to run from the date of a tortious act. See Comment *b*. In determining when such statutes of repose start to run in the case of recurring and continuous tortious acts, the rules stated in § 4(b) and (c) are applied.

REPORTERS' NOTE

Comment d. The discovery rule does not apply to statutes of repose. It is well established that the discovery rule does not apply to statutes of repose. See, e.g., O'Brien v. Scovil, 774 N.E.2d 466, 468 (Ill. App. Ct. 2002) (holding that the statute of repose is not subject to the discovery rule); Tibbitt v. Eagle Home Inspections, Inc., 305 A.3d 156, 161 n.3 (Pa. Super. Ct. 2023) (stating that discovery rule does not apply to statute of repose); Marriage of Kunz, 136 P.3d 1278, 1283-1284 (Utah Ct. App. 2006) (ruling that discovery rule cannot operate to toll statute of repose).

Comment e. Application of statutes of repose to continuing torts. For cases supporting the statement in Comment *e* that the rules stated in § 4(b) and (c) apply to statutes of repose, see, e.g., Comstock v. Collier, 737 P.2d 845, 846-850 (Colo. 1987) (ruling that, in the case of a continuous course of negligent treatment, the act or omission that triggers the statute of repose is the end of the course of treatment); Flannery v. Singer Asset Fin. Co., LLC, 94 A.3d 553, 569 (Conn. 2014) (addressing three-year tort statute of repose (CONN. GEN. STAT. § 52-577) and explaining that "[w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed."); Cunningham v. Huffman, 609 N.E.2d 321, 325 (Ill. 1993) ("When the cumulative results of continued negligence is the cause of the injury, the statute of repose cannot start to run until the last date of negligent treatment."); Smith v. Dewey, 335 N.W.2d 530, 533 (Neb. 1983) (holding that statute of repose began to run at the end of the treatment that plaintiff claimed to have been malpractice); Stallings v. Gunter, 394 S.E.2d 212, 216 (N.C. Ct. App. 1990) ("[I]t is correct to use the 'continuing course of treatment' doctrine to

determine the start date for running of the statute of repose. It is only by using the doctrine that the court can determine defendant's relevant 'last act.'"); Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Off., 939 N.W.2d 32, 42-48 (S.D. 2020) (ruling that attorney's failure to disclose prior malpractice may constitute continuing wrong that delays commencement of repose period); Pitt-Hart v. Sanford USD Med. Ctr., 878 N.W.2d 406, 414-415 (S.D. 2016) (holding that continuing tort doctrine applies to medical malpractice statute of repose). For contrary cases, see, e.g., Woodward v. Olson, 107 So. 3d 540, 544 (Fla. Dist. Ct. App. 2013) (ruling that continuing tort doctrine is inapplicable to statutes of repose); Coté v. Hiller, 162 So. 3d 608, 615 (La. Ct. App. 2015) (ruling that continuing tort doctrine does not apply to peremptive period [the Louisiana civil-law counterpart of a statute of repose] governing legal malpractice claims). See generally Robin Miller, Annotation, *Timeliness of Action Under Medical Malpractice Statute of Repose, Aside from Effect of Fraudulent Concealment of Patient's Cause of Action*, 14 A.L.R.6th 301, at §§ 7-14 (originally published in 2006).

TOPIC 3

THE STATUTE OF REPOSE IS NOT SUSPENDED BY COMMON-LAW TOLLING RULES

§ 14. The Statute of Repose Is Not Suspended by Common-Law Tolling Rules

The running of the statute of repose is not suspended by common-law tolling rules.

Comment:

a. Sources and cross-references.
b. Scope and purpose.
c. The continuous representation rule does not apply to statutes of repose.
d. The continuous treatment rule does not apply to statutes of repose.
e. Equitable tolling does not apply to statutes of repose.

a. Sources and cross-references. This Section and the other Sections in Part 2 supersede Restatement Second, Torts § 899, Comment *g*. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 2 are subject to the contrary terms of any applicable statute. See § 12, Comment *c*.

b. Scope and purpose. Depending on their terms, statutory tolling rules may apply to statutes of repose. Such statutory tolling rules are beyond the scope of this Restatement. See § 5, Comment *b*; § 12, Comment *f*. This Section applies only to common-law tolling rules.

The rule of this Section follows directly from the fact that the running of statutes of repose is unaffected by whether the plaintiff is able to sue on the cause of action subject to the statute of repose. See § 12, Comments *b*, *d*. Because common-law tolling rules are designed to help ensure that the plaintiff is able to sue (see Introductory Note to Part 1, Topic 3, Comment *a*), which is not a prerequisite to the application of statutes of repose, it follows that common-law tolling rules do not apply to statutes of repose.

c. The continuous representation rule does not apply to statutes of repose. Because the continuous representation rule is designed to help ensure that the plaintiff has the ability to sue on a cause of action for legal malpractice (see § 6, Comment *b*), and because statutes of repose are unaffected by the plaintiff's inability to sue (see § 12, Comments *b*, *d*), the continuous representation rule does not apply to statutes of repose.

d. The continuous treatment rule does not apply to statutes of repose. Because the continuous treatment rule is designed to help ensure that the plaintiff has the ability to sue on a cause of action for medical malpractice (see § 7, Comment *b*), and because statutes of repose are unaffected by the plaintiff's inability to sue (see § 12, Comments *b*, *d*), the continuous treatment rule does not apply to statutes of repose.

e. Equitable tolling does not apply to statutes of repose. Because equitable tolling is designed to address extraordinary circumstances which prevent a plaintiff from bringing a timely action (see § 8(b)), and because statutes of repose are unaffected by the plaintiff's inability to bring a timely action (see § 12, Comments *b*, *d*), equitable tolling does not apply to statutes of repose. For the contrasting rule that the doctrines of equitable estoppel and fraudulent concealment do apply to statutes of repose, see § 15.

REPORTERS' NOTE

Comment b. Scope and purpose. For cases stating that statutes of repose are not subject to tolling, see, e.g., Simmons v. Sonyika, 614 S.E.2d 27, 30 (Ga. 2005) (stating that, unlike statutes of limitation, statutes of repose may not be tolled for any reason); Monson v. Paramount Homes, Inc., 515 S.E.2d 445, 449-450 (N.C. Ct. App. 1999) ("While equitable doctrines may toll statutes of limitations, they do not toll substantive rights created by statutes of repose.").

Comment c. The continuous representation rule does not apply to statutes of repose. Cases holding that the continuous representation rule does not apply to statutes of repose include Jenkins v. Starns, 85 So. 3d 612, 622-628 (La. 2012) (ruling that continuous representation doctrine does not apply to peremptive period [the Louisiana civil-law counterpart of a statute of repose] governing legal malpractice claims); Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Off.,

939 N.W.2d 32, 41-42 (S.D. 2020) (holding, inter alia, that continuing representation doctrine does not toll legal malpractice statute of repose). But see DeLeo v. Nusbaum, 821 A.2d 744, 748-751 (Conn. 2003) (holding that statute of repose is tolled by continuous representation rule, modified to apply when plaintiff can show (1) that defendant continued to represent plaintiff with respect to same underlying matter, and (2) either that plaintiff did not know of the alleged malpractice, or that the attorney could still mitigate the harm caused by the alleged malpractice during the continued representation period).

Comment d. The continuous treatment rule does not apply to statutes of repose. For cases holding that the continuous treatment rule does not apply to statutes of repose, see, e.g., Cunningham v. Huffman, 609 N.E.2d 321, 324-326 (Ill. 1993) (holding that continuous course of treatment does not toll statute of repose for medical malpractice claims); Bonin v. Vannaman, 929 P.2d 754, 774-775 (Kan. 1996) (ruling that continuous treatment doctrine would not toll statute of repose); Hill v. Fitzgerald, 501 A.2d 27, 32-33 (Md. 1985) (holding that continuous course of treatment rule does not apply to medical malpractice statute of repose); Rudenauer v. Zafiropoulos, 837 N.E.2d 278, 281-293 (Mass. 2005) (ruling that continuous treatment rule does not apply to statute of repose); Urbick v. Suburban Med. Clinic, Inc., 918 P.2d 453, 455-457 (Or. Ct. App. 1996) (rejecting continuing treatment doctrine as inconsistent with medical malpractice statute of repose, which contains exception only for "fraud, deceit, or misleading representation"); Pitt-Hart v. Sanford USD Med. Ctr., 878 N.W.2d 406, 414-415 (S.D. 2016) (ruling that continuous treatment doctrine does not apply to medical malpractice statute of repose); see generally Robin Miller, Annotation, *Timeliness of Action Under Medical Malpractice Statute of Repose, Aside From Effect of Fraudulent Concealment of Patient's Cause of Action*, 14 A.L.R.6th 301, at §§ 7-14 (originally published in 2006).

Comment e. Equitable tolling does not apply to statutes of repose. For cases declining to apply equitable tolling to statutes of repose, see, e.g., CTS Corp. v. Waldburger, 573 U.S. 1, 9-10 (2014) (construing 42 U.S.C. § 9658) (stating that statutes of repose are not subject to equitable tolling); Ambers-Phillips v. SSM DePaul Health Ctr., 459 S.W.3d 901, 906-909 (Mo. 2015) (ruling that medical malpractice statute of repose is not subject to equitable tolling based on discovery of foreign object left in body); Hardgrove v. Transp. Ins. Co., 103 P.3d 999, 1002 (Mont. 2004) (holding that courts may equitably toll statutes of limitations for latent injuries, but no event short of a legislative mandate can toll statutes of repose); Somersett Owners Ass'n v. Somersett Dev. Co., Ltd., 492 P.3d 534, 538-540 (Nev. 2021) (ruling that statutes of repose are not subject to equitable tolling). But see R.A.C. v. P.J.S., Jr., 927 A.2d 97, 107-108 (N.J. 2007) (concluding that equitable tolling can apply to a repose statute, but stating that "we expect that equitable tolling will arise only in extraordinary circumstances consistent with legislative intent"; mentioning as examples insurance-company statements and conduct that lulled plaintiff and plaintiff's attorney into believing that claim was properly filed and overt trickery that induced plaintiff to forgo timely filing of complaint—examples that would support the application of equitable estoppel under §§ 9 and 15 of this Restatement).

TOPIC 4
EFFECT OF DEFENDANT MISCONDUCT

§ 15. Effect of Defendant Misconduct

The rules of § 9 (equitable estoppel) and § 10 (fraudulent concealment) apply to statutes of repose just as they do to statutes of limitations.

Comment:

a. Sources and cross-references.
b. Rationale and support.
c. The provisions and limitations of §§ 9 and 10 apply equally to statutes of repose.
d. Burden of proof.
e. Judge and jury.

a. Sources and cross-references. This Section and the other Sections in Part 2 supersede Restatement Second, Torts § 899, Comment *g*. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 2 are subject to the contrary terms of any applicable statute. See § 12, Comment *c*. The rules in this Section are applied separately to each cause of action by each plaintiff against each defendant. See § 12, Comment *e*.

b. Rationale and support. The application of equitable estoppel and fraudulent concealment to bar resort to the statute of limitations in cases of defendant misconduct is based on the fundamental principle that no one should benefit from their own wrong. See § 9, Comment *b*; § 10, Comment *b*. That fundamental principle is just as applicable to statutes of repose as it is to statutes of limitations, and the majority of courts so hold. If the plaintiff's failure to bring an action within the period specified by a statute of repose is the result of conduct by the defendant that comes within the doctrine of equitable estoppel or fraudulent concealment, it would be unjust to permit the defendant to rely on the defendant's own wrong as a ground for defeating the plaintiff's cause of action.

The application of equitable estoppel and fraudulent concealment to statutes of limitations has deep historical roots and was extremely well established when statutes of repose began to be enacted in the 1960s and 1970s. See § 9, Comment *b*; § 10, Comment *b*. If the legislators who enacted statutes of repose had intended to preclude the application of these well-established rules

to statutes of repose, it is reasonable to conclude that they would have made that intention express in the statutes.

c. The provisions and limitations of §§ 9 and 10 apply equally to statutes of repose. The black letter, Comments, and Illustrations of §§ 9 and 10 set forth in detail the contours of equitable estoppel and fraudulent concealment as they apply to statutes of limitations. The black letter, Comments, and Illustrations of those Sections apply equally to statutes of repose.

Illustrations:

1. Penfield authorizes his dentist, Denton, to remove the remaining five teeth in Penfield's lower jaw so that dentures can be fitted. Denton notes on an x-ray that Penfield has a fully impacted wisdom tooth in his lower jaw that might erupt later, but he does not remove the impacted wisdom tooth or tell Penfield about it. After the five teeth are extracted and dentures are fitted, Penfield experiences continuing pain and repeatedly goes back to Denton, who tells him that the pain is due to bone slivers that can be expected to work their way out over time. Eventually Penfield goes to another dentist, who discovers and removes the impacted wisdom tooth—but by then, the jurisdiction's statute of repose applicable to dental malpractice has run. In Penfield's ensuing suit against Denton, if the trier of fact determines that Penfield has established the requirements of the doctrines of equitable estoppel and fraudulent concealment, Denton will be precluded from relying on the medical malpractice statute of repose. (This Illustration takes no position on whether Denton, in fact, committed malpractice.)

2. Pedro retains attorney Diego to file an action for medical malpractice and wrongful death following the death of Pedro's wife. Without informing Pedro, Diego files the action without the required affidavit of a medical expert in order to test the constitutionality of the affidavit requirement. After the constitutionality of the requirement is upheld, Diego files a second action with the required affidavit, but the second action is dismissed on the ground of claim preclusion. Instead of informing Pedro about the dismissals, Diego continues to tell him that the lawsuit is going very well until after the legal malpractice statute of repose expires. In Pedro's ensuing malpractice suit against Diego, if the trier of fact determines that Pedro has established the requirements of the doctrines of equitable estoppel and fraudulent concealment, Diego will be precluded from relying on the legal malpractice statute of repose.

d. Burden of proof. The burden of proof is on the plaintiff seeking to employ the doctrines of equitable estoppel and fraudulent concealment to defeat the application of a statute of repose. This means that, typically, the plaintiff has the burden of proving the elements of equitable estoppel and fraudulent concealment.

e. Judge and jury. Whether the requirements of the doctrines of equitable estoppel and fraudulent concealment have been met is a question for the factfinder.

REPORTERS' NOTE

Comment b. Rationale and support. Cases holding that equitable estoppel and fraudulent concealment apply to statutes of repose include Bullington v. Precise, 698 F. App'x 565, 570-571 (11th Cir. 2017) (applying Georgia law) (holding that equitable estoppel precluded defendants from relying on statute of repose); Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck, 507 F. Supp. 873, 878-880 (D.S.D. 1981) (holding that fraudulent concealment, fraud, and equitable estoppel may bar reliance on statute of repose); Normandy v. Am. Med. Sys., Inc., 262 A.3d 698, 710 n.16 (Conn. 2021) (stating that fraudulent concealment doctrine may toll period of repose); Hill v. Fordham, 367 S.E.2d 128, 131-132 (Ga. Ct. App. 1988) (following other jurisdictions that "have held that the doctrine of equitable estoppel precludes a defendant from raising the defense of the statute of ultimate repose where there is evidence of fraud or other conduct on which the plaintiff reasonably relied in forbearing the bringing of a lawsuit"); DeLuna v. Burciaga, 857 N.E.2d 229, 240-245 (Ill. 2006) (holding that fraudulent concealment is an exception to legal malpractice statute of repose); Downing v. Grossmann, 973 N.W.2d 512, 519-522 (Iowa 2022) (explaining that fraudulent concealment and equitable estoppel may prevent a defendant from raising the defense of the statute of repose); Doe v. Popravak, 421 P.3d 760, 768-772 (Kan. Ct. App. 2017) (holding that statute of repose may be barred by fraudulent concealment, but not by equitable estoppel); Lomont v. Bennett, 172 So. 3d 620, 625-635 (La. 2015) (applying fraudulent concealment to defeat defendant's reliance on the peremptive period [the Louisiana civil-law counterpart of a statute of repose] applicable to legal malpractice); Windham v. Latco of Miss., Inc., 972 So. 2d 608, 610-616 (Miss. 2008) (ruling that fraudulent concealment bars application of statute of repose); Tomlinson v. George, 116 P.3d 105, 108-112 (N.M. 2005) (explaining that fraudulent concealment estops defendant from relying upon statute of repose, but fraudulent concealment does not apply if plaintiff discovers injury within statute-of-repose period); cf. R.A.C. v. P.J.S., Jr., 927 A.2d 97, 107-108 (N.J. 2007) (concluding that equitable tolling can apply to a statute of repose but stating that "we expect that equitable tolling will arise only in extraordinary circumstances consistent with legislative intent"; mentioning as examples insurance-company statements and conduct that lulled plaintiff and plaintiff's attorney into believing that claim was properly filed and overt trickery that induced plaintiff to forgo timely filing of complaint—examples that would support the application of equitable estoppel under §§ 9 and 15 of this Restatement). See generally Robin Miller, Annotation, *Effect of Fraudulent or Negligent*

Concealment of Patient's Cause of Action on Timeliness of Action Under Medical Malpractice Statute of Repose, 19 A.L.R.6th 475, at § 2 (originally published in 2006) ("In most states, the defendant's concealment of the patient's cause of action tolls the running of the repose period, although in a few states this is not the case.") (citations omitted); see also George L. Blum, Annotation, *Estoppel to Assert Statute of Limitations or Statute of Repose in Action for Malpractice of Health Care Provider*, 45 A.L.R.7th Art. 3 (originally published in 2019); Jay M. Zitter, Annotation, *Fraud, Misrepresentation, or Deception as Estopping Reliance on Nonmedical Malpractice Statutes of Repose*, 98 A.L.R.6th 417 (originally published in 2014).

For contrary holdings, see, e.g., Cortez v. Cook Inc., 27 F.4th 563, 566-567 (7th Cir. 2022) (applying Indiana law) (holding that fraudulent concealment cannot extend time to file claims under statute of repose); First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 865-866 (4th Cir. 1989) (applying Maryland law) (ruling that fraudulent concealment cannot toll statute of repose); Joslyn v. Chang, 837 N.E.2d 1107, 1110-1114 (Mass. 2005) (holding that neither equitable estoppel nor fraudulent concealment tolls medical malpractice statute of repose and declining to follow contrary cases from other jurisdictions based on the language and legislative history of the Massachusetts medical malpractice statute of repose); Joyce v. Garnaas, 983 P.2d 369, 371-373 (Mont. 1999) (ruling that not even fraudulent concealment can toll statute of repose); Stallings v. Gunter, 394 S.E.2d 212, 216 (N.C. Ct. App. 1990) (holding that fraudulent concealment cannot toll the running of the statute of repose because substantive rights, such as those created by the statute of repose, are not subject to tolling); Pitt-Hart v. Sanford USD Med. Ctr., 878 N.W.2d 406, 415 (S.D. 2016) (indicating that equitable tolling, estoppel, and fraudulent concealment do not apply to statutes of repose).

For judicial explanations of the reasons for applying equitable estoppel and fraudulent concealment to statutes of repose, see, e.g., Hill v. Fordham, 367 S.E.2d 128, 131-132 (Ga. Ct. App. 1988) ("The statute of ultimate repose should not provide an incentive for a doctor or other medical professional to conceal his or her negligence with the assurance that after five years such fraudulent conduct will insulate him or her from liability. The sun never sets on fraud."); DeLuna v. Burciaga, 857 N.E.2d 229, 242 (Ill. 2006) ("[T]here would be an obvious and gross injustice in a rule that allows a defendant—particularly a defendant who stands in a fiduciary relationship to the plaintiff—to conceal the plaintiff's cause of action and then benefit from a statute of repose."); Windham v. Latco of Miss., Inc., 972 So. 2d 608, 614 (Miss. 2008) ("Wrongdoing ought not be shielded if fraudulent concealment can be proven.").

Comment c. The provisions and limitations of §§ 9 and 10 apply equally to statutes of repose. Illustration 1, concerning the dentist who fails to remove an impacted wisdom tooth, is based on Hill v. Fordham, 367 S.E.2d 128, 131-132 (Ga. Ct. App. 1988).

Illustration 2, involving the attorney who tells the client that the lawsuit is going very well when in fact the lawsuit has been dismissed, is based on DeLuna v. Burciaga, 857 N.E.2d 229, 240-249 (Ill. 2006).

Comment d. Burden of proof. For cases supporting the rule that the burden of proof is on the plaintiff seeking to employ the doctrines of equitable estoppel and fraudulent concealment to

defeat the application of a statute of repose, see, e.g., Downing v. Grossmann, 973 N.W.2d 512, 519-522 (Iowa 2022) (describing burden of proof on plaintiff seeking to estop defendant from raising statute-of-repose defense); Tomlinson v. George, 116 P.3d 105, 109 (N.M. 2005) (stating that plaintiff has the burden of establishing fraudulent concealment sufficient to estop defendant from relying on statute of repose).

Comment e. Judge and jury. For cases holding that whether the requirements of the doctrines of equitable estoppel and fraudulent concealment have been satisfied is a question for the factfinder, unless the evidence is so clear that no reasonable factfinder could decide the question otherwise, see, e.g., Hill v. Fordham, 367 S.E.2d 128, 132 (Ga. Ct. App. 1988) ("[A]n issue of fraud remains for jury determination which, if found, would estop the defendant from raising the defense of the statute of ultimate repose."); Windham v. Latco of Miss., Inc., 972 So. 2d 608, 616 (Miss. 2008) (remanding for determination whether genuine issues of material fact exist with respect to fraudulent concealment that would bar statute of repose).

TOPIC 5

CONTRACTS SHORTENING OR LENGTHENING THE STATUTE-OF-REPOSE PERIOD

§ 16. Contracts Shortening or Lengthening the Statute-of-Repose Period

The rules of § 11 (contracts shortening or lengthening the statute-of-limitations period) apply to statutes of repose just as they do to statutes of limitations.

Comment:

a. Sources and cross-references.
b. Contracts shortening the statute-of-repose period.
c. Contracts lengthening the statute-of-repose period.
d. Consumer contracts.
e. Other types of contracts.

a. Sources and cross-references. This Section and the other Sections in Part 2 supersede Restatement Second, Torts § 899, Comment *g*. The Restatement of the Law Second, Contracts does not specifically address contracts shortening or lengthening the statute-of-repose period. For the doctrine of laches applicable to suits for injunctions and other specific relief, see Restatement Third, Torts: Remedies § 53 (Tentative Draft No. 3, 2024). This Section and the other Sections in Part 2 are subject to the contrary terms of any applicable statute. See § 12, Comment *c*. The rules

in this Section are applied separately to each cause of action by each plaintiff against each defendant. See § 12, Comment *e*.

b. Contracts shortening the statute-of-repose period. The reasons for allowing parties to enter into contracts shortening the applicable period as long as the plaintiff retains a reasonable opportunity to bring an action, as explained in § 11, Comment *b*, apply to statutes of repose just as they do to statutes of limitations.

c. Contracts lengthening the statute-of-repose period. The reasons for allowing parties to enter into contracts lengthening the applicable period, as explained in § 11, Comment *c*, apply to statutes of repose just as they do to statutes of limitations.

d. Consumer contracts. Sometimes, contracts that purport to shorten or lengthen the statute-of-repose period are contained in standard-form consumer contracts. Those contractual provisions are governed by the rules restated in Restatement of the Law, Consumer Contracts (Revised Tentative Draft No. 2, 2022), including the rules summarized in § 11, Comment *d* of this Restatement.

e. Other types of contracts. Sometimes, contracts that purport to shorten or lengthen the statute-of-repose period are contained in standard-form employment or insurance contracts. Considerations similar to those governing consumer contracts may also apply to these other types of contracts. See § 11, Comment *e*.

REPORTERS' NOTE

Comment b. Contracts shortening the statute-of-repose period. Cases dealing with contracts shortening the statute-of-repose period include Pincover v. J.P. Morgan Chase Bank, N.A., 592 F. Supp. 3d 212, 225-226 (S.D.N.Y. 2022) (ruling on motion to dismiss that it might be found "manifestly unreasonable" to reduce one-year statute-of-repose period to notify bank of improperly paid items to 30 days in case of 80-year-old customer who lived in nursing home, was not computer or internet savvy, and lacked anyone to help him navigate paperless accounts); Clemente Bros. Contracting Corp. v. Hafner-Milazzo, 14 N.E.3d 367, 371-374 (N.Y. 2014) (ruling that one-year statute-of-repose period to notify bank of improperly paid items may be modified by agreement so long as modification is not manifestly unreasonable, and that shortening period to 14 days in case involving sophisticated commercial parties was not manifestly unreasonable); Tadych v. Noble Ridge Constr., Inc., 519 P.3d 199, 202-204 (Wash. 2022) (ruling that contract reducing six-year construction-defect statute of repose to one year was unconscionable); cf., e.g., Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., 296 P.3d 821, 826-827 (Wash. 2013) (ruling that, subject to same principles that apply to contractual modification of statute of limitations, parties may agree to set time for accrual of causes of action arising under their construction contracts, and may do so with regard to both

statute of limitations and statute of repose). For contrary decisions based on the purposes of the statute of repose governing fraudulent bank transfers, see Rodriguez v. Branch Banking & Tr. Co., 46 F.4th 1247, 1254-1258 (11th Cir. 2022) (applying Florida law) (holding that one-year statute of repose to demand refund of fraudulent bank transfer may not be altered by agreement); Regatos v. N. Fork Bank, 838 N.E.2d 629, 632-633 (N.Y. 2005) (same).

Comment c. Contracts lengthening the statute-of-repose period. For cases upholding contracts lengthening the statute-of-repose period, see, e.g., Sec'y, U.S. Dep't of Labor v. Preston, 873 F.3d 877, 883-887 (11th Cir. 2017) (applying ERISA) (concluding that there seems to be a "broad consensus" that statutes of repose can be expressly waived); Urenco, USA, Inc. v. Baker Concrete Constr., Inc., 2022 WL 1078570, at *1-2 (D.N.M. 2022) (following weight of authority that allows express written tolling agreement to toll statute of repose); LREP Ariz. LLC v. 597 Broadway Realty LP, 2019 WL 1382465, at *3 (D. Ariz. 2019) (following authorities holding that parties may waive or agree to toll statutes of repose through an express agreement), clarified on other issues on reconsideration, 2020 WL 13573982 (D. Ariz. 2020); Lewis v. Taylor, 375 P.3d 1205, 1210-1212 (Colo. 2016) (citing cases from other jurisdictions, holding that statutes of repose may be extended by express tolling agreements, and explaining that voluntary tolling agreements serve the public interest by reducing unnecessary and costly litigation); Christie v. Hartley Constr., Inc., 766 S.E.2d 283, 287 (N.C. 2014) ("[W]e see no public policy reason why the beneficiary of a statute of repose cannot bargain away, or even waive, that benefit.").

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

CHAPTER 3

THE NEGLIGENCE DOCTRINE AND NEGLIGENCE LIABILITY

§ 18 A. Negligent Misrepresentation Causing Physical Harm

(a) An actor who negligently furnishes false information is subject to liability for any physical harm factually caused by another's reliance on the information that is within the actor's scope of liability.

(b) An actor's negligence may occur in ascertaining the accuracy of the information, in the manner in which it is communicated, or in other ways that result in the communication of false information.

(c) An actor is subject to liability pursuant to this Section regardless of whether the person who received or relied upon the actor's misrepresentation is the person who suffered physical harm.

Comment:

a. Negligent misrepresentation is a species of basic negligence doctrine.
b. History.
c. Relationship with negligent representation causing economic loss.
d. Duty.
e. Negligence.
f. Factual causation.
g. Reliance.
h. Reasonable reliance and comparative responsibility.
i. Comparative responsibility.
j. Scope of liability.
k. Scienter.
l. Opinions, predictions, and "puffing."
m. Obligation to disclose.
n. Negligent misrepresentations enabling third parties to cause injury.
o. Publishers and First Amendment limitations.
p. Commercial product seller or distributor misrepresentation.
q. Brand-name drug manufacturers.
r. Medical professionals' negligent misrepresentations.
s. Misrepresentation causing only emotional harm.

a. Negligent misrepresentation is a species of basic negligence doctrine. At bottom, the tort identified in this Section is merely a species of a negligence claim. True, negligent misrepresentation is distinctive in a few respects: The tort is committed through communication rather than other conduct; reliance on the communication is necessary for causation; some negligent misrepresentation cases implicate the protection of speech. These distinctive aspects, however, do not alter the fact that the core of negligent misrepresentation is situated firmly in the general doctrine of negligence.

Thus, when the law of some aspect of negligent misrepresentation is not yet established or otherwise unsettled, courts can profitably consult general negligence tort principles contained in the Restatement Third of Torts: Liability for Physical and Emotional Harm. Just as the elements of factual cause and scope of liability limit the extent of liability for those acting negligently, so too do these elements limit the extent of liability for negligent misrepresentations.

b. History. Negligent misrepresentation has its roots in the ancient doctrine of deceit. Deceit originally arose in connection with those in a contractual relationship. The claim could be asserted only by parties to the contract until the seminal case of Pasley v. Freeman, 100 Eng. Rep. 450 (K.B. 1789). Even when extended to third parties and thereby recognized as an independent claim from breach of contract, the claim was limited to business or financial transactions and protected victims from financial loss. Because of this history and because of the dominance of business and financial losses in claims for misrepresentation, many tend to assume that misrepresentation claims are limited to claims for economic loss.

Yet, for many decades, courts and commentators have recognized that it makes little sense to distinguish between those plaintiffs who sustain financial—as opposed to physical—harm. Indeed, since 1934, the Restatements of Torts have contained provisions imposing liability for negligently furnishing information that causes bodily injury (later expanded to cover property damage). See Restatement of Torts § 311 (recognizing the cause of action); Restatement Second, Torts § 311 (expanding § 311 of the first Restatement to include property damage). These provisions are distinct from liability for negligent misrepresentations causing economic loss. See id. § 552; see also Restatement Third, Torts: Liability for Economic Harm § 5 (replacing § 552 of the Second Restatement). This Section and § 51 of the Restatement Third of Torts: Intentional Torts to Persons, which addresses intentional misrepresentations, continue the long history of Torts

Restatements recognizing these claims for physical harm. In particular, this Section carries forward § 311 from the Second Restatement with minor modifications, as noted in the Comments below.

Notwithstanding this long acceptance, almost half of U.S. states have no definitive case law recognizing—or expressly refusing to recognize—this claim. By contrast, there is no shortage of case law addressing § 552, involving economic harm. The paucity of precedent addressing negligent misrepresentation causing physical harm may be traceable to the fact that, despite decades of authority to the contrary, some still think that liability for misrepresentation is limited to financial and business relationships and the pure economic harm that occurs in those realms. As this Section and § 51 of the Restatement Third of Torts: Intentional Torts to Persons make clear, liability for misrepresentations extends to physical harm.

c. Relationship with negligent representation causing economic loss. The claim recognized in this Section is different from negligent misrepresentation causing purely economic harm, currently recognized in Restatement Third of Torts: Liability for Economic Harm § 5 and previously addressed in Restatement Second of Torts § 552. Because a single negligent misrepresentation can cause widespread and indeterminate economic harm, the economic harm version of misrepresentation is more cabined than the one in this Section. While there are some instances in which an actor's course of conduct can subject the actor to extensive liability for physical harm, as is evident, for example, in Illustration 5 below, such situations comprise a relatively small proportion of physical harm torts.

d. Duty. An actor's conduct that creates a risk of physical harm triggers the ordinary duty to exercise reasonable care. Thus, if an actor makes a false statement that, when relied upon, poses a risk of physical harm, the basic condition for a duty of reasonable care has been satisfied. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(a). In such situations, because there is an affirmative act (i.e., the communication), resort to a basis for an affirmative duty, see id. §§ 38-44, is unnecessary. The foreseeability of physical harm is a matter addressed by the negligence inquiry rather than in the duty determination. See id. § 7, Comment *j* ("Foreseeable risk is an element in the determination of negligence.").

However, in a number of specific situations, such as for publishers of others' false material, courts employ restricted duty rules for reasons of public policy, as explained in the Comments below. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(b) (providing

that, in exceptional cases for reasons of principle or policy, courts may rule that there is no duty and thereby shield the actor from liability).

Compared to liability for negligently caused physical harm, liability for negligently caused economic harm is far more circumscribed by duty limitations. As explained above in Comment *c*, courts reasonably limit the latter because a single misrepresentation can more readily cause widespread and indeterminate economic harm. See Restatement Third, Torts: Liability for Economic Harm § 5, Comments *b*, *f*, and *g*.

e. Negligence. As Subsection (b) makes plain, an actor's negligence may consist of failing to exercise reasonable care in ascertaining the truth of the information conveyed, in the manner in which the information is communicated, or in other ways in which the actor's negligence leads to the communications of a false statement.

Illustrations:

1. Keira Construction hires Lampley Services to inspect Keira's headquarters for asbestos contamination. Lampley's inspector conducts a wholly inadequate inspection, finds no asbestos, and falsely reports to Keira that its building is asbestos-free. Upon receiving this (incorrect) report, Keira takes no steps to mitigate any asbestos contamination; if asbestos had been found, thorough mitigation efforts would have been taken to eliminate any risk of asbestotic disease. Subsequently, employees of Keira, who were exposed to asbestos at its headquarters in the years after Lampley's shoddy inspection, contract asbestotic disease. Lampley is subject to liability to those employees for negligent misrepresentation.

2. Same facts as Illustration 1, except that Lampley's inspector performs a competent inspection and discovers the presence of asbestos at Keira's headquarters. The inspector files a report with her findings, but, due to an error by a Lampley administrator, Lampley reports to Keira that there is no asbestos contamination. Same result as Illustration 1.

f. Factual causation. An element of the negligent misrepresentation tort is that the misrepresentation is a factual cause of the victim's physical harm. The rules for factual causation set forth in Restatement Third of Torts: Liability for Physical and Emotional Harm §§ 26-28 apply to claims under this Section. Reliance, addressed in Comment *g*, is a necessary, but not sufficient, condition for factual causation.

g. Reliance. For a false statement factually to cause harm, someone must rely on the statement and take (or avoid taking) action based on the information conveyed. As Subsection (c)

makes plain, the victim may be, but need not be, the person who received or relied upon the defendant's false statement. Thus, for example, if an employer relies on a machinery consultant's false statement about a safety guard on an industrial machine, and, in reliance on the representation, the employer decides to purchase it, and an employee is subsequently injured because the guard does not protect as represented, the reliance requirement is satisfied in the employee's suit against the consultant, even though the employee never heard or personally relied upon the utterance.

Often, reliance will evidently be the basis for factual causation, as when a former employer provides a glowing reference letter for a sexual predator who is hired in reliance on the reference letter. On some occasions, however, reliance may not be sufficient for factual causation, such as when a victim would have suffered the same injury even if she had not relied on the misinformation.

Illustrations:

3. David, the pilot of a small airplane without onboard weather services, contacts Air Traffic Control to inquire whether there are hidden thunderstorms directly ahead. Receiving a negative response, David continues on his current course and enters a severe thunderstorm that results in a crash landing, injuring David. At the time of the Air Traffic Controller's false statement, thunderstorms had completely surrounded David so that, even if Air Traffic Control had furnished accurate information, David would have had no way to escape. Although David relied on the controller's statement by proceeding on the same course, that reliance was not a factual cause of the crash and harm to David.

4. Mason is fired from his job at Apple Middle School after the school learns that he has engaged in sexual misconduct. Nevertheless, Apple Middle School provides a glowing letter of recommendation for Mason, and, based on that letter, he is hired at Pear Middle School, in the next town over. In Mason's free time, he leads a church youth group and, in that capacity, meets and molests 14-year-old Ruchi. At trial, Ruchi offers testimony that, had Apple Middle School offered an honest assessment of Mason's background, he would not have been hired at Pear Middle School, and he would, therefore, have been ineligible to lead the church youth group (as the church had a policy of employing only teachers in that position). Apple Middle School is subject to liability to Ruchi notwithstanding that Pear Middle School, rather than she, relied on Apple Middle School's misrepresentation.

By contrast with Illustration 4, an employer has a privilege when communicating with, inter alia, prospective employers of an employee or former employee. That privilege extends to

false information negligently provided but excludes false information that the employer knows is false or when the employer acts in reckless disregard of the truth. See Restatement of the Law, Employment Law § 6.02.

As technology develops, the concept of human reliance may, too, have to develop. When fully autonomous vehicles are in operation, inaccurate information may be conveyed to the controller system of the vehicle resulting in an accident. That a machine, rather than a human, "relied" on the incorrect information should not affect the analysis or the outcome of the case. Similarly, artificial intelligence or other technology may provide information that, if incorrect, constitutes a misrepresentation. Such technology is treated as a tool, not as a person subject to liability, and it is the latter that is subject to liability for any such misrepresentation. Cf. Restatement of the Law Third, Agency § 1.04, Comment *e* ("[I]t is not possible for an inanimate object or a nonhuman animal to be a principal or an agent under the common-law definition of agency. However, an animal or an inanimate object may serve as a person's instrumentality in a manner that may be legally consequential for the person.").

h. Reasonable reliance and comparative responsibility. Section 311 of the Restatement Second of Torts required that reliance on a misrepresentation be reasonable—and it made reasonable reliance an element of the prima facie claim. The advent of comparative responsibility and its core principle that fairness requires sharing of a loss when both plaintiff and defendant act negligently raises the question of whether plaintiff's unreasonable reliance should be compared with defendant's negligent misrepresentation to apportion liability between the parties—or whether unreasonable reliance should simply defeat the plaintiff's claim. In the economic harm realm, courts have opted for the former, employing comparative responsibility principles to apportion liability between a negligent misrepresenter and a victim who acted unreasonably in relying on the misrepresentation. The Restatement Third of Torts: Liability for Economic Harm has endorsed this position in Comment *j* to § 5, which provides that a "plaintiff's unreasonable reliance does not defeat a claim for misrepresentation but only reduces recovery."

In the physical harm realm, courts have not squarely confronted this issue. No court has held that reasonable reliance remains a prima facie element of the claim in light of the adoption of comparative responsibility. Neither has any court held that comparative responsibility principles apply when reliance is unreasonable. There are a handful of cases that proceed on the unarticulated assumption that reliance must be reasonable by denying recovery based on a determination that

reliance was unreasonable. At the same time, there are a small number of physical harm cases that advert to comparative fault.

Militating toward treating all plaintiff negligence the same way, unreasonable reliance and unreasonable (subsequent) behavior often blur. Thus, a pilot of a small plane might unreasonably rely on inaccurate vectors from Air Traffic Control to avoid a building thunderstorm. Or, a pilot of a small plane may reasonably rely on those vectors but act negligently when approaching the affected area by failing visually to ascertain the thunderstorm's location. After the fact, it is difficult to say how the pilot's error should be categorized. Unfortunately, none of the cases that advert to comparative fault in negligent misrepresentation cases specifies to which aspect of unreasonable conduct by a plaintiff they are referring. Highlighting this categorization problem, the Restatement Third of Torts: Liability for Economic Harm observed in § 5, Comment *j*: "The same conduct by the plaintiff can often be described as imprudent reliance or as negligence of some other kind." Yet, if unreasonable reliance is treated differently from other forms of unreasonable conduct, courts and factfinders will be forced to make difficult—and often slippery—determinations about contending characterizations of plaintiff's conduct.

Given the categorization difficulty addressed above, and consistent with § 5, Comment *j*, this Section requires only reliance to make out a prima facie case of misrepresentation; the unreasonableness of the plaintiff's or another's reliance is to be addressed as a matter of comparative responsibility and the jurisdiction's rules regarding joint and several liability. This Section takes this tack for three reasons. First, doing so maintains consistency between different provisions of this Third Restatement. The case for treating unreasonable reliance with a comparative lens is at least as strong for physical harm cases as it is in the economic harm realm. Second, as noted above, differentiating plaintiff conduct related and unrelated to reliance will often be difficult and contested. By assessing both forms of plaintiff conduct through a comparative lens, this Section frees courts from having to categorize plaintiff misconduct. See Illustration 6, below. Third, addressing unreasonable reliance through principles of comparative responsibility supports the fundamental fairness of comparative responsibility and the principle that sharing costs among those who wrongfully cause a loss should be a strong default unless there are very good reasons to depart from that default. In this context—the reasonableness of reliance—there are not.

Illustrations:

5. Tadro, a popular political commentator with approximately one million followers, tweets: "Don't get vaccinated with the commercially prepared vaccines; instead take 100 milligrams of arsenic, which will provide greater protection and, unlike the other vaccines, prevent the government from monitoring your brain." Tadro wrote this because a local politician told him it was so in an interview, and Tadro did no further research to determine the truth of what he tweeted. Tadro's tweet goes viral, and over 1000 people take Tadro's advice to heart, resulting in hundreds of deaths and more who suffered serious injuries. The unreasonableness of the victims' reliance on Tadro's statement does not bar their claims; if the factfinder determines that a victim's reliance is unreasonable, damages should be apportioned to Tadro (if the factfinder determines that Tadro is liable for negligent misrepresentation) and the victim on the basis of comparative responsibility.

6. ExFed, Inc. employs Tadlock Truck and Automotive to maintain its fleet of trucks and to ensure they are in appropriate mechanical condition to reliably and safely serve the needs of ExFed. When Pat, one of ExFed's drivers, retrieves a truck from Tadlock, Lynn, the mechanic who serviced the truck, assures Pat that the truck is in tip-top shape. In fact, however, the truck's rear tires evidence an imminent fatigue failure due to their obvious underinflation. While Pat is driving the truck cross-country, a tire suddenly fails, causing the truck to overturn, injuring Pat. In Pat's suit against Tadlock, Tadlock claims Pat unreasonably relied on its and Lynn's affirmation of the truck's safe condition. Pat responds by claiming that, if he acted unreasonably, it was only in failing to inspect the truck and tires before he left on the cross-country trip. There is no need to resolve whether Pat or Tadlock are correct in their contrary characterizations of Pat's behavior. If the factfinder determines that Pat acted unreasonably in either or both respects, it should apportion comparative responsibility to Pat. Such an apportionment will reduce Pat's recovery from Tadlock but not bar his claim (although in modified comparative fault jurisdictions if Pat's comparative fault exceeds the jurisdiction's threshold, he will be barred, and he will likewise be barred in the handful of jurisdictions that continue to utilize contributory negligence).

The absence of unreasonable reliance to bar a claim may require more careful analysis of other elements of a case. Thus, sometimes courts have denied recovery for statements that were general superlatives, such as in Illustration 11, below, on the ground that plaintiff's reliance was

unreasonable. However, a similar resolution can be attained on the ground that a statement that constitutes puffing is not actionable, see Comment *l*, regardless of plaintiff's reliance, reasonable or unreasonable. Similarly, in the past, courts have relied on unreasonable reliance to deny recovery in cases in which it was an easier issue to resolve than reliance itself.

Whether a person's reliance on a statement is or is not reasonable must be assessed under all of the circumstances. The actor's superior knowledge, the plausibility vel non of the representation, the ability to verify and ease of doing so, the use of general superlatives, e.g., "the best Restatement of all time," are among the factors that bear on whether reliance was reasonable. The reasonableness of reliance is a matter for the factfinder, subject to the usual prerogative of the court to rule as a matter of law when no reasonable jury could find otherwise.

Illustrations:

7. Peggy is intimate with her boyfriend, Braylen. Over a period of months, Braylen's health declines. Concerned about the possibility that Braylen is infected with HIV, Peggy asks Braylen's parents, with whom he resides, about his health. They assure her that his malady is due to heavy-metal poisoning and not a sexually transmitted disease, although they have no basis for their statement. At the time of this exchange, Peggy is not infected with HIV, but she subsequently does become infected as a result of having intercourse with Braylen. Peggy sues Braylen's parents for negligently misrepresenting his medical condition. Whether Peggy's reliance on the parents' misrepresentation is unreasonable is a matter for the factfinder based on all of the circumstances.

8. As an electric train approaches a grade crossing, the crossing gates remain up signaling that it is safe for drivers to cross the tracks. In reliance on the position of the gates and the obscuration of the tracks leading to the crossing by heavily forested land, Hines drives across the tracks and is hit by the train. Hines's reliance on the crossing gates is, as a matter of law, reasonable.

i. Comparative responsibility. In addition to unreasonable reliance, addressed in Comment *h*, other unreasonable conduct by a plaintiff that is also a cause of plaintiff's harm is subject to comparative responsibility principles.

j. Scope of liability. The same standards for scope of liability that apply to other negligence actions apply to claims under this Section. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29.

Illustration:

9. Jarnaya decides to have surgery on her leg to address unsightly varicose veins. She does so in reliance on Dr. Boone's baseless assurance that the surgery would not leave her with a visible scar; in fact, some scarring following the procedure is very common. After the surgery, it so happens that Jarnaya does not have visible scarring, but she does suffer continuous pain that requires a second surgery. Although Jarnaya suffers physical harm caused by Dr. Boone's misrepresentation (she would not have consented to the surgery without the false assurance), the harm is, as a matter of law, not within the scope of Dr. Boone's liability, and Dr. Boone is not liable to Jarnaya for negligent misrepresentation because Dr. Boone's misrepresentation created a risk that Jarnaya would have visible scarring, not pain and a second surgery. Whether Jarnaya has a claim against Dr. Boone based on a failure to obtain informed consent is addressed in Restatement Third of Torts: Medical Malpractice § 12 (Tentative Draft No. 2, 2024).

The issue of whether a victim is a foreseeable plaintiff is subsumed within the scope of liability analysis. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29, Comment *n*.

k. Scienter. Intentional misrepresentation (fraud) actions require scienter—the plaintiff must show that the actor knew of the falsity of the representation. Scienter is not an element of negligent misrepresentation. So long as an actor's false statement results from a failure to exercise reasonable care, the actor is subject to liability for negligent misrepresentation.

Illustration:

10. Umberto hires Rattle & Hum to service his automobile in anticipation of a long cross-country trip, and, when dropping the car off, he specifically requests Rattle & Hum to inspect and repair the automobile's brakes. The mechanic assigned to service Umberto's car becomes distracted during her inspection of the brakes, thereby failing to discover that the brakes are in a precarious condition that could lead to sudden failure without warning. Rattle & Hum returns Umberto's car to him, telling him that all systems are operating properly and specifically that the brakes are in "like new condition." During his trip, the brakes fail, and Umberto is injured in the ensuing accident. Rattle & Hum is subject to liability for its misrepresentation, notwithstanding that neither it nor its mechanic knew of the deficient condition of the brakes.

l. Opinions, predictions, and "puffing." It is frequently said that opinions cannot be the basis for a claim of misrepresentation because opinions cannot be proven to be false. That, however, oversimplifies a highly fact-intensive and context-specific determination.

True, some statements (such as the one in Illustration 11, below) are inadequate to serve as the basis of a misrepresentation claim. This inadequacy is similar to courts' refusal to recognize puffing as an affirmation of fact for purposes of creating an express warranty. Sometimes this result is justified on the ground that such statements are not capable of being proved false; sometimes the ground is that such statements cannot, as a matter of law, be relied upon.

Yet, some opinions may serve as a basis for liability under this Section. In particular, some opinions may imply a fact that can be proved false, as where someone claims that a particular merchant "is the most honest in town," when, according to the Better Business Bureau, that merchant has the worst record for complaints about its dishonesty. An opinion or prediction may also be actionable if it falsely implies that the speaker has facts to support the statement or knows of no material facts contrary to the statement. Thus, if the owner of a bicycle lends it to a friend stating: "This bike will safely serve your needs in the upcoming race" aware that the bicycle had been sitting unused in the basement for 15 years, a claim for negligent misrepresentation will lie. Similarly, if the mechanic in Illustration 10 stated to the owner, "my opinion is that your vehicle is in tip-top shape," that statement implies that the mechanic has inspected the car and determined it to be travel worthy. A speaker may not shield a false statement from scrutiny merely by couching it as opinion rather than fact.

True statements may also be misrepresentations when they imply a false state of affairs (a "half-truth"). An actionable half-truth may exist, for example, when a school district provides a reference for a teacher that characterizes him (truthfully) as a highly popular teacher, without revealing that the teacher is the subject of three credible reports of sexual misconduct. Or, another may exist when a mechanic, hired (as in Illustration 10) to inspect a vehicle, says (truthfully) "I didn't see anything wrong with your car," without revealing that he only gave the car a cursory once-over.

Illustrations:

11. In advance of a major national musical festival in Winston-Salem, North Carolina, Deborah, the director of security for the event, publicly assures those considering attending that, during the event, "Winston-Salem will be the safest place on earth." Emilio

attends the festival and, on the second day, is mugged. Because Deborah's statement is pure puffing, Deborah and the festival are not liable to Emilio for negligent misrepresentation.

12. At a farmers' convention, a representative of a pesticide manufacturer, Perfect Kill Pesticide, promotes its product, stating: "Why gamble with your crop when you can insure its success with our product, Perfect Kill Pesticide." Perfect Kill and its representative know that Perfect Kill is only 93 percent effective. Relying on that promotion, Farmer Brown purchases and applies Perfect Kill to his cotton field, and he quickly appreciates its inability to kill all natural pests. After boll weevils destroy Farmer Brown's cotton crop, he sues for negligent misrepresentation. Whether Perfect Kill's representative's statement is actionable as a misrepresentation is a question for the factfinder.

m. Obligation to disclose. Most negligent misrepresentation claims are based on affirmative false representations. There are, however, some instances in which liability may lie under this Section when an actor has an obligation to communicate the existence of risk and yet negligently fails to do so. Those instances exist when the context of the relationship is such that the actor has superior knowledge and knows or should know the other is reasonably relying on the actor to furnish accurate information.

Illustrations:

13. Pam and Dan arrange for the adoption of Scout, a 12-year-old boy, through a social-services agency. The agency provides considerable information about Scout but neglects to tell Pam and Dan that Scout assaulted several young children while in foster care. After he is adopted, Scout assaults Michael, a child whom Pam and Dan had previously adopted, causing him serious physical injury. The social-services agency is subject to liability for negligent misrepresentation even though it made no affirmative misrepresentation about Scout's violent past.

14. Same facts as Illustration 11, except that Deborah, the director of security for the event, says nothing about safety while otherwise promoting the Winston-Salem music festival. The local newspaper reports on a planned demonstration by a fringe group that opposes music for enjoyment's sake, believing it should be used only for religious purposes and whose demonstrations sometimes turn violent. Deborah, as a matter of law, has no duty affirmatively to report on the group and the risks that it poses.

n. Negligent misrepresentations enabling third parties to cause injury. A negligent misrepresentation may enable a third party to injure an individual negligently, intentionally, or even criminally. Such misrepresentations, which create risk for potential victims, are subject to the ordinary duty of care contained in § 7 of the Restatement Third of Torts: Liability for Physical and Emotional Harm. The speaker may be subject to liability, absent any special relationship, undertaking, or any other basis for an affirmative duty. See id. § 19 (providing that an actor can be negligent when acting so as to foreseeably enable another to cause harm).

Illustration:

15. The Muroc School District provides an unreservedly positive reference for Robert, a former teacher in the District. It does so aware that multiple parents had complained that Robert solicited sexual favors from students—and that Robert had been fired based on those reports. Relying on Muroc's glowing recommendation, Robert is hired as an assistant principal at another school district where he sexually assaults Randi. The Muroc School District is subject to liability to Randi for negligent misrepresentation.

o. Publishers and First Amendment limitations. Courts have not permitted claims of negligent misrepresentation causing physical harm against publishers who did not provide the content of the publication alleged to be false. As noted in Comment *d*, this limitation on liability is often effectuated by no-duty rulings. These rulings reflect the fact that liability for some negligent misrepresentation claims may actually violate the First Amendment—and others may fall within a penumbra that extends beyond the four corners of the First Amendment itself but that courts protect with no-duty rulings. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(b) (providing for withdrawal of duty based on policy or principle).

p. Commercial product seller or distributor misrepresentation. Restatement Third of Torts: Products Liability § 9 governs the liability of a commercial seller or distributor for misrepresentations concerning products distributed by the seller or distributor. That Section imposes liability for fraudulent, negligent, and innocent misrepresentations, and it sets forth the conditions for such liability. Notably, § 9 relies on § 311 of the Second Restatement of Torts for negligent misrepresentation, so liability for negligent misrepresentations by product sellers is congruent with liability under this Section. In addition to tort liability for product sellers' misrepresentations, contract, through express warranty, may provide a basis for liability. See UCC § 2-313.

While commercial sellers' and distributors' misrepresentations are governed by § 9, *nonsellers*, such as endorsers, trade associations, and private standards groups, may also, on occasion, make representations about a product. When those actors make negligent misrepresentations, their misrepresentations are subject to liability under this Section, not § 9. As to noncommercial sellers' misrepresentations, see [coverage in this Restatement on liability of noncommercial sellers].

q. Brand-name drug manufacturers. Generally, as Comment *p* explains, a product user can assert a cause of action against a product seller for negligent misrepresentation. See Restatement Third, Torts: Products Liability § 9. This principle gets more complicated, however, when the product user is injured by a generic (rather than brand-name) prescription drug and sues the brand-name manufacturer for misrepresentation.

Because of two Supreme Court decisions, state-law products liability claims against generic drug manufacturers are preempted by the federal Food, Drug and Cosmetic Act (the "FFDCA"), while claims against *brand-name* drug manufacturers are generally not preempted. Given this framework, many consumers, allegedly injured by their use or ingestion of a generic drug, have brought claims against the brand-name manufacturer. Under rules that govern the labeling of prescription medications, the brand-name manufacturer (subject to FDA veto and oversight) actually crafts and controls the language in the package insert that accompanies not only the manufacturer's drug *but also* the generic medication. Typically, then, the brand-name manufacturer (not the generic manufacturer) actually drafted the warning at issue—and it is on that basis that numerous plaintiffs have asserted that the brand-name manufacturer, as the drafter of the allegedly deficient language, is properly subject to liability for misrepresentation. Although plaintiffs often assert a multiplicity of claims, this Section addresses only defendants' potential liability under a negligent misrepresentation—and not a products liability—theory.

Since 1994, over 150 court decisions have addressed the liability of brand-name manufacturers in this situation. The overwhelming number of these decisions have concluded that brand-name manufacturers cannot be held liable if they did not manufacture the drug consumed by the plaintiff. In a few instances, courts interpreted the language of the state's products liability act as applicable to negligent misrepresentation claims and concluded the statute barred recovery. In other instances, courts denied recovery on less persuasive grounds, as detailed in the Reporters' Note to this Comment. Most of these decisions have come from federal district courts that have

ventured *Erie*-required assessments of this state-law issue; others have come from federal appellate courts, joined by a significant number of state trial and intermediate appellate courts.

Notwithstanding the overwhelming body of case law developed over a quarter century, only five state supreme courts have ruled on the matter. In three of those, the court held that brand-name manufacturers could be liable to generic-drug patients, although one limited liability to instances of brand-name manufacturer recklessness, and another one was legislatively overturned. Because of the paucity of state-supreme-court decisions addressing this issue, the Institute takes no position on this matter, deferring to further developments in state high courts.

r. Medical professionals' negligent misrepresentations. A medical professional who negligently misrepresents the risks of a procedure or course of treatment is subject to liability under this Section, regardless of the professional's liability for failure to provide informed consent. See Restatement Third, Torts: Medical Malpractice § 12 (Tentative Draft No. 2, 2024). A professional may meet the requisite standard for informed consent but provide additional false information that induces the patient to consent to treatment, in which case the professional would be subject to liability for negligent misrepresentation regardless of whether the professional adequately provided or obtained informed consent.

Although medical professionals' primary duty is to their patients, medical professionals are also subject to liability for actions that create risks to foreseeable third parties, as when a physician prescribes medication that impairs a patient's ability to drive without furnishing an appropriate warning to the patient. See Restatement Third, Torts: Liability for Physical and Emotional Harm, Chapter 11 (Liability of Medical Professionals and Institutions) § 3, Comment *g* and Illustration 2 (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (addressing liability of physician who prescribes sedating medication to patient without informing her of sedating qualities that results in accident in which third party is injured). So it is as well with health care professionals who affirmatively make negligent misrepresentations that imperil others.

Some courts, however, limit this duty to identifiable potential victims. Because negligent misrepresentations may pose a foreseeable risk to a class of unidentified persons, as in id., without creating the potential for unbounded liability—and because nonprofessionals in similar circumstances would be subject to liability to the entire class of foreseeable victims—the limitation

to identifiable victims appears arbitrary, unnecessary, and inconsistent with id. § 3. As such, it is not adopted by this Section.

Illustration:

16. Dr. Max tests his patient, Vivian, for sexually transmitted diseases ("STDs") at her request because, as she explains to Dr. Max, she and her new exclusive boyfriend, Menachim, have agreed to be tested before engaging in sexual relations. After the results come back and reveal that Vivian tested positive, Dr. Max negligently informs Vivian that she tested negative. As a result, Vivian has unprotected sexual relations with Menachim who contracts an STD. Notwithstanding the fact that Dr. Max has no physician–patient relationship with Menachim, Dr. Max is subject to liability to Menachim for negligent misrepresentation. Whether Dr. Max's duty extends to Menachim's *subsequent* romantic partners who contract an STD from him is a question to be resolved based on public-policy considerations under Restatement Third of Torts: Liability for Physical and Emotional Harm § 7(b).

s. Misrepresentation causing only emotional harm. A negligent misrepresentation claim for pure emotional distress is subject to the same rules as other negligent infliction of emotional distress claims. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 47. That emotional harm is inflicted through a misrepresentation rather than other conduct is irrelevant to the validity of the claim.

REPORTERS' NOTE

Comment b. History. The Dobbs treatise reports, without citation and contrary to this Comment, that: "Courts fully accept liability for *personal injury or property damage* resulting from negligent misrepresentations." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 43.5, at 1123 (2d ed. 2016). The Harper, James and Gray treatise is in accord: "Where misrepresentations entail the foreseeability of physical harm and such harm in fact results, the ordinary rules of negligence have for some time been applied." 2 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 7.6, at 473 (3d ed. 2006).

Notwithstanding the Dobbs and Harper treatises and Restatement endorsement since 1934, numerous courts have expressed doubt that misrepresentations outside the business- or financial-transaction realm can supply the basis for recovery. See Doe v. Dilling, 861 N.E.2d 1052, 1066 (Ill. App. Ct. 2006) (discussing cases), aff'd, 888 N.E.2d 24 (Ill. 2008). While there are a substantial number of states that have clearly endorsed the claim, many have no case law that addresses the issue, and, in many others, the case law is insufficient to draw a firm conclusion about the state of the doctrine. To be sure, only one court has outright rejected the availability of these claims, and

that decision was subsequently disavowed by a sister court. See id. at 1066. Yet many courts, confronted with a negligent misrepresentation claim, remark on the lack of its adoption and then proceed to explain why, if such a claim did exist, the plaintiff nevertheless cannot recover. In other jurisdictions, courts clearly accept one type of negligent misrepresentation, say for false employment references, but there is still doubt about the generalizability of that acceptance to the broad swath of circumstances in which negligent misrepresentations cause physical harm.

There are approximately a dozen states with strong case law evidencing clear acceptance of claims for negligent misrepresentation. See Garcia v. Superior Ct., 789 P.2d 960, 964 (Cal. 1990) ("[T]he duty to use reasonable care in giving information applies more broadly when physical safety is involved."); Bloskas v. Murray, 646 P.2d 907, 914 (Colo. 1982) (surgeon falsely stated to patient that surgeon had performed similar surgeries previously when he had not and falsely assured the patient that amputation was not a risk of the contemplated procedure); Doe v. Cochran, 210 A.3d 469 (Conn. 2019) (remarking in suit against physician for negligently reporting that patient's test for herpes was negative: "This court has long recognized liability for negligent misrepresentation.") (quoting D'Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch., 520 A.2d 206, 217 (Conn. 1987)); Seagraves v. ABCO Mfg. Co., 164 S.E.2d 242, 244 (Ga. Ct. App. 1968) ("One who negligently gives false information to another is subject to liability for physical harm to the other caused by the latter's action taken in reasonable reliance on the information."); Schmidt v. Mahoney, 659 N.W.2d 552, 555 (Iowa 2003) (recognizing the general availability of a § 311 claim, while denying such a claim by a third party against a physician for reasons of public policy); Daye v. Gen. Motors Corp., 720 So. 2d 654 (La. 1998) (confusing opinion that suggests Louisiana Code provisions are broad enough to permit negligent misrepresentation claims against product manufacturer but are subject to duty/risk analysis without explaining the duty analysis part of that test); White v. Kennedy Krieger Inst., Inc., 110 A.3d 724, 747 (Md. Ct. Spec. App. 2015) (commenting "[w]here a negligent misrepresentation is alleged to create a threat or risk of physical harm, Maryland courts appear to have adopted the position of Section 311 of the Restatement (Second) of Torts"); Clark v. St. Dominic-Jackson Mem'l Hosp., 660 So. 2d 970, 974 (Miss. 1995) (citing, quoting, and applying § 311 in an action against medical provider for omissions in informed consent form); Elizabeth E. v. ADT Sec. Sys. W., Inc., 839 P.2d 1308, 1311 (Nev. 1992) (seeking and finding the basis for plaintiff's negligent misrepresentation claim in a contract between defendant and plaintiff's employer); Marcotte v. Peirce Constr. Co., 280 A.2d 105, 108 (N.H. 1971); Reynolds v. Lancaster Cnty. Prison, 739 A.2d 413, 422 (N.J. Super. Ct. App. Div. 1999) (applying § 311 to negligent misrepresentation about viciousness of guard dog); Davis v. Bd. of Cnty. Comm'rs of Dona Ana Cnty., 987 P.2d 1172, 1179 (N.M. Ct. App. 1999) ("[W]e accept the principles set forth in Section 311, as they apply to an employer's duty of care in making employment references and the circumstances under which that duty extends to foreseeable third parties. We find those principles harmonious with the general propositions of New Mexico law that govern duty of care and duty to third parties."); Heard v. City of New York, 623 N.E.2d 541, 545 (N.Y. 1993) (observing that, "though initially the cause of action arose solely in commercial litigation, misrepresentation now may be asserted as grounds for recovery in personal injury litigation as well"); Jones v. Stanko, 160

N.E. 456, 458 (Ohio 1928) (reversing trial court's failure to instruct jury on negligence of physician in failing to diagnose patient with smallpox and assuring neighbor that it was safe to assist patient).

For cases that impliedly support the existence of a physical harm claim without explicitly recognizing such, see P.G. v. State, Dep't of Health & Hum. Servs., Div. of Fam. & Youth Servs., 4 P.3d 326, 336 (Alaska 2000) ("DFYS owes a duty of due care to disclose relevant information to prospective foster parents."); Hamman v. County of Maricopa, 775 P.2d 1122, 1125 (Ariz. 1989) ("We approve of the ruling of the Court of Appeals that the alleged negligent representation by Dr. Suguitan that [son] was 'harmless' stated a valid claim."); Johnson v. Preferred Pro. Ins. Co., 91 A.3d 994, 1017 (Del. Super. Ct. 2014) (confusing opinion addressing negligent misrepresentation when facts revealed clear case of fraud, in which court asserted knowledge of falsity was required element of negligent misrepresentation); Hall v. Ford Enters., Ltd., 445 A.2d 610, 611 (D.C. 1982) (affirming a directed verdict for defendant because the alleged misrepresentation was not false); Passmore v. Multi-Mgmt. Servs., Inc., 810 N.E.2d 1022, 1028 (Ind. 2004) (affirming summary judgment for employer who allegedly provided negligent misrepresentations in reference letter for former employee in order to foster fuller and more candid referral letters); Stafford v. Neurological Med., Inc., 811 F.2d 470 (8th Cir. 1987) (applying Missouri law) (reversing JNOV for defendant in case in which defendants negligently filled out insurance form with incorrect diagnosis of brain tumor that led to patient committing suicide after finding the insurance form); Jackson v. State, 956 P.2d 35, 49 (Mont. 1998) (upholding claim against adoption agency for failing accurately to report to adoptive parents the severe mental deficiencies of biological parents); English v. Lehigh Cnty. Auth., 428 A.2d 1343, 1357 (Pa. Super. Ct. 1981) (finding § 311 inapplicable to the facts of the case); Grogan v. Uggla, 535 S.W.3d 864, 870 (Tenn. 2017) ("While we do not foreclose the possibility of recognizing the tort of negligent misrepresentation involving physical harm, we decline to do so in this case because the plaintiff has failed to allege that the defendant negligently gave false information."); Doe v. Roe Sch., 67 Va. Cir. 387 (2005) ("Although neither the Restatement nor the circuit court opinion is binding on this Court, both provide persuasive guidance in the absence of controlling authority.").

Texas, as is so often the case, is in a category by itself, having acknowledged in pure dicta the availability of a claim for negligent misrepresentation that causes physical harm. See D.S.A., Inc. v. Hillsboro Indep. Sch. Dist., 973 S.W.2d 662, 664 (Tex. 1998) ("A party may recover for negligent misrepresentations involving a risk of physical harm only if actual physical harm results."); see also Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins, 926 S.W.2d 287 (Tex. 1996) (permitting a claim against a local Boy Scout Council that recommended an assistant scoutmaster to be scoutmaster for a newly formed troop despite knowledge of claims of sexual abuse by the scoutmaster); see also id. at 293 (Enoch, J., concurring in part) ("The similarities between the duty adopted by the Court today and section 311's duty are striking. Even more striking is that this Court has refused to recognize the tort of negligent misrepresentation for a non-pecuniary injury.").

Almost half of the states have insufficient case law to enable a reasonably confident assessment of the law in that jurisdiction. These states include: Florida, Hawaii, Idaho, Kansas,

Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

For the history of actions for deceit, see JOHN BAKER, INTRODUCTION TO LEGAL HISTORY 352-353 (2019); 2 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 7.1, at 443-444 (3d ed. 2006); Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Among Change*, 39 AM. J. LEGAL HIST. 405 (1995).

This Section is largely consistent with Restatement Second of Torts § 311 (AM. L. INST. 1965). To the extent it diverges, it reflects modifications to basic tort-law principles that have been endorsed by earlier portions of this Third Restatement of Torts, as well as case law decided since the Second Restatement was published over half a century before this Restatement was prepared. This Section replaces § 311.

Comment c. Relationship with negligent representation causing economic loss. As the Harper, James, and Gray treatise provides:

> Where misrepresentations entail the foreseeability of physical harm and such harm in fact results, the ordinary rules of negligence have for some time been applied [specifically citing § 311]. Courts have been more reluctant, however, to impose liability on this basis where a misrepresentation leads solely to economic loss. The reason for the difference is that by and large the range of physical harm is more limited. In the field of economic harm, however "[i]f liability for negligence exists, a thoughtless slip or blunder . . . may expose [defendants] to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."

2 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 7.6, at 473-474 (3d ed. 2006) (quoting Ultramares v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (footnotes omitted)). See also W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 205 (5th ed. 1984) (observing that pecuniary harm cases have been "kept within somewhat more narrow limits").

Courts recognizing the broader scope of liability for negligent misrepresentations causing physical injury include Garcia v. Superior Ct., 789 P.2d 960, 964 (Cal. 1990) ("[T]he duty to use reasonable care in giving information applies more broadly when physical safety is involved."); Doe v. Cochran, 210 A.3d 469, 481 (Conn. 2019) ("[T]here is even less need to cabin potential third-party liability for negligent misrepresentation in cases such as this, in which the misinformation was not supplied for the recipient's financial benefit and the third-party plaintiff suffered physical . . . injuries."); Bd. of Educ. of City of Chi. v. A, C & S, Inc., 546 N.E.2d 580, 592 (Ill. 1989) (rejecting relevancy of cases relying on § 552 of the Second Restatement of Torts that limit negligent misrepresentation liability to those who are in the business of supplying information in case involving physical harm and concluding § 311 of the Second Restatement is the proper provision to consult in such cases).

Comment d. Duty. Notably, Restatement Second of Torts § 311 (AM. L. INST. 1965) makes no mention of duty in setting forth the basis for liability for negligent misrepresentations causing physical harm. Illustrating the position of Comment *d* is Randi W. v. Muroc Joint Unified Sch.

Dist., 929 P.2d 582 (Cal. 1997). There, a 13-year-old student was sexually abused by Robert Gadams, the vice-principal of her school. She sued defendants, which included school districts where Gadams had previously worked, for negligently providing misleading references for a teacher who had been the subject of complaints of sexual misconduct. The defendants argued that, in the absence of a special relationship between the defendants and the plaintiff or some known and specific threat to plaintiff, they had no duty to the plaintiff. The court rejected that contention, responding: "In this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct." Id. at 588. Defendants, but not the court, confused affirmative duties to rescue another from the ordinary duty of reasonable care when creating a risk to others. Defendants' acts of providing misleading references created precisely the risk of sexual assault that plaintiff ultimately suffered.

> Similar is Garcia v. Superior Ct., 789 P.2d 960 (Cal. 1990). There, the court explained:
>
> [T]he [lower] court's search for a special relationship was unnecessary. A special relationship is a prerequisite for liability based on a defendant's *failure to act*. In contrast, plaintiffs in this case assert that [the parole officer] is liable because his allegedly negligent representations about [the parolee's] physical safety induced her to be less careful. Accordingly, it is unnecessary to look beyond the ordinary rules that determine when misrepresentations are actionable.

Id. at 963 (footnote omitted). Numerous other cases are in accord. See, e.g., Bd. of Educ. of City of Chi. v. A, C & S, Inc., 546 N.E.2d 580, 592 (Ill. 1989) (explaining in negligent misrepresentation case involving false statements concerning safety of asbestos-containing materials that defendant was subject to the default duty of reasonable care for an actor who creates risk); Smith v. Brutger Cos., 569 N.W.2d 408, 416 (Minn. 1997) (Tomljanovich, J., dissenting) (correctly observing that "this tort does not require the defendant to protect the plaintiff from the acts of a third party, rather it requires the defendant to take objectively reasonable steps to assure that the information the defendant is providing to the plaintiff is accurate"); Heard v. City of New York, 623 N.E.2d 541, 544 (N.Y. 1993) ("Put differently, the question is whether defendant's conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing.") (citation omitted); see also Restatement Third, Torts: Liability for Physical and Emotional Harm § 19 (AM. L. INST. 2010) (specifying that defendant's conduct can be negligent in foreseeably permitting actions by third party that harm plaintiff).

For courts that fail to appreciate that a negligent misrepresentation creating a risk of physical harm is sufficient to invoke the ordinary duty of care and, based on this misapprehension, seek an appropriate affirmative duty, see, e.g., King v. Nat'l Spa & Pool Inst., Inc., 570 So. 2d 612 (Ala. 1990) (relying on trade association's undertaking and § 324A of the Second Restatement of Torts to find duty to diver who suffered injury using diving board constructed in compliance with association's design standards); Elizabeth E. v. ADT Sec. Sys. W., Inc., 839 P.2d 1308, 1311 (Nev. 1992) (reversing summary judgment for defendant on plaintiff's negligent misrepresentation claim; nevertheless seeking the basis for, and finding the existence of, duty based on a contract between defendant and plaintiff's employer); Davis v. Bd. of Cnty. Comm'rs of Dona Ana Cnty.,

987 P.2d 1172, 1178 (N.M. 1999) (finding basis for duty not to make negligent misrepresentations in the affirmative duty of undertakings when defendant's reference letter enabled former employee to obtain employment where employee sexually assaulted plaintiff); see also Comment *n* (explaining that an actor is subject to liability when her negligent misrepresentation enables a third party to injure another, even when the third party commits an intentional tort in doing so).

In claims for economic loss caused by negligent misrepresentation, courts often begin their analyses with the issue of duty. See, e.g., Howarth v. Pfeifer, 443 P.2d 39, 42 (Alaska 1968) ("Liability arises only where there is a duty, if one speaks at all, to give correct information.").

Comment e. Negligence. Save for details that have no legal impact, Illustrations 1 and 2 mirror Illustrations 8 and 9 to Restatement Second of Torts § 311 (AM. L. INST. 1965).

The Federal Tort Claims Act contains an exception to the waiver of sovereign immunity for claims "arising out of . . . misrepresentation." 28 U.S.C. § 2680(h). In Block v. Neal, 460 U.S. 289 (1983), the Court confronted the scope of that exception when a house inspector for a federal agency was negligent in determining that a home financed by the agency complied with applicable drawings and specifications and also failed to identify any problems with the house, which was subsequently found to have over a dozen construction defects. In the homeowner's suit against the federal government, the Court distinguished a claim based on the communication of the false information from a claim for negligence in conducting the inspection. The latter, the Court concluded, was not barred by § 2680(h) because it was limited to the negligent inspection and was not dependent on plaintiff's reliance—causation existed because a proper inspection that identified the defects would have resulted in their being corrected before the closing on the house. For purposes of the Federal Tort Claims Act, with its exclusion of negligent misrepresentations, this distinction is crucial. For common-law negligent misrepresentation claims, it does not play a critical role, but may, given the facts, provide a successful claim for negligence when negligent misrepresentation is unavailable because of a lack of reliance or other missing element of the misrepresentation claim.

Comment g. Reliance. To state a misrepresentation claim under this Section, the plaintiff must show reliance. See Garcia v. Superior Ct., 789 P.2d 960, 965 (Cal. 1990) (observing that "as in all cases for negligent misrepresentation, plaintiffs must allege facts sufficient to show [reliance] on the alleged misrepresentations"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 43.7, at 1130 (2d ed. 2016) ("The requirement of reliance is one of the requirements of causation in misrepresentation cases . . . ."). However, as Illustration 3 reveals, reliance is not always sufficient for factual causation to exist. See also 2 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 7.13, at 549 (3d ed. 2006) ("Reliance, however, is insufficient to establish causation if plaintiff would have suffered the same damage even if he had not relied on the misrepresentation, or if plaintiff's damage otherwise results from causes other than his reliance.").

Restatement Second of Torts § 311(1)(b) (AM. L. INST. 1965) also provided for third-party reliance so long as the victims were foreseeably put at risk. The foreseeability of victims is addressed in Comment *j*.

For courts that recognize that the false statement need not be made to the victim and that reliance by someone other than the victim supports claims under this Section, see, e.g., Freeman v. United States, 509 F.2d 626, 629 (6th Cir. 1975) (Federal Tort Claims Act case applying Ohio law) (holding parachutists had valid claims after air-traffic controller furnished erroneous report on airplane's location to a third party); Duarte v. State, 151 Cal. Rptr. 727 (Ct. App. 1979) (mother's reliance on college's representation of safety sufficient in suit against college for wrongful death of daughter who was sexually assaulted and killed in dormitory); White v. Kennedy Krieger Inst., Inc., 110 A.3d 724, 744 (Md. Ct. Spec. App. 2015) ("[W]e will conclude that parental reliance may be imputed to an infant as a form of indirect reliance."); Davis v. Bd. of Cnty. Comm'rs of Dona Ana Cnty., 987 P.2d 1172, 1180 (N.M. Ct. App. 1999) ("A victim of physical violence need not rely on the negligent misrepresentation, or even be a party to it, as long as the injury is a result of the recipient's reliance on the employer's misrepresentation."); Brown v. Neff, 175 Misc. 2d 151, 154 (N.Y. Sup. Ct. 1997) ("Clearly, the driver and passenger of a vehicle which is certified to be safe, but which a reasonably careful inspection would have shown to be unsafe, are among the 'third persons' who, [defendant] should have realized, would be imperiled."), aff'd sub nom. Wood v. Neff, 683 N.Y.S.2d 612 (App. Div. 1998); Devonshire v. EurAuPair Int'l, 40 Va. Cir. 149 (1996) (reliance satisfied by parents' reliance resulting in foreseeable harm to child victim). See also W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 206 (5th ed. 1984) (recognizing that liability extends "to others who may reasonably be expected to be endangered by [the misrepresentation]").

New York courts have been inconsistent when assessing whether the victim must rely on the misrepresentation or whether another's reliance suffices. Compare Brown v. Neff, 603 N.Y.S.2d 707, 710 (Sup. Ct. 1993) (asserting that "privity is not an essential element of claims for misrepresentation involving the risk of physical harm"), with Loewy v. Stuart Drug & Surgical Supply, Inc., 1999 WL 76939, at *4 (S.D.N.Y. 1999) (concluding New York law requires privity between plaintiff and defendant in misrepresentation claims).

Comments h and *i. Reasonable reliance and comparative responsibility.* Illustration 7 is a modified version of the facts in Doe v. Dilling, 861 N.E.2d 1052 (Ill. App. Ct. 2006), aff'd, 888 N.E.2d 24 (Ill. 2008), and reaches the conclusion, contrary to *Doe*, that the issue of reasonableness is for the factfinder. Illustration 8 is from Restatement Second of Torts § 311, Illustration 1 (AM. L. INST. 1965).

Restatement Third of Torts: Liability for Economic Harm § 5, Comment *j* (AM. L. INST. 2020) adopts comparative responsibility for a victim's reliance on a negligent misrepresentation that causes economic harm. The Dobbs treatise confirms that employing comparative principles for reliance in negligence actions reflects the approach of many courts since the adoption of comparative responsibility in the 1970s and '80s. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 43.7, at 1131 & n.142 (2d ed. 2016).

In order to understand the case law addressing the reasonableness of reliance and comparative responsibility one must appreciate the difference between negligence in relying on

the misrepresentation and subsequent negligence once having relied. Professor Michael Green illustrates the distinction in the following hypothetical:

> Consider a business aviation service that provides recommendations on the right airplane for any business's needs. The service recommends an appropriate airplane for a sole proprietorship that carries small freight overnight. The plane turns out to be inappropriate because its maximum load capacity is insufficient for the purposes required by the purchaser. . . .
>
> The plaintiff-owner negligently relies on the service company's misrepresentation, as she could have determined the load capacity of the plane before purchasing it with reasonable research. She also is negligent in failing to check the airplane's weight and balance before taking off with an especially large load of freight, after the plane has been delivered and used satisfactorily for some time without discovering its load capacity. The overweight condition results in a forced off-airport landing. The landing damages the pilot . . . .

Michael D. Green, *Apportionment, Victim Reliance, and Fraud: A Comment*, 48 ARIZ. L. REV. 1027, 1031 (2006).

Among the negligent misrepresentation cases in which the court adverts to comparative responsibility, none explicitly addresses whether they are referring to negligence in reliance (accepting the aviation service recommendation and purchasing the recommended plane) versus subsequent negligence (failing to check weight and balance before taking off with a heavy load). One case best supports the idea that comparative responsibility replaces the reasonableness of plaintiff's reliance. In Brown v. Neff, 668 N.Y.S.2d 873 (Sup. Ct. 1997), aff'd sub nom. Wood v. Neff, 683 N.Y.S.2d 612 (App. Div. 1998), plaintiffs were injured when a tire blew out causing an accident. They brought suit against the repair shop that had inspected the truck and certified that it met all safety requirements. Defendant claimed that one plaintiff was aware of the visibly defective condition of the tire at the time of inspection and assumed the risk of its condition. The court held that any culpable conduct of the plaintiff would reduce, rather than bar, recovery. Since the defendant alleged that one plaintiff had knowledge of the tire's condition at the time of the inspection, this case can best be interpreted as applying comparative principles to the unreasonableness of plaintiff's reliance. The court did not, however, address the looming question of whether plaintiff, with knowledge of the tire's defectiveness, relied at all on the representation of safety, at least with regard to the tire.

Most other cases appear to address subsequent negligence rather than the reasonableness of reliance in the first instance. See, e.g., Seagraves v. ABCO Mfg. Co., 164 S.E.2d 242, 245 (Ga. Ct. App. 1968) (holding that comparative negligence applied to the plaintiff's negligent misrepresentation claim, where the plaintiff was injured by an explosion when he attempted to weld a tank that defendant had incorrectly assured him had been cleaned of all flammable contents, without filling the tank with water before welding); Smith v. Roussel, 809 So. 2d 159, 167 (La. Ct. App. 2001) (addressing plaintiff's behavior in unloading a horse three weeks after it was purchased from seller who stated that horse was docile and gentle); Reynolds v. Lancaster Cnty.

Prison, 739 A.2d 413, 417 (N.J. Super. Ct. App. Div. 1999) (explaining, in claim for negligent misrepresentation to new owner about behaviors of prison dog that had developed vicious tendencies toward its handler, that comparative fault applied to subsequent handler's returning to warehouse where dog was kenneled but had escaped from the kennel; the court did not comment, likely because of the procedural posture of the case, on the weakness of defendant's claim of comparative fault).

In addition, in some cases, it is difficult to sort out whether the court is referring to plaintiff negligence in relying on defendant's representation or in the plaintiff's unreasonable subsequent behavior. Thus, for example, in Bazazi v. Michaud, 856 F. Supp. 33, 34 (D.N.H. 1994), plaintiff was injured in a sparring match at a martial-arts academy. Plaintiff brought suit and alleged, among other claims, misrepresentation, although the court's opinion provides no further specification about the content of the representation or plaintiff's reliance on it. In its defense, defendant asserted assumption of risk, arguing that the plaintiff chose to participate in a karate class and also conducted himself in an aggressive manner during the sparring match. Relying on New Hampshire law that assumption of risk had been absorbed by comparative fault, the court granted plaintiff's motion to strike the defense without adverting to the matter of whether the first aspect of the defense raised by defendant implicated the issue of reasonable reliance.

By contrast with the above cases, a handful of cases proceed on the (unstated) assumption that the plaintiff's failure to *reasonably* rely on the defendant's misrepresentation defeats the plaintiff's claim. See Garcia v. Superior Ct., 789 P.2d 960, 965 (Cal. 1990) (holding that the plaintiff must allege facts showing that the plaintiff reasonably relied on defendant's misrepresentation and providing leave to amend the complaint to do so); Weissich v. County of Marin, 274 Cal. Rptr. 342, 351 (Ct. App. 1990) (affirming dismissal of claim by prosecutor who was told that mechanism was in place to monitor released prisoner and that prosecutor would be notified of any threats to him because he could not reasonably rely on a representation after it occurred 11 years previously); Doe v. Dilling, 861 N.E.2d 1052, 1071 (Ill. App. Ct. 2006), aff'd, 888 N.E.2d 24 (Ill. 2008) (holding intimate partner of person infected with HIV could not justifiably rely on her partner's parents' representation concerning his medical condition and that this lack of reasonable reliance defeated the plaintiff's prima facie case). To be sure, in none of those cases was the issue of the effect of the adoption of comparative responsibility on reasonable reliance raised. But cf. Aetna Cas. & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 343 (9th Cir. 1981) (applying Nevada law) (holding, in products liability action against publisher of aviation chart that contained misleading information about an instrument approach to the Las Vegas Airport, that pilots' failure to attend to other information available that would have clarified safe height for approach required apportionment of comparative fault).

As mentioned in Comment *h*, courts will sometimes have to analyze cases more carefully to screen unmeritorious cases because plaintiff's unreasonable reliance will no longer defeat a claim. For example, in Heard v. City of New York, 623 N.E.2d 541, 544 (N.Y. 1993), jetty divers continued to dive despite a lifeguard's demand that they stop. Plaintiff insisted he wanted to do one more dive, and a lifeguard reluctantly acquiesced. Plaintiff was injured during that last dive

and sued, claiming that the lifeguard's acquiescence constituted a misrepresentation that it was safe to dive. The court affirmed dismissal of the case on the ground that the diver's reliance on the lifeguard's representation was unjustified. Dismissal was, no doubt, the right outcome for the claim. But, two better grounds for dismissal would have been that the lifeguard's acquiescence did not constitute a representation of safety and that, in any case, the diver did not rely on anything the lifeguard may have communicated. See Green, supra at 1030 (explaining that "justifiable" reliance may be serving a surrogate role of resolving whether reliance existed).

Comment j. Scope of liability. For the basic standard for scope of liability, which addresses unforeseeable plaintiffs, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 29 and Comment *n* (AM. L. INST. 2010). The question of whether a given plaintiff was foreseeable under the circumstances is a matter for the factfinder. See P.G. v. State, Dep't of Health & Hum. Servs., Div. of Fam. & Youth Servs., 4 P.3d 326, 335 (Alaska 2000); see also Freeman v. United States, 509 F.2d 626, 629 (6th Cir. 1975) (Federal Tort Claims Act case applying Ohio law) (holding parachutists had valid claims for air-traffic controller's provision of erroneous report on airplane's location as being above the airport jump site when it was four miles off shore and commenting that claims, in similar circumstances, had been upheld for passengers, crews cargo, and the airplane; making no mention of misrepresentation exception in Federal Tort Claims Act).

Illustration 9 is based very loosely on Pollak v. Holencik, 48 Pa. D. & C. 4th 57, 60 (Ct. Com. Pl. 2000), which reached a different result because it failed to address the scope of liability issue raised by the facts of the case.

Comment k. Scienter. For the fact that fraud requires scienter but that negligent and innocent misrepresentations do not, see 2 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 7.3, at 459-460 (3d ed. 2006).

Comment l. Opinions, predictions, and "puffing." Illustration 11 is based on Anderson v. Atlanta Comm. for Olympic Games, Inc., 584 S.E.2d 16, 21 (Ga. Ct. App. 2003) (representation made by director of security at the 1996 Olympics held in Atlanta), aff'd sub nom. on other grounds, Atlanta Comm. for Olympic Games, Inc. v. Hawthorne, 598 S.E.2d 471 (Ga. 2004). Illustration 12 is based very loosely on Triple E, Inc. v. Hendrix & Dail, Inc., 543 S.E.2d 245 (S.C. Ct. App. 2001).

Comment m. Obligation to disclose. Illustration 13 is based loosely on P.G. v. State, Dep't of Health & Hum. Servs., Div. of Fam. & Youth Servs., 4 P.3d 326, 329 (Alaska 2000), which alternatively might have been resolved based on affirmative misrepresentations by defendant. But the court emphasized the failure to disclose information which made the issue of factual cause an easier matter. See also Green v. Walker, 910 F.2d 291, 296 (5th Cir. 1990) (applying Louisiana law) (recognizing that a physician hired by the plaintiff's employer to conduct annual employee physicals is obliged "to take reasonable steps to make information available timely to the examinee of any findings that pose an imminent danger to the examinee's physical or mental well-being"); Daly v. United States, 946 F.2d 1467 (9th Cir. 1991) (Federal Tort Claims Act applying Washington law) (same as *Green*); Soto v. Frankford Hosp., 478 F. Supp. 1134, 1135-1136 (E.D. Pa. 1979) (discussing cases in which courts held physicians who diagnosed patients with contagious diseases or other conditions posing risks to third parties owed a duty to the third parties

to disclose that fact); Webb v. T.D., 951 P.2d 1008 (Mont. 1997) (relying on *Green* and requiring physician to inform examinee of conditions that pose a threat to "physical or mental health"); Mussivand v. David, 544 N.E.2d 265, 269 (Ohio 1989) (observing that "several jurisdictions have allowed tort actions for negligent, fraudulent or intentional transmission of genital herpes where the person infected with genital herpes fails to disclose to his or her sexual partner that he or she is infected with such a disease"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 207 (5th ed. 1984) (listing instances of tortious failure to disclose when disclosure would be expected, including Air Traffic Control warning of serious adverse weather, a landlord who fails to disclose latent dangers in newly rented property, and a surgeon who fails to explain to a patient that extraneous material was left in the patient's body).

Cases deciding defendant had no duty to disclose a risk to others include Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 447 (4th Cir. 2001) (applying South Carolina law) (holding that auto manufacturer had no affirmative duty to disclose defects in rear liftgate latch in minivan); D'Amico v. Delliquadri, 683 N.E.2d 814, 817 (Ohio Ct. App. 1996) (holding statutory physician–patient privilege required dismissal of claim that physician failed to reveal patient's sexually transmitted disease); Grogan v. Uggla, 535 S.W.3d 864, 870 (Tenn. 2017) (concluding that home inspector who failed to discover, and therefore disclose, defect in home's railing was not subject to liability for negligent misrepresentation).

Comment n. Negligent misrepresentations enabling third parties to cause injury. Misconstruing Restatement Second of Torts § 315 (AM. L. INST. 1965), courts sometimes assert that, in the absence of a basis for an affirmative duty, a negligent actor cannot be held liable for harm caused by the criminal act or intentional tort of another. This error arises from courts' failure to appreciate that § 315 is contained within a Topic covering affirmative duties of rescue when the actor has *not* created a risk, including the risk of a third party committing an intentional tort or a criminal act or both. See Restatement Second, Torts, Chapter 12, Scope Note to Topic 7 (Duties of Affirmative Action), Title A.

For an example of a court that fell into the trap of failing to distinguish duties that arise from an actor's conduct that creates risk, as distinct from duties that arise to rescue or ameliorate risk that the actor had no role in creating, see Hall v. Ford Enters., Ltd., 445 A.2d 610, 611 (D.C. 1982) (declining to decide whether defendant could be liable for negligent misrepresentation that allegedly enabled criminal attack without proof of a special relationship). By contrast, Davis v. Bd. of Cnty. Comm'rs of Dona Ana Cnty., 987 P.2d 1172, 1177 (N.M. Ct. App. 1999), correctly explains why a false employment reference is not subject to the rule in Restatement Second, Torts § 315 (AM. L. INST. 1965).

Illustration 15, involving the inaccurate letter of recommendation, is based on Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 (Cal. 1997). For further discussion of employers' potential liability when furnishing false or incomplete references for past employees, see Kiren Dosanjh, *Former Employer's or Supervisor's Tort Liability to Prospective Employer or Third Person for Misrepresentation or Nondisclosure in Employment Reference*, 68 A.L.R.5th 1 (originally published in 1999).

Comment o. Publishers and First Amendment limitations. For courts influenced by the First Amendment in determining the scope of negligent misrepresentation claims, see Gorran v. Atkins Nutritionals, Inc., 464 F. Supp. 2d 315 (S.D.N.Y. 2006) (stating in dicta that book and website providing and advocating for the Atkins diet was noncommercial speech with First Amendment protection that barred a negligent misrepresentation claim); Demuth Dev. Corp. v. Merck & Co., 432 F. Supp. 990, 993-994 (E.D.N.Y. 1977) (expressing concern about respecting First Amendment principles but resting its decision to deny a claim for pure economic harm on the lack of duty); Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc., 952 P.2d 768, 773 (Colo. App. 1997) (concluding that the social utility of protecting defendant's freedom to make statements to the public in television program and book about the safety of dental amalgam, a matter of public concern, justified the withdrawal of a duty that could impose liability for negligent misrepresentation and distinguishing cases in which medical professionals made misrepresentations privately and only to patients); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (concluding that plaintiff could not pursue negligent misrepresentation claim against publisher of content provided by others and recognizing First Amendment concerns as informing its decision); Smith v. Linn, 563 A.2d 123, 126 (Pa. Super. Ct. 1989) (holding publisher of book, alleged to contain misrepresentations, protected by First Amendment from liability), aff'd per curiam, 587 A.2d 309 (Pa. 1991); cf. Zamora v. Columbia Broad. Sys., 480 F. Supp. 199, 206 (S.D. Fla. 1979) (holding that claim against television broadcasters alleging violent shows desensitized plaintiff-adolescent to violence and involuntarily addicted him to such was barred by the First Amendment); Birmingham v. Fodor's Travel Publications, Inc., 833 P.2d 70 (Haw. 1992) (tour-book publisher, who did not author contents, had no duty to warn of dangerous wave and ocean conditions at recommended beach location, relying, in part, on First Amendment concerns). See also Restatement Third, Torts: Products Liability § 19, Comment *d* (AM. L. INST. 1998) (addressing products liability claims based on false information in a variety of media sources). For commentary on the extent to which the First Amendment has encroached on core tort principles, see Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEX. L. REV. 813, 852 (2020).

Courts have permitted claims against aviation-chart publishers that allegedly contain misinformation in the chart that led to an airplane crash, perhaps because the publishers are responsible for the misinformation. But, consistent with Comment *p*, all of those cases proceed on a theory of products liability rather than negligent misrepresentation. See Brocklesby v. United States, 767 F.2d 1288, 1291 (9th Cir. 1985) (applying California law); Saloomey v. Jeppesen & Co., 707 F.2d 671, 673 (2d Cir. 1983) (applying Connecticut law); Aetna Cas. & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 341-342 (9th Cir. 1981) (applying Nevada law); Fluor Corp. v. Jeppesen & Co., 216 Cal. Rptr. 68, 70 (Ct. App. 1985).

Comment p. Commercial product seller or distributor misrepresentation. In the small number of states that have enacted products liability statutes that provide the exclusive source of claims against product manufacturers and distributors, a claim based on this Section would be preempted by the statutory provision. See, e.g., Trees v. Pfizer, Inc., 2018 WL 6710594 (Mich. Ct.

App. 2018) (affirming dismissal of claims for negligent misrepresentation in drug's labeling because all such claims were subsumed by products liability statute).

Restatement Third of Torts: Products Liability § 9 (AM. L. INST. 1998) imposes liability on commercial sellers and distributors of products for intentional, negligent, and innocent misrepresentations, specifically identifying the principles contained in Restatement Second of Torts §§ 310 and 311 (AM. L. INST. 1965) as the basis of such liability. However, § 9 eschews the requirement of reliance, instead requiring materiality and causation, contrary to this Section, Restatement Third of Torts: Intentional Torts to Persons § 51 (AM. L. INST., Tentative Draft No. 6, 2021), and §§ 310 and 311. Consequently, the Products Liability Restatement did not confront the issue addressed in Comment *h* on the matter of whether reliance must be reasonable.

Nonsellers or nondistributors may make representations about a product (or service). The parties include, but are not limited to, endorsers, certifiers, trade associations, or private standards groups. If these actors make representations negligently and physical harm results, the actors may be subject to liability under this Section. Such claims are not products liability claims because they do not involve commercial sellers or distributors as defendants. See In re Factor VIII or IX Concentrate Blood Prods. Litig., 25 F. Supp. 2d 837, 840 (N.D. Ill. 1998) (holding that National Hemophiliac Association was not protected by the First Amendment from claims that it provided false information to hemophiliacs about the safety of blood products, which resulted in plaintiffs becoming infected with HIV); Hempstead v. Gen. Fire Extinguisher Corp., 269 F. Supp. 109, 118 (D. Del. 1967) (applying Virginia law) (concluding that negligence by testing laboratory in approving the design of a fire extinguisher, which resulted in endorsement seal of laboratory on extinguisher, was actionable); King v. Nat'l Spa & Pool Inst., Inc., 570 So. 2d 612, 616 (Ala. 1990) (holding trade association that prescribed standards for diving board subject to liability to plaintiff, who dove from diving board that complied with allegedly deficient standard and hit the bottom of the pool resulting in quadriplegia and subsequently premature death); Hanberry v. Hearst Corp., 81 Cal. Rptr. 519, 521 (Ct. App. 1969) (concluding that "one who endorses a product for his own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement"); Snyder v. Am. Ass'n of Blood Banks, 676 A.2d 1036, 1038 (N.J. 1996) (establishing that national association of blood banks that made recommendations to ensure safety of blood transfusions could be found liable to those contracting HIV because association negligently delayed recommending surrogate testing of blood donations).

Comment q. Brand-name drug manufacturers. The two Supreme Court preemption cases referred to in Comment *q* are Wyeth v. Levine, 555 U.S. 555 (2009) and PLIVA Inc. v. Mensing, 564 U.S. 604 (2011). In *Wyeth*, the Court found that there was no implied preemption of state-law products liability claims based on impossibility—complying with both federal and state mandates—because brand-name manufacturers can unilaterally change labeling once a drug has been approved and new evidence develops that requires a change. By contrast, in *Mensing*, 564 U.S. at 608, the Court reasoned that generic drug manufacturers do not have the same authority. They are required to include precisely the same warning as is provided with the brand-name

equivalent—and, given this inflexibility, failure-to-warn claims against generic drug manufacturers are preempted.

Numerous courts have rejected misrepresentation claims brought by plaintiffs against brand-name drug manufacturers after plaintiffs ingested the generic version of the drug manufactured by a different company. In a recent Multidistrict Litigation involving the drug Zantac, the court observed:

> As an initial matter, the Court recognizes that the overwhelming national consensus—including the decisions of every [federal] court of appeal and the vast majority of district courts around the country to consider the question—is that a brand-name manufacturer cannot be liable for injuries caused by the ingestion of the generic form of a product.

In re Zantac (Ranitidine) Prods. Liab. Litig., 510 F. Supp. 3d 1175, 1196 (S.D. Fla. 2020) (canvassing the law in 35 states and concluding that no state would recognize such a claim) (quotation marks omitted). See also, e.g., Mensing v. Wyeth, Inc., 588 F.3d 603, 613 (8th Cir. 2009) (applying Minnesota law), rev'd sub nom. on other grounds, PLIVA, Inc. v. Mensing, 564 U.S. 604 (2011), and opinion vacated in part and reinstated in part, 658 F.3d 867 (8th Cir. 2011); Foster v. Am. Home Prods. Corp., 29 F.3d 165, 167 (4th Cir. 1994) (applying Maryland law) (concluding that "a name brand manufacturer cannot be held liable on a negligent misrepresentation theory for injuries resulting from use of another manufacturer's product"); Overton v. Wyeth, Inc., 2011 WL 1343392, at *1 (S.D. Ala. 2011) (ruling that product liability claim was limited to seller whose drug was ingested by plaintiff), report and recommendation adopted sub nom. Overton v. Wyeth, LLC, 2011 WL 1343391 (S.D. Ala. 2011).

While those cases are correct that victims may not assert a *products liability* theory against a different seller of the drug from the one the victim consumed, the courts fail to appreciate that a different *non*-products liability claim may exist if this Section's requirements are satisfied. Non-sellers who make negligent misrepresentations about a product have long been subject to liability for their misrepresentations. These include endorsers and certifiers of a product, as well as private standards organizations or trade associations, as documented in Reporters' Note to Comment *p* of this Section. None of these claims are products liability claims because the defendants, like brand-name drug manufacturers, did not sell the product that injured the plaintiff. As the court recognized in In re Fluoroquinolone Prods. Liab. Litig., 517 F. Supp. 3d 806, 812, 819-823 (D. Minn. 2021) (applying Illinois law), while plaintiff's products liability claims are nonviable, those who provide information about a product are subject to liability if they make negligent misrepresentations about the product. See also Kellogg v. Wyeth, 762 F. Supp. 2d 694, 704, 707-708 (D. Vt. 2010) (holding that plaintiffs can pursue non-products liability claims for negligent misrepresentation against the brand-name manufacturer and citing cases on the issue); Chatman v. Pfizer, Inc., 960 F. Supp. 2d 641, 655 (S.D. Miss. 2013), modified, 2014 WL 4546042 (2014) (same as *Kellogg*); T.H. v. Novartis Pharms. Corp., 407 P.3d 18, 33-34 (Cal. 2017) ("[T]he plaintiffs' claim here is not that [the drug] is defectively designed or inherently dangerous. It is that [the drug]'s warning label

failed to mention the risk [of side effects], and that Novartis was responsible for the deficient label. So the alleged fault here lies with Novartis, not with its generic competitors.").

The seminal case addressing the liability of brand-name manufacturers to generic drug consumers is Foster v. Am. Home Prods. Corp., 29 F.3d 165 (4th Cir. 1994) (applying Maryland law). There, the court denied that a negligent misrepresentation claim could be asserted independently from a products liability claim: "the allegations of negligent misrepresentation are an effort to recover for injuries caused by a product without meeting the requirements the law imposes in products liability actions." Id. at 168. In so holding, however, the court failed to appreciate that there is a stand-alone negligent misrepresentation that *can* be asserted against non-sellers of the product, as explained above and documented in the Reporters' Note to Comment *p*. Thus, while it is true that a plaintiff in a products liability case can only recover from the manufacturer (and other sellers) of the drug, that limitation applies only to products liability claims and not to unrelated tortious conduct. *Foster* also incorrectly stated that generic manufacturers are free to change the labeling on their drugs and consequently erred in reasoning that: "Manufacturers of generic drugs, like all other manufacturers, are responsible for the representations they make regarding their products." Id. at 170. That is incorrect; federal law requires generic-drug manufacturers to use the same labeling as that employed by the brand-name manufacturer. See 21 U.S.C. § 355(j)(2)(A)(v); *Mensing*, 564 U.S. at 612-613.

Foster was not only seminal, it was quite influential; numerous subsequent courts relied on *Foster*, some with little or no additional inquiry. See, e.g., Stoddard v. Wyeth, Inc., 630 F. Supp. 2d 631, 634 (E.D.N.C. 2009) (quoting and relying substantially on *Foster*); Beutella v. A.H. Robins Co., 2001 WL 35669202, at *2-3 (D. Utah 2001) (relying entirely on *Foster* in concluding plaintiff had no claim for negligent misrepresentation). Other cases relied on *Foster* for the (incorrect) proposition that a negligent misrepresentation claim is a products liability claim. See, e.g., Colacicco v. Apotex, Inc., 432 F. Supp. 2d 514, 540-541 (E.D. Pa. 2006) (relying on *Foster* and its progeny for the proposition that a drug manufacturer's duty is limited to those who consumed the manufacturer's drug), aff'd on other grounds, 521 F.3d 253 (3d Cir. 2008), vacated on other grounds, 556 U.S. 1101 (2009); Sheeks v. Am. Home Prods. Corp., 2004 WL 4056060, at *1 (Colo. Dist. Ct. 2004) (addressing plaintiff's negligent misrepresentation claim: "Regardless of how termed, the action brought by the [plaintiffs] is a product liability action"); cf. Sharp v. Leichus, 2006 WL 515532, at *3 (Fla. Cir. Ct. 2006) (citing numerous products liability cases in which the plaintiffs lost because they could not identify the manufacturer of the product that caused their injury), aff'd per curiam, 952 So. 2d 555 (Fla. Dist. Ct. App. 2007). Some courts, without relying on *Foster*, also conflated misrepresentation with products liability and granted summary judgment because plaintiff had not taken the brand-name manufacturer's drug. See, e.g., McNair v. Johnson & Johnson, 818 S.E.2d 852, 861 (W. Va. 2018) ("We, likewise, find that a negligent misrepresentation claim against a brand manufacturer for injuries allegedly caused by a generic drug is not viable under our products liability law."); Possa v. Eli Lilly & Co., 2006 WL 6393160, at *1 (M.D. La. 2006) (dismissing claims for misrepresentation, as well as consumer protection and unjust enrichment, because plaintiff had not taken defendant's drug).

Other cases have relied on equally questionable, albeit different, reasoning. Thus, some courts, especially federal courts, have expressed an unwillingness to venture into adopting a new theory of liability that had not been recognized by the state. See, e.g., Guarino v. Wyeth, LLC, 719 F.3d 1245, 1251 (11th Cir. 2013) (applying Florida law) (refusing to recognize a negligent misrepresentation claim against brand-name manufacturers liable that would be made "out of whole cloth," in part, because no Florida state court had adopted such law); Trower v. Janssen Pharms., Inc., 2019 WL 1571834, at *4 (D. Del. 2019) (observing that "even if Delaware law provided some basis for imposing liability for failure to warn on brand-name manufacturers, it would be imprudent for me to extend Delaware's law to that point while sitting in diversity"); Block v. Wyeth, Inc., 2003 WL 203067, at *2 (N.D. Tex. 2003) (asserting that recognition of plaintiff's negligent misrepresentation claim would take the law into "new and uncharted waters"). These courts fail to appreciate that negligent misrepresentation is not a "new" theory of liability. It is, instead, a longstanding accepted tort, as detailed in this Section.

The same courts also fail to appreciate that, in many such cases, defendants removed plaintiff's state-law claim to federal court, depriving the plaintiffs of a state-court forum. See, e.g., *Foster*, 29 F.3d 165; Evans v. Johnson & Johnson Co., 2020 WL 616575, at *1 (D. Del. 2020), appeal dismissed sub nom. Augustus Evans, Jr. v. Johnson & Johnson, 2020 WL 9763147 (3d Cir. 2020); Murphy v. Aventis Pasteur, Inc., 270 F. Supp. 2d 1368, 1373 (N.D. Ga. 2003). Comity should not deprive a plaintiff from an unconstrained effort to determine a state's law. As the court in In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 415 F. Supp. 2d 261, 269 (S.D.N.Y. 2005), persuasively explained:

> When a defendant removes a case from state to federal court, the principle of dual sovereignty requires the application of a liberal construction of state law in order to protect a party who sought to obtain a resolution of state law claims from state courts. If this Court were to adopt a more restrictive reading of state law than the highest courts of the relevant states would be likely to adopt, the parties would be treated differently than they would be in a state court—a result directly contrary to the fundamental goals of *Erie*, namely the "discouragement of forum-shopping and avoidance of inequitable administration of laws."

Some courts, meanwhile, express the incorrect position that negligent misrepresentation is limited to recovery of financial loss and does not apply to physical harm. See, e.g., Huck v. Wyeth, Inc., 850 N.W.2d 353, 371 (Iowa 2014) ("[T]he tort of negligent misrepresentation does not apply to sellers of products but rather is limited to those in the business or profession of supplying information for the guidance of others."). *Huck* flies in the face of almost 100 years of precedent, as well as the Restatements of Torts' consistent endorsement of such use. Section 402 B in the Restatement Second of Torts (AM. L. INST. 1965) and § 9 of the Restatement Third of Torts: Products Liability (AM. L. INST. 1998) canvas the case law and endorse the use of negligent (and innocent) misrepresentation claims against product sellers when those misrepresentations cause physical injury. Section 312 of the Restatement Second of Torts (AM. L. INST. 1965) and this

Section of this Restatement recognize negligent misrepresentation claims more generally and are not limited to products liability claims.

Meanwhile, some other courts conflate negligent misrepresentations that cause physical harm with those that cause only financial loss (or pure economic harm). Then, with the two conflated, courts impose on physical harm claims the more rigorous limits properly imposed on economic loss claims, without appreciating that the two are not congruent; there is a broader scope of liability for misrepresentations that cause physical harm. Compare Restatement Second, Torts § 312 (AM. L. INST. 1965) and this Section, with Restatement Second, Torts § 552 (AM. L. INST. 1977) and Restatement Third, Torts: Liability for Economic Harm § 5 (AM. L. INST. 2020); see also Strayhorn v. Wyeth Pharms., Inc., 882 F. Supp. 2d 1020, 1030 (W.D. Tenn. 2012) (improperly relying on § 552 of the Restatement Second of Torts, which addresses liability for pure economic harm, to conclude plaintiff could not pursue a negligent misrepresentation claim for her physical injury), aff'd, 737 F.3d 378 (6th Cir. 2013); Goldych v. Eli Lilly & Co., 2006 WL 2038436, at *4 (N.D.N.Y. 2006) ("Moreover, 'claims of fraudulent concealment and negligent misrepresentation also require the plaintiff to demonstrate the existence of a special relationship of trust or confidence between the parties giving rise to a duty to impart correct information[.]'" (quoting Rose v. Am. Tobacco Co., 2004 WL 986239, at *5 (N.Y. Sup. Ct. 2004)).

Or, exhibiting significant confusion, at least one court has reasoned that, because the plaintiff had not taken the brand-name manufacturer's drug, the manufacturer could not have caused the plaintiff's harm. See DaCosta v. Novartis AG, 2002 WL 31957424, at *8-9 (D. Or. 2002). The court's analysis failed to appreciate that the *appropriate* causal question was whether the defendant's alleged misrepresentation—the tortious act—caused the plaintiff's harm. Such reasoning fails to appreciate that it is the manufacturer's negligent misrepresentation, not its drug, that is the relevant conduct for determining causation.

Still another line of authority relies on a series of products liability cases in which the plaintiff was unable to prove which manufacturer manufactured the product that caused the plaintiff's injury. (This problem, some may note, famously plagued the DES plaintiffs, who could not identify which pill their mothers had ingested decades before; it arises in other contexts as well.) See, e.g., Evans v. Johnson & Johnson Co., 2020 WL 616575, at *6 (D. Del. 2020) (rejecting the plaintiff's claim against the brand-name manufacturer because he could not prove whether he ingested the brand-name or generic version of the drug; relying on asbestos and benzene products liability claims in which the plaintiff was unable to identify the manufacturer of the asbestos or benzene to which the plaintiff was exposed); Huck v. Wyeth, Inc., 850 N.W.2d 353, 369 (Iowa 2014) (similar to *Evans*); Schrock v. Wyeth, Inc., 601 F. Supp. 2d 1262, 1267 (W.D. Okla. 2009) (granting defendant's motion for summary judgment, in part because "Oklahoma has rejected market share liability, alternative liability theory, the concert of action theory and enterprise liability"), aff'd, 727 F.3d 1273 (10th Cir. 2013). These courts fail to appreciate that, in the cases on which they rely, plaintiffs were pursuing only products liability claims, which *do* require suit against the manufacturer of the allegedly defective product. But negligent misrepresentation claims are different. See In re Fluoroquinolone Prods. Liab. Litig., 517 F. Supp. 3d 806, 818 (D.

Minn. 2021) (explaining the difference between negligent misrepresentation suits against brand-name manufacturers, on the one hand, and products liability cases in which plaintiff cannot identify the manufacturer of the product that injured plaintiff, on the other).

In rejecting the plaintiffs' negligent misrepresentation claims, some courts have also reasoned that a brand-name manufacturer owes no duty to those who take generic drugs. See, e.g., Goldych v. Eli Lilly & Co., 2006 WL 2038436, at *6 (N.D.N.Y. 2006) ("Since Eli Lilly has no duty to the users of other manufacturers' products, Goldych's claims for negligence, fraud, fraudulent concealment, and negligent misrepresentation cannot be maintained on the facts of this case."); Murphy v. Aventis Pasteur, Inc., 270 F. Supp. 2d 1368, 1377 (N.D. Ga. 2003) (concluding there was no basis for an affirmative duty to warn by brand-name manufacturer). These courts fail to appreciate the ordinary duty of reasonable care that exists when an actor creates a risk of harm to others—and the fact that misrepresentations about the safety of a drug create such a risk. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(a) (AM. L. INST. 2010). Neither this Section nor Restatement Second of Torts § 311 (AM. L. INST. 1965) (nor the first Restatement of Torts, again in § 311 (AM. L. INST. 1934)) impose an independent duty requirement for negligent misrepresentation as it is an instance of misfeasance not nonfeasance.

For courts concluding that the state's products liability acts encompassed negligent misrepresentation claims and required plaintiff to have been injured by the defendant's product, thereby requiring dismissal of misrepresentation claims against brand-name manufacturers, see, e.g., Lashley v. Pfizer, Inc., 750 F.3d 470, 476-478 (5th Cir. 2014) (Mississippi and Texas products liability acts); Strayhorn v. Wyeth Pharms., Inc., 882 F. Supp. 2d 1020, 1030 (W.D. Tenn. 2012), aff'd, 737 F.3d 378 (6th Cir. 2013).

Contrary to the result and reasoning of the cases cited above, Conte v. Wyeth, Inc., 85 Cal. Rptr. 3d 299, 309-311 (Ct. App. 2008), review denied (Cal. 2009) reasoned:

- That plaintiff's negligent misrepresentation claim was a different cause of action from a products liability inadequate warning claim. Id. at 309-310.
- Any requirement that a plaintiff must prove that the defendant manufactured the drug that caused plaintiff's harm is inapt to whether a brand-name manufacturer is liable for negligent misrepresentation. Id. at 310.
- Pursuant to § 311 of the Restatement Second, Torts (AM. L. INST. 1965), an actor who makes a representation aware that another might rely on it owes a duty of reasonable care to avoid false representations. Id. at 312-313.
- The *Foster* court failed adequately to consider the elements of negligent misrepresentation by concluding the brand-name manufacturer owed no duty to those who did not take its drug. Id. at 316.

The California Supreme Court subsequently affirmed the position of the *Conte* court. See T.H. v. Novartis Pharm. Corp., 407 P.3d 18, 47-48 (Cal. 2017).

Professor Allen Rostron, in an article addressing this issue, described the state of the contrary case law and assessed *Conte*:

> Although courts and commentators have overwhelmingly sided with the drug manufacturers, treating the *Conte* decision as a lonely and misguided deviation from past precedents and sound principles of products liability law, I contend that *Conte* should instead be seen as the first case in which a court finally got this issue right. The *Conte* court saw through distracting mischaracterizations of the issue that plagued judicial analysis in *Foster* and other past cases. Applying basic rules of liability for negligence, the court correctly recognized that a manufacturer may be liable in some instances for tortious conduct other than having made or sold the product that inflicted plaintiff's injuries. Although all questions about liability for prescription drugs should be handled with special care because of the unique difficulty of developing new drugs and their immense potential benefits for consumers, the *Conte* court soundly concluded that fairness and policy considerations ultimately weigh against giving brand-name manufacturers complete immunity from liability for generic drug injuries.

Allen Rostron, *Prescription for Fairness: A New Approach to Tort Liability of Brand-Name and Generic Drug Manufacturers*, 60 DUKE L.J. 1123, 1127-1128 (2011). But see Victor E. Schwartz et. al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm Was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 FORDHAM L. REV. 1835, 1879 (2013) ("It is a bedrock principle of product liability and tort law that a product manufacturer is subject to liability only for harms caused by its products.").

As explained in Comment *q*, only five state supreme courts have addressed whether a person injured by a generic drug can assert a negligent misrepresentation claim against the brand-name manufacturer. Three permit a misrepresentation claim. See Wyeth, Inc. v. Weeks, 159 So. 3d 649, 676 (Ala. 2014) ("Under Alabama law, a brand-name-drug company may be held liable for fraud or misrepresentation (by misstatement or omission), based on statements it made in connection with the manufacture of a brand-name prescription drug, by a plaintiff claiming physical injury caused by a generic drug manufactured by a different company."), superseded by statute, ALA. CODE § 6-5-530(a); T.H. v. Novartis Pharm. Corp., 407 P.3d 18, 47-48 (Cal. 2017) (concluding that plaintiff could prevail in a suit against a brand-name manufacturer for negligent misrepresentation regardless of whether the injured party consumed the brand-name or generic drug); Rafferty v. Merck & Co., 92 N.E.3d 1205, 1219-1220 (Mass. 2018) (holding that brand-name manufacturers owe a duty to generic drug consumers not to act in reckless disregard of the risk of harm to those consumers).

Two do not. In Huck v. Wyeth, Inc., 850 N.W.2d 353, 369-381 (Iowa 2014), the court held: "Under Iowa law, manufacturers owe duties to those harmed by use of their products. We decline to change Iowa law to impose a new duty on manufacturers to those who never used their products and were instead harmed by use of a competitor's product." *Huck* also relied on the public-policy ground that brand-name manufacturers invest in the development of their drugs but obtain no benefit from the sale of generic drugs. Id. at 380. One might critique this rationale on the ground that an actor who causes harm to others does not have to benefit from their conduct in order to be held liable. Hornbook law provides that creating unreasonable risk to others is the basis for

negligence liability regardless of self-benefit. Meanwhile, in McNair v. Johnson & Johnson, 818 S.E.2d 852, 861-867 (W. Va. 2018), the court concluded that, despite the foreseeability of harm, no duty existed to generic drug consumers. In reaching this conclusion, the court relied on the need to limit the bounds of liability, the *Huck* case, the strong weight of precedent, and the court's view that a negligent misrepresentation claim is a product liability claim that can be brought only against the manufacturer of the drug the plaintiff ingested.

Comment r. Medical professionals' negligent misrepresentations. For cases upholding the principle that a patient may pursue parallel claims for lack of informed consent and negligent misrepresentation, see Bloskas v. Murray, 646 P.2d 907, 915 (Colo. 1982); Thiel v. Fine, 2009 WL 765497, at *4 (Conn. Super. Ct. 2009) (denying motion to dismiss informed consent and negligent misrepresentation claims); Pflueger-James v. Pope Paul VI Inst. Physicians, P.C., 842 N.W.2d 184, 187 (Neb. Ct. App. 2014) (permitting amendment of complaint to add claim for informed consent to original claim of negligent misrepresentation).

In addition to misrepresentations to patients, physicians who perform medical examinations on nonpatients for litigation, workers' compensation, or employment physicals may be subject to liability both for affirmative misrepresentations and for negligence in failing to identify and communicate the existence of a medical condition posing a risk to the nonpatient. See Restatement Third, Torts: Liability for Physical and Emotional Harm, Chapter 11 (Liability of Medical Professionals and Institutions) § 3, Comment *e* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)); see also Webb v. T.D., 951 P.2d 1008 (Mont. 1997) (holding physician who conducted examination of employee for workers' compensation purposes subject to liability for affirmative misrepresentation of worker's condition); Daly v. United States, 946 F.2d 1467 (9th Cir. 1991) (Federal Tort Claims Act applying Washington law) (same as *Webb*); Green v. Walker, 910 F.2d 291, 296 (5th Cir. 1990) (applying Louisiana law) (physician hired by employer to conduct annual physicals of employees obliged "to take reasonable steps to make information available timely to the examinee of any findings that pose an imminent danger to the examinee's physical or mental well-being").

Illustration 16 is based on Doe v. Cochran, 210 A.3d 469, 477 (Conn. 2019) (concluding that plaintiff's claim sounded in ordinary negligence rather than professional malpractice).

Restatement Third of Torts: Liability for Physical and Emotional Harm, Chapter 11 (Liability of Medical Professionals and Institutions) § 3, Reporters' Note to Comment *g* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022), addressing duties of medical professionals to third parties, reports:

> The most straightforward case for a provider's duty to third parties is when the provider's actions create a risk of harm that otherwise did not exist, such as by prescribing medication that impairs a patient's mental or motor functioning. Those situations fall easily within tort law's ordinary negligence principles. Those general principles also recognize, however, that courts may omit or limit the ordinary duty

> of reasonable care in "exceptional cases, when an articulated countervailing principle or policy warrants" doing so . . . . Courts sometimes find that the special features of patient-care relationships, such as loyalty to the patient, carry this countervailing weight, but when the duty in question does not require warning third parties, and merely reinforces (rather than interferes with) the provider's primary duty to the patient, then such countervailing considerations are at a minimum.
>
> Accordingly, a clear majority of states' highest courts permit third-party suits for either negligent prescription or negligent failure to warn patients that prescribed medication causes impairment. . . .

Id. (citation omitted).

Comment s. Misrepresentation causing only emotional harm. When plaintiffs seek to recover for pure emotional harm, most courts do not distinguish negligent misrepresentation claims from other negligent conduct cases. Thus, in numerous HIV misdiagnosis cases, courts have held that misrepresentations or omissions about a party's HIV status supported a claim for emotional harm based on general principles of recovery for negligently inflicted emotional harm. These cases are consistent with Restatement Third of Torts: Liability for Physical and Emotional Harm § 47 (AM. L. INST. 2012), which provides for recovery for emotional harm that "occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm." See Chizmar v. Mackie, 896 P.2d 196, 205 (Alaska 1995) (physician–patient relationship sufficient to support negligent infliction of emotional distress claim based on misdiagnosis of HIV infection); Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980) (permitting claim by husband of patient who was incorrectly diagnosed with a sexually transmitted disease that led to marital difficulties and the onset of dissolution proceeding); Hedgepeth v. Whitman Walker Clinic, 22 A.3d 789, 792 (D.C. 2011) (holding doctor–patient relationship sufficient to support negligent HIV diagnosis claim and to dispense with zone-of-physical-danger requirement in such cases); Faya v. Almaraz, 620 A.2d 327, 334 (Md. 1993) (holding plaintiff-patient stated a claim for defendant-surgeon's failure to disclose that he was HIV positive and that plaintiff's resultant emotional harm was legally compensable); Schulman v. Prudential Ins. Co. of Am., 640 N.Y.S.2d 112, 112 (App. Div. 1996) ("The erroneous report of an HIV positive finding following blood analysis is a "special circumstance" that provides assurance that a claim to recover for negligent infliction of emotional distress as a result of the erroneous report is genuine and not spurious, and therefore plaintiff's claim may be maintained."); Bramer v. Dotson, 437 S.E.2d 773, 774-775 (W. Va. 1993) (holding plaintiff stated a claim for negligent diagnosis of HIV infection).

In addition to the cases discussed above, a longstanding exception to limitations on negligent infliction of emotional distress cases is in cases in which a relative is negligently and incorrectly informed of the death or serious medical condition of a family member. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 47, Illustration 4 and Reporters' Note to Comment *f* (AM. L. INST. 2012).

Contrary cases do not rely on the fact that the claim is based on negligent misrepresentation. Instead, they are resolved on general limitations on negligent infliction of emotional distress. See Friedman v. Merck & Co., 131 Cal. Rptr. 2d 885 (Ct. App. 2003) (denying claim by "strict ethical vegan," explaining: "We conclude a TB test distributor's negligent failure to warn that the test contains animal products is not (and is not alleged to be) sufficiently likely to result in serious harm to a sufficiently significant segment of the population so as to impose a duty to so advise on defendants as a matter of law."); R.J. v. Humana of Fla., Inc., 652 So. 2d 360, 363 (Fla. 1995) (holding that the impact rule for emotional harm barred plaintiff's HIV incorrect diagnosis claim and refusing to create an exception to the impact rule for such cases); Brogan v. Mitchell Int'l, Inc., 692 N.E.2d 276 (Ill. 1998) (denying claim for emotional distress by former employee based on misrepresentations of potential employer's business prospects that led to his hiring and subsequent dismissal due to financial difficulties of employer because of lack of special relationship between potential employer and applicant, a requirement for such emotional harm cases); Heiner v. Moretuzzo, 652 N.E.2d 664, 670 (Ohio 1995) (denying plaintiff's claim because negligent infliction of emotional distress claims require risk of physical harm); Verinakis v. Med. Profiles, Inc., 987 S.W.2d 90, 95 (Tex. App. 1998) (denying plaintiff's claim because, in HIV misdiagnosis cases seeking recovery for emotional distress, Texas law requires a showing that the plaintiff has sustained a serious bodily injury).

CHAPTER 12
LIABILITY IN EVENT OF DEATH

§ 70 [Approximately]. Actions for Causing Death (Wrongful Death)

An actor's liability for tortiously causing the death of another is determined by the statute creating the right of action and its interpretation. The measure of damages for wrongful death is addressed by § 23 of the Restatement Third of Torts: Remedies (Tentative Draft No. 2, 2023).

Comment:

a. History and scope.
b. Relationship to survival and loss of consortium claims.
c. Terminology: "beneficiary."
d. Placement in Liability for Physical and Emotional Harm.
e. Duty, tortious conduct, factual cause, and scope of liability.
f. Derivative or independent?
g. Effect of prior judgment.
h. Effect of prior settlement or post-injury release.
i. Effect of agreement, signed by decedent, to arbitrate claim.
j. Effect of contractual limitations on liability.
k. If statute of limitations lapses on injury claim before decedent's death.
l. Preclusive effect of separate survival action.
m. Effect of decedent fault.
n. Effect of beneficiary fault.
o. Prenatal injury: death after birth.
p. Prenatal injury: fetus not born alive.
q. Death suffered in the scope of employment.

a. History and scope. Following the holding in Baker v. Bolton, (1808) 1 Camp. 493, 170 Eng.Rep. 1033, it was generally agreed that, at common law, a person who had suffered pecuniary or other harm due to the death of another had no cause of action against the actor or actors who tortiously caused the decedent's death. This legal situation was broadly—and correctly—viewed as intolerable. It was, eventually, remedied in England in 1846 by a statute commonly known as "Lord Campbell's Act." So-called "wrongful-death statutes," statutes similar to, and modeled on, Lord Campbell's Act, have now been enacted in every state. In addition to these wrongful-death

statutes (addressed here), many states have enacted separate but complementary "survival statutes" (see § __), which preserve to the decedent's estate the right of action that had accrued before the decedent's death.

Published in 1979, the Second Restatement of Torts § 925 addressed wrongful-death causes of action. Its black letter stated: "The measure of damages for causing the death of another depends upon the wording of the statute creating the right of action and its interpretation." The Third Restatement supersedes § 925, although its substance is broadly consistent with it. One significant difference between the Second and Third Restatements relates to organization. In particular, while § 925 addressed substantive rights and available damages in one overarching provision, the Third Restatement decouples this material. It addresses the rules for liability here, and it addresses damages in a companion provision, Restatement Third, Torts: Remedies § 23 (Tentative Draft No. 2, 2023).

An action for wrongful death is statutory, and each state's wrongful-death statute requires careful and independent evaluation. This Section merely complements that statutory framework. As such, this Section may be helpful in filling gaps in statutory coverage and clarifying ambiguity in statutory language, but where a statute clearly addresses a matter, that statute governs.

b. Relationship to survival and loss of consortium claims. The wrongful-death claim, addressed here, is a cause of action conferred on the decedent's statutorily designated family or dependents—hereinafter, per Comment *c*, "the beneficiaries"—for the losses they have sustained as a result of the decedent's death. The general aim of a wrongful-death statute is to compensate the decedent's dependents, heirs, and loved ones for *their* losses. By contrast, the survival action, addressed by § 71 [approximately] of this draft and Restatement Third of Torts: Remedies § 24 (Tentative Draft No. 2, 2023), aims to compensate for the losses *the decedent* sustained, between tortious injury and death. Before death, the injured person could have recovered these damages in a personal injury action, but at the moment that person dies, the personal injury action is no longer viable—requiring a survival action to be initiated. As the Restatement of the Law Second, Judgments § 45, Comment *a* explains: "In most jurisdictions . . . there can be both a surviving personal injury claim and a wrongful death claim." In a few states, a single statutory provision consolidates both functions.

Illustrations:

1. Regina takes a prescription migraine medication, manufactured by MigX, which is accompanied by an inadequate warning. Soon after ingesting the medication, she suffers a stroke. Evidence demonstrates that Regina's stroke was caused by MigX's migraine medication, and, if the medication had been accompanied by an adequate warning, it would not have been prescribed for Regina. Three months after her stroke, Regina dies of stroke-related complications. Following Regina's death, Regina's personal representative may assert a survival act claim against MigX (see § 71 [approximately]), and her beneficiaries may additionally assert a claim for her wrongful death.

2. Same facts as Illustration 1, except that now, three months after her stroke, Regina is a passenger in a car that is struck at high speed by another vehicle, and she dies immediately upon impact. Following Regina's death, Regina's personal representative may assert a survival act claim against MigX. See § 71 [approximately]. However, MigX is not liable for Regina's wrongful death because MigX's migraine medication did not cause Regina's death. Regina's death in the automobile accident is unrelated to MigX's tortious conduct, and a predicate for a wrongful-death action is that the tortfeasor caused the victim's death.

There is also some conceptual similarity between wrongful-death claims and loss of consortium claims, which are addressed by the Restatement Third of Torts: Liability for Physical and Emotional Harm §§ 48 A, 48 B, and 48 C (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)), and Restatement Third, Torts: Remedies § 25 (Tentative Draft No. 2, 2023). Loss of consortium claims are common-law, not statutory, causes of action. And, unlike wrongful-death claims, loss of consortium claims do not involve the death of a spouse, parent, or child; rather, consortium claims merely demand that the spouse, parent, or child sustain physical or emotional harm that impairs the spousal or filial relationship. For more on the relationship between wrongful-death claims and these other causes of action, see Restatement Third, Torts: Remedies § 25, Comment *b* (Tentative Draft No. 2, 2023).

Sometimes, an injury will give rise to a loss of consortium claim filed by the victim's spouse, parent, or child, followed by a wrongful-death claim, filed by the victim's beneficiaries, after the victim dies due to tortiously inflicted injuries.

Illustration:

3. Graham tortiously injures Silvie, who is married to Harry. Following the injury, Silvie lives for one year before succumbing to injury-related complications. During that one-year period, Silvie and Harry's marriage is impaired. Harry may maintain a consortium claim and recover for lost consortium from the date of injury until the date of Silvie's death. Beyond that, Harry's entitlement to compensation for losses due to Silvie's death is determined by the state's wrongful-death statute.

For more on the intersection of wrongful-death claims and loss of consortium claims, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 A, Comment *g* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

c. Terminology: "beneficiary." This Section refers to the person or persons asserting a wrongful-death claim as the decedent's "beneficiary" or "beneficiaries." This vocabulary is utilized simply for expositional ease. In specifying who is and is not entitled to assert a wrongful-death claim following a person's death, state statutes differ. This Section's use of the term "beneficiary" is not intended to expand, contract, or otherwise alter those statutory specifications.

d. Placement in Liability for Physical and Emotional Harm. Added pursuant to the Miscellaneous Provisions project, this Section is located in the Restatement Third of Torts: Liability for Physical and Emotional Harm project. That placement is warranted because, almost by definition, a wrongful-death claim involves the infliction of physical and emotional harm. However, wrongful-death actions can involve tortious conduct that the Restatement Third of Torts addresses outside of its Liability for Physical and Emotional Harm project (such as tortious conduct involving medical malpractice, intentional misconduct, or defective products). Such wrongful-death claims are also subject to the rules provided in this Section.

e. Duty, tortious conduct, factual cause, and scope of liability. An actor is subject to liability for the wrongful death of another only if the actor had a duty to the victim, acted tortiously, the tortious conduct was a factual cause of the victim's death, and the death was within the actor's scope of liability (frequently called proximate cause). For duty, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 7. For factual cause, see id. § 26. For scope of liability, see id. § 29. The actor's conduct may be negligent, reckless, or intentional. Or, the actor may be subject to liability under principles of strict liability or product liability law.

f. Derivative or independent? The claim for wrongful death that arises in favor of the decedent's beneficiaries tends to be characterized as either "derivative" from the decedent's own claim or "independent" of it. Often, a state's categorization of its statute derives from the statute's text.

If, as is true in the majority of states, the claim for wrongful death is treated as "derivative," the beneficiaries can maintain a wrongful-death action only if the decedent would be in a position to assert a personal injury action if the decedent were still alive. If, as is true in a significant minority of states, the claim for wrongful death is treated as "independent," the decedent's beneficiaries can maintain a wrongful-death action, even if the decedent would not be in a position to assert a personal injury action if the decedent were still alive.

The approach a state takes (treating the wrongful-death claim as derivative or, alternatively, independent) tends to affect the states' handling of numerous matters related to the wrongful-death cause of action. These include the preclusive effect of prior judgments (Comment *g*), the effect of prior settlements and post-injury releases (Comment *h*), whether pre-injury agreements to arbitrate claims bind the decedent's beneficiaries (Comment *i*), the effect of pre-injury contractual limitations on liability (Comment *j*), and whether a wrongful-death claim is time-barred, if the decedent's own cause of action for personal injuries had lapsed by the time of the decedent's death (Comment *k*). Because, as the Restatement of the Law Second, Judgments § 46, Comment *b* recognized, states are, and have long been, in "profound conflict" as to whether wrongful-death claims are derivative or independent, and because as well, the divergent approaches tend to have a statutory basis, this Section does not attempt to reconcile the sharp disagreement or forge a middle ground. Rather, similar to the Restatement Second, Judgments, this Section restates both competing approaches.

g. Effect of prior judgment. Sometimes, a person who sustains an injury files a lawsuit based on that injury—and then the person subsequently dies because of injury-related complications, giving rise (at least theoretically) to an action for wrongful death. That scenario raises the question of whether the decedent's prior litigation activity precludes the beneficiaries' subsequent wrongful-death action.

If the personal injury lawsuit reached a final judgment prior to the decedent's death, the preclusive effect of that judgment is determined by Restatement of the Law Second, Judgments § 46. That provision provides:

> When a person has been injured by an act which later causes his death and during his lifetime brought an action based on that act:
>
> (1) If the action resulted in judgment against the injured person, it precludes a wrongful death action by his beneficiaries to the same extent that the person himself would have been precluded from bringing another action based on the act, unless the judgment was based on a defense that is unavailable against the beneficiaries in the second action.
>
> (2) If the action resulted in judgment in favor of the injured person:
>
> (a) If a wrongful death action is permitted only when the decedent had a claim at the time of his death, the judgment precludes such an action to the same extent that the person himself would have been precluded from bringing another action based on the act.
>
> (b) If a wrongful death action is permitted even though the decedent had obtained a judgment for his personal injuries, the judgment precludes recovery of damages in the wrongful death action for such elements of loss as could have been recovered by the decedent in his action.
>
> (3) Issues determined by a judgment for or against a person in an action based on an act which later causes his death are conclusive in a subsequent action for causing his death.

The Restatement of the Law Second, Judgments § 46(2) thus offers two rules. The rule stated in Subsection (2)(a) is utilized in jurisdictions that view the wrongful-death cause of action as derivative. The rule stated in Subsection (2)(b) is utilized in jurisdictions that view the wrongful-death cause of action as independent. For a discussion of whether a wrongful-death claim is derivative or independent, see Comment *f* and the Reporters' Note thereto.

h. Effect of prior settlement or post-injury release. Sometimes, a person who sustains an injury asserts a claim against the actor who inflicted that injury—and the person subsequently settles or releases that personal injury claim. Then, after the settlement or release is executed, the person dies because of injury-related complications, giving rise (at least theoretically) to an action for wrongful death. That scenario raises the question of whether the prior settlement or release bars a subsequent wrongful-death action initiated by the decedent's beneficiaries.

Viewing wrongful-death claims as derivative (see Comment *f*), the majority of states hold that the settlement of the decedent's personal injury claim extinguishes a wrongful-death claim against that tortfeasor, just as the personal injury suit against the tortfeasor is or would be extinguished. This position has the salutary effect of encouraging settlement and promoting finality, as the defendant can rest assured that the claim's consensual resolution will forever terminate the defendant's liability, even if the victim should later die. Furthermore, this position avoids any specter of a double recovery.

However, a significant minority of states adheres to the opposite position. Viewing the wrongful-death cause of action as "independent," see Comment *f*, these courts hold that a decedent's settlement or release of liability, executed for injuries sustained prior to the decedent's death, does not extinguish a subsequent wrongful-death action initiated by the decedent's beneficiaries after the decedent's death for the distinct harms that they suffer due to the death. This position is sensible, in part, because it avoids a conceptual tension: the oddity of saying that the decedent extinguished a cause of action before that cause of action ever came into existence, particularly given that the wrongful-death cause of action does not typically belong to, or even seek to compensate, the decedent. See Restatement Third, Torts: Remedies § 23 (Tentative Draft No. 2, 2023) (explaining that the wrongful-death cause of action entitles beneficiaries to recover for their *own* losses, "including lost financial support from the decedent, funeral and burial expenses, loss of services, and loss of inheritance, and damages for loss of society, including affection, comfort, companionship, love, support, and, in the case of a marital relationship, sexual relations").

i. Effect of agreement, signed by decedent, to arbitrate claim. In recent years, a number of states have grappled with the question of whether a valid arbitration agreement signed by the decedent that compels the decedent to arbitrate the decedent's personal injury claim compels the decedent's beneficiaries to arbitrate (rather than litigate) their subsequent wrongful-death action.

Once again, courts tend to resolve this question by assessing whether the state's wrongful-death statute is derivative or independent. See Comment *f*. If the wrongful-death statute is derivative, the decedent's pre-death agreement to arbitrate compels the beneficiaries to submit their wrongful-death claim to arbitration, even though the beneficiaries were not parties to the arbitration agreement. Conversely, if the state's wrongful-death statute establishes an independent cause of action, the decedent's pre-death agreement to arbitrate does not bind the decedent's beneficiaries.

Even in states in which the wrongful-death cause of action is derivative, beneficiaries cannot be forced to arbitrate their claims unless the arbitration agreement is valid and, by its terms, subjects the wrongful-death claim to an arbitral forum. If, for example, the arbitration agreement, signed by the decedent, is unconscionable, then the agreement does not and cannot bind the decedent's beneficiaries. For unconscionability, see Restatement of the Law, Consumer Contracts § 6 (Revised Tentative Draft No. 2, 2022); Restatement of the Law Second, Contracts § 208. For discussion of such agreements in the realm of medical malpractice, see Restatement Third, Torts: Medical Malpractice § 9 (Tentative Draft No. 2, 2024).

j. Effect of contractual limitations on liability. Courts have grappled with the effect of contractual limitations on liability (sometimes called "exculpatory agreements," "exculpatory contracts," "hold harmless agreements," "express assumptions of risk," or "pre-injury releases"), executed by the decedent (but not the beneficiaries) prior to the decedent's tortiously inflicted injury.

Once again, courts tend to evaluate the enforceability of these contracts by assessing whether the state's wrongful-death statute is derivative or independent. In the majority of states that view the wrongful-death action as derivative (per Comment *f*), a valid, enforceable, applicable, and unambiguous pre-injury release executed by the decedent bars the decedent's beneficiaries' from asserting a wrongful-death claim, should death ensue. The notion is that a wrongful-death action only preserves for the beneficiary that claim that could have been initiated by the decedent if death had not ensued—and because a valid and enforceable pre-injury release would have extinguished the victim's personal injury claim, it also extinguishes the wrongful-death claim passed to the victim's beneficiaries.

In the minority of states that view the wrongful-death action as independent, two distinct approaches have emerged. Some courts reason that a valid and enforceable pre-injury release, executed by the decedent, bars a subsequent wrongful-death action, not because the wrongful-death action is derivative, but because a decedent who signed such a release assumed the risk of injury and, in so doing, relieved defendants of any duty to him—and absent a duty (per Comment *e*), there can be no action for wrongful death. Alternatively, and more convincingly, a few courts reason that an exculpatory agreement only binds the parties who *actually signed* the agreement—and, unless the beneficiaries actually signed the agreement (a rarity), they are not bound thereby. In these states, then, an exculpatory contract, signed by the defendant and victim, does not limit the beneficiary's cause of action for the victim's wrongful death.

In the majority of states where the wrongful-death statute establishes a derivative cause of action, a valid and enforceable exculpatory agreement binds the beneficiaries, just as it would have bound the decedent.

In the significant minority of states where the wrongful-death statute establishes an independent cause of action, the preferred position is the latter one (that an exculpatory agreement only binds the parties who *actually signed* the agreement—and, unless the beneficiaries actually signed the agreement, they are not bound thereby). The former position (that the exculpatory agreement's execution obviates a duty to the decedent, even if it does not "bind" the decedent's beneficiaries), is not preferred as it is circuitous and also in tension with the Restatement Third, Torts: Apportionment of Liability § 2, Comment *i*. Consistent with the majority of states, that Comment provides that, with one minor exception, the traditional doctrine of implied secondary assumption of risk does not furnish a complete defense; instead, the plaintiff's voluntary and knowing assumption of risk is addressed through familiar principles of comparative responsibility. See also id. § 3, Comment *c* (explaining that, when a plaintiff's knowing and voluntary assumption of risk is unreasonable, the plaintiff's recovery is reduced according to comparative responsibility principles).

In no event will a pre-injury release, signed by the decedent prior to death, shield the defendant unless it is valid, applicable, unambiguous, and, by its terms, enforceable. For the general validity and enforceability of such contracts, see Restatement Third, Torts: Apportionment of Liability § 2, Comment *e*, as well as the Restatement of the Law, Consumer Contracts § 6(c) (Revised Tentative Draft No. 2, 2022). For discussion in the context of defective products, see Restatement Third, Torts: Products Liability § 18 ("Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products-liability claims against sellers or other distributors of new products for harm to persons."). For discussion in the realm of medical malpractice, see Restatement Third, Torts: Medical Malpractice § 10 (Tentative Draft No. 2, 2024) (explaining that such agreements are unenforceable).

k. If statute of limitations lapses on injury claim before decedent's death. Courts have also grappled with whether a wrongful-death claim is time-barred if the statute of limitations governing the decedent's personal injury claim had lapsed by the time of the decedent's death. Addressing that question, the Restatement Second of Torts § 899, Comment *c*, explained that "since the cause

of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred." That position continues to be held by numerous states—and particularly those that categorize their wrongful-death statute as setting forth an independent cause of action. See Comment *f*.

However, many states, to the contrary, conclude that a wrongful-death action is barred when the statute of limitations on the decedent's personal injury claim has expired. Viewing their wrongful-death statutes as derivative (see Comment *f*), these states reason that the beneficiaries of the wrongful-death action can sue only if the victim would still be in a position to sue, if the victim were still alive. Reasoning that the victim's suit was foreclosed by the passage of time, courts conclude that the beneficiaries' claims are similarly extinguished.

In certain states, any ambiguity is averted, as statutory language clearly establishes that the statute of limitations that governs the wrongful-death statute begins to run on the date of the allegedly wrongful act or omission or, alternatively, on the date of death.

l. Preclusive effect of separate survival action. As noted in Comment *b* and explained in Illustration 1, a person's death often gives rise to two overlapping causes of action: a survival action and a wrongful-death action. Frequently, these two complementary actions are initiated at the same time and by the same person, such as the decedent's spouse, parent, or child. In some jurisdictions, however, the claims can devolve to differently designated persons, and they are not necessarily subject to a rule of compulsory joinder. On those occasions, questions can arise concerning the preclusive effect of one action on the other.

The Restatement of the Law Second, Judgments § 47 addresses this situation. It provides:

> When a person has been injured by an act which later causes his death and following his death separate actions are prosecuted, one under a survival statute and one under a death statute:
>
> (1) A judgment for the plaintiff in either action precludes recovery in the second action of those elements of loss that could have been recovered in the first action; and
>
> (2) A judgment against the plaintiff in the first action precludes any person who was a beneficiary of that action from being a beneficiary in the second action, unless the judgment was based on a defense that is unavailable against that beneficiary in the second action.

m. Effect of decedent fault. Unless otherwise provided by statute, in a wrongful-death action, the decedent's fault is imputed to the decedent's beneficiary. The decedent's fault is not imputed to the beneficiary for any injury that does not derive from an injury to the decedent. See Restatement Third, Torts: Apportionment of Liability § 6, Comment *c*.

Illustration:

4. Gerona is driving an automobile while her husband, Troy, is riding in the passenger seat. At an intersection, Gerona's negligently driven automobile collides with Maurice's negligently driven automobile. In the crash, Gerona is killed, and Troy's arm is broken. In the ensuing claim by Troy, Gerona's beneficiary, against Maurice for Gerona's wrongful death, Gerona's negligence is imputed to Troy. As a consequence, Troy's recovery for Gerona's wrongful death will be reduced by the percentage of comparative responsibility the factfinder assigns to Gerona. However, in Troy's personal injury claim against Maurice for his broken arm, Gerona's fault is not imputed to Troy. Maurice, however, may assert a contribution claim against Gerona, even though Gerona is deceased. See § 72 [approximately] of this draft (addressing liability upon the death of a tortfeasor); Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) Chapter 1, Intra-Family Immunities § 1 (Tentative Draft No. 1, 2022) (discussing the abrogation of spousal immunity).

n. Effect of beneficiary fault. A beneficiary under a wrongful-death statute is responsible for the beneficiary's own fault, and that beneficiary's recovery is proportionately reduced to account for that fault—and, as Illustration 5 demonstrates, the defendant's total payment for the death of the decedent is likewise, correspondingly, reduced. But one beneficiary's fault is not imputed to, and will not defeat the recovery of, any other beneficiary. See Restatement Third, Torts: Apportionment of Liability § 6, Comment *c*.

Illustration:

5. Clarissa, Charles, and their 13-year-old daughter, Victoria, are driving to get ice cream when their vehicle collides with a vehicle driven by Brandynn. Clarissa, who was driving the family's vehicle, and Brandynn were both negligent at the time of the collision. Victoria is killed in the accident. In the wrongful-death action that ensues, the factfinder, applying the standard of care in Restatement Third, Torts: Concluding Provisions § 10A(a), assigns 40 percent comparative responsibility to Clarissa (Victoria's mother) and 60

percent to Brandynn (the other motorist). The applicable wrongful-death statute makes Victoria's parents, Charles and Clarissa, the beneficiaries of any recovery. Charles is entitled to recover the full amount of his share of the wrongful-death damages. Clarissa's recovery is reduced by the 40 percent of comparative responsibility assigned to her. Accordingly, if the jury awards $100,000 in damages for Victoria's death, Charles is entitled to recover $50,000 (his pro rata share of the $100,000 recovery), while Clarissa is entitled to recover only $30,000, and Brandynn pays a total of $80,000.

o. Prenatal injury: death after birth. Fetal death and injury claims are addressed by § __ of this draft. Comment *i* to § __ specifically addresses liability when a fetus is tortiously injured in utero, the child is subsequently born alive, and then the child dies as a result of the tortiously inflicted prenatal injury. That Comment provides: "If the child is born alive and then dies, as a result of the injury inflicted prior to birth, an action can be maintained for the child's wrongful death. If appropriate under the state's statutory scheme, a survival action may also be initiated."

p. Prenatal injury: fetus not born alive. Fetal death and injury claims are addressed by § __ of this draft. Comment *j* to § __ specifically addresses liability when a fetus dies before birth. That Comment states that such claims are "governed by the state's wrongful-death act."

q. Death suffered in the scope of employment. Sometimes, a worker is fatally injured by tortious conduct that arises out of and in the course of employment. This fact implicates the workers' compensation schemes that are in place in every state, as workers who sustain injury within the scope of employment are entitled to recover workers' compensation benefits. But, under the exclusive remedy provision of state workers' compensation statutes, unless an exception obtains, they may not sue the employer in tort. That reality, in turn, raises the question of whether a worker's beneficiaries are subject to the exclusive remedy provision of a workers' compensation statute when the worker dies.

Confronting that question, courts have consistently held that, because workers' compensation is intended to be the "exclusive" remedy against employers for workplace injury *and death*, the scheme's exclusive remedy provision bars a worker's beneficiaries from asserting a wrongful-death claim against the employer, following the worker's fatal injuries. Accordingly, when a worker sustains a fatal injury that arises out of and in the course of employment, unless an exception obtains, the decedent's beneficiaries are precluded from asserting a tort claim against the employer for the worker's wrongful death.

The above discussion of "an exception" reflects the fact that there are times when a worker, injured within the scope of employment, is nevertheless entitled to assert a claim in tort against the worker's employer via well-established exclusions to workers' compensation's exclusive remedy provisions (e.g., for intentionally inflicted injuries). These channels are equally available to the decedent's beneficiaries. Furthermore, the qualifier "against the employer" reflects the fact that workers frequently have cognizable claims against third-party tortfeasors, and those third-party claims fall outside the workers' compensation scheme.

REPORTERS' NOTE

Comment a. History and scope. For the fact that wrongful-death statutes have been enacted in all 50 states, see Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390 (1970) ("In the United States, every State today has enacted a wrongful-death statute."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984) ("Every American state now has a statutory remedy for wrongful death."). In addition to these state enactments, federal statutes furnish a cause of action for wrongful death in many scenarios, and the Supreme Court of the United States created a judge-made cause of action for wrongful death under the laws of admiralty. See *Moragne*, 398 U.S. at 390 & 402 (cataloging these enactments). For a history of the laws' creation, see generally Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth–Century Family*, 25 LAW & SOC. INQUIRY 717 (2000).

For the Second Restatement's treatment of wrongful-death claims, see Restatement Second, Torts § 925 (AM. L. INST. 1979). For discussion in the first Restatement, see Restatement of Torts § 925 (AM. L. INST. 1939).

Comment b. Relationship to survival and loss of consortium claims. The discussion of wrongful-death and survival actions is drawn, in large part, from the Restatement of the Law Second, Judgments § 45, Comment *a* (AM. L. INST. 1982). For a cogent discussion of the difference between wrongful-death and survival actions, see Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1257 (Wash. Ct. App. 2010); MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES 745-749 (11th ed. 2021).

As Comment *b* notes, some states combine wrongful-death and survival statutes into one multipurpose cause of action. For discussion, see Provident Life & Acc. Ins. Co., 21 F.3d 586, 589 (4th Cir. 1994) (applying and discussing North Carolina's combined statute); Lozier v. Brown Co., 426 A.2d 29, 30 (N.H. 1981) (observing that New Hampshire's statute "is one that combines the elements of both [wrongful-death and survival statutes]").

For the relationship between loss of consortium claims (which are common-law claims) and wrongful-death claims (which are statutory claims), see Restatement Third, Torts: Liability

for Physical and Emotional Harm § 48 A, Comment *g* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)); Restatement Third, Torts: Remedies § 25 (Tentative Draft No. 2, 2023). Illustration 3 is drawn from, and is similar to, Illustration 5 in Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 A (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

Comment c. Terminology: "beneficiary." For discussion of who may assert a wrongful-death claim, owing to the decedent's death, see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 376 (2023 update). For an example of a statute's delineation, see CAL. CIV. PROC. CODE § 377.60 (offering a detailed list of who may sue for a person's wrongful death in California).

Comment e. Duty, tortious conduct, factual cause, and scope of liability. For the uncontroversial fact that a plaintiff pursuing a wrongful-death claim must establish the basic tort-law elements, see Thompson v. Wing, 637 N.E.2d 917, 923-924 (Ohio 1994); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 372 (2023 update).

Comment f. Derivative or independent? The discussion is drawn from Restatement of the Law Second, Judgments § 46, Comments *b* and *c* (AM. L. INST. 1982). Note that this terminology (i.e., "derivative" and "independent") is ubiquitous in the wrongful-death context such that its use is inescapable—and, sometimes, a state's interpretation of its statute as derivative or independent is based on the statute's plain language. But, in other contexts, the terminology tends to obscure more than clarify. See, e.g., Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 A, Comment *i* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (explaining why "labeling consortium claims as 'independent' or 'derivative' is unhelpful in explicating what is at stake").

The majority of states treat wrongful-death actions as derivative, rather than independent. See Berry v. City of Muskogee, Okla., 900 F.3d 1489, 1505 n.22 (10th Cir. 1990) (applying Oklahoma law) (explaining that the majority of states "view[] wrongful death actions as derivative claims that depend upon the existence of a right of action in the decedent before death"); Schwarder v. United States, 974 F.2d 1118, 1129 (9th Cir. 1992) (Alarcon, J., concurring) ("A majority of the state courts that have considered the question have held that a survivor cannot bring a wrongful death action if the decedent was barred from doing so in his lifetime, because the wrongful death claim is essentially derivative of the injury to the decedent."); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1261 (Ohio 2007) ("The majority of states treat wrongful-death actions as derivative of actions brought for the decedent's own injuries . . . ."); Restatement of the Law Second, Judgments § 46, Comment *b* (AM. L. INST. 1982) ("In the distinct majority of jurisdictions, the rule is that the wrongful death action is 'derivative,' i.e., an action by the beneficiaries under the wrongful death statute is permitted only if the decedent had a claim at the time of his death."); id. Comment *c* ("In a substantial minority of states, the wrongful death statute has been construed

as creating a cause of action in favor of the beneficiaries that is independent, in some degree, of the decedent's claim for his injuries.").

Arkansas, Colorado, Georgia, Michigan, New Mexico, New York, and Texas offer illustrative examples of states where the wrongful-death statute is clearly derivative. For Arkansas, see Searcy Healthcare Ctr., LLC v. Murphy, 2013 Ark. 463, at *4 (2013) (unreported) (explaining that "[a] wrongful-death claim is derivative of the claim that the decedent would have had, had he survived" and, as such, it "arises only where the original right of the decedent has been preserved"). For Colorado, see Salazar v. On the Trail Rentals, Inc., 506 F. App'x 709, 713 (10th Cir. 2012) (applying Colorado law) ("Colorado's wrongful death statute limits wrongful death claims to those that could have been brought by the decedent if he or she had survived."); Sigman v. Seafood Ltd. P'ship I, 817 P.2d 527, 530 (Colo. 1991) ("Pursuant to Colorado's wrongful death statute, the plaintiffs can maintain an action only if [the decedent] could have done so had his injuries not been fatal."). For Georgia, see United Health Servs. of Ga., Inc. v. Norton, 797 S.E.2d 825, 827-828 (Ga. 2017) (observing that it is well-settled that "a wrongful death action is wholly derivative of a decedent's right of action"). For Michigan, see Kane v. Rohrbacher, 83 F.3d 804, 805 (6th Cir. 1996) (applying Michigan law) ("[U]nder Michigan precedent it is clear that a wrongful death action is derivative, rather than independent, of a decedent's underlying tort action."). For New Mexico, see Krahmer v. Laurel Healthcare Providers, 315 P.3d 298, 300 (N.M. Ct. App. 2013) (explaining that, under the state's "strict" statute, "the same cause of action exactly as it would have been possessed by the decedent is what is transmitted to the personal representative, and any limitations on the decedent's personal right to maintain an action will survive as well"). For New York, see Prink v. Rockefeller Ctr., Inc., 398 N.E.2d 517, 521 (N.Y. 1979) (stating that, "to succeed in this action . . . plaintiff must establish that it could have been maintained by decedent had he survived"). For Texas, see In re Labatt Food Serv., L.P., 279 S.W.3d 640, 644 (Tex. 2009) ("[W]e have consistently held that the right of statutory beneficiaries to maintain a wrongful death action is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death. Thus, it is well established that statutory wrongful death beneficiaries' claims place them in the exact 'legal shoes' of the decedent, and they are subject to the same defenses to which the decedent's claims would have been subject.") (citation omitted).

In other states, as noted, the wrongful-death statute sets forth an independent claim in favor of the beneficiaries—and the claim can be pursued even if the decedent could not have pursued a claim for the decedent's injuries, had the decedent lived. Arizona, California, Idaho, Kentucky, Maryland, Missouri, and Ohio offer illustrative examples of states that take this tack. For Arizona, see James v. Phoenix Gen. Hosp., Inc., 744 P.2d 695, 704 (Ariz. 1987) (explaining that, in Arizona, the wrongful-death claim "is not a derivation from nor a continuation of claims which formerly existed in the injured party" but is, rather "an independent claim"). For California, see Ruiz v. Podolsky, 237 P.3d 584, 586 (Cal. 2010) ("[W]rongful death claims in the state are not derivative claims but are independent actions accruing to a decedent's heirs."); Avila v. S. Cal. Specialty Care, Inc., 20 Cal. App. 5th 835, 844 (2018) ("Unlike some jurisdictions wherein wrongful death actions are derivative, Code of Civil Procedure section 377.60 creates a *new cause of action* in favor of the

heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived.") (internal quotation marks and citation omitted). For Idaho, see Castorena v. Gen. Elec., 238 P.3d 209, 219 (Idaho 2010) (explaining that the state's "wrongful death action is entirely distinct from any action the decedent may have brought on her own behalf, prior to her death"). For Kentucky, see Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 600 (Ky. 2012) (explaining that wrongful-death beneficiaries in Kentucky hold a "statutorily distinct claim [that] does not derive from any claim on behalf of the decedent"). For Maryland, see Spangler v. McQuitty, 141 A.3d 156, 165 (Md. 2016) ("We hold that the Maryland wrongful death statute provides a new and independent cause of action . . . ."). For Missouri, see Lawrence v. Beverly Manor, 273 S.W.3d 525, 529 (Mo. 2009) (holding that Missouri's wrongful-death act created a new cause of action and "[a] claim for wrongful death is not derivative from any claims [the decedent] might have had"). For Ohio, see *Peters*, 873 N.E.2d at 1262 (explaining that a minority of states view wrongful-death claims as independent, rather than derivative, and that "the Ohio wrongful-death statute follows the minority position"); Thompson v. Wing, 637 N.E.2d 917, 922 (Ohio 1994) ("Because a wrongful death action is an independent cause of action, the right to bring the action cannot depend on the existence of a separate cause of action held by the injured person immediately before his or her death . . . .").

Some states fall somewhere between these two poles—with wrongful-death statutes that are neither wholly derivative nor wholly independent. See, e.g., Bybee v. Abdulla, 189 P.3d 40, 46 (Utah 2008) (explaining that, in Utah, the "wrongful death cause of action" is derivative in one sense and independent in another, meaning "that in our state the heirs in a wrongful death action stand in, at most, one shoe of the decedent"); Deggs v. Asbestos Corp. Ltd., 381 P.3d 32, 35 (Wash. 2016) (explaining that Washington's wrongful-death cause of action "is not truly a derivative action" but nor is it "completely separate").

Comment g. Effect of prior judgment. For discussion, see generally Restatement of the Law Second, Judgments § 46 (AM. L. INST. 1982); see also Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748 (Mo. Ct. App. 2008) (offering a detailed summary of courts' varying approaches); Vitauts M. Gulbis, Annotation, *Judgment in Favor of, or Adverse to, Person Injured as Barring Action for His Death*, 26 A.L.R.4th 1264 (originally published in 1983) (same). The Second Restatement of Torts addressed this issue with less nuance, stating: "On the other hand, a release of his claim by the injured person bars an action after his death for causing the death; this is also true of a judgment either for, or if on the merits, against him given in an action brought by him for the tort." Restatement Second, Torts § 925, Comment *i* (AM. L. INST. 1979). That statement is inconsistent with the Restatement Second, Judgments § 46, does not reflect the position of Comment *g*, and is contrary to the view of many states.

For the fact that the majority of states adheres to the "derivative" position of the Restatement of the Law Second, Judgments § 46(2)(a) (AM. L. INST. 1982), see In re Joint E. & S. Dist. Asbestos Litig., 726 F. Supp. 426, 433 (E.D.N.Y. 1989) ("The majority of jurisdictions has held that a prior personal injury judgment acts as a total bar to a subsequent wrongful death action.").

For states adopting the (minority) "independent" position of the Restatement of the Law Second, Judgments § 46(2)(b) (AM. L. INST. 1982), see, for example, Spangler v. McQuitty, 141 A.3d 156, 165 (Md. 2016) ("We hold that the Maryland wrongful death statute provides a new and independent cause of action, which does not preclude a subsequent action brought by a decedent's beneficiaries, although the decedent obtained a personal injury judgment based essentially on the same underlying facts during his or her lifetime."); Riggs v. Georgia-Pac. LLC, 345 P.3d 1219, 1221 (Utah 2015) ("[A] decedent's heirs may bring an action for wrongful death even when the decedent prevailed in a related personal injury suit during his or her lifetime."); accord W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 956 (5th ed. 1984) (explaining that, in a minority of states, a judgment resolving the injury victim's pre-death personal injury action will not bar a beneficiary's subsequent action for the decedent's wrongful death).

Comment h. Effect of prior settlement or post-injury release. As Comment *h* makes plain, "[a] majority of jurisdictions have held that . . . a release of liability prior to the decedent's death, bars a subsequent action." Spangler v. McQuitty, 141 A.3d 156, 172-173 (Md. 2016); see Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 579 (1974) ("[A] majority of courts interpreting state and federal wrongful-death statute[s] have held that an action for wrongful death is barred by the decedent's recovery for injuries during his lifetime."); Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748, 771 (Mo. Ct. App. 2008) ("If the injured person releases his or her personal injury claims while alive, the majority rule holds that a subsequent wrongful death action is barred."); Jensen v. IHC Hosps., Inc., 944 P.2d 327, 332 (Utah 1997) ("The majority of states refuses to allow a decedent's heirs to proceed with a wrongful death suit after the decedent has settled his or her personal injury case . . . ."); 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 24.6, at 552 (3d ed. 2007) ("If the deceased . . . settled and released a claim for injuries, before death, most courts hold this a bar to any action under either a survival or wrongful death statute.").

States adopting this majority position include, but are not limited to, the following: Kane v. Rohrbacher, 83 F.3d 804, 805 (6th Cir. 1996) (applying Michigan law); Schoenrock v. Cigna Health Plan of Ariz., Inc., 715 P.2d 1236 (Ariz. Ct. App. 1985); Hull v. Union Pac. R.R. Co., 141 S.W.3d 356, 360 (Ark. 2004); Warren v. Cohen, 363 So. 2d 129, 131 (Fla. Dist. Ct. App. 1978); Fountas v. Breed, 455 N.E.2d 200, 204 (Ill. App. Ct. 1983); Haws v. Luethje, 503 P.2d 871, 875 (Okla. 1972); Union Bank of Cal. v. Copeland Lumber Yards, Inc., 160 P.3d 1032 (Or. Ct. App. 2007); Hall v. Knudsen, 535 A.2d 772 (R.I. 1988); Ruppa v. Am. States Ins. Co., 284 N.W.2d 318, 325 (Wis. 1979); see also W. VA. CODE ANN. § 55-7-5 (statutorily specifying: "No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death.").[1]

[1] In these states, although a subsequent wrongful-death action would be "barred," it would not be precluded, as a matter of *res judicata*, because there is no judgment. See Carver v. Nall, 172 F.3d 513, 515 (7th Cir. 1999) (explaining "the fundamental point . . . that *res judicata* cannot operate in the absence of a judgment" and that "[a] settlement agreement that has not been integrated into a consent decree is not a judgment and cannot trigger *res judicata*"). Furthermore, the release, as a contract, presumably only bars further litigation if, or to the extent, it so provides. See Ostrowski v. Lake County, 33 F.4th 960, 965 (7th Cir. 2022) (applying Indiana law) (explaining that courts interpret settlement agreements "like other contracts"); Lindell v. Landis Corp. 401(k) Plan, 640 F. Supp. 2d 11, 15 (D.D.C. 2009) ("Settlement agreements are contracts, and courts interpret them accordingly.").

However, while that is the position of a majority of states, a significant minority of states interpret their statutes differently—to set forth an independent, rather than wholly derivative, cause of action that cannot be compromised or defeated by the decedent's actions. See Thompson v. Wing, 637 N.E.2d 917, 920 (Ohio 1994) ("A minority of jurisdictions . . . hold that a recovery by the injured person does not extinguish a subsequent wrongful death action because the action is an independent cause of action. Accordingly, the decedent's . . . settlement of his or her own claim during his or her lifetime can have no effect on the separate wrongful death claim that arises upon the decedent's death."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 956 (5th ed. 1984) ("[T]here is a minority view that neither a judgment in [the victim's personal injury] action nor his release of his claims will bar the action for wrongful death."); JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 11:14 (2023 update) ("The courts have been sharply divided on the issue whether a release by decedent bars a subsequent wrongful death action . . . ."); Restatement of the Law Second, Judgments § 46, Comment *b* (AM. L. INST. 1982) ("If . . . the claim for wrongful death is treated as wholly 'independent,' the deceased's disposition of his personal injury claim would have no effect on the wrongful death claim."); Vitauts M. Gulbis, Annotation, *Judgment in Favor of, or Adverse to, Person Injured as Barring Action for His Death*, 26 A.L.R.4th 1264 (originally published in 1983) (explaining that, some courts, "treating the wrongful death claim as wholly distinct from the personal injury claim, have taken the view that a release by the injured person does not bar a subsequent wrongful death claim"); see also Kane v. Rohrbacher, 83 F.3d 804, 805 (6th Cir. 1996) (applying Michigan law) ("If the [wrongful-death] action is independent, it does not come into existence until the date of the injured party's death, and thus it cannot be waived by a pre-death settlement agreement. If, however, [it] is derivative, the entry of a settlement agreement during decedent's life would preclude his personal representative from recovering additional amounts through a subsequent action.").

Courts that take this minority position include, but are not limited to, the following: Earley v. Pac. Elec. Ry. Co., 167 P. 513 (Cal. 1917) (holding that a widow's cause of action for the wrongful death of her husband is not barred by her husband's pre-death release of his claim for personal injury); Khosravan v. Chevron Corp., 280 Cal. Rptr. 3d 754, 762 n.5 (Ct. App. 2021) ("Under California law, the decedent's release of claims for his or her injuries does not bar a future wrongful death claim by the decedent's heirs."); *Thompson*, 637 N.E.2d at 922 ("Because a wrongful death action is an independent cause of action, the right to bring the action cannot depend on the existence of a separate cause of action held by the injured person immediately before his or her death. . . . Injured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves."); Rowe v. Richards, 151 N.W. 1001, 1001-1003 (S.D. 1915) (concluding that, although a husband executed a release prior to his death, his wife was entitled to bring an action for his death caused by defendant's tortious conduct); Weer v. Hess Oil V.I. Corp., 64 V.I. 107, 138 (Super. Ct. 2016) (siding with the minority because, among other deficiencies, the "derivative approach overlooks or perhaps ignores the fundamental difference between wrongful death statutes and survival statutes"); accord Riggs v. Georgia-Pacific LLC, 345 P.3d 1219, 1225 (Utah 2015) (holding that a wrongful-death action is

not barred by the fact that the decedent sued during her lifetime and prevailed against the same defendants; the two causes of action "are aimed at compensating different types of loss" to different people); cf. Bibbs v. Toyota Motor Corp., 815 S.E.2d 850 (Ga. 2018) (answering certified question: Even though decedent settled her personal injury claims and recovered economic damages prior to her death, a jury might determine that noneconomic damages are recoverable in her husband's subsequent wrongful-death action). The Supreme Court has approved this general approach for a narrow band of admiralty cases. See Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 583 (1974) (permitting beneficiaries to bring "a separate cause of action for wrongful death in cases where the decedent has already received a judgment for his personal injuries"), superseded by statutory amendments to the Longshore & Harbor Worker's Compensation Act, 33 U.S.C. § 905(b).

The courts that hew to this minority approach tend to reason that "because a wrongful death action is operative only after the injured party's death for the benefit of the surviving beneficiaries, it is unreasonable to read the statutory language as allowing a decedent's personal injury action to essentially 'defeat' the beneficiaries' right to pursue a wrongful death action on their behalf, when the right to claim has not been triggered." Spangler v. McQuitty, 141 A.3d 156, 174-175 (Md. 2016); see *Sea-Land Servs., Inc*., 414 U.S. at 583 ("Since the policy underlying the [wrongful-death] remedy is to insure compensation of the dependents for their losses resulting from the decedent's death, the remedy should not be precluded merely because the decedent, during his lifetime, is able to obtain a judgment for his own personal injuries."); Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748, 782 (Mo. Ct. App. 2008) (stating, in a slightly different context, "there is a logical inconsistency in holding that something a decedent does during his or her lifetime bars a wrongful death cause of action"); see also HARPER ET AL., supra § 24.6, at 553-554 (observing that courts "point to the anomaly of letting the deceased extinguish a right that had not yet come into existence and would not belong to him in any event"); JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 11:14 (2023 update) (dismissing the majority position as "a contradiction in terms" because "[a]n injured party . . . has no implied power to release the wrongful death claim which has not accrued and which, by its nature, could not accrue until his death").

In these states, courts appropriately take steps to ensure there is no "overlap in damages." *Spangler*, 141 A.3d at 174-175; see also *Sea-Land Servs., Inc*., 414 U.S. at 583-592 (parsing various damage categories to ensure there is no "double recovery" between what the decedent recovered in his personal injury action and what the beneficiaries seek to recover for his wrongful death); *Bibbs*, 815 S.E.2d at 852 (explaining that "damages recovered . . . in an earlier personal injury lawsuit cannot be recovered again in a wrongful death suit"); Restatement of the Law Second, Judgments § 46, Comment *c* (AM. L. INST. 1982) (explaining that, even in jurisdictions that deem beneficiaries' wrongful-death claims to be independent, "double recovery of damages is not permitted").

Comment i. Effect of agreement, signed by decedent, to arbitrate claim. As Comment *i* makes plain, whether a beneficiary can be compelled to arbitrate the beneficiary's wrongful-death claim tends to depend on whether that particular state classifies its wrongful-death action as derivative or independent. See Comment *f*. Or, as the Iowa Supreme Court has put it: "[I]n . . . jurisdictions where wrongful-death actions are brought by a personal representative who stands in

the shoes of the decedent, courts regularly hold that the personal representative must abide by any arbitration agreement of the decedent. . . . By contrast, in jurisdictions where wrongful death is regarded as an independent claim for the direct benefit of the estate's beneficiaries . . . courts generally do not find the decedent's arbitration agreement to be binding." Roth v. Evangelical Lutheran Good Samaritan Soc., 886 N.W.2d 601, 609 (Iowa 2016); see also Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 598 (Ky. 2012) ("Courts in states where the wrongful death action is derivative have held that an arbitration agreement applicable to a personal injury claim applies as well to the wrongful death claim. Where the claims are deemed independent, however, courts have held that a person's agreement to arbitrate his or her personal injury claim does not bind the wrongful death claimants to arbitration, because they were not parties to the agreement and do not derive their claim from a party.") (citations omitted).

For states taking the position that the wrongful-death statute is derivative and that, as a consequence, a decedent can bind the decedent's beneficiaries to an arbitral forum, see, e.g., Bales v. Arbor Manor, 2008 WL 2660366, at *8 (D. Neb. 2008) ("Because of the derivative nature of a wrongful death action in Nebraska, I conclude that the arbitration must be enforced against the plaintiff to the same extent it would have been enforced against the plaintiff's decedent had he survived."); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 665 (Ala. 2004) (concluding that nursing-home residents' wrongful-death beneficiaries were bound by arbitration provisions signed by the residents since beneficiaries "stand in the shoes of the decedent") (internal quotation marks omitted); Searcy Healthcare Ctr., LLC v. Murphy, 2013 Ark. 463, at *5 (2013) (unreported) ("[B]ecause the wrongful-death claim is derivative, the wrongful-death beneficiaries have the same limitations as the decedent would if the decedent brought the claim, and are bound by the agreements entered into by the decedent involving the decedent's claims."); Trinity Mission Health & Rehab. of Clinton v. Scott, 19 So. 3d 735, 740 (Miss. Ct. App. 2008) (finding that, since a wrongful-death action is derivative, the beneficiary must stand in the shoes of the decedent—and since the decedent's claims "would have been subject to arbitration," the beneficiaries' claim is "likewise subject to the arbitration provision"); Krahmer v. Laurel Healthcare Providers, 315 P.3d 298, 300 (N.M. Ct. App. 2013) (explaining that, under New Mexico law, "the same cause of action exactly as it would have been possessed by the decedent is what is transmitted," to decedent's beneficiaries, and, as a consequence, if the decedent agreed to arbitrate her claims with the nursing home, her beneficiary was similarly bound); In re Labatt Food Serv., L.P., 279 S.W.3d 640, 644 (Tex. 2009) (compelling arbitration because, prior to death, the decedent employee had agreed to arbitrate claims with his employer, and "wrongful death beneficiaries may pursue a cause of action . . . only if the individual injured would have been entitled to bring an action for the injury if the individual had lived").

For states concluding, in contrast, that the wrongful-death statute sets forth an at least partially independent cause of action and that, as a consequence, a decedent cannot compel the decedent's beneficiaries to pursue their rights in an arbitral (rather than judicial) forum, see, e.g., Golden Gate Nat'l Senior Care, LLC v. Beavens, 123 F. Supp. 3d 619, 634 (E.D. Pa. 2015) ("Since a wrongful death action does not belong to the decedent and is not derived from the decedent's

rights, a decedent may not waive a wrongful death beneficiary's right to a jury trial."); Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014) (reasoning that a "wrongful death claim is independently held by the decedent's statutory beneficiaries" and, as a consequence, the claim "is not subject to the terms of the . . . arbitration clause" which bound the decedent); *Ping*, 376 S.W.3d at 599 (holding that, because "the wrongful death claim is not derived through or on behalf of the [decedent], but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss," a decedent cannot bind his beneficiaries to arbitrate their wrongful-death claim); FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 201 (Md. Ct. Spec. App. 2016) (concluding that an arbitration agreement signed by a nursing-home resident prior to her death did not bind the resident's wrongful-death beneficiary after her death); Finney v. Nat'l Healthcare Corp., 193 S.W.3d 393, 395 & 397 (Mo. Ct. App. 2006) (reiterating that a "wrongful death claim does not belong to the deceased or even to a decedent's estate" and therefore holding that the decedent's beneficiary, "a nonparty to the initial agreement containing an arbitration clause, is not bound by the clause in her independent cause of action for the wrongful death"); Lawrence v. Beverly Manor, 273 S.W.3d 525, 527-529 (Mont. 2009) (holding that adult children of a nursing-home resident were not bound by the resident's arbitration agreement with the home because the state's wrongful-death act created a new cause of action); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1261-1262 (Ohio 2007) (explaining that Ohio follows the minority rule of viewing wrongful-death claims as independent, rather than derivative, and that, pursuant to this conception, "a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims"); Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 663 (Pa. Super. Ct. 2013) (concluding "that Pennsylvania's wrongful-death statute creates an independent action" and affirming "therefore" the trial court's ruling "that Decedent's contractual agreement with [defendant] to arbitrate all claims was not binding on the non-signatory wrongful death claimants"); Bybee v. Abdulla, 189 P.3d 40, 46 & 50 (Utah 2008) (holding that, in Utah, a wrongful-death claim "is a separate claim that comes into existence upon the death of the injured person" and that, owing to this independence, "a decedent does not have the power to contract away the wrongful death action of his heirs"); Woodall v. Avalon Care Ctr.-Fed. Way, L.L.C., 231 P.3d 1252, 1257-1259 (Wash. Ct. App. 2010) (holding that the decedent's beneficiaries were not required to arbitrate their wrongful-death claim against the operator of decedent's nursing home because, although the decedent waived his right to a judicial forum, wrongful-death liability "creates a new cause of action") (internal quotation marks omitted).

As Comment *i* makes plain, even in states where the wrongful-death cause of action is wholly derivative, beneficiaries cannot be forced to arbitrate, rather than litigate, their wrongful-death claim, unless the arbitration agreement is both applicable and valid. If, for example, the arbitration agreement, signed by the decedent, is substantively or procedurally unconscionable, then the agreement cannot be enforced. See, e.g., Allen v. Pacheco, 71 P.3d 375 (Colo. 2003) (finding that an arbitration agreement could (theoretically) encompass wrongful-death claims and bind the decedent's beneficiaries, but holding that the agreement in question was unenforceable for failure to comply with statutory requirements); Covenant Health & Rehab. of Picayune, LP v.

Estate of Moulds, 14 So. 3d 695 (Miss. 2009) (rejecting arbitration clause in nursing-home wrongful-death case based on the provision's substantive unconscionability). For unconscionability, see Restatement of the Law, Consumer Contracts § 6 (Revised Tentative Draft No. 2, 2022); Restatement of the Law Second, Contracts § 208 (AM. L. INST. 1981).

Occasionally, a state's views of arbitration and wrongful death may buck the independent/derivative categorization. For example, generally, wrongful-death claims are independent in California. See Avila v. S. Cal. Specialty Care, Inc., 20 Cal. App. 5th 835 (2018). However, in Ruiz v. Podolsky, 237 P.3d 584, 586, 588, 594-595 (Cal. 2010), even while observing that "wrongful death claims in the state are not derivative claims but are independent actions accruing to a decedent's heirs," the California Supreme Court held that a provision in the state's medical malpractice act required arbitration of wrongful-death claims when the decedent had agreed to arbitrate any claim arising from the medical provider's services. Conversely, in Illinois, wrongful-death actions are "said to be 'derivative.'" Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 358 (Ill. 2012). Yet, in Illinois, a decedent's pre-death agreement to arbitrate her claims does not bind her beneficiaries, should death ensue. Id. at 359 (explaining that, notwithstanding the derivative nature of wrongful-death claims, beneficiaries are not parties to the arbitration agreement and "only parties to the arbitration contract may compel arbitration or be compelled to arbitrate").

For a detailed discussion of the issue, see generally The Hon. Victoria A.B. Willis & Judson R. Peverall, *The "Vanishing Trial": Arbitrating Wrongful Death*, 53 U. RICH. L. REV. 1339 (2019).

Comment j. Effect of contractual limitations on liability. The majority of states that view the wrongful-death action as derivative (per Comment *f*) conclude that a valid, enforceable, and unambiguous pre-injury release executed by decedent prior to the decedent's death bars the decedent's beneficiaries' from asserting a wrongful-death claim should death ensue. E.g., Salazar v. On the Trail Rentals, Inc., 506 F. App'x 709, 713 (10th Cir. 2012) (applying Colorado law) (explaining that, in Colorado, the wrongful-death statute "limits wrongful death claims to those that could have been brought by the decedent if he or she had survived" and that, as a consequence, a valid exculpatory agreement, signed by decedent, extinguished his beneficiary's wrongful-death claim); Borden v. Phillips, 752 So. 2d 69, 73-74 (Fla. Dist. Ct. App. 2000) (holding that the exculpatory clause in a release signed by the decedent SCUBA diver was enforceable to release defendants from liability); Doherty v. Diving Unlimited Int'l, Inc., 140 N.E.3d 394 (Mass. 2020) (concluding that the release executed by diver prior to his death bound wrongful-death beneficiaries); Ruppa v. Am. States Ins. Co., 284 N.W.2d 318, 325 (Wis. 1979) (reasoning that, since an action for wrongful death is derivative—and "[o]ne is liable to the plaintiff in an action under [the wrongful-death] statute only if and to the extent that he would have been liable to the decedent had death not ensued"—a release executed by decedent affected beneficiaries' rights under the wrongful-death statute to the same extent as decedent's rights would have been affected); accord David L. Teklits, Note, *Sign Me Up?: A Critique of the Pennsylvania Supreme Court's Approach to Pre-Injury Sports Liability Waivers in the Wrongful Death Context*, 93 TEMP. L. REV. 451, 459-460 (2021) ("Many states' wrongful death statutes include a condition that in order for a beneficiary to bring a claim, the decedent must have been able to bring the claim had she survived.

The beneficiary's claim is therefore wholly derivative of the underlying decedent's claim. States that follow the wholly derivative approach generally recognize the validity of a liability waiver as a bar to . . . a spouse's separate wrongful death claim. This is because, by expressly assuming the risk, the decedent—and by extension, her wrongful death beneficiaries—would not have been able to recover if she had survived.").

Meanwhile, in those states in which the wrongful-death statute sets forth an independent cause of action (see Comment *f*), two approaches have emerged.

Some states hold that a valid and enforceable pre-injury release furnishes the defendant "a complete defense" to a wrongful-death action, not because the action is derivative, but because a person who signed such a release assumed the risk of injury and, in so doing, relieved the defendant of any duty to him—and, absent a duty (per Comment *e*), there can be no action for wrongful death. See Madison v. Superior Ct., 203 Cal. App. 3d 589, 598 & 600 (1988), modified (Sept. 1, 1988) (taking this tack and stating that, in signing an exculpatory agreement, "[the decedent] expressly manifested his intent to relieve the defendants of any duty to him and to assume the entire risk of any injury" and that "[the decedent] effectively assumed all of the risks of any injury he might suffer as a result of defendants' negligence during the training course"); id. at 597 ("[A] distinction must be made between the legal *ineffectiveness* of a decedent's pre-injury release of his heirs's [sic] subsequent wrongful death action and the legal *effectiveness* of an express release of negligence by a decedent which provides a defendant with a complete defense.") (internal quotation and citation omitted); see also, e.g., Ruiz v. Podolsky, 237 P.3d 584, 593 (Cal. 2010) (approvingly citing *Madison* and noting in dicta: "although an individual involved in a dangerous activity cannot by signing a release extinguish his heirs' wrongful death claim, the heirs will be bound by the decedent's agreement to waive a defendant's negligence and assume all risk"); Hass v. RhodyCo Prods., 26 Cal. App. 5th 11, 25 (2018) (approvingly citing *Madison* and explaining: "[A]lthough a decedent cannot release or waive a subsequent wrongful death claim by the decedent's heirs, that decedent's express agreement to waive the defendant's negligence and assume all risks acts as a complete defense to such a wrongful death action. Under such circumstances, the releasor is essentially agreeing not to expect the other party to act carefully, thus eliminating that person's duty of care.") (internal quotation marks and citations omitted); Eriksson v. Nunnink, 233 Cal. App. 4th 708, 726 (2015) (approvingly citing *Madison*, and further observing: "while the wrongful death cause of action is not derived from the decedent's rights, the pertinent duty of care is the duty of care the defendant owed to the decedent, which can be limited or negated by the decedent in a preaccident release"); Paralift, Inc. v. Superior Ct., 23 Cal. App. 4th 748, 757 (1993) (approvingly citing *Madison* and concluding: "The decedent's express release of any negligence liability on the part of Paralift binds his heirs in this action and provides Paralift with a complete defense."); Valentino v. Phila. Triathlon, LLC, 150 A.3d 483, 494 (Pa. Super. Ct. 2016) (agreeing with *Madison* and its progeny that "an enforceable waiver under which the decedent assumes specified risks transforms the nature of the defendant's conduct *vis-à-vis* the decedent from tortious to non-tortious").

On the other hand, some states hold that a pre-injury release, signed by the victim prior to death, does not bar the beneficiary's claim for the victim's death. See, e.g., Gershon v. Regency Diving Ctr., Inc., 845 A.2d 720, 722 & 727 (N.J. Super. Ct. App. Div. 2004) (holding that "a release signed by decedent with the express purpose of barring his potential heirs from instituting a wrongful death action in the event of his death in connection with his underwater diving activities did not legally extinguish the potential heirs' rights to prosecute their statutorily authorized cause of action" because the release "was signed by decedent and defendants" and could not bind nonparties to the agreement); id. at 725 (rejecting *Madison* as "paradoxical[]" and "internally inconsistent"); accord Spangler v. McQuitty, 141 A.3d 156, 173 (Md. 2016) (stating that "a minority of jurisdictions have held that . . . a release of liability prior to the decedent's death" does not "bar[] a subsequent wrongful death action" and that Maryland adheres to this minority position); *Valentino*, 150 A.3d at 502 (Elliott, J., dissenting in part) ("I view the *Madison* line of cases as creating a distinction without a difference, *i.e.,* a wrongful death claimant can bring suit but will inevitably lose on summary judgment because of the decedent's waiver of liability, to which the wrongful death claimant was not a party.").

As Comment *j* explains, it is very hard, if not impossible, to reconcile the position of states that take the former position (that the exculpatory agreement's execution obviates a duty to the decedent, even if it does not bind the decedent's beneficiaries), with the states' simultaneous decision to merge secondary implied assumption of risk with comparative responsibility, as opposed to having it stand as a separate—and complete—defense. Cf. Li v. Yellow Cab Co., 532 P.2d 1226, 1240-1241 (Cal. 1975) (explaining the variant of "assumption of risk" "where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him" is, henceforth in California, merged "into the general scheme of assessment of liability in proportion to fault"); id. at 1241 (explaining that "assumption of risk" is to be "subsumed under the general process of assessing liability in proportion to fault"); Patterson v. Sacramento City Unified Sch. Dist., 155 Cal. App. 4th 821 (2007), as modified on denial of reh'g (Oct. 22, 2007) (further describing California's approach). Likewise, it is hard, if not impossible, to reconcile it with the Restatement Third, Torts: Apportionment of Liability § 2, Comment *i*, which abolishes secondary implied assumption of risk as a complete stand-alone defense—and, instead, merges it into comparative responsibility. See also Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 508 S.E.2d 565, 571 (S.C. 1998) (explaining that the majority of comparative fault jurisdictions have merged secondary implied assumption of risk with comparative fault and only a handful "have retained assumption of risk as an absolute defense").

Even when exculpatory contracts, signed by decedents, are theoretically capable of binding wrongful-death beneficiaries, they will be carefully scrutinized and may be disregarded for a range of reasons, including, inter alia, if the death was not clearly contemplated by the contract or because the exculpation violates public policy. See, e.g., Huverserian v. Catalina Scuba Luv, Inc., 184 Cal. App. 4th 1462, 1467-1469 (2010) (finding that the exculpatory agreement did not shield the defendant from liability because its phrasing was deficient); Atkins v. Swimwest Fam. Fitness Ctr., 691 N.W.2d 334, 340 (Wis. 2005) (concluding that the defendant's exculpatory clause was

invalid because it was "overly broad," failed to "provide the signer adequate notification of the waiver's nature and significance," and gave the signer "little or no opportunity to bargain or negotiate in regard to the exculpatory language in question"); Dobratz v. Thomson, 468 N.W.2d 654, 663 (Wis. 1991) ("While we find that the exculpatory contract in this case was not void and unenforceable as contrary to public policy, the contract is unenforceable as a matter of law due to its ambiguity and uncertainty.").

In some states, the issue is avoided as exculpatory agreements are generally invalid. See, e.g., Spath v. Dillon Enters., Inc., 97 F. Supp. 2d 1215, 1218 (D. Mont. 1999) ("Montana law prohibits exculpatory phrases contained in contracts."); Hiett v. Lake Barcroft Cmty. Ass'n, Inc., 418 S.E.2d 894, 894 (Va. 1992) (concluding that "pre-injury release[s] from liability" are "void as being against public policy").

Comment k. If statute of limitations lapses on injury claim before decedent's death. The Restatement Second of Torts § 899, Comment *c* (AM. L. INST. 1979) explained:

> A cause of action for death is complete when death occurs. Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred.

Numerous courts continue to adhere to this position. See, e.g., In re Haw. Fed. Asbestos Cases, 854 F. Supp. 702, 712 (D. Haw. 1994); Frongillo v. Grimmett, 788 P.2d 102, 103 (Ariz. Ct. App. 1989); Vecchione v. Carlin, 111 Cal. App. 3d 351, 357 (1980); Rowell v. Clifford, 976 P.2d 363, 364 (Colo. App. 1998); Castorena v. Gen. Elec., 238 P.3d 209, 219-220 (Idaho 2010); Holmes v. ACandS, Inc., 711 N.E.2d 1289 (Ind. Ct. App. 1999); Farmers Bank & Tr. Co. of Bardstown v. Rice, 674 S.W.2d 510, 512 (Ky. 1984); Guthrie v. La. Med. Mut. Ins. Co., 975 So. 2d 804, 811 (La. Ct. App. 2008); Mummert v. Alizadeh, 77 A.3d 1049, 1059 (Md. 2013); Goldsworthy v. Kanatzar, 543 S.W.3d 582, 585 (Mo. 2018); Carroll v. W.R. Grace & Co., 830 P.2d 1253, 1254 (Mont. 1992); Fernandez v. Kozar, 814 P.2d 68, 70 (Nev. 1991); Silverman v. Lathrop, 403 A.2d 18, 23 (N.J. Super. Ct. App. Div. 1979); Olson v. Rustad, 831 N.W.2d 369, 374 (N.D. 2013); McKee v. New Idea, 44 N.E.2d 697, 717 (Ohio Ct. App. 1942); O'Sullivan v. R.I. Hosp., 874 A.2d 179, 183 (R.I. 2005); Hoover's Adm'x v. Chesapeake & O. Ry. Co., 33 S.E. 224 (W. Va. 1899).

Certain prominent authorities suggest that this is the majority view. E.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 957 (5th ed. 1984) ("[T]he considerable majority of the courts have held that the statute [of limitations] runs against the death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living. Only a few courts hold that it runs from the time of the original injury, and consequently that the death action may be lost before it has ever accrued."); JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 7:13 (2023 update) ("[I]n the great majority of jurisdictions which have considered the question, the limitation period applicable to a cause of

action for wrongful death—whether contained in the statute creating the cause of action or in general statutes of limitation—begins to run from the date of death.").

However, below all this, there lies substantial state-by-state variation. See 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 24.7, at 565-566 (3d ed. 2007) (recognizing this division); accord M. C. Dransfield, *Time from Which Statute of Limitations Begins to Run Against Cause of Action for Wrongful Death*, 97 A.L.R.2d 1151 (originally published in 1964).

In fact, as made clear in Comment *f* and its accompanying Reporters' Note, the majority of states view their statutes as setting forth a derivative claim. Pursuant to this conceptualization, the beneficiaries of the wrongful-death action can state a claim only if the decedent would have been in a position to state a claim, if the decedent were still alive. Operationalizing that view, numerous courts have interpreted their statutory language to bar the wrongful-death claim if the statute of limitations had lapsed on the underlying injury claim. See, e.g., Nelson v. Am. Nat'l Red Cross, 26 F.3d 193, 198 (D.C. Cir. 1994) (applying D.C. law); Miller v. United States, 932 F.2d 301, 303 (4th Cir. 1991) (applying Virginia law); Okeke v. Craig, 782 So. 2d 281, 283 (Ala. 2000); Brown v. Pine Bluff Nursing Home, 199 S.W.3d 45, 48 (Ark. 2004); Hudson v. Keene Corp., 445 So. 2d 1151 (Fla. Dist. Ct. App. 1984); Lambert v. Vill. of Summit, 433 N.E.2d 1016, 1019 (Ill. App. Ct. 1982); Ogden v. Berry, 572 A.2d 1082, 1084 (Me. 1990); Xu v. Gay, 668 N.W.2d 166, 174 (Mich. Ct. App. 2003); Bevinetto v. Plotnick, 51 A.D.3d 612, 615 (N.Y. App. Div. 2008); Myers v. City of Plattsburgh, 13 A.D.2d 866, 866 (N.Y. App. Div. 1961); Howard v. Bell Tel. Co. of Pa., 160 A. 613, 614 (Pa. 1932); Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 351-352 (Tex. 1992); Miller v. Luther, 489 N.W.2d 651, 654 (Wis. Ct. App. 1992); Edwards v. Fogarty, 962 P.2d 879, 883 (Wyo. 1998). Beyond statutory language, this position is justified on the ground that it promotes repose and avoids the litigation of stale claims. See HARPER ET AL., supra § 24.7, at 567.

In some states, the law is conflicted, unclear, or difficult to classify. Compare Martin v. Naik, 300 P.3d 625, 634 (Kan. 2013), with Mason v. Gerin Corp., 647 P.2d 1340 (Kan. 1982); see also, e.g., Cook v. S. Cent. Reg'l Med. Ctr., Inc., 25 So. 3d 1037, 1042 (Miss. 2010) (Kitchens, J., concurring) (tracing the "confusing" state of Mississippi law and lamenting that "we have yet to settle on a controlling rule"). Meanwhile, in some states, the resolution of the statute-of-limitations question stands in tension with the state's general approach to whether wrongful-death claims are independent or derivative. See, e.g., Deggs v. Asbestos Corp. Ltd., 381 P.3d 32, 35 (Wash. 2016) (explaining that the wrongful-death cause of action "is not truly a derivative action" nor is it "completely separate," but nevertheless holding that, because the statute of limitations on the underlying personal injury claim had already lapsed when the decedent died, his beneficiary was precluded from asserting a wrongful-death action).

In some states, any ambiguity is averted (or at least minimized), as statutory language supplies a clear trigger. See, e.g., CONN. GEN. STAT. ANN. § 52-555 (establishing that "no such action may be brought more than five years from the date of the act or omission complained of"); OR. REV. STAT. ANN. § 30.020 (establishing that a wrongful-death "action shall be commenced within three years after the injury causing the death of the decedent is discovered or reasonably

should have been discovered by the decedent, by the personal representative or by a person for whose benefit the action may be brought").

Comment l. Preclusive effect of separate survival action. For discussion, see Restatement of the Law Second, Judgments § 47 (AM. L. INST. 1982). Similar but more emphatic is the Restatement Second, Torts § 925, Comment *i* which provides: "a judgment under a survival statute has no effect upon the damages given under a death statute, since the damages in the one case are based upon events preceding death, while the damages under the other statute are based upon harm caused by the death." Restatement Second, Torts § 925 (AM. L. INST. 1979). That position is largely correct but, in its certainty, overlooks issue preclusion (sometimes called collateral estoppel) and the fact that issue preclusion could defeat the wrongful-death claim if an individual loses a survival act suit against the defendant by an adverse finding on an issue that would defeat the subsequent wrongful-death claim. Correspondingly, under those same principles, resolution of an issue adverse to the defendant in the first suit could preclude the defendant from relitigating that same issue in a subsequent suit.

For further discussion of the interaction between survival act and wrongful-death claims, see Taylor v. Norfolk S. Ry. Co., 86 F. Supp. 3d 448, 453-464 (M.D.N.C. 2015); 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 24.6, at 559-561 (3d ed. 2007); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 957-958 (5th ed. 1984).

Comment m. Effect of decedent fault. For discussion and supporting authority, see Restatement Third, Torts: Apportionment of Liability § 6, Reporters' Note to Comment *c* (AM. L. INST. 2000); accord DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 378 (2023 update) (summarizing how courts have handled the decedent's fault, both traditionally, in contributory negligence regimes, and in contemporary pure and modified comparative fault systems).

Comment o. Prenatal injury: death after birth. Comment n. Effect of beneficiary fault. For discussion and supporting authority, see Restatement Third, Torts: Apportionment of Liability § 6, Reporters' Note to Comment *c* (AM. L. INST. 2000); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 958-959 (5th ed. 1984) (discussing how courts have addressed this question while stating that, "in a comparative negligence state, a beneficiary's contributory negligence presumably would reduce his own recovery"); JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 11:8 (2023 update) (explaining that, when one beneficiary is at fault, "the action or right of action will not be barred, [but] the amount of recovery will be reduced (assuming that a reduction is properly requested) to the extent of the contributorily negligent beneficiary's share in the recovery"). For further discussion, see Winding River Vill. Condo. Ass'n, Inc. v. Barnett, 459 S.E.2d 569, 572-573 (Ga. Ct. App. 1995).

For detailed discussion, see § __, Reporters' Note to Comment *i* of this draft.

Comment p. Prenatal injury: fetus not born alive. For detailed discussion, see § __, Reporters' Note to Comment *j* of this draft.

Comment q. Death suffered in the scope of employment. Summarizing the doctrinal landscape, a treatise provides: "Because worker compensation is intended to be the 'exclusive'

remedy for workplace injury and death, [wrongful-death] actions against employers are usually barred." JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 1:18 (2023 update); see also MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES 856 (11th ed. 2021) (explaining that, "when a worker is . . . killed on the job, the worker's spouse . . . is barred from asserting a claim for . . . wrongful death"); 101 C.J.S. *Workers' Compensation* § 1780 (2023 update) ("The exclusivity provision of workers' compensation acts over claims for injuries arising out of and sustained during the course of employment includes claims brought by dependents, heirs, or personal representatives of workers killed on the job.").

Case law is in accord. See, e.g., Pizza Hut of Am., Inc. v. Keefe, 900 P.2d 97, 100 (Colo. 1995) ("[A] wrongful death action brought against an employer by an employee's heirs, based upon the death of an employee which occurred in the course and scope of the employee's employment, is barred by the statute, since such an action is for and on account of the death of an employee."); Karhoff v. Nat'l Mills, Inc., 851 P.2d 1021 (Kan. Ct. App. 1993) (concluding that, even when the worker's injury results in death, the Workers Compensation Act precludes the decedents' representatives from asserting a tort action); Peerless Ins. Co. v. Hartford Ins. Co., 723 N.E.2d 996, 1000 (Mass. App. Ct. 2000) ("The statutory scheme, read as a whole, precludes maintaining a wrongful death action against the employer for the death of an employee arising from his or her employment when the employer is insured under the workers' compensation act."); Torres v. Morales, 756 N.W.2d 662, 664 (Wis. 2008) (explaining that workers' compensation's "'exclusive remedy' provision . . . bars wrongful death actions against an employer . . . by the employee's estate or relatives").

There are times, of course, when a worker, injured on the job, is nevertheless entitled to assert a tort claim against the employer, via well-established exceptions to workers' compensation's exclusive remedy provisions (such as, for example, if the employer acts "with deliberate intention to cause an employee's injury"). Falls v. Union Drilling Inc., 672 S.E.2d 204, 208 (W. Va. 2008) (offering this and other exceptions). These channels are equally available to the decedents' personal representatives. See Dove v. Sentry Ins., 513 S.E.2d 289, 290 (Ga. Ct. App. 1999) (noting that "if [decedent's] death falls outside the purview of the [Workers' Compensation] Act," the decedent's child would be entitled to assert a "common law cause of action for the wrongful death of his father"). For discussion of these various exceptions, see FRANKLIN ET AL., supra at 854-856; Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT L. 75, 83-86 (2013).

Likewise, exclusive remedy provisions only shield the employer from tort liability. They do not shield third-party defendants from suit. See Hastings v. Trinity Broad. of New York, Inc., 130 F. Supp. 2d 575, 576-577 (S.D.N.Y. 2001) ("[W]hile workers' compensation precludes recovery in a civil action against the *employer*, it does not preclude recovery against unrelated, contributing third parties.") (internal quotations and citations omitted); Quinn v. Clayton Constr. Co., 111 S.W.3d 428, 432 (Mo. Ct. App. 2003) (explaining that the state's workers' compensation scheme "does not . . . take away an employee's right to bring a common-law action against negligent third parties").

§ 71 [Approximately]. Survival of Tort Actions Upon the Death of the Victim

Under statutes providing for the survival or revival of tort actions, a person's cause of action may proceed, even if the person dies before the final resolution of the claim. The measure of damages for such an action is addressed by § 24 of the Restatement Third of Torts: Remedies (Tentative Draft No. 2, 2023).

Comment:

a. History and scope.
b. Wrongful-death claims and survival-act claims, distinguished.
c. Terminology: "personal representative" and "estate."
d. Coverage beyond liability for physical and emotional harm.
e. Duty, tortious conduct, factual cause, and scope of liability.
f. Effect of prior judgment.
g. Effect of prior settlement or post-injury release.
h. Effect of agreement, signed by decedent, to limit or arbitrate claim.
i. Effect of contractual limitations on liability.
j. Statute of limitations.
k. Preclusive effect of separate wrongful-death action.
l. Effect of decedent fault.
m. Effect of personal representative fault.
n. Interaction with workers' compensation.
o. "Instantaneous" death.

a. History and scope. At common law, the death before trial either of the tortfeasor or the victim, from whatever cause, extinguished the victim's cause of action. Rectifying that situation, which was broadly—and correctly—viewed as inequitable, states have enacted "survival statutes." These statutes provide that claims held by a person at the time of the person's death are not extinguished but may be enforced by an action brought by another, usually the decedent's personal representative.

Published in 1979, the Second Restatement of Torts § 926 addressed survival actions. It specified that, with certain exceptions, "the damages for a tort not involving death for which the tortfeasor is responsible are not affected by the death of either party before or during trial." This Third Restatement supersedes § 926, although its substance is broadly consistent with it. One significant difference between the Second and Third Restatements relates to organization. In

particular, while § 926 addressed substantive rights and available damages in one encompassing provision, the Third Restatement disaggregates this material. This Section addresses the rules for liability when the victim dies. Section 72 addresses the rules for liability when the tortfeasor dies. And Restatement Third, Torts: Remedies § 24 (Tentative Draft No. 2, 2023) addresses damages when the victim dies.

A survival action is statutory, and each state's survival-act statute requires careful and independent evaluation. This Section merely complements that statutory framework. As such, this Section may be helpful in filling gaps in statutory coverage and clarifying ambiguity in statutory language, but when a statute clearly addresses a matter, the statute, of course, governs.

b. Wrongful-death claims and survival-act claims, distinguished. A survival action, as addressed here, aims to compensate for the losses the decedent sustained between tortious injury and death (from whatever cause). Before death, the injured person could have recovered these damages in a personal injury action. But at the moment the injured person dies, as Comment *a* explains, the common-law personal injury action is extinguished—requiring a survival action to be initiated. A survival action, then, is not a new claim. Rather, it is a vehicle that allows the decedent's personal injury claim to continue, notwithstanding the decedent's death.

By contrast, a wrongful-death action, addressed at § 70 [approximately] of this draft as well as the Restatement Third of Torts: Remedies § 23 (Tentative Draft No. 2, 2023), is a statutory cause of action conferred on the decedent's statutorily designated beneficiaries for the losses that *they* have sustained as a result of the decedent's death. Further, in order to recover in a wrongful-death action, the death must be tortiously caused. If the actor's tortious conduct did not cause the death, no wrongful-death action lies.

As Restatement of the Law Second, Judgments § 45, Comment *a* explains: "In most jurisdictions . . . there can be both a surviving personal injury claim and a wrongful death claim." In a few states, a single statutory provision performs both functions.

Illustrations:

1. Regina takes a prescription migraine medication, manufactured by MigX, which is accompanied by an inadequate warning. Soon after ingesting the medication, she suffers a stroke. Evidence demonstrates that Regina's stroke was caused by MigX's migraine medication, and, if the medication had been accompanied by an adequate warning, it would not have been prescribed for Regina. Three months after her stroke, Regina dies of stroke-

related complications. Following Regina's death, Regina's personal representative may assert a survival-act claim against MigX, and her beneficiaries may additionally assert a claim for her wrongful death.

2. Same facts as Illustration 1, except that now, three months after her stroke, Regina is a passenger in a car struck at high speed by another vehicle, and she dies immediately upon impact. Following Regina's death, Regina's personal representative may assert a survival-act claim against MigX. However, MigX is not liable for Regina's wrongful death (per § 70, approximately), because MigX's migraine medication did not cause Regina's death. Regina's death in the automobile accident is unrelated to MigX's tortious conduct, and a predicate for a wrongful-death action is that the tortfeasor caused the victim's death. See id.

c. Terminology: "personal representative" and "estate." This Section refers to the person or persons asserting a survival-act claim as the decedent's "personal representative," and it refers to the recipient of funds as the decedent's "estate." This vocabulary is utilized simply for expositional ease. In specifying who is and is not entitled to assert a survival-act claim following a person's death, state statutes govern—and they also differ. This Section's use of the terms "personal representative" and "estate" is not intended to expand, contract, or otherwise alter those statutory specifications.

d. Coverage beyond liability for physical and emotional harm. This Section, added pursuant to the Miscellaneous Provisions project, is located in the Restatement Third of Torts: Liability for Physical and Emotional Harm. That placement is warranted because many survival-act actions involve the tortious infliction of physical and emotional harm. However, actions initiated pursuant to state survival statutes can just as easily involve tortious conduct that the Restatement Third of Torts addresses *outside* of its Liability for Physical and Emotional Harm project (such as tortious conduct involving medical malpractice, defective products, economic harm, or intentional misconduct). Unless the state survival statute excludes the cause of action from its coverage, these actions fall within the scope of this Section.

e. Duty, tortious conduct, factual cause, and scope of liability. As previously explained, a survival action is merely a vehicle to permit a traditional tort action to continue, despite the victim's death. See Comment *b*. It follows, then, that an actor is subject to liability under a state survival statute only if the actor would be subject to liability under traditional tort principles if the

plaintiff had lived. This typically means, in turn, that the personal representative asserting a claim under this Section must show that the actor had a duty to the victim, acted tortiously, the tortious conduct caused injury, and the injury was within the actor's scope of liability. For duty, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 7. For factual cause, see id. § 26. For scope of liability (frequently called proximate cause), see id. § 29. The actor's conduct may be negligent, reckless, or intentional. Or, the actor may be subject to liability under principles of strict liability or product liability law.

As Comment *b* and Illustrations 1 and 2 underscore, to state a survival-act claim, the personal representative need not show that the actor *caused* the victim's death. Rather, the personal representative need only show that the actor inflicted some cognizable injury on the victim prior to, or, in some circumstances, simultaneously with, the victim's death.

f. Effect of prior judgment. Comment *b* to Restatement of the Law Second, Judgments § 45 addresses the preclusive effect of a prior judgment obtained by the victim, prior to the victim's death. It provides: If the victim obtained a favorable judgment upon the victim's personal injury claim, or suffered an adverse judgment in an action on the claim, a subsequent survival action upon the claim is precluded, just as successive actions by the victim would be precluded. Furthermore, the rules of issue preclusion apply against the decedent's personal representative in a survival action, in the same way as they would apply in successive actions maintained by the victim (if the victim were still alive).

g. Effect of prior settlement or post-injury release. Because "[s]urvival claims proceed as though they were being prosecuted by the decedent," if the victim effectively settles or releases the victim's personal injury claim prior to death, a survival action upon the claim is precluded, just as a successive action by the victim would be precluded (if the victim were still alive). Restatement Third, Torts: Apportionment of Liability § 6, Reporters' Note to Comment *d*.

h. Effect of agreement, signed by decedent, to limit or arbitrate claim. Because "[s]urvival claims proceed as though they were being prosecuted by the decedent," a valid arbitration agreement, executed between the defendant and the decedent, in which the decedent agrees to arbitrate his or her survival-act claim, binds the decedent's personal representative, even if the personal representative is not a party to the agreement. Restatement Third, Torts: Apportionment of Liability § 6, Reporters' Note to Comment *d*. Even so, however, a decedent's personal representative cannot be compelled to arbitrate, rather than litigate, the claim, unless the arbitration

agreement is valid, enforceable, and, by its terms, subjects the survival action to an arbitral forum. If, for example, the arbitration agreement signed by the decedent is substantively or procedurally unconscionable, then the agreement is not enforceable and does not and cannot bind the decedent's personal representative. For unconscionability, see Restatement of the Law, Consumer Contracts § 6 (Revised Tentative Draft No. 2, 2022); Restatement of the Law Second, Contracts § 208.

i. Effect of contractual limitations on liability. Because survival statutes merely provide for the continuation of the victim's cause of action after the victim's death, a contractual limitation on liability (sometimes called an "exculpatory agreement," "exculpatory contract," "hold harmless agreement," "pre-injury release," or "express assumption of risk") executed by the victim prior to death may preclude the decedent's personal representative from maintaining a survival action after the victim's death.

In no event will a pre-injury release, signed by the decedent prior to death, shield the defendant, however, unless it is valid, applicable, unambiguous, and, by its terms, enforceable. For the general validity and enforceability of such contracts, see Restatement Third, Torts: Apportionment of Liability § 2, Comment *e*, as well as the Restatement of the Law, Consumer Contracts § 6(c) (Revised Tentative Draft No. 2, 2022). For discussion in the context of defective products, see Restatement Third, Torts: Products Liability § 18. For discussion in the realm of medical malpractice, see Restatement Third, Torts: Medical Malpractice § 9 (Tentative Draft No. 2, 2024).

j. Statute of limitations. Unless a statute specifies otherwise, a survival action is subject to the statute-of-limitations period that would have bound the victim had the victim lived.

To the extent the statute of limitations is affected by the victim's discovery of injury or understanding of the defendant's culpability for it, it is the victim's knowledge that matters, not the knowledge or understanding of the personal representative. However, if the victim dies before discovery, the cause of action accrues at the moment of death; the discovery rule does not extend the accrual of a survival cause of action beyond the date of the victim's death.

Illustration:

3. Same facts as Illustration 1, except that Regina recognizes, at the time of her stroke, that her stroke was caused by MigX. The stroke occurs on May 1, 2020, and Regina dies three months later, on August 1, 2020. Regina resides in a jurisdiction with a three-

year statute of limitations for personal injury claims. Regina's personal representative must file any survival-act claim by May 1, 2023.

k. Preclusive effect of separate wrongful-death action. As noted in Comment *b* and as depicted in Illustration 1, a person's death often gives rise to two overlapping causes of action: a survival action and a wrongful-death action. Frequently, these two complementary actions are initiated at the same time and by the same person, such as the decedent's spouse or parent. In some jurisdictions, however, the claims can devolve to differently designated persons, and they are not necessarily subject to a rule of compulsory joinder. When the two causes of action proceed separately, questions can arise concerning the preclusive effect of one action on the other.

Restatement of the Law Second, Judgments § 47, addresses this situation and provides:

> When a person has been injured by an act which later causes his death and following his death separate actions are prosecuted, one under a survival statute and one under a death statute:
>
> (1) A judgment for the plaintiff in either action precludes recovery in the second action of those elements of loss that could have been recovered in the first action; and
>
> (2) A judgment against the plaintiff in the first action precludes any person who was a beneficiary of that action from being a beneficiary in the second action, unless the judgment was based on a defense that is unavailable against that beneficiary in the second action.

l. Effect of decedent fault. A decedent's fault affects the recovery under a survival statute to the same extent that it would have affected the victim's recovery had the victim survived. See Restatement Third, Torts: Apportionment of Liability § 6(b) and Comment *d*.

Illustration:

4. Ralph's and Divan's automobiles collide at an intersection. Both motorists' negligence cause the collision. Ralph is injured, and, one year after the collision, he dies of unrelated causes. Clarence, who is the personal representative of Ralph's estate, sues Divan under a survival-act statute, seeking to recover for the injuries Ralph sustained in the accident, prior to his death. The survival-act recovery is reduced by the percentage of comparative responsibility the factfinder assigns to Ralph.

m. Effect of personal representative fault. The fault of a personal representative, or the fault of a beneficiary of the decedent's estate, is not imputed to the decedent—and a defendant cannot therefore defend by pointing to the contributory fault or comparative responsibility of the personal representative. See Restatement Third, Torts: Apportionment of Liability § 6(b) and Comment *d*. However, a contribution claim can be lodged against the personal representative if all of the requirements for such a claim are otherwise satisfied.

Illustration:

5. Kristan, a four-year-old child, nearly drowns in Beverly's inadequately fenced swimming pool. After that near-drowning incident, Kristan lives for six months before succumbing to the neurological injuries she sustained. After Kristan's death, her mother, Laana, who is the personal representative of Kristan's estate, sues Beverly under the state's survival-act statute. Beverly, however, claims that Kristan fell into the inadequately fenced pool because of Laana's negligent supervision. Laana's fault, if it exists, is not imputed to her as plaintiff in the survival action. However, Laana's fault might nevertheless affect the survival-act recovery because Beverly might assert a successful contribution claim against her. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 10A, Comment *h* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (discussing contribution claims against parents for, inter alia, inadequate supervision). In order to prevail in that contribution claim, Beverly will have to show, however, that Laana's supervision was reckless, rather than merely negligent. See id. § 10A(b) ("When conduct of a parent involves an unemancipated minor child's discipline, supervision, or care, the parent is subject to tort liability to his or her unemancipated minor child only when the parent acts recklessly.").

n. Interaction with workers' compensation. Workers' compensation provides the exclusive remedy for claims against employers for injuries (including fatal injuries) that arise out of and in the course of employment. Accordingly, unless an exception applies, the schemes' exclusive remedy provisions bar survival-act claims against employers, following workers' deaths.

The above discussion of "an exception" reflects the fact that there are times when a worker, injured within the scope of employment, is nevertheless entitled to assert a claim in tort against the worker's employer, via well-established exclusions to workers' compensation's exclusive

remedy provisions (e.g., for intentionally inflicted injuries). These channels are equally available to the decedent's personal representative. Furthermore, the qualifier "against employers" reflects the fact that workers injured on the job frequently have cognizable claims against third-party tortfeasors. Whether initiated by the worker (when the worker is alive) or initiated by the worker's personal representative (when the worker is deceased), those third-party claims also fall outside the workers' compensation scheme.

o. "Instantaneous" death. Instantaneous death—which is to say, death that occurs simultaneously with the injury causing it—is extremely rare. Indeed, it is so rare that some question its very existence. As one court has put it: "[C]ommon sense compels the conclusion that both the cause of death and death itself did not occur in the same split second. The cause of death must come first, and the death must follow as a result." Justin v. Ketcham, 298 N.W. 294, 295 (Mich. 1941).

Nevertheless, some courts have wrestled with cases where, it appears, the physical impact and death really did occur at the exact same instant. Addressing these cases, courts have divided. Some conclude that, because a survival action exists to compensate for the time between the infliction of injury and death, when those two events occur simultaneously, that fact defeats the claim. Other courts authorize the action, often reasoning that, while the victim may not have *physically* suffered between the infliction of traumatic injury and moment of death—the victim (very often) did suffer *psychically*, in the seconds or minutes preceding the deadly blow.

When a survival-act statute is equally susceptible to either interpretation, the latter view—to permit a survival action, even when death occurs at the precise moment as the tortious infliction of physical injury—is preferred, particularly when, as is often the case, the victim suffers emotional distress preceding death. This position is preferred, in large part, because it keeps the *entire* claim from hinging on whether the decedent, did, in fact, die instantly or whether the decedent lived for some very short period of time after the traumatic impact—and that high-stakes after-the-fact inquiry is almost inevitably uncertain, speculative, and hotly contested. Furthermore, the contrary approach (to bar recovery when death is instantaneous) fails to account for the fact that, even if the death occurs at the precise moment of impact, the decedent may well have suffered pre-death fright, as a consequence of recognizing impending doom. Pursuant to the Restatement Third, Torts: Liability for Physical and Emotional Harm § 47, Comment *e*, when circumstances warrant, a plaintiff is entitled to recover for that pre-impact distress. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 47, Comment *e* ("[W]hen an actor creates a risk of bodily harm

that causes emotional harm in anticipation of immediate bodily harm or death, such as might occur in passengers in an apparently doomed aircraft, the emotional harm is recoverable"). When states permit the victims' personal representatives to pursue survival actions, even when no time elapsed between impact and death, they credit § 47's position, as they authorize at least modest recoveries for the victim's bona fide fright that precedes impact. By contrast, in those states that bar recovery, a victim would have a cognizable claim for that pre-impact fright if the victim happens to survive (because they were in the zone of danger). See id. § 47, Comment *e* (authorizing recovery for those in the zone of danger). But, if the victim dies, the personal representatives would *not* have a cognizable claim for the *identical* emotional harm—which is an arbitrary and nonsensical result.

REPORTERS' NOTE

Comment a. History and scope. Survival actions address gaps in the traditional common law, under which the death of the tortfeasor or victim, from whatever cause, extinguished the victim's cause of action. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS §§ 372-373 (2023 update).

Comment b. Wrongful-death claims and survival-act claims, distinguished. Of survival actions, the Prosser treatise explains: "The survival action . . . is not a new cause of action. It is rather the cause of action held by the decedent immediately before or at death, now transferred to his personal representative." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125A, at 942-943 (5th ed. 1984). Furthermore, "[u]nder most [survival] statutes, the cause of death is not significant and the action will survive whether or not the death was the result of the defendant's tort or entirely independent of it." Id. § 125A, at 943; see also MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES 745 (11th ed. 2021) (explaining that, when it comes to survival actions, "it is immaterial whether the defendant's conduct *caused* the decedent's death").

For further discussion of the differences between the two claims, see Restatement of the Law Second, Judgments § 45, Comment *a* (AM. L. INST. 1982); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1260-1263 (Ohio 2007); Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1257 (Wash. Ct. App. 2010); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 372 (2021 update); FRANKLIN ET AL., supra 745-749.

As Comment *b* notes, some states combine wrongful-death and survival statutes into one multipurpose cause of action. For discussion, see Provident Life & Acc. Ins. Co., 21 F.3d 586, 589 (4th Cir. 1994) (applying and discussing North Carolina's combined statute); Lozier v. Brown Co., 426 A.2d 29, 30 (N.H. 1981) (concluding that New Hampshire's statute "is one that combines the elements of both [wrongful-death and survival statutes]").

Comment d. Coverage beyond liability for physical and emotional harm. Most tort claims survive the death of the victim. See, e.g., Thompson v. Petroff, 319 N.W.2d 400 (Minn. 1982) (holding that the state's survival statute was irrational insofar as it excluded intentional torts).

As Comment *d* suggests, however, in some states, certain actions are excluded from coverage, such that those causes of action abate upon the death of the victim. Libel and slander claims frequently fall into this category. Compare MD. CODE ANN., CTS. & JUD. PROC. § 6-401(b) ("A cause of action for slander abates upon the death of either party . . . ."), Innes v. Howell Corp., 76 F.3d 702 (6th Cir. 1996) (applying Kentucky law) (upholding the constitutionality of Kentucky's survival statute, which excluded slander and libel claims, such that those claims did not survive the death of the decedent), and Drake v. Park Newspapers of Ne. Okla., Inc., 683 P.2d 1347, 1349 (Okla. 1984) (remarking that "libel is one of the few actions which does not survive the death of a plaintiff who has been defamed in his own lifetime"), with Canino v. New York News, Inc., 475 A.2d 528, 533 (N.J. 1984) (holding that, in New Jersey, an action for libel or slander "survives the death of the person claiming injury"), Moyer v. Phillips, 341 A.2d 441 (Pa. 1975) (holding that the state statute that excluded libel and slander actions such that neither action survived the death of either the plaintiff or defendant was unconstitutional on equal-protection grounds), and Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308, 310 (5th Cir. 1997) (holding that, in Texas, a slander claim survives the death of the victim). For further discussion, see generally Francis M. Dougherty, *Defamation Action As Surviving Plaintiff's Death, Under Statute Not Specifically Covering Action*, 42 A.L.R.4th 272 (originally published in 1985); *Abatement or Survival, Upon Death of Party, of Action, or Cause of Action, Based on Libel or Slander*, 134 A.L.R. 717 (originally published in 1941); Florence Frances Cameron, Note, *Defamation Survivability and the Demise of the Antiquated "Actio Personalis" Doctrine*, 85 COLUM. L. REV. 1833 (1985).

In addition to libel, slander, and defamation, some state survival statutes exclude a variety of other discrete causes of action from their coverage. See, e.g., ARIZ. REV. STAT. ANN. § 14-3110 ("Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefor . . . ."); KAN. STAT. ANN. § 60-1802 ("No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, or for a nuisance."); NEB. REV. STAT. ANN. § 25-1402 ("No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant."); N.M. STAT. ANN. § 37-2-4 ("No action pending in any court shall abate by the death of either, or both, the parties thereto, except an action for libel, slander, malicious prosecution, assault or assault and battery, for a nuisance or against a justice of the peace [magistrate] for misconduct in office, which shall abate by the death of the defendant."); N.D. CENT. CODE ANN. § 28-01-26.1 ("No action or claim for relief, except for breach of promise, alienation of affections, libel, and slander, abates by the death of a party or of a person who might have been a party had such death not occurred."); OHIO REV. CODE ANN. § 2311.21 ("Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party."); WYO. STAT. ANN. § 1-4-102 ("No action or

proceeding pending in any court abates by the death of either or both of the parties thereto except as herein provided; an action for libel, slander, malicious prosecution, assault, assault and battery or nuisance shall abate by the death of either party."); *Plumley*, 122 F.3d at 311 (holding that, in Texas, a claim for intentional infliction of emotional distress did not survive the death of the victim).

Comment e. Duty, tortious conduct, factual cause, and scope of liability. For the uncontroversial fact that a plaintiff pursuing a survival-act claim must establish the basic tort-law elements, see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 372 (2023 update).

Comment f. Effect of prior judgment. For discussion, see generally Restatement of the Law Second, Judgments § 45 (AM. L. INST. 1982); see also Restatement Second, Torts § 926, Comment *a* (AM. L. INST. 1979) ("[A] judgment obtained by the deceased . . . terminates the right of action."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 380 (2023 update) ("When an injured victim pursues her claim against the tortfeasor to judgment . . . the victim's claim is terminated. Consequently, there is no personal injury claim to survive and no survival action may be brought.").

Comment g. Effect of prior settlement or post-injury release. For discussion, see Restatement of the Law Second, Judgments § 45, Comment *b* (AM. L. INST. 1982); see also Restatement Second, Torts § 926, Comment *a* (AM. L. INST. 1979) ("[A] release of the cause of action by [the decedent prior to death] terminates the right of action."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 380 (2023 update) ("When an injured victim pursues her claim against the tortfeasor to judgment or settles and releases her claim with him, the victim's claim is terminated. Consequently, there is no personal injury claim to survive and no survival action may be brought."); 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 24.26, at 552 (3d ed. 2007) (observing that "[i]f the deceased . . . settled and released a claim for injuries, before death, most courts hold this a bar to any action under . . . a survival . . . statute" and further noting that "the result is fairly clearly demanded by the theory of a statute that seeks simply to continue the rights that the deceased had"); JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 11:14 (2023 update) ("Survival statutes merely provide, where applicable, for the survival of *decedent's* cause of action. This may be bargained away by [the decedent prior to death]."). For further discussion, see Joseph v. Huntington Ingalls Inc., 347 So. 3d 579, 585 (La. 2020) (finding that, because "the only rights transmitted to the beneficiaries in a survival action are those [held by] the decedent," the decedent's release of his personal injury claims prior to death barred a survival-act claim by his personal representative).

Comment h. Effect of agreement, signed by decedent, to limit or arbitrate claim. Courts broadly accept that the victim's pre-death agreement to arbitrate binds the decedent's personal representative in a subsequent survival action. See, e.g., Golden Gate Nat'l Senior Care, LLC v. Beavens, 123 F. Supp. 3d 619, 633-634 (E.D. Pa. 2015) (concluding that a survival action "belong[s]" to the decedent and therefore falls within the scope of an arbitration agreement entered into by the decedent); Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 358-360 (Ill. 2012) (explaining that a decedent's acceptance of an arbitration agreement can bind his personal

representative to an arbitral forum, as the representative pursues a survival action); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (explaining that a survival-act claim is wholly derivative, and, as a consequence, if the decedent agreed to arbitrate her claims, "the Estate bringing those claims in her stead would likewise have been bound by her agreement"); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) ("When Peters signed the arbitration agreement, he agreed to arbitrate *his* claims against the company, whether brought during his life or after his death. Thus, the provision . . . applies to a survival action, which is the vessel used to pursue his claims after his death."); Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1252-1253 (Wash. Ct. App. 2010) (holding that survival-act claims are bound by arbitration agreements signed by decedents).

As Comment *h* makes plain, a personal representative cannot be forced to arbitrate, rather than litigate, a survival-act claim, unless the arbitration agreement is both applicable and valid. If, for example, the arbitration agreement, signed by the decedent, is substantively or procedurally unconscionable, then the agreement is unenforceable. For unconscionability, see Restatement of the Law, Consumer Contracts § 6 (Revised Tentative Draft No. 2, 2022); Restatement of the Law Second, Contracts § 208 (AM. L. INST. 1981).

Further note that, while it is well-established that the decedent's pre-death agreement to arbitrate binds the decedent's personal representative in a subsequent survival action, the victim's pre-death acquiescence does not necessarily bind the decedent's beneficiaries in a subsequent wrongful-death action. For discussion of that hotly contested question, see § 70 [approximately], Reporters' Note to Comment *h*.

Comment i. Effect of contractual limitations on liability. See Restatement Third, Torts: Apportionment of Liability § 6, Reporters' Note to Comment *d* (AM. L. INST. 2000) ("Survival claims proceed as though they were being prosecuted by the decedent. Thus, any defense based on the decedent's conduct is effective against the representative of the estate."); JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 11:14 (2023 update) ("Clearly a valid release executed by the decedent will bar his personal representative from maintaining either a 'true' survival action for the fatal injuries or an enlarged survival-death action for both the injuries and the death. This seems to be the proper result. Survival statutes merely provide, where applicable, for the survival of decedent's cause of action.").

As Comment *i* emphasizes, in no event will a pre-injury release, signed by the decedent prior to death, shield the defendant unless it is valid, applicable, unambiguous, and, by its terms, enforceable. For the general enforceability of such contracts, see Restatement Third, Torts: Apportionment of Liability § 2 (AM. L. INST. 2000). For discussion in the context of defective products, see Restatement Third, Torts: Products Liability § 18 (AM. L. INST. 1998) ("Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products-liability claims against sellers or other distributors of new products for harm to persons."). For discussion in the realm of medical malpractice, see Restatement Third, Torts: Medical Malpractice § 10 (Tentative Draft No. 2, 2024) (explaining that such agreements are unenforceable).

For discussion in the context of professional negligence that results in economic harm, see Restatement Third, Torts: Liability for Economic Harm § 4, Comment *e* (AM. L. INST. 2020) ("Clauses exempting a professional from responsibility for negligence are strongly disfavored.").

Comment j. Statute of limitations. The statute of limitations that governs a survival-act claim generally "runs from the time of [the decedent's] original injury." Restatement Second, Torts § 899, Comment *c* (AM. L. INST. 1979). Accordingly, "[i]f the statute of limitations for the underlying claim has expired when the decedent dies, the survivorship action is barred." Taylor v. Norfolk S. Ry. Co., 86 F. Supp. 3d 448, 453 (M.D.N.C. 2015). See Erickson v. Baxter Healthcare, Inc., 151 F. Supp. 2d 952, 959-960 (N.D. Ill. 2001) ("A survival action is a derivative action, subject to the statute of limitations for the decedent's original claim."); Moon v. Rhode, 67 N.E.3d 220, 230 (Ill. 2016) (explaining that, in a survival-act action, the personal representative "steps into the shoes of the decedent," and so, "[i]f the decedent could not pursue a cause of action if he or she had survived because it would have been time-barred, neither can the representative"); Kimberly v. DeWitt, 606 P.2d 612, 616 (Okla. Civ. App. 1980) (explaining that survival actions are subject to the statute of limitations which would have been binding on decedent had he lived).

To the extent the statute of limitations is affected by the victim's discovery of injury or understanding of the defendant's culpability for it, it is the decedent's knowledge that matters. As the Illinois Supreme Court has aptly explained: "[A] survival claim remains a *derivative* action advanced by a *nominal* plaintiff in a representative rather than a personal capacity. The actual plaintiff in such derivative action is the deceased, and it is that person's knowledge of injury which triggers the limitations period." Advincula v. United Blood Servs., 678 N.E.2d 1009, 1029 (Ill. 1996); see also Carney v. Barnett, 278 F. Supp. 572, 574 (E.D. Pa. 1967) ("Since a Survival Action is not a new cause of action but merely a continuation of the cause of action which accrued to the deceased, it is the decedent's knowledge that we must consider in determining when the statute commences to run and not that of his personal representative.") (citation omitted); Pastierik v. Duquesne Light Co., 526 A.2d 323, 327 (Pa. 1987) (explaining that, for a survival action, the statute of limitations begins "to run on the date when the victim ascertained, or in the exercise of due diligence should have ascertained, the fact of a cause of action"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 379 (2023 update) ("In the survival context, the main question [for statute-of-limitations purposes] is whether suit was brought within the prescriptive period after the decedent discovered or should have discovered the facts considered relevant in the particular jurisdiction.").

However, the "discovery rule does not extend accrual of a survival cause of action beyond the date of the decedent's death." Mertz v. 999 Quebec, Inc., 780 N.W.2d 446, 453-458 (N.D. 2010) (stating this rule and supplying copious authority for it).

In some states, statutes supply somewhat greater flexibility. E.g., Hulne v. Int'l Harvester Co., 322 N.W.2d 474, 477 (N.D. 1982) (construing the state's survival act "to permit the commencement of a survival action at any time within one year from the decedent's death if the applicable statute of limitations period expires within one year from the decedent's death").

Comment k. Preclusive effect of separate wrongful-death action. For discussion, see Restatement of the Law Second, Judgments § 47 (AM. L. INST. 1982); see also Taylor v. Norfolk S. Ry. Co., 86 F. Supp. 3d 448, 453-464 (M.D.N.C. 2015); 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 24.27, at 559-561 (3d ed. 2007); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 957-958 (5th ed. 1984).

Occasionally, the causes of action are subject to a default rule of compulsory joinder, subject to exceptions. E.g., Freudeman v. Landing of Canton, 702 F.3d 318, 333 n.6 (6th Cir. 2012) (applying Ohio law) ("Ohio's compulsory joinder rule mandates that a survival claim and a wrongful death claim be joined in the same action, unless a party or the person to be joined can show good cause why they should not.") (citing OHIO CIV. R. 19.1(a)(1)).

Comment l. Effect of decedent fault. For discussion, see Restatement Third, Torts: Apportionment of Liability § 6(b) and Comment *d* (AM. L. INST. 2000); see also id. Reporters' Note to Comment *d* ("Survival claims proceed as though they were being prosecuted by the decedent. Thus, any defense based on the decedent's conduct is effective against the representative of the estate."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 378 (2023 update) ("Since survival statutes merely perpetuated the cause of action the decedent himself would have had and did not purport to create a 'new' cause of action for the benefit of others, a defense that would bar or reduce damages of the deceased would have the same effect on the estate's claim under the survival act."). Illustration 4, involving Ralph and Divan, is adapted from Restatement Third, Torts: Apportionment of Liability § 6, Illustration 4.

Comment m. Effect of personal representative fault. It is well established that, "under survival statutes[,] the contributory negligence of the beneficiary of the decedent's estate is not a defense." Lundberg v. Hagen, 316 A.2d 177, 179 (N.H. 1974). For discussion, see Restatement Third, Torts: Apportionment of Liability § 6(b) and Comment *d* (AM. L. INST. 2000); see also id. Reporters' Note to Comment *d* (explaining that "the negligence of someone other than the decedent, even of a beneficiary of the estate, does not affect the representative's recovery"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 378 (2023 update) (explaining that, generally, "the heir's contributory negligence does not bar the survival claim or reduce damages recoverable"); JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 11:6 (2023 update) (explaining that "'contributory' negligence of the heir or distributee is not a defense").

For the fact that, notwithstanding the above, the personal representative's fault can reduce the estate's recovery through familiar channels of contribution, see DOBBS ET AL., supra § 378.

Comment n. Interaction with workers' compensation. See 101 C.J.S. Workers' Compensation § 1780 (2022 update) ("The estate of a deceased employee may recover only the death benefits provided for under workers' compensation, in a survivorship action, and workers' compensation exclusivity cannot be circumvented to allow a survivorship action against an employer by an employee's estate."); see also Nelson v. Hawkins, 45 F. Supp. 2d 1015, 1020 (D. Mont. 1999) ("Because . . . survivorship claims are derivative claims, they are barred by the exclusivity provisions of the Montana Workers Compensation Act.").

There are times, of course, when a worker, injured on the job, is nevertheless entitled to assert a tort claim against the employer, via well-established exceptions to workers' compensation's exclusive remedy provisions (such as, for example, if the employer acts "with deliberate intention to cause an employee's injury"). See Falls v. Union Drilling Inc., 672 S.E.2d 204, 208 (W. Va. 2008) (offering this and other exceptions). These channels are equally available to the decedent's personal representative. For discussion of these various exceptions, see MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES 854-856 (11th ed. 2021); Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT L. 75, 83-86 (2013).

Likewise, exclusive remedy provisions only shield the employer from tort liability. They do not shield third-party defendants from suit. See Hastings v. Trinity Broad. of N.Y., Inc., 130 F. Supp. 2d 575, 576-577 (S.D.N.Y. 2001) ("[W]hile workers' compensation precludes recovery in a civil action against the *employer*, it does not preclude recovery against unrelated, contributing third parties.") (internal quotations and citations omitted); Quinn v. Clayton Constr. Co., 111 S.W.3d 428, 432 (Mo. Ct. App. 2003) (explaining that the state's workers' compensation scheme "does not . . . take away an employee's right to bring a common-law action against negligent third parties").

Comment o. "Instantaneous" death. Truly instantaneous death is rare. Indeed, it is so rare that some question its existence. See Smith v. Whitaker, 734 A.2d 243, 253-254 (N.J. 1999) (explaining that "some jurisdictions have rejected altogether the notion of 'instantaneous death' as an artificial legal fiction"). Nevertheless, assuming that some deaths do truly occur at the exact moment of traumatic impact, that should not necessarily defeat the personal representative's claim.

In numerous states, a personal representative may recover in a survival action, even when no time elapses between the victim's traumatic injury and death. E.g., Manion v. Ameri-Can Freight Sys. Inc., 391 F. Supp. 3d 888 (D. Ariz. 2019) (authorizing a survival action arising from a motorist's "instantaneous death"); Fleckenstein v. Crawford, 2015 WL 5829758, at *15 n.9 (M.D. Pa. 2015) ("Pennsylvania courts have not interpreted the survival statute as foreclosing claims brought under the survival statute where death was instantaneous."); Durham v. Marberry, 156 S.W.3d 242, 248-249 (Ark. 2004) (concluding "that it is not necessary for a decedent to live for a period of time between injury and death in order to recover" under Arkansas's survival action); Broughel v. S. New England Tel. Co., 45 A. 435, 436 (Conn. 1900) (authorizing a survival-act recovery, even though the decedent's death "was instantaneous, and he suffered no pain or sensation, and never recovered the least consciousness"); Smallwood v. Bradford, 720 A.2d 586, 589 (Md. 1998) (authorizing a survival-act recovery, even though the decedent was killed "instantly"); Criscuola v. Andrews, 507 P.2d 149, 151 (Wash. 1973) ("We hold that when there is an instantaneous death, a cause of action still exists under the Washington survival statute."); accord Smith v. Whitaker, 734 A.2d 243 (N.J. 1999) (establishing that, in an action under the survivor's act, a claim for punitive damages may be sustained even absent an award of compensatory damages for pain and suffering); accord In re Ethiopian Airlines Flight ET 302 Crash, __ F. Supp. 3d __, 2023 WL 3728625, at *2-3 (N.D. Ill. 2023) (interpreting Illinois's survival act to permit recovery for the air crash victims' "pre-impact fright and terror" and finding

that, since the victims' pre-impact fear would have been compensable had the victims lived, it would be inequitable to preclude recovery for that same fear simply because the victims died).

In some states, by contrast, when death is instantaneous, that fact defeats the personal representative's survival-act claim. E.g., Scott v. Block, 187 F.3d 648 (9th Cir. 1999) (applying California law) ("In California, there is no survival action if the injury causing death is simultaneous with death.") (citation omitted); Jaco v. Bloechle, 739 F.2d 239, 242 & n.4 (6th Cir. 1984) (concluding that Ohio's survival statute does not authorize recovery when the death is "instantaneous"); Starkenburg v. State, 934 P.2d 1018, 1030 (Mont. 1997) (holding that "the decedent's cause of action, commonly called a survival action, cannot be pursued if the decedent's death was instantaneous"); Rhein v. Caterpillar Tractor Co., 314 N.W.2d 19, 22 (Neb. 1982) (rejecting a survival action because the decedent's death was instantaneous).

As Comment *o* explains, where a survival-act statute is equally susceptible to either interpretation, the former approach (i.e., allowing a survival-act recovery in the case of instantaneous death) is preferred. The contrary approach (i.e., disallowing such a recovery) is problematic because, as Comment *o* explains, it makes the *entire* claim hinge on whether the decedent, did, in fact, die instantly or whether the decedent lived for some very short period of time after the traumatic impact—and that high-stakes after-the-fact inquiry is almost inevitably uncertain, speculative, and hotly contested. See generally John P. Ludington, *When Is Death "Instantaneous" for Purposes of Wrongful Death or Survival Action*, 75 A.L.R.4th 151 (originally published in 1989).

Second, that approach fails to account for the fact that, even if the death is instantaneous, the decedent may have suffered *pre*-death anguish, as a consequence of recognizing that they were doomed. Woodard v. Ford Motor Co., 2007 WL 4125519, at *2 (N.D. Ga. 2007) (making this point); accord Gage v. City of Westfield, 532 N.E.2d 62, 71 (Mass. App. Ct. 1988) ("It is not at all uncommon for victims of sudden, fatal accidents to experience momentary fright prior to impact . . . ."). Many courts expressly permit recovery for pre-impact fright. For a compilation, see In re Jacoby Airplane Crash Litig., 2006 WL 3511162, at *5 (D.N.J. 2006). Additional examples include: Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 47 (2d Cir. 1984) (applying New York law) (affirming award of "$10,000 for [the decedent's] pre-impact pain and suffering"); Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 315 (5th Cir. 1984) (interpreting Louisiana law) (authorizing recovery where the plaintiff experienced "at least four to six seconds" of pre-impact terror); Monk v. Dial, 441 S.E.2d 857, 859 (Ga. Ct. App. 1994) (holding that, even though the decedent's death may have been "instantaneous," the estate was entitled to recover for pain and suffering where the evidence suggested that the victim suffered "fright, shock, and mental suffering" prior to death); Beynon v. Montgomery Cablevision Ltd. P'ship, 718 A.2d 1161, 1163 (Md. 1998) (establishing that, "where a decedent experiences great fear and apprehension of imminent death before the fatal physical impact, the decedent's estate may recover for such emotional distress and mental anguish); Nelson v. Dolan, 434 N.W.2d 25, 26 (Neb. 1989) (holding that conscious pre-impact fear and apprehension survives a decedent's death); Mo. Pac. R.R. Co. v. Lane, 720 S.W.2d 830, 833 (Tex. App. 1986) (authorizing survival-act recovery where the

decedent was "apparently killed instantly" but there was evidence that the decedent suffered "terror and consequent mental anguish . . . for the six to eight seconds while he faced imminent death"); accord Jeffrey J. Kroll, *The Case for Making Pre-Impact Fear Compensable in Survival Actions*, 88 ILL. B.J. 462 (2000). But see, e.g., BNSF Ry. Co. v. Lafarge Sw., Inc., 2009 WL 10665776, at *4 (D.N.M. 2009), on reconsideration, 2009 WL 10665752 (D.N.M. 2009) (rejecting the plaintiff's effort "to recover damages stemming from any emotional distress, fright, fear, or mental anguish their decedents may have experienced prior to being struck by the train" because the court was unable to find "any New Mexico case law allowing or approving of the recovery of damages for [such] pre-injury emotional distress"); Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953 (D. Kan. 1986) (interpreting Kansas law as to not allow for pre-impact fright).

Additionally, the no-recovery approach is inconsistent with the position of those states that expressly permit recovery for the loss of life or loss of enjoyment of life, separate from its conscious apprehension. E.g., *Durham*, 156 S.W.3d at 248-249 (discussing Arkansas's 2001 revision to its survival-act statute to authorize loss of life damages, available even when the decedent dies instantly); Castro v. Melchor, 414 P.3d 53, 67-69 (Haw. 2018) (holding that, under Hawaii's survival act, a fetus's estate was entitled to recover damages for the fetus's loss of enjoyment of life); accord 25A C.J.S. *Death* § 270 (2022 update) ("Loss-of-life damages, which are available as independent damages under a survival statute, seek to compensate a decedent for the loss of the value that the decedent would have placed on his or her own life. The recovery of loss-of-life damages, under a survival statute allowing independent damages for loss of life, is not subject to a requirement that the decedent live for some period of time between the injury and his or her death.").

"It goes without saying, however, that while survival for one-tenth of a second may technically qualify the injured party to recover under the Survivor's Act, the lesser the seconds (or tenths thereof), the lesser the damages recoverable." In re Jacoby Airplane Crash Litig., 2006 WL 3511162, at *7 (D.N.J. 2006).

§ 72 [Approximately]. Survival of Tort Actions Upon the Death of the Tortfeasor

Under statutes providing for the survival of a tort action, a person's cause of action may proceed even if the tortfeasor dies before the final resolution of the claim.

a. History and scope.
b. Death of tortfeasor.
c. Coverage beyond liability for physical and emotional harm.

Comment:

a. History and scope. At common law, the death before trial either of the tortfeasor or the victim, from whatever cause, extinguished the victim's cause of action. Rectifying that situation, which was broadly—and correctly—viewed as inequitable, states enacted "survival statutes."

These statutes provide that claims held by a victim at the moment of death are not extinguished but may be enforced by an action brought by another, usually the decedent's personal representative—and further establish that causes of action survive the death of the tortfeasor.

Published in 1979, the Second Restatement of Torts § 926 addressed survival actions. It specified that, with certain exceptions, "the damages for a tort not involving death for which the tortfeasor is responsible are not affected by the death of either party before or during trial." The Third Restatement supersedes § 926, although its substance is broadly consistent with it. One significant difference between the Second and Third Restatements relates to organization. In particular, although § 926 addressed substantive rights and available damages in one encompassing provision, the Third Restatement disaggregates this material. It addresses rules creating liability upon the death of the tortfeasor here. It addresses rules creating liability following the death of the victim in § 71 [approximately]. And it addresses damages when the victim dies prior to or during trial in Restatement Third, Torts: Remedies § 24 (Tentative Draft No. 2, 2023).

b. Death of tortfeasor. As noted in Comment *a*, traditionally, the tortfeasor's death extinguished the plaintiff's cause of action against the tortfeasor. As the Second Restatement of Torts § 926 recognized, however, that is no longer the case. Now, per statutory action, the death of the tortfeasor does not prevent or abate actions for torts that the tortfeasor committed. Instead, actions may be lodged against the estate of the deceased tortfeasor as if the tortfeasor were alive. The plaintiff's ability to obtain punitive damages may, however, be affected. See Restatement Third, Torts: Remedies § 39 (Tentative Draft No. 3, 2024).

c. Coverage beyond liability for physical and emotional harm. This Section, added pursuant to the Miscellaneous Provisions project, is located in the Restatement Third of Torts: Liability for Physical and Emotional Harm. That placement is warranted because many survival-act actions involve the tortious infliction of physical and emotional harm. However, actions initiated pursuant to state survival statutes can just as easily involve tortious conduct that the Third Restatement addresses *outside* of its Liability for Physical and Emotional Harm project (such as tortious conduct involving defective products, intentional misconduct, medical malpractice, or economic harm). Unless the state survival statute excludes a cause of action from its coverage, these actions also fall within the scope of this Section.

REPORTERS' NOTE

Comment a. History and scope. Survival actions address gaps in the traditional common law, under which the death of the tortfeasor or victim, from whatever cause, extinguished the victim's cause of action. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS §§ 372-373 (2023 update); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125A, at 940-942 (5th ed. 1984); 1 AM. JUR. 2D *Abatement, Survival, and Revival* § 65 (2022 update).

Comment b. Death of tortfeasor. For discussion, see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS §§ 372-373 (2023 update); 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 24.2, at 545-546 (3d ed. 2007); 1 C.J.S. *Abatement and Revival* § 138 (2022 update). For the death of a party after the entry of final judgment, see id. § 140. For further discussion see W. R. Habeeb, *Survival of Action or Cause of Action for Wrongful Death Against Representative of Wrongdoer*, 171 A.L.R. 1392 (originally published in 1947), which explains: "Where the express provision of the statute provides for the survival of a pending action or a cause of action, it is obvious that an action for wrongful death may be maintained against the representative of the wrongdoer upon his death."

Some states limit the recovery of punitive damages when the tortfeasor is deceased. For discussion, see Restatement Third, Torts: Remedies § 39 (Tentative Draft No. 3, 2024); see also id., Reporters' Note to Comment *b*; 1 JACOB STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 4:23 (2023 update); Doe v. Colligan, 753 P.2d 144, 144-146 (Alaska 1988).

Comment c. Coverage beyond liability for physical and emotional harm. Sometimes, a survival-act statute excludes a particular tort from its coverage, such that that tort abates upon the tortfeasor's death. Those statutes, of course, must be given effect. See, e.g., ARIZ. REV. STAT. ANN. § 14-3110 ("Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefor . . . ."); KAN. STAT. ANN. § 60-1802 ("No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, or for a nuisance."); MD. CODE ANN., CTS. & JUD. PROC. § 6-401(b) ("A cause of action for slander abates upon the death of either party unless an appeal has been taken from a judgment entered in favor of the plaintiff."); NEB. REV. STAT. ANN. § 25-1402 ("No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant."); N.M. STAT. ANN. § 37-2-4 ("No action pending in any court shall abate by the death of either, or both, the parties thereto, except an action for libel, slander, malicious prosecution, assault or assault and battery, for a nuisance or against a justice of the peace [magistrate] for misconduct in office, which shall abate by the death of the defendant."); N.D. CENT. CODE ANN. § 28-01-26.1 ("No action or claim for relief, except for breach of promise, alienation of affections, libel, and slander, abates by the death of a party or of a person who might have been a party had such death not occurred."); OHIO REV. CODE ANN. § 2311.21 ("Unless otherwise provided, no

action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party."); WYO. STAT. ANN. § 1-4-102 ("No action or proceeding pending in any court abates by the death of either or both of the parties thereto except as herein provided; an action for libel, slander, malicious prosecution, assault, assault and battery or nuisance shall abate by the death of either party."); Drake v. Park Newspapers of Ne. Okla., Inc., 683 P.2d 1347, 1349 (Okla. 1984) (explaining that, in Oklahoma, "libel is one of the few actions . . . which abates on the death of the defendant").

CHAPTER 8A

INTERFERENCE WITH FAMILY RELATIONSHIPS

§ 48 A. Loss of Spousal Consortium – in T.D. No. 1
§ 48 B. Loss of Child Consortium – in T.D. No. 1
§ 48 C. Loss of Parental Consortium – in T.D. No. 1
§ 48 D. Alienation of Spousal Affections Abolished – in T.D. No. 1
§ 48 E. Criminal Conversation Abolished – in T.D. No. 1
§ 48 F. Spousal Abduction and Enticement Abolished – in T.D. No. 3
§ 48 G. Alienation of Betrothed's Affections Abolished – in T.D. No. 3
§ 48 H. Alienation of a Child's Affections Abolished – in T.D. No. 3
§ 48 I. Parental Claim for Seduction of a Minor Abolished – in T.D. No. 3
§ 48 J. Tortious Interference with Parental Rights – in T.D. No. 3
§ 48 K. Alienation of Parent's Affections Abolished – in T.D. No. 3

§ 48 F. Spousal Abduction and Enticement Abolished

One who compels or otherwise induces a spouse physically to separate or remain apart from the other spouse is not liable for the harm thus caused to the marital relationship.

Comment:

a. History, scope, and support.
b. Limitations.

a. History, scope, and support. Titled "Causing One Spouse to Separate From or Refuse to Return to the Other Spouse," the Restatement Second of Torts § 684 stated a cause of action for a traditional tort that went by various names, including "enticement" and "abduction." Similar to criminal conversation, addressed in and abolished by § 48 E of the Restatement Third of Torts: Liability for Physical and Emotional Harm (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)), and also similar to alienation of spousal affections, addressed in and abolished by id. § 48 D, § 684 provided:

> (1) One who abducts a spouse or by similar intentional action compels a spouse to be asunder from the other spouse is subject to liability to the other spouse for the harm thus caused to any of the latter's legally protected marital interests.

(2) One who for the purpose of disrupting the marital relation induces one spouse to separate from the other spouse or not to return after being separated, is subject to the liability stated in Subsection (1).

In the decades since the Second Restatement of Torts was published, the tort has fallen sharply out of favor, in part because courts have broadly rejected the notion that spouses have a proprietary interest in one another's physical presence, household services, or sexual fidelity. Accordingly—and consistent with the law in the vast majority of states—this Restatement abolishes the cause of action encompassed by the Restatement Second of Torts § 684.

b. Limitations. This Section does not affect an actor's liability to the extent the actor's conduct would subject the actor to liability for a tort other than spousal enticement or abduction. This means that, if the plaintiff pleads a recognized cause of action (such as, for example, intentional infliction of emotional distress), a plaintiff is not barred from asserting that cause of action simply because the underlying dispute would *also* have given rise to a cause of action for enticement pursuant to the Restatement Second of Torts § 684. On the other hand, however, through artful pleading, a plaintiff cannot seek compensation for what is, in essence, the tort of spousal enticement or abduction, simply by calling it by another name.

Illustrations:

1. Wanda and Harry are married. Charlie is Wanda and Harry's marriage counselor and a licensed psychologist. During their counseling sessions, Charlie falls in love with Wanda and ultimately induces her to leave Harry and live with him. In so doing, Charlie behaves outrageously towards Harry—including by intimidating, belittling, and threatening him. As a consequence of Charlie's actions, Harry suffers severe, medically verifiable emotional distress. Based on this Section, Charlie is not liable to Harry for causing Wanda to separate from Harry. However, Charlie may be otherwise subject to liability to Harry, including for his professional misconduct and, if Charlie's behavior is found to be extreme and outrageous, for intentional infliction of emotional distress. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 46.

2. Wendy and Herman are married. Herman, however, falls in love with his younger coworker, Cindy, and he ultimately leaves Wendy to live with Cindy. As a consequence of Herman's departure, Wendy suffers severe, medically verifiable emotional distress. Based on this Section, Cindy is not liable to Wendy for Herman's leaving Wendy. Assuming

Cindy's behavior is not extreme and outrageous, she also is not liable for intentional infliction of emotional distress. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 46.

REPORTERS' NOTE

Comment a. History, scope, and support. The action abolished here dates back to 1745, when an English court allowed a husband to sue a defendant who intentionally "persuaded, procured, and enticed" his wife to leave home. Winsmore v. Greenbank, 125 Eng. Rep. 1330 (1745); see also Hanover v. Ruch, 809 S.W.2d 893, 894 (Tenn. 1991) (recounting the cause of action's early history); Kimberley A. Reilly, *Wronged in Her Dearest Rights: Plaintiff Wives and the Transformation of Marital Consortium, 1870-1920*, 31 LAW & HIST. REV. 61, 99 n.15 (2013) (noting the tort's ancient lineage).

Ultimately, a cause of action was vested in a spouse for everything from abduction (the act of compelling one spouse to be "asunder involuntarily from the other spouse") to enticement (which encompassed situations where one spouse was persuaded voluntarily to depart from the marital home). See Belles v. Warner, 1982 WL 2870, at *2 (Ohio Ct. App. 1982) (explaining that "Section 684(2) encompasses what was known at common law as enticement"); Timmann v. Corvese, 1993 WL 853863, at *2 (R.I. Super. Ct. 1993) (defining abduction and noting that abduction is encompassed by § 684 of the Second Restatement of Torts); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 602 (2023 update) (explaining that, in § 684, the Second Restatement endorsed a cause of action for enticement); Ronald J. Resmini, *The Law of Domestic Relations in Rhode Island*, 29 SUFFOLK U. L. REV. 379, 398 n.128 (1995) (explaining that, in Rhode Island, the tort encompassed by § 684 is referred to as "enticement"); Jeremy D. Weinstein*, Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 220 & n.181 (1986) (defining "enticement" as "a civil action by a husband against another who had unjustifiably persuaded his wife to leave him" and observing that enticement is encompassed by § 684 of the Second Restatement).

At one time, the liability encompassed by § 684 of the Restatement Second of Torts (AM. L. INST. 1977) was broadly accepted. See R. KEITH PERKINS, DOMESTIC TORTS § 8:19 (2023 update) (explaining that, in the tort's heyday, "[e]very state but Louisiana adopted this common law action for abduction or enticement"); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 917 (5th ed. 1984) (describing the tort's one-time-broad acceptance).

In recent decades, this tort has fallen sharply out of favor. In abolishing the cause of action, this Section finds support in the vast majority of states. See Nelson v. Jacobsen, 669 P.2d 1207, 1227 (Utah 1983) (Stewart, J., concurring in part) (explaining that "a majority of jurisdictions has eliminated the actions by statute or judicial decision"); PERKINS, supra at § 8:19 (explaining that this cause of action has "disappeared from American jurisprudence"); see also, e.g., DEL. CODE ANN. tit. 10, § 3924 (abolishing a cause of action for, inter alia, "enticement"); Hoye v. Hoye, 824 S.W.2d 422, 425 (Ky. 1992) (abolishing a cause of action for the "intentional interference with the

marital relation" which was a judicially created doctrine that incorporated the "common law torts of criminal conversation, enticement, and alienation of affections"); *Belles*, 1982 WL 2870, at *2 (explaining that, "when the General Assembly precluded damages for alienation of affections, it included therein enticement" as encompassed by § 684); Haskins v. Bias, 441 N.E.2d 842, 843 (Ohio Ct. App. 1981) (holding that, although the Ohio legislature had not specifically abolished a cause of action for enticement, it impliedly did so by abolishing claims for alienation of affections because the two causes of action were so closely intertwined that the former was "subsumed" in the latter).

In advocating the tort's abolition, some have pointed to the tort's original—and now offensive—property-based rationale, rooted in a view that wives were possessed by their husbands, just as "masters" once possessed servants and were entitled to their servants' labor. See Hoye v. Hoye, 824 S.W.2d 422, 426 (Ky. 1992) ("Tortious interference with the marital relation . . . has never sufficiently separated from its property based origins; a rationale that is counter to contemporary thought."); PERKINS, supra at § 8:19 (explaining that this cause of action has been roundly rejected, "probably as a result of the rejection of the concept that the husband had a proprietary interest in his wife"). (For discussion of the fact that the historical record is actually somewhat more complicated, see Restatement Third, Torts: Liability for Physical and Emotional Harm, Reporters' Note to Introductory Note to Chapter 8 (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).)

Some, likewise, have noted that the tort is susceptible to abuse. E.g., Hoye v. Hoye, 824 S.W.2d 422, 427 (Ky. 1992) ("Such suits invite abuse."); DOBBS ET AL., supra § 602 ("Courts and legislatures [abolishing the tort] have been moved in part by the conclusion that these torts lent themselves to blackmail and to vindictiveness pursued by a spouse whose marriage is over and who seeks merely to inflict harm.").

Some, meanwhile, have noted that the tort is archaic and out-of-step in our current era in which divorce is common, legally permissible, and socially acceptable. See, e.g., Corbott, supra at 99-100 (tracing this historical evolution).

Finally, some have observed that the tort of enticement or abduction, which is encompassed by the Restatement Second of Torts § 684 (AM. L. INST. 1977), overlaps with, and is conceptually similar to, a companion cause of action, alienation of affections. See Haskins v. Bias, 441 N.E.2d 842, 843 (Ohio Ct. App. 1981) (holding that an action for enticement was "subsumed" in the now-discarded tort: alienation of affections); DOBBS ET AL., supra § 602 (observing that "enticement is merely one form of, or at most an extension of, alienation of affections and like alienation, turns on an intent to disrupt the marriage"); Weinstein, supra at 220 (observing that alienation of affections "usually subsumes" an action for enticement).

Indeed, many have observed that enticement and abduction were the precursors to the latter (more modern) tort. See Helsel v. Noellsch, 107 S.W.3d 231, 231-232 (Mo. 2003) (explaining that enticement is "the precursor[]" to alienation of affections); Lockhart v. Loosen, 943 P.2d 1074, 1083 (Okla. 1997) (Opala, J., dissenting) ("Two actions developed to make marriage interference

remediable at common law. The *first* of these, called *enticement*, lay for inducing a wife to *leave her husband*. Enticement later underwent a metamorphosis into present-day alienation of affections."); Hanover v. Ruch, 809 S.W.2d 893, 894 (Tenn. 1991) ("Enticement, or abduction, has evolved into what is commonly known today as the tort of alienation of affections."); Don Corbett, *If Loving You Is Wrong . . . Can First Amendment Protection Be Right? Alienation of Affection, Criminal Conversation, and the Right to Free Speech*, 38 N.C. CENT. L. REV. 93, 97 (2016) ("The writ of abduction became one of the early forerunners to what would become alienation. Abduction allowed husbands to recover for the improper taking of their chattel (the wife) . . . ."); Michele Crissman, Note, *Alienation of Affections: An Ancient Tort—But Still Alive in South Dakota*, 48 S.D. L. REV. 518, 519 (2003) (explaining that "enticement, involved inducing a woman to leave her husband through fraud, violence or persuasive means" and that "[e]nticement has evolved into the modern day alienation of affections tort"); Marshall L. Davidson, III, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 630-631 (1989) ("Historically, two different tort actions were available to an injured spouse against one who intentionally interfered with the marriage relationship. The first, enticement (also called abduction), involved assisting or inducing a wife to leave her husband by means of fraud, violence, or persuasion. The injury was considered to be the loss of the wife's services and consortium. Enticement (or abduction) has evolved into what is commonly known today as the tort of alienation of affections."); Jeffery F. Ghent, *Right of Child or Parent to Recover for Alienation of Other's Affections*, 60 A.L.R.3d 931 (originally published in 1974) (explaining that alienation of affections evolved out of a prior action, for "enticing the wife away").

Alienation of affections has been roundly repudiated. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 D and Reporters' Note to Comment *a* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (abolishing alienation of affections and compiling authorities supporting the tort's abolition); see also DOBBS ET AL., supra § 602 (recognizing that "alienation of affections" has "now been abolished in the great majority of states, either by explicit legislation or by judicial decision"); Golden v. Kaufman, 760 S.E.2d 883, 891 (W. Va. 2014) (collecting authority and explaining that alienation of affections "has been abolished in most states, either judicially or by statute"). Thus, it is logical for its precursors—enticement and abduction—to be similarly discarded.

Comment b. Limitations. For a discussion of this line-drawing in a similar context, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 D and Reporters' Note to Comment *b* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

§ 48 G. Alienation of Betrothed's Affections Abolished

An actor who alienates one fiancé or fiancée's affections from the other is not liable for inducing a breach of the marriage contract or for the harm thus caused to the premarital or future marital relationship.

Comment:

a. History and support.

b. Limitations.

a. History and support. The Restatement Second of Torts § 698, titled "Alienation of or Sexual Intercourse With Betrothed," established: "One who alienates the affections of a person under contract to marry or who has sexual intercourse with such a person does not thereby become liable to the other party to the contract." Consistent with Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 D (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)), which abolishes a cause of action for alienation of *spousal* affections, this Section supersedes § 698, even while endorsing its core provisions. Consistent with the vast majority of states, this Section establishes that an actor who alienates one fiancé or fiancée's affections from the other is not liable, whether for inducing a breach of the marriage contract or for the harm thus caused to the premarital or future marital relationship.

b. Limitations. This Section does not affect an actor's liability to the extent the actor's conduct would otherwise subject the actor to liability for a tort other than alienation of affections. This means that, if the plaintiff pleads a recognized cause of action (such as defamation or intentional infliction of emotional distress), a plaintiff should not be barred from asserting that cause of action simply because the underlying dispute would *also* have given rise to a cause of action for alienation of a betrothed's affections, had the latter not been abolished. On the other hand, through artful pleading, a plaintiff cannot seek compensation for what is, in essence, alienation of affections simply by calling it by another name.

Illustration:

1. Vanessa and Frank are engaged to be married, but Vanessa's mother, Marian, decides that the marriage is not in her daughter's best interest. In an effort to induce Vanessa to call off the engagement, Marian falsely tells Vanessa that Frank is a member of a hate group that promotes vile notions of white supremacy. Horrified, Vanessa calls off her engagement with Frank and severs all ties with him. Under this Section, Marian is not liable to Frank for the alienation of his fiancée's affections. However, Marian may be subject to liability to Frank for defamation, see Restatement Second, Torts § 559, Illustration 2, or, if

Marian's behavior is found to be extreme and outrageous, intentional infliction of emotional distress, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 46.

REPORTERS' NOTE

Comment a. History and support. For a discussion of the rise and fall of the companion tort, alienation of spousal affections, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 D, Reporters' Note to Comment *a* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

For judicial opinions that, consistent with this Section, reject a cause of action for inducing breach of the marriage contract or for alienating the affections of an intended spouse, see, for example, Brown v. Glickstein, 107 N.E.2d 267 (Ill. App. Ct. 1952); Leonard v. Whetstone, 68 N.E. 197 (Ind. App. 1903); Nelson v. Melvin, 19 N.W.2d 685 (Iowa 1945); Overhultz v. Row, 92 So. 716, 717 (La. 1922); Conway v. O'Brien, 169 N.E. 491 (Mass. 1929); Clarahan v. Cosper, 296 P. 140 (Wash. 1931); see also Annotation, *Liability of Third Person for Inducing Breach, or Preventing Performance, of Contract to Marry*, 47 A.L.R. 442 (originally published in 1927) (collecting authority).

As one court explained:

> [Courts' rejection of a cause of action for inducing breach of a marriage contract] seems to have been based upon the salutary premise that fullest freedom be permitted interested third parties to inform each of the parties to the marriage contract of the qualities, habits, peculiarities and reputation of the other before marriage in order that the permanency of the subsequent marital relationship might better be ensured. This principle of freedom to exchange information in this respect was regarded of such importance as to justify the risk of an occasional abuse by maliciously motivated individuals.

Brown, 107 N.E.2d at 267. Another has put it similarly:

> The right of engaged parties to ask the advice of their friends and the right of the friends to give advice has never been denied. To hold that a third party may be subject to answer in damages for advising or inducing an engaged person to break the engagement might result in a suit by every disappointed lover against his successful rival. The state has an interest in the marriage relation, and until the marriage is solemnized no domestic rights exist, and therefore cannot be violated.

Homan v. Hall, 165 N.W. 881, 882 (Neb. 1917).

Comment b. Limitations. For discussion of this limitation in the similar context of alienation of spousal affections, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 D, Reporters' Note to Comment *b* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

For authority supporting Illustration 1, see, e.g., Leonard v. Whetstone, 68 N.E. 197, 198 (Ind. App. 1903) (holding that, even though the son's parents were not liable to the son's fiancée for advising their son to break off the engagement, "if a person is induced to refuse to comply with

his agreement to marry by false and slanderous charges," the defendant may be liable "for slander or libel, as the case might be"); Conway v. O'Brien, 169 N.E. 491, 492 (Mass. 1929) (similar to *Leonard*); Minsky v. Satenstein, 143 A. 512, 514 (N.J. 1928) ("If, therefore, a parent in an effort to break off an engagement stoops to libel or slander, the aggrieved party would have a remedy for the tort thus committed.").

§ 48 H. Alienation of a Child's Affections Abolished

An actor who alienates a child's affections from a parent is not liable for the harm thus caused to the parent due to the impairment or destruction of the parent–child relationship.

Comment:

a. History, scope, and support.
b. Distinguishing tortious interference with parental rights.
c. Distinguishing loss of consortium.
d. Limitations.

a. History, scope, and support. The Restatement Second of Torts § 699, titled "Alienation of Affections of Minor or Adult Child," provided: "One who, without more, alienates from its parent the affections of a child, whether a minor or of full age, is not liable to the child's parent." The first Restatement specified much the same. This Section supersedes § 699, although it is consistent with it. Like its predecessors—and like the vast majority of courts—this Restatement declines to recognize a cause of action for the alienation of a child's affections, regardless of whether the child is a minor or an adult.

b. Distinguishing tortious interference with parental rights. The cause of action this Section addresses is distinct from tortious interference with parental rights, addressed in, and embraced by, § 48 J in this Tentative Draft. An important way in which alienation of affections and tortious interference with parental rights differ is that the latter requires the wrongful deprivation of physical custody, while the former contains no such requirement. In declining to recognize a cause of action for alienation of a child's affections, while simultaneously recognizing a cause of action for tortious interference with parental rights, this Restatement echoes the Second Restatement, which followed the same course. Compare Restatement Second, Torts § 699 (establishing that "[o]ne who, without more, alienates from its parent the affections of a child, whether a minor or of full age, is not liable

to the child's parent"), with id. § 700 (endorsing a cause of action for tortious interference with parental rights, there titled "Inducing Minor Child to Leave or Not to Return Home").

c. Distinguishing loss of consortium. The cause of action this Section addresses is also distinct from the cause of action for loss of child consortium, addressed in, and embraced by Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 B (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). Loss-of-consortium claims arise when a third party tortiously injures the child and, as a result of that injury, impairs the parent–child relationship.

d. Limitations. This Section does not affect an actor's liability for conduct that would otherwise subject the actor to liability. This means that, if the plaintiff pleads a recognized cause of action (such as, for example, defamation, professional malpractice, tortious interference with parental rights, or intentional infliction of emotional distress), a plaintiff is not precluded from asserting that cause of action simply because the underlying dispute would *also* have given rise to a cause of action for alienation of a child's affections, had the latter not been abolished. On the other hand, through artful pleading, a plaintiff cannot seek compensation for what is, in essence, alienation of a child's affections simply by calling it another name.

Illustrations:

1. Michelle and Francisco are married and have three children. Bruce is Michelle and Francisco's minister. Among other responsibilities, Bruce provides couple's counseling to Michelle and Francisco. Notwithstanding Bruce's obligation to keep the information divulged in these counseling sessions confidential, Bruce gossips about these counseling sessions and, in so doing, falsely suggests to certain members of his congregation that Michelle and Francisco sexually abuse their youngest child. Michelle and Francisco's eldest daughter, Diane, hears and believes the false allegation. As a consequence, she severs ties with her parents. Based on this Section, Bruce is not liable to Michelle and Francisco for the alienation of Diane's affections. However, Bruce may be otherwise subject to liability to Michelle and Francisco, including, inter alia, for his professional misconduct, misrepresentation, defamation, invasion of privacy, and intentional infliction of emotional distress. See Restatement Second, Torts § 299A (regarding professional malpractice); id. § 558 (defamation); id. § 652D or § 652E

(invasion of privacy); Restatement Third, Torts: Liability for Physical and Emotional Harm § 46 (intentional infliction of emotional distress).

2. Felix and Mary are divorced and have one child, Sam. Mary's live-in boyfriend, Brandon, often prevents Sam from speaking to Felix on the phone and instructs Sam to disregard Felix's parental authority. As a result of Brandon's actions, Felix's relationship with Sam deteriorates, and Felix suffers severe, medically verifiable emotional distress. Based on this Section, Brandon is not liable to Felix for the alienation of Sam's affections. If Brandon's behavior is found to be extreme and outrageous, he may be subject to liability to Felix for intentional infliction of emotional distress. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 46.

REPORTERS' NOTE

Comment a. History, scope, and support. Alienation of a child's affections evolved along with—and is often considered alongside—its companion cause of action: alienation of a spouse's affections. Alienation of spousal affections, which involved harm to the marital, rather than the parental, relationship, was endorsed by § 683 of the Second Restatement of Torts (AM. L. INST. 1977) and—before falling sharply out of favor in the middle years of the last century—was recognized in every state save Louisiana. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 D, Reporters' Note to Comment *a* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). For the fact that alienation of a spouse's affections is now mostly a dead letter, see Coulson v. Steiner, 390 P.3d 1139, 1142 (Alaska 2017) (recognizing that the tort is now recognized by "only a handful of states").

As compared to its companion cause of action for spousal affections, alienation of a child's affections has never achieved particularly widespread recognition or support. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 924 (5th ed. 1984) ("The law has been somewhat more reluctant to protect the relation of parent and child than that of husband and wife."); Jeffrey F. Ghent, *Right of Child or Parent to Recover for Alienation of Other's Affections*, 60 A.L.R.3d 931 (originally published in 1974) ("[W]hen a child or a parent has brought a direct action for alienation of the other's affections . . . recovery has been denied much more often than it has been allowed."); Jordyn L. Bangasser, *Missing the Mark: Alienation of Affections As an Attempt to Address Parental Alienation in South Dakota*, 62 S.D. L. REV. 105, 113 (2017) ("Unlike spousal alienation, there was no common law right for alienation of a child's affections."); Clay A. Mosberg, Note, *A Parent's Cause of Action for the Alienation of a Child's Affections*, 22 U. KAN. L. REV. 684, 688 (1974) (noting that there is "virtually no precedent for sustaining [a cause of action for alienation of a child's affections]").

Both the first and Second Restatements rejected parents' attempts to recover for the alienation of a child's affections. Published in 1938, the first Restatement of Torts § 699 (AM. L. INST. 1938), provided: "One who, without more, alienates from its parent the affections of a child, whether a minor or of full age, is not liable to the child's parent." Published in 1977, the Restatement Second of Torts § 699 (AM. L. INST. 1977) used identical black-letter language to signal its continuing disapproval. Partly relying on these Restatements, many courts have explicitly declined to recognize a cause of action for the alienation of a child's affections. E.g., Zamstein v. Marvasti, 692 A.2d 781, 790 (Conn. 1997) ("We find persuasive § 699 of the Restatement (Second) of Torts, which provides that '[o]ne who, without more, alienates from its parent the affections of a child, whether a minor or of full age, is not liable to the child's parent.'"); Bartanus v. Lis, 480 A.2d 1178, 1181 (Pa. Super. Ct. 1984) ("In accordance with the position expressed in the Restatement, the majority of jurisdictions that have considered this question have refused to recognize a cause of action by a parent for alienation of a child's affections."); accord R. KEITH PERKINS, DOMESTIC TORTS § 8:16 (2023) ("Traditionally, there has been no cause of action for a parent for the alienation of a child's affections standing alone."); 59 AM. JUR., *Parent and Child* § 112 (2d ed. 2019) ("Generally, a parent has no right of action for alienation of his or her child's affections . . . .").

In total, at least 23 states and the District of Columbia have, via judicial decision, explicitly rejected a parental cause of action for the alienation of a child's affections. Meanwhile, only two states—Washington and South Dakota—have expressly recognized the cause of action. In the remaining jurisdictions, the authority is uncertain, although the absence or paucity of reported decisions points, at least weakly, against the tort's acceptance. Cf. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 40.1, at 1051 n.20 (2d ed. 2016) ("Even when an action may be possible in theory, the absence of decisions in this area for decades suggests the decline of the tort if not its demise.").

In addition to citing the first and Second Restatements, the many courts that have expressly refused to accept the cause of action justify their decision on various grounds. Three merit discussion here.

First, while tradition ought not be dispositive, many courts have looked to history and observed that there is little support for the cause of action in the early common law. E.g., Hinton v. Hinton, 436 F.2d 211, 212 (D.C. Cir. 1970) (applying District of Columbia law) ("[A]ncient common law conferred no right of action upon the parent or child for simple alienation of affections . . . ."); Edwards v. Edwards, 259 S.E.2d 11, 14 (N.C. Ct. App. 1979) ("The asserted cause of action was not known to the common law.").

Second, courts have looked to statutory activity. Led by Indiana in 1935 and continuing throughout the middle years of the last century, many states passed "anti-heartbalm statutes" that repealed or repudiated then-prevalent actions for criminal conversation, alienation of spousal affections, breach of the promise to marry, and seduction. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 D, Reporters' Note to Comment *a* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (discussing and collecting these statutory enactments). Parsing these

anti-heartbalm statutes, many (though not all) courts concluded that these enactments—which might be read as barring only spousal actions—additionally barred a parent from recovering for the alienation of the child's affections. E.g., Raftery v. Scott, 756 F.2d 335, 338-339 (4th Cir. 1985) (applying Virginia law) (reasoning that Virginia's statute abolishing alienation of affections encompassed child alienation); Schuppin v. Unification Church, 435 F. Supp. 603, 609 (D. Vt.) (ruling that Vermont's anti-heartbalm statute abolished "all actions of alienation of affections *of any nature*") (emphasis added), aff'd, 573 F.2d 1295 (2d Cir. 1977); Zamstein v. Marvasti, 692 A.2d 781, 790 (Conn. 1997) (holding that the plaintiff's action "must fail because the legislature has specifically abolished actions based on alienation of affections"); Hyman v. Moldovan, 305 S.E.2d 648, 648 (Ga. Ct. App. 1983) (noting lack of "limiting language" in the statute that could have cabined it only to "loss of spousal alienation"); Lapides v. Trabbic, 758 A.2d 1114, 1119 n.3 (Md. Ct. Spec. App. 2000) (reasoning that child alienation, if ever recognized, would have been extinguished when Maryland statutorily abolished alienation of affections); Miller v. Kretschmer, 132 N.W.2d 141, 143 (Mich. 1965) (holding that Michigan's anti-alienation of affections statute displayed a clear legislative intent to abolish all actions for alienation of affections); Bock v. Lindquist, 278 N.W.2d 326, 328 (Minn. 1979) ("It is significant that in 1978 our legislature abolished all civil causes of action for alienation of affections . . . . [I]ts expression of policy clearly argues against recognizing any new cause of action involving alienation of affections."); Sahid v. Chambers, 655 N.Y.S.2d 20, 20 (App. Div. 1997) (holding child alienation claim was barred by statute abolishing right of action for alienation of affections); Beal v. Fulmer, 1985 WL 9208, at *2 (Ohio Ct. App. 1985) (holding state statute abolishing alienation of affections "appl[ies] to claims for loss of children's affections"). But see, e.g., Russick v. Hicks, 85 F. Supp. 281, 286 (W.D. Mich. 1949) (holding that a child's action for the alienation of parental affections was not barred by a state statute that was "obviously intended to apply only to the traditional alienation-of-affections suit"); McEntee v. N.Y. Foundling Hosp., 194 N.Y.S.2d 269, 271 (Sup. Ct. 1959) (reasoning that the statute abolishing a right of action for alienation of affections would not bar a child alienation claim because such an action was not "maintainable at common law" and thus was not part of the problem the legislature sought to address).

Third, some courts have declined to recognize the cause of action, at least in part, for policy reasons. In this vein, some courts have raised concerns that the action sows familial discord and also harms children by making them the focal point of acrimonious intra-family disputes. See, e.g., Davis v. Hilton, 780 So. 2d 974, 976 (Fla. Dist. Ct. App. 2001) (discussing the "risk that litigation might increase intra-family disharmony"); *Bock*, 278 N.W.2d at 327-328 (lamenting that "a cause of action by one parent against another for alienation of a child's affections would exacerbate the unhappy relationships"); Hester v. Barnett, 723 S.W.2d 544, 556 (Mo. Ct. App. 1987) (explaining that the court's refusal to recognize the cause of action "rests on concern that such a recovery would render the child a hostage in family disputes"); Segal v. Lynch, 993 A.2d 1229, 1233 (N.J. Super. Ct. App. Div. 2010) (suggesting that child alienation "can be wielded like a sword . . . with little to no consideration of how the litigation will affect the child"). Others, meanwhile, have suggested that the cause of action could be used strategically for extortionate, abusive, or otherwise

malicious ends. See, e.g., *Bock*, 278 N.W.2d at 328 (recognizing that "a cause of action by one parent against another for alienation of a child's affections would . . . become a strategic tool for advantageous use of one family member over another"); Jordyn L. Bangasser, Comment, *Missing the Mark: Alienation of Affections as an Attempt to Address Parental Alienation in South Dakota*, 62 S.D. L. REV. 105, 126 (2017) (discussing the concern that child alienation will be used as a strategic tool in the context of divorce); Clay A. Mosberg, Note, *A Parent's Cause of Action for the Alienation of a Child's Affections*, 22 U. KAN. L. REV. 684, 692 (1974) (noting threat of extortion due to fear of humiliation or exorbitant damages); Note, *The Right to Recover for Malicious Alienation of a Child's Affections*, 40 HARV. L. REV. 771, 774 (1927) (warning of the "danger lest the injury be feigned and the court used to further imposture and blackmail").

Notwithstanding the weight of authority against recognizing the cause of action, as noted above, both South Dakota and Washington retain the doctrine. See Hershey v. Hershey, 467 N.W.2d 484 (S.D. 1991) (allowing alienation-of-a-child's-affection claim in an action concerning an adult child); Strode v. Gleason, 510 P.2d 250, 254 (Wash. Ct. App. 1973) (holding that "a parent has a cause of action for compensatory damages against a third party who maliciously alienates the affections of a minor child").

Comment b. Distinguishing tortious interference with parental rights. Although the first and Second Restatements provided "[o]ne who, without more, alienates from its parent the affections of a child, whether a minor or of full age, is not liable to the child's parent," both expressly preserved and endorsed other, arguably similar, causes of action. In particular, the Restatement Second of Torts § 700 (AM. L. INST. 1977), recognized a parent's right to recover from one who "abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody." This Restatement addresses the abduction of a minor child, now called tortious interference with parental rights, at § 48 J in this Tentative Draft.

Comment c. Distinguishing loss of consortium. For more on consortium claims, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 B (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

Comment d. Limitations. The line drawn in Comment *d* traces the line drawn by many states. See Marjorie A. Shields, *Actions for Intentional Infliction of Emotional Distress Against Paramours*, 99 A.L.R. 5th 455 (originally published in 2002) (providing, in the context of alienation of spousal affections: "Where the cause of action for alienation of affections . . . [has] been abolished, it is generally recognized that a plaintiff cannot mask one of the abolished actions behind a common-law label such as intentional infliction of emotional distress. However, if the essence of the complaint is directed to a cause of action other than one that is abolished, it has been found to be legally recognizable.").

Thus, while a litigant cannot simply recast a claim for alienation of affections as another cause of action, the fact that the claim may have overtones of alienation of affections ought not spell its doom, if the requirements of another, valid cause of action are satisfied. See Raftery v. Scott, 756 F.2d 335, 339 (4th Cir. 1985) (applying Virginia law) (finding that the plaintiff, who

alleged that his ex-wife had, for years, deprived him of all interaction with his son, had sufficiently stated a claim for intentional infliction of emotional distress, while observing "[t]he fact that a tort may have overtones of affection alienation does not bar recovery on the separate and distinct accompanying wrongdoing").

Illustration 1 is based on Hester v. Barnett, 723 S.W.2d 544 (Miss. Ct. App. 1987). See also DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 604 (2023 update) ("A parent or anyone else who is libeled by the defendant can recover for loss of esteem or standing in the eyes of the community and with friends and family.").

Illustration 2 is loosely based on Lapides v. Trabbic, 758 A.2d 1114 (Md. Ct. Spec. App. 2000).

§ 48 I. Parental Claim for Seduction of a Minor Abolished

An actor who has sexual intercourse with a minor is not liable to the minor's parent because of the sexual intercourse. This Section does not address the actor's liability to the minor or the actor's responsibility under other law.

Comment:

a. Scope and history.
b. Limitations: parents' other claims preserved.
c. Limitations: underage victims' claims preserved.

a. Scope and history. The cause of action abolished in this Section often goes by the name "seduction" or the "seduction of a minor." The Restatement Second of Torts § 701, titled "Sexual Intercourse with Minor Female Child," endorsed a parent's cause of action for the seduction of the parent's underage daughter. It provided: "One other than her husband who, without her parent's consent, has sexual intercourse with a minor female child [but not a minor male child] is subject to liability to (a) the parent who is entitled to the child's services for any resulting loss of services or ability to render services, and to (b) the parent who is under a legal duty to furnish medical treatment for expenses reasonably incurred or likely to be incurred for medical treatment during the child's minority." Under § 701, it was immaterial "whether the intercourse with his minor child was with or without the child's consent." Id., Comment *a*. It was also immaterial "whether the child was or was not below the statutory age of consent." Id. What was crucial was that the parent lost services because of the sexual intercourse. Id., Comment *c*.

Breaking with the Second Restatement, but consistent with the majority of states, this Section declines to vest parents with a cause of action against an actor because of an actor's sexual intercourse with their underage child. This Section supersedes and abrogates the Restatement Second of Torts § 701.

b. Limitations: parents' other claims preserved. This Section does not limit an actor's liability to the extent the actor's conduct would otherwise subject the actor to liability for another tort. This means that if the parent pleads a recognized cause of action (such as, for example, tortious interference with parental rights or intentional infliction of emotional distress), the parent is not barred from pursuing that claim simply because the underlying dispute would *also* have given rise to a cause of action for seduction under the Second Restatement of Torts § 701, had the latter not been repudiated. On the other hand, through artful pleading, a parent cannot seek compensation for what is, in essence, seduction simply by repackaging it or calling it by another name.

Illustration:

1. Lila is Hubert's 15-year-old daughter. Chuck is Hubert and Lila's pastor. Chuck embarks on a sexual relationship with Lila. In so doing, Chuck behaves outrageously towards Hubert, including by calling him and offering lurid details of his relationship with Lila. As a consequence of Chuck's actions, Hubert suffers severe, medically verifiable emotional distress. Under this Section, Chuck is not liable to Hubert for seduction. Because Chuck acted in an extreme and outrageous manner, however, Chuck may otherwise be subject to liability to Hubert, including for his professional misconduct and intentional infliction of emotional distress. For the former, see Restatement Second, Torts § 299A. For the latter, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 46.

c. Limitations: underage victims' claims preserved. As the black letter makes plain, this Section's scope is limited. It simply addresses a *parent's* cause of action in tort when an actor has sexual intercourse with the parent's underage child. This Section does not address—nor in any way limit—an actor's liability to the minor (even if the parent, as a *guardian ad litem*, brings suit on the child's behalf). Nor does this Section in any way curtail or affect an actor's responsibility under other law.

REPORTERS' NOTE

Comment a. Scope and history. Traditionally, the common law entitled fathers to assert a cause of action for "seduction of a minor child." In the suit, the father (but not the mother) could

recover for attendant medical expenses, loss of his daughter's services, and, sometimes, injury to the family's reputation and honor. See Magierowski v. Buckley, 121 A.2d 749, 753 (N.J. Super. Ct. App. Div. 1956) (explaining that the suit was intended to "redress[] injury to family honor, reputation and the feelings involved in the father–child relation"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 603 (2023 update) ("When a minor female child was seduced, old common law recognized a claim by the father both for medical expenses and for loss of his daughter's services resulting from the seduction."). For a detailed discussion, see generally Michael L. Smith, *Idaho's Law of Seduction*, 59 IDAHO L. REV. 291 (2023).

Published in 1977, the Second Restatement of Torts § 701 (AM. L. INST. 1977) endorsed this cause of action, while extending it to both members of the parental unit. A companion provision, § 702, elaborated that a parent's consent to sexual intercourse between the parent's minor daughter and another barred the parent from recovery. The latter provided: "The consent of the parent to sexual intercourse between his minor daughter and another, or conduct on his part which shows a willingness that his daughter have sexual relations with the other, bars him from recovery for the intercourse." Restatement Second, Torts § 702 (AM. L. INST. 1977).

In the decades since the Second Restatement's publication, the tort has fallen out of favor. Reflecting this fact, only four cases have cited the Restatement Second of Torts § 701 (AM. L. INST. 1977) in the more than 40 years since its publication. Meanwhile, more than a dozen states have expressly rejected the cause of action by legislative action or judicial decision. See COLO. REV. STAT. § 13-20-202 ("All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation, and seduction are hereby abolished."); DEL. CODE ANN. tit. 10, § 3924 ("The rights of action to recover sums of money as damages for alienation of affections, criminal conversation, seduction, enticement, or breach of contract to marry are abolished."); FLA. STAT. § 771.01 ("The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are hereby abolished."); N.Y. CIV. RIGHTS LAW § 80-a ("The rights of action to recover sums of money as damages for alienation of affections, criminal conversation, seduction, or breach of contract to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action."); N.D. CENT. CODE § 14-02-06 ("All civil claims for relief for breach of promise to marry, alienation of affection, criminal conversation, and seduction are abolished."); 9 R.I. GEN. LAWS § 9-1-42 ("No civil action shall be commenced or prosecuted for alienation of affection, criminal conversation, or seduction, and those causes of action are hereby abolished."); VT. STAT. ANN. tit. 15, § 1001 ("The rights of action to recover sums of money as damages for alienation of affections, criminal conversation, seduction, or breach of contract to marry are abolished. No act done within this State shall operate to give rise, either within or outside this State, to any such right of action."); VA. CODE ANN. § 8.01-220(B) ("No civil action for seduction shall lie or be maintained . . . ."); WYO. STAT. ANN. § 1-23-101 ("The rights of action to recover money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are abolished. No act done in this state shall give rise, either in or out of this state, to any of the rights of action abolished."); Doe v. United States, 976

F.2d 1071, 1082 (7th Cir. 1992) (applying Illinois law) ("We . . . conclude that Illinois courts would no longer recognize a cause of action for the tort of seduction."); Rita M. v. Roman Catholic Archbishop, 232 Cal. Rptr. 685, 691 (Ct. App. 1986) ("It is clear that there is no longer a cause of action for seduction of one's child in the State of California."); Franklin v. Hill, 444 S.E.2d 778, 781 (Ga. 1994) (invalidating Georgia Code § 51-1-16, which furnished a cause of action for seduction, because the enactment "by definition applies only to men" and thus violated "the equal protection of laws"); Erickson v. Christensen, 781 P.2d 383, 385 (Or. Ct. App. 1989) (finding that Oregon's repeal of a statute that previously codified seduction constituted abolition of the tort); Gaspard v. Beadle, 36 S.W.3d 229, 235 n.2 (Tex. App. 2001) ("Texas no longer recognizes the cause of action of wrongful seduction.").

In an additional 14 states and the District of Columbia, the status of the cause of action is uncertain—either because of conflicting authority or a dearth of recent authority. On the latter, see, for example, Mudd v. Clements, 3 D.C. (3 Cranch) 3 (D.C. Cir. 1826) (last reported seduction case in D.C.); Territory v. Willie Fong Yee, 25 Haw. 309 (1920) (last reported seduction case in the state); Gardner v. Boland, 227 N.W. 902 (Iowa 1929) (same); Ferguson v. Stewart, 250 P. 292 (Kan. 1926) (same); Bunker v. Mains, 28 A.2d 734 (Me. 1942) (same); Sullivan v. Storz, 55 N.W.2d 499 (Neb. 1962) (same); accord R. KEITH PERKINS, DOMESTIC TORTS § 8:12 (2023 update) ("Nearly all cases that reference this cause of action are more than a century old.").

While abolishing the cause of action for the seduction of a minor, courts have cited various rationales. Some, for example, have noted that the tort is rooted in archaic and offensive conceptions. In particular, the tort "rest[s] upon a conception of the parent-child relationship, and specifically, the father-daughter relation, as one of master and servant," *Doe*, 976 F.2d at 1083, and is also rooted in the idea that parents have a property interest in their children's bodies, see, e.g., *Franklin*, 444 S.E.2d at 783 (Sears-Collins, J., concurring) (describing Georgia's seduction statute as "carr[ying] the unacceptable implication that a parent 'owns' a daughter and that if the parent's 'goods' are damaged, the 'owner' should be compensated"). Accord Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 382 (1993) ("[T]he seduction tort developed as a means to enforce men's property interests in women's bodies and sexuality."); Sarah Swan, *A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles* in Lumely v. Gye, 35 HARV. J. L. & GENDER 167, 198 (2012) (describing seduction as "explicitly based on the idea that men had property rights to their . . . daughters" and noting that it is now "culturally unacceptable to speak of one person holding property rights in another"); Lea Vandervelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 897 (1996) ("Although the seduction cases quintessentially involve issues of gender, they are also cases about mastery, dominance, and hierarchy."); Douglas E. Cressler, *An Old Tort with A Unique Hoosier History Finds New Life Seduction*, RES GESTAE, June 2004, at 26 ("The tort of seduction owes its beginnings to the early common law view that women were the 'property' of their fathers.").

Meanwhile, in two states, courts have invalidated the cause of action because it arbitrarily distinguishes between children on the basis of gender. Thus, in Edwards v. Moore, 699 So. 2d 220,

222-223 (Ala. Civ. App. 1997), the Alabama Court of Civil Appeals reasoned that "'[s]eduction,' by its very definition, applies only to male seducers" and therefore the seduction statute "create[d] a gender-based classification" and was "therefore unconstitutional." In Franklin v. Hill, 444 S.E.2d 778, 781 (Ga. 1994), the court followed a similar line of reasoning to invalidate a Georgia enactment, concluding that, "by definition the statute makes a gender classification in that only men may be liable for the seduction of unwed daughters."

Comment b. Limitations: parents' other claims preserved. The line drawn in Comment *b* follows the line drawn by the majority of states. See Marjorie A. Shields, *Action for Intentional Infliction of Emotional Distress Against Paramours*, 99 A.L.R.5th 455 (originally published in 2002) ("Where the causes of action . . . have been abolished, it is generally recognized that a plaintiff cannot mask one of the abolished actions behind a common-law label such as intentional infliction of emotional distress. However, if the essence of the complaint is directed to a cause of action other than one that is abolished, it has been found to be legally recognizable.").

Illustration 1, involving Lila and her pastor, is based very loosely on Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989). There, the court concluded: "The mere fact that sexual intimacy was the means of inflicting that distress does not convert [the plaintiff's] claim into one for seduction." Id. at 385; see also Croft v. Wicker, 737 P.2d 789, 792-793 (Alaska 1987) (holding that parents had stated a claim for both negligent and intentional infliction of emotional distress stemming from the defendant's sexual contact with their minor daughter); Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 770 P.2d 278 (Cal. 1989) (holding that a mother stated a cause of action for negligent infliction of emotional distress, where a psychotherapist, who was treating both the mother and her minor child, sexually molested the child).

§ 48 J. Tortious Interference with Parental Rights

An actor is subject to liability to a parent who has custodial responsibilities over a minor child if the actor, with knowledge that the parent does not consent, intentionally and by affirmative conduct:

(a) compels or induces the child to leave the parent, or

(b) detains the child and prevents the child from returning to the parent's custody.

Comment:

a. Terminology.

b. History and support.

c. Distinguishing both alienation of a child's affections and loss of consortium.

d. "Parent" and "child," defined.

e. "Custodial responsibilities" requirement.

f. "Custodial responsibilities" requirement: unmarried biological fathers.
g. Physical-absence requirement.
h. Intent requirement.
i. Affirmative-act requirement.
j. Actual-or-constructive-knowledge requirement.
k. Loss of child's services not a prerequisite.
l. Affirmative defenses.
m. Damages.

a. Terminology. The cause of action encompassed by this Section goes by many names, including "abduction," "enticement," "harboring," "intentional interference with parental rights," "interference with child custody," "interference with custody rights," "interference with parental consortium," "interference with parent–child relations," "malicious custodial interference," "wrongful interference with custodial rights," and—as used here—"tortious interference with parental rights." As explained below in Comment *b*, the Restatement Second of Torts § 700 referred to this cause of action as "Causing Minor Child to Leave or not to Return Home," although, in the decades since the Second Restatement was published, that terminology has not been widely utilized.

b. History and support. The early common law recognized a tort claim based on wrongful interference with the parent–child relationship. Traditionally, however, the cause of action could be brought exclusively by the father, and it was premised on the loss of the child's services, rather than on the impairment of the parent–child relationship.

In time, American courts discarded the loss-of-services requirement and also extended the cause of action to mothers. Reflecting this trend, the first Restatement of Torts § 700, published in 1938, endorsed this cause of action in a gender-neutral provision entitled "Inducing Minor Child to Leave or Not to Return Home." A Comment accompanying the provision's black letter disclaimed lost services as the protected interest, instead emphasizing: "The deprivation to the parent of the society of the child is itself an injury that the law redresses." Id., Comment *d*.

Published in 1977, Volume 3 of the Restatement Second of Torts carried the provision forward, this time titling it "Causing Minor Child to Leave or not to Return Home." That Section provided: "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to [the child's] custody or not to return to the parent after [the child] has been left him, is subject to liability to the parent." Restatement Second, Torts § 700.

In the intervening decades, numerous courts have affirmed or reaffirmed their support for the cause of action recognized herein—and, in so doing, many courts have expressly stated that their version of the tort tracks or echoes § 700 of the Restatement Second of Torts. Accordingly, this Section supersedes § 700 but reaffirms the core elements of that provision.

c. Distinguishing both alienation of a child's affections and loss of consortium. The cause of action recognized in this Section is distinct from alienation of a child's affections. See § 48 H. A key difference between this tort (recognized by the majority of courts to consider the question) and alienation of affections (rejected by § 48 H, as well as the majority of courts to consider the question) is the prerequisite of physical separation. Unlike alienation of affections, the cause of action recognized herein demands the wrongful deprivation of physical custody. In recognizing a cause of action for tortious interference with parental rights, while simultaneously declining to recognize a cause of action for alienation of a child's affections, this Restatement echoes the Second Restatement, which followed the same course. Compare Restatement Second, Torts § 700 (endorsing a cause of action for tortious interference with parental rights), with id. § 699 (refusing to recognize a cause of action for alienation of a child's affections).

Conceptually, there are also similarities between the cause of action recognized in this Section and filial consortium claims, recognized by Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 B (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). The latter claims arise when a third party tortiously injures the child and, consequential to that injury, impairs the parent–child relationship. The claims recognized here, of course, arise in a different context: when an actor intentionally absconds with or detains a child and thereby deprives the parent of the child's physical presence and, in so doing, impairs the parent–child relationship.

d. "Parent" and "child," defined. A "parent" stating a claim under this Section must have a legally recognized parental relationship with the child, as well as "custodial responsibilities" over the child, as defined in Comment *e*. A "child," refers to an unemancipated minor. Any possibility for recovery under this Section ends with either the child's majority or emancipation. For discussion of this limitation, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 B, Comment *g* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

e. "Custodial responsibilities" requirement. In order to state a claim under this Section against a third party (someone other than the child's other parent), the complaining parent must show that he or she had some custodial responsibilities over the minor child or a legally protected right to establish, maintain, or resume such responsibilities. See Restatement of the Law, Children and the Law § 1.82, Comment *b* (Tentative Draft No. 2, 2019) (defining the term "custodial responsibility"). In order to state a claim under this Section against a fellow parent, the complaining parent must show that he or she had sole, primary, equal, or substantially equal custody over the minor child.

This two-track custodial-responsibilities requirement differs subtly from the requirement set forth in the Restatement Second of Torts. In particular, Restatement Second, Torts § 700, Comments *a* and *c*, specified that a complaining parent could state a cause of action against a third-party defendant so long as the complaining parent had *some custody*, but a parent could not state a cause of action against the child's other parent unless the parent had *sole custody*. In Comment *c*'s words: "One parent may be liable to the other parent for the abduction of his own child if by judicial decree the sole custody of the child has been awarded to the other parent." Partly in reliance on that requirement, in many states, only a parent with sole or "superior" custody rights is entitled to assert a cause of action against the fellow parent.

This Section retains the Restatement Second of Torts' approach to claims involving third-party defendants. But, when the claim involves a fellow parent, it relaxes the sole-custody requirement, in light of a broad trend toward joint or shared, rather than sole or superior, custody. Accordingly, pursuant to this Section, a complaining parent can state a cause of action against the child's other parent, even if the two parents have joint or shared custody, provided that the complaining parent is the child's primary custodian or the two parents share equal or substantially equal custody.

Illustrations:

1. Lisa and John divorce. After a contentious custody battle, a judge orders that physical custody of their one minor child must be shared. John, the child's father, is entitled to physical custody of the child one-half of the time, and Lisa, the child's mother, is entitled to custody of the child one-half of the time. Dissatisfied with the judge's order, Lisa absconds with the child to a distant state, depriving John of any time with his child, in contravention of the judge's order. Under this Section, Lisa is subject to liability to John.

2. Neha and Kenji divorce. Following a custody hearing, a judge grants Neha, the child's mother, sole physical and legal custody of Imran, Neha and Kenji's child, although, with Neha's approval, Imran continues to see Kenji once or twice each week for meals and other outings. That summer, however, believing that Imran would benefit from time outdoors—and without consulting with Kenji—Neha sends Imran to an immersive summer camp, where he is unable to see or speak to Kenji for three months. Although Kenji is deprived of all interaction with Imran, Neha is not liable to Kenji under this Section because Kenji does not satisfy Comment *e*'s custody requirement, since Neha has been granted exclusive physical and legal custody of Imran.

3. Sharice and Ivan divorce. Following a custody hearing, the court grants Ivan, the child's father, sole physical and legal custody of Sharice and Ivan's minor son, Agastya, although the court also awards Sharice the right to unsupervised visitation with Agastya for four hours per week. Two months after that judgment is entered, Ivan moves with Agastya to Europe, depriving Sharice of her right to unsupervised visitation. Although Sharice is deprived of physical contact with Agastya, Ivan is not liable to Sharice under this Section because Sharice does not satisfy Comment *e*'s custody requirement, since Ivan has been granted exclusive physical and legal custody of Agastya.

If a parent with primary or superior custody absconds with the child, the other parent, entitled to some custody of the child, can petition the family court to modify the custody order. If, after considering the best interest of the child, the family court grants the petition, the remaining parent may become the primary parent. Thereafter, if the child is not immediately returned, a tort claim under this Section may lie. The advantage of this two-step process (as opposed to permitting the tort suit to proceed in the first instance) is that the family-court judge—specialized in addressing complex family dynamics—will have the first opportunity to evaluate the situation, assess the child's best interest, and offer alternative remedies as appropriate.

f. "Custodial responsibilities" requirement: unmarried biological fathers. Justifiably concerned about maternal privacy and eager to ensure the efficiency and finality of adoptions, some states, by statute, give unwed biological fathers no say in whether an infant is put up for adoption unless the biological father takes timely and particular statutorily defined action. In these states, frequently, an unwed father is entitled to establish custodial responsibilities over the child when he, for instance, supports the biological mother during pregnancy, formally acknowledges

liability for contribution to the support and education of the child after birth, and/or files an affidavit setting forth his plans for care of the child. But he relinquishes his rights if he fails to take these statutorily defined steps. This Restatement in no way interferes with states' statutory schemes. Accordingly, under this Section, an unmarried father who does not comply with a state statutory scheme and, by statute, is not entitled to establish parental rights, is precluded from asserting a cause of action for tortious interference with parental rights.

Illustrations:

4. Genevieve and Wyatt, an unmarried couple, conceive a child together. Throughout her pregnancy, Genevieve tells Wyatt that she is excited to have his baby and to make a life with him, and Wyatt eagerly plans for the baby's arrival, including, inter alia, by supporting Genevieve during her pregnancy, which, under governing state law, entitles Wyatt to statutory protection as the infant's parent. But, when she goes into labor, Genevieve hides her whereabouts and, once the baby is born, she signs papers at the hospital falsely attesting that she does not know the child's father's identity or whereabouts—and once those papers are signed, she places the child for adoption. Pursuant to this Section, Genevieve is subject to liability to Wyatt because, under governing state law, Wyatt had a right to establish custodial responsibilities over the infant, and he was deprived of that right.

5. Same facts as Illustration 4, except that, now, Wyatt fails to support Genevieve during her pregnancy, and, with his failure, Wyatt fails to comply with the state's governing statute. Because now, under governing state law, Wyatt had no right to establish custodial responsibilities over the infant, Genevieve is not liable to Wyatt under this Section. Whether Genevieve may otherwise be liable to Wyatt is outside the scope of this Illustration.

g. Physical-absence requirement. In order to state a claim under this Section, the child must be physically absent from the complaining parent at a time when the parent was entitled to the child's physical company. Mere emotional distance does not suffice. Because of insufficient doctrinal development, this Restatement takes no position on any durational requirement—and, in particular, it takes no position on whether a very brief physical absence should defeat the cause of action or, conversely, merely reduce the complaining parent's monetary recovery.

h. Intent requirement. In order to state a claim under this Section, the plaintiff must prove that the defendant acted with the intent to separate the child from the complaining parent, either by compelling or inducing the child to leave the parent or by detaining the child.

Illustration:

6. Ashish and Marigold divorce, and, pursuant to the court's custody order, they share custody of their child, Lillibet. Under the court's custody order, Ashish is entitled to one week with Lillibet per month. During his week, Ashish travels with Lillibet out of the country. When it is time for their return, however, Ashish carelessly oversleeps, missing their return flight. As a consequence of this travel snafu, which is then exacerbated by a freak winter storm, Lillibet and Ashish are forced to remain overseas for an additional 12 days, during which time Lillibet is not returned to her mother. Although Lillibet is physically absent from her mother (Comment *g*), Ashish is not subject to liability under this Section because his conduct, in causing the extended absence, was negligent, rather than intentional.

While the defendant must intend to separate the child from the complaining parent, the defendant's *underlying* motive or purpose in causing that separation is immaterial (subject to the affirmative defenses set forth in Comment *l*). As the Restatement Second of Torts § 700, Comment *b* aptly explained: "[T]he actor may be inspired by motives of kindness and affection toward the child but none the less become liable for interfering with the interests of [the child's] lawful custodian."

i. Affirmative-act requirement. To state a claim under this Section, the complaining parent must show that the defendant acted affirmatively to abduct the child or to compel or induce the child to leave the complaining parent's custody or to detain the child, so that the child would not return to the plaintiff's custody. In order to satisfy this affirmative-act requirement, it is immaterial whether the defendant abducts the child from the complaining parent's home, takes the child from school or some other neutral location, or detains the child at the child's own abode. This affirmative-act requirement is not satisfied, however, if one merely gives shelter and sustenance to a child known by the actor to have left home without the parent's permission. Because of insufficient doctrinal development, this Restatement takes no position on whether mere language (such as exhortation or persuasion) can satisfy this affirmative-action requirement or whether some physical conduct is necessary.

Illustrations:

7. Winifred and Harry, a married couple with an 11-year-old son named Samuel, decide to spend the summer in Europe. Reluctant to take Samuel to Europe, they leave

Samuel with Winifred's mother, Gram. Upon the couple's return, Samuel refuses to return to Winifred's and Harry's home, and Gram keeps caring for him. In the absence of any showing that, beyond continuing to offer shelter and sustenance to Samuel, Gram has taken an affirmative action to detain Samuel or to keep him from returning to his parents' home, Gram is not liable to Winifred and Harry under this Section.

8. Same facts as Illustration 7, except that, instead of merely continuing to care for Samuel, Gram moves with Samuel out of state to cement their new relationship. Gram is subject to liability to Winifred and Harry under this Section.

j. Actual-or-constructive-knowledge requirement. To state a claim under this Section, the complaining parent must show that the defendant knew or reasonably should have known that the child was away from the complaining parent in contravention of the parent's right to full or partial custody, without the parent's consent.

Illustration:

9. Same facts as Illustration 1, in that Lisa and John divorce, a judge grants Lisa and John shared custody, and, notwithstanding the judge's order, Lisa absconds with the child to another state, depriving John of any time with the child. Now, however, Lisa absconds with the child, along with her new boyfriend, Mac. Before their departure, Lisa tells Mac that she was awarded sole custody of the child, and, to support the story, even shows Mac a manufactured but authentic looking "court" document. Mac genuinely and reasonably believes Lisa's account. Under this Section, Mac is not liable to John because Mac did not know (nor should he reasonably have known) that John was entitled to partial custody of the child and that the child was physically separated from John in contravention of John's right to partial custody.

k. Loss of child's services not a prerequisite. Consistent with the first and Second Restatements, the complaining parent need not show any loss of services flowing from the tortious interference. See Restatement of Torts § 700, Comment *d* ("Under the rule stated in this Section, loss of service or impairment of ability to perform service is not a necessary element of a cause of action."); Restatement Second, Torts § 700, Comment *d* (same). Instead, the harm to the parent–child relationship suffered by the complaining parent, once proved, is the injury that the law redresses.

l. Affirmative defenses. In cases in which a complaining parent presents a prima facie case of tortious interference with parental rights, the defendant may nevertheless avoid liability by proving that the defendant was authorized by law to remove the child and, in effecting the removal, acted within the scope of that legal authority. In addition, a defendant may avoid liability by proving possession of a reasonable good-faith belief that the interference was necessary to protect the child from substantial physical, mental, or emotional harm.

This threshold—a "reasonable good-faith belief"—includes both a subjective and objective component. The defendant must prove by a preponderance of the evidence both that the defendant subjectively believed that removal was necessary to prevent substantial physical, mental, or emotional harm and that a reasonable person would have so believed. Furthermore, the word "substantial" reflects the fact that the harm threatened—and averted—cannot be trivial or even modest. One therefore may not defend against this cause of action by asserting even an objectively reasonable belief that the abduction or detention was necessary to protect the child from minor injury, improper surroundings, or immoral influences that do not threaten substantial physical, mental, or emotional harm.

It is equally true, however, that, in order to satisfy this standard, the defendant need not show that the complaining parent has subjected *the child* to physical violence. Because it is well established that exposure to domestic violence (including emotional abuse) inflicts harm on the child even if the child is not the abuser's direct target, a showing of an incidence or pattern of domestic violence directed at other members of the household (such as the child's sibling or the abducting parent), will suffice. As such, Comment *l* aligns with 18 U.S.C. § 1204(c)(2), the International Parental Kidnapping Crime Act, which makes it a crime for a parent to remove a child from the United States with the purpose of obstructing "the lawful exercise of parental rights" but includes an affirmative defense if "the defendant was fleeing an incidence or pattern of domestic violence." 18 U.S.C. § 1204(c)(2).

Illustration:

10. Marjorie and Abel are married with a six-year-old son, Dante. Abel subjects Marjorie to serious, repeated physical and verbal abuse and tells her that if she tries to leave him, he will kill her. Abel never, however, threatens or physically assaults Dante. Believing that escape is necessary, including to protect Dante from substantial mental and emotional harm, Marjorie takes Dante and flees the house in the middle of the night. Under this

Section, Marjorie is not liable to Abel. Even though Abel has not yet physically abused Dante, Marjorie subjectively believes that their departure is necessary to protect Dante from substantial mental and emotional harm, and Marjorie's belief is objectively reasonable.

When a defendant, ostensibly concerned about a child's welfare, abducts or detains a child, in defiance of a court order and without pursuing available and appropriate legal remedies, such as petitioning the court to modify the relevant custody order, the factfinder may take that fact into account when assessing whether the defendant had the requisite "reasonable good-faith belief."

An actor may not defend by pointing to the consent or acquiescence of the minor child.

m. Damages. Under this Section, a complaining parent may recover compensatory damages for the expenses incurred in seeking and obtaining the child's return and in treating or caring for the parent or child if either suffered physical or mental harm as a result of the defendant's tortious conduct. The complaining parent may also recover for lost society, lost services, and emotional distress—as well as, when appropriate, punitive damages. For lost society and services, see Restatement Third, Torts: Remedies § 25 (Tentative Draft No. 2, 2023). For emotional distress, see id. § 21 (Tentative Draft No. 2, 2023). And for punitive damages, see id. § 39 (Tentative Draft No. 3, 2024).

REPORTERS' NOTE

Comment a. Terminology. For the fact that the cause of action encompassed by this Section goes by several names, see, for example, Borer v. Am. Airlines, Inc., 563 P.2d 858, 865 n.3 (Cal. 1977); Stone v. Wall, 734 So. 2d 1038, 1041 (Fla. 1999); Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 351 (Mass. 1991); Wyatt v. McDermott, 725 S.E.2d 555, 562 (Va. 2012).

For how this cause of action relates to the older torts of abduction and harboring, see Beth Rosenberg, Khalifa v. Shannon: *How Much Interference Is Too Much When It Comes to A Tort for Interfering with the Parent-Child Relationship?*, 68 MD. L. REV. ENDNOTES 124, 128 (2009) ("The tort of intentional interference with the parent-child relationship is the modern interpretation of the tort for abduction and harboring of a child from a parent. The tort of intentional interference with the parent-child relationship is broader than its ancestor, allowing recovery in more instances than the tort of abduction of a child.").

This Section adopts the label "tortious interference with parental rights." For prior use of this terminology, see, for example, *Wyatt*, 725 S.E.2d at 562.

Comment b. History and support. A claim based on wrongful interference with the parent–child relationship dates back more than 400 years. See Wyatt v. McDermott, 725 S.E.2d 555, 561 (Va. 2012) (explaining that "the common law recognized an English writ providing a tort claim based on wrongful interference with the parent-child relationship prior to 1607"). Early on,

however, any cause of action against the defendant could be brought exclusively by the father, and it was premised on loss of the child's services. In time, American courts discarded the loss-of-services requirement as an "outworn fiction"—and also extended the tort to both parents. Howell v. Howell, 78 S.E. 222, 224 (N.C. 1913).

Yet, while the tort's premise has changed, and the number of potential plaintiffs has doubled, the cause of action has retained its essential vitality, with, now, a singular focus on the tortfeasor's interference with the legally protected filial relationship. For a discussion of this gradual jurisprudential evolution, see Wood v. Wood, 338 N.W.2d 123, 124-125 (Iowa 1983); *Wyatt*, 725 S.E.2d at 559-560; DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 603 (2023 update). For a similar evolution in the context of loss of consortium, which now, similarly, protects the parent–child relationship from tortious interference, see Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 48 B and 48 C (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

Only a handful of courts have expressly declined to recognize a cause of action for tortious interference with parental rights. See Mueller v. Auker, 2005 WL 8159827, at *15 (D. Idaho 2005) ("The majority of states considering the question have recognized a cause of action for intentional or wrongful interference with custodial rights."); Stone v. Wall, 734 So. 2d 1038, 1043 & n.6 (Fla. 1999) (reporting that "[t]he majority of states considering the question have recognized a cause of action for intentional interference with the custodial parent-child relationship"); Finn v. Lipman, 526 A.2d 1380, 1382 n.1 (Me. 1987) ("A cause of action for interference with parental custody appears to have been recognized in those jurisdictions that have addressed the issue."); Larson v. Dunn, 449 N.W.2d 751, 755 (Minn. Ct. App.) ("[V]irtually every state that has considered the issue has adopted the tort of intentional interference with custodial rights."), aff'd in part, 460 N.W.2d 39 (Minn. 1990); *Wyatt*, 725 S.E.2d at 560 ("The overwhelming majority of the high courts of our sister states that have considered the issue have also recognized such a tort . . . ."); Kessel v. Leavitt, 511 S.E.2d 720, 758 (W. Va. 1998) (observing that "a majority of jurisdictions throughout the country have recognized such a claim"); accord BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 28:38 (2020 update) (recognizing that "the trend appears to be toward recognizing" the cause of action); R. KEITH PERKINS, DOMESTIC TORTS § 9:3 (2023 update) ("Most courts that have been presented with the issue have recognized the cause of action in tort against those who unlawfully interfere with the custody rights of a parent entitled to such custody."); Beth Rosenberg, Khalifa v. Shannon: *How Much Interference Is Too Much When It Comes to A Tort for Interfering with the Parent-Child Relationship?*, 68 MD. L. REV. ENDNOTES 124, 129 (2009) ("The current trend among states is to recognize a cause of action for the tort of intentional interference with the parent-child relationship when the interference is with a parent's custodial rights.").

On the rare occasions that states have declined to recognize the cause of action, three concerns have been most frequently articulated. First, courts (and commentators) have worried that recognition of the cause of action runs contrary to the best interests of children who might get caught in acrimonious custody battles that this litigation might escalate. See, e.g., Larson v. Dunn,

460 N.W.2d 39, 45-46 (Minn. 1990); Zaharias v. Gammill, 844 P.2d 137, 140 (Okla. 1992); Joseph R. Hillebrand, Note, *Parental Kidnapping and the Tort of Custodial Interference: Not in A Child's Best Interests*, 25 IND. L. REV. 893, 917 (1991). Second, some courts have expressed doubt that the tort is necessary, given other criminal and regulatory mechanisms designed to deter and punish what is sometimes, essentially, kidnapping. See, e.g., Politte v. Politte, 727 S.W.2d 198, 201 (Mo. Ct. App. 1987). Third (and somewhat overlapping with point two), courts have found that "the area of civil sanctions for interference with a custodial parent's custody of a minor child is better addressed by the legislature." Whitehorse v. Critchfield, 494 N.E.2d 743, 745 (Ill. App. Ct. 1986).

On the other hand, the many courts that have adopted the cause of action have tended to base their support on its ancient lineage; the fact that the tort's recognition is consistent with the law's overall approach to the tortious impairment of familial relationships; an appreciation that a tort claim—unlike other alternatives—may supply money damages, which might, in turn, furnish parents with the funds necessary to regain the child's custody; and, finally, a view that the tort's recognition may deter the wrongful taking of children and, when a child *is* taken, encourage third parties to cooperate in the child's swift return.

For discussion of the tort's ancient lineage, see, for example, DiRuggiero v. Rodgers, 743 F.2d 1009, 1017 (3d Cir. 1984) (applying New Jersey law) (observing that, at least by 1825, "English authorities permitted a parent to recover in tort for the abduction of a child if the parent suffered a 'loss of services'" and that the New Jersey Supreme Court endorsed such a cause of action in 1858); Wyatt v. McDermott, 725 S.E.2d 555, 561 (Va. 2012) (noting that "the common law recognized an English writ providing a tort claim based on wrongful interference with the parent-child relationship prior to 1607"); see also Stone v. Wall, 734 So. 2d 1038, 1044 (Fla. 1999) (tracing the tort's ancient origins and observing that "the cause of action for interference with a custodial parent-child relationship is a natural progression of the common law with due regard for constitutional principles, changes in our social and economic customs, and 'present day conceptions of right and justice'").

Regarding consistency with the law's broader fabric, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 915 (5th ed. 1984) (emphasizing that the law has long protected "relational" interests, such as those between family members, from interference); Restatement Second, Torts § 700, Comment *d* (AM. L. INST. 1977) ("The deprivation to the parent of the society of the child is itself an injury that the law redresses."); see also Lloyd v. Loeffler, 694 F.2d 489, 496 (7th Cir. 1982) (applying Wisconsin law) ("We know of no state that, having swallowed the camel of allowing parents to sue for intangible loss of companionship as well as pecuniary loss, has strained at the gnat of allowing that loss to be recovered when it is caused by abduction rather than by physical injury."). Concerning consistency, some courts have also recognized that it would be anomalous to permit a plaintiff to sue for the loss of her skateboard, bicycle, automobile, or pet—but not for the loss of her minor child. E.g., Pickle v. Page, 169 N.E. 650, 653 (N.Y. 1930) ("It would be a reproach to our legal system if, for the abduction of a child in arms, no remedy ran to its parent, although for a parrot, a popinjay, a thrush, and even for a dog

an ample remedy is furnished to their custodian for the loss of their possession.") (quotation mark and citation omitted).

For discussion of the fact that a tort claim, unlike other regulatory alternatives, offers the possibility of a monetary recovery, which might supply parents with the funds necessary to determine the child's whereabouts and effect the child's swift return, see, for example, Wood v. Wood, 338 N.W.2d 123, 125-127 (Iowa 1983) (cataloging the advantages and disadvantages of various "remedies available to a victimized parent," including actions under the Uniform Child Custody Jurisdiction Act, a prosecution for kidnapping, and a contempt action, and observing that, of these, only a tort claim can furnish compensation); accord Mueller v. Auker, 2005 WL 8159827, at *15 (D. Idaho 2005) (arguing that the tort's recognition might furnish "parents with the funds necessary to pay the expenses incurred in regaining custody of the child").

Lastly, for a discussion of how recognition of the cause of action might deter wrongful conduct, see, for example, *Mueller*, 2005 WL 8159827, at *15 (arguing that "the tort may very likely serve as a deterrent to wrongful interference with parental rights"); *Wood*, 338 N.W.2d at 127 (suggesting that the tort may promote the child's speedy return); accord D & D Fuller CATV Constr., Inc. v. Pace, 780 P.2d 520, 524 (Colo. 1989) (echoing *Wood*); Sue T. Bentch, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY'S L.J. 361, 383 (1986) (suggesting that "large damage awards may help compel the abductor to return the child"); Mary Louise Taylor, Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 515 (1983) (concluding that the tort "can remedy some snatchings and deter others, thus enhancing the stability and security of many vulnerable children").

Courts that have endorsed the cause of action include the following, in alphabetical order by state: Anonymous v. Anonymous, 672 So. 2d 787, 789-790 (Ala. 1995); Borer v. American Airlines, 563 P.2d 858, 865 n.3 (Cal. 1977) (expressing support in dicta); Surina v. Lucey, 168 Cal. App. 3d 539 (1985); D & D Fuller CATV Constr., Inc. v. Pace, 780 P.2d 520 (Colo. 1989); Bouchard v. Sundberg, 834 A.2d 744, 757 (Conn. App. Ct. 2003) (declaring that "our Supreme Court has recognized the tort of custodial interference" and citing Zamstein v. Marvasti, 692 A.2d 781 (Conn. 1997), in which the father failed to state a claim for intentional interference with custodial right because the father did not allege any facts suggesting unlawful custody of his children); Hinton v. Hinton, 436 F.2d 211 (D.C. Cir. 1970), aff'd, 492 F.2d 669 (D.C. Cir. 1974); Stone v. Wall, 734 So. 2d 1038 (Fla. 1999); Mathews v. Murray, 113 S.E.2d 232 (Ga. Ct. App. 1960); Wood v. Wood, 338 N.W.2d 123, 127 (Iowa 1983); Spencer v. Terebelo, 373 So. 2d 200 (La. Ct. App. 1979); Khalifa v. Shannon, 945 A.2d 1244, 1248-1262 (Md. 2008); Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 352 (Mass. 1991); Brown v. Brown, 61 N.W.2d 656, 659 (Mich. 1953); Ashby v. State, 779 N.W.2d 343, 357 (Neb. 2010); Plante v. Engel, 469 A.2d 1299 (N.H. 1983); DiRuggiero v. Rodgers, 743 F.2d 1009, 1017-1018 (3d Cir. 1984) (applying New Jersey law); Casivant v. Greene County, 234 A.D.2d 818, 819-820 (N.Y. App. Div. 1996), aff'd, 688 N.E.2d 1034 (N.Y. 1997); Hinton-Lynch v. Frierson, 716 S.E.2d 440 (N.C. 2011) (Table); McBride v. Magnuson, 578 P.2d 1259, 1260 (Or. 1978); Bedard v. Notre Dame Hosp.,

151 A.2d 690 (R.I. 1959); Silcott v. Oglesby, 721 S.W.2d 290 (Tex. 1986); Jenkins v. Miller, 2017 WL 4402431, at *7 (D. Vt. 2017); Wyatt v. McDermott, 725 S.E.2d 555 (Va. 2012); Kessel v. Leavitt, 511 S.E.2d 720, 758-766 (W. Va. 1998); Lloyd v. Loeffler, 694 F.2d 489, 495-497 (7th Cir. 1982) (applying Wisconsin law); cf. Brown v. Denny, 594 N.E.2d 1008, 1011 (Ohio Ct. App. 1991) (interpreting a statutory provision addressing "child stealing" that entitled the prevailing party to damages); Hershey v. Hershey, 467 N.W.2d 484, 489 (S.D. 1991) (recognizing a cause of action in tort for interference with parental relationship but characterizing the claim as one for alienation of affections).

In addition, a number of states have enacted statutes creating, or reaffirming, a civil cause of action for tortious interference with parental rights. See, e.g., OHIO REV. CODE ANN. § 2307.50 (providing a civil action for "child stealing" backed by compensatory and punitive damages, although excluding parents from liability); 9 R.I. GEN. LAWS ANN. § 9-1-43 (establishing that "[a]ny person, including a parent, who intentionally removes, causes the removal of, or detains any child under the age of eighteen (18) years with intent to deny another person's right of custody . . . shall be liable in an action at law"); TEX. FAM. CODE ANN. § 42.002 (clarifying that "[a] person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person"). For further discussion of state statutory provisions, see R. KEITH PERKINS, DOMESTIC TORTS § 9:4 (2023 update) (discussing laws enacted in California, Montana, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, and Texas).

On the other side of the ledger, two state supreme courts—those of Minnesota and Oklahoma—have expressly declined to recognize a claim for tortious interference with parental rights. See Larson v. Dunn, 460 N.W.2d 39 (Minn. 1990); Zaharias v. Gammill, 844 P.2d 137 (Okla. 1992). In addition, the Idaho Supreme Court has stated, without elaboration, that "causes of action for alienation of affections of a child and malicious interference with family relations do not exist in Idaho." Hopper v. Swinnerton, 317 P.3d 698, 704 (Idaho 2013). And the Wyoming Supreme Court has intimated that it might reject the cause of action, if the question were properly before the court. See Hoblyn v. Johnson, 55 P.3d 1219, 1227 (Wyo. 2002); Cosner v. Ridinger, 882 P.2d 1243 (Wyo. 1994).

In Illinois and Missouri there is a split in authority in the intermediate-level appellate courts regarding whether the cause of action should be recognized. For Illinois, compare Whitehorse v. Critchfield, 494 N.E.2d 743, 744-745 (Ill. App. Ct. 1986) ("Plaintiff urges this court to recognize a cause of action based upon a tortious interference with a custodial parent's right to custody, care, and companionship of his child. We decline to do so . . . ."), with Dymek v. Nyquist, 469 N.E.2d 659, 666 (Ill. App. Ct. 1984) ("It is plaintiff's contention that a cause of action for the loss of a minor child's society and companionship can be maintained by a parent in Illinois [for the forced separation from a parent]. We agree."), Kunz v. Deitch, 660 F. Supp. 679, 682-683 (N.D. Ill. 1987) (recognizing the split while siding with *Dymek*), and Dralle v. Ruder, 529 N.E.2d 209, 214 (Ill. 1988) (recognizing the split while offering some support for the *Dymek* position). For Missouri, compare Politte v. Politte, 727 S.W.2d 198 (Mo. Ct. App. 1987) ("question[ing] the need of

recognizing the tort claim defined in § 700"), with Ruffalo v. United States, 590 F. Supp. 706 (W.D. Mo. 1984) (recognizing the cause of action), Kramer v. Leineweber, 642 S.W.2d 364, 366 (Mo. Ct. App. 1982) (same), and Kipper v. Vokolek, 546 S.W.2d 521, 525-526 (Mo. Ct. App. 1977) (same).

A couple of other states, including Delaware and Pennsylvania, are somewhat difficult to classify. For Delaware, see Smith v. Delaware, 745 F. Supp. 2d 467, 487 (D. Del. 2010) (predicting that the Delaware Supreme Court would not recognize this tort, while recognizing that it "has been adopted by numerous other jurisdictions"). For Pennsylvania, see Bartanus v. Lis, 480 A.2d 1178, 1182 (Pa. Super. Ct. 1984) ("Even if Pennsylvania were to recognize a cause of action under Restatement, § 700 for harboring a child, the facts averred in the instant complaint would be insufficient to satisfy the elements of such an action. The complaint herein does not aver that appellant had lawful custody of his son at the time of appellees' allegedly tortious acts.").

In endorsing the cause of action, numerous contemporary courts observe that their states' version of the tort reflects, is based on, or is drawn from, the Restatement Second of Torts § 700 (AM. L. INST. 1977). See Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 351 (Mass. 1991) (explaining that jurisdictions tend to define the tort "intentional interference with parental rights" by reference to § 700); George L. Blum, Annotation, *Recognition and Application of Common Law Action for Tortious Interference with Parental Rights*, 103 A.L.R.6th 461 (originally published in 2015) ("A number of courts have opined that the common law action for tortious interference with parental rights has, in essence, evolved to substantially track the language and policy set forth in Restatement Second, Torts § 700."). Examples abound. Just a few include: *Hinton*, 436 F.2d at 212; Lloyd v. Loeffler, 539 F. Supp. 998, 1004 (E.D. Wis.), aff'd, 694 F.2d 489 (7th Cir. 1982); *Anonymous*, 672 So. 2d at 789-790; *D & D Fuller CATV Constr., Inc.*, 780 P.2d at 524.

Comment c. Distinguishing both alienation of a child's affections and loss of consortium. The cause of action recognized in this Section is distinct from alienation of a child's affections, disapproved of by § 48 H. A key difference is that, in order to state a cause of action under this Section, there must be some physical absence of the child from the parent. For discussion of this distinction, see Kessel v. Leavitt, 511 S.E.2d 720, 761 n.44 (Va. 1998), which explains:

> "Tortious interference with parental or custodial relationship" intimates that the complaining parent has been deprived of his/her parental or custodial rights; in other words, but for the tortious interference, the complaining parent would be able to exercise some measure of control over his/her child's care, rearing, safety, well-being, etc. By contrast, "alienation of affections" connotes only that the parent is not able to enjoy the company of his/her child; this cause of action does not suggest that the offending party has removed parental or custodial authority from the complaining parent.

For further discussion, see Haines v. Vogel, 249 A.3d 151, 160-162 (Md. Ct. Spec. App. 2021) (highlighting the key differences between tortious interference with the parental relationship and alienation of affections); Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 351 (Mass. 1991) (drawing a clear line between this cause of action and alienation of affections based on the

"physical absence of the minor child from the home"); Wyatt v. McDermott, 725 S.E.2d 555, 562 (Va. 2012) (explaining that there is nothing inconsistent with abrogating alienation of affections, on the one hand, while recognizing tortious interference with parental rights, on the other, and that "[t]he added element of physical separation from the parent in tortious interference renders the torts distinct"); Qiu v. Huang, 885 S.E.2d 503, 510 (Va. Ct. App. 2023) (explaining that tortious interference and alienation of affections are "distinguishable" because "[a]lienation of affection connotes only that the parent is not able to enjoy the company of the child, not that the offending party has removed parental or custodial authority from that parent") (quotation marks and alterations omitted); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 603 (2023 update) ("When the minor child is enticed, or abducted, or 'harbored,' the custodians of the child are entitled by common law or statute to recover. The claim is not for alienation of affections, but for deprivation of physical custody.").

The line drawn by this Restatement—recognizing a cause of action for tortious interference with parental rights, while refusing to recognize a cause of action for alienation of affections—is not new. This, indeed, was the path taken by the Second Restatement. Compare Restatement Second, Torts § 699 (AM. L. INST. 1977) ("One who, without more, alienates from its parent the affections of a child, whether a minor or of full age, is not liable to the child's parent."), with id. § 700 (recognizing a cause of action for tortious interference with parental rights, there titled "Causing Minor Child to Leave or not to Return Home").

As Comment *c* points out, there are also similarities between the cause of action addressed here and the filial consortium claims addressed in Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 B (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

For a brief discussion, see Borer v. Am. Airlines, Inc., 563 P.2d 858, 865 n.3 (Cal. 1977). For a broader discussion of these torts' contours, similarities, and differences, see generally Susan J. G. Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child's Companionship*, 8 T.M. COOLEY L. REV. 273, 273-296 (1991).

On occasion, there is also overlap between the tort recognized in this Section and the separate tort, intentional infliction of emotional distress, addressed at Restatement Third, Torts: Liability for Physical and Emotional Harm § 46 (AM. LAW INST. 2012); cf. Sheltra v. Smith, 392 A.2d 431, 433 (Vt. 1978) (holding that the plaintiff stated a claim for intentional infliction of emotional distress when the plaintiff claimed that, for nearly a month, "the Defendant willfully, maliciously, intentionally, and outrageously inflicted extreme mental suffering and acute mental distress on the Plaintiff, by . . . rendering it impossible for any personal contact or other communication to take place between the Plaintiff and her daughter"). For certain differences between these two causes of action, see Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1, 67 (1993) ("The tort of intentional infliction of emotional distress is both narrower and broader than the tort of intentional interference with custodial rights. Intentional infliction of emotional distress is broader because the tort may be utilized by noncustodial parents. The tort is narrower because it requires proof of severe emotional distress; the tort of interference

with custodial rights does not."); see also Stewart v. Walker, 5 So. 3d 746, 748-749 (Fla. Dist. Ct. App. 2009) (tracing key differences); *Haines*, 249 A.3d at 162-165 (same).

Comment d. "Parent" and "child," defined. The relatively narrow definition of "parent" in Comment *d* is consistent with the definition set forth in Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 B, Comment *f* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)), which involves "Loss of Child Consortium." Comment *d*'s definition of "parent" is more circumscribed than the definition used in some other contexts, where there is less need for specificity. Cf. id. § 10A, Comment *f* (defining "parent" expansively for purposes of the parental standard of care to include those "who undertake and are authorized to act in a parental role, i.e., act in loco parentis, including a biological parent, an adopting parent, a legal guardian, a stepparent, a foster parent, a grandparent, or another adult"); Restatement of the Law, Children and the Law § 3.24, Comment *i* (AM. L. INST., Tentative Draft No. 1, 2018) (defining the term "parent" when addressing the parental privilege to use corporeal punishment, to include "parents, guardians, and adults acting as parents" as well as, on occasion, others, such as babysitters).

Comment e. "Custodial responsibilities" requirement. To state a cause of action under this Section, the complaining parent must demonstrate physical custodial responsibilities over the minor child or a legal right to establish or maintain such responsibilities. As the influential Dobbs treatise puts it: "The right protected in interference with custody cases is the right to custody of the child. If the plaintiff does not have custody rights, she has no claim." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 603 (2023 update).

This prerequisite, which is carried over from the Restatement Second of Torts, is well supported and frequently articulated. See, e.g., Restatement Second, Torts § 700 (AM. L. INST. 1977) (extending the cause of action only to those parents who are "legally entitled to [the child's] custody"); Decter v. Second Nature Therapeutic Program, LLC, 42 F. Supp. 3d 450, 457 (E.D.N.Y. 2014) (finding that, where the child's mother was granted "sole legal and physical custody" of the child, the father could not assert a cause of action for tortious interference with parental rights); Mueller v. Auker, 2005 WL 8159827, at *16 (D. Idaho 2005) (demanding, as a prerequisite, that the plaintiff show "a right to establish or maintain a parental or custodial relationship with his or her minor child"); Whalen v. County of Fulton, 941 F. Supp. 290, 299 (N.D.N.Y. 1996) ("The plaintiff must have a legal right to custody in order to possess a cause of action for custodial interference."), aff'd, 126 F.3d 400 (2d Cir. 1997); Cosner v. Ridinger, 882 P.2d 1243, 1246 (Wyo. 1994) ("The jurisdictions recognizing this tort have limited the cause of action to the custodial parent and have not extended it to a non-custodial parent who is somehow deprived of visitation privileges."); see also, e.g., Ashby v. State, 779 N.W.2d 343, 358 (Neb. 2010) (finding that the father's claim failed because he was not entitled to custody before April 21, 2004, the date when he received a custody order—and that, after that date, defendants' actions did not reveal an effort to deprive him of his parental rights); Harley v. Druzba, 560 N.Y.S.2d 959, 961 (Sup. Ct. 1990) (concluding that plaintiff's claim failed because the plaintiff had no "right of custody" over her sibling).

A difficult issue, however, has arisen regarding suits between parents when the parents share custody. The Restatement Second of Torts § 700, Comment *c* (AM. L. INST. 1977) took the position that, when parents share custody, neither parent may recover from the other for denying access to the child. In particular, Comment *c* stated: "When the parents are by law jointly entitled to the custody and earnings of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other."

Comment *c*'s restriction—although sometimes softened to demand "superior," rather than "sole," custody—has been endorsed by numerous courts. See, e.g., Politte v. Politte, 727 S.W.2d 198, 200 (Mo. Ct. App. 1987) (endorsing Comment *c* and observing: "Clearly, only a custodial parent can sue for custodial interference when he or she possesses superior custody rights to the child."); Kipper v. Vokolek, 546 S.W.2d 521, 525 (Mo. Ct. App. 1977) ("The tort may be actionable between parents of the child where, by proper judicial decree, the sole custody of the child has been awarded to one of the parents."); Hinton-Lynch v. Frierson, 716 S.E.2d 440, at *3-4 (N.C. 2011) (Table) (requiring that, to state a claim, the plaintiff must have "custody rights superior to [the defendant's] at the time of the alleged abduction"); *Wyatt*, 725 S.E.2d at 561 (establishing that one parent cannot assert a cause of action against the child's other parent "if both parents have equal, or substantially equal rights") (quotation marks omitted); Qiu v. Huang, 885 S.E.2d 503, 510 (Va. Ct. App. 2023) (explaining that, "in Virginia, no parent can successfully maintain a tortious interference claim against another parent whose rights have not been terminated"); Kessel v. Leavitt, 511 S.E.2d 720, 766-767 (W. Va. 1998) (finding that, where the father and mother had equal parental rights, the father could not assert a claim against her, but he could assert such a claim as against other defendants, while reasoning: "[A] parent cannot charge his/her child's other parent with tortious interference with parental or custodial relationship if both parents have equal rights, or substantially equal rights . . . to establish or maintain a parental or custodial relationship with their child"); accord 2 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 8.6, at 627 (3d ed. 2008) ("While the action lies against an abducting (or enticing or harboring) parent who is not entitled to custody, there is no liability for such acts on the part of a parent who has or shares legal custody."); Richard A. Campbell, Note, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 244 ("A parent can only sue for custodial interference when he possesses superior custody rights to the child. . . . Parental kidnappings that occur . . . after a joint custody award . . . are immune from tort actions."); Joseph R. Hillebrand, Note, *Parental Kidnapping and the Tort of Custodial Interference: Not in A Child's Best Interests*, 25 IND. L. REV. 893, 907 (1991) ("Only a parent with a superior right of custody to the child may recover damages . . . .").

Yet, this seemingly arbitrary, all-or-nothing line has also drawn criticism, particularly as shared-custody agreements—which were previously the exception—become ever more common. For discussion of the rapidly changing custody norms following marital dissolution, see J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 213 (2014) ("Until recently, child custody presumptions adhered to a 'rule of one': courts generally insisted that only one parent could properly be awarded child custody.

Child custody law is moving toward a norm of shared parenting, with frequent and continuing contact provided for each parent."); Daniel R. Meyer et al., *The Growth in Shared Custody in the United States: Patterns and Implications*, 55 FAM. CT. REV. 500, 500 (2017) (tracing the evolution of child custody in the United States and explaining that, "for most of the last century, when parents divorced, physical custody was awarded to the mother," but that, in recent years, shared custody has started to eclipse sole custody).

Offering a pointed critique of the all-or-nothing line that predicates a cause of action on a showing that the complaining parent has been granted sole or superior custodial rights, the Dobbs treatise explains: "If joint custody means anything, it must mean that one parent cannot be the sole custodian. When a father carries children abroad and hides them, it seems absurd to say that he is respecting the mother's right of joint custody." DOBBS ET AL., supra § 603; see also Campbell, supra at 251 ("An abducting parent's equal right to custody of the child should not shield that parent from liability.").

Seemingly recognizing this tension, the Dobbs treatise provides that "recent cases hold that a claim of interference with custody can be brought against a parent who has shared custody." DOBBS ET AL., supra § 603. Indeed, several courts have even held that a parent who is entitled only to "visitation" may state a claim for tortious interference with parental rights—although, complicating matters, in some states, a parent who is entitled to care for the child less than half of the time might be characterized as entitled only to "visitation," and some of these suits involve nonparent defendants.[1] Courts that have taken a flexible stance to the custody question include the following: Ruffalo v. United States, 590 F. Supp. 706, 711 (W.D. Mo. 1984) (finding that a parent entitled merely to visitation could state a claim against the federal government and that, "[w]hile the injury to parental rights may be less severe in a case involving what is usually called visitation, that is a matter of degree that logically relates to damages rather than liability"); Khalifa v. Shannon, 945 A.2d 1244, 1248-1262 (Md. 2008) (finding that a parent entitled merely to visitation who is deprived of his right to visit his child could state a claim); see also 59 AM. JUR. 2d *Parent and Child* § 118 (2022 update) ("A claim for tortious interference with parent-child relations may even be stated by a parent who only has visitation rights where the interference is substantial.").

Other statutes, similarly, decline to draw lines between certain custodians and others, when authorizing civil or criminal penalties. See, e.g., 18 U.S.C. § 1204 (establishing criminal penalties for "[w]hoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights"; protects parents with "physical custody," regardless of whether the physical custody is "joint or sole (and includes visiting rights)"); 9 R.I. GEN. LAWS ANN. § 9-1-43 (establishing that "[a]ny person, including a parent, who intentionally removes, causes the removal of, or detains any child under the age of eighteen (18) years with intent to deny another person's right of custody . . . shall be liable in an action at law . . . for redress in the superior court," without

[1] See, for example, Judicial Branch of California, California Courts, Custody & Visitation, https://www.courts.ca.gov/documents/WelcomePacketAttnyForms.pdf ("A parent who has the children less than half of the time has visitation with the children.").

restricting the cause of action to those with superior or sole custody); TEX. FAM. CODE ANN. §§ 42.001 & 42.002 (establishing that "[a] person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person" while clarifying that a "'Possessory right' means a court-ordered right of possession of or access to a child, including conservatorship, custody, *and visitation*") (emphasis added); W. VA. CODE § 61-2-14d ("Any person who conceals, takes or removes a minor child in violation of any court order and with the intent to deprive another person of lawful custody *or visitation rights* shall be guilty of a felony . . . .") (emphasis added); see also Strother v. State, 891 P.2d 214, 220-221 (Alaska Ct. App. 1995) ("The crime of custodial interference was designed to protect any custodian from deprivation of his or her custody rights—even if that deprivation results from the actions of a person who also has a right to physical custody of the child. The crime does not focus on the legal status of the defendant, but rather focuses on the defendant's actions, the effect of the defendant's actions, and the intent with which those actions were performed."); State v. Vakilzaden, 742 A.2d 767, 770-771 (Conn. 1999) (finding, in the criminal-law context, that "a joint custodian is not inherently immune . . . based solely on his or her status as joint custodian" when all the elements of custodial interference are proved, including both knowledge and intent, and further concluding that the court's 1993 opinion, Marshak v. Marshak, 628 A.2d 964, 972 (Conn. 1993), involving tortious interference with custody rights was "wrong to conclude that a joint custodian could never, under any scenario, be liable for custodial interference"); State v. Butt, 656 A.2d 1225 (Me. 1995) (finding that a criminal statute that prohibited the taking of a child from the custody of a parent prohibited one parent from depriving the other parent, entitled to joint custody, from contact with the minor child).

Against this complex and evolving backdrop, Comment *e* clarifies that a complaining parent can state a cause of action against a fellow parent, even if the two parents have equal or substantially equal custodial rights provided that the complaining parent (1) is, in fact, a "parent," as defined by Comment *d*, and (2) satisfies Comment *e*'s custody requirement. Comment *e* takes this position—which subtly departs from the position of the Second Restatement of Torts—given the evolution in views and practices regarding shared custody, as described above.

Yet, unlike some states' laws and certain criminal statutes, this Restatement does not go further to permit *any* entitlement to the child's custody to suffice. The Restatement draws this line in deference to the Second Restatement of Torts and the substantial case law supporting a "primary" or "superior" custody requirement and in recognition of the fact that, generally, if a parent, entitled to primary custody, absconds with a child, it is better if the complaining parent (entitled only to limited custody) first petitions the family court for an adjustment in the custody decree (to obtain a ruling of greater custody), before initiating tort litigation. The family-court judge—charged with acting in the best interest of the child—is frequently in the best position to assess custodial interference. Accord Qiu v. Huang, 885 S.E.2d 503, 510 (Va. Ct. App. 2023) (explaining that, if a defendant violates a court order that entitles a parent "to visitation with her children," rather than initiating tort litigation, a better step is to seek an adjustment in custody in family court); Gleiss v. Newman, 415 N.W.2d 845, 846 (Wis. Ct. App. 1987) (rejecting suit by complaining parent with

mere visitation rights, reasoning that "[s]tate courts are already plagued by trifling departures from court visitation orders" and that "noncustodial parents claiming intentional interference with their visitation rights" have other and better remedies, including that they "institute not only contempt proceedings, but also proceedings to obtain custody of the child").

Illustration 2, regarding Imran and the summer camp, is based on Decter v. Second Nature Therapeutic Program, LLC, 42 F. Supp. 3d 450, 456 (E.D.N.Y. 2014).

Comment f. "Custodial responsibilities" requirement: unmarried biological fathers. Illustrations 4 and 5 present a scenario involving unwed biological parents, wherein the biological father is suing the biological mother for placing the child up for adoption without his knowledge or consent. As Comment *f* explains, some states, by statute, give unwed fathers no say in whether an infant is placed for adoption unless the father takes particular statutorily specified steps. E.g., ARIZ. REV. STAT. ANN. § 8-106.01; FLA. STAT. ANN. § 63.062; NEB. REV. STAT. ANN. § 43-104.01; OKLA. STAT. ANN. tit. 10, § 7505-4.2; accord FLA. STAT. ANN. § 63.022(1) (explaining the state of Florida's "compelling interest in providing stable and permanent homes for adoptive children in a prompt manner [and] in preventing the disruption of adoptive placements" and further noting that "[a]n unmarried mother faced with the responsibility of making crucial decisions about the future of a newborn child is entitled to privacy, has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to assurance regarding an adoptive placement"); Frank R. v. Mother Goose Adoptions, 402 P.3d 996, 1000 (Ariz. 2017), as amended (Oct. 31, 2017) ("The law favors rapid placement so that the child can bond with those who will be the legal parents and not with those from whom the child may be taken. This sound policy benefits the child, the natural parents, the prospective adoptive parents, and society.") (quotation marks omitted). In these states, frequently, an unwed father is entitled to object to an adoption only when he takes timely, specific steps, which may include, for instance, supporting the mother during pregnancy (as the father does in Illustration 4), formally acknowledging liability for contribution to the support and education of the child after birth, and/or his filing an affidavit setting forth his plans for care of the child. But he is not entitled to the child's custody if he doesn't. See FLA. STAT. ANN. § 63.022 ("An unmarried biological father has the primary responsibility to protect his rights and is presumed to know that his child may be adopted without his consent unless he complies with the provisions of this chapter and demonstrates a prompt and full commitment to his parental responsibilities."); see also *Frank R.*, 402 P.3d at 1000 (observing that "[a]t least twenty-five states, including Arizona, have created putative father registries" and that these registries seek "to avoid protracted legal disputes between unwed fathers and potential adoptive parents"); John Klimpflen, C.J.S. *Adoption of Persons* § 55 ("The consent of a putative father to an adoption will not be obligatory unless he has assumed some of the burdens of parenthood."); see also Malinda L. Seymore, *Ethical Blind Spots in Adoption Lawyering*, 54 U. RICH. L. REV. 461, 471-478 (2020) (discussing states' statutory schemes, particularly with regard to the parental rights of unmarried fathers).

This Restatement in no way interferes with states' statutory schemes. Accordingly, an unmarried father out of compliance with a state statutory scheme cannot assert a cause of action

for tortious interference with parental rights. E.g., Stewart v. Walker, 5 So. 3d 746, 749 (Fla. Dist. Ct. App. 2009) (affirming the trial court's determination that an unwed biological father could not state a cause of action for tortious interference with parental rights because the father was out of compliance with Florida's statutory scheme); Ashby v. State, 779 N.W.2d 343, 358 (Neb. 2010) (holding that a biological father cannot "assert a claim for intentional interference with his parental rights before gaining a custody order").

Comment g. Physical-absence requirement. It is well established that, in order to state a cause of action, there must be a physical separation between the complaining parent and the minor child. This requirement was implicit in Restatement Second, Torts § 700 (AM. L. INST. 1977). For discussion of the requirement, see, e.g., Woodburn v. State of Fla. Dep't of Child. & Fam. Servs., 854 F. Supp. 2d 1184, 1217 (S.D. Fla. 2011) ("In Florida, the cause of action is only applied to cases in which a child is physically taken from his custodial parent."); Haines v. Vogel, 249 A.3d 151, 161 (Md. Ct. Spec. App. 2021) (emphasizing that "physical removal must be alleged and proven to sustain a charge of interference with a parental relationship"); Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 351 (Mass. 1991) ("To allow recovery for interference with parental interests without physical absence of the minor child from the home would be to allow an action for alienation of affections, for which recovery cannot be had."); accord Jordyn L. Bangasser, *Missing the Mark: Alienation of Affections as an Attempt to Address Parental Alienation in South Dakota*, 62 S.D. L. REV. 105, 132 (2017) (recognizing that, to state a claim for tortious interference with parental rights, the complaining parent must typically show "the complete removal of the child" from the parent's life).

In parsing this separation requirement, few cases have addressed whether brief absences from the complaining parent's physical custody are sufficient to state a claim. Nor was any durational requirement addressed in the Second Restatement. See Restatement Second, Torts § 700 (AM. L. INST. 1977). Cf. Ruffalo v. United States, 590 F. Supp. 706, 712 (W.D. Mo. 1984) (stating, in dicta, that if state courts were inclined to restrict the cause of action, they "could well restrict this type of claim to situations that are not 'insubstantial in duration'"); *Murphy*, 571 N.E.2d at 351 (observing that, to recover, "the child [must] be physically absent from the home for a continuous period of time," although not defining what might or might not qualify as a sufficiently "continuous period"); Casivant v. Greene Cnty. Cmty. Action Agency, Inc., 652 N.Y.S.2d 115, 117 (App. Div. 1996) (emphasizing, in the course of granting summary judgment to defendants on another ground, that the plaintiff was only separated from his children for a "single day" and observing that, even without the interference, the father's "interaction with the children during that day would have been inconsequential at best"), aff'd, 688 N.E.2d 1034 (N.Y. 1997). But see id. at 118 (Yesawich, J., dissenting) (observing that, "while the short duration of the allegedly improper detention may prove to be relevant when and if the issue of damages is reached, it has no bearing on whether plaintiff has stated a cause of action for custodial interference").

For a criminal statute that imposes a minimum time threshold, see WIS. STAT. ANN. § 948.31 ("Whoever causes a child to leave, takes a child away or withholds a child for more than

12 hours from the child's parents . . . without the consent of the parents, the mother or the father with legal custody, is guilty of a Class I felony.").

Comment h. Intent requirement. For the fact that the action must be taken with the intent to separate the child from the complaining parent, see, e.g., Sager v. Rochester Gen. Hosp., 647 N.Y.S.2d 408, 411 (Sup. Ct. 1996) ("[I]nterference with the custodial relationship with a child likewise requires proof of intentional or willful conduct on the part of the defendant."); Grange Ins. Ass'n v. Roberts, 320 P.3d 77, 93 (Wash. Ct. App. 2013) ("The tort of interference with a parent-child relationship cannot be committed accidentally or negligently."); Kessel v. Leavitt, 511 S.E.2d 720, 766 (W. Va. 1998) (clarifying that "[a] party also cannot be held liable for tortious interference with a parental or custodial relationship if he/she acted negligently, rather than intentionally").

For the fact that, beyond the above intent requirement, the actor's underlying motive or purpose is immaterial, see Restatement Second, Torts § 700, Comment *b* (AM. L. INST. 1977), which explains that, unless the actor is privileged, the actor's "motive or purpose" is of no moment and that "the actor may be inspired by motives of kindness and affection toward the child but none the less become liable for interfering with the interests of its lawful custodian." See also Hinton v. Hinton, 436 F.2d 211, 213 (D.C. Cir. 1970) (applying District of Columbia law) (explaining that, in order to state a cause of action, "the interference with the relation must be a deliberate one, although not necessarily motivated by ill will or anything other than kindness or affection towards the child"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 925 (5th ed. 1984) (emphasizing that the action need "not necessarily" be "motivated by ill will or anything other than kindness or affection toward the child"); R. KEITH PERKINS, DOMESTIC TORTS § 9:3 (2023 update) ("The motives of the defendant are immaterial. Even if the defendant acts out of kindness or affection toward the child, liability still exists for interfering with the custodial parent's interests.").

Comment i. Affirmative-act requirement. To state a claim under this Section, the complaining parent must show that the defendant took affirmative action to abduct the child or to compel or induce the child to leave the plaintiff's custody or to detain the child, so that the child would not return to the plaintiff's custody. See Wolf v. Wolf, 690 N.W.2d 887, 892 (Iowa 2005) ("To establish a claim of tortious interference with custody, a plaintiff must show . . . the defendant took some action or affirmative effort to abduct the child or to compel or induce the child to leave the plaintiff's custody . . . ."); Kipper v. Vokolek, 546 S.W.2d 521, 526 (Mo. Ct. App. 1977) (explaining that "there must be some affirmative act of decoying or enticing away in order to render one liable in an action based on enticement, and for one to be guilty of harboring, there should be proof of conduct which induces the child not to return to the parent having legal custody or which prevents the child from so doing"); 59 AM. JUR. 2d *Parent and Child* § 118 (2022 update) ("To establish a claim of tortious interference with child custody, a plaintiff must show that . . . the defendant took some action or affirmative effort to abduct the child or to compel or induce the child to leave the plaintiff's custody . . . .").

For the fact that it is immaterial whether the actor actually abducts the child from the child's home or takes the child from school or some other location, see Restatement Second, Torts § 700, Comment *a* (AM. L. INST. 1977).

For the fact that no action can be maintained "against one who merely gives shelter and sustenance to a child known by the actor to have left home without the parent's permission, if the child is not induced by other means to remain away from its home," see id., which adopts this limitation almost verbatim. For a case applying this limitation, see Robbins v. Hamburger Home for Girls, 38 Cal. Rptr. 2d 534, 540 (Ct. App. 1995).

Comment *i* declines to take a position on whether words alone (such as exhortation or persuasion) can satisfy this affirmative-action requirement. Few cases address whether words alone can satisfy Comment *i*'s affirmative-act requirement, and the cases' holdings are divergent.

In Meikle v. Van Biber, 745 S.W.2d 714 (Mo. Ct. App. 1987), for example, the appellant alleged that "respondents have interfered with appellant's parental and custodial rights concerning John [the minor child] in that they have encouraged the boy not to live with appellant [and] they have assisted John to accomplish a separation from appellant by providing a residence for him in their home." Id. at 714. Observing that recovery had, so far, only been allowed in Missouri in cases involving physical abduction, and further observing that the appellant's allegations tended to blur with the alienation-of-affections tort (which was not recognized), the court found the allegations insufficient to state a claim. Id. at 717. Accordingly, the appellate court affirmed the lower court's judgment, dismissing the complaint. Id. at 718.

In 1991, the Massachusetts Supreme Judicial Court cited *Meikle*, albeit in dicta and in a somewhat cryptic footnote, stating of the affirmative-act requirement: "Mere persuasion is not enough." Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 351 n.16 (Mass. 1991).

Lapides v. Trabbic, 758 A.2d 1114 (Md. Ct. Spec. App. 2000), is also arguably germane. There, the complaining parent alleged that the defendant interfered with his custody rights by "refusing and denying him the opportunity to speak with Jessica [his child] on the telephone; interfering with his telephone calls to Jessica; making deliberate plans to interrupt his time spent with Jessica; instructing Jessica to not speak to him; directing Jessica to disregard his authority; and advising Jessica that he was not the parent responsible for disciplining her." Id. at 1118. The court stated, in dicta, that "an actionable tort must be predicated on proof of acts other than the mere persuasion of a child to transfer its affection from its parent." Id. at 1117-1118. But *Lapides* sheds only very limited light on the subject at hand because the complaining parent never alleged that the defendant "induce[d] . . . Jessica to live" apart from him—and, as Comment *f* of this Section makes plain, physical separation is an essential element of this cause of action. Id. at 1118.

Hinton v. Hinton, 436 F.2d 211 (D.C. Cir. 1970), aff'd, 492 F.2d 669 (D.C. Cir. 1974), is similarly relevant but tends to point the other way. There, the court suggested that if "Eva Hinton [the child's grandmother] *did anything* to encourage the minor child, John Hinton, to remain away from custody of his parents," the complaining parents stated a cognizable claim. Id. at 214 (emphasis added). Sargent v. Mathewson, 38 N.H. 54 (1859), likewise, can be read to suggest that mere encouragement suffices. There, the court affirmed the judgment for the father when he did

not allege that the defendant "detained the plaintiff's son from him by force" but rather alleged that the defendant "encouraged and aided the [plaintiff's] son to persevere in a disobedient and undutiful disposition, which prevented him from voluntarily returning to his father's house." Id. at 58; see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 925 (5th ed. 1984) (stating that the defendant may be liable for, inter alia, "inducing or encouraging" the minor child "to remain away from home") (citing, inter alia, *Sargent*).

Illustration 7, regarding Samuel and Gram, is based, loosely, on *Hinton*, 436 F.2d at 214.

Comment j. Actual-or-constructive-knowledge requirement. The Second Restatement imposed a knowledge requirement, demanding: "To become liable under the rule stated in this Section for inducing a child not to return home, it is necessary that the actor know that the child is away from home against the will of the parent." Restatement Second, Torts § 700, Comment *b* (AM. L. INST. 1977). Comment *j* echoes, though refines, that knowledge requirement.

The knowledge requirement, as it is articulated in Comment *j*, is well supported. See, e.g., Anonymous v. Anonymous, 672 So. 2d 787, 790 (Ala. 1995) ("To state a claim of intentional or malicious custodial interference, a plaintiff need only plead facts tending to show: . . . (3) [that the enticing or harboring was done] with notice or knowledge that the child had a parent whose rights were thereby invaded.") (quotation marks omitted and alteration in original); Wolf v. Wolf, 690 N.W.2d 887, 892 (Iowa 2005) ("To establish a claim of tortious interference with custody, a plaintiff must show . . . the abducting, compelling, or inducing was done with notice or knowledge that the child had a parent whose rights were thereby invaded and who did not consent."); Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 351 (Mass. 1991) ("Liability for harboring a child will not be found . . . unless the actor knows or has reason to know that the child is away from the parent without the parent's consent."); Kessel v. Leavitt, 511 S.E.2d 720, 766 (W. Va. 1998) ("A party . . . cannot be held liable for tortious interference with a parental or custodial relationship if he/she . . . possessed a reasonable, good faith belief that the interference was proper . . . or reasonably and in good faith believed that the complaining parent did not have a right to establish or maintain a parental or custodial relationship with the minor child . . . ."); George L. Blum, Annotation, *Recognition and Application of Common Law Action for Tortious Interference with Parental Rights*, 103 A.L.R.6th 461 (originally published in 2015) ("To establish a claim of tortious interference with child custody, a plaintiff must show that . . . the abducting, compelling, or inducing was done with notice or knowledge that the child had a parent whose rights were thereby invaded and who did not consent."); cf. Wyatt v. McDermott, 725 S.E.2d 555, 564 (Va. 2012) (concluding that a defendant who "reasonably and in good faith believed that the complaining parent did not have a right to establish or maintain a parental or custodial relationship with the minor child" cannot be liable for the tort of intentional interference with parental rights—but couching the matter as an affirmative defense, rather than as part of the plaintiff's prima facie case).

For a case defeated by the absence of proof that the defendant knew that "the custodial parent ha[d] not consented to the alleged interference," see Bower v. El-Nady, 847 F. Supp. 2d 266, 274 (D. Mass. 2012), aff'd on other grounds sub nom. Bower v. Egyptair Airlines Co., 731 F.3d 85 (1st Cir. 2013).

Comment k. Loss of child's services not a prerequisite. Consistent with the position of the first and Second Restatements of Torts, as well as (it appears) all contemporary courts, "recovery is not predicated on loss of services," Stone v. Wall, 734 So. 2d 1038, 1044 (Fla. 1999). See, e.g., Surina v. Lucey, 214 Cal. Rptr. 509, 512-513 (Ct. App. 1985) ("The parent may recover even though the child renders no services to him."); Pickle v. Page, 169 N.E. 650, 653 (N.Y. 1930) ("[I]n actions for the abduction of immature children from the custody of their lawful custodians, parents or foster parents, no loss of service need be alleged or proven; that for the direct injury done, a direct recovery may be had without resort to the fiction that a loss of service has been occasioned.").

Comment l. Affirmative defenses. Comment *l* largely tracks the "Privilege to rescue from physical violence" provision of the Second Restatement. See Restatement Second, Torts § 700, Comment *e* (AM. L. INST. 1977). As Comment *l* makes plain, these are affirmative defenses, not elements of the prima facie case. See Brown v. Brown, 800 So. 2d 359, 362 (Fla. Dist. Ct. App. 2001) (explaining that these are affirmative defenses); McBride v. Magnuson, 578 P.2d 1259, 1260 (Or. 1978) (same); Wyatt v. McDermott, 725 S.E.2d 555, 563 (Va. 2012) (same); Kessel v. Leavitt, 511 S.E.2d 720, 766 (W. Va. 1998) (same).

For the fact that one may defend by pointing to a risk of harm, see, e.g., Brown v. Brown, 800 So. 2d 359, 362 (Fla. Dist. Ct. App. 2001) ("It is a defense to the cause of action . . . that the defendant took the child to prevent physical harm to the child, or that the defendant possessed a reasonable, good faith belief that the interference was proper.") (quotation marks omitted); *Kessel*, 511 S.E.2d at 766 (explaining that there is a valid defense if the absconding "party possessed a reasonable, good faith belief that interference with the parent's parental or custodial relationship was necessary to protect the child from physical, mental, or emotional harm"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 915 (5th ed. 1984) (recognizing that it would be a defense if one seeks to "protect the child from physical violence in excess of the parental privilege of discipline").

As Comment *l* notes, a parent who is the victim of domestic violence will almost inevitably satisfy the reasonable, good-faith-belief standard, as it is well established that children who are exposed to domestic violence are harmed thereby, even if the child is not the abuser's target. See Merle H. Weiner, *You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence*, 28 UCLA WOMEN'S L.J. 223, 253-256 (2021) (explaining that, even when an abuser does not directly target the child, domestic violence imperils the child's physical safety, as the child may be "incidentally caught between the abuser and the victim," and exposure to familial abuse inflicts emotional harm, as "children who are exposed to domestic violence can suffer increased physical and psychological illnesses that undermine their health, social and emotional development, and interpersonal behaviors") (quotation marks omitted); Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57, 60-61 (2003) (cataloging research which shows that exposure to domestic violence causes substantial harm, even if the child is not the abuser's direct target); Carrie A. Moylan et al., *The Effects of Child Abuse and Exposure to Domestic Violence on Adolescent Internalizing and*

Externalizing Behavior Problems, 25 J. FAM. VIOLENCE 53, 53 (2010) (collecting "[n]umerous studies" demonstrating "that children exposed to domestic violence and/or child abuse are more likely to experience a wide range of adverse psychosocial and behavioral outcomes").

For the fact that "[t]he consent of the child is, of course, no defense to the parents' action," see Surina v. Lucey, 168 Cal. App. 3d 539, 543 (1985). See also, e.g., 2 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 8.6, at 627 (3d ed. 2008) ("The consent of the child in these actions is, of course, no defense, since the parent is seeking recovery not for the wrong to the child but for the invasion of his personal interest as a parent.").

Comment m. Damages. Comment *m* largely tracks the "Damages" provision of the Second Restatement, although that Comment does not mention punitive or exemplary damages. Restatement Second, Torts § 700, Comment *g* (AM. L. INST. 1977). For further support and specification, see Kajtazi v. Kajtazi, 488 F. Supp. 15, 19 (E.D.N.Y. 1978); Surina v. Lucey, 168 Cal. App. 3d 539, 544 (1985); Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 352 (Mass. 1991); Wyatt v. McDermott, 725 S.E.2d 555, 563 (Va. 2012); BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 28:38 (2020 update).

For the proposition that, on appropriate facts, an award of punitive damages is justified, see, e.g., *Kajtazi*, 488 F. Supp. at 19 (awarding $100,000 in punitive damages); Wolf v. Wolf, 690 N.W.2d 887, 893-896 (Iowa 2005) (concluding that clear and convincing evidence supported award of punitive damages in the amount of $25,000 to child's father); Khalifa v. Shannon, 945 A.2d 1244, 1264-1269 (Md. 2008) (affirming a large award of punitive damages); Kramer v. Leineweber, 642 S.W.2d 364, 369 (Mo. Ct. App. 1982) (affirming award of punitive damages); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 925 (5th ed. 1984) (recognizing that punitive damages may be appropriate "where the facts warrant"); Richard A. Campbell, Note, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 245 ("Under common law principles, courts will award punitive damages to a custodial parent when the abducting parent acted with a culpable state of mind and his acts rose to the level of malicious, outrageous or wanton misconduct.").

§ 48 K. Alienation of Parent's Affections Abolished

An actor who alienates a parent's affections from a child is not liable for the harm thus caused to the child due to the impairment or destruction of the parent–child relationship.

Comment:

a. History, scope, and support.

b. Distinguishing loss of consortium.

c. Limitations.

a. History, scope, and support. The Restatement Second of Torts § 702A, titled "Alienation of Affections of Parent," provided: "One who, without more, alienates from a child the affections of a parent, is not liable to the child." Like its predecessor—and consistent with the vast majority of courts—this Restatement does not recognize a cause of action for the alienation of a parent's affections. Accordingly, this Section, which supersedes § 702A, reaffirms the core elements of that provision.

This Section is an analogue to § 48 H. That Section provides that a parent does not have a cause of action against a defendant who alienates the affections of the parent's child. This Section confirms that the converse is also true; just as a parent has no cause of action for the alienation of a child's affections, a child has no cause of action for the alienation of a parent's affections.

b. Distinguishing loss of consortium. The cause of action this Section addresses is distinct from loss of parental consortium, addressed in, and embraced by, Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 C (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). Loss-of-consortium claims arise when a third party tortiously injures the parent and, consequential to that injury, impairs the parent–child relationship.

c. Limitations. This Section does not affect an actor's liability to the extent the actor's conduct would otherwise subject the actor to liability for a tort other than alienation of a parent's affections. This means that, if the plaintiff pleads a *recognized* cause of action (such as, for example, defamation, professional malpractice, or intentional infliction of emotional distress), a victim is not barred from asserting that cause of action simply because the underlying dispute would *also* have given rise to a cause of action for alienation of a parent's affections, had the latter not been repudiated. On the other hand, through artful pleading, a victim cannot seek compensation for what is, in essence, alienation of a parent's affections simply by calling it another name.

Illustration:

1. Bruce is the Sannah family's minister. Among other responsibilities, Bruce provides individual counseling to various family members, including 15-year-old Eileen. Notwithstanding Bruce's obligation to keep the information divulged in these counseling sessions confidential, Bruce gossips about these sessions and, in so doing, falsely suggests that Eileen is sexually promiscuous and "Devil loving." Michelle, Eileen's mother, hears and believes the false allegations. As a consequence, she severs ties with Eileen and casts

her out of the family home. Based on this Section, Bruce is not liable to Eileen for the alienation of Michelle's affections. However, Bruce may be otherwise subject to liability to Eileen, including, inter alia, for his professional misconduct, misrepresentation, defamation, invasion of privacy, or intentional infliction of emotional distress. See Restatement Second, Torts § 299A (regarding professional malpractice); id. § 558 (defamation); id. § 652D or § 652E (invasion of privacy); Restatement Third, Torts: Liability for Physical and Emotional Harm § 46 (intentional infliction of emotional distress).

REPORTERS' NOTE

Comment a. History, scope, and support. Alienation of a parent's affections evolved along with—and is often considered alongside—its companion cause of action: alienation of a spouse's affections. Alienation of a spouse's affections, which involved harm to the marital, rather than the parental, relationship, was endorsed by the Restatement Second of Torts § 683 (AM. L. INST. 1977) and—before falling sharply out of favor in the middle years of the last century—was recognized in every state save Louisiana. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 D, Reporters' Note to Comment *a* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). For the fact that alienation of a spouse's affections is now mostly a dead letter, see Coulson v. Steiner, 390 P.3d 1139, 1142 (Alaska 2017) (recognizing that the tort is now recognized by "only a handful of states"); Matthew v. Herman, 2012 WL 1965891, at *4 (V.I. 2012) (observing that a cause of action for alienation of a spouse's affections has "been abolished in the vast majority of American jurisdictions"); David M. Cotter, *The Well-Deserved Erosion of the Tort of Alienation of Affections and the Potential Liability of Nonresident Defendants*, 15 DIVORCE LITIG. 204 (Dec. 2003) (explaining that "an overwhelming majority of states have chosen to abolish the tort of alienation of affections").

As compared to its companion cause of action, alienation of parental affections has never achieved particularly widespread recognition or support. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 924 (5th ed. 1984) ("The law has been somewhat more reluctant to protect the relation of parent and child than that of husband and wife."); Jeffrey F. Ghent, *Right of Child or Parent to Recover for Alienation of Other's Affections*, 60 A.L.R. 3d 931 (originally published in 1974) ("[W]hen a child . . . has brought a direct action for alienation of [a parent's] affections . . . recovery has been denied much more often than it has been allowed.").

Consistent with this Section, the vast majority of courts to consider the matter have concluded that a child has no cause of action for the alienation of a parent's affections. See Hale v. Buckner, 615 S.W.2d 97, 97 (Mo. Ct. App. 1981) (declaring that "[t]he great majority of jurisdictions considering the matter have held that a minor child does not have a cause of action for the alienation of affections of his parent" while collecting copious authority); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 604 (2023 update) ("The usual rule . . . is

that there is no independent action for the defendant's acts alienating the affections of either a parent or a child."); 7 STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 22:11 (2024 update) ("A child cannot recover for alienation of a parent's affections either from the other parent or from a third person. This is the rule adopted by a majority of jurisdictions."); Kathleen Niggemyer, Comment, *Parental Alienation Is Open Heart Surgery: It Needs More Than A Band-Aid to Fix It*, 34 CAL. W. L. REV. 567, 573 (1998) ("[M]ost courts today decline to recognize a cause of action by a child for the alienation of a parent's affections by a third party."); see also, e.g., Hunt v. Chang, 594 P.2d 118, 127 (Haw. 1979) ("join[ing] the majority of jurisdictions in holding that a minor child does not have a cause of action for alienation of [a parent's] affections"); Wheeler v. Luhman, 305 N.W.2d 466, 467 (Iowa 1981) (refusing to "recognize a new cause of action by children for the alienation of the affections of a parent"); Mier v. Mier, 178 So. 3d 270, 272 (La. Ct. App. 2015) ("Under the law and jurisprudence of Louisiana, children have no cause of action for alienation of affection against their parent's paramour."); Brent v. Mathis, 154 So. 3d 842, 848 (Miss. 2014) (rejecting a claim lodged by children against their mother's paramour while observing "if allowed to bring alienation of affection claims, the children virtually become their parents' pawns to seek revenge on a former spouse's paramour"); Zarrella v. Robinson, 492 A.2d 833, 835 (R.I. 1985) (refusing "to expand the common law to include a right of action by a minor against a third party for the alienation of affection of his or her parent" while noting that, in refusing to recognize this cause of action, the court was siding with the "overwhelming" majority of other states).

Comment b. Distinguishing loss of consortium. For more on consortium claims, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 C (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

—

Other provisions in the Restatement Second of Torts are hereby determined to be "obsolete."

Restatement Second, Torts § 705 (AM. L. INST. 1977), entitled "Sale to Minor Child of Habit-Forming Drug."

> One who unlawfully sells or otherwise supplies to a minor child a habit-forming drug without its parent's consent and with knowledge that it will be used by the child in a way to cause him harm, is subject to liability to:
>
> (a) the parent who is entitled to the child's services for any resulting loss of services or ability to render services, and to
>
> (b) the parent who is under a legal duty to furnish medical treatment for expenses reasonably incurred or likely to be incurred for the child's treatment during its minority.

The Reporters' Note accompanying Restatement Second of Torts § 705 cited only one case: Tidd v. Skinner, 122 N.E. 247 (N.Y. 1919). Since the Section's publication, this Section has never been cited by a case (pro or con), and the material previously addressed by § 705 is now more appropriately addressed by general tort principles.

Restatement Second, Torts § 696 (AM. L. INST. 1977), entitled "Sale to Spouse of Habit-Forming Drug." That provision provides:

> One who unlawfully sells or otherwise supplies to one spouse a habit-forming drug with knowledge that it will be used in a way that will cause harm to any of the legally protected marital interests of the other spouse, is subject to liability for harm caused by the drug to those interests unless the other spouse consents to the acquisition or use of the drug.

In the decades since the provision's publication, it has been cited only a few times, and the material covered by § 696 is now more appropriately addressed by general tort principles.

Restatement Second, Torts § 707 (AM. L. INST. 1977), entitled "Harm to Minor Child in Dangerous Employment." That provision provides:

> (1) One who, without the parent's consent or acquiescence to the particular risk involved, employs a minor child in an occupation which in consideration of the age and experience of the minor is dangerous to it, is subject to liability to
>
> (a) that parent who is entitled to the child's services for the loss of its services or ability to render services resulting from illness or other bodily harm sustained by the child in the course of the dangerous employment, and
>
> (b) that parent who is under a legal duty to furnish medical treatment for expenses reasonably incurred or likely to be incurred for the treatment of the child during its minority.
>
> (2) The rule stated in Subsection (1) is applicable although the employer of the child is not liable to the child for the harm sustained by it in the course of the employment.

In the decades since that provision was published, it has been cited only 12 times. To the extent the child sustains an injury, a loss-of-consortium claim may be available. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 B (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (involving loss of child consortium).

AIDING AND ABETTING NEGLIGENCE TORTS

§ ___.[1] Aiding and Abetting Negligence Torts

An actor is subject to liability for aiding and abetting if:

(a) another commits a negligence tort causing physical, emotional, or dignitary harm to a third person;

(b) the actor had actual knowledge that the other might engage in negligent or reckless conduct posing a risk to a third person or persons; and

(c) the actor substantially assisted or encouraged the other to engage in, and thereby increased the risk of, that negligent or risky conduct.

Comment:

a. History and scope.
b. Terminology.
c. Necessity of negligence tort by other.
d. Knowledge.
e. Assistance or encouragement.
f. Substantiality.
g. Factual causation.
h. Scope of liability.
i. Duty.
j. Joint and several liability.
k. Comparison with vicarious liability.
l. Apportionment of liability.
m. Comparison with civil agreement liability.
n. Employer as primary defendant.
o. Primary defendant not subject to liability for independent torts of the secondary defendant.
p. Independent tort liability of secondary defendant.
q. Relationship with dramshop and social host liability.
r. Strict liability.
s. Judge and jury.

[1] This Section's eventual placement will depend on whether the Defamation and Privacy project drafts its own aiding and abetting Section. If they draft their own Section, then our tentative plan is for this Section to slot into Liability for Physical and Emotional Harm. If they do not, then this Section will be slotted into Miscellaneous Provisions with an explanation in History and Scope of where it applies.

a. History and scope. Restatement Second of Torts § 876(a) and (b) comprehensively addressed liability for concerted action, including aiding and abetting and civil conspiracy. The Third Restatement of Torts has superseded § 876(a), (b), and (c) although it has done so in a somewhat piecemeal fashion. Completed in 2020, Restatement Third of Torts: Liability for Economic Harm §§ 27 and 28 replaced the portions of § 876(a) and (b) that addressed torts causing economic harm. Completed in 202_, Restatement Third of Torts: Intentional Torts to Persons § 10 (Tentative Draft No. 3, 2018) replaced the portions of § 876(a) and (b) that addressed battery, assault, purposeful infliction of bodily harm, intentional infliction of emotional harm, and false imprisonment. Restatement of the Law Fourth of Property Volume 2, Division I, § 1.1, Comment *j* (Tentative Draft No. 2, 2021) supersedes the portion of Restatement Second of Torts § 876(b) that addresses trespass to land. Meanwhile, Restatement Third of Torts: Liability for Physical and Emotional Harm § 28(b) replaced § 876(c), which addressed alternative liability (the "two hunters case"). This Section and § __ [civil conspiracy], complete the Third Restatement's coverage of liability for concerted action by addressing liability for non-intentional torts that result in physical, emotional, or dignitary harm.

b. Terminology. Restatement Second of Torts § 876, titled "Persons Acting in Concert," addressed aiding and abetting liability. The Section's title arguably suggests that an agreement to commit a tort is required for aiding and abetting liability. While such an agreement is a prerequisite to impose liability for a civil conspiracy, addressed in § __ [the next one] of this Restatement, liability for aiding and abetting does not—and has never—required an agreement. Nevertheless, because of its long history, this Restatement uses the umbrella term "concerted action" to cover both aiding and abetting and civil conspiracy.[*] In this Section, the tortfeasor who commits the tort is designated as the "primary tortfeasor" while the actor who aids and abets the primary tortfeasor is the "secondary tortfeasor."

c. Necessity of negligence tort by other. Before an actor (the "secondary tortfeasor") can be liable for aiding and abetting under this Section, the other (the "primary tortfeasor") must have acted negligently or recklessly and caused injury within the scope of liability, such that the other is subject to tort liability. (Aider and abettor liability, when the primary tortfeasor has not been negligent but is nevertheless liable under strict liability principles is addressed in Comment *r*

[*] For reasons explained in § __ [Agreements to Engage in Conduct that is Negligent or Reckless], "civil agreements" or "concerted action" are employed instead of referring to these agreements as conspiracies.

below. Aider and abettor liability involving intentional torts is addressed in Restatement Third of Torts: Intentional Torts to Persons § 10 (Tentative Draft No. 3, 2018).)

No action can be maintained for aiding and abetting a tort unless that tort actually occurred. However, the primary tortfeasor may have an immunity to tort liability that does not extend to the secondary tortfeasor—and that immunity does not foreclose the secondary tortfeasor's liability. So, for example, if an actor convinces an employer to buy a dangerous, unguarded industrial machine that injures an employee, the employer will typically be immune from the employee's suit based on the exclusive remedy provision of workers' compensation. The exclusive remedy provision, however, typically does not immunize third parties. See Comment *n*. As such, the secondary defendant may be subject to liability for aiding and abetting the employer's tortious conduct, notwithstanding the employer's protection from suit.

d. Knowledge. Unlike negligence, which uses an objective assessment of conduct, a defendant is subject to liability under this Section only if the actor actually, subjectively knows that the other (the primary defendant) is prepared to engage in risky conduct.

Illustrations:

1. Ted, Ken, and Marie, all 17-year-olds, are taking a joy ride in Ted's father's truck. Ted is driving, Marie is in the passenger seat, and Ken is in the back seat. As Ted is driving, however, he persuades a reluctant Marie to take the steering wheel so that he can take a hit from a marijuana bong. Marie reaches across the front seat, grabs the wheel and, because of her position, promptly loses control of the car, which crashes into a bridge abutment. In Ken's suit against Ted for aiding and abetting, Ted's knowledge that Marie is poised to take control of the car under risky circumstances is sufficient, as a matter of law, to satisfy the knowledge requirement for aiding and abetting liability.

2. Drew and Keosha are school friends. One afternoon, Keosha randomly texts Drew inquiring whether he wants to hang out; Drew receives Keosha's text while driving home from basketball practice. Distracted by Keosha's text, Drew does not see a red light—and he plows through an intersection, injuring Patrick. Keosha is not liable for aiding and abetting Drew's negligent driving and texting because Keosha had no knowledge that Drew was engaging in that activity.

3. Bivilis, a minor devoted to Pokemon cards, convinces Sam, her older brother, to drive to a nearby convenience store to purchase a pack of such cards for her. While

traveling to the store, Sam becomes distracted and plows into the rear of a stopped car, injuring Elizabeth, an occupant of the car. Although Bivilis knew that Sam would drive to the store, there is nothing particularly risky about such an activity. Bivilis, thus, is not, as a matter of law, liable to Elizabeth for aiding and abetting.

As stated above, case law is clear that, in order to be liable under this Section, the actor must actually, subjectively know that the other is prepared to engage in risky conduct. What is less clear is whether that suffices—or whether, in addition, the aider and abettor must *also* appreciate that the risky conduct is tortious. Often, because the primary defendant has engaged in quite culpable behavior, such as driving while intoxicated or otherwise impaired, courts pay little attention to the *precise* knowledge required. As the Reporters' Note to this Comment reveals, no case has been found in which the court denied an aiding and abetting claim based on a lack of knowledge that the conduct is tortious when the aider and abettor had knowledge of the risky conduct that comprised the tort. And, the Economic Harm Restatement requires knowledge only of the underlying facts that made the primary conduct wrongful. See Restatement Third, Torts: Liability for Economic Harm § 28, Comment *c* ("It is sufficient if the defendant was aware of facts that made the primary conduct wrongful.").

Because aiding and abetting liability is based on knowledge rather than an intent to cause harm or merely objectively unreasonable conduct, aiding and abetting liability cannot be classified as either an intentional or negligence tort.

e. Assistance or encouragement. An actor provides assistance or encouragement when the actor's conduct increases the risk that the other will engage in conduct that is tortious. Presence, observation, and knowledge are relevant to the determination of whether the actor has, in fact, assisted or encouraged the actor's tortious conduct—although, without more, individually each is, or together all are, insufficient to constitute the requisite assistance or encouragement.

Presence and observation, while relevant, are not required for the existence of assistance or encouragement. See Illustration 6. For the fact that actual knowledge, by contrast, is required, see Comment *d*.

Illustrations:

4. Reynoldo is a passenger in Carmen's car. Carmen drives recklessly for 20 minutes while Reynoldo observes passively. Carmen then crashes into and injures Lee. Reynoldo is not liable to Lee for aiding and abetting because, although he was present in

the car and observed Carmen's conduct, Reynoldo did not assist or encourage Carmen's reckless driving.

5. Hayley, a teenage passenger in her friend Brandon's vehicle, encourages him to drive to their destination via a street with dips that enable an automobile with sufficient speed to become airborne. While Brandon is driving on the street, Hayley urges Brandon to speed up, which he does, driving 70 MPH on a road with a 25 MPH speed limit. After becoming airborne, Brandon loses control of his car and veers into a parked car on the side of the road, injuring Esteban. Hayley is subject to liability to Esteban under this Section based on her encouraging Brandon to speed (and her knowledge he would do so) in order to become airborne.

6. Same facts as Illustration 5, except that Hayley is at home and offering encouragement to Brandon by phone, fully aware of his location and circumstances. Same outcome as Illustration 5. That Hayley is neither present nor observing Brandon at the time of the encouragement does not affect the outcome.

As Comment *f* makes plain, in order to state a claim under this Section, the plaintiff must show that the actor's assistance or encouragement was substantial.

f. Substantiality. As noted directly above, in order for an actor to be liable under this Section, the assistance or encouragement the actor furnishes must be substantial. No definite line can be drawn to distinguish between assistance or encouragement that is substantial and that which is insubstantial. Determination of the matter depends on the facts of each particular case. Restatement Second of Torts § 876, Comment *d* recommended that courts assess several factors to determine substantiality: the nature of the act encouraged, the amount of assistance given, the secondary defendant's presence or absence at the time of the tort, the secondary defendant's relation to the primary defendant, and the secondary defendant's state of mind. These factors, frequently cited by courts, remain instructive.

Illustration:

7. Henry, a minor, becomes intoxicated at work. His supervisor, Debra, calls Grimaldi, Henry's friend, and asks him to pick Henry up and take him home. Grimaldi agrees, drives to the workplace, and, with Debra's assistance, helps Henry into Grimaldi's vehicle. Instead of taking Henry home, however, Grimaldi takes him to the home of Jarren, another friend; at Jarren's home, Henry and Grimaldi continue to drink alcohol the three

take from Jarren's parents' liquor cabinet. Grimaldi then drives Henry back to his workplace so that he can retrieve his car and drive himself home. During the drive home, Henry crashes into and destroys Luther's parked vehicle. Grimaldi's actions, as a matter of law, constitute substantial assistance to Henry because no reasonable jury could find otherwise. Debra's assistance in enabling Henry to climb into Grimaldi's car is, as a matter of law, insubstantial (again, because no reasonable jury could find otherwise), and she is not liable to Luther based on aiding and abetting Henry. Whether Jarren's conduct constitutes substantial assistance is a question for the factfinder. Jarren's liability under this Section and his liability as a social host both depend on the applicable law for such liability. See Comment *q* and § __. Liability for the Provision of Alcohol, in this draft.

g. Factual causation. Proof that the secondary defendant's substantial assistance or encouragement was a factual cause of the victim's harm is not required. So long as the secondary defendant's assistance or encouragement was substantial and increased the risk of the victim's harm, and so long as the primary defendant caused the victim's harm (see Comment *c*), the factual cause element is satisfied.

Illustration:

8. Same facts as Illustration 5, in which Hayley encourages Brandon to drive dangerously, except that Brandon queries Hayley about whether he should drive so as to "get air" before Hayley encourages him to do so, such that it is uncertain whether Brandon would have driven dangerously even without Hayley's substantial encouragement. Hayley is subject to liability even though her encouragement may not have been a factual cause of Esteban's injury. That Brandon's dangerous driving was a factual cause of Esteban's injury satisfies the factual cause requirement for this Section.

h. Scope of liability. An aider and abettor's liability is limited by general scope of liability (proximate cause) principles. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29. Thus, if harm occurs that is unforeseeable or outside the scope of the risks created by the secondary defendant's assistance or encouragement, under this Section, the secondary defendant is not liable for such harm.

Illustration:

9. At Steve's encouragement, Jenny engages in a drag race with Brenda. During the drag race, Jenny becomes enraged at Jonathan, another motorist, who is traveling below

the speed limit, and who gets in Jenny's way. Jenny pulls out a high-powered rifle and starts firing randomly to scare Jonathan. One of the bullets from Jenny's gun strikes the fuel tank on Jonathan's car, resulting in an explosion that kills him. Steve is not liable for Jonathan's death because Jonathan's shooting and death, as a matter of law, are outside the scope of the risks created by Steve's encouragement.

i. Duty. No independent inquiry into the existence of a duty for a secondary defendant is required. The elements of aiding and abetting another's tortious conduct, including knowledge of wrongful conduct and substantial assistance or encouragement, is sufficient for liability to be imposed.

j. Joint and several liability. Subject to contrary statutory provisions, the secondary defendant and the primary defendant are jointly and severally liable. See Restatement Third, Torts: Apportionment of Liability § 15 (providing that those who engage in concerted actions are jointly and severally liable).

Some jurisdictions, by statute or otherwise, may not impose joint and several liability on those engaged in concerted action. In those jurisdictions, a share of comparative responsibility should be assigned to the secondary defendant for purposes of determining the liability of the defendants to plaintiff under the applicable rules (joint and several or several). See Restatement Third, Torts: Apportionment of Liability §§ A18-E18. Although a secondary defendant has not committed a classical tort, knowingly and substantially assisting another in the commission of a tort is a wrong for which the factfinder can assign comparative responsibility. For discussion of apportionment among defendants, see Comment *l*. Even if joint and several liability is imposed, the factfinder should assign comparative responsibility to all defendants, save those vicariously liable. See Restatement Third, Torts: Apportionment of Liability § 7, Comment *g* and § 13.

k. Comparison with vicarious liability. Liability for aiding and abetting is distinct from vicarious liability. Vicarious liability imposes strict liability on an actor who has not acted wrongfully based only on the relationship of the vicariously liable actor with the other who commits a tort. See coverage of vicarious liability in this Restatement §§ 1-7 (Tentative Draft No. 2, 2023). By contrast, aiding and abetting liability requires wrongful conduct that encourages or assists another's tort even if the conduct by the secondary actor does not constitute a tort unto itself. Thus, aiding and abetting liability straddles vicarious and direct liability; both require a tort by another, but aiding and abetting liability requires more—actual knowledge plus substantial assistance or

encouragement—while vicarious liability does not. For further discussion, see Restatement Third, Torts: Intentional Torts to Persons § 10, Comment *e* (Tentative Draft No. 3, 2018).

This distinction is critical for apportionment of liability purposes, because, as explained in Comment *j*, a separate share of comparative responsibility is not assigned to vicariously liable defendants, yet it is assigned to the secondary defendant as explained in Comment *j*.

l. Apportionment of liability. Because secondary defendants are not vicariously liable, see Comment *k*, the factfinder should assign shares of comparative responsibility to each primary and secondary defendant. See Restatement Third, Torts: Apportionment of Liability § 15 (contemplating that comparative responsibility will be assigned to each party engaging in concerted action). In jurisdictions that impose joint and several liability on primary and secondary tortfeasors, the comparative shares assigned can be the basis for apportioning liability among them. In jurisdictions that employ only several liability, no contribution claims exist, save in unusual circumstances explained in Restatement Third, Torts: Apportionment of Liability § 23, Comment *c*. No common-law indemnity action exists for a secondary defendant, see Restatement Third, Torts: Apportionment of Liability § 22(a)(2)(i), because a secondary defendant has engaged in wrongdoing by knowingly substantially assisting or encouraging another to commit a tort. In some jurisdictions, the doctrine of *in pari delicto* may bar a contribution claim among parties engaged in concerted action.

m. Comparison with civil agreement liability. As explained in Comment *a*, liability for aiding and abetting is distinct from liability for engaging in a civil agreement or conspiracy. Published in 1979, Restatement Second of Torts § 876 contained three separate Subsections, including one for each basis of concerted action liability, under the umbrella title "Persons Acting in Concert." The popularity of § 876 has embedded these two distinct bases for secondary liability in modern case law.

Published in 2020, the Restatement Third of Torts: Liability for Economic Harm separates these two bases for secondary liability into two different Sections. This Restatement follows the Economic Harm Restatement's classification, employing two different Sections for the two different bases for secondary liability. Civil agreement, addressed by § __ [Agreements to Engage in Conduct that is Negligent or Reckless], requires an agreement; aiding and abetting, addressed here, does not. Aiding and abetting, meanwhile, requires substantial assistance or encouragement to the primary defendant; civil agreement contains no such requirement. Restatement Third of Torts:

Intentional Torts to Persons § 10 (Tentative Draft No. 3, 2018) addresses both aiding and abetting and civil agreement in one black-letter Section, entitled: "Participation in an Intentional Tort."

n. Employer as primary defendant. When an employer's negligence injures an employee, the question of whether another party is liable for aiding and abetting the employer's negligence can arise. Given workers' compensation's exclusive remedy provision, the employer is immune from negligence liability to the injured employee. But, what of the secondary defendant who aided and abetted the employer's tortious conduct?

One somewhat formalistic way to address that question is to say that the aider and abettor cannot be jointly liable with another (here, the employer) who is not liable in tort. But, one could just as easily reason—to the contrary—that imposing secondary liability on the aider and abettor does not affect the basic compromise at the heart of workers' compensation: the employee is provided a no-fault recovery, and the employer remains shielded from tort liability. Indeed, imposing secondary liability in this instance might be analogized to tort claims by injured employees who sue third parties for their tortious conduct contributing to the employee's occupational injury. In a somewhat different context, Restatement Third of Torts: Intentional Torts to Persons § 10, Comment *i* (Tentative Draft No. 3, 2018), provides that, notwithstanding a primary tortfeasor's privilege to commit an intentional tort, secondary liability may be imposed. However, in light of the lack of case law addressing this issue, the Institute leaves the matter to further development.

o. Primary defendant not subject to liability for independent torts of the secondary defendant. A secondary defendant is subject to liability for harm caused by the primary defendant. The complement is not the case: the primary defendant is not liable for the independent torts of the secondary defendant that may have been committed in the course of the actor's aiding and abetting. See Restatement Third, Torts: Liability for Economic Harm § 27, Comment *g*. This result is contrary to the result in civil agreements and conspiracies in which all parties are jointly and severally subject to liability for harms tortiously caused by any member of the conspiracy in carrying it out. See § __ [addressing Agreements to Engage in Conduct that is Negligent or Reckless].

p. Independent tort liability of secondary defendant. In addition to aiding and abetting liability, a secondary defendant may be independently liable if that defendant commits a tort in the course of aiding and abetting. Thus, in Illustration 1, in which Ted, the driver of a car, passes control of the vehicle to Marie, a passenger, Ted may be liable for negligence or negligent

entrustment for the victim's injury in addition to being liable for aiding and abetting Marie. In such instances, as in all cases in which a defendant is liable on two different bases, the factfinder should assign a share of comparative fault to Ted both for aiding and abetting and for his independent tort.

q. Relationship with dramshop and social host liability. With some frequency, commercial establishments or social hosts that furnish alcohol may encourage or assist actors to engage in risky behavior, most notably, driving under the influence. If a jurisdiction permits dramshop or social host liability, see § __ [addressing Liability for the Provision of Alcohol], then liability under this Section may overlap with dramshop or social host liability—and an actor could be liable under both theories. However, in jurisdictions that bar this liability, there is tension between that prohibition and this Section. Some courts have resolved this tension by ruling, as a matter of law, that the provision of alcohol to another cannot be the basis for the requirement of "substantial assistance" in § 876(c) of the Restatement Second, Torts.

Illustrations:

10. Spiros, Omar, and Sigma plan an outdoor fraternity party in a remote field; they agree that the party will be open to minors and that beer and other alcoholic beverages will be served. Sigma serves as the bartender at the party. Sigma serves 12 cocktails to Omri, a minor, who assures Sigma that it is okay to serve him that many drinks because he will drive home carefully, notwithstanding his intoxication. Unfortunately, because he is impaired, when driving home, Omri runs into and injures Tau, a pedestrian. In a jurisdiction that permits social host liability, Sigma is subject to aiding and abetting liability to Tau. As well, Spiros and Omar may also be liable to Tau for aiding and abetting for their role in planning and hosting the party. Spiros, Omar, and Sigma may additionally be liable to Tau based on civil agreement, see § __ [addressing Agreements to Engage in Conduct that is Negligent or Reckless]. Whether Sigma is additionally liable to Tau for the provision of alcohol is outside the scope of this Illustration. See § __ [addressing Liability for the Provision of Alcohol].

11. Same facts as Illustration 10, except that the jurisdiction does not permit social host liability for serving alcohol to adults or minors. Neither Sigma nor Spiros nor Omar is subject to aiding and abetting liability for Tau's harm.

r. Strict liability. Restatement Second of Torts § 876 contained a Caveat stating that the Institute took no position on whether the Section's rules applied when the primary defendant

committed a strict liability tort. At the time, the Institute declined to take a position because of insufficient doctrinal development.

Today, as was true back in 1979, scant case law addresses whether aiding and abetting liability applies to strict liability torts, including torts involving abnormally dangerous activities, escaping animals, and true strict products liability. Accordingly, the Institute continues to take no position on the issue.

s. Judge and jury. Whether each of the elements required for aiding and abetting liability exists is a matter for the finder of fact.

REPORTERS' NOTE

Comment a. History and scope. This Section addresses liability for aiding and abetting a tort premised on the primary tortfeasor's negligence or reckless conduct that causes physical, emotional, or dignitary harm. Restatement Second of Torts § 876, Comment *d* (AM. L. INST. 1979) explains that liability for aiding and abetting extends to negligently committed torts as well as intentional ones.

Consistent with Comment *d*, case law since the Second Restatement's 1979 publication overwhelmingly supports the application of aiding and abetting liability to negligently committed torts. See, e.g., Allen v. Am. Cap. Ltd., 287 F. Supp. 3d 763, 807 (D. Ariz. 2017) (involving aiding and abetting liability, where the secondary defendant encouraged negligent conduct); Sierra Enters. Inc. v. SWO & ISM, LLC, 264 F. Supp. 3d 826, 841 (W.D. Ky. 2017) (concluding that Kentucky courts would recognize concerted action claim involving negligent misrepresentation); Lawson v. E. Orange Sch. Dist., 2017 WL 751425, at *3 (D.N.J. 2017) (stating that "aiding and abetting negligence" is "a legally cognizable claim"); McKay v. Hageseth, 2007 WL 1056784, at *2 (N.D. Cal. 2007) (rejecting defendant's "argument that liability may be imposed only for aiding and abetting an intentional tort"); Navarrete v. Meyer, 188 Cal. Rptr. 3d 623, 632, 635-636 (Ct. App. 2015), as modified (July 22, 2015) (rejecting defendant's argument that aiding and abetting liability applies only to intentional torts); F. Fin. Grp. Liab. Co. v. President, Fellows of Harvard Coll., 173 F. Supp. 2d 72, 96-97 (D. Me. 2001) (observing that "a defendant may be held liable in tort under aiding and abetting liability theory, even for negligence"); Thomas v. Ross & Hardies, 9 F. Supp. 2d 547, 559 (D. Md. 1998) (denying motion to dismiss claim for aiding and abetting negligent misrepresentation because "Maryland recognizes aiding and abetting tort liability"); Shelter Mut. Ins. Co. v. White, 930 S.W.2d 1, 3 (Mo. Ct. App. 1996) (holding passengers who encouraged driver to drive while intoxicated and to speed liable for aiding and abetting); Miele v. Am. Tobacco Co., 770 N.Y.S.2d 386, 392 (App. Div. 2003) (stating that "[t]he concerted action theory of liability for injury to a third party will attach when one knows that another's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other" and recognizing that liability can lie when the primary tortfeasor has engaged in "merely a negligent act"); Cooper v. Bondoni, 841 P.2d 608, 612 (Okla. 1992) (concluding that passengers who

encouraged driver to pass a slow-moving truck on a hill in a no-passing zone were subject to concerted action liability); Price v. Halstead, 355 S.E.2d 380, 389 (W. Va. 1987) (affirming that passengers who assisted driver's continued use of alcohol and drugs were subject to liability for aiding and abetting); Winslow v. Brown, 371 N.W.2d 417, 421-423 (Wis. Ct. App. 1985) (addressing concerted action liability of passengers in car that proceeded on a trail limited to bicycles when car struck bicyclist). But see George v. Marshall, 2007 WL 2472552, at *2 (Minn. Ct. App. 2007) (refusing to apply aiding and abetting liability to a passenger who allegedly encouraged driver to drive unsafely because Supreme Court had not adopted § 876); Bastable v. Muslu, 2009 WL 733988778, at *3 (Va. Cir. Ct. 2009) (asserting that aiding and abetting is not a valid claim in Virginia because there is no authority for its existence).

For a vintage case applying concerted action when the underlying tort was defamation, see Russell v. Marboro Books, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (addressing concerted action liability of defendant book company that sold a model's photograph to another company with the knowledge that the company would alter and use the photograph to defame the model); see also Black v. Wrigley, 2017 WL 8186996, at *11 (N.D. Ill. 2017) (denying defendant's motion to dismiss, inter alia, plaintiff's claim for aiding and abetting defamation because defendants' only argument for dismissal was that the underlying tort had not adequately been pled); Byars v. Sch. Dist. of Phila., 2015 WL 4876257, at *19 (E.D. Pa. 2015) (denying motion for summary judgment on plaintiff's aiding and abetting claim based on underlying torts of defamation and false light privacy); cf. Blessing v. Cable News Network, Inc., 2020 WL 7647530, at *8 (E.D. Ky. 2020) (addressing aiding and abetting claim based on underlying torts of defamation and invasion of privacy, but concluding that facts of the case did not support such a claim).

The form of secondary liability stated in Restatement Second, Torts § 876(c) (AM. L. INST. 1979) is superseded by Restatement Third of Torts: Liability for Physical and Emotional Harm § 28(b) (AM. L. INST. 2010), which addresses alternative liability—the doctrine first enunciated in 1948, in Summers v. Tice, 199 P.2d 1 (Cal. 1948). Although *Summers* cited the first Restatement's version of § 876(c) (AM. L. INST. 1939), the case actually articulated an alternative-liability principle. In the decades since *Summers*'s publication, its position has held sway, rendering § 876(c) superfluous. Thus, in McMillan v. Mahoney, 393 S.E.2d 298, 300 (N.C. Ct. App. 1990), two child shooters negligently fired their rifles and one shot hit plaintiff. Because plaintiff could not prove which one did so, the court concluded that concerted action liability existed under § 876(c), but a simpler basis for liability could have been based on the *Summers* doctrine, then contained in Restatement Second of Torts § 433(b)(3) (AM. L. INST. 1965). See generally T. C. Williams, *Liability of Several Persons Guilty of Acts One of Which Alone Caused Injury, in Absence of Showing as to Whose Act Was the Cause*, 5 A.L.R.2d 98 (originally published in 1949). It is true that *Summers* only shifts the burden of proof on causation to the defendants. After that burden shift, if a defendant can prove that they did not injure the plaintiff, then the defendant is not liable under an alternative-liability theory. In that instance, the court should proceed to assess whether the defendant is liable under a concert of action theory, which, in turn, will depend on

whether the elements of this Section (or the companion provision, § __, addressing civil conspiracy) are satisfied.

Comment c. Necessity of negligence tort by other. It is well established that "a fundamental requirement of establishing a claim for aiding and abetting is the existence of an underlying tort." Gantvoort v. Ranschau, 973 N.W.2d 225, 237 (S.D. 2022). For a court invoking this requirement to deny liability for aiding and abetting, see Norman v. Distasio, 2001 WL 761135, at *4 (Conn. Super. Ct. 2001) ("Thus, a prerequisite to § 876 liability is that another person has committed a tort, which the court has concluded is not the case here.").

Comment d. Knowledge. It is well-established that knowledge, but not intent, is required for civil aiding and abetting liability. See Reilly v. Anderson, 727 N.W.2d 102, 114 (Iowa 2006) (contrasting the contrary rule in criminal law). For a court that failed to appreciate the difference between civil and criminal liability for aiding and abetting, see Leon v. FedEx Ground Package Sys., Inc., 2016 WL 836980, at *16 & n.8 (D.N.M. 2016) (stating that plaintiff had to prove secondary defendant intentionally provided assistance and encouragement and citing standard criminal jury instruction in support).

As Comment *d* explains, courts have not squarely addressed whether it suffices for the plaintiff to prove that the secondary defendant knew that the primary defendant was engaging in risky conduct (i.e., knowledge of mere facts) or, alternatively, whether the plaintiff must *also* show that the secondary defendant knew that the primary defendant was engaging in a legal wrong. Indeed, some courts have collapsed the two requirements. Compare Reilly v. Anderson, 727 N.W.2d 102, 115 (Iowa 2006) ("It simply requires Naughton to know Anderson's actions were tortious and that Naughton gave substantial assistance."), with Aebischer v. Reidt, 704 P.2d 531, 533 (Or. Ct. App. 1985) (explaining that liability could be imposed when the secondary defendant "knew or should have known that the marijuana would contribute to [the primary defendant's] intoxication and further impair his ability to drive"), and with Concord Gen. Mut. Ins. Co. v. Gritman, 146 A.3d 882, 887 (Vt. 2016) (referring to knowledge of a breach of duty and to knowledge "of the pertinent attendant circumstance" without addressing their relationship); see also Lussier v. Bessette, 16 A.3d 580, 584 (Vt. 2010) (referring to "dangerous actions," "awareness of the danger and the possibility of harm," "flagrant hunting violations in breach of his duty," and "the pertinent attendant circumstances" as objects of the knowledge requirement).

In Kilgus v. Kilgus, 495 So. 2d 1230, 1231 (Fla. Dist. Ct. App. 1986), a father suggested to his son that he use lighter fluid to revive a cooking fire. The son did so, and when the fire flared, he dropped the flaming can, splashing fluid on his wife, burning her. The court denied secondary liability for the father in his daughter-in-law's suit against him, reasoning that the son's act could have been done negligently or non-negligently. *Kilgus*, thus, stands for the proposition that the aider and abettor must know that the act assisted or encouraged necessarily entails conduct that fits the breach element of negligence.

Prior projects of the Third Restatement of Torts come down on the side of knowledge of facts rather than their legal implication. See Restatement Third, Torts: Intentional Torts to Persons § 10, Comment *c* (AM. L. INST., Tentative Draft No. 3, 2018) ("knowing that the primary actor

intends one of the specified tortious acts"); Restatement Third, Torts: Liability for Economic Harm § 28, Comment *c* (AM. L. INST. 2020) ("It is sufficient if the defendant was aware of facts that made the primary conduct wrongful.").

Illustration 1, involving the teenager driving a vehicle from the passenger seat, is based on Reilly v. Anderson, 727 N.W.2d 102 (Iowa 2006). Illustration 2, involving the texting driver, is based on Kubert v. Best, 75 A.3d 1214, 1218 (N.J. Super. Ct. App. Div. 2013). There, the court accepted the principle that concerted action liability could apply to someone texting with a driver but found, on the facts, that there was inadequate evidence that the texter *encouraged* the driver to text while driving.

Unlike concerted action involving intentional torts, courts do not require that the secondary tortfeasor have knowledge that that tortfeasor's actions will contribute to the occurrence of the tort. In negligence cases, courts require only that the secondary tortfeasor know that the primary tortfeasor may engage in conduct that is negligent or reckless, although on the facts of many negligence cases, the secondary tortfeasor's contribution seems obvious. Compare Restatement Third, Torts: Intentional Torts to Persons § 10, Comment *c* (AM. L. INST., Tentative Draft No. 3, 2018) (requiring that the secondary tortfeasor know that "the actor's participation might contribute to" the intentional tort by the primary tortfeasor) with Reilly v. Anderson, 727 N.W.2d 102, 115 (Iowa 2006) (requiring only knowledge of conduct that is negligent); Aebischer v. Reidt, 704 P.2d 531, 533 (Or. Ct. App. 1985) (same as *Reilly*); Concord Gen. Mut. Ins. Co. v. Gritman, 146 A.3d 882, 887-888 (Vt. 2016) (same as *Reilly*).

The black letter of this Section requires that the secondary tortfeasor knows that the primary tortfeasor "might" commit a negligent tort. The Reporters found no case in which "might" did any work in screening cases that were actionable from those that were not. Conceivably and theoretically "might" could play a role if the primary tortfeasor were physically or otherwise unable to commit a tort. But such a case seems extremely unlikely to arise.

There is a similar paucity of case law on the certainty required for the secondary tortfeasor's knowledge of the primary tortfeasor's knowledge. No cases were found that addressed the issue. See also Restatement Third, Torts Intentional Torts to Persons § 10, Comment *c* (AM. L. INST., Tentative Draft No. 3, 2018) ("[I]t remains unclear whether courts interpret "knowingly" narrowly to mean "knowing with substantial certainty," as defined in Restatement Third, Torts: Liability for Physical and Emotional Harm § 1, or instead more broadly to include knowledge with a lesser degree of confidence.")

Comment e. Assistance or encouragement. Illustration 4, involving the passive passenger, is based loosely on Safe Auto Ins. Co. v. Hazelwood, 404 S.W.3d 360, 368 (Mo. Ct. App. 2013). Courts frequently explain the principle in Illustration 4 by stating: "Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting." See, e.g., Austin B. v. Escondido Union Sch. Dist., 57 Cal. Rptr. 3d 454, 469 (Ct. App. 2007); Dennison v. Klotz, 532 A.2d 1311, 1317 (Conn. App. Ct. 1987) (explaining that "inaction by a defendant passenger does not give rise to liability to a fellow passenger or other third party injured by the driver's conduct"); A.S. v. LaPorte Reg'l Health Sys., Inc., 921 N.E.2d 853, 860 (Ind. Ct. App.

2010); Rael v. Cadena, 604 P.2d 822, 823 (N.M. 1979); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 46, at 323-324 (5th ed. 1984) (reiterating that "mere presence at the commission of the wrong, or failure to object to it is not enough to charge one with responsibility"); Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1220 & 1227 (2023) (explaining in case based on Justice Against Sponsors of Terrorism Act (JASTA),18 U.S.C. § 2333(d)(2) that passively watching the commission of a tort is insufficient to satisfy JASTA's aiding and abetting provision).

Illustration 5, involving the passenger who encouraged the driver to drive dangerously, is based on Navarrete v. Meyer, 188 Cal. Rptr. 3d 623, 632 (Ct. App. 2015), as modified (July 22, 2015).

Comment f. Substantiality. For courts employing the factors contained in § 876, Comment *d*, see, e.g., Fassett v. Delta Kappa Epsilon (New York), 807 F.2d 1150, 1163 (3d Cir. 1986) (applying Pennsylvania law); Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983) (applying District of Columbia law).

Illustration 7, involving Henry the intoxicated minor, is based loosely on Cowart v. Grimaldi, 746 A.2d 833 (Conn. Super. Ct. 1997). For courts finding that the secondary defendant's assistance or encouragement was insufficiently substantial, see Rangel v. Parkhurst, 779 A.2d 1277, 1284 (Conn. App. Ct. 2001) (distinguishing *Cowart* and holding that parents who were aware that their 20-year-old son who lived with them had purchased beer and stored it in a second refrigerator in their home did not, as a matter of law, substantially contribute to their son's drunken driving); Heick v. Bacon, 561 N.W.2d 45, 53 (Iowa 1997) (holding that girlfriend of intoxicated driver who told him to "keep going" when he considered pulling over to re-engage four-wheel drive on snowy road, despite a convenient place to stop, failed, as a matter of law, to satisfy substantiality requirement).

Comment g. Factual causation. Restatement Second of Torts § 876, Comment *d* (AM. L. INST. 1979) provided that liability for aiding and abetting would be imposed if the "encouragement or assistance is a *substantial factor* in causing the resulting tort." (Emphasis added.) The use of that "substantial factor" language creates uncertainty and confusion, however—and for that reason, the Institute disavowed the language's use in 2010. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 26, Comment *j* (AM. L. INST. 2010). Nevertheless, in context, the most reasonable interpretation of that language is that it requires proof that the secondary defendant's encouragement or assistance was necessary for the outcome—that, in other words, the plaintiff would have avoided injury, had the encouragement or assistance not been furnished. See Restatement Second, Torts § 432 (AM. L. INST. 1965) (discussing the "substantial factor" test).

That, however, is not the position taken by courts. Nor is it the position endorsed by prior projects of the Third Restatement of Torts. Courts have imposed aider and abettor liability absent proof that the secondary defendant's assistance or encouragement *caused* the primary defendant's tortious conduct. See, e.g., Allen v. Am. Cap. Ltd., 287 F. Supp. 3d 763, 807 (D. Ariz. 2017) ("Substantial assistance need not have been necessary to commit the tort."). And other parts of this Third Restatement have followed suit. See Restatement Third, Torts: Liability for Economic Harm § 28, Comment *e* (AM. L. INST. 2020) ("Liability for aiding and abetting does not require a showing

that the primary wrongdoing could not have occurred without the defendant's help."); see also Restatement Third, Torts: Intentional Torts to Persons § 10, Comment *g* (AM. L. INST., Tentative Draft No. 3, 2018) (observing that "courts often relax the traditional rules of causation in this context, allowing the plaintiff to recover even if he or she cannot prove that the participant's conduct was a but-for cause or part of a multiple sufficient causal set").

Indeed, the Reporters' research has found virtually no negligent aiding and abetting cases in which a court ruled that factual cause was required for liability, even though the research surfaced many cases in which it was doubtful that the secondary defendant's assistance or encouragement actually affected the primary wrongdoer's conduct. Possible exceptions to the above statement include Hellums v. Raber, 853 N.E.2d 143, 147 (Ind. Ct. App. 2006), and In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997) (citing Metge v. Baehler, 762 F.2d 621, 624 (8th Cir. 1985)). In both cases, use of "proximate cause" creates ambiguity about whether the court meant factual cause or scope of liability.

Comment h. Scope of liability. See Am. Fam. Mut. Ins. Co. v. Grim, 440 P.2d 621, 626 (Kan. 1968) (recognizing that an aider and abettor "may also be responsible for other foreseeable acts done by such other person in connection with the intended act").

Comment i. Duty. Professor Sarah Swan observes that "civil aiding and abetting . . . is not rooted in duty" even when the tort involved is a negligent one. Sarah L. Swan, *Aiding and Abetting Matters*, 12 J. TORT L. 255, 265 & n.72 (2019). For courts eschewing an inquiry into whether the secondary defendant owed a duty to the plaintiff, see Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr. Fund, 38 P.3d 12, 23 (Ariz. 2002), as corrected (Apr. 9, 2002) (stating, in an economic loss case, that proof of knowledge is a sufficient basis for imposing liability and that the imposition of liability "does not require the existence of, nor does it create, a pre-existing duty of care") (quoting Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 186 (Minn. 1999)); Stueve Bros. Farms, LLC v. Berger Kahn, 166 Cal. Rptr. 3d 116, 132 (Ct. App. 2013) (observing that civil liability for "aiding and abetting the commission of a tort" has "no overlaid requirement of an independent duty"); cf. Cowart v. Grimaldi, 746 A.2d 833, 836 (Conn. Super. Ct. 1997) (concluding that, because plaintiff's complaint adequately alleged the elements of aiding and abetting liability against defendant, defendant owed plaintiff a duty); Simons v. Homatas, 925 N.E.2d 1089, 1100 (Ill. 2010) (remarking that, while there is no general duty to prevent the criminal acts of another "one does have a duty to refrain from assisting and encouraging such tortious conduct").

Sometimes, courts use a no-duty determination to deny secondary liability when the aider and abettor merely failed to intervene to prevent the primary tortfeasor from committing the tort. See, e.g., Fiol v. Doellstedt, 58 Cal. Rptr. 2d 308, 313 (Ct. App. 1996) (declaring that "a supervisory employee owes no duty to his or her subordinates to prevent sexual harassment in the workplace"). The better way to address that scenario is to deny the claim because the secondary defendant did not affirmatively assist or encourage the primary defendant's tortious conduct. Some courts, unaware of the requisites of aiding and abetting, reflexively (and inappropriately) seek a basis for duty for those engaged in concerted action. See, e.g., Leon v. FedEx Ground Package

Sys., Inc., 2016 WL 836980, at *16 (D.N.M. 2016) ("To establish a claim for aiding and abetting, E. Leon must prove that: (i) Martinez–Leandro breached a duty owed to M. Leon . . . .").

Comment j. Joint and several liability. Restatement Third of Torts: Apportionment of Liability § 15 (AM. L. INST. 2000) imposes joint and several liability on those engaged in concerted action. In some jurisdictions, the state comparative responsibility statute speaks to whether liability for those engaged in concerted action is joint and several or otherwise, and, in those jurisdictions, Comment *j* has no role to play. However, other comparative responsibility statutes do not speak to the issue, and courts have had to resolve the matter of joint and several liability for secondary defendants in jurisdictions that have modified the rule of joint and several liability for multiple independent tortfeasors.

The leading case addressing the issue is Reilly v. Anderson, 727 N.W.2d 102 (Iowa 2006). There, the court analyzed the Iowa Comparative Fault Act, which generally adopts a hybrid rule straddling joint and several and pure several liability but does not expressly address liability for concerted action. Filling that gap, the *Reilly* court relied on the Restatement Third of Torts: Apportionment of Liability (AM. L. INST. 2000) to conclude that the Comparative Fault Act did not affect the common-law rule of joint and several liability for concerted action defendants. Id. at 110 (citing similar cases). Nevertheless, the court held that the Comparative Fault Act could be employed to apportion fault between primary and secondary defendants. The court recognized that the apportionment would not affect the defendants' liability to the plaintiff—but would facilitate contribution between them. See Comment *l*. Accord Fed. Deposit Ins. Corp. v. Loudermilk, 826 S.E.2d 116, 127 (Ga. 2019) ("Under these circumstances, we hold that concerted action does survive the apportionment statute and damages (if any) will be awarded jointly and severally."); cf. Consumer Prot. Div. v. Morgan, 874 A.2d 919, 953 (Md. 2005) (concluding that concerted action defendants were jointly and severally liable for restitution in action under state's Consumer Protection Act).

For an example of a state comparative responsibility statute that explicitly imposes joint and several liability on those who act in concert, see N.D. CENT. CODE § 32-03.2-02 (specifying that "any persons who act in concert in committing a tortious act or aid or encourage the act . . . are jointly liable for all damages attributable to their combined percentage of fault"). Restatement Third, Torts: Apportionment of Liability § 15, Reporters' Note to Comment *a* (AM. L. INST. 2000) compiles additional state statutes addressing this issue.

In those jurisdictions that employ several liability, in whole or in part, for concerted action defendants, the factfinder's assignment of comparative responsibility to the primarily and secondary tortfeasors determines their several liability shares.

Comment k. Comparison with vicarious liability. For a cogent discussion of the difference between vicarious liability and liability for aiding and abetting, see Restatement Third, Torts: Intentional Torts to Persons § 10, Comment *e* (AM. L. INST., Tentative Draft No. 3, 2018). Notwithstanding the fact that liability for aiding and abetting, unlike vicarious liability, requires affirmative conduct by the secondary defendant (namely, the secondary defendant must substantially assist or encourage the primary defendant's tortious conduct), many courts and some

commentators confuse the two bases for liability, likely because both require the commission of a tort by another.

Reflecting this confusion, the leading case on concerted action liability, Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983) (applying District of Columbia law), repeatedly refers to both aiding and abetting and civil conspiracy as entailing vicarious liability. See also Anderson v. Airco, Inc., 2004 WL 2827887, at *2 (Del. Super. Ct. 2004) ("Accountability for concerted tortious action stems from common-law principles of vicarious liability."); 2 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 435 (2d ed. 2011) (addressing concerted action in section on vicarious liability, although noting that explanations of concerted liability other than vicarious liability are "equally or more plausible"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 46, at 322 (4th ed. 1971) ("The original meaning of 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result."); 1 STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 3:8 (2022 update) ("Aiding and abetting and conspiracy are theories of derivative or vicarious liability."). But see Hansen v. State Farm Mut. Auto. Ins. Co., 2012 WL 993264, at *4 n.2 (D. Nev.), on reconsideration in part, 2012 WL 6204822 (D. Nev. 2012) (explaining misuse of vicarious liability in case involving concerted action); 1 JOEL W. MOHRMAN & ROBERT J. CALDWELL, HANDLING BUSINESS TORT CASES § 5:5 (2020 update) (distinguishing concerted action from vicarious liability).

Comment l. Apportionment of liability. As explained in the Reporters' Note to Comment *j*, Reilly v. Anderson, 727 N.W.2d 102, 110-111 (Iowa 2006), held that responsibility could be separately assigned to those engaged in concerted action. See also Restatement Third, Torts: Apportionment of Liability § 15 (AM. L. INST. 2000) (assuming comparative share of responsibility will be assigned to each participant in concerted activity); Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1222 (2023) (emphasizing that aiding and abetting requires "conscious and culpable assistance"). Although both the primary and secondary defendants are jointly and severally liable to the plaintiff, assigning responsibility separately to each permits contribution claims between them if one pays more than one's share.

Notwithstanding *Reilly* and § 15, a handful of courts have held that responsibility cannot be apportioned among tortfeasors who act in concert. Taking this tack, for instance, the Illinois Supreme Court stated:

> Thus, while the tortfeasors who act in concert in causing a plaintiff's injury may all engage in some affirmative conduct relating to that injury, the legal relationship which exists among them eliminates the possibility of comparing their conduct for purposes of apportioning liability. Indeed, if an apportionment of liability were permitted, the act of one tortfeasor would no longer be the act of all, and the essence of the doctrine of concerted action would be destroyed.

Woods v. Cole, 693 N.E.2d 333, 337 (Ill. 1998). The court did not address whether and, if so how, liability would be apportioned among concerted action defendants. Likewise, in Fed. Deposit Ins. Corp. v. Loudermilk, 826 S.E.2d 116, 128 (Ga. 2019), the Georgia Supreme Court declared that

"the fault resulting from concerted action (in its traditional, common-law form) is not divisible as a matter of law and, therefore, cannot be apportioned" but nevertheless found that Georgia's contribution statute, which preceded comparative responsibility and provided for pro rata contribution, could be used for contribution claims among those engaged in concerted action. Cf. Consumer Prot. Div. v. Morgan, 874 A.2d 919, 953 (Md. 2005) (agreeing with *Woods* with regard to a restitution award under the state's Consumer Protection Act). The commentary the *Woods* and *Loudermilk* courts relied on when discussing the difficulty of apportioning comparative responsibility between various defendants preceded the adoption of comparative contribution, which provides an appropriate and useful tool for such apportionment.

Historically, *in pari delicto* barred a contribution claim among defendants jointly liable for concerted action. See, e.g., Union Stock Yards Co. of Omaha v. Chi., B. & Q.R.R. Co., 196 U.S. 217, 226 (1905) ("When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable or participes criminis, and the damage results from their joint offense.") (quoting Gray v. Bos. Gas Light Co., 114 Mass. 149 (1873)); Sargent v. Interstate Bakeries, Inc., 229 N.E.2d 769, 773 (Ill. App. Ct. 1967). However, that rule was applied to concerted action that resulted in an intentional tort. Whether *in pari delicto* bars a contribution claim among concerted action defendants liable for a negligence tort is a matter about which the Reporters have found very little case law. But see Bohannon v. Indus. Maint., Inc., 148 N.E.2d 602, 605 (Ill. App. Ct. 1958) (ruling that *in pari delicto* barred a contribution claim between concerted action defendants involving a negligence tort), vacated on other grounds sub nom. Bohannon v. Ryerson & Sons, Inc., 155 N.E.2d 585 (Ill. App. Ct. 1959).

Comment m. Comparison with civil agreement liability. See Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983) (applying District of Columbia law) (explaining the difference between civil conspiracy and aiding and abetting); Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr. Fund, 38 P.3d 12, 37 (Ariz. 2002), as corrected (Apr. 9, 2002) ("There is a qualitative difference between proving an agreement to participate in a tort, i.e., a civil conspiracy, and proving knowing action that substantially aids another to commit a tort."); Restatement Third, Torts: Liability for Economic Harm § 27, Comment *a* (AM. L. INST. 2020) (tracing the differences between civil conspiracy and aiding and abetting while noting "[t]he two theories diverge most significantly because liability for conspiracy does not require that the defendant have substantially assisted the wrongdoer's misconduct" because, for conspiracy, "[i]t is enough if the defendant agreed with another, or others, to join in committing a tort"); Sarah L. Swan, *Aiding and Abetting Matters*, 12 J. TORT L. 255, 259 (2019) ("[C]ivil conspiracy involves joint activity through *agreement*, while aiding and abetting, involves joint activity through *substantial assistance*.").

Unfortunately, as the D.C. Circuit has observed, "[c]ourts and commentators have frequently blurred the distinction between the two theories of concerted liability." *Halberstam*, 705 F.2d at 478. See Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIAMI L. REV. 1, 13 (1999) ("The use of a conspiracy theory to impose liability is often confused with the similar

[concept of] aider-abettor liability."); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy,* In Pari Delicto, *Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 639-641 (1972) (noting the confusion and urging greater rigor in recognizing the differences between these two bases for secondary liability); Swan, supra at 259 (lamenting that "civil aiding and abetting continues to be commonly conflated with conspiracy"). For an opinion in which the court did not keep the two bases for concerted action liability as distinct as described in Comment *m*, see Olson v. Ische, 343 N.W.2d 284, 289 (Minn. 1984) (mixing and matching requirements from § 876(a) and (b)).

As one commentator put it: "The differences are important to maintain where both [aider and abettor liability and conspiracy] could apply so that the court can determine whether the plaintiff has established one cause of action, instead of parts of each but not a whole of either." Josephine T. Willis, Note, *To (b) or Not to (b): The Future of Aider and Abettor Liability in South Carolina*, 51 S.C. L. REV. 1045, 1051 (2000). Another reason for careful delineation is that, while all parties to a conspiracy are liable for any coconspirator's torts in furtherance of the conspiracy, in the aiding and abetting context, primary parties are not liable for torts committed by the secondary tortfeasor, as Comment *o* makes plain. See Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 259 (2005) ("While an aider and abettor is liable for the wrongs of the primary wrongdoer, the primary wrongdoer would not be liable for wrongs committed by the aider and abettor, absent a finding of conspiracy.").

Comment n. Employer as primary defendant. This issue was latent in Patton v. Simone, 1992 WL 398478, at *5 (Del. Super. Ct. 1992), in which the court found that the employer committed a negligence tort but did not identify or address the impact of workers' compensation.

Comment o. Primary defendant not subject to liability for independent torts of the secondary defendant. See Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983) (applying District of Columbia law) ("An aider-abettor is liable for damages caused by the main perpetrator, but that perpetrator, absent a finding of conspiracy, is not liable for the damages caused by the aider-abettor."); Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 259 (2005) ("While an aider and abettor is liable for the wrongs of the primary wrongdoer, the primary wrongdoer would not be liable for wrongs committed by the aider and abettor, absent a finding of conspiracy.").

Comment q. Relationship with dramshop and social host liability. Illustrations 10 and 11, involving the fraternity party where alcohol is served to minors, are loosely based on the facts of Fassett v. Delta Kappa Epsilon (New York), 807 F.2d 1150, 1163 (3d Cir. 1986) (applying Pennsylvania law). Because Missouri does not recognize social host liability, the court in Shelter Mut. Ins. Co. v. White, 930 S.W.2d 1, 2 (Mo. Ct. App. 1996), held that passenger-defendants who furnished alcohol to the driver of their vehicle were not liable for aiding and abetting in their provision of alcohol. However, the passengers' encouraging the driver to speed, ignore stop lights, and drive while intoxicated could be the basis for aiding and abetting liability.

Comment r. Strict liability. Published in 1979, Restatement Second of Torts § 876 (AM. L. INST. 1979) included a Caveat that the Institute took no position on the applicability of that Section

to strict liability torts. The Reporters' research has uncovered no cases published since 1979 that address the matter for strict liability for abnormally dangerous activity or for escaping animals. A small smattering of cases address concerted action liability in products liability cases, in which strict liability is among the claims made, but none identify or address the issue of the applicability of concerted action to strict products liability claims.

Comment s. Judge and jury. See, e.g., Cowart v. Grimaldi, 746 A.2d 833, 836 (Conn. Super. Ct. 1997) (observing that "whether there was 'substantial assistance' must be resolved by the trier of fact").

§ __. Agreements to Engage in Conduct that is Negligent or Reckless

(a) Actors are subject to liability for harm resulting from concerted action if:

(1) they agree to engage in conduct that is negligent or reckless;

(2) each actor engages in the conduct to which they agreed;

(3) at least one of the actors' agreed-to conduct factually causes cognizable physical, emotional, [or dignitary harm][*] to another; and

(4) the harm is within the scope of liability of the agreed-to negligent or reckless conduct.

(b) Liability of multiple actors under this Section is joint and several, in the absence of a statute modifying the rule. If a statute modifies the rule of joint and several liability for claims under this Section, apportionment of liability among those found liable is in accordance with the statute.

Comment:

a. History, scope, and rationale.

b. Terminology.

c. Agreement.

d. The object of the agreement.

e. Engaging in negligent or reckless conduct.

f. Agreement or conspiracy as a tort.

g. Factual causation.

h. Scope of liability.

i. Harm.

j. Joint and several liability.

k. Comparison with vicarious liability.

l. Apportionment of liability.

m. Comparison with aiding and abetting liability.

n. Strict liability.

o. Judge and jury.

[*] Depending on whether the Reporters for the Restatement Third of Torts: Defamation and Privacy cover this.

a. History, scope, and rationale. Restatement Second of Torts § 876(a) and (b) comprehensively addressed liability for concerted action, including aiding and abetting and agreements to engage in tortious conduct. The Third Restatement of Torts restates this material in a somewhat piecemeal fashion. Restatement Third of Torts: Liability for Economic Harm §§ 27 and 28 replace the portions of § 876(a) and (b) that cover torts causing purely economic harm. Restatement Third of Torts: Intentional Torts to Persons § 10 (Tentative Draft No. 3, 2018) replaces the portions of § 876(a) and (b) that address the intentional torts of battery, assault, purposeful infliction of bodily harm, intentional infliction of emotional harm, and false imprisonment. Restatement of the Law Fourth, Property Volume 2, Division I, § 1.1, Comment *j* (Tentative Draft No. 2, 2021) supersedes the portion of the Restatement Second of Torts § 876(b) that addresses trespass to land. This Section and § __ [Aiding and Abetting Negligence Torts] complete the Third Restatement's coverage of liability for concerted action (or in the terminology of the Restatement Third of Torts: Intentional Torts to Persons, "participation liability") by addressing agreements to commit negligent or reckless acts that result in physical, emotional, or [dignitary] harm. Section 876(c) is not restated in this Third Restatement of Torts because it is an a fortiori case of alternative liability, already addressed in Restatement Third of Torts: Liability for Physical and Emotional Harm § 28(b). The provisions identified above in the Third Restatement of Torts collectively supersede § 876 of the Second Restatement of Torts. The Reporters' Note to this Comment contains a table of the treatment of concerted-action torts in the different portions of the Third Restatement of Torts.

The Restatement Second of Torts endorsed liability for concerted action that consists of agreements to engage in conduct that is negligent or reckless. The Second Restatement did so by employing the broad term "tortious conduct," albeit with a caveat for strict liability. Nevertheless, because of confusion about the agreement and its object, see Comment *d*, case law supporting this Section is less robust than for the companion Section (§ __), which addresses aiding and abetting. The case law is roughly evenly balanced on whether to recognize this tort. Yet, there is no doubt that the Second Restatement of Torts extended liability to those who agree to engage in conduct that is negligent in § 876(a). That Section's Illustration 2 identifies a drag race, similar to Illustration 2 below, as an instance in which liability is imposed on all actors who engage in the race. Those decisions recognizing the tort display more coherency than those that do not. For this reason, rather than breaking with the Second Restatement, this Section carries its provision forward. See Comments *c* and *d*.

b. Terminology. Restatement Second of Torts § 876 is titled "Persons Acting in Concert." That title and Section encompassed liability for agreements as well as for aiding and abetting, which is addressed in § __ of this Restatement. This Section follows the Second Restatement's use of "concerted action" as an umbrella term covering both aiding and abetting and agreement liability. Rather than using the term "conspiracy" to describe the concerted action addressed in this Section, this Section employs the terms "agreement" and "agreement to engage in concerted action." In so doing, this Section echoes the Second Restatement, which also avoided use of "conspiracy" in favor of "acting in concert" or "pursuant to a common design." Employing language other than conspiracy makes sense because conspiracy is often associated with intentional, criminal, and especially heinous wrongdoing, and this Section addresses neither intent to cause harm nor criminal conduct. Use of this language also serves to emphasize how this Section differs from Restatement Third of Torts: Intentional Torts to Persons § 10 (Tentative Draft No. 3, 2018), entitled "Participation in an Intentional Tort."

c. Agreement. As Subsection (a)(1) makes plain, an agreement among actors is a prerequisite to liability under this Section; without an agreement, an actor may be liable pursuant to § __, which addresses aiding and abetting liability, but an actor is not subject to liability under this Section.

No formal or explicit agreement is required to satisfy Subsection (a)(1), and tacit agreement, or a wink or a nod, suffices. In virtually all cases, the existence of an agreement will be proven by circumstantial evidence, as defendants are not often forthcoming in providing direct evidence. The parties must agree to act in a manner that is sufficiently unreasonable to constitute negligence. Of course, an agreement can only be entered intentionally, but the intent necessary to agree must be distinguished from the conduct that is the object of the agreement. See Comment *d*. Put simply, two parties can intentionally agree to engage in conduct that is sufficiently unreasonable to be negligent.

The strength of the circumstantial evidence sufficient to satisfy the burden of production that an agreement exists is, as is the case with other instances of the use of circumstantial evidence, highly dependent on the facts, and it is sometimes subject to reasonable disagreement. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 28, Comment *b* (explaining the distinction between circumstantial evidence of causation that is sufficiently strong to permit an inference by contrast to weaker circumstantial evidence that would require the factfinder to engage in impermissible speculation and is therefore insufficient to meet the burden of production).

Illustration:

1. John and Richard are exiting a restaurant when they see Raphael, whom they know, driving in Raphael's souped-up pickup truck. All three teenagers make eye contact. While John and Richard enter John's sports car, Raphael pulls his truck to the side of the road. John, whose parked car is initially ahead of Raphael's truck, drives around the block so as to enable John to pull right beside Raphael's truck. After John stops beside Raphael's truck, John and Raphael make eye contact, while John guns his engine. A few seconds later, Raphael accelerates his truck by pushing the gas pedal to the floor. John does the same—and, a few moments later, John loses control of his car while traveling at 70 miles per hour and runs into a tree, injuring Richard. The circumstantial evidence of an agreement between Raphael and John to engage in a race is sufficient for the factfinder to find that there was an agreement, rendering Raphael subject to liability to Richard pursuant to this Section.

d. The object of the agreement. As Comment *c* explains, the object of the agreement must be distinguished from the fact of an agreement. While the actors must *intentionally agree*, the actors *need not* agree to engage in intentional wrongdoing: the actors need only agree to engage in conduct sufficiently risky that it constitutes negligence or recklessness. As one court saliently observed: "So long as the underlying actionable conduct is of the type that one can plan ahead to do, it should not matter that the legal system allows recovery upon a mere showing of unreasonableness (negligence) rather than requiring an intent to harm." Failure to keep these two elements of agreement and object distinct has led some courts to assert that there cannot be a conspiracy or agreement to commit negligence because intent is required—indeed, that an agreement to commit negligence is a logical fallacy. It is not.

Illustrations:

2. While fueling their cars at a gas station, John and Keefe agree to race on the adjacent public highway. During the race, Keefe, traveling at 85 miles per hour, strikes and injures Edwina. Even though it was not his car that struck Edwina, and even though neither John nor Keefe intentionally harmed Edwina, John is subject to liability to Edwina under this Section based on his agreement to engage, and engaging, in a drag race.

3. Able, Baker, and Charlie agree to play Russian Roulette with a 12-cylinder handgun. Able and Charlie take their turns, but no shell fires. Baker, next, pulls the trigger, and the chamber containing a live shell fires. The bullet misses Baker but destroys a

valuable antique owned by Able's parents. Even though no one intentionally destroyed the parents' antique, under this Section, Able and Charlie, along with Baker, are subject to liability to Able's parents for its value.

e. Engaging in negligent or reckless conduct. As Subsection (a)(2) makes plain, in order to be liable under this Section, the actor must actually engage in the agreed-to negligent or reckless conduct. Thus, an actor who agrees with another to engage in such conduct but who does not so engage is not liable under this Section but may be liable under § __ [Aiding and Abetting Negligence Torts].

Illustration:

4. River, Skylar, and Azariah agree that they will move a refrigerator owned by Skylar in a small pickup truck; because the truck's bed is so small, the refrigerator has to be upright (rather than on its back or side) during the move, which creates an unreasonable risk that the refrigerator will fall while in transit. The next day, Skylar and Azariah meet as planned, but River oversleeps and so does not appear. Skylar and Azariah muscle the refrigerator onto the truck, and, while Skylar is driving on the highway, the refrigerator tips over and flies out of the truck, injuring Noah, a pedestrian. Because River did not engage in the agreed-to negligent conduct, River is not liable to Noah under this Section. Because Skylar and Azariah both agreed to engage in conduct that is negligent and also engaged in the negligent conduct, they are subject to liability under this Section.

5. Same facts as Illustration 4, except that, while transporting the refrigerator, Skylar exceeds the speed limit by 25 miles per hour. The additional speed propels the refrigerator at a greater rate when it leaves the truck, resulting in Noah suffering enhanced harm over what was suffered in Illustration 4. River is not liable to Noah for the enhanced harm for the same reason he is not liable for the harm in Illustration 4. Azariah is liable for the same harm as in Illustration 4 but is not liable for the enhanced harm because he did not agree with Skylar to proceed at the enhanced speed. Skylar, alone, is subject to liability for Noah's enhanced harm.

6. Same facts as Illustration 4, except that River, Skylar, and Azariah, while discussing their plan to move the refrigerator, decide it would be safer to borrow D'Andre's larger truck for the move so that the refrigerator will fit lying down, which they do. The next day, while moving the refrigerator, D'Andre's truck breaks down. Skylar and Azariah

then transfer the refrigerator to Skylar's truck, where it stands upright; River remains with D'Andre's truck while it is towed to a repair shop. While Skylar and Azariah are moving the refrigerator in Skylar's truck, the refrigerator tips over and flies out of the truck, injuring Noah. Under this Section, Skylar and Azariah are subject to liability. River is not liable to Noah under this Section for two independently sufficient reasons: River did not agree to engage in conduct that is negligent, and River did not participate in the negligent conduct in which Skylar and Azariah engaged.

No case law addresses the matter of an actor who partially engages in the agreed-to conduct and whether there is a threshold of engagement that is nevertheless sufficient for liability under this Section. For the companion concerted-action tort of aiding and abetting negligent conduct, *substantial* assistance or encouragement is required for liability under that Section. See § __ [Aiding and Abetting Negligence Torts]. If confronted with an issue of threshold under this Section, courts might find the analogous threshold for Aiding and Abetting Negligence Torts informative, but in the absence of any case law, the Institute takes no position on the matter.

f. Agreement or conspiracy as a tort. It is often said, and correctly, that merely conspiring (or agreeing) is not a tort. Thus, there is no tort of civil conspiracy or agreement. Rather, as the foregoing Illustrations demonstrate, an agreement to engage in concerted action triggers liability if an actor both agrees to engage in conduct that is negligent or reckless and engages in that conduct, even if the actor's conduct did not cause the harm. For purposes of this Section, the relevant conduct is behavior sufficiently risky to constitute negligence or recklessness. Without the commission of all elements of a tort by one of those agreeing to the concerted action, there is no liability under this Section. While the actors must agree to conduct sufficiently unreasonable to constitute negligence or recklessness, they need not know that the conduct constitutes the tort of negligence (there is generally not a separate tort for reckless conduct; liability is ordinarily imposed under the negligence umbrella), just as an actor in an ordinary case of negligence need not be aware that the actor's conduct constitutes such a tort.

Illustration:

7. Same facts as Illustration 3, involving Russian Roulette, except that, after Able, Baker, and Charlie agree to play Russian Roulette, and after Able and Charlie have pulled the trigger (but for empty chambers), Able's parents discover what the boys are up to and prevent them from proceeding. Able, Baker, and Charlie have not committed a tort because,

although they agreed to engage in risky conduct sufficient to constitute negligence (or recklessness), and even engaged in such risky conduct, no legally cognizable harm resulted from their agreement.

g. Factual causation. The tortious act of at least one participant in the concerted action must be a factual cause of the plaintiff's harm. Of course, the requirement of Subsection (a)(3) is satisfied if more than one participant is a factual cause of the harm; a plausible case might be made that each of the participants who agree to the conduct that is negligent is a factual cause, albeit indirectly, of any harm that results from the performance of the agreed-to conduct. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 26-27. However, it is irrelevant if the conduct of other participants in the concerted action is not a direct factual cause of the harm. All of those who engage in concerted action are subject to liability for harm caused by any one of the actors in the course of the concerted activity. See Illustration 3 above. Thus, this tort might be conceptualized, although courts tend not to do so, as merely a rule attributing causation to those who agree with others who are the direct factual cause of the victim's harm.

h. Scope of liability. As with all other torts, an actor is not liable unless the harm is within the scope of liability (proximate cause) for the concerted negligent action in which the actor engaged. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 29-34. In the context of this Section, this means that an actor is not liable unless the plaintiff's harm results from one of the risks that made the actors' agreed-to conduct negligent or reckless.

Illustrations:

8. Jenny and Brenda agree to engage in a drag race. During the drag race, Jenny's engine explodes, injuring Colby, a pedestrian. Jenny's car engine explodes because Jenny's former partner sabotaged the car. Although Jenny and Brenda agreed to engage in risky conduct sufficient to constitute negligence (or recklessness), actually engaged in the conduct, and factually caused Colby's injury, neither is subject to liability under this Section because Colby's injury is not a result of any of the risks that made Jenny and Brenda's engaging in a drag race risky.

9. Same facts as Illustration 8, except that, instead of the car's engine exploding, Jenny loses control of her car while traveling 105 miles per hour and crashes into Colby, killing her. Pursuant to this Section, Brenda and Jenny are subject to liability for Colby's death. Colby's death is, as a matter of law, within Brenda and Jenny's scope of liability

(thus satisfying Subsection (a)(4)) because a car crash and physical injury or death are precisely the harm the risk of which made Brenda and Jenny's agreed-to conduct tortious. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29.

i. Harm. This Section covers physical and cognizable emotional harm as well as any residual legally cognizable harm caused by negligent or reckless conduct that is not addressed in other Third Restatement of Torts projects. Thus, Restatement Third of Torts: Liability for Economic Harm §§ 27 and 28 covers liability for concerted action that causes pure economic harm. That Restatement, and not this one, provide the rules for liability for such concerted action. See Reporters' Note to Comment *a* for a catalog of which of the projects in the Third Restatement cover which concerted-action torts.

j. Joint and several liability. As the black letter specifies, subject to contrary statutory provisions, all actors liable under this Section are jointly and severally liable for the comparative shares of responsibility assigned to each. See Restatement Third, Torts: Apportionment of Liability § 15 (imposing joint and several liability on all found liable for concerted action). While, historically, all those engaged in such conduct were jointly and severally liable, the modification of that doctrine by statute in some jurisdictions requires adapting the liability of concerted-action actors. Thus, in a jurisdiction that employs several liability for all tortfeasors, concerted-action liability can be employed, but each concerted-action defendant would be liable only for that defendant's comparative share of the damages rather than for the comparative share of all concerted-action defendants, as is the case for joint and several liability.

In those jurisdictions that, by statute, do not apply pure joint and several liability to concerted-action actors, a share of comparative responsibility should be assigned to each of the agreeing defendants for purposes of determining the liability of the defendants to plaintiff under the applicable rules for multiple tortfeasors. See Restatement Third, Torts: Apportionment of Liability §§ A18-E18 (providing alternative apportionment rules for jurisdictions with pure joint and several liability, pure several liability, and different hybrid systems that employ a mix of several and joint and several liability). For purposes of apportionment among defendants when contribution claims are asserted, see Comment *l*, even if joint and several liability is imposed, the factfinder should assign comparative responsibility to all defendants, save those vicariously liable. See Restatement Third, Torts: Apportionment of Liability § 7, Comment *g* and § 13.

Illustration:

10. Same facts as Illustration 3, involving the game of Russian Roulette. The factfinder should assign a percentage of comparative responsibility to each of Able, Baker, and Charlie. Unless the jurisdiction's statutory rules are otherwise, Able, Baker, and Charlie are jointly and severally liable to Able's parents for their full loss; the tortfeasors may be liable to each other for contribution. For discussion of apportionment among Able, Baker, and Charlie, see Comment *l.*

k. Comparison with vicarious liability. Liability under this Section is distinct from vicarious liability. Vicarious liability imposes liability on an actor who has not acted wrongfully based only on the relationship between the vicariously liable actor and the actor who commits a tort (sometimes called the "direct tortfeasor"). See [coverage of vicarious liability in this Restatement in the Introductory Note and §§ 1-7 (Tentative Draft No. 2, 2023)]. By contrast, this Section requires that each actor agree to engage and actually engage in negligent conduct, although only one actor's conduct need be a factual cause of plaintiff's harm. See Illustration 2. This distinction is critical for apportionment-of-liability purposes: comparative responsibility is not assigned to vicariously liable defendants who have not engaged in tortious conduct, yet it is assigned to concerted-action actors as explained in Comment *j*.

l. Apportionment of liability. Because those who agree to engage in negligent conduct are directly, not vicariously, liable, see Comment *k*, under this Section, the factfinder should assign a share of comparative responsibility to each defendant found liable under this Section. In jurisdictions that impose joint and several liability on those engaged in concerted action, the comparative share assigned to each constitutes the basis for apportioning liability among them. In jurisdictions that employ only several liability, no contribution claims exist, save in unusual circumstances explained in Restatement Third of Torts: Apportionment of Liability § 23, Comment *c*. No common-law indemnity action exists for a concerted-action defendant, because such a defendant has engaged in wrongdoing by agreeing with others to act in an unreasonably risky manner. See id. § 22(a)(2) (limiting common-law indemnity to those whose liability is not based on wrongdoing).

m. Comparison with aiding and abetting liability. Analytically, liability for agreeing to engage in concerted action is distinct from liability for aiding and abetting. Restatement Second of Torts § 876 contains two separate Subsections, one for each basis of concerted-action liability, under the umbrella title "Persons Acting in Concert." The popularity of § 876 has embedded these

two distinct bases for secondary liability in modern case law. As well, the Restatement Third of Torts: Liability for Economic Harm separates these two bases for secondary liability into two different Sections. This Restatement follows the Second Restatement's and the Economic Harm Restatement's structure for concerted action, employing two different Sections for the two different bases for concerted-action liability. Concerted action, as addressed in this Section, requires an agreement (see Subsection (a)(1)) and further requires each party to engage in conduct that is negligent or reckless (see Subsection (a)(2)); aiding and abetting does not. Aiding and abetting requires the secondary tortfeasor to offer substantial assistance or encouragement to the primary tortfeasor; this Section has no such requirement. Sometimes, defendants will be subject to liability under both this Section and § __ [Aiding and Abetting Negligence Torts]; sometimes, defendants will be subject to liability under only this Section or only § __ [Aiding and Abetting Negligence Torts].

Illustration:

11. Alice, Bobby, and Charlise agree to engage in a drag race two days hence. In the interim, Bobby gets cold feet and, because his car is operating suboptimally, decides to withdraw. Bobby's fiancé, Randi, urges him to participate and repairs Bobby's car. Bobby participates in the drag race and loses control of his vehicle during the race, resulting in damage to a parked car owned by Darcy. Alice, Bobby, and Charlise are subject to liability to Darcy based on this Section. Randi is not liable to Darcy based on this Section because Randi was not part of the agreement to engage in the drag race. See Comment *c* and Subsection (a)(1). Randi is subject to liability to Darcy based on aiding and abetting pursuant to § __. (Whether Alice, Bobby, and Charlise are liable under § __ for aiding and abetting depends on additional facts about their roles vel non in encouraging the others' participation.)

n. Strict liability. Restatement Second of Torts § 876 contained a Caveat stating that the Institute took no position on whether the concerted-action rules applied when the underlying tort was based on strict liability, rather than negligence or intentional conduct. It took that position because, at the time of the provision's publication (in 1979), scant case law addressed the issue. In the intervening decades, little has changed. There is no more developed case law on liability for agreements to engage in conduct that would constitute strict-liability torts, including abnormally dangerous activity and escaping animals, today than existed in 1979. Accordingly, the Institute continues to take no position on the matter.

A number of courts have addressed whether concerted-action liability exists for those who sell or distribute defective products. Because much of products liability today is based on negligence principles, such an application would be well within the scope of this Section. See Restatement Third, Torts: Products Liability § 4 ("While §§ 2(b) and 2(c) [that define design and warnings defects] do not explicitly talk in terms of negligence, they do incorporate the risk/utility approach that characterizes classic negligence law.").

However, some products-liability claims (such as those involving manufacturing defects or nonnegligent sellers) are truly based on strict-liability principles. Given the limited case law addressing these strict-liability torts, the Institute takes no position on this matter as well.

o. Judge and jury. The issues that determine whether concerted-action liability exists—agreement, factual causation, scope of liability, whether the conduct agreed to constitutes negligence or recklessness, and whether the defendants, in fact, engaged in the conduct—are all standard tort-law issues that are addressed by the jury.

REPORTERS' NOTE

Comment a. History, scope, and rationale. This Section addresses liability for agreements to engage in conduct that is negligent or reckless and results in physical, emotional [or dignitary] harm. Restatement Second of Torts § 876 (AM. L. INST. 1979) does not explicitly state that its concerted-action provision applies to negligence torts (indeed, § 876 merely states that it is applicable to "tortious conduct" and, in a Caveat, takes no position on conduct that supports imposing strict liability), contrary to the explicit inclusion of negligent conduct for agreements to engage in concerted actions under this Section. See id. Comment *d*. However, § 876 plainly contemplates the application of concerted-action liability to agreements to engage in conduct that is negligent, as Illustration 2 describes an impromptu drag race by two drivers. See also Clausen v. Carroll, 684 N.E.2d 167, 171 (Ill. App. Ct. 1997) (holding "all participants in a drag race can be held equally liable for any injury resulting from such a race, even when the participant being sued did not physically cause the injury"). As explained below, significant case law since the Second Restatement supports the application of concerted-action liability to agreements to engage in negligent conduct, although a substantial minority of courts have denied such. The history of civil conspiracy in Anglo-American law is recounted in Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIAMI L. REV. 1, 5-11 (1999); see also Jerry Whitson, Note, *Civil Conspiracy: A Substantive Tort?*, 59 B.U. L. REV. 921, 922-927 (1979) (tracing the history of civil conspiracy from medieval England).

Counting the position of jurisdictions on recognizing a claim for concerted-action agreement to engage in conduct that is negligent or reckless is a bit difficult because most concerted-action cases involve intentional wrongdoing, and these cases often involve the infliction of economic, rather than physical or emotional, harm. We have eliminated most such cases from

our tally, and we limit discussion below to cases that address nonintentional tortious conduct that causes physical or emotional (and occasionally reputational) harm. To round out our analysis, we have also included economic-harm cases denying liability (there are none accepting such liability) for agreements to engage in conduct that is negligent from states with no case law on negligent conduct causing physical harm because we think that is reasonably good evidence about how the jurisdiction would respond to cases involving the harm addressed in this Section.

Seven jurisdictions have case law that explicitly considers and approves liability for those who agree to engage in, and in fact engage in, conduct that is negligent or reckless and causes injury. See Navarrete v. Meyer, 188 Cal. Rptr. 3d 623, 638 (Ct. App. 2015), as modified (July 22, 2015) (rejecting defendant's argument that civil conspiracy requires an intentional tort and holding that an agreement to commit a negligent act is sufficient for concerted-action liability); Resol. Tr. Corp. v. Heiserman, 898 P.2d 1049, 1055 (Colo. 1995) (holding for purposes of requirement of "tortious act" in long-arm statute that civil conspiracy to engage in negligent conduct is sufficient to constitute a tortious act); Adcock v. Brakegate, Ltd., 645 N.E.2d 888, 894 (Ill. 1994) ("[W]e reject Owens-Corning's claim that a cause of action for civil conspiracy does not arise unless one of the conspirators commits an *intentional* tort in furtherance of the conspiracy."); Wright v. Brooke Grp. Ltd., 652 N.W.2d 159, 172-173 (Iowa 2002) ("We disagree with those courts that conclude an agreement to be negligent is a non sequitur. . . . So long as the underlying actionable conduct is of the type that one can plan ahead to do, it should not matter that the legal system allows recovery upon a mere showing of unreasonableness (negligence) rather than requiring an intent to harm."); Farmer v. City of Newport, 748 S.W.2d 162, 164 (Ky. Ct. App. 1988) (plaintiffs "may present evidence to prove that the . . . manufacturers, acting jointly, manufactured and/or marketed an unreasonably dangerous product); Gettings v. Farr, 41 S.W.3d 539, 543 (Mo. Ct. App. 2001) (endorsing concerted-action liability for drag racing in the course of concluding that allegations that one defendant drove negligently and injured plaintiff after agreeing with other defendants to steal a car sufficient to state a claim for civil conspiracy); Boykin v. Bennett, 118 S.E.2d 12 (N.C. 1961) (approving liability for concerted action when the defendants engaged in a drag race). See also Bader Farms, Inc. v. BASF Corp., 39 F.4th 954, 970 (8th Cir. 2022) (applying Missouri law) (affirming sufficiency of the evidence to support jury's finding of an agreement by two seed companies that resulted in the sale of genetic-modified cotton seed that encouraged improper and off-label use of an herbicide that damaged plaintiff's cotton crop and stating that concerted-action liability can be imposed even when concerted actors did not agree to cause harm).

In addition, another 13 states have cases that address claims against defendants who agreed to engage in negligent or reckless conduct and affirm liability therefor, but without explicitly addressing the propriety of extending concerted action to negligent or reckless conduct. See Taylor v. Am. Chemistry Council, 576 F.3d 16, 34 & n.20 (1st Cir. 2009) (applying Massachusetts law) (stating in dicta: "The second type of conspiracy, based on section 876 of the Restatement, is a form of vicarious liability for the tortious conduct of others."); Bors v. Johnson & Johnson, 208 F. Supp. 3d 648, 658 (E.D. Pa. 2016) ("Pennsylvania follows Section 876 of the Restatement (Second) of Torts defining the elements of a concerted action claim providing an individual is liable under a

concerted action claim when the individual "does a tortious act in concert with the other or pursuant to a common design with him . . . and his own conduct, separately considered, constitutes a breach of duty to the third person.") (quoting In re Asbestos Sch. Litig., 46 F.3d 1284, 1293 (3d Cir. 1994)); Gomez v. Hensley, 700 P.2d 874, 877 (Ariz. Ct. App. 1984) (reversing summary judgment for three truck drivers who agreed to "run together" to arrive before rush hour, while analogizing their conduct to drag racing); Kuczynski v. McLaughlin, 835 A.2d 150, 157 (Del. Super. Ct. 2003) (denying motion for summary judgment by operators of two boats when one pilot led the other at an excessive speed); Roos v. Morrison, 913 So. 2d 59, 68 n.1 (Fla. Dist. Ct. App. 2005) (stating that Florida recognizes the "'acting in concert' basis for joint and several liability" and analyzing conduct pursuant to § 876 of the Second Restatement); Yount v. Deibert, 147 P.3d 1065, 1074 (Kan. 2006) (concluding that plaintiff could pursue a concerted-action claim against children who engaged in pyromaniacal activities but that Kansas's modification of joint and several liability precluded application of Restatement Second of Torts § 876); Bates v. Lagars, 193 So. 2d 375, 381 (La. Ct. App. 1966) ("The common intent of Samuels and Lagars and the purpose to be accomplished through their concerted action was, as heretofore noted, to replace Samuels' truck on the highway. Their concerted action did not end there, but, as already pointed out, extended to the negligent acts by which they endeavored to place the truck back on the highway."), writ refused, 195 So. 2d 146 (La. 1967); Abel v. Eli Lilly & Co., 343 N.W.2d 164, 176 (Mich. 1984) (upholding DES plaintiffs' claims for concerted action to negligently manufacture and promote ineffective and dangerous drugs, analogizing the claim to drag-racing agreements); Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 188 (N.Y. 1982) (affirming jury verdict against DES manufacturer based on claim of concerted action due to conscious parallelism); McDonald v. Sarriugarte, 124 P.3d 614, 616 (Or. Ct. App. 2005) (reversing trial court's grant of summary judgment on behalf of defendant driver because evidence was sufficient for factfinder to determine driver was engaged in drag race); Skipper v. Hartley, 130 S.E.2d 486, 489 (S.C. 1963) (affirming judgment against three defendants who engaged in a drag race that resulted in death of plaintiff's decedent); Mich. Millers Mut. Fire Ins. Co. v. Or.-Wash. R. & Nav. Co., 201 P.2d 207, 211 (Wash. 1948) (holding two railroads whose crews agreed to cooperate in burning weeds and underbrush near their tracks and who negligently failed to have adequate fire-suppression equipment on-site were subject to liability to plaintiff whose warehouse was damaged by the fire based on concerted action to engage in negligent conduct); Ogle v. Avina, 146 N.W.2d 422, 426 (Wis. 1966) ("In a race, the participants share equally the responsibility for damage done by any participant.").

An additional four states have case law that impliedly recognizes liability for agreements to act wrongfully but not criminally or intentionally to cause harm, but deny liability based on the facts of the case. See In re Welding Fume Prods. Liab. Litig., 526 F. Supp. 2d 775, 807 (N.D. Ohio 2007) (rejecting the particular claim because "no reasonable jury could find that Caterpillar acted 'in accordance with an agreement to cooperate' with any other defendant in this case—neither an agreement to engage in a particular course of conduct, nor an agreement to accomplish any of the objectives alleged by plaintiffs"); Olson v. Ische, 343 N.W.2d 284, 289 (Minn. 1984) (rejecting the particular claim given the lack of agreement between defendants); GES, Inc. v. Corbitt, 21 P.3d

11, 15 (Nev. 2001) (holding lack of evidence of agreement to engage in risky conduct rendered particular concerted-action claim inappropriate); Lussier v. Bessette, 16 A.3d 580, 584 (Vt. 2010) (denying concerted-action liability to hunters on joint hunting effort because nonshooting hunters were unaware of shooting hunter's reckless conduct).

The leading case on concerted-action liability generally expressed dubiety in dicta about the issue of civil conspiracy to commit an underlying tort. See Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983) ("Furthermore, it is difficult to conceive of how a conspiracy could establish vicarious liability where the primary wrong is negligence . . . ."). Exemplary of courts that express the view that concerted action to commit negligence is a logical fallacy is Juhl v. Airington, 936 S.W.2d 640, 644 (Tex. 1996): "Because negligence by definition is not an intentional wrong, one cannot agree or conspire to be negligent." *Juhl* (and others) confuse the requirement that there be an agreement with the element of the object of that agreement. See also 16 AM. JUR. 2d *Conspiracy* § 53 (Feb. 2023 update) ("[I]n order for civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement. Thus, civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong.").

There are 14 jurisdictions with cases that explicitly deny the availability of concerted-action liability for agreements to engage in negligent or reckless conduct as provided in this Section, although in some of those jurisdictions contrary precedent exists. See In re Nat'l Century Fin. Enters., Inc., 504 F. Supp. 2d 287, 292-293 (S.D. Ohio 2007) (ruling, in economic-loss case, that complaint failed to state a claim for conspiracy to commit negligent misrepresentation because it is "'impossible to conspire to commit negligence'") (quoting Senart v. Mobay Chem. Corp., 597 F. Supp. 502, 505 (D. Minn. 1984)); Ruth v. A.O. Smith Corp., 2005 WL 2978694, at *2-3 (N.D. Ohio 2005) (applying Mississippi law) (declaring that a "conspiracy requires an 'agreement,' and a person cannot negligently agree to something—an agreement can only be reached with intent"); Sonnenreich v. Philip Morris Inc., 929 F. Supp. 416, 419 (S.D. Fla. 1996) (declaring that "[l]ogic and case law dictate that a conspiracy to commit negligence is a non sequitur"); Rogers v. Furlow, 699 F. Supp. 672, 675 (N.D. Ill. 1988) (stating that a conspiracy to commit negligence is "a paradox at best"); Campbell v. A.H. Robins Co., 615 F. Supp. 496, 500 (W.D. Wis. 1985) (concluding that defendants cannot conspire to commit negligence or strict-products-liability torts because there "must be some manifestation of intent to conspire"); Anderson v. Airco, Inc., 2004 WL 2827887, at *4 (Del. Super. Ct. 2004) (concluding that recognizing civil agreements to commit negligent acts "would blur the distinctions between conspiracy and aiding and abetting" and therefore should not be recognized); R.R.R. P'ship v. Investguard, Ltd., 463 S.E.2d 735, 736 (Ga. 1995) (dicta endorsing trial court's statement that "a conspiracy to commit negligence was a 'non sequitur'"); Shirley v. Glass, 241 P.3d 134, 157 (Kan. Ct. App. 2010) (stating that "it would be illogical to find a 'meeting of the minds' (conspiracy) to act negligently") (quoting Gillespie v. Seymour, 876 P.2d 193 (Kan. Ct. App. 1994)), aff'd in part, rev'd in part on other grounds, 308 P.3d 1 (Kan. 2013); New Orleans Jazz & Heritage Found., Inc. v. Kirksey, 40 So. 3d 394, 408 (La. Ct. App. 2010) (asserting that an intentional tort is required for concerted-action liability, albeit in an economic-harm case); Lewis v. Airco, Inc., 2011 WL 2731880, at *33 (N.J. Super. Ct. App. Div. 2011) (concluding that the New

Jersey Supreme Court would follow a majority of case law requiring an intentional tort to support liability for agreement to engage in concerted action); Rosen v. Brown & Williamson Tobacco Corp., 782 N.Y.S.2d 795, 795 (App. Div. 2004) (failing to cite *Bichler*); Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590 (Pa. Super. Ct. 2004) ("Strict liability and negligence counts are insufficient to support their civil conspiracy claim."); Fogarty v. Palumbo, 163 A.3d 526, 543 (R.I. 2017) (economic-loss case, concluding concerted action "'requires a valid underlying intentional tort theory'") (quoting Read & Lundy, Inc. v. Wash. Tr. Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004)); Juhl v. Airington, 936 S.W.2d 640, 644 (Tex. 1996) ("Because negligence by definition is not an intentional wrong, one cannot agree or conspire to be negligent.") In addition, Restatement Third of Torts: Liability for Economic Harm § 27, Comment *f* (AM. L. INST. 2020) concurs with these courts for concerted-action claims involving economic harm.

Of the 15 cases (two are cited for Kansas) cited above denying concerted-action liability for negligent or reckless conduct, nine rely, at least in part, on the proposition that because an agreement requires intentionality, there can be no conspiracy claim for negligence. See In re Nat'l Century Fin. Enters., Inc., 504 F. Supp. 2d 287, 292-293 (S.D. Ohio 2007) (ruling, in economic-loss case, that complaint failed to state a claim for conspiracy to commit negligent misrepresentation because it is "'impossible to conspire to commit negligence'") (quoting Senart v. Mobay Chem. Corp., 597 F. Supp. 502, 505 (D. Minn. 1984)); Ruth v. A.O. Smith Corp., 2005 WL 2978694, at *2-3 (N.D. Ohio 2005) (applying Mississippi law) (declaring that "conspiracy requires an 'agreement,' and a person cannot negligently agree to something—an agreement can only be reached with intent"); Sonnenreich v. Philip Morris Inc., 929 F. Supp. 416, 419 (S.D. Fla. 1996) (declaring that "[l]ogic and case law dictate that a conspiracy to commit negligence is a non sequitur"); Campbell v. A.H. Robins Co., 615 F. Supp. 496, 500 (W.D. Wis. 1985) (concluding that defendants cannot conspire to commit negligence or strict-products-liability torts because there "must be some manifestation of intent to conspire"); R.R.R. P'ship v. Investguard, Ltd., 463 S.E.2d 735, 736 (Ga. 1995) (dicta endorsing trial court's statement that "a conspiracy to commit negligence was a 'non sequitur'"); Shirley v. Glass, 241 P.3d 134, 157 (Kan. Ct. App. 2010) (asserting that "it would be illogical to find a 'meeting of the minds' (conspiracy) to act negligently") (quoting Gillespie v. Seymour, 876 P.2d 193 (Kan. Ct. App. 1994)), aff'd in part, rev'd in part on other grounds, 308 P.3d 1 (Kan. 2013); Rosen v. Brown & Williamson Tobacco Corp., 782 N.Y.S.2d 795, 795 (App. Div. 2004) (failing to cite *Bichler*); Sackman v. Liggett Group, Inc., 965 F. Supp. 391, 395 (E.D.N.Y. 1997) (failing to cite *Bichler*; concluding that, because conspiracy claim can only be based on intentional conduct, plaintiff could succeed based only on products-liability claim and not on negligence claim); Juhl v. Airington, 936 S.W.2d 640, 644 (Tex. 1996) ("Because negligence by definition is not an intentional wrong, one cannot agree or conspire to be negligent.").

In five other cases, the court's discussion of the reason for denying the claim is so confused it is impossible to categorize the reason(s) why it denies liability for concerted-action agreements. See Anderson v. Airco, Inc., 2004 WL 2827887, at *3 (Del. Super. Ct. 2004); Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co., 277 S.W.3d 255, 261 (Ky. Ct. App. 2008); Fogarty v. Palumbo, 163 A.3d 526, 543 (R.I. 2017); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1012 (D.S.C. 1981).

Another is based solely on a statute that imposes joint liability for conspiracy to commit an "intentional or willful act." New Orleans Jazz & Heritage Found. Inc. v. Kirksey, 40 So. 3d 394, 408 (La. Ct. App. 2010).

In another three cases, the courts conclusorily assert that conspiracy requires an intentional tort, sometimes citing other cases that had so held. See Brown v. Philip Morris Inc., 228 F. Supp. 2d 506, 517 (D.N.J. 2002) ("Absent her fraud claim or other intentional tort, plaintiff's conspiracy claim fails for lack of an underlying tort. Civil conspiracy is not an independent cause of action, and conspiracy liability depends on the presence of an underlying finding of tort liability."); Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268 (D.R.I. 2000) ("Civil conspiracy is not an independent basis of liability, but merely a means of establishing joint liability for tortious conduct. Thus, a civil conspiracy claim requires a valid underlying intentional tort theory."); Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590 (Pa. Super. Ct. 2004) ("Strict liability and negligence counts are insufficient to support their civil conspiracy claim").

In some instances, there are conflicting cases from the same jurisdiction: Compare Kuczynski v. McLaughlin, 835 A.2d 150, 157 (Del. Super. Ct. 2003) (denying motion for summary judgment by operators of two boats when one pilot led the other at an excessive speed), with Anderson v. Airco, Inc., 2004 WL 2827887, at *4 (Del. Super. Ct. 2004) (concluding that civil-conspiracy claim based on negligence required dismissal). Compare Adcock v. Brakegate, Ltd., 645 N.E.2d 888 (Ill. 1994) (affirming the legitimacy of a civil-conspiracy claim in the negligence context), with Rogers v. Furlow, 699 F. Supp. 672, 675 (N.D. Ill. 1988) (observing that a conspiracy to commit negligence is "a paradox at best"). Compare Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 188 (N.Y. 1982) (affirming jury verdict against DES manufacturer based on claim of concerted action due to conscious parallelism after concluding that ineffective objection to challenged instruction on concerted action rendered it the law governing the case), with Rosen v. Brown & Williamson Tobacco Corp., 782 N.Y.S.2d 795, 795 (App. Div. 2004) (denying existence of liability for agreeing to engage in conduct that is negligent while failing to cite *Bichler*); Sackman v. Liggett Grp., Inc., 965 F. Supp. 391, 395 (E.D.N.Y. 1997) (same as *Rosen*).

In many of the above-cited cases that reject civil liability for agreements to commit negligent acts, the holdings were based on reasoning by analogy to inapposite criminal-conspiracy doctrine. Criminal law requires that a conspiracy must be for the purpose of committing an underlying criminal offense. When the offense does not require specific intent but can occur through negligence or recklessness, courts hold that an agreement to commit that negligent or reckless conduct is insufficient to support a criminal conspiracy to commit the underlying crime. The rationale is that the conduct the defendants agreed to engage in was not itself criminal, as it did not have as its object the outcome that creates criminality. Thus, consider two defendants who agree to engage in a drag race in a jurisdiction that criminalizes negligent homicide. The defendants have not agreed to commit the crime, i.e., a negligent homicide; they have agreed only to commit a negligent (or reckless) act; courts hold that under criminal-conspiracy statutes, defendants have not entered into a criminal conspiracy. See WAYNE R. LAFAVE, CRIMINAL LAW § 12.2, at 835 (6th

ed. 2017) ("It follows, therefore, that there is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result.").

Commentary to the Model Penal Code endorses this position but also explains why the doctrinal position on criminal-law conspiracies is not necessarily applicable to civil conspiracies to commit negligent acts:

> When recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, as for example when homicide through negligence is made criminal, there could not be a conspiracy to commit that crime. This should be distinguished, however, from a crime defined in terms of conduct that creates a risk of harm, such as reckless driving or driving above a certain speed limit. In this situation the conduct rather than any result it may produce is the element of the crime, and it would suffice for guilt of conspiracy that the actor's purpose was to promote or facilitate such conduct.

Model Penal Code § 5.03, Comment 2(c)(i) at 408 (AM. L. INST., Proposed Official Draft and Revised Comments 1985); accord LAFAVE, supra, § 12.2, at 836 n.211.

The remaining states are either unclear about their position or have failed to address the issue.

In short, when it comes to whether to recognize a cause of action to engage in negligent conduct, jurisdictions are split. In state supreme courts, the tilt toward permitting concerted-action liability for negligent conduct is pronounced: 13 state supreme courts support such liability while only two deny it. That tilt is balanced by federal district courts where 10 have ruled against concerted-action liability and only two support it. Among those courts denying liability, a significant proportion demonstrate confusion about what element of the concerted-action claim requires intent.[*]

Coverage of the full panoply of provisions addressing liability for concerted actions is distributed among several of the projects that comprise the Third Restatement of Torts. That distribution is explained in the following table:

Third Restatement Project	Conduct and Harm Covered	Aiding and Abetting	Conspiracy or Agreement
Liability for Economic Harm	Intentionally Tortious and Negligent (only for aiding and abetting); Pure economic harm	§ 28 Aiding and Abetting. A defendant is subject to liability for aiding and abetting a tort upon proof of the following elements: (a) a tort was committed against the plaintiff by another party; (b) the defendant knew that the other party's conduct was wrongful; (c) the defendant knowingly and substantially assisted in the commission or concealment of the tort; and (d) the plaintiff suffered economic loss as a result.	§ 27 Civil Conspiracy. A defendant is subject to liability for conspiracy to commit a tort upon proof of the following elements: (a) the defendant made an agreement with another to commit a wrong; (b) a tortious or unlawful act was committed against the plaintiff in furtherance of the agreement; and (c) the plaintiff suffered economic loss as a result.

[*] A separate Comment about reputational harm may be required depending on what the Defamation and Privacy Reporters want to do. A file titled "Defamation for Agreements" has cases with which to construct a Comment on this subject.

Third Restatement Project	Conduct and Harm Covered	Aiding and Abetting	Conspiracy or Agreement
Intentional Torts to Persons	Intentionally Tortious Harm to Natural Persons	One Section Addresses Both § 10 Participation in an Intentional Tort. An actor who knowingly and substantially instigates, encourages, or assists another person's commission of an intentional tort of battery, purposeful infliction of bodily harm, assault, intentional infliction of emotional harm, or false imprisonment is subject to liability for that tort, even if the actor's conduct does not independently satisfy all elements of the underlying tort.	
Miscellaneous Provisions	Negligent or Reckless Conduct. Physical and Emotional Harm and Residual Harms not Covered in Other Third Restatement Projects	§ ___. Aiding and Abetting Negligence Torts. An actor is subject to liability for aiding and abetting if: (1) another commits a negligence tort causing physical, emotional, or dignitary harm to a third person; (2) the actor had actual knowledge that the other might engage in negligent or reckless conduct posing a risk to a third person or persons; and (3) the actor substantially assisted or encouraged the other to engage in, and thereby increased the risk of, that negligent or risky conduct.	§ ___. Agreements to Engage in Conduct that is Negligent or Reckless. (a) Actors are subject to liability for negligence for harm resulting from concerted action if: (1) they agree to engage in conduct that is negligent or reckless; (2) each actor engages in the conduct to which they agreed; (3) at least one of the actors' agreed-to conduct factually causes cognizable physical, emotional, [or dignitary harm]* to another; and (4) the harm is within the scope of liability of the agreed-to negligent or reckless conduct. (b) Liability of multiple actors under this Section is joint and several, in the absence of a statute modifying the rule. If a statute modifies the rule of joint and several liability for claims under this Section, apportionment of liability among those found liable is in accordance with the statute. * Depending on whether the Reporters for Defamation and Privacy cover this.
Restatement of the Law Fourth, Property	Property Torts; Trespass to Land	Volume 2, Division I § 1.1. Trespass to Land: Prima Facie Case. An actor is subject to liability to another for trespass to land if the actor intentionally: (a) enters or causes entry of a tangible thing or a person onto land in the other's possession, or (b) remains on land in the other's possession, or (c) fails to remove a tangible thing that the actor is duty-bound to remove from land in the other's possession. Section 1.1, Comment *j* is titled: "Causing entry by third persons: secondary trespass liability."	

Comment b. Terminology. On the baggage that use of the term "conspiracy" conveys, see Krulewitch v. United States, 336 U.S. 440, 448 (1949) (Jackson, J. concurring) ("It sounds

historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself.").

Comment c. Agreement. In Orszulak v. Bujnevicie, 243 N.E.2d 897, 898 (Mass. 1969), two drivers began spontaneously racing, resulting in one of them injuring the plaintiff. Over the other driver's objection that there was insufficient evidence of an agreement to race, the court observed: "Direct testimony of an agreement to race was not required." (quoting Nelson v. Nason, 177 N.E.2d 887, 888 (Mass. 1961)) and continued: "The jury could have reasonably inferred that the conduct of the defendant and [the other defendant] prior to the accident amounted to a challenge and response . . . ." Id. Illustration 1 is based loosely on *Orszulak*. See also W. PAGE KEETON ET AL., THE LAW OF TORTS § 46, at 323 (5th ed. 1984) (declaring that "all that is required is that there be a tacit understanding as where two automobile drivers suddenly and without consultation decide to race their cars on the public highway"). It is sometimes said that: "Parallel conduct by itself cannot prove agreement . . . ." Payton v. Abbott Labs, 512 F. Supp. 1031, 1037 (D. Mass. 1981). The qualification *by itself* is important, because parallel conduct is relevant and with other circumstantial evidence may be sufficient to find an agreement, as the *Payton* court recognized by analyzing additional circumstantial evidence proffered by the plaintiff before concluding that the evidence was insufficient for a finding of agreement.

For a case in which the appellate court disagreed with the trial court on whether the evidence was sufficient for the jury to draw an inference that defendant was engaged in racing another driver, see McDonald v. Sarriugarte, 124 P.3d 614, 616 (Or. Ct. App. 2005).

Comment d. The object of the agreement. Illustration 2, involving the drag race on a public highway, is based on Saisa v. Lilja, 76 F.2d 380, 380 (1st Cir. 1935) (applying Massachusetts law). For other cases imposing liability on participants in a drag race for harm caused by one of the racers, see Biercyznski v. Rogers, 239 A.2d 218 (Del. 1968); Clausen v. Carroll, 684 N.E.2d 167 (Ill. App. Ct. 1997); Nelson v. Nason, 177 N.E.2d 887, 888 (Mass. 1961); see generally A. E. Korpela, *Liability of Participant in Unauthorized Highway Race for Injury to Third Person Directly Caused by Other Racer*, 13 A.L.R.3d 431 § 3[a] (originally published in 1967) (listing 22 states that have recognized concerted-action liability for those engaging in drag racing).

As explained in the Reporters' Note to Comment *a*, Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), is a prominent case that, in dicta, supported the position that civil-agreement liability did not extend to negligence: "Furthermore, it is difficult to conceive of how a conspiracy could establish vicarious liability where the primary wrong is negligence . . . ." Id. at 478. For other courts that express the view that concerted action to commit negligence is a logical fallacy, see e.g., Juhl v. Airington, 936 S.W.2d 640, 644 (Tex. 1996): "Because negligence by definition is not an intentional wrong, one cannot agree or conspire to be negligent." *Juhl* (and others) confuse the requirement that there be an agreement with the element of the object of that agreement. See also, e.g., Wright v. Brooke Grp. Ltd., 114 F. Supp. 2d 797, 837 (N.D. Iowa 2000) ("[B]ecause conspiracy requires an agreement to commit a wrong, there can hardly be a conspiracy to be negligent—that is, to intend to act negligently."); Campbell v. A.H. Robins Co., 615 F. Supp. 496, 500 (W.D. Wis. 1985) (declaring that "how the defendants, or anyone else, can conspire to cause

negligent harm or conspire to cause damages under a strict product liability claim is inexplicable"); see also 16 AM. JUR. 2d *Conspiracy* § 53 (2023 update) ("[I]n order for civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement. Thus, civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong."). Restatement Third of Torts: Liability for Economic Harm § 27, Comment *f* (AM. L. INST. 2020) concurs:

> Joining a conspiracy is an intentional act. It cannot be done negligently. Likewise, to conspire is to plan a deliberate wrong; liability does not arise for an agreement to do an act that is then found to have been negligent. But if a conspiracy is formed to commit an intentional wrong, and such a wrong is then committed, the conspirators are subject to liability for any tortious act in furtherance of the conspiracy, including an act that is wrongful because it was negligent.

Comment e. Engaging in negligent or reckless conduct. This requirement, while not prominent in Restatement Second of Torts § 876(a) (AM. L. INST. 1979) is nevertheless reflected in the "does a tortious act" language in the paragraph and in Illustration 2, in which police officers who have agreed to attempt to arrest an individual are not liable for the harm resulting from one such officer shooting the individual as he attempted to escape. See also Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co., 277 S.W.3d 255, 261 (Ky. Ct. App. 2008) (concluding that there was no evidence that two defendants alleged to have agreed were participants in the misconduct by other defendants).

Comment f. Agreement or conspiracy as a tort. See Halberstam v. Welch, 705 F.2d 472, 479 (D.C. Cir. 1983) (applying District of Columbia law) ("Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing . . . liability for the underlying tort."); Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIAMI L. REV. 1, 15-16 (1999) ("For 300 years it has been taken as settled law that there can be no recovery based on a claim of civil conspiracy absent a completed, underlying tort.").

Contrary to tort law, criminal law, which does not always require that harm occur for a crime to be committed, criminalizes agreements to engage in a crime or to commit a criminal act or to accomplish a lawful goal in a criminal manner—and a defendant can be convicted of a conspiracy even if no harm ensues. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.01(A), at 402 (8th ed. 2018) (explaining that a conspirator may be prosecuted for conspiracy before committing the substantive offense).

Comment g. Factual causation. For the basic requirement that conduct of one of the concerted-action parties be a cause of plaintiff's harm, see, e.g., Baker v. Danek Med., 35 F. Supp. 2d 865, 873 (N.D. Fla. 1998) (concluding plaintiff could not pursue concerted-action claim against medical product manufacturers because there was no evidence that plaintiff's surgeon had ever seen or been affected by defendants' misleading and deceptive marketing practices). For the proposition that the conduct of only one of the parties to an agreement needs to be a factual cause of harm, see, e.g., Payton v. Abbott Labs, 512 F. Supp. 1031, 1035 (D. Mass. 1981) ("The second

element of the theory is that the defendant's own conduct must be tortious. This does not mean that the defendant's conduct must cause or be a substantial factor in causing the plaintiff's injury."). Some courts, in the intentional-tort context, require that defendant's agreeing be a substantial contributing factor for the plaintiff's harm, but the Intentional Torts Restatement explains why that language cannot be understood as requiring factual causation as provided in the Third Restatement of Torts. See Restatement Third, Torts: Intentional Torts to Persons § 10, Reporters' Note to Comment *g* (AM. L. INST., Tentative Draft No. 3, 2018).

Courts sometimes say that the agreement itself is the cause of plaintiff's injury. See, e.g., Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183, 187 (S.D. Ga. 1982) ("The common tortious activity is held to be the cause of the plaintiff's injury, and therefore all participants are held liable even if only one directly caused the harm."). There is some sense to that claim, as it may be that but for the agreement, made by all participants, harm would not have occurred. However, under this Section, such an inquiry is unnecessary. If only one actor's conduct was a factual cause of plaintiff's harm, all who engaged in the conduct are also liable for the harm, as is the case in other areas of tort law when one party is liable for the acts of another, such as vicarious liability.

Comment j. Joint and several liability. In some jurisdictions that have statutorily modified joint and several liability, the statute's modification does not apply to defendants held liable on a concerted-action theory. See, e.g., Woods v. Cole, 693 N.E.2d 333, 337 (Ill. 1998) (holding that statute modifying joint and several liability "is not applicable in negligence actions where several individuals act in concert to cause a single, indivisible harm," even though the statute contained no explicit exception); Reilly v. Anderson, 727 N.W.2d 102, 109 (Iowa 2006) (same as *Woods* in aiding and abetting case). By contrast, some courts have ruled that the state's comparative fault act requires that several liability be employed for concerted-action defendants. See Yount v. Deibert, 147 P.3d 1065, 1076 (Kan. 2006).

Despite the historical yoking of joint and several liability and concerted action, concerted action can exist without joint and several liability. For a court that, contrary to this Comment, believed that abolition of joint and several liability negated the availability of concerted action, see Doe v. Cutter Biological, a Div. of Miles, Inc., 852 F. Supp. 909, 914 (D. Idaho 1994) (reasoning that because Idaho abolished joint and several lability, "it does not appear that the concert of action theory of alternative liability would be viable in Idaho"); cf. Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 823 P.2d 717, 726 (Haw. 1991) (denying concerted-action claim in suit against Factor VIII manufacturers in order "not to burden" defendants with joint and several liability).

Comment k. Comparison with vicarious liability. For a cogent discussion of the difference between vicarious liability and liability for concerted action, see Restatement Third, Torts: Intentional Torts to Persons § 10, Comment *e* (AM. L. INST., Tentative Draft No. 3, 2018). Notwithstanding the fact that liability for concerted-action agreements, unlike vicarious liability, requires wrongful conduct by all parties to the agreement, many courts and some commentators confuse the two bases for liability, likely because, as with vicarious liability, concerted-action liability does not require that each member of the agreement commit a completed tort.

Reflecting this confusion, the leading case on concerted-action liability, Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983) (applying District of Columbia law), repeatedly refers to both aiding and abetting and concerted action as entailing "vicarious liability." See also Anderson v. Airco, Inc., 2004 WL 2827887, at *2 (Del. Super. Ct. 2004) ("Accountability for concerted tortious action stems from common-law principles of vicarious liability."); Cunningham v. Waymire, 612 S.W.3d 47, 68 (Tex. App. 2019) (stating that "civil conspiracy is a theory of vicarious liability"); 2 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 435 (2d ed. 2011) (addressing concerted action in section on vicarious liability, although noting that explanations of concerted liability other than vicarious liability are "equally or more plausible"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 46, at 322 (4th ed. 1971) ("The original meaning of 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result."); 1 STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 3:8 (2022 update) ("Aiding and abetting and conspiracy are theories of derivative or vicarious liability."). But see Hansen v. State Farm Mut. Auto. Ins. Co., 2012 WL 993264, at *4 n.2 (D. Nev.), on reconsideration in part, 2012 WL 6204822 (D. Nev. 2012) (explaining misuse of vicarious liability in case involving concerted action); 1 JOEL W. MOHRMAN & ROBERT J. CALDWELL, HANDLING BUSINESS TORT CASES § 5:5 (2020 update) (distinguishing concerted-action liability from vicarious liability).

Comment l. Apportionment of liability. Because agreement to engage in concerted action requires the parties to agree to and actually engage in conduct that is negligent, each of the parties to the agreement should be assigned a share of comparative responsibility by the factfinder. See Restatement Third, Torts: Apportionment of Liability § 15 (AM. L. INST. 2000) (assuming comparative share of responsibility will be assigned to each participant in concerted activity). Although in the absence of law negating it, all those who agree are jointly and severally liable to the plaintiff, assigning responsibility separately to each permits contribution claims among them if one pays more than his or her share.

Notwithstanding § 15, a few courts have held that responsibility cannot be apportioned among tortfeasors who act in concert. Taking this tack, for instance, the Illinois Supreme Court stated:

> Thus, while the tortfeasors who act in concert in causing a plaintiff's injury may all engage in some affirmative conduct relating to that injury, the legal relationship which exists among them eliminates the possibility of comparing their conduct for purposes of apportioning liability. Indeed, if an apportionment of liability were permitted, the act of one tortfeasor would no longer be the act of all, and the essence of the doctrine of concerted action would be destroyed.

Woods v. Cole, 693 N.E.2d 333, 337 (Ill. 1998). The court did not address whether and, if so how, liability would be apportioned among concerted-action defendants. Likewise, in Fed. Deposit Ins. Corp. v. Loudermilk, 826 S.E.2d 116, 128 (Ga. 2019), the Georgia Supreme Court declared that "the fault resulting from concerted action (in its traditional, common-law form) is not divisible as a matter of law and, therefore, cannot be apportioned" but nevertheless found that Georgia's contribution statute, which preceded comparative responsibility and provided for pro rata

contribution, could be used for contribution claims among those engaged in concerted action. Cf. Consumer Prot. Div. v. Morgan, 874 A.2d 919, 953 (Md. 2005) (agreeing with *Woods* with regard to a restitution award under the state's Consumer Protection Act). The commentary the *Woods* and *Loudermilk* courts relied on in discussing the difficulty of apportioning comparative responsibility among various defendants preceded the adoption of comparative contribution, which provides an appropriate and useful tool for such apportionment.

Historically, in pari delicto barred a contribution claim among defendants jointly liable for concerted action. See, e.g., Union Stock Yards Co. of Omaha v. Chi., B. & Q.R. Co., 196 U.S. 217, 226 (1905) ("When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable or participes criminis, and the damage results from their joint offense.") (quoting Gray v. Bos. Gas Light Co., 114 Mass. 149 (1873)); Sargent v. Interstate Bakeries, Inc., 229 N.E.2d 769, 773 (Ill. App. Ct. 1967). However, that rule was applied to concerted action to commit an intentional tort. Whether in pari delicto bars a contribution claim among concerted-action defendants liable for a negligence tort is a matter about which the Reporters have found very little case law. But see Bohannon v. Indus. Maint., Inc., 148 N.E.2d 602, 605 (Ill. App. Ct. 1958) (ruling that in pari delicto barred a contribution claim between concerted-action defendants involving a negligence tort), vacated on other grounds sub nom. Bohannon v. Ryerson & Sons, Inc., 155 N.E.2d 585 (Ill. App. Ct. 1959). Given that in pari delicto is not applied to bar contribution claims when two defendants independently act negligently or recklessly and cause indivisible harm, there would seem to be little reason to apply it to two defendants who agree to engage in conduct that is negligent or reckless.

Comment m. Comparison with aiding and abetting liability. See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr. Fund, 38 P.3d 12, 37 (Ariz. 2002), as corrected (Apr. 9, 2002) ("There is a qualitative difference between proving an agreement to participate in a tort, i.e., a civil conspiracy, and proving knowing action that substantially aids another to commit a tort."); Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983) (applying District of Columbia law) (explaining the difference between civil conspiracy and aiding and abetting); Restatement Third, Torts: Liability for Economic Harm § 27, Comment *a* (AM. L. INST. 2020) (explaining the two differences between concerted action and aiding and abetting described in this Comment *m*); Sarah L. Swan, *Aiding and Abetting Matters*, 12 J. TORT L. 255, 259 (2019) (observing that "civil conspiracy involves joint activity through *agreement*, while aiding and abetting, involves joint activity through *substantial assistance*"). For opinions in which the court did not keep the two bases for concerted-action liability as distinct as described in Comment *m*, see Olson v. Ische, 343 N.W.2d 284, 289 (Minn. 1984) (mixing and matching requirements from § 876(a) and (b)). See also Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983) (applying District of Columbia law) ("Courts and commentators have frequently blurred the distinction between the two theories of concerted liability."); Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIAMI L. REV. 1, 13 (1999) ("The use of a conspiracy theory to impose liability is often confused with the similar [concept of] aider-abettor liability."); David S. Ruder, *Multiple Defendants in Securities Law Fraud*

Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, *Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 639-641 (1972) (noting the confusion and urging greater rigor in recognizing the differences between these two bases for liability); Swan, supra at 259 (observing that "civil aiding and abetting continues to be commonly conflated with conspiracy").

As one commentator put it: "The differences are important to maintain where both subsections could apply so that the court can determine whether the plaintiff has established one cause of action, instead of parts of each but not a whole of either." Josephine T. Willis, Note, *To (b) or Not to (b): The Future of Aider and Abettor Liability in South Carolina*, 51 S.C. L. REV. 1045, 1051 (2000). Another reason for distinction is that all parties to an agreement are liable for all others' torts in furtherance of the agreement; that is not true for primarily liable parties to aiding and abetting who are not vicariously liable for torts committed by the secondarily liable tortfeasor. See § __ Aiding and Abetting Negligence Torts, Comment *o*; Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 259 (2005) ("While an aider and abettor is liable for the wrongs of the primary wrongdoer, the primary wrongdoer would not be liable for wrongs committed by the aider and abettor, absent a finding of conspiracy."); Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIAMI L. REV. 1, 13-14 (1999) ("Arguably the advantage of the choice of a conspiracy theory, in contrast to joint tortfeasorship or aiding and abetting, is that the co-conspirator generally need not be shown to have performed or contributed substantial assistance to a tortious act that caused the plaintiff's injury in order to be found liable. It must be noted, however, that even the courts have difficulty separating the concepts; thus, the advantage may be lost in the confusion.").

Comment n. Strict liability. For discussion of the application of concerted-action liability in a products-liability claim, see In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 175 F. Supp. 2d 593, 634 (S.D.N.Y. 2001) (identifying, but ducking, the issue by reasoning that defendants' acts of marketing the product were intentional, so civil conspiracy could apply); Sackman v. Liggett Grp., Inc., 965 F. Supp. 391, 396 (E.D.N.Y. 1997) (discussing the conflicting case law on the issue and concluding "the case law on this area is muddled"); Farmer v. City of Newport, 748 S.W.2d 162, 164 (Ky. Ct. App. 1988) (recognizing concerted-action claim against mattress manufacturers and observing, "[o]ther jurisdictions have recognized the tort of concert of action when applied to product liability litigation," and citing cases from Michigan and Pennsylvania). For further discussion of the concert-of-action theory as applied in products-liability litigation, see LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 3.06[4] (2023 update), and AMERICAN LAW OF PRODUCT LIABILITY 3D, TREATISE §§ 9.23-9.24 (2023 update).

FIREFIGHTER'S RULE

Firefighter's Rule

An actor who innocently or negligently creates a peril that occasions the presence of a professional rescuer owes no duty to that professional rescuer when the rescuer is injured by the very same peril that occasioned the rescuer's presence, and the rescuer is injured while (1) on duty, (2) acting within the scope of employment, and (3) engaged in the performance of emergency activities.

Comment:

a. History and terminology.
b. Rationale and support.
c. Restriction on duty, not affirmative defense.
d. "Professional rescuer" defined: *firefighters and police officers.*
e. "Professional rescuer" defined: *volunteers.*
f. On duty and acting within scope of employment.
g. "Emergency," not routine, activities.
h. Exception for conduct more culpable than negligence.
i. Only bars recovery for tortious conduct that occasioned the rescuer's presence.
j. Only bars recovery for risk inherent in the rescuer's duties.
k. Ownership of property immaterial.
l. Exception when tortfeasor violates a safety statute enacted to protect rescuers.

a. History and terminology. Adopted in some form by a majority of states, the rule in this Section goes by several different names including the "firefighter's rule," the "fireman's rule," and the "professional rescuers doctrine." Regardless of the terminology utilized, this rule generally establishes that when, in the course of an emergency, on-duty professional rescuers are tortiously injured by the very peril they have been called to confront, they have no claim against the actor who negligently created that peril. In drawing a categorical line to bar *certain* rescuers' causes of action, the firefighter's rule deviates sharply from general tort principles, which hold, and have long held, that a party who attempts a rescue and is injured thereby may recover from the actor whose tortious conduct made the rescue necessary. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 32 (articulating the general and longstanding "rescue doctrine").

The Restatement Second of Torts addressed the firefighter's rule, somewhat elliptically, in § 345. That Section determined whether certain entrants on land, who entered the land in the performance of their public duties, were licensees or invitees. In particular, it provided:

> (1) Except as stated in Subsection (2), the liability of a possessor of land to one who enters the land only in the exercise of a privilege, for either a public or a private purpose, and irrespective of the possessor's consent, is the same as the liability to a licensee.
>
> (2) The liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land held open to the public, is the same as the liability to an invitee.

A prior project of the Restatement Third of Torts also discussed the firefighter's rule (but did not restate it). In particular, Restatement Third of Torts: Liability for Physical and Emotional Harm, discussed the rule in two places: §§ 32 and 51. The rule is addressed most prominently at Comment *m* to § 51, a Section titled "General Duty of Land Possessors." That Comment expressly declined to take a position on the firefighter's rule's vitality or scope. It did clarify, however, that, if the rule is to endure, it has to be justified on public-policy grounds. It can no longer be justified on its original basis—professional rescuers' status as entrants on the land—since, under id. § 51 (contra the Second Restatement § 345), except for flagrant trespassers, all land entrants are owed a duty of reasonable care. Likewise, that Third Restatement of Torts addressed what it calls the "firefighter rule" at § 32, Comment *c*. That Comment observed: "Professional rescuers are often treated differently [from other rescuers] under what is colloquially known as the 'firefighter rule.' Under its modern incarnation, that rule is based on a mélange of public-policy considerations and dealt with under the rubric of duty." This Section is consistent with, although greatly expands upon, those companion provisions.

b. Rationale and support. As Comment *a* explains, over time, the rationale undergirding the firefighter's rule has undergone a significant shift. Initially, the rule rested on status-based categories that classified entrants on land—and, in particular, an understanding that *certain* entrants were entitled only to the barest protection. Yet, starting in the late 1960s, those rigid property-based classifications started to be erased, and their underlying assumptions were reexamined. With the classifications' erasure, the primary rationale that initially justified the

firefighter's rule was eliminated. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, Comment *m* (explaining that, except for flagrant trespassers, all entrants on land are owed a duty of reasonable care and, therefore, "[t]o the extent that the firefighter rule has historically been grounded in the status of professional rescuers on the land, this Restatement eliminates the basis for that rationale").

As the firefighter's rule was divorced from its reliance on (largely defunct) landowner/land occupier categories, many courts turned to another premise: assumption of risk. In particular, many courts doubled down on the notion that professional rescuers ought to be barred from recovery in tort because, by becoming firefighters or police officers, these public servants impliedly assumed the particular risks one predictably encounters in those notoriously dangerous professions. For a time, this justification held sway. Yet eventually, it, too, was undercut, as comparative responsibility took hold, and the separate defense of secondary implied assumption of risk was broadly abolished. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 25, Comment *e* (explaining that, with the widespread adoption of comparative responsibility, "[n]o separate defense of assumption of risk is recognized"); see also Restatement Third, Torts: Apportionment of Liability § 2, Comment *i* (explaining that "'implied assumption of risk,' does not . . . constitute a [separate] defense unless it constitutes consent to an intentional tort"); id. § 3, Comment *c* (further explaining that, to the extent a plaintiff unreasonably and voluntarily encounters a known risk, the plaintiff's fault is to be addressed under principles of comparative responsibility).

With both the above landowner/occupier and assumption-of-risk justifications weakened or demolished, support for the rule has cooled in some quarters. Reflecting this chill, a half-dozen states have completely or mostly abolished the firefighter's rule, whether by judicial decision or legislative action. Furthermore, a handful of states that had not previously adopted the rule have expressly declined to do so, finding that contemporary justifications for the rule do not support its creation.

In the approximately 35 states where the firefighter's rule has been retained, it now rests, somewhat precariously, on a kaleidoscope of public-policy considerations. In particular, in contemporary jurisprudence, the rule is principally justified on the following three grounds: (1) a desire to avoid double recovery within the tort system on the one hand and the workers' compensation system on the other, sometimes alongside a sense that taxpayers who furnish the rescuer's salary and benefits are analogous to employers who provide workers' compensation coverage and, like employers, are entitled to protection from liability; (2) a market-driven theory

that rescuers impliedly exchange their right to sue in order to obtain higher wages and benefits and the related notion that, given this exchange, it is unfair to allow rescuers, already appropriately compensated for accepting risk, to recover on those occasions when the anticipated risk materializes; and (3) an interest in encouraging members of the public to call for assistance whenever that assistance is needed, without hesitation or fear of liability.

As should be clear: In contemporary doctrine, the rule tends to rest on these rationales, and so, to the extent the protection afforded tortfeasors by the firefighter's rule does not meaningfully advance these disparate aims and policies, the rule's application in any particular instance becomes harder to justify. Moreover, these justifications are not watertight. Each is susceptible to critique, rests on a dubious empirical premise, or is under- or over-inclusive. Because these justifications are not unassailable, this Section proceeds on the assumption that these public-policy rationales are not strong enough to support a broad rule that would extinguish a wide array of rescuers' claims in contravention of traditional tort principles. Accordingly—and consistent with its narrow articulation in many states—the firefighter's rule endorsed by this Section is quite circumscribed.

c. Restriction on duty, not affirmative defense. Consistent with the vast majority of courts to address the matter, the limitation of liability set forth in this Section is "dealt with under the rubric of duty." Restatement Third, Torts: Liability for Physical and Emotional Harm § 32, Comment *c* (discussing the firefighter's rule). When underlying facts are in dispute, those facts must be submitted to the factfinder with appropriate instructions.

It bears emphasis: On those occasions when the firefighter's rule is found *not* to apply, that determination in no way guarantees that the professional rescuer will succeed in the rescuer's tort suit against the defendant. Such a finding merely permits the rescuer's suit to move forward. Like other litigants—even absent the firefighter's rule—professional rescuers must still prove all of the elements of their prima facie case, and, in certain instances, even if they do, their recovery may be reduced (or eliminated in modified comparative responsibility jurisdictions) because of comparative responsibility or because the defendant is able successfully to offer another affirmative defense.

d. "Professional rescuer" defined: firefighters and police officers. As used in this Section, a "professional rescuer" includes publicly employed professional firefighters and police officers. The term "professional rescuer" does not include privately employed security officers or medical personnel. This line-drawing, with publicly employed firefighters and police officers, on the one

side, and privately employed security officers and medical personnel, on the other, enjoys significant doctrinal support.

Less certain is whether this Section's firefighter's rule encompasses, and bars the claims of, other publicly employed professional rescuers, including emergency medical technicians (EMTs) and paramedics, or even lifeguards, customs officials, or animal-control officers. Counseling in favor of extending the firefighter's rule to these other professionals: Some justifications undergirding the firefighter's rule—including the desire to avoid a double recovery in the face of workers' compensation and an interest in encouraging members of the public to call for professional assistance whenever that assistance is needed—seem to fit. On these grounds, there is little reason to restrict the firefighter's rule to firefighters and police officers.

On the other side of the ledger, however, there are four powerful arguments against expansion of the firefighter's rule to encompass other publicly employed professionals. First, the expansion has limited doctrinal support: The majority of courts to address the matter continue to restrict the firefighter's rule only to firefighters and police officers. Second, there is no discernible trend toward expansion. In recent years, while some courts have expanded the firefighter's rule to encompass additional categories of rescuers, including EMTs and paramedics, other courts have emphasized that, particularly with the rule's foundation in flux and support for the rule arguably in eclipse (see Comments *a* and *b*), the firefighter's rule should be narrowly construed. Third, a restrained stance is appropriate because the firefighter's rule is an exception to typical tort principles—and exceptions to general principles should be narrowly drawn and jealously policed. Fourth and finally: This area of law ought not be subject to wild swings. Restraint is particularly appropriate, because, as noted in Comment *b*, the firefighter's rule rests, in part, on a market-driven theory that rescuers exchange their right to sue in order to obtain higher wages. If that trade is not transparent (i.e., employers and employees do not know, ex ante, which professionals' rights have been extinguished by the firefighter's rule, and so wages cannot calibrate), courts risk depriving rescuers of their right to sue in tort without any quid pro quo in the form of salary adjustments.

Given the scant authority supporting the extension of the firefighter rule to other professionals, the absence of a discernible trend toward expansion, and the special reasons for restraint and caution in this area, the preferred approach is to limit expansion of the firefighter's rule to publicly employed police officers and firefighters.

e. "Professional rescuer" defined: *volunteers.* Whether the term "professional rescuer" includes volunteers (i.e., on-duty rescuers who perform their work without remuneration) has been the subject of significant litigation. A majority of courts make no distinction based on whether the on-duty rescuer is or is not a volunteer, sometimes reasoning that even volunteer firefighters are entitled to generous state benefits for on-the-job injury. On the other hand, another key justification for the firefighter's rule—the market-driven theory that rescuers exchange their right to sue in order to receive higher wages and that, given this exchange, it is unfair to allow rescuers, already generously compensated for accepting risk, to recover on those occasions when that risk materializes—offers no support to the blanket denial of recovery, when the rescuer is not, in fact, paid. Furthermore, as noted above, a restrained stance regarding the firefighter's rule's scope and application is appropriate because the rule deviates sharply from typical tort principles, and exceptions that upend typical tort principles should be narrowly and clearly drawn. Given this uncertain terrain, the Institute declines to take a position regarding whether the rule enunciated in this Section applies only to paid rescuers or, instead, extends to extinguish the claims of those individuals who sustain tortious injury while volunteering their time in service to their communities.

f. On duty and acting within scope of employment. Consistent with a majority of courts and as clauses (1) and (2) of the black letter make clear, the firefighter's rule only shields an actor from liability when, at the time of injury, the professional rescuer is "on duty" and "acting within the scope of employment."

Illustrations:

1. The prior day, Elliot had worked on his car's engine but had inadvertently crossed some wires. Because of these crossed wires, when driving, his car started to smoke, causing him to stop in the right-hand lane of traffic, with smoke billowing out of his vehicle's hood. On her way home from the dentist, Nicole, a firefighter, sees Elliot's car smoking. Nicole immediately stops to help. As Nicole reaches into Elliot's vehicle to turn off the ignition, the car catches fire, and Nicole is injured by the blaze. This Section does not preclude Nicole's negligence action against Elliot because she was not "on duty" at the time of her injuries. Because the firefighter's rule is dealt with under the rubric of duty, see Comment *c*, and duty is a matter of law, the application of the firefighter's rule is a matter for the court when, as here, there is no dispute about the relevant facts.

2. Same facts as Illustration 1, except that, Nicole, in uniform, is no longer driving home from the dentist; she is now driving back to the firehouse after an offsite training exercise to gather her personal belongings before heading home. At the time of Elliot's car fire (5:08 p.m.), she is supposed to be clocked out (her shift technically ends at 5:00 p.m.). Whether she is "on duty" and "acting within the scope of employment" at the time of injury are questions for the factfinder. Once the factfinder resolves these questions, the application of the firefighter's rule is a matter for the court.

g. "Emergency," not routine, activities. Clause (3)'s qualifier "in the performance of emergency activities" clarifies that this Section does not shield an actor from liability when the actor's tortious conduct injures a professional rescuer while the rescuer is performing a routine or scheduled, rather than an emergency, activity.

Illustration:

3. Firefighter Francine is conducting an annual inspection of Owen's building to ensure compliance with the city's fire code. After inspecting the building's loading dock, Francine traverses a wooden staircase, which suddenly collapses because of Owen's negligent maintenance of it, causing her to suffer severe injuries. Because, inter alia, Francine sustained an injury when performing a routine, rather than an emergency, activity, Owen owes a duty of reasonable care to Francine, notwithstanding the firefighter's rule. For the general duty of land possessors, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 51.

h. Exception for conduct more culpable than negligence. This Section relieves a tortfeasor from liability to a professional rescuer only when the tortfeasor acts negligently or would be otherwise subject to liability under strict liability principles. This Section does not preclude liability when the actor behaves in a more culpable manner, whether recklessly, willfully, wantonly, or intentionally.

Illustrations:

4. Adam, an owner of a failing restaurant, intentionally sets fire to his own business in an attempt to commit insurance fraud. A passerby sees the flames and calls 911. After the firefighters arrive, the restaurant's roof collapses, causing severe injuries to Firefighter Francisco. This Section does not affect Firefighter Francisco's lawsuit against Adam because Adam started the blaze with the wrongful intent to destroy property. For a

discussion of arson, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 5, Comment *a*.

5. One snowy evening, Amanda is driving on the highway, 16 miles-per-hour over the speed limit, notwithstanding the treacherous conditions. Amanda's car hits a patch of ice, and, because of her excessive speed, careens into a guardrail, knocking her unconscious. While on patrol for the police department, Officer Jones sees Amanda's car, pulls over, and seeks to assist. In the course of opening Amanda's car door, Officer Jones strains her back. Whether this Section bars Officer Jones from recovery will depend on whether the factfinder determines that Amanda's conduct was merely negligent (and hence shielded from liability) or reckless (and therefore not shielded from liability). For what constitutes reckless conduct, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 2. For negligence, see id. § 3.

i. Only bars recovery for tortious conduct that occasioned the rescuer's presence. This Section shields from liability only the actor whose tortious conduct necessitates the rescuer's rescue. Pursuant to what is sometimes called the "independent negligence exception," this Section does not shield actors from liability if or to the extent that their tortious conduct is independent of or distinct from the tortious conduct that occasioned the professional rescuer's presence.

Illustrations:

6. At 11:47 p.m., Police Officer Wu responds to a domestic disturbance call in a mobile home park. Deciding he is safer with his flashlight turned off, Officer Wu walks with only faint illumination, provided by a distant streetlight. When in front of the neighbor's property, he trips on a baseball bat that the neighbor had carelessly left on the sidewalk. Officer Wu's suit against the neighbor property owner is not affected by the firefighter's rule because he was not injured by the risk that required his presence (the domestic disturbance), but instead by a different risk (the carelessly discarded baseball bat).

7. Police Officer Larsen sees Mitch, a motorist, driving erratically. Officer Larsen flashes her blue lights, and Mitch, a 17-year-old who had been drinking at Bob's Bar, slams on his brakes. As Mitch's vehicle careens to a stop, Officer Larsen's police cruiser collides into it, and Officer Larsen is injured in the collision. This Section does not affect Officer Larsen's suit against Bob's Bar for illegally serving Mitch alcohol because Bob's Bar's tortious conduct is distinct from the tortious conduct that occasioned Officer Larsen's

injury. Whether this Section precludes Officer Larsen from recovering against Mitch is a matter, initially, for the factfinder, who will have to determine whether Mitch was merely negligent (and hence shielded from liability) or reckless (and therefore not shielded from liability, pursuant to Comment *h*, supra).

8. Andre carelessly leaves a candle burning, causing a fire in his home. Recognizing the emergency, Andre summons the local fire department. As Firefighter Johnson arrives at Andre's property, she slips while running down Andre's icy driveway, breaking her leg. Because the icy driveway did not occasion Firefighter Johnson's presence at Andre's home, this Section does not affect Firefighter Johnson's suit against Andre. For the general duty of land possessors, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 51.

Nor does this Section shield actors from liability if their tortious conduct occurs after the rescuer arrives at the scene. Even actors whose tortious conduct occasions the rescuer's presence at the scene owe the rescuer a duty of reasonable care once the rescuer is in their presence or on their property. For that duty of care, see Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 6-7, 51. For adjustments to that general duty in the case of emergency, see id. § 9.

Illustrations:

9. Following a football game at the local high school, an officer from the local police department typically directs traffic—and, in particular, the officer assists attendees exiting a parking lot, as they turn onto a busy thoroughfare. This evening, Officer Martinez is tasked with these traffic responsibilities. While performing these responsibilities, however, Officer Martinez is struck by Leon, who is driving negligently. For three independently sufficient reasons, this Section does not affect Officer Martinez's suit against Leon: (1) Leon's tortious conduct was not the reason for Officer Martinez's presence at the intersection, (2) Leon's tortious conduct occurred after Officer Martinez's arrival at the intersection, and (3) Officer Martinez was performing a routine, rather than an emergency, activity.

10. Cynthia carelessly leaves her stove on, and a small kitchen fire erupts. After Cynthia calls 911, Firefighter Afzal and her crew enter Cynthia's house to extinguish the flames. In the course of her firefighting efforts, Firefighter Afzal decides to check surrounding rooms, including Cynthia's basement. Although Cynthia sees Firefighter Afzal headed toward the basement staircase, she neglects to warn Firefighter Afzal that the

third stair down is wobbly and should be avoided. Unwarned, Firefighter Afzal steps on the troublesome stair and falls, sustaining injury. For two independently sufficient reasons, this Section does not affect Firefighter Afzal's suit against Cynthia: (1) the poor condition of the stairs was not the reason for Firefighter Afzal's presence on the premises, and (2) Cynthia's failure to warn occurred after Firefighter Afzal's arrival. For the general duty of land possessors, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 51. For how the emergency circumstances might affect the claim, see id. § 9.

For purposes of the independent negligence exception, it is immaterial whether the actor summons emergency assistance or whether another individual makes the call.

Illustration:

11. Same facts as Illustration 10, except that (1) a *neighbor* sees the fire and calls 911, and (2) Firefighter Afzal is not injured by the wobbly step, but, rather, she is burned in the fire. Pursuant to this Section, Cynthia is not liable to Firefighter Afzal.

j. Only bars recovery for risk inherent in the rescuer's duties. Consistent with the interpretation of most courts, this Section precludes liability only if the professional rescuer is injured by risks that are inherent in, or peculiar to, the rescuer's professional responsibilities. This requirement, however, is mostly subsumed under the "independent negligence exception," as set forth in Comment *i*.

Illustration:

12. Train Co.'s train derails because of operator negligence. In the course of derailment, the train, which happened to be transporting an extremely rare and highly toxic chemical, spews dangerous vapors and fumes into the air. Unaware of the dangerous situation, Police Officer Latisha rushes to the crash site without donning personal protective equipment. Unguarded, she is exposed to the toxic vapors and fumes, causing serious injuries to her skin and eyes. Because unprotected exposure to the extremely rare toxic chemical is not an inherent danger of police officers' employment, this Section does not affect Police Officer Latisha's claim against Train Co.

k. Ownership of property immaterial. As Comments *a* and *b* explain, the firefighter's rule was originally born of, and justified by, the special duty rules that protected owners and occupiers of real property from liability. Reasoning that rescuers were licensees, or something closely analogous, courts held that rescuers took the property as they found it, so the landowner would not

be liable for negligently creating the dangerous condition that occasioned the rescuer's injury. Reflecting the doctrine's origins, some courts initially held that the firefighter's rule protected property owners and not others—or protected tortfeasors only if the tort was committed on private, but not public, land.

As explained above, the firefighter's rule no longer finds support in common-law entrant classifications. See Comments *a* and *b*; Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, Comment *m*. As a consequence, any distinction between property owners and others, or between one's private home and the public square, is unjustified. Accordingly, it is immaterial whether the actor seeking this Section's protection from liability is a property owner. Nor is it material whether the rescue—or the injury to the professional rescuer—took place on or off a given tract of private property.

Illustration:

13. Alexandra, a college student who lives in a dorm on campus, is driving on the highway, just over the speed limit. Alexandra's car hits a patch of ice, and, because of her excessive speed, careens into a snow drift, knocking her unconscious. While on patrol for the police department, Officer Jorge sees Alexandra's car and immediately pulls over and seeks to assist. In the course of opening Alexandra's car door, Officer Jorge strains his shoulder. Although Alexandra owns no real property and, at the time of rescue, was driving on a public road, pursuant to this Section, Alexandra is not liable to Officer Jorge for his injuries.

l. Exception when tortfeasor violates a safety statute enacted to protect rescuers. This Section does not bar a professional rescuer's claim when, in the course of creating the peril, the actor violates a safety statute, ordinance, or regulation specifically enacted to protect professional rescuers. If, on the other hand, the provision was enacted for some other purpose, the existence or violation of the safety statute may be relevant (including for assessing whether the actor was merely negligent or, alternatively, reckless, pursuant to Comment *h*). But, the actor's violation will not be determinative.

REPORTERS' NOTE

Comment a. History and terminology. The firefighter's rule dates back more than a century to Gibson v. Leonard, 32 N.E. 182 (Ill. 1892), which invented the doctrine. For discussion of the rule's history, see David L. Strauss, Comment, *Where There's Smoke, There's the Firefighter's*

Rule: Containing the Conflagration After One Hundred Years, 1992 WIS. L. REV. 2031, 2031, 2034-2041.

At its most basic, the firefighter's rule (variously called the "fireman's rule" or "public rescuer's doctrine") establishes that, when, in the course of an emergency, on-duty firefighters or police officers are tortiously injured by the very peril they have been called to confront, they have no claim against the actor who negligently created that peril. In barring the claims of *particular* rescuers, the firefighter's rule deviates sharply from general tort principles, which hold, and have long held, that a party who attempts a rescue and is injured thereby may recover from the actor whose tortious conduct made the rescue necessary. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 32 (AM. L. INST. 2010); Wagner v. Int'l Ry. Co., 133 N.E. 437, 437 (N.Y. 1921) (Cardozo, J.) (articulating the principle that "[d]anger invites rescue" and that a wrongdoer who imperiled life is accountable for subsequent injury to the rescuer).

As Comment *a* recognizes, the Restatement Third of Torts: Liability for Physical and Emotional Harm § 51, Comment *m* (AM. L. INST. 2012) addressed what it called the "firefighter's rule" although it declined to take a position on the rule's scope or continuing vitality. At the same time, however, the Comment made clear that, if the rule is to be defended, it must be defended on public-policy grounds; it cannot be defended or justified based on the traditional notion that landowners owe no duty of care to rescuers because of the latter's traditional status as licensees or trespassers on land. In particular, the Comment explained:

> To the extent that the firefighter rule has historically been grounded in the status of professional rescuers on the land, this Restatement eliminates the basis for that rationale by adopting a duty of reasonable care for all entrants on the land (with the sole exception involving flagrant trespassers under § 52). Firefighters and other professional rescuers acting within the scope of their employment are not trespassers under § 50 of this Restatement because they enter the land either with the consent of the land possessor or with the legal justification of performing their public duties.

Comment b. Rationale and support. Some version of the firefighter's rule has been adopted by a significant majority of states. See Apodaca v. Willmore, 392 P.3d 529, 537 (Kan. 2017) ("More than 30 jurisdictions in the United States have adopted the firefighter's rule . . . ."); see also Moody v. Delta W., Inc., 38 P.3d 1139, 1140 (Alaska 2002) (discussing the rule's broad acceptance); Aetna Cas. & Sur. Co. v. Vierra, 619 A.2d 436, 437 (R.I. 1993) (same).

As Comment *b* explains, over time, the rationale undergirding the rule has shifted. The rule historically rested on the limited (though categorical) duty rules that governed entrants on land. In time, as those categorical duty rules were blurred or erased, courts adapted by justifying the firefighter's rule on traditional notions of assumption of risk. For a broad discussion of these early rationales and their gradual evolution, see Thomas v. Pang, 811 P.2d 821, 823-825 (Haw. 1991); Syracuse Rural Fire Dist. v. Pletan, 577 N.W.2d 527, 533 (Neb. 1998); David L. Strauss, Comment, *Where There's Smoke, There's The Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2034-2038.

More recently, as *both* of those early rationales have been unable to bear the weight of the firefighter's rule, states have further adapted. Many states have found justification in a range of public-policy considerations, addressed in more detail below. According to many courts, these public-policy considerations support the rule's retention and imposition. See Krause v. U.S. Truck Co., 787 S.W.2d 708, 712 (Mo. 1990) (discussing this dynamic). For illustrations of this adjustment, see, e.g., England v. Tasker, 529 A.2d 938, 939-942 (N.H. 1987) (discussing and serially discarding the landowner and assumption-of-risk rationales and concluding that "[t]he better justification for the fireman's rule today rests in considerations of public policy"); Hack v. Gillespie, 658 N.E.2d 1046, 1049 (Ohio 1996) (discarding the landowner rationale that initially supported the rule and finding, instead, that "Ohio's Fireman's Rule is more *properly* grounded on policy considerations, not artificially imputed common-law entrant classifications").

Other states—including Florida, Massachusetts, Minnesota, New Jersey, New York, and Oregon—have adapted by abolishing the firefighter rule altogether or dramatically curtailing its scope. See Jolly v. Hoegh Autoliners Shipping AS, 2021 WL 2661005, at *4 (M.D. Fla. 2021) ("[M]any states . . . have abolished or largely ameliorated the harsh effects of the firefighter's rule in their states."). Authority, which consists of both legislative action and judicial decision, includes: FLA. STAT. § 112.182 (firefighter or law enforcement officer who lawfully enters premises in discharge of duties is an "invitee"); MINN. STAT. ANN. § 604.06 ("The common law doctrine known as the fireman's rule shall not operate to deny any peace officer . . . or public safety officer . . . a recovery in any action at law or authorized by statute."; "public safety officer" defined to include firefighters); N.J. STAT. ANN. § 2A:62A-21 ("[W]henever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease or death while in the lawful discharge of his official duties and the injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person [the injured rescuer] may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death."); N.Y. GEN. OBLIG. L. § 11-106 (establishing that "whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person . . . that police officer or firefighter may seek recovery and damages from the person [who caused the injury]," while creating a limited carve-out for tort claims against a police officer's employer or co-employee); Hopkins v. Medeiros, 724 N.E.2d 336, 343 (Mass. App. Ct. 2000) (concluding "that the firefighter's rule has no continuing vitality in Massachusetts"); Christensen v. Murphy, 678 P.2d 1210, 1217 (Or. 1984) (abolishing the rule).

In a few additional states, courts have expressly declined to adopt the rule when invited to do so. See, e.g., Angelo v. Campus Crest at Orono, LLC, 2017 WL 6540029, at *7 (D. Me. 2017) (recognizing that, in Maine, the rule has never been formally adopted and that "Maine trial courts have twice rejected it"); Minnich v. Med-Waste, Inc., 564 S.E.2d 98, 103 (S.C. 2002) (declining to adopt the firefighter's rule while explaining: "We are not persuaded by any of the various

rationales advanced by those courts that recognize the firefighter's rule. The more sound public policy—and the one we adopt—is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment."); cf. Thompson v. FMC Corp., 710 So. 2d 1270, 1271 (Ala. Civ. App. 1998) (recognizing that "Alabama has not yet adopted the firefighter's rule" while declining to do so in the instant case because a determination of the rule's vitality was not necessary to the case's resolution); Bath Excavating & Constr. Co. v. Wills, 847 P.2d 1141, 1147 (Colo. 1993) (declining to adopt the rule in a particular instance, while expressly withholding judgment on "the question of whether Colorado should judicially adopt a no-duty fireman's rule").

Pennsylvania takes a position that is somewhat difficult to classify. The state has not adopted the firefighter's rule. Holpp v. Fez, Inc., 656 A.2d 147, 149 (Pa. Super. Ct. 1995) ("The 'fireman's rule', which provides that a police officer or fire fighter who enters upon the land of another in connection with official duties cannot recover from the possessor of land for subsequent injuries, has not been adopted in Pennsylvania."); Bole v. Erie Ins. Exch., 967 A.2d 1017, 1021 (Pa. Super. Ct. 2009) (observing that "Pennsylvania has not adopted the 'fireman's rule'"). But, courts simultaneously hold that "a police officer who enters upon another's land in his or her official capacity and in response to a call for assistance is generally considered a licensee." Juszczyszyn v. Taiwo, 113 A.3d 853, 857 (Pa. Super. Ct. 2015).

In sum, while canvassing the rule's support, one federal court has recently—and correctly—explained: "The [firefighter's rule] is a majority rule, but it has been rejected (or never adopted) in a significant minority of jurisdictions." *Angelo*, 2017 WL 6540029, at *7 n.13; see also Sepega v. DeLaura, 167 A.3d 916, 929 (Conn. 2017) ("Although a majority of jurisdictions employ the firefighter's rule, there are many that do not. In total, eighteen states have abolished the firefighter's rule, severely limited its application, or have not addressed it at all."); accord Ehud Guttel & Ariel Porat, *Tort Liability and the Risk of Discriminatory Government*, 87 U. CHI. L. REV. 1, 15 (2020) ("A number of states have abolished the [firefighter's] rule altogether or statutorily limited its scope. In states where the rule still applies, its scope has been narrowed through substantial exceptions.").

Where the rule *is* adopted, its contours vary. Painting with a broad brush, some states have extended the rule quite broadly, while, in many other states, the rule's application has hewed very closely to its common-law core. Compare Young v. Sherwin-Williams Co., 569 A.2d 1173, 1175 (D.C. 1990) (broadly construing the firefighter's rule to hold that it conferred immunity, even when the tortfeasor acted willfully or wantonly), with Espinoza v. Schulenburg, 129 P.3d 937, 940 (Ariz. 2006) (observing "[w]e adopt the firefighter's rule, but we construe it narrowly"), and Levandoski v. Cone, 841 A.2d 208, 214 (Conn. 2004) (observing that, "the firefighter's rule is an exception to the general rule of tort liability that, as between an innocent party and a negligent party, any loss should be borne by the negligent party," and that, given its exceptional character, "the burden of persuasion is on the party who seeks to extend the exception beyond its traditional boundaries," and that, in this case, because the burden justifying extension was not carried, the court "confined" the firefighter's rule "to claims of premises liability"), and Sallee v. GTE S., Inc., 839 S.W.2d 277, 278 (Ky. 1992) (explaining that the court will "narrowly circumscribe" the firefighter's rule "to protect no one from responsibility for the consequences of their wrongdoing

except where protecting the public makes it essential to do so"), and Cole v. Hubanks, 681 N.W.2d 147, 149 (Wis. 2004) (offering a narrow construction while confining the firefighter's rule to firefighters only and excluding police officers).

Some of this significant state-to-state variation is seemingly traceable to the fact that, in its modern guise, there is little agreement as to the rule's aim or purpose—and many supposed public-policy rationales for the rule are susceptible to significant critique. As the South Carolina Supreme Court has summarized: "Not only have courts been unable to agree on a consistent rationale for the rule, they have not been able to agree on the proper parameters for the rule." *Minnich*, 564 S.E.2d at 101; see also Edwards v. Honeywell, Inc., 50 F.3d 484, 492 (7th Cir. 1995) ("Unclarity about the rationale of a rule makes its scope difficult to determine . . . ."); *Hack*, 658 N.E.2d at 1048 (recognizing that "those jurisdictions which have adopted or retained some vestige of the rule have done so by applying various legal theories and principles, resulting in several different versions").

As noted above, to the extent courts today retain the firefighter's rule, they do so, these days, mostly on public-policy grounds. Three frequently articulated public-policy justifications—as well as commonly voiced counters thereto—are considered below.

First, some courts hold that, to allow a rescuer to file suit for her injuries in tort would result in double recovery from both the tort system and the state's workers' compensation program. See, e.g., Syracuse Rural Fire Dist. v. Pletan, 577 N.W.2d 527, 533 (Neb. 1998). While frequently articulated, however, this "double recovery" justification is quite unpersuasive. For starters, to the extent the rescuer is a casual volunteer who is not covered by the state's workers' compensation law, this justification loses all force. Next, even when the rescuer is entitled to workers' compensation benefits (as many even voluntary rescuers are), the rationale is question-begging: On *many* occasions, public workers are entitled to workers' compensation benefits and are also able to claim for injuries in tort—and, in most instances, no special doctrines block such parallel recoveries. Against that backdrop, it is unclear why *particular* public workers are singled out for especially disadvantageous treatment. Or, as the Oregon Supreme Court has put it, it is unclear why, under the firefighter's rule, "the injured public safety officer must bear a loss which other public employees are not required to bear." *Christensen*, 678 P.2d at 1217; see also *Levandoski*, 841 A.2d at 215 (surfacing this inconsistency); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 61, at 431 (5th ed. 1984) (same); accord Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT L. 1, 10-11 (2015) (describing the frequency with which injured workers supplement relatively meager workers' compensation benefits by suing nonemployer defendants in tort).

Worse, the "double recovery" problem that the firefighter rule ostensibly guards against is more imagined than real. As the influential Dobbs treatise explains, given subrogation, "[t]he public employer who paid compensation benefits to the injured firefighter would in fact recoup some or all of the payments from the tort recovery against the negligent defendant." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 363 (2023 update). For more on the allocation of payments when a worker receives benefits under both workers' compensation and through the tort system, see Restatement Third, Torts: Apportionment of

Liability § C20, Comments *c* and *d* (AM. L. INST. 2000); Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY J. EMP. & LAB. L. 65 (2005). Given these litigation realities, one might argue that what the firefighter's rule *really* does is to stunt cost internalization, and thus, insufficiently deter negligent injury-causing conduct. Accord *Levandoski*, 841 A.2d at 215 (recognizing, in the context of the firefighter's rule, that "permitting the plaintiff to recover for the defendant's negligence will tend to reduce workers' compensation costs by permitting the plaintiff's employer to recoup those benefits").

Second, some courts have held that a rescuer is compensated to confront dangerous situations; therefore, he cannot complain when the danger he is paid to confront materializes—and that, to permit such "double" compensation would impose an unreasonable burden on taxpayers. Advancing this argument, the Alaska Supreme Court explains:

> The negligent party is said to have no duty to the public safety officer to act without negligence in creating the condition that necessitates the officer's intervention because the officer is employed by the public to respond to such conditions and receives compensation and benefits for the risks inherent in such responses. Requiring members of the public to pay for injuries resulting from such responses effectively imposes a double payment obligation on them.

Moody v. Delta W., Inc., 38 P.3d 1139, 1142 (Alaska 2002); see also, e.g., Furstein v. Hill, 590 A.2d 939, 944 (Conn. 1991) (summarizing a rationale commonly articulated by others: "permitting firefighters and police officers to recover in tort for occupational injuries caused by the negligence of particular members of the public whom the officer is called upon to aid would impose a double burden on the taxpayers, who already pay such officers to deal with the hazards that may result from the taxpayers' own future acts of negligence"); Young v. Sherwin-Williams Co., 569 A.2d 1173, 1175 (D.C. 1990) (explaining that "the modern rationale for the doctrine—indeed, its basis in the District of Columbia—is that a professional rescuer has assumed the risks of his or her employment and is compensated accordingly by the public, both in pay and in worker's compensation benefits in the event of injury"); Steelman v. Lind, 634 P.2d 666, 667 (Nev. 1981) ("A public safety officer . . . cannot base a tort claim upon damage caused by the very risk that he is paid to encounter and with which he is trained to cope."); accord DOBBS ET AL., supra § 285, at 772 (summarizing the rationale as follows: "If salaries of these employees do or should reflect advance payment for taking risks, no other payment is due when injuries occur.").

The notion that firefighters are already compensated for their exposure to risks is not entirely satisfactory, however. For starters, to the extent the justification circles back on a claim that firefighters are already compensated for their exposure to risks inherent in fighting fires and that taxpayers should not be charged twice, that claim is problematic. An initial problem is that, given the rule's extension beyond premises liability cases, it is not clear that those tortfeasors shielded from the firefighter's rule will frequently be taxpayers at all, much less taxpayers in the given jurisdiction; some will be, while others will not. See *Levandoski*, 841 A.2d at 215 (recognizing that, once the rule extends beyond premises liability cases and shields those who do not own property or pay property taxes in the given jurisdiction, the double taxation argument justifying the rule falters).

Then, the notion that taxpayers already pay rescuers to confront risk is wholly unsatisfactory when it comes to *unpaid* firefighters, addressed in Comment *e*—and this problem is not trivial, as the majority of the nation's firefighters are, in fact, volunteers. See Joe Uhlman, *The Roof Is on Fire: Dangers to the Volunteer Emergency Services After* Mendel v. City of Gibraltar, 66 U. KAN. L. REV. 819, 821 (2018) ("Volunteer emergency responders—both firefighters and emergency medical services technicians—make up most of the emergency responders in the United States."); FEMA, *National Fire Department Registry Quick Facts*, last updated Mar. 28, 2024, https://apps.usfa.fema.gov/registry/summary#:~:text=Of%20the%20active%20firefighting%20personnel,were%20paid%20per%20call%20firefighters (reporting that, of registered fire departments in the United States, 70 percent are comprised of volunteers and another 15.5 percent are comprised mostly of volunteers); Nat'l Fire Prot. Ass'n, U.S. Fire Department Profile (Sept. 2022), https://www.nfpa.org/News-and-Research/Data-research-and-tools/Emergency-Responders/US-fire-department-profile (reporting that, as of 2020, the United States had approximately 1,041,200 firefighters and, of those, 65 percent were volunteers).

Meanwhile, even for professional rescuers who *are* compensated, whether their compensation includes a premium for tortiously created risks to which they are exposed logically depends on what the rule is in the particular jurisdiction. Yet, the Reporters have uncovered no evidence that the pay of firefighters or police officers systematically differs based on the jurisdiction's adoption, revocation, or modification of the firefighter's rule. See also Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, Reporters' Note to Comment *m* (AM. L. INST. 2012) (articulating this point, while reporting a similar absence of authority); accord Sepega v. DeLaura, 167 A.3d 916, 929 (Conn. 2017) (making a similar point and noting that, to the extent police officers or firefighters do enjoy a wage premium in relation to other professionals, there is no apparent link to the firefighter's rule); cf. Holmes v. Adams Marine Ctr., 2000 WL 33675369, at *2 (Me. Super. Ct. 2000) ("This rationale is not compelling. Expecting a firefighter's salary to adequately compensate him for actual serious injury while performing that job is unjustified.").

Third, numerous courts justify the rule by explaining that it is in society's best interest for individuals to seek professional emergency assistance when circumstances require. If such a call could generate costly litigation, the thinking goes, individuals might be deterred from seeking emergency assistance, to the public's detriment. See, e.g., Sam v. Wesley, 647 N.E.2d 382, 385 (Ind. Ct. App. 1995) ("The rule was designed to protect victims by encouraging them to seek emergency assistance without fear of subsequent tort liability."); Pottebaum v. Hinds, 347 N.W.2d 642, 645 (Iowa 1984) ("Citizens should be encouraged and not in any way discouraged from relying on those public employees who have been specially trained and paid to deal with these hazards."); Sallee v. GTE S., Inc., 839 S.W.2d 277, 279 (Ky. 1992) ("The purpose of the [rule] is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk."); Baldonado v. El Paso Nat. Gas Co., 176 P.3d 277, 282 (N.M. 2007) ("A policy-based approach to the firefighter's rule will encourage the public to ask for rescue . . . ."); Carson v.

Headrick, 900 S.W.2d 685, 690 (Tenn. 1995) (justifying the rule, in part, with the observation that "public policy is served when citizens are encouraged to summon aid from police, regardless of their negligence"); Thomas v. CNC Invs., L.L.P., 234 S.W.3d 111, 120 (Tex. App. 2007) ("The purpose of the rule is to limit the recovery of firefighters and police officers so that citizens will not be discouraged from relying on the skill, training, and expertise of these public servants."); 65A C.J.S. *Negligence* § 577 (2021 update) ("[T]he purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation when it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk."); Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 IND. L.J. 745, 783-784 (2007) ("Abolishing the rule encourages a potential defendant fearful of a tort claim against her to delay calling the professional rescuer . . . .").

But this, rationalization, too, is hardly water-tight, as it is not clear how many Americans know about tort doctrines in general, much less the firefighter's rule in particular—and, in any event, disincentives are apt to be blunted by the fact that a high proportion of homeowners, apartment dwellers, and motorists are already insured against risk. For all of these reasons, the influential Prosser treatise provides: "The argument sometimes offered, that tort liability might deter landowners from uttering such cries of distress, is surely preposterous rubbish." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 61, at 431 (5th ed. 1984). Likewise, the Harper, James and Gray treatise puts it thus:

> As another reason for limiting liability, it has been suggested that landowners would be deterred from calling the police or firefighters if their tort liability were extended. But surely this suggestion has little weight. It is inconceivable that an occupier—even if he knew the extent of his legal duties in the case of a possible hypothetical injury—would be deterred in the ordinary situation.

5 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 27.14, at 294 (3d ed. 2008).

Recently, the Connecticut Supreme Court expressed similar skepticism. There, in Sepega v. DeLaura, 167 A.3d 916, 929 (Conn. 2017), the court observed: "[I]n an emergency situation, it is unlikely any person would be hesitant to call for help because they are concerned about liability for potential injuries to public safety personnel." The court also observed: "No jurisdiction appears to have analyzed whether the absence of the firefighter's rule actually *does* deter people from calling for emergency assistance." Id. And, the court concluded: "It is simply inconceivable to us that someone whose house is on fire will debate or hesitate in calling the fire department because he or she fears a firefighter might bring some negligence action if injury occurs. Instead, we presume that the primary concern of a person whose house is on fire would be to act to protect the health and safety of the people in the home and to salvage the property." Id.

In addition to these three main justifications, there are others. These include that, without the rule, potential liability would place "too heavy a burden on premises owners to keep their premises safe from the unpredictable entrance of fire fighters." Christensen v. Murphy, 678 P.2d 1210, 1217 (Or. 1984) (articulating but disapproving of this rationale); see Furstein v. Hill, 590

A.2d 939, 943 (Conn. 1991) ("The most compelling argument for the continuing validity of the rule is the recognition that firefighters and police officers often enter property at unforeseeable times and may enter unusual parts of the premises under emergency circumstances."). Likewise, some courts reason that the rule should be retained because its abolition would spur additional litigation. E.g., Moody v. Delta W., Inc., 38 P.3d 1139, 1142 (Alaska 2002) (defending the firefighter's rule on the ground that its abolition would "compound the growth of litigation"); Walters v. Sloan, 571 P.2d 609, 613 (Cal. 1977) (lamenting that "abolition of the fireman's rule would burden our courts with litigation").

As above, these justifications are not particularly convincing. Among other counters to the "too heavy burden" argument, "since the landowner is already under a duty to maintain her premises for a host of persons, including invitees and employees, it is hard to see how including firefighters within the scope of an existing duty would create an additional burden." Louie A. Wright, Note, *The Missouri "Fireman's Rule": An Unprincipled Rule in Search of a Theory*, 58 UMKC L. REV. 329, 350 (1990). Furthermore, this rationale seems like a back-door effort to resurrect the premises liability justification for the firefighter's rule, which the Institute has already rejected. Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, Comment *m* (AM. L. INST. 2012). And, to the extent this *is* the rule's justification, there is no support for its now broadly accepted expansion into nonproperty contexts. Accord DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 363 (2023 update) (discussing this rationale and observing that "if this is the most legitimate rationale for the rule, then the rule has little support indeed").

Counters to the "flood of litigation" argument similarly have been expressed. For one, there is, currently, a great deal of litigation about the rule's blurry contours and myriad exceptions. The rule's abolition might well, then, *cut down* on litigation—particularly of the appellate kind. See Strauss, supra at 2040-2041.

Worse, the "flood of litigation" argument fails on its own terms. Courts do not extinguish individual rights merely because the vindication of those rights would take some judicial effort. See, e.g., Falzone v. Busch, 214 A.2d 12, 16 (N.J. 1965) (rejecting the argument that a right should not be recognized because its recognition would trigger "'a flood of litigations'" while observing "the fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice"); Schultz v. Barberton Glass Co., 447 N.E.2d 109, 111 (Ohio 1983) ("Even if there may be a possibility of increased litigation, it is not a valid reason for denying a judicial forum. . . . It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.") (quotation marks and citations omitted); cf. Bates v. State Bar of Ariz., 433 U.S. 350, 376 (1977) ("[W]e cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."). Nor is there evidence that states *without* the firefighter's rule have been engulfed in a flood of litigation. As the court in Holmes v. Adams Marine Ctr., 2000 WL 33675369, at *2

(Me. Super. Ct. 2000), explained: "Maine . . . has never adopted the firefighter's rule and the courts have not been flooded."

Comment c. Restriction on duty, not affirmative defense. Comment *c* is consistent with the Restatement Third of Torts: Liability for Physical and Emotional Harm § 32, Comment *c* (AM. L. INST. 2010). That Comment observes: "Professional rescuers are often treated differently [from other rescuers] under what is colloquially known as the 'firefighter rule.' Under its modern incarnation, that rule is based on a mélange of public-policy considerations *and dealt with under the rubric of duty*" (emphasis added).

This duty-based approach enjoys strong support. See, e.g., Moody v. Delta W., 38 P.3d 1139 (Alaska 2002); Orth v. Cole, 955 P.2d 47, 48 (Ariz. Ct. App. 1998); Garcia v. City of S. Tucson, 640 P.2d 1117, 1120 (Ariz. Ct. App. 1981); Rusch v. Leonard, 927 N.E.2d 316, 322-323 (Ill. App. Ct. 2010); Syracuse Rural Fire Dist. v. Pletan, 577 N.W.2d 527, 534 (Neb. 1998); Hack v. Gillespie, 658 N.E.2d 1046 (Ohio 1996); Krajewski v. Bourque, 782 A.2d 650, 652 (R.I. 2001); Carson v. Headrick, 900 S.W.2d 685, 690 (Tenn. 1995); Fordham v. Oldroyd, 171 P.3d 411, 412-413, 415 (Utah 2007). Accord DAN B. DOBBS ET AL., THE LAW OF TORTS § 285, at 769 (2000) (recognizing that the firefighter's rule is "[p]hrased in terms of duty").

Comment d. "Professional rescuer" defined: firefighters and police officers. Consistent with the vast majority of courts to address the question, Comment *d* clarifies that "a professional rescuer" includes not just professional publicly employed firefighters but also police officers. See Apodaca v. Willmore, 392 P.3d 529, 539 (Kan. 2017) ("In our sister jurisdictions that have adopted the firefighter's rule, approximately 25 have extended it to police officers . . . ."); see also England v. Tasker, 529 A.2d 938, 939 (N.H. 1987) ("Notwithstanding its designation, the [firefighter's] rule has been extended to policemen in most jurisdictions that recognize it."); Hack v. Gillespie, 658 N.E.2d 1046, 1048 (Ohio 1996) ("The rule was originally created to apply to fire fighters, but it has evolved and has been extended to include police officers."); Aetna Cas. & Sur. Co. v. Vierra, 619 A.2d 436, 439 (R.I. 1993) (extending the rule to police officers and compiling supportive authority).

The Reporters' research has surfaced only one state (Wisconsin) that has adopted the firefighter's rule but expressly declined to extend the rule to police officers. See Cole v. Hubanks, 681 N.W.2d 147, 149 (Wis. 2004) ("We conclude that public policy reasons do not support extending the firefighters rule to police officers.").

Comment *d* further clarifies that the term "professional rescuer"—and hence, the boundary of the firefighter's rule—excludes private security officers and private medical personnel. As the Michigan Court of Appeals has aptly explained: "Application of the fireman's rule is limited by its very nature to public employees." Kowalski v. Gratopp, 442 N.W.2d 682, 683 (Mich. Ct. App. 1989). This limitation is well supported. See, e.g., Neighbarger v. Irwin Indus., Inc., 882 P.2d 347, 357 (Cal. 1994); Nagy v. Arsenault, 2015 WL 3685212, at *7 (Conn. Super. Ct. 2015). Accord DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 365 (2023 update) ("[C]ourts have refused to apply the firefighter's rule to privately employed professional risk-takers, with the result that the ordinary claims and defenses will determine the case."); 65A C.J.S.

Negligence § 577 (2021 update) (explaining that private employee's claims are "not barred by the firefighter's rule").

Though these two poles are relatively clear, the large space in the middle—including the categorization of publicly employed paramedics and EMTs—is murkier. See generally Annotation, *Application of "Firemen's Rule" to Bar Recovery by Emergency Medical Personnel Injured in Responding to, or at Scene of, Emergency*, 89 A.L.R.4th 1079 (originally published in 1991).

Roughly a dozen jurisdictions have, by court action or legislative determination, extended the firefighter's rule to encompass other public professionals, including emergency medical technicians (EMTs) and/or paramedics. See, e.g., CAL. CIV. CODE § 1714.9(a); NEV. REV. STAT. ANN. § 41.139(3)(a); N.H. REV. STAT. ANN. § 507:8-h(I)(a); VA. CODE ANN. § 8.01-226(B); Kapherr v. MFG Chem., Inc., 625 S.E.2d 513, 515-517 (Ga. Ct. App. 2005); Maggard v. Conagra Foods, Inc., 168 S.W.3d 425, 427-428 (Ky. Ct. App. 2005); Pinter v. Am. Fam. Mut. Ins. Co., 613 N.W.2d 110, 118 (Wis. 2000); cf. Whiting v. Cent. Trux & Parts, Inc., 984 F. Supp. 1096, 1106 (E.D. Mich. 1997) (extending the rule to customs officials); Nowicki v. Pigue, 430 S.W.3d 765, 768 (Ark. 2013) (extending the rule to a "Department of Transportation ("TDOT") HELP program operator"); City of Oceanside v. Superior Ct., 96 Cal. Rptr. 2d 621, 629 (Ct. App. 2000) (extending the rule to publicly employed lifeguards); Jamison v. Ulrich, 206 S.W.3d 419, 425 (Tenn. Ct. App. 2006) (extending the rule to animal-control officers); Maltman v. Sauer, 530 P.2d 254 (Wash. 1975) (extending the rule to rescuer who rode a military helicopter). For a thorough, although somewhat dated, discussion, see generally Stephen E. Ruscus, *Empty Pockets: Application of the Fireman's Rule to Emergency Medical Technicians*, 7 J. CONTEMP. HEALTH L. & POL'Y 339 (1991). Fortifying—and perhaps explaining—this doctrinal support, the extension is, in some ways, logical: Certain justifications for the firefighter's rule apply equally well to certain other public emergency-response personnel.

There are, however, important countervailing considerations. First, support for such an extension is only tepid. As of the time of this writing, the majority of states that adopt the firefighter's rule do not extend the rule beyond police officers and firefighters. See Lees v. Lobosco, 625 A.2d 573, 575 (N.J. Super. Ct. App. Div. 1993) (observing that the majority of jurisdictions to adopt a "fireman's rule" have concluded "that the rule is to be applied only to firefighters and police officers" and collecting authority); accord Sepega v. DeLaura, 167 A.3d 916, 933 n.16 (Conn. 2017) (recognizing that, in Connecticut, EMTs do not fall within the ambit of the firefighter's rule and collecting cases from other jurisdictions in accord); Biggs v. Hall, 2021 WL 387873, at *3 (Del. Super. Ct. 2021) ("The Firefighter's Rule shall not be extended to EMTs under the circumstances of this case.").

Next, in recent years, some courts have either abolished the firefighter's rule or expressed a clear resistance to *any* expansion thereof. See Reporters' Note to Comments *a* and *b*; see also Ehud Guttel & Ariel Porat, *Tort Liability and the Risk of Discriminatory Government*, 87 U. CHI. L. REV. 1, 15 (2020) ("A number of states have abolished the [firefighter's] rule altogether or statutorily limited its scope. In states where the rule still applies, its scope has been narrowed through substantial exceptions."). Undergirding the view of the latter courts is a sense that the rule

represents a sharp departure from traditional tort principles, and such departures should be narrowly circumscribed; any expansion should be resisted. See, e.g., Sallee v. GTE S., Inc., 839 S.W.2d 277, 278 (Ky. 1992) ("We narrowly circumscribe the application of such exceptions so as to protect no one from responsibility for the consequences of their wrongdoing except where protecting the public makes it essential to do so. . . . Claims of privilege are carefully scrutinized, and . . . afforded validity in relatively few instances in the common law.") (quotation marks omitted); Labrie v. Pace Membership Warehouse, Inc., 678 A.2d 867, 868 (R.I. 1996) (explaining why the firefighter's rule should be narrowly construed); Ipsen v. Diamond Tree Experts, Inc., 466 P.3d 190, 193-198 (Utah 2020) (emphasizing that, in Utah, the firefighter's rule will extend no further than its common-law core); accord Walters v. Sloan, 20 Cal. 3d 199, 217 (Cal. 1977) (Tobriner, J., dissenting) ("Courts should be hesitant to cut holes in the carefully woven fabric of the requirement of due care, and to deny to certain selected classifications that protection."); Ami C. Dwyer, Note, *Torts—Negligence—the Fireman's Rule—Public Policy or Premises Liability? The Proper Basis for the Fire Fighter's Rule in* Maryland Southland Corp. v. Griffith, 332 Md. 704, 633 A.2d 84 (1993), 24 U. BALT. L. REV. 229, 246 (1994) ("The fireman's rule is harsh . . . [as it] prevents an injured public servant from recovering damages for his or her injuries caused by an admittedly negligent tortfeasor. Such a drastic divergence from ordinary principles of tort law, which otherwise allow recovery, ought to be limited in scope to those instances where public policy demands such a result.").

Finally, there are some reasons why firefighters and police officers might fall on one side of the line, while EMTs, paramedics, and others might be afforded somewhat greater protection. See Krause v. U.S. Truck Co., 787 S.W.2d 708, 713 (Mo. 1990) (finding the firefighters' rule, which applied to firefighters and police officers, did not extend to ambulance attendants, because, unlike the latter, firefighters and police officers "have exceptional responsibilities . . . [and] are covered by a panoply of legal powers and duties necessary to control the people"); cf. Sanders v. Alger, 394 P.3d 1083, 1088 (Ariz. 2017) (declining to extend the firefighter's rule to publicly compensated caregivers because, inter alia, "[u]nlike firefighters, caregivers generally are not 'public safety employees' who are trained, equipped, and compensated to professionally rescue others"); DeLaire v. Kaskel, 842 A.2d 1052, 1056 (R.I. 2004) (refusing to extend the firefighter's rule to animal-control officers because, inter alia, compared to police officers and firefighters, animal-control officers "do not receive the same compensation, training, and benefits"). Further, as Comment *d* explains, to the extent the firefighter's rule is justified on the ground that wage adjustments account for the rule, significant and unpredictable swings in the rule's reach or contours are counterproductive and improper, as the court risks depriving rescuers from recovery before their wages have had the opportunity to equilibrate.

Comment e. "*Professional rescuer" defined: volunteers*. Whether the firefighter's rule encompasses volunteers has been the subject of significant controversy, in part because so many fire departments in the United States are comprised mostly or entirely of volunteer firefighters. See FEMA, *National Fire Department Registry Quick Facts*, last updated Mar. 28, 2024, https://apps.usfa.fema.gov/registry/summary#:~:text=Of%20the%20active%20firefighting%20personnel,

were%20paid%20per%20call%20firefighters (reporting that, of registered fire departments in the United States, 70 percent are comprised of volunteers and another 15.5 percent are comprised mostly of volunteers).

Confronting this question, a clear majority of courts make no distinction based on whether the on-duty rescuer is a paid professional rescuer, as opposed to a volunteer. As the Arkansas Supreme Court explained in Waggoner v. Troutman Oil Co., 894 S.W.2d 913, 916 (Ark. 1995): "[T]he general rule appears to be that the duty owed to volunteer firefighters is no different from that owed to paid firefighters." See, e.g., Butler v. Union Pac. R.R. Co., 1994 WL 243794, at *2 (D. Kan. 1994) ("[W]e believe that the Fireman's Rule should also apply to volunteer fire fighters in Kansas."), aff'd, 68 F.3d 378 (10th Cir. 1995); Baker v. Superior Ct., 129 Cal. App. 3d 710, 716 (1982) ("We do not believe that a valid distinction can be made in the application of the rule, at least in this case, as between 'professional' and 'amateur' firefighters."); Buchanan v. Prickett & Son, Inc., 279 N.W.2d 855, 860 (Neb. 1979) (rejecting any paid/unpaid distinction because, inter alia, "[i]t would be impractical to distinguish between volunteers and paid firemen" since volunteer firefighters handle the same responsibilities as professional firefighters). For further support, see, for example, *Waggoner*, 894 S.W.2d at 916; Carpenter v. O'Day, 562 A.2d 595 (Del. Super. Ct.), aff'd, 553 A.2d 638 (Del. 1988); Bourgeois v. Duplessis, 540 So. 2d 397 (La. Ct. App. 1989); Baldonado v. El Paso Nat. Gas Co., 176 P.3d 277, 281 (N.M. 2007); Haas v. Chi. & N.W. Ry. Co., 179 N.W.2d 885 (Wis. 1970).

Treating volunteer and paid firefighters in the same manner is most justified when volunteer firefighters are entitled to the same benefits as their compensated counterparts on those occasions when they sustain tortious injury. See *Waggoner*, 894 S.W.2d at 916 (reasoning that volunteer firefighters are already able to recover under the Arkansas Worker's Compensation Laws); Flowers v. Sting Sec., Inc., 488 A.2d 523, 536 n.11 (Md. Ct. Spec. App. 1985) (noting that the Maryland Code provides that "both full-time and volunteer [firefighters]" receive disability and death benefits, thereby satisfying part of the rationale behind the rule); *Buchanan*, 279 N.W.2d at 860 (recognizing that even volunteer firefighters are provided workers' compensation benefits). In the absence of state or other public benefits in the event of death or injury, any decision that lumps volunteers with paid rescuers becomes much more difficult to justify.

Still, some courts break with that majority; these courts distinguish between paid and volunteer rescuers—and refuse to deploy the firefighter's rule to extinguish the latter's claims. Here, for example, the Michigan Supreme Court has held: "Although public policy warrants application of the firefighter's rule to professional firefighters and police officers, that same policy does not dictate that volunteers be precluded from recovery for injuries." Roberts v. Vaughn, 587 N.W.2d 249, 252 (Mich. 1998).

Comment f. On duty and acting within scope of employment. As the black letter makes clear and Comment *f* further explains, this Section applies only when the professional rescuer is on duty and acting within the scope of employment at the time of the rescuer's injury. Restricting the firefighter's rule to on-duty conduct is justified for three reasons. First, as the Arizona Supreme Court has explained, off-duty rescuers have no duty to rescue others—and are not, therefore, being

compensated for this particular risk-taking activity. See Espinoza v. Schulenburg, 129 P.3d 937, 941 (Ariz. 2006). Second, a significant justification for the firefighter's rule is that, without it, persons will be deterred from seeking professional assistance and won't dial 911. See Comment *b*. But this justification is generally inapplicable vis-à-vis off-duty personnel, as these rescuers are not typically *called*, but rather, happen serendipitously upon particular emergencies. Third and finally, all things being equal, we, as a society, are better off if off-duty professional rescuers volunteer to assist those in peril, as opposed to untrained lay volunteers.

The on-duty/off-duty line drawn by Comment *f* enjoys the support of a clear majority of courts that have adopted the firefighter's rule. See, e.g., Yurecka v. Zappala, 472 F.3d 59, 65 n.5 (3d Cir. 2006) (applying Pennsylvania law) ("The Firefighter's Rule is a narrow exception to the rescue doctrine, stating that the rescue doctrine does not apply to professional rescuers *injured in the line of duty*.") (emphasis added); *Espinoza*, 129 P.3d at 942 (finding that, when an off-duty firefighter offered assistance, "the firefighter's rule . . . does not bar her suit"); Watson Used Cars, LLC v. Kirkland, 805 S.E.2d 920, 923 (Ga. Ct. App. 2017) ("The relevant inquiry is whether the negligently created risk which resulted in the . . . injury was the very reason for [the officer's] presence on the scene *in his professional capacity*.") (emphasis added) (quotation marks omitted; alteration in original); State v. Shears, 920 N.W.2d 527, 543 (Iowa 2018) ("Although there are many permutations in different jurisdictions, the firefighter's rule generally stands for the proposition that firefighters or police officers may not recover for injuries that occur *in the ordinary course of their duties*.") (emphasis added); McKernan v. Gen. Motors Corp., 3 P.3d 1261, 1263 (Kan. 2000) ("The Firefighter's Rule, as adopted in Kansas, provides that a firefighter who enters upon the premises of another *in the discharge of his duty* may not maintain a cause of action against the individual whose negligence created the risk which necessitated the firefighter's presence and resulted in injury to the firefighter.") (emphasis added); Norfolk S. Ry. Co. v. Johnson, 554 S.W.3d 315, 317 (Ky. 2018) ("The Rule is a public policy consideration that bars firefighters from recovering from injuries sustained *while in the course of their duties*.") (emphasis added); White v. State, 19 A.3d 369, 373 (Md. 2011) ("[T]he doctrine known as the fireman's rule generally prevents fire fighters and police officers *injured in the course of their duties* from recovering tort damages from those whose negligence exposed them to the risk of injury.") (emphasis added); Farmer v. B & G Food Enters., 818 So. 2d 1154, 1159-1160 (Miss. 2002) ("We hold that an action brought by a firefighter or a police officer for an injury sustained as the result of a negligent act by another party and *sustained in the course of his employment* is barred only when the sole negligent act is the same negligent act that necessitated rescue and therefore brought the firefighter or police officer to the scene of the emergency.") (emphasis added); Aetna Cas. & Sur. Co. v. Vierra, 619 A.2d 436, 439 (R.I. 1993) (clarifying that, to invoke the firefighter's rule, "the defendant must demonstrate," among other things, "that the tortfeasor injured the police officer or firefighter *in the course of his or her employment*") (emphasis added).

For further explanation, see, e.g., BARRY A. LINDAHL, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 38:32 (2d ed. 2023 update) ("[T]hose who . . . help while off duty have been held to fall outside the rule, even when they do so to offer their specialized rescue training.");

accord DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 365 (2023 update) ("As to off-duty public safety officers, it is difficult to see why the firefighter's rule should be invoked to protect the negligent defendant.").

Taking the opposite tack, a handful of courts have held that the firefighter's rule precludes recovery, even if the rescuer was off duty at the time of the rescuer's injury. See, e.g., Hodges v. Yarian, 62 Cal. Rptr. 2d 130, 135 (Ct. App. 1997) (extending the firefighter's rule to off-duty conduct because "[a]pplication of the firefighter's rule is not strictly limited to cases in which the particular risk was assumed for compensation"); Hockensmith v. Brown, 929 S.W.2d 840, 846 (Mo. Ct. App. 1996) ("The firefighter's rule applies if an emergency exists irrespective of his or her official duty status."); cf. Sports Bench, Inc. v. McPherson, 509 N.E.2d 233, 235 (Ind. Ct. App. 1987) (establishing that, in order to fall within the firefighter's rule, rescuers must act "within their official/professional capacities" while also clarifying that a rescuer may satisfy that standard even if technically off-duty); Fordham v. Oldroyd, 171 P.3d 411, 412 n.1 (Utah 2007) (stating, in a footnote in dicta, that the rule "bar[s] negligence claims by those who take on a professional duty to rescue others irrespective of whether they do so in a public or private capacity").

Illustration 1, regarding Nicole's duty status, is drawn from *Espinoza*, 129 P.3d 937.

Comment g. "Emergency," not routine, activities. As Comment *g* explains, this Section—and the legal protection afforded tortfeasors thereunder—does not apply when the professional rescuer is injured while performing a routine, rather than an emergency, activity. This "emergency" restriction is well supported. See, e.g., Orth v. Cole, 955 P.2d 47, 47, 49 (Ariz. Ct. App. 1998) (declining to apply the firefighter's rule when the plaintiff firefighter was injured during a "routine inspection of an apartment complex"); Gray v. Russell, 853 S.W.2d 928, 930 (Mo. 1993) (declining to apply the firefighter's rule when a staircase collapsed and injured the plaintiff firefighter during a routine inspection, while emphasizing that "the firefighter's rule applies only in emergencies"); Labrie v. Pace Membership Warehouse, Inc., 678 A.2d 867, 871 (R.I. 1996) (finding the firefighter's rule did not apply because the firefighter arrived at the scene in order to conduct a scheduled sprinkler-system inspection); see also 2 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 13:19 (4th ed. 2020 update) (describing the rule as a "narrow doctrine" that applies in certain "emergency situations"); cf. Sam v. Wesley, 647 N.E.2d 382, 387 (Ind. Ct. App. 1995) (Sullivan, J., concurring) ("Our decision today limits the application of the Rule to [professional rescuers] when they are actually engaged in emergency rescue activities in an effort to protect life, health or property."). But see Gottas v. Consol. Rail Corp., 623 N.E.2d 1244, 1246 (Ohio Ct. App. 1993) ("[W]e find that the application of the fireman's rule is not limited to emergency situations.").

Illustration 3, involving Francine's inspection of Owen's property, is drawn from Gray v. Russell, 853 S.W.2d 928 (Mo. 1993).

Comment h. Exception for conduct more culpable than negligence. As Comment *h* explains, this Section bars a professional rescuer's recovery only when the tortfeasor acts negligently or is subject to liability under strict liability principles. This Section does not apply, or shield a tortfeasor, when the tortfeasor behaves in a more culpable manner.

A strong majority of courts draw a clear line regarding tortfeasor culpability. As one court explains: "Even jurisdictions that adhere to the rule have carved out an exception for . . . intentional acts, [or] willful, wanton, or reckless conduct in order to mitigate the rule's harshness." Holmes v. Adams Marine Ctr., 2000 WL 33675369, at *2 n.2 (Me. Super. Ct. 2000); accord Migdal v. Stamp, 564 A.2d 826, 828 (N.H. 1989) ("Traditionally, courts have held that the protection of the fireman's rule does not extend to willful, wanton or reckless conduct."); Ehud Guttel & Ariel Porat, *Tort Liability and the Risk of Discriminatory Government*, 87 U. CHI. L. REV. 1, 15 (2020) ("[M]ultiple courts have held that the fireman's rule will not preclude claims when a beneficiary's risky behavior was intentional or willful.").

In drawing this line, some jurisdictions focus on recklessness; conduct that is reckless or worse is exempt from the firefighter's rule. See, e.g., N.H. REV. STAT. ANN. § 507:8-h(I)(b); Carson v. Headrick, 900 S.W.2d 685, 690-691 (Tenn. 1995) (observing that, "when a police officer is injured by the intentional, malicious, or reckless acts of a citizen, the action is not barred by the policemen and firemen's rule"). For the definition of "recklessness," see Restatement Third, Torts: Liability for Physical and Emotional Harm § 2 (AM. L. INST. 2010).

Offering somewhat greater protection to rescuers, some jurisdictions draw the line between ordinary and gross negligence—although, given persistent confusion regarding relevant terminology, it is not always clear whether these jurisdictions' definitions of "gross negligence" accord with the definition set forth by § 2 of the Restatement Third of Torts: Liability for Physical and Emotional Harm (AM. L. INST. 2010) or, instead, mean something more like recklessness. See id., Comment *a* (discussing confusion regarding the meaning of the term "gross negligence"). For the jurisdictions that purport to draw a line between ordinary and gross negligence, see, for example, MICH. COMP. LAWS ANN. § 600.2967(a); VA. CODE ANN. § 8.01-226(A); Piercy v. E.I. DuPont de Nemours & Co., 2006 WL 8445580, at *2 (E.D. Ky. 2006); Holloway v. Midland Risk Ins. Co., 759 So. 2d 309, 313-314 (La. Ct. App. 2000); Krause v. U.S. Truck Co., Inc., 787 S.W.2d 708, 711 (Mo. 1990); Campus Mgmt., Inc. v. Kimball, 991 S.W.2d 948, 950 (Tex. App. 1999); Ipsen v. Diamond Tree Experts, Inc., 466 P.3d 190, 192-193 (Utah 2020).

On the other side of the spectrum, a few courts hold that the firefighter's rule insulates actors even from egregious misconduct. E.g., Young v. Sherwin-Williams Co., 569 A.2d 1173, 1177-1178 (D.C. 1990) (concluding that the tortfeasor's intent is irrelevant); Markoff v. Puget Sound Energy, Inc., 447 P.3d 577, 585 (Wash. Ct. App. 2019) (rejecting an analysis of a rescued party's intent while intoning that "Washington courts have not looked to the conduct of a person in creating a hazard to establish whether the professional rescuer doctrine applies"), reconsideration denied (Oct. 9, 2019), review denied, 460 P.3d 183 (Wash. 2020).

For the fact that the rule protects an actor engaged in a "strict liability activity," see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 363 (2023 update).

For support for Illustration 4 regarding Adam the arsonist, see Alvarado v. United States, 798 F. Supp. 84, 88 (D.P.R. 1992) ("The exception for intentionally caused fires allows fire fighters to sue arsonists for injuries suffered while combating the hazardous blaze. The exception is based on public policy grounds . . . which justif[y] the different treatment."); Flowers v. Rock

Creek Terrace P'ship, 520 A.2d 361, 369 (Md. 1987) ("[T]he fireman's rule does not apply to suits against arsonists or those engaging in similar misconduct.").

Comment i. Only bars recovery for tortious conduct that occasioned the rescuer's presence. Comment *i* encompasses what is sometimes referred to as the "independent negligence exception." Pursuant to this important exception, the firefighter's rule applies only if the "tortfeasor is the individual who created the dangerous situation which brought the rescuer to the crime scene, accident scene, or fire." Aetna Cas. & Sur. Co. v. Vierra, 619 A.2d 436, 439 (R.I. 1993); see Knight v. Schneider Nat'l Carriers, Inc., 350 F. Supp. 2d 775, 783 (N.D. Ill. 2004) ("Courts have consistently allowed a public officer to recover when his injuries are caused by negligence that is independent of the negligence that created the emergency requiring the officer's presence."); Krajewski v. Bourque, 782 A.2d 650, 652 (R.I. 2001) (reiterating that the firefighter's rule applies only when "the alleged tortfeasor was the individual responsible for bringing the officer to the scene of a potential crime, fire, or other emergency where the injury then occurs") (quotation marks omitted); Beaupre v. Pierce County, 166 P.3d 712, 716 (Wash. 2007) ("The doctrine does not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene.").

Furthermore, the firefighter's rule precludes the rescuer's recovery only if "the negligently created risk which resulted in plaintiff's injury was the reason for [the rescuer] being at the scene in his professional capacity." Garcia v. City of South Tucson, 640 P.2d 1117, 1120 (Ariz. Ct. App. 1981). As such, "the Firefighter's Rule does not apply . . . to misconduct other than that which necessitates the officer's presence." Moody v. Delta W., 38 P.3d 1139, 1141 (Alaska 2002).

This restriction is significant, and it is broadly accepted. See Melton v. Crane Rental Co., 742 A.2d 875, 878 & n.9 (D.C. 1999) (suggesting that the independent negligence exception has been accepted by every state expressly to consider the doctrine); see, e.g., Neighbarger v. Irwin Indus., Inc., 882 P.2d 347, 352 (Cal. 1994) (explaining that the rule "does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer"); Lipson v. Superior Ct., 644 P.2d 822, 826 (Cal. 1982) ("The rule has *only* been applied to prohibit a fireman from recovering for injuries caused by the very misconduct which created the risk which necessitated his presence."); Pottebaum v. Hinds, 347 N.W.2d 642, 646 (Iowa 1984) ("The relevant inquiry is whether the negligently created risk which resulted in the fireman's or policeman's injury was the very reason for his presence on the scene in his professional capacity. If the answer is yes, then recovery is barred; if no, recovery may be had."); Farmer v. B & G Food Enters., Inc., 818 So. 2d 1154, 1159-1160 (Miss. 2002) ("We hold that an action brought by a firefighter or a police officer for an injury sustained as the result of a negligent act by another party and sustained in the course of his employment is barred only when the sole negligent act is the same negligent act that necessitated rescue and therefore brought the firefighter or police officer to the scene of the emergency."); Fordham v. Oldroyd, 171 P.3d 411, 413 (Utah 2007) (explaining that the rule precludes recovery only when "the injury was derived from the negligence that occasioned the professional rescuer's response"); Pinter v. Am. Fam. Mut. Ins. Co., 613 N.W.2d 110, 115 (Wis. 2000) (holding that the firefighter's rule "bars a cause of action only when the sole

negligent act is the same negligent act that necessitated rescue and therefore brought the firefighter to the scene of the emergency"); 65A C.J.S. *Negligence* § 577 (2021 update) ("The rule precludes liability when the firefighter's injuries are caused by the very wrong that initially required the firefighter's presence in an official capacity and subjected the firefighter to harm."); Ehud Guttel & Ariel Porat, *Tort Liability and the Risk of Discriminatory Government*, 87 U. CHI. L. REV. 1, 15 (2020) ("Most states now allow recovery when the plaintiff-rescuer's harm resulted from a different risk than the risk that necessitates their presence in the first place.") (quotations and alteration omitted); Stephen E. Ruscus, *Empty Pockets: Application of the Fireman's Rule to Emergency Medical Technicians*, 7 J. CONTEMP. HEALTH L. & POL'Y 339, 342 (1991) ("The fireman's rule prohibits a fireman from recovering damages for injuries caused by the very negligence that created the risk necessitating his presence.").

For statutory support, see, e.g., N.H. REV. STAT. ANN. § 507:8-h(I)(a) (establishing that defined rescuers "shall have no cause of action for injuries incurred during the performance of duties incidental to and inherent in the officer's official engagement arising from negligent conduct of the person or persons requiring the officer's services"); VA. CODE ANN. § 8.01-226(A) ("The common-law doctrine known as the fireman's rule . . . shall not be a defense to claims (i) against third parties whose negligent acts did not give rise to the emergency to which such public official is responding and who were not occupiers of the premises where such emergency arose and injuries occurred; (ii) arising out of further acts of negligence separate and apart from the negligent acts that gave rise to the emergency to which such public official is responding . . . .").

For illustrations of how this limitation plays out in a variety of factual circumstances, see, e.g., Stapper v. GMI Holdings, Inc., 73 Cal. App. 4th 787 (1999) (holding that the firefighter's rule did not bar the firefighter's suit against a garage-door-opener manufacturer, when, in the midst of a fire, the manufacturer's product malfunctioned, trapping the firefighter in the garage); Terhell v. Am. Commonwealth Assocs., 172 Cal. App. 3d 434, 442 (1985) (holding that the rule did not preclude a firefighter's cause of action against a landowner for injuries he sustained when he fell through an unguarded hole in the roof of defendant's property because "[h]aving an unguarded hole in the roof was not the cause of appellant's presence at the scene, and the firefighter's rule has never been applied to negligence which did not cause the fire"); Ruffing v. Ada Cnty. Paramedics, 188 P.3d 885, 945-946 (Idaho 2008) (concluding that the firefighter's rule did not bar the rescuer's cause of action when the conduct that caused his injury "was not the 'same conduct' that required his official presence"); Rusch v. Leonard, 927 N.E.2d 316, 322-324 (Ill. App. Ct. 2010) (holding that the rule did not preclude a firefighter's cause of action when he was injured by an allegedly defective stairway on the defendant's premises); Rennenger v. Pacesetter Co., 558 N.W.2d 419, 422-423 (Iowa 1997) (concluding that the rule did not preclude the firefighter's cause of action because his injuries arose from defects in the property, rather than from the act that created the need for his presence).

Comment *i* also makes plain that the firefighter's rule does not preclude liability if the actor's tortious conduct occurs subsequently to, or independently of, the rescuer's arrival at the scene. Once a rescuer is on the scene, in other words, the actor owes the rescuer a duty of

reasonable care. As the Indiana Supreme Court has put it: "[T]he automobile driver who negligently causes an accident can call paramedics without fear that they will sue him for causing the accident, but he must behave reasonably once they arrive." Babes Showclub, Jaba, Inc. v. Lair, 918 N.E.2d 308, 314 (Ind. 2009).

This temporal limitation is broadly accepted. See, e.g., CAL. CIV. CODE § 1714.9(a)(1) (creating an exception to the firefighter's rule when "the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel"); NEV. REV. STAT. ANN. § 41.139(a) (creating an exception to the firefighter's rule if the tortious conduct "[o]ccurred after the person who caused the injury knew or should have known of the presence of the peace officer, firefighter or emergency medical attendant"); N.H. REV. STAT. ANN. § 507:8-h(I)(b) ("This section does not affect such officer's causes of action for unrelated negligent conduct occurring during the officer's official engagement . . . ."); *Moody*, 38 P.3d at 1141 (qualifying the firefighter's rule by establishing that it "does not apply to negligent conduct occurring after the police officer or firefighter arrives at the scene"); *Neighbarger*, 882 P.2d at 352 ("The rule does not apply to . . . independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene."); *Melton*, 742 A.2d at 879 ("[T]he only activities that the doctrine seeks to immunize from liability are those negligent acts that occasioned the professional rescuer's presence at the scene."); Apodaca v. Willmore, 392 P.3d 529, 537 (Kan. 2017) (explaining that "a firefighter is not barred from recovery if the individual responsible for the firefighter's presence engages in a subsequent act of negligence after the firefighter arrives at the scene"); Harris-Fields v. Syze, 600 N.W.2d 611, 615 (Mich. 1999) ("[W]here officer's injury results from subsequent negligence of defendant, rule does not bar recovery."); Thomas v. CNC Invs., 234 S.W.3d 111, 121 (Tex. App. 2007) (explaining that the firefighter's rule does not preclude a rescuer's recovery "when acts of negligence occur after the public-safety officer reaches the scene"); Wright v. Coleman, 436 N.W.2d 864, 868-869 (Wis. 1989) (holding that, although a landowner is immunized for negligently starting a fire or in failing to curtail its spread, the landowner owes a duty of ordinary care to a firefighter while the firefighter is on the premises); accord 65A C.J.S. *Negligence* § 577 (2021 update) ("It does not apply when subsequent acts of negligence or misconduct occur once the firefighter is on the scene."); BARRY A. LINDAHL, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 38:26 (2023 update) ("[A] distinction is generally drawn between the conduct of the defendant in causing the firefighter or police officer to come to the premises in the first instance, i.e., negligence in causing the fire itself, and subsequent conduct after the firefighter or police officer arrives on the premises."); Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 IND. L.J. 745, 753 (2007) ("A prominent exception [to the firefighter's rule] arises when the defendant negligently injures rescuers after those rescuers have arrived at the scene.").

Notwithstanding the above, a number of courts have, in operation, taken a somewhat more restricted view of the "independent negligence exception." These courts have shielded actors from liability, even when the actors' negligence did not *directly* occasion the rescuer's presence or inflict the rescuer's injury. See, e.g., *Moody*, 38 P.3d at 1140-1143 (holding that police officer injured in

car accident involving stolen car could not recover from the owner who negligently left car keys in the ignition); White v. State, 202 P.3d 507 (Ariz. Ct. App. 2008) (police officers killed while responding to a shooting; held that the firefighter's rule barred the wrongful-death claims against the defendant mental-health counselors for negligence in treating the shooter); Young v. Sherwin-Williams Co., Inc., 569 A.2d 1173, 1179 (D.C. 1990) (holding that firefighter injured while responding to an accident involving a commercial truck driven by an intoxicated employee could not recover from the company that negligently failed to conduct a background check of the employee); Hockensmith v. Brown, 929 S.W.2d 840 (Mo. Ct. App. 1996) (holding that police officer, who was assaulted by a 17-year-old at a convenience store after trying to quell a public disturbance, could not recover against the minor's parents, apparently for their prior negligent supervision); Loiland v. State, 407 P.3d 377, 381 (Wash. Ct. App. 2017) (holding that "where the negligent acts of multiple parties cause the public safety issue that necessitates the rescuer's presence, the professional rescuer doctrine bars recovery from each of these parties").

Illustration 6, regarding Officer Wu and the baseball bat, is based loosely on Tucker v. Shoemake, 731 A.2d 884 (Md. 1999). Also supportive is Benefiel v. Walker, 422 S.E.2d 773 (Va. 1992). There, the Virginia Supreme Court observed that "all the other jurisdictions that have considered the matter have excluded from the protection of the fireman's rule third parties whose negligent acts did not give rise to the emergency and who were not occupiers of the premises where the emergency arose and the injuries occurred." Id. at 777. See also Wilbanks v. Echols, 433 S.E.2d 134, 135 (Ga. Ct. App. 1993) (finding that firefighter's rule did not preclude recovery when plaintiff firefighter fell into an open excavation while trying to get to a fire); Paul v. Luigi's, Inc., 557 N.W.2d 895, 897 (Iowa 1997) (concluding that the firefighter's rule "does not bar" plaintiff's premises liability claim when the plaintiff was "dispatched to investigate a suspicious vehicle," but he was injured, not by that vehicle's occupants but, rather, by a third-party's "negligence in maintaining an unguarded window well"); Sallee v. GTE S., Inc., 839 S.W.2d 277 (Ky. 1992) (concluding that the firefighter's rule did not preclude paramedic's suit, when he was called to transport an assault victim but twisted his ankle in a rut left by a utility company).

Illustration 7, regarding the liability of Bob's Bar, is based loosely on Gail v. Clark, 410 N.W.2d 662, 666-667 (Iowa 1987). Consider also Olle v. C House Corp., 967 N.E.2d 886 (Ill. App. Ct. 2012), and Tull v. WTF, Inc., 706 N.W.2d 439 (Mich. Ct. App. 2005).

Illustration 8, involving Firefighter Johnson and the icy driveway, is drawn from Antosz v. Allain, 40 A.3d 679, 681-682 (N.H. 2012), which held that the firefighter's rule did not preclude the rescuer's tort action when the rescuer slipped on the homeowner's driveway while responding to a fire; "the only relevant inquiry in determining whether a cause of action is barred is whether the negligently-created risk that caused the firefighter's injury was the reason for his presence on the scene." See also 425 ILL. COMP. STAT. 25/9f ("The owner or occupier of the premises and his or her agents are not relieved of the duty of reasonable care if the fire fighter is injured due to the lack of maintenance of the premises in the course of responding to a fire. . . ."); Terhell v. Am. Commonwealth Assocs., 172 Cal. App. 3d 434, 442 (1985) (regarding defects in the homeowner's

property); Rennenger v. Pacesetter Co., 558 N.W.2d 419 (Iowa 1997) (regarding defects in an apartment building, undergoing renovation).

Illustration 9, involving Officer Martinez, struck while directing traffic after the football game, is derived from Aetna Cas. & Sur. Co. v. Vierra, 619 A.2d 436, 440 (R.I. 1993), which held that the firefighter's rule did not prevent a police officer from suing the motorist who struck her as she was directing traffic at an accident site. Also supportive are Gould v. George Brox, Inc., 623 A.2d 1325, 1328 (N.H. 1993) (finding that the rule would not preclude the plaintiff's recovery when the plaintiff-rescuer was directing traffic around a hazard when another motorist drove into the hazard, causing the plaintiff-rescuer to sustain injury); *Benefiel*, 422 S.E.2d at 777 (concluding that the rule did not preclude liability of a motorist who struck an officer's cruiser, while the officer had stopped another motorist for making an illegal U-turn); Sutton v. Shufelberger, 643 P.2d 920 (Wash. Ct. App. 1982) (finding that the rule, if accepted, would not preclude recovery by police officer who, while stopping one vehicle, was struck by another).

Illustration 10, regarding Firefighter Afzal and the wobbly step, is supported by, inter alia, Apodaca v. Willmore, 392 P.3d 529, 542 (Kan. 2017), which emphasizes that "[e]ven the initial tortfeasor is still under a duty to warn of 'known, hidden dangers'" once the rescuer is on the scene, and Baldonado v. El Paso Nat. Gas Co., 176 P.3d 277, 281 (N.M. 2007), which also underscores that, even in the face of the firefighter's rule, an actor must still "warn of hidden hazards." See also FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS Vol. 5 § 27.14, at 301 (3d ed. 2008) ("[T]he occupier has been held liable for failing to use care to warn an officer of concealed perils known to the occupier."); Larry D. Schaefer, *Liability of Owner or Occupant of Premises to Firefighter Coming Thereon in Discharge of His Duty*, 11 A.L.R.4th 597 (originally published in 1982) ("[T]he owner or occupant of premises may be held liable to a firefighter injured by a hidden danger on the premises, where the owner or occupant knew of the danger and had an opportunity to warn the firefighter of it.").

Illustration 11, regarding Firefighter Afzal and the neighbor's call to 911, is supported by, inter alia, Norfolk S. Ry. Co. v. Johnson, 554 S.W.3d 315, 318 (Ky. 2018) (rejecting argument that the homeowner herself must be the one to call law enforcement).

Comment j. Only bars recovery for risk inherent in the rescuer's duties. The majority of courts impose what might be called an "inherent" or "typical" risk requirement, holding that the firefighter's rule only bars recovery for those risks inherent in, or peculiar to, the rescuer's duties. This requirement, however, is largely subsumed by the "independent negligence exception" of Comment *i*.

For cases addressing this limitation, see, for example, Aetna Cas. & Sur. Co. v. Vierra, 619 A.2d 436, 439 (R.I. 1993) (clarifying that, to invoke the firefighter's rule, "the defendant must demonstrate," among other things, that "the risk the tortfeasor created was the type of risk that one could reasonably anticipate would arise" in the course of employment); Fordham v. Oldroyd, 171 P.3d 411, 413 (Utah 2007) (explaining that the doctrine only restricts recovery when "the injury was within the scope of those risks inherent in the professional rescuer's duties"); Beaupre v. Pierce County, 166 P.3d 712, 715 (Wash. 2007) (imposing an inherent hazard requirement); see

also, e.g., Collins v. Flash Lube Oil, Inc., 2012 WL 4605562, at *2 (S.D. Miss. 2012) (describing the rule as one that "prohibits recovery by firefighters and police officers injured as a result of a risk inherent in, and foreseeable as a part of their duties as police officers") (quotation marks and citation omitted), aff'd, 518 F. App'x 298 (5th Cir. 2013); Knight v. Schneider Nat'l Carriers, Inc., 350 F. Supp. 2d 775, 783 (N.D. Ill. 2004) (explaining that rescuers are only prevented from recovering for those risks "inherent in" the emergencies they confront and that "[d]angers that are not inherent are those that might be faced by an ordinary citizen") (quotation marks omitted); Whiting v. Cent. Trux & Parts, Inc., 984 F. Supp. 1096, 1105 (E.D. Mich. 1997) (explaining that the "fireman's rule" only "prevents recovery for injuries arising out of the inherent risks of these professions"); Malo v. Willis, 178 Cal. Rptr. 774, 777 (Ct. App. 1981) (imposing a requirement that "the risk be 'of the type usually dealt with by firemen,' which we may call the special or typical risk requirement"); Jamison v. Ulrich, 206 S.W.3d 419, 422 (Tenn. Ct. App. 2006) ("The policemen and firemen's rule precludes firefighters and police officers from recovering damages for injuries arising out of risks peculiar to their employment.").

Illustration 12, regarding Train Co., is based loosely on Tipton v. CSX Transp., Inc., 2016 WL 11501426, at *3 (E.D. Tenn. 2016). Somewhat similar is Chinigo v. Geismar Marine, Inc., 512 So. 2d 487, 492 (La. Ct. App. 1987), although *Chinigo* was ultimately decided on the ground that the defendant "improperly handled a hazardous chemical in a wanton manner."

Comment k. Ownership of property immaterial. As Comments *a* and *b* explain, the firefighter's rule was originally born of, and justified by, the special duty rules that protected owners and occupiers of real property. Reasoning that rescuers were licensees, or something closely analogous, courts held that rescuers took the premises as they found it, so the landowner would not be liable for negligently creating the dangerous condition that occasioned the rescuer's injury. Reflecting the doctrine's origins, some courts initially held that the rule protected only property owners or occupiers when these owners or occupiers were rescued while on their own land. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 285, at 769 (2000) (discussing the doctrine's initial rationale).

As rigid categories governing premises liability have faded and the rationale undergirding the firefighter's rule has necessarily shifted, many courts have relaxed this somewhat arbitrary distinction in favor of a broader application. (For more on how the firefighter's rule's rationale has evolved, see Reporters' Note to Comment *b* above.) See DOBBS ET AL., supra § 285, at 770 (observing that courts have "divorce[d] the rule from its connection to landowner cases" and held that "public safety officers in the course of their employment should be denied recovery for injuries inflicted by the defendant's negligence even when injuries occurred outside the defendant's land and even when the defendant was not a landowner at all").

Reflecting this evolution, a strong majority of the courts that have adopted the firefighter's rule support its application to any actor whose tortious activity creates the need for the rescuer's presence. As the Kansas Supreme Court explained: "A firefighter is prohibited from recovering based on the initial act of negligence regardless of whether the call is to a traffic accident or someone's home, to a fire or some other emergency." Apodaca v. Willmore, 392 P.3d 529, 541

(Kan. 2017); accord BARRY A. LINDAHL, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 38:26 (2023 update) ("The rule is not limited exclusively to landowners.").

On the other hand, a handful of courts continue to restrict the rule to property owners or occupiers, although this is "much the minority view." Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 IND. L.J. 745, 755 (2007). See, e.g., Levandoski v. Cone, 841 A.2d 208, 210 (Conn. 2004) (reasoning that the rationale of the rule, as a rule of premises liability, did not warrant extension beyond premises liability cases); Randich v. Pirtano Constr. Co., 804 N.E.2d 581, 589 (Ill. App. Ct. 2003) ("[B]ecause the rule's grounding is found in a compromise of rights between firemen and owners or occupiers, the rule cannot be expanded beyond its limited context of landowner/occupier liability."); Torchik v. Boyce, 905 N.E.2d 179 (Ohio 2009) (holding that defendant independent contractor's lack of a property interest in premises negates the contractor's ability to rely on the firefighter's rule, since the rule is a defense traditionally created for property owners); Sobanski v. Donahue, 792 A.2d 57, 59 (R.I. 2002) ("The police officer or public safety officer's rule bars members . . . from bringing tort actions against property owners . . . ."); Campus Mgmt. Inc. v. Kimball, 991 S.W.2d 948, 950 (Tex. App. 1999) ("Texas has long employed the Fireman's Rule in premises liability cases. . . . [T]he Texas version of the Fireman's Rule provides that a fire fighter is a licensee to whom a property owner or operator owes certain duties: not to injure the fire fighter by willful, wanton, or gross negligence; to warn of known dangerous conditions of which the fire fighter is unaware; and not to injure the fire fighter through active negligence after the fire fighter arrives at the premises to combat the blaze.").

Comment l. Exception when tortfeasor violates a safety statute enacted to protect rescuers. As Comment *l* explains, this Section does not preclude a professional rescuer's claim when the actor violates a safety statute specifically enacted to protect professional rescuers. The restriction drawn by Comment *l* enjoys broad support. See, e.g., VA. CODE ANN. § 8.01-226 ("The common-law doctrine known as the fireman's rule, . . . shall not be a defense to claims . . . (iii) based upon a violation of a statutory duty created for the express benefit of such public official . . . ."); Babes Showclub v. Lair, 918 N.E.2d 308, 314-315 (Ind. 2009) (adopting an exception for the violation of a statute or ordinance if that statute or ordinance was enacted "specifically" to protect rescuers—and pointing out that if the "specifically" requirement were erased, "the exception to the fireman's rule . . . would swallow the rule"); Woodruff v. Bowen, 34 N.E. 1113, 1117 (Ind. 1893) (articulating a specific-purpose requirement); Hack v. Gillespie, 658 N.E.2d 1046, 1051 (Ohio 1996) (creating an exception when the injury resulted from the actor's violation of a statute or ordinance and the statute or ordinance was created for the benefit of firefighters or police officers); Hawkins v. Imboden, 1998 WL 471527, at *2 (Ohio Ct. App. 1998) (explaining that, "in order for the owner's violation of a statute to be the basis of an exception to the 'Fireman's Rule,' the statute must be one 'enacted specifically for the benefit of fire fighters'"); Clark v. Corby, 249 N.W.2d 567, 571-572 (Wis. 1977) ("This claim of breach of duty owed requires that the ordinances allegedly violated have been enacted to protect a fire fighter in the performance of his fire fighting duties. . . . Even where it is conceded that the statute or ordinance is a safety requirement, the

question that must be decided is whether 'the purpose of the ordinance was to protect the party seeking to invoke it.'"); accord DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 363 (2023 update) (explaining that, in its traditional incarnation, there was an exception to the firefighter's rule "when the landowner has violated an ordinance or safety statute aimed at protecting firefighters or officers"); DEFENSE AGAINST A PRIMA FACIE CASE § 13:83 (2022 update) (observing that "violation of a statute or ordinance enacted specifically to protect emergency responders may remove the protection otherwise afforded by the fireman's rule").

In a few states, there is a similar, though seemingly less demanding, requirement that appears to carve an exception to the firefighter's rule as long as the rescuer was within the scope of the law's protection. See, e.g., NEV. REV. STAT. ANN. § 41.139(c)(1) (creating an exception to the firefighter's rule when the "conduct causing the injury . . . . [v]iolated a statute, ordinance or regulation . . . [i]ntended to protect the peace officer, firefighter or emergency medical attendant"); Farmer v. B & G Food Enters., 818 So. 2d 1154, 1160 (Miss. 2002) (explaining that the firefighter's rule will not preclude the rescuer's recovery if the injury was the result of the "negligent violation of an ordinance designed to protect the injured party").

LIABILITY FOR ECONOMIC HARM

CHAPTER 3
INTERFERENCE WITH ECONOMIC INTERESTS

§ 20 A. Bad-Faith Performance of First-Party Insurance Contract

An insurer is subject to tort liability to its insured when:

(a) the insurer's claims processing of a first-party insurance policy lacks a reasonable basis;

(b) the insurer acted with knowledge of the lack of a reasonable basis or acted in reckless disregard of the lack of a reasonable basis; and

(c) the insurer's deficient performance is a factual cause of harm to the insured and the harm is within the insurer's scope of liability.

Comment:

a. History, terminology, scope, and cross-reference.
b. Bad-faith performance of third-party insurance contracts.
c. The special nature of insurance contracts.
d. The dual subjective and objective nature of the bad-faith tort.
e. The various bases for bad-faith claims processing.
f. Intentional or negligent tort.
g. Timing of insurer's knowledge of facts supporting good faith.
h. Factual cause and scope of liability.
i. Obligation reasonably to investigate.
j. Other tortious conduct by an insurer.
k. Fiduciary duty.
l. Judge and jury.
m. State unfair-insurance-claims-practices provisions.
n. Negligence and honest mistakes.
o. Independent contractors hired to perform claims processing.
p. Damages.

a. History, terminology, scope, and cross-reference. This Section covers "first-party" insurance, which is insurance that persons, businesses, or other entities, purchase for their protection from loss—or for the protection of their families. Common examples include health insurance, life

insurance, and disability insurance. By contrast with first-party insurance, "third-party" insurance, sometimes called "liability insurance," covers liability risks of the insured that occur when a third party sues or otherwise asserts a claim against the insured for tortiously causing harm.

Frequently, insurance policies are hybrids, containing coverage for first-party losses as well as third-party losses. So, for example, both standard-form automobile policies and homeowners' policies contain coverage for specified losses suffered by the insured as well as liability coverage for certain tort claims by third parties. This Section addresses not just pure first-party policies (such as life-insurance policies), but also the first-party coverages of those hybrid policies. Bad faith arising from the liability aspects of those hybrid policies is covered in the Restatement of the Law, Liability Insurance. See Comment *b*. Insurance is a state-law issue; there is (with only limited exceptions) no federal common law of insurance.

Prior Torts Restatements did not address the liability of first-party insurers that acted in bad faith in performing their obligations contained in an insurance policy, as this tort first emerged in 1973 in the seminal case of Gruenberg v. Aetna Insurance Co., 510 P.2d 1032 (Cal. 1973), after the publication of the first two volumes of the Restatement Second of Torts. Bad faith by liability (third-party) insurers is addressed in Restatement of the Law, Liability Insurance §§ 49 and 50 and incorporated by reference in Comment *b*. As that Restatement observed, "[m]uch of the relevant law governing insurance bad faith has been developed in the first-party insurance context." Id. § 4, Comment *b*. This Section, of course, is based on and draws from, that governing law.

b. Bad-faith performance of third-party insurance contracts. Like their first-party counterparts, liability insurers are subject to tort liability for certain actions (or inactions) in their claims processing. A liability insurer might incur such liability in one of two primary (though nonexclusive) ways. First, a liability insurer might incur tort liability if it breaches its duty to make reasonable settlement decisions. That obligation—to settle liability claims reasonably—is peculiar to liability insurance, requires only unreasonable conduct in the settlement context, and has no counterpart in this Section. For discussion, see Restatement of the Law, Liability Insurance §§ 24 and 27 (explaining that some jurisdictions ground this liability in tort while others rely on contract).

Second, a liability insurer might incur bad-faith tort liability if it fails to perform its contractual obligations without a reasonable basis for its conduct and with knowledge of its duty to perform or in reckless disregard of its obligation to perform. *Those* third-party bad-faith claims, which are very similar to the first-party claims addressed by this Section, are addressed in id. §§ 49

and 50. These provisions in the Liability Insurance Restatement are incorporated by reference in this Restatement.

c. The special nature of insurance contracts. Courts that impose tort obligations on insurers often say that tort liability arises from insurers' breach of the duty of good faith and fair dealing—a duty implied in all contractual agreements. Yet, as many courts also acknowledge, bad-faith tort liability is not ordinarily available for breach of contract. Nevertheless, consistent with this Section, a strong majority of jurisdictions authorizes bad-faith claims in the special context of insurance law. Courts explain this differential treatment by pointing to exceptional aspects of an insuring agreement, which include the following realities: (1) there is a significant disparity in market power between insurers and insureds, and, among other things, this disparity results in contracts of adhesion for all standard-form (and some other) policies; (2) the insurance industry is suffused with public-interest concerns—its extensive regulation reflects the public aspects of insurance; (3) concomitantly with (2), insurance contracts play a critical role in the American economy by transferring and distributing risk—and, in so doing, these contracts facilitate productive economic activity; (4) insureds rely on insurance—and insureds reasonably expect that insurers will perform their coverage obligations promptly when losses occur and when financial compensation is urgently needed; (5) some insureds are economically fragile and vulnerable, particularly after suffering a significant loss; (6) without liability for insurance bad faith, there exist inadequate alternative mechanisms to ensure that insurers will promptly and reasonably process claims and pay covered losses; and (7) the insurer is in the dual role of party and, at least initially, the judge, imposing special obligations to judge neutrally.

d. The dual subjective and objective nature of the bad-faith tort. To make out a prima facie case of first-party bad faith, the plaintiff-insured must prove both that there was no reasonable basis for the defendant-insurer's claims processing and that, in its claims-processing conduct, the defendant-insurer knew or acted in reckless disregard of the lack of a reasonable basis. Thus, the first element focuses on whether the insurer's challenged conduct was objectively unreasonable, or, as some courts explain it when the issue is a coverage denial, whether coverage was "fairly debatable." The second element, a subjective one, requires proof that the insurer knew its conduct was unreasonable or acted in reckless disregard of facts or legal authority that revealed the unreasonableness. Knowledge, a matter exclusively within the ken of the insurer, will often be proved through circumstantial evidence. Since juridical entities cannot themselves have

knowledge, knowledge by an insurer's employee or agent satisfies this element of the standard for the bad-faith tort.

This dual standard, although not always precisely articulated in this fashion by courts, reflects the predominant view and parallels the standard adopted in the Restatement of the Law, Liability Insurance § 49, for third-party (liability) insurer bad faith.

In adopting this dual objective–subjective standard, courts have recognized both the policy reasons explained in Comment *c* and the countervailing concerns that insurers should not be pressured by the threat of tort damages to pay unmeritorious claims; nor should insurers be deterred from fully investigating and challenging dubious or questionable claims. Neither insureds nor insurers benefit if insurers pay for claims for which there is no coverage.

A few courts formally have adopted different standards than the one in this Section. On the more stringent side of the continuum, some courts predicate bad-faith liability on a showing that the insurer engaged in oppressive, dishonest, or malicious conduct, along with a subjective state of mind requiring ill will, hatred, or revenge. Yet, in operationalizing that standard, courts tend to take a relatively indulgent view of whether the facts satisfy that standard; few insurers, after all, are motivated by hatred or ill will toward a particular insured, even when engaging in egregious claims-processing conduct. On the more lenient side of the continuum, some courts require only that the insurer's actions or decisions were objectively unreasonable. The dual standard adopted in this Section charts a middle course between these two alternatives—one that comports with the majority of courts recognizing the bad-faith tort.

e. The various bases for bad-faith claims processing. Bad faith in claims processing may include: (1) denials of claims for which no reasonable basis exists for the denial; (2) offers of settlement in amounts below the minimum that would be reasonable based on the facts of the claim and the scope of coverage; (3) investigations that take an unreasonably long time, that are unreasonably onerous or demanding, or that are otherwise unreasonable; (4) imposing conditions on insureds during claims processing that are unreasonable or impossible to fulfill; (5) conditioning payment for an uncontested aspect of a claim on the insured agreeing to a global settlement of the claim; (6) misrepresentations about coverage; (7) improper destruction of evidence; or (8) overpaying to accelerate the exhaustion of policy limits when the policy otherwise would fund ongoing obligations. "Claims processing" as used in this Section covers the insurer's conduct from the time when an insurer first has notice of a claim through to final resolution of the claim.

f. Intentional or negligent tort. Some courts and commentators have sought to pigeon-hole the insurance bad-faith claim as either an intentional or negligent tort. In the form adopted in this Section, it is neither exclusively one nor the other; it straddles, and contains elements of, both.

The conduct aspect of the bad-faith tort is similar to negligence insofar as it adopts an objective standard based on reasonableness. But the subjective-knowledge element cannot be squared with negligence, as an actor can act negligently without any knowledge of, indeed while remaining oblivious to, the risk and without appreciating that the conduct is unreasonable. Accordingly, the tort of insurance bad faith, recognized here, is not one that sounds neatly in negligence.

On the other hand, nor does it resemble an intentional tort. The objective unreasonableness aspect, for one, is not consistent with intentional torts. The subjective-knowledge element, meanwhile, does have a passing similarity to the intent requirement of intentional torts in that an insurer that is aware of an unreasonable position or unreasonable conduct in its claims processing, would likely satisfy the "substantial certainty" prong for intent. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 1(b). But the insurer's recklessness with regard to the unreasonableness of its own conduct, while reflecting a higher degree of culpability than negligence, is not the equivalent of intentionally causing harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 2, Comment *a* (contrasting the serious wrongdoing of recklessness with intentionally causing harm). Courts and commentators should accept this tort for the hybrid that it is rather than laboring to place it into the traditional tort taxonomy.

g. Timing of insurer's knowledge of facts supporting good faith. An insurer who claims a reasonable basis for denying a claim may, in an action under this Section, rely on any facts uncovered during its investigation as a basis for its denial of, or failing to accept, coverage of the insured's claim. In defending itself against a claim of bad faith for denying coverage, an insurer may not rely on facts of which it became aware only after its denial of the claim. Thus, an insurer who wrongly denies a claim and is liable for indemnity may not defend a bad-faith claim on the grounds it had a reasonable basis for its decision based on facts of which it was unaware at the time of its decision.

Comment *g* applies only when a claim is denied, in contrast to instances in which an insurer is subject to liability for different claims-handling practices (such as unreasonably delaying

payment—or any of the other bases for liability described in Comment *e*). In those latter circumstances (in the absence of a denial), Comment *g* has no effect.

h. Factual cause and scope of liability. An insurer may act in an egregiously culpable manner but not cause any harm to its insured, just as *any* tortfeasor may act in an egregiously culpable manner but, due to fortuity, not inflict injury. In either instance, the same factual-cause rules applicable to other torts apply to insurance bad-faith claims—and, pursuant to these rules, an insurer is liable only if its misconduct actually causes harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 26-28. Thus, an insurer who fails reasonably to investigate a claim because of a cynical policy to reduce administrative costs is not liable under this Section if the claim is for an uncovered loss; nor is the insurer liable if the insurer cynically denies a claim for which there is, in fact, a justifiable basis for denial so long as the facts that support the justifiable basis were known at the time of the denial. See Comment *g.* However, an insurer that engages in dilatory claims investigation or processing may be liable for any harm caused by the delay in payment or for other harm that the deficient claims processing caused. Simply, if the insurer harms the insured, the insurer may be subject to liability under this Section; if the insurer causes no harm to the insured, the insurer is not liable under this Section, no matter how egregious its conduct.

Even if an insurer's outrageous, dilatory, or otherwise unreasonable conduct does not give rise to bad-faith tort liability because it fails to meet the factual-cause requirement of Subsection (c), the insurer nevertheless may be liable for negligent or intentional infliction of emotional distress if the requirements for one of those torts are satisfied. See Comment *j*; Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 46 and 47.

Illustration:

1. Lana's home was badly burned under mildly suspicious circumstances. A few months before the fire, County Farm, Lana's insurer, had adopted an internal policy to pursue possible fraud aggressively—and, pursuant to that policy, it conducts a biased and unreasonable investigation that seeks only to find evidence of fraud by Lana. Notwithstanding its myopic focus, County Farm completes its investigation in a timely fashion. In the course of the investigation, County Farm uncovers evidence that creates a genuine issue about the merits of the claim (evidence that could have been found in a proper investigation), although Lana ultimately overcomes County Farm's initial denial of the claim. Pursuant to this Section, County Farm is not liable to Lana for bad faith because its

biased investigation did not cause Lana harm; even a reasonable investigation would have led to the same initial insurer decision.

In addition to factual cause, the harm suffered by the insured must be within the insurer's scope of liability. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29. Sometimes referred to as proximate cause or legal cause, the Liability for Physical and Emotional Harm Restatement employed the new "scope of liability" terminology because it better describes the function of this element of a case and because proximate cause is often used to mean something different from this element. See id. Chapter 6, Scope of Liability (Proximate Cause), Special Note on Proximate Cause.

Illustration:

2. Alan's home becomes uninhabitable because of storm damage, and he submits a claim for the loss to his insurer, Habitable Home Insurance. Habitable unreasonably delays paying for the costs of repair, even though it knows that there is no basis for its delay. During this time, Alan uses money he had set aside for a vacation in Rio de Janeiro to repair his home. When Habitable still has not paid the claim as the date for his vacation approaches, Alan changes the location for his vacation to a more economical place, St. Louis. While in St. Louis, Alan is the victim of a mugging, during which his luxury watch is stolen. Habitable's delay in paying Alan's claim satisfies the standard for bad faith in Subsections (a) and (b) and is also a factual cause of the loss of jewelry (per Subsection (c)). But Habitable is not liable for the watch's loss because (also per Subsection (c)) the loss of the watch is not within the scope of Habitable's liability; theft of a watch is, as a matter of law, not among the risks created by bad-faith delays in claims processing.

i. Obligation reasonably to investigate. As Comment *e* makes plain, an insurer's obligation of good faith and fair dealing is not limited to the claims decision it ultimately makes. An insurer must act reasonably in investigating a claim when there are factual or legal matters that must be resolved. An insurer acting reasonably will: engage in a prompt investigation that does not unreasonably delay resolution of the claim; hire independent and unbiased experts when expertise is required to determine relevant facts; and even-handedly seek and give due regard to all of the facts bearing on the coverage issue, claim, and the amount of the loss (although, in so doing, an insurer is entitled to consider the fact that insureds do not have a concomitant obligation of even-handedness in filing and supporting their claims). Beyond that, a reasonable insurer will: respond

appropriately when additional material facts are provided after an initial denial of a claim; resolve any legal issues bearing on the legitimacy of the claim without bias favoring itself; and consider all possible bases for coverage and not truncate inquiry when one basis for coverage is not established if there are other provisions in the policy that might provide coverage.

Insurers engaging in bad-faith investigations are subject to liability for harm caused by the insurer's breach of the duty of good faith and fair dealing, which includes the obligation to act reasonably in claims investigations. See Comment *e*.

Illustration:

3. Laura, who has a homeowner's insurance policy with Jackson Insurance Co., discovers that a window has fallen out of the wall of her living room, and the floor in one part of the living room has given way in her 100-year-old house. Laura hires an investigator who reports that a fungus is responsible for the condition that led to the mishaps and that her home is at risk of imminent collapse. Jackson initially determines that the claim is not covered based on an exclusion for any damage caused by "wet or dry rot." That narrow determination is reasonable, but Jackson, even though aware of the possibility of *other* bases for coverage, denies Laura's claim without investigating or considering whether the damage is covered by an "additional coverage" section of Laura's policy that provides coverage for "an actual collapse" "due to decay"—an action that is unreasonable. Jackson is subject to liability for bad faith based on its failure to investigate whether coverage exists under the additional coverage section of the policy.

j. Other tortious conduct by an insurer. Before the bad-faith tort claim became well recognized, a number of courts permitted insureds to recover extracontractual damages from insurers based on the tort of intentional infliction of emotional distress. The significance of intentional infliction of emotional distress as a remedy for insurer misconduct has declined with the advent of the insurance bad-faith tort because the hurdles to recovery for intentional infliction are generally more stringent, requiring not only intentional or reckless conduct in interfering with the insured's emotional tranquility, but also extreme and outrageous behavior and a showing that the victim suffers severe emotional harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 46. However, this claim remains available when circumstances warrant, including on those occasions when coverage is fairly debatable, so that denial was not unreasonable, but the insurer engages in extreme and outrageous conduct in investigating the claim.

Besides intentional infliction of emotional distress, an insurer's conduct in its claims processing may constitute another tort, such as defamation or negligent infliction of emotional distress. For defamation, see Restatement Third, Torts: Defamation and Privacy § __ (forthcoming). For negligent infliction of emotional distress, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 47. If the elements of another tort are established, the insurer is liable for that tort. In other words, the availability of a bad-faith claim does not preempt other torts that the insurer may commit in its claims-processing conduct.

k. Fiduciary duty. An insurer does not have a fiduciary duty to its insured in its processing of first-party insurance claims; the insurer is not required to take the insured's interests as primary over the insurer's. But, nor is the insurer in the opposite position; it cannot prioritize its own interests over the interests of the insured in conducting an investigation into whether coverage exists. The insurer must, in other words, act in its role as investigator in a way that gives equal weight to its and its insured's often divergent interests. The insurer must act in a way that recognizes the insured's interest in recovering for legitimately covered losses and the insurer's coequal interest in not paying uncovered claims. Or, to put the point in slightly different terms, the insurer must act as a neutral in examining whether coverage exists and other contested aspects that arise in the processing of the insured's claim. However, at the end of the investigation, if there is a reasonable basis for concluding coverage does not exist, the insurer may decline to pay the claim without violating this Section.

The bad-faith claim recognized in this Section provides fully adequate remedies without the need to resort to a fiduciary-duty obligation. See Restatement Third, Torts: Liability for Economic Harm § 16, Comment *b*.

l. Judge and jury. Both the objective and subjective elements of the bad-faith tort are generally mixed questions of law and fact reserved for the factfinder. There are two exceptions, however. First, when the question that must be assessed is whether the insurer's denial of coverage was reasonable based on the policy or statutory language—and that inquiry turns on the interpretation of specific policy or statutory language—courts must assess whether the insurer acted reasonably as a matter of law. Addressing that limited matter as a legal one is consistent with the rule that interpretation of insurance policy or statutory language is a matter for the court because a legally trained official is better able to make that determination than a lay adjudicator.

Illustrations:

4. Same facts as Illustration 3, involving the falling-down house, except that Laura's home suffers a total collapse. Controlling precedent in the jurisdiction provides that damage due to fungus constitutes "decay." Laura makes a claim for $190,000, the policy limits. Jackson does not respond to her claim for 100 days—and when it finally does respond, it offers her $97,500. In so doing, it provides no reason for the discounted sum, and it refuses to negotiate with Laura. Whether there was a reasonable basis for Jackson's claims-processing behavior is a matter for the jury.

5. Same facts as Illustration 3, except that there is no "additional coverage" section of the policy so that the issue of whether the insurer had a reasonable basis for denying coverage turns on the interpretation of Laura's insurance policy—and particularly the meaning of the terms "wet or dry rot." That determination is a legal one and consequently one for the court.

Second, in instances in which the plaintiff claims bad faith based only on the insurer's denial of coverage and the facts bearing on whether coverage exists are not in dispute, the question of whether the insurer had a reasonable basis for denying coverage is a legal one for the court.

m. State unfair-insurance-claims-practices provisions. Virtually all states have enacted statutory provisions prohibiting specified unfair claims practices. In most states, the statutes are not enforceable through private rights of action. However, in jurisdictions recognizing common-law bad-faith claims, the insurer's violation of such statutory provisions may be considered in an insurance bad-faith claim in determining whether there was a lack of reasonable basis in the insurer's claims processing.

n. Negligence and honest mistakes. As Subsection (b) and Comments *d* and *e* make plain, insurers' ordinary negligence or insurers' good-faith mistakes are not an adequate basis for bad-faith tort liability. Before liability is imposed under this Section, there must be unreasonable conduct by the insurer in its claims processing *and* awareness or reckless disregard of that unreasonable conduct in denying the insured the benefits of proper performance. Numerous courts have expressed concern that the bad-faith tort might impose liability on every insurer that makes an innocent but incorrect judgment about the validity of a claim. Incorrect judgments, however, without more, are insufficient to satisfy this Section. The incorrect judgment must be one that a reasonable insurer would not make, *and* the insurer must know that its conduct lacks a reasonable

basis or acts recklessly in remaining ignorant of the lack of reasonable basis in its claims-processing process.

In an effort to cordon off routine erroneous determinations by insurers, some courts insist that insurance bad faith is an "intentional tort." Such a characterization is misleading, as explained in Comment *f*.

Illustrations:

6. Same facts as Illustration 3, regarding the falling-down house, except that there is no additional coverage section in Laura's policy. Jackson's denial of Laura's claim under the standard policy provisions that exclude damage due to wet or dry rot, while determined to be incorrect by the court because that language was ambiguous in its application to fungus, is reasonable or, alternatively, fairly debatable. Jackson is not liable to Laura for bad faith in its denial of her claim. It is, however, liable to Laura for breach of the insurance contract.

7. Same facts as Illustration 3, except that Laura's home suffers a total collapse. Laura makes a claim for $190,000, the policy limits. Jackson does not respond to Laura's claim for 100 days (despite an insurance regulation requiring responses within 60 days)—and when it finally does respond, it offers her $97,500. In so doing, Jackson provides no reason for the discounted sum, and it refuses to negotiate with Laura who Jackson knows has become homeless, owing to her home's destruction. Jackson is subject to liability to Laura for its bad-faith claims processing.

o. Independent contractors hired to perform claims processing. Frequently, claims processing is performed by the insurer's employees. In such instances, the insurer will, under ordinary vicarious liability principles, be liable for the employees' conduct that constitutes bad faith. In other instances, an insurer may choose to contract out to third-party independent contractors some or all of the tasks involved in processing its insureds' claims. While the insurer is free to do so, it nevertheless remains vicariously liable for the independent contractors' bad-faith misconduct. To put the point in a slightly different way—one frequently used by courts—the insurer has a nondelegable duty to conduct its claims processing consistent with its obligation of good faith and fair dealing. Although enforced in a tort claim, the insurer's duty arises from the insurance contract. A party to a contract may not avoid liability for breach of the contract by delegating its nondelegable obligations to another.

p. Damages. A plaintiff who prevails in a first-party insurance bad-faith claim is entitled to the benefit of the insurance coverage, if not otherwise recovered in a contract claim, as well as consequential damages. Thus, contrary to the general contract-law rule, a prevailing plaintiff is entitled to recovery for all consequential economic losses and emotional harm that are within the insurer's scope of liability (proximate cause). See Comment *h*; Restatement Third, Torts: Liability for Physical and Emotional Harm § 29 (discussing scope of liability). Family members who suffer lost consortium due to emotional harm to an insured family member may recover damages for their own emotional harm. See id. §§ 48 A and 48 C (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). Notwithstanding the American rule that each party generally bears its own attorneys' fees, an insured may also be entitled to recover reasonable attorneys' fees incurred in establishing that coverage exists as a remedy in the bad-faith claim but not the fees required to establish bad faith. In addition, if an insurer's conduct is sufficiently culpable to meet the jurisdiction's standard for punitive damages, those damages may be obtained as well.

REPORTERS' NOTE

Comment a. History, terminology, scope, and cross-reference. The *Gruenberg* case, the first to recognize a tort claim against a first-party insurer, relied on prior third-party insurance bad-faith cases requiring insurers to act reasonably in negotiating a settlement when there was a risk of a judgment in excess of the insurer's coverage. Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1036-1038 (Cal. 1973). In both *Gruenberg* and its third-party predecessors, the California Supreme Court relied on the implied covenant of good faith and fair dealing contained in all contracts. A number of other courts followed this same pattern of recognizing first-party claims based on third-party insurance precedent regarding settlement practices. See, e.g., Chavers v. Nat'l Sec. Fire & Cas. Co., 405 So. 2d 1, 5 (Ala. 1981); Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315, 1319 (Ohio 1983); Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 16 (1992) ("The origins of the tort of bad faith in first-party insurance cases are to be found in third-party insurance contracts, that is, liability insurance.").

Today, the vast majority of states permit recovery of extracontractual damages either through a bad-faith tort claim, a statutory claim (discussed in more detail in the Reporters' Note to Comment *m*), or in a breach-of-contract claim against the insurer in which extracontractual damages are permitted. See STEPHEN S. ASHLEY, BAD FAITH ACTIONS LIABILITY & DAMAGES § 2:15 (2019 update) (cataloguing states' approaches and reporting that a majority of states recognize claims for bad faith or otherwise permit extracontractual damages, while identifying 13 states that do not and three that have not addressed the matter); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK,

THE LAW OF TORTS § 702 (2023 update) (explaining that "most states" have adopted first-party bad faith or equivalent provisions permitting recovery of extracontractual damages); LORELIE S. MASTERS, JORDAN S. STANZLER & EUGENE R. ANDERSON, INSURANCE COVERAGE LITIGATION § 11.07, at 12-40 (2d ed. 2000 & Supp. 2023) ("[T]he majority of states . . . have found that breach of the duty of good faith and fair dealing under first-party claims may subject insurance companies to tort liability."). Delaware is an example of a state that situates bad-faith claims in the contract rather than tort law. See Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 264 (Del. 1995) (stating "we take the occasion to adopt the contractual basis for a bad faith action," and limiting recovery for emotional distress to instances in which it is accompanied by physical harm). One jurisdiction that has declined to adopt a bad-faith tort claim is the District of Columbia. See Choharis v. State Farm Fire & Cas. Co., 961 A.2d 1080, 1088-1090 (D.C. 2008) (rejecting bad-faith tort claim against insurers while identifying other tort claims that might be available, which exist in their "own right independent of the contract, and any duty upon which the tort is based must flow from considerations other than the contractual relationship").

Comment c. The special nature of insurance contracts. For cases endorsing the various aspects of insurance contracts that make them exceptional, see:

(1) Vast disparity of bargaining power; contracts of adhesion. Healy Tibbitts Constr. Co. v. Employers' Surplus Lines Ins. Co., 140 Cal. Rptr. 375, 379 (Ct. App. 1977) (observing that "insurance contracts are regarded as contracts of adhesion expressing the superior bargaining power of the insurer"); White v. Unigard Mut. Ins. Co., 730 P.2d 1014, 1019 (Idaho 1986) (adopting first-party bad faith while observing "[i]t is in fact these 'adhesionary aspects' of the insurance contract which have prompted this court in the past to come to the aid of the insured"); Eagle Star Ins. Co. v. Int'l Proteins Corp., 360 N.Y.S.2d 648, 650 (App. Div. 1974) ("Contracts of insurance have been referred to as 'Contracts of Adhesion' in view of the disadvantageous bargaining position which generally exists between the parties and, under such circumstances, are narrowly construed against the insurer" (citation omitted)), aff'd, 346 N.E.2d 249 (N.Y. 1976); Skaling v. Aetna Ins. Co., 799 A.2d 997, 1003 (R.I. 2002) (acknowledging that the court's adoption of the bad-faith tort was "[i]n recognition of the imbalance in the bargaining positions of the parties to an insurance contract").

(2) Public nature of insurance. Findley v. Time Ins. Co., 573 S.W.2d 908, 910 (Ark. 1978) (observing that "insurance companies, like common carriers and utilities, are regulated and clearly affected with a public interest"); Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 146 (Cal. 1979) (explaining the insurance industry as providing a "vital service labeled quasi-public in nature"); Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334, 339-340 (Haw. 1996), as amended (June 21, 1996) (observing that numerous laws regulating the insurance industry reveal the legislature "has recognized that the insurance industry affects the public interest"); Curry v. Fireman's Fund Ins. Co., 784 S.W.2d 176, 178 (Ky. 1978) ("[F]irst-party insurance is recognized as essential. From cradle to grave, individuals willingly pay premiums to insurance companies to obtain financial protection

against property and personal loss."); LORELIE S. MASTERS, JORDAN S. STANZLER & EUGENE R. ANDERSON, INSURANCE COVERAGE LITIGATION § 11.07[A], at 10-40 to 10-41 (2d ed. 2000 & Supp. 2023) (discussing first-party insurance bad faith and public-policy considerations supporting the bad-faith tort); Jay M. Feinman, *The Insurance Relationship As Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 557 (2009) (recognizing that "the single insurance contract is an instance of a system of insurance on which policyholders, dependents, tort victims, and society at large depend to provide security in the event of harm"); William M. Goodman & Thomas Greenfield Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CAL. L. REV. 309, 346 (1974) (observing that "insurers' obligations are also rooted in their status as purveyors of a vital service labeled quasi-public in nature").

(3) Risk transfer and distribution. See Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 8-10 (1992) (detailing the important work of risk transfer for economic development).

(4) Reliance and reasonable expectations of the insured. Noble v. Nat'l Am. Life Ins. Co., 624 P.2d 866, 867 (Ariz. 1981) (recognizing the special nature of insurance contracts and reciting the role of "securing the reasonable expectations" of insureds for special treatment of those contracts); Crisci v. Sec. Ins. Co., 426 P.2d 173, 179 (Cal. 1967) (noting that, "among the considerations in purchasing liability insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss"); see generally Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966-977 (1970) (identifying and developing principle of insured's reasonable expectations).

(5) Economic fragility of insureds. See *Noble*, 624 P.2d at 868 ("Often the insured is in an especially vulnerable economic position when such a casualty loss occurs."); *Best Place, Inc*., 920 P.2d at 344 (explaining that the insured "seeks protection and security from economic catastrophe"); Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315, 1319 (Ohio 1983) (recognizing that the insured "may be in dire financial straits and therefore may be especially vulnerable to oppressive tactics by an insurer seeking a settlement or a release"); Arnold v. Nat'l Cnty. Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (adverting to unscrupulous insurers taking advantage of "insured's misfortunes"); WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 5.02[1], at 5-4.1 (2d ed. 2019) ("[R]isks which are insured are normally ones which an insured cannot afford to bear without insurance, so the occurrence of such a loss exerts pressure on an insured to obtain a prompt settlement, even if that may mean foregoing full compensation . . . .").

(6) Lack of adequate incentives, absent tort liability. DiSalvatore v. Aetna Cas. & Sur. Co., 624 F. Supp. 541, 543 (D.N.J. 1986) ("Recognition of an action permitting an insured to recover damages in excess of the actual amount owed under the contract would

provide an effective means of countering the existing incentives for an insurance company to wrongfully delay or deny payment."); *Best Place, Inc*., 920 P.2d at 346 ("Without the threat of a tort action, insurance companies have little incentive to promptly pay proceeds rightfully due to their insureds, as they stand to lose very little by delaying payment."); *Curry*, 784 S.W.2d at 178 (expressing concern that, without the availability of a bad-faith claim, the insurer could "delay payment by litigation with no greater possible detriment than payment of the amount justly owed plus interest"); Skaling v. Aetna Ins. Co., 799 A.2d 997, 1003 (R.I. 2002) (observing that "limiting an insured to recovery of the policy limits for a breach of the insurance contract, without the threat of punitive damages or awards in excess of the policy limits, would do little to promote the prompt payment of claims or to prevent an unscrupulous insurer from refusing payment or delaying settlement of legitimate claims"); *Arnold*, 725 S.W.2d at 167 (noting that "insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed"); Kenneth S. Abraham, *The Natural History of the Insurer's Liability for Bad Faith*, 72 TEX. L. REV. 1295, 1309 (1994) (explaining the effect of bad-faith liability on insurer incentives to engage in dilatory and other unfair claims practices); Phyllis Savage, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 FORDHAM L. REV. 164, 169 (1976) ("Because [the contract measure of damages] so severely restricts the maximum available recovery, it is in the insurer's best interest to delay payment as long as possible.").

For further discussion of why the insurer's bad-faith breach of an insurance contract is properly subject to special treatment, see Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 466 (Colo. 2003), as modified on denial of reh'g (May 19, 2003) (observing that "insurance contracts are not ordinary commercial contracts"); Dolan v. Aid Ins. Co., 431 N.W.2d 790, 791-792 (Iowa 1988) (cataloguing reasons for recognizing bad-faith claims); BARKER & KENT, supra § 1.05[1], at 1-20; Jay M. Feinman, *The Insurance Relationship As Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 557-559 (2009) (outlining other distinct aspects of insurance contracts).

Comment d. The dual subjective and objective nature of the bad-faith tort. The Wisconsin Supreme Court, in Anderson v. Continental Ins. Co., 271 N.W.2d 368 (Wis. 1978), set forth the two-part standard for bad faith that has influenced many other courts adopting bad-faith claims and on which the black letter of this Section is based:

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. . . .
>
> . . .
>
> The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.

Id. at 376-378; see also Noble v. Nat'l Am. Life Ins. Co., 624 P.2d 866, 868 (Ariz. 1981) (adopting the *Anderson* standards); Braesch v. Union Ins. Co., 464 N.W.2d 769, 778 (Neb. 1991) ("We conclude that the *Anderson* standard of care strikes a proper balance between the respective rights of the insurer and the policyholder."); McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 855 (Wyo. 1990) ("[W]e adopt . . . the 'fairly debatable' objective standard care analysis of *Anderson* . . . for any award of extra-contractual damages."); WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 5.03[2], at 5-14 (2d ed. 2019) ("The *Anderson* standard has been adopted by most courts recognizing expanded recovery for bad faith and by the Restatement of the Law of Liability Insurance."); Jay M. Feinman, *The Insurance Relationship As Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 561 (2009) (characterizing *Anderson* as "[p]erhaps the most widely cited formulation" of the standard for bad faith); accord Douglas R. Richmond, *Bad Insurance Bad Faith Law*, 39 TORT TRIAL & INS. PRAC. L.J. 1, 5-6 (2003) ("An insured charging first-party bad faith generally must establish (1) that the insurer's conduct was unreasonable and (2) that the insurer knew or reasonably should have known that it was being unreasonable in its handling or payment of the claim at issue. This two-part test applies no matter what type of first-party coverage is in dispute.").

Sometimes the objective element is expressed by courts as a claims decision that is not "fairly debatable," the equivalent of a lack of a reasonable basis for the insurer's claim decision. As the *Anderson* court stated in its seminal decision, "when a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Anderson,* 271 N.W.2d at 376. Given their equivalence, courts may choose as a matter of custom and style whether to employ "fairly debatable" or "reasonable basis" in jury instructions. It would, however, be redundant to instruct on both "reasonable basis" and "fairly debatable." See *Noble*, 624 P.2d at 868 (treating "fairly debatable" and denials without a "reasonable basis" as equivalent antonyms).

The existence of a fairly debatable question about a claim should not be understood or treated as an affirmative defense. Because saying a claim is "fairly debatable" is the equivalent of saying that an insurer had a "reasonable basis" for its denial, it is an element of the plaintiff's prima facie case for which the plaintiff bears the burden of proof. Thus, an insurer who seeks to prove that a claim was fairly debatable is seeking to negate the existence of a prima facie element of plaintiff's claim rather than proving an affirmative defense. See BARKER & KENT, supra § 17.05[10][a], at 17-124 (stating that "whether a claim is 'fairly debatable' is not really a defense, but is a fundamental aspect of what must be established in order to impose bad faith liability"). Reference to "fairly debatable" as a defense is, unfortunately, common. See, e.g., Schuessler v. Wolter, 310 P.3d 151, 162 (Colo. App. 2012) (observing that "the defense of fair debatability is not a threshold inquiry"); Sanderson v. Am. Fam. Mut. Ins. Co., 251 P.3d 1213, 1217 (Colo. App. 2010) (stating that a showing that the claim was "fairly debatable" is not sufficient to defeat a bad-faith claim).

When the bad-faith claim involves a coverage issue and when the insurer ultimately denies coverage, some courts employ the standard for judgment as a matter of law contained in Fed. R. Civ. Pro. 50(a) (or a state-court counterpart) as the standard for whether the insurer had a

reasonable basis for denying the insured's claim. These courts reason that, if the factual record, after appropriate investigation by the insurer, is one requiring jury resolution to determine whether coverage exists, then the insurer *necessarily* had a reasonable basis for denying coverage. An early and explicit such case is Nat'l Sav. Life Ins. Co. v. Dutton, 419 So. 2d 1357, 1362 (Ala. 1982). There, the court, acknowledging that the bad-faith tort was at an "embryonic" stage and that the burden on plaintiff to establish a claim was a heavy one, stated that if there was a fact issue with regard to coverage of the insurance claim, the tort claim failed. See also Blue Cross & Blue Shield v. Campbell, 466 So. 2d 833, 843 (Miss. 1984) (declaring that, "unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance carrier has shown a reasonably arguable basis to deny the claim"); Pickett v. Lloyd's, 621 A.2d 445, 454 (N.J. 1993) (stating, in dicta, "[u]nder the 'fairly debatable' standard, a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad-faith refusal to pay the claim"). In other cases, such a standard is only implicit in the reasoning of the court. See Cont'l Cas. Co. v. Howard, 775 F.2d 876, 880-881 (7th Cir. 1985) (applying Indiana law) (adverting to the standard of review for a directed verdict and then proceeding to canvas the record to determine if there was a reasonable basis for the insurer to deny the claim). For courts that do employ the judgment-as-a-matter-of-law standard for determining whether there was a reasonable basis for the insurer's claims handling, the determination would be one of law for similar reasons to the reasons explaining why courts must resolve issues related to the meaning of insurance-policy language. See Tarsio v. Provident Ins. Co., 108 F. Supp. 2d 397, 401 (D.N.J. 2000) (recognizing, while criticizing, that under New Jersey law, the court was required in bad-faith claim to determine whether summary judgment would have been appropriate on coverage issue).

Among those courts adopting the judgment-as-a-matter-of-law standard, most do so cautiously, recognizing that there are or may be exceptions. See *Dutton*, 419 So. 2d at 1362 (softening its adoption of the judgment-as-a-matter-of-law standard by stating that it would be true "[i]n the normal case" and "[o]rdinarily, to describe a factual issue if the evidence produced . . . creates a fact issue" for the jury, it will negate a bad faith claim"); *Campbell*, 466 So. 2d at 843 (adding the qualifier "in the vast majority of cases"); 2 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 17.03[4][b], at 17-26-30.1 (2d ed. 2019). Importantly, even if such a "directed verdict" shortcut is adopted, it must be limited to disputes over whether coverage exists; it has no bearing on the reasonableness of an insurer's investigation, delay, settlement offers, or other claims-processing misconduct.

Other courts reject the equivalence of the directed-verdict standard with whether the insurer had a reasonable basis for denying coverage. E.g., Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321, 1325 (Alaska 1993) ("*Dutton* does not state the Alaska rule of law."); Brewer v. Am. & Foreign Ins. Co., 837 P.2d 236, 238 (Colo. App. 1992) ("We reject defendant's assertion . . . that, since plaintiff could not, as a matter of law, have properly been awarded a directed verdict on the underlying arson claim, his bad faith claim must, as a matter of law, be denied. . . . The test for an insurer's duty for good faith and fair dealing with its insured is one of reasonableness under the

circumstances."); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995) (rejecting, in its entirety, the directed-verdict standard); Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 254 (Iowa 1991) ("We do not agree that the mere denial of a plaintiff's motion for a directed verdict automatically establishes that the issue is 'fairly debatable.'"); Farmland Mut. Ins. Co. v. Johnson, 36 S.W.3d 368, 375 (Ky. 2000), as modified (Feb. 22, 2001) (observing that "the existence of jury issues on the contract claim does not preclude the bad faith claim"); Peterson v. W. Nat'l Mut. Ins. Co., 946 N.W.2d 903, 911 (Minn. 2020) (rejecting the judgment-as-a-matter-of-law standard and explaining the difference between a judge making that determination and an insurer deciding whether to honor an insurance claim); Skaling v. Aetna Ins. Co., 799 A.2d 997, 1003 (R.I. 2002) (overruling prior precedent that adopted the directed-verdict standard and concluding that the directed-verdict standard for proof of reasonable basis "is unworkable and unjust," while further explaining that a conflict in testimony between insured and insurance adjuster or insurer would require jury determination but should not be dispositive on whether a reasonable basis existed); Jones v. Farmers Ins. Exch., 286 P.3d 301, 304 (Utah 2012) ("It is not the law in Utah that, when the insurance company argues a claim was fairly debatable, the case must be resolved by the court as a matter of law.").

Conduct supporting a finding of bad faith can occur in a variety of circumstances. See Ruwe v. Farmers Mut. United Ins. Co., 469 N.W.2d 129, 135 (Neb. 1991) ("The tort of bad faith embraces any number of bad faith settlement tactics, such as inadequate investigation, delays in settlement, false accusations, and so forth."); Fetch v. Quam, 623 N.W.2d 357, 361 (N.D. 2001) ("This duty of good faith imposed on an insurer . . . include[s] a duty of fair dealing in paying claims, providing defense to claims, negotiating settlements, and fulfilling all other contractual obligations.").

Behavior supporting a finding of bad faith can take myriad forms, and it can occur at different times throughout the claims process. Such behavior includes failing reasonably to investigate a claim, making an unreasonably low settlement offer, and insisting on a global settlement of plaintiff's claim when one aspect of the claim is undisputed. E.g., Lockwood v. Geico Gen. Ins. Co., 323 P.3d 691, 698 (Alaska 2014) (identifying all of the first three in the list above as potential bases for a jury finding of unreasonable conduct in claims processing); Drop Anchor Realty Tr. v. Hartford Fire Ins. Co., 496 A.2d 339, 344 (N.H. 1985) (insurer taking "unfair advantage of the plaintiff's weakened position by making [unjustifiably low] settlement offers . . . to force the plaintiff to accept less than the true value of its compensable losses"). Such behavior also includes failing to consider all of the evidence possessed by the insurer by "cherry picking" evidence only favorable thereto, Peterson v. W. Nat'l Mut. Ins. Co., 946 N.W.2d 903, 911 (Minn. 2020), as well as conducting a biased investigation that seeks to find only evidence supporting a denial of coverage, Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 400 (Ohio 1994); 1 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 5.04[1][a], at 5-20 (2d ed. 2019) ("Because the insurer must pay the claim if there is coverage, it has a private incentive to find facts that defeat coverage. To assure that the insurer also looks for facts that would support coverage, duties to investigate are imposed . . . by . . . the common law of bad faith."). It also encompasses drawing conclusions from circumstantial evidence based on mere speculation rather than reasonable

inference. E.g., LeForge v. Nationwide Mut. Fire Ins. Co., 612 N.E.2d 1318, 1323 (Ohio Ct. App. 1992) (assuming, without evidence, that insured's current symptoms were caused by preexisting condition rather than accident). And, it encompasses unreasonable delay in investigating a claim that results in late payment of benefits, Daney v. Haynes, 630 So. 2d 949 (La. Ct. App. 1993) (violation of statutory claims-practices act providing time limits for payment of claims), as well as an unjustified delay in providing the benefits to which the insured is entitled, under the insurance agreement, LeRette v. Am. Med. Sec., Inc., 705 N.W.2d 41, 49 (Neb. 2005) ("[W]e reject [the insurer's] argument asserting that its ultimate payment of benefits in this case precluded a judgment in favor of the [insured] on the bad faith claim [asserting unreasonable delay]."); Pickett v. Lloyd's, 621 A.2d 445, 457-458 (N.J. 1993) ("In the case of processing delay, bad faith is established by showing that no valid reasons existed to delay processing the claim and the insurance company knew or recklessly disregarded the fact that no valid reasons supported the delay.").

Often, the second subjective element can be proved only by circumstantial evidence because, as with intent in criminal law, unless the defendant admits to having the requisite knowledge or intent, only circumstantial evidence is available. See *Anderson*, 271 N.W.2d at 377 (explaining that "knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured"); Peterson v. W. Nat'l Mut. Ins. Co., 930 N.W.2d 443, 451 (Minn. Ct. App. 2019) (finding that unreasonable actions by insurer justified the lower court's (acting as finder of fact) inference of reckless disregard); Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454, 458 (Mo. 2006) (recognizing that circumstantial evidence is sufficient to prove willful refusal to pay claim); Wadeer v. N.J. Mfrs. Ins. Co., 110 A.3d 19, 26 (N.J. 2015) (explaining that "knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless . . . indifference to facts or to proofs submitted by the insured").

The many courts adopting this dual objective–subjective standard have recognized the tension inherent in, on the one hand, enabling insurers fully to investigate questionable claims and to deny claims that are fairly debatable without being subject to bad-faith liability and, on the other, ensuring that insureds—who are often vulnerable and at the insurer's mercy—are treated fairly and in good faith. Courts have expressed the view that the dual standard offers the best balance between these competing but important goals. See, e.g., McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 860 (Wyo. 1990) ("The logical premise of the debatable (or arguable) standard is that if a realistic question of liability does exist, the insurance carrier is entitled to reasonably pursue that debate without exposure to a claim of violation of its duty of good faith and fair dealing."); see also BARKER & KENT, supra § 5.02[2], at 5-6 to 5-9 (explaining that insurers need latitude to investigate and deny claims so as to preserve premiums paid for deserving claims and to avoid increasing premiums to cover fraudulent or unmeritorious claims).

Some courts, including the California Supreme Court in the seminal *Gruenberg* case, have adopted a more lenient standard than the one adopted in this Section, imposing liability whenever the insurer acts without reasonable or proper basis in denying or investigating a claim. See

Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973) (holding insurer subject to liability when insurer fails "without proper cause, to compensate its insured for a loss covered by the policy"); see also Seifert v. Farmers Union Mut. Ins. Co., 497 N.W.2d 694, 698 (N.D. 1993) (explaining that, when the insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing") (quoting Corwin Chrysler–Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638, 642 (N.D. 1979)); BARKER & KENT, supra § 5.03[1], at 5-12 ("While the [*Gruenberg*] test is a minority rule, it is followed in a number of other states.").

By contrast with the lenient standard in California, other courts have adopted a more stringent standard, requiring oppressive, dishonest, or malicious conduct and a subjective state of mind requiring ill will, hatred, or revenge. See, e.g., Rathbun v. Ward, 866 S.W.2d 403 (Ark. 1993). Yet, as noted in the Comments, in operationalizing that standard, courts tend to take a more lenient view of whether that standard is satisfied. See, e.g., Columbia Nat'l Ins. Co. v. Freeman, 64 S.W.3d 720, 723-725 (Ark. 2002) (holding that several actions by insurer that might best be characterized as having no reasonable basis were sufficient evidence for the factfinder to find "oppressive conduct carried out with a state of mind characterized by ill will").

In addition, some courts have adopted a stringent standard because they confronted only the narrow question of whether the plaintiff could recover punitive damages. As explained in Comment *p*, recovery of punitive damages in bad-faith claims should be limited to those instances in which the insurer engages in sufficiently culpable conduct to meet the jurisdiction's ordinary standard for awarding punitive damages. Thus, in Pirkl v. Nw. Mut. Ins. Ass'n, 348 N.W.2d 633, 636 (Iowa 1984), the Iowa Supreme Court first recognized that a bad-faith claim for punitive damages could be made, but it limited such claims to insurer behavior that was malicious, illegal, or immoral. Later, the court adopted the *Anderson* standard for bad-faith claims, while retaining the *Pirkl* standard for recovery of punitive damages.

In some jurisdictions, the bad-faith tort claim is not recognized, but other alternatives provide a functional equivalent. For example, Minnesota has a statute that incorporates the *Anderson* standard for liability and awards statutory damages, including attorneys' fees and, when the insurer's behavior is sufficiently egregious, punitive damages. See MINN. STAT. ANN. § 604.18; see also FLA. STAT. ANN. § 624.155. Other jurisdictions permit the recovery of extracontractual damages in a breach-of-contract case against the insurer. See, e.g., ME. REV. STAT. ANN. tit. 24-A, § 2436-A; MD. CODE ANN., CTS. & JUD. PROC. § 3-1701; Jarvis v. Prudential Ins. Co. of Am., 448 A.2d 407, 408 (N.H. 1982).

Comment f. Intentional or negligent tort. Some courts have characterized the bad-faith claim as an intentional tort without recognizing that all intentional torts, save for the highly controversial prima facie tort, require an intent to cause a specific harm. See, e.g., Standard Life Ins. Co. of Indiana v. Veal, 354 So. 2d 239, 248 (Miss. 1977) (concluding that the "refusal to pay the legitimate claim in this case was an intentional wrong," without identifying what harm the

insurer intended); Hein v. Acuity, 731 N.W.2d 231, 235 (S.D. 2007) (describing first-party bad-faith claim as an intentional tort).

Comment g. Timing of insurer's knowledge of facts supporting good faith. Insurers may not justify the reasonableness of their decision to deny a claim based on information that emerges after the denial of the claim. See, e.g., Skaling v. Aetna Ins. Co., 799 A.2d 997, 1014 (R.I. 2002) (facts about insured's use of alcohol at the time of the accident were unknown when the claim was denied and cannot be used in defense of the bad-faith claim); Walz v. Fireman's Fund Ins. Co., 556 N.W.2d 68, 70 (S.D. 1996) ("The issue [of bad faith] is determined based upon the facts and law available to Insurer at the time it made the decision to deny coverage.").

Comment h. Factual cause and scope of liability. Consistent with Subsection (c) and Comment *h*, courts refuse to permit bad-faith recovery when insurers engage in dubious claims investigating or handling practices but there actually existed a reasonable basis to deny or delay the claim, although they often fail to identify factual cause as the reason for such denial. See State Farm Fire & Cas. Co. v. Brechbill, 144 So. 3d 248, 258 (Ala. 2013) ("The existence of an insurer's lawful basis for denying a claim is a sufficient condition for defeating a claim that relies upon the fifth element of the insurer's intentional or reckless failure to investigate"); Waller v. Truck Ins. Exch., Inc., 900 P.2d 619, 639 (Cal. 1995), as modified on denial of reh'g (Oct. 26, 1995) (liability insurance policy) ("It is clear that if there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer.").

Although not always articulated, the basic tort-law principle that defendant's tortious conduct must be a factual cause of legally cognizable harm supports the decisions by these courts. As Douglas Richmond, a prominent commentator, put it when discussing an insurer's conduct in Rawlings v. Apodaca, 726 P.2d 565 (Ariz. 1986):

> To be sure, Farmers' [the insurer's] conduct in this instance was offensive. Farmers' reprehensible conduct may have been actionable fraud, it might have been actionable as the intentional infliction of emotional distress or the tort of outrage, it might have constituted negligent infliction of emotional distress, and it might have amounted to tortious interference with the Rawlings' [the plaintiffs'] business interests. Farmers' conduct did not constitute bad faith, however, because Farmers did nothing to injure the Rawlings' rights to receive the policy benefits for which they bargained, which is what the implied duty of good faith and fair dealing protects. Farmers paid the Rawlings the $10,000 they were owed under their policy. That the Rawlings may not have pleaded tort causes of action other than bad faith does not through some default mechanism transform Farmers' conduct into something that as a matter of law it was not.

Douglas R. Richmond, *Bad Insurance Bad Faith Law*, 39 TORT TRIAL & INS. PRAC. L.J. 1, 10-11 (2003). Farmers' conduct may have been egregious, but that conduct did not cause harm—and so the conduct would not have been actionable under this Section based on Subsection (c).

Contrary to the requirement of Subsection (c) of this Section, some courts permit a bad-faith claim when the insurer fails to conduct its investigation as a reasonable insurer would, even though, at the end of the day, the claim is, or properly would be, denied. As the Washington Supreme Court observed in such a case: "[The insurer] would have us adopt the same 'no harm, no foul' rule, in which bad faith is not actionable, as a matter of law, when the insured's policy does not provide coverage for the loss. We decline to do so." Coventry Assocs. v. Am. States Ins. Co., 961 P.2d 933, 937 (Wash. 1998). Actually, the court paid considerable homage to "no harm, no foul," which reflects the basic proposition of tort law that requires the defendant's tortious conduct to have caused the harm for which the plaintiff seeks recovery. The court limited damages to the costs of investigation incurred by the insured that were caused by the insurer's bad-faith investigation, rejecting the insured's claim that it should obtain coverage by estoppel or a return of a portion of the premium paid by the insured. Id. at 940; see also United Techs. Corp. v. Am. Home Assur. Co., 118 F. Supp. 2d 181, 189 (D. Conn. 2000) (permitting recovery for "procedural bad faith" without identifying the harm the insured suffered due to the insurer's bad faith); Lloyd's & Inst. of London Underwriting Cos. v. Fulton, 2 P.3d 1199, 1207-1209 (Alaska 2000) (adopting a combination of estoppel and presumption of prejudice in a third-party insurance dispute to provide coverage to insured after a determination that an exclusion in the policy barred coverage); Safeco Ins. Co. of Am. v. Butler, 823 P.2d 499, 512 (Wash. 1992) (employing estoppel to provide coverage for third-party insurance claim despite exclusion in policy found applicable to deny coverage). Other courts, while declining to permit recovery for a loss that was not covered by the policy, permit recovery for harm to an insured's emotional security due to the insurer's wrongful conduct, in effect recognizing a claim for dignitary harm in the claims-processing arena. See, e.g., Deese v. State Farm Mut. Auto. Ins. Co., 838 P.2d 1265, 1269 (Ariz. 1992) ("However, the insured also is entitled to receive the additional security of knowing that she will be dealt with fairly and in good faith."). This Section declines to follow the lead of these more permissive courts because there is no substantial body of case law supporting any of the disparate efforts to award bad-faith damages and because of the lack of persuasiveness of the supporting rationales.

In addition, some courts, including the Alabama Supreme Court, carve a middle path; they permit an inference that coverage existed whenever the insurer fails to conduct a good-faith investigation. See State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 304 (Ala. 1999) (declaring that "the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proof submitted by the insured"). The effect of this inference is to permit the factfinder to decide there was no reasonable basis for denying coverage. The insurer is, of course, free to overcome this inference by proving that there was no coverage for the claim or that there was reasonable doubt about the existence of coverage.

Illustration 1, involving possible arson, is based loosely on Guebara v. Allstate Ins. Co., 237 F.3d 987, 993 (9th Cir. 2001) (applying California law). There, the issue was whether a genuine coverage dispute precluded a bad-faith claim.

Comment i. Obligation reasonably to investigate. Numerous cases address instances in which insurers failed to conduct a reasonable investigation into facts relevant to whether coverage existed. In addition to cases and sources cited in the Reporters' Note to Comment *d*, see Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 145 (Cal. 1979) ("To protect [the insured's legitimate] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim."); Jordan v. Allstate Ins. Co., 56 Cal. Rptr. 3d 312, 321 (Ct. App. 2007), as modified on denial of reh'g (Apr. 20, 2007) (finding that, although insurer reasonably determined that exclusion in policy prevented coverage, insurer breached its good-faith duty by failing to consider whether coverage existed under an "additional coverage" provision); Hatch v. State Farm Fire & Cas. Co., 842 P.2d 1089, 1098-1099 (Wyo. 1992) (holding that the insurer's investigation of a fire that destroyed the insured's home, in which the insurer required the insured to provide a 275-page inventory of items in the house, including listing the number of cornflakes remaining in cereal container and specifying the amount of salt left in a salt shaker could be found to have engaged in bad-faith investigation of claim); see generally 1 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 5.04, at 5-20 to 5-47 (2d ed. 2019).

Consistent with Comment *i*, the basic principle applicable to insurers' investigations is that insurers should regard the interest in avoiding an incorrect denial of coverage as equal to the interest in avoiding an incorrect decision providing coverage. See Rawlings v. Apodaca, 726 P.2d 565, 572 (Ariz. 1986) (recognizing insurer's "obligation to give equal consideration to the insured's interests"); Silberg v. Cal. Life Ins. Co., 521 P.2d 1103, 1109 (Cal. 1974) (observing that, to satisfy its duty of good faith and fair dealing, an "insurer is obligated to give the interests of the insured at least as much consideration as it gives to its own interests"); Foster v. Stonebridge Life Ins. Co., 291 P.3d 105 (Kan. Ct. App. 2012) (declaring that "the insurer has a duty to diligently search for evidence which supports insured's claim and not merely seek evidence upholding its own interests") (quoting 14 COUCH ON INSURANCE § 207:25, at 207-241 (3d ed. 2005)).

Illustration 3, involving the possibility of additional coverage, is loosely based on Jordan v. Allstate Ins. Co., 56 Cal. Rptr. 3d 312, 321 (Ct. App. 2007), as modified on denial of reh'g (Apr. 20, 2007).

Comment j. Other tortious conduct by an insurer. The Restatement Third of Torts: Liability for Physical and Emotional Harm § 46 contains the elements of the intentional-infliction tort. It provides: "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm." Consistent with Comment *j*, it is well established that seriously deficient claims-handling practices can give rise to a claim for the intentional infliction of emotional distress. See Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1, 5 (7th Cir. 1972) (applying Illinois law) (holding plaintiff's allegations of insurer's refusal to pay life-insurance benefits stated a claim for intentional infliction of emotional distress); Fletcher v. W. Nat'l Life Ins. Co., 89 Cal. Rptr. 78 (Ct. App. 1970) (permitting recovery on an intentional-infliction-of-emotional-distress standard). For discussion of the standards for liability under the

intentional-infliction tort, see generally WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 1.05[3][c], at 1-26 (2d ed. 2019).

The court in Hatch v. State Farm Fire & Cas. Co., 842 P.2d 1089, 1099 (Wyo. 1992), put it well in a case in which the insurer had not engaged in bad faith in denying the claim but had processed the claim in a culpable manner:

> Even though the insurer here had a "fairly debatable" reason for not paying the claim in the first place, i.e., its belief that the loss was the result of arson, it cannot properly go beyond a reasonable denial of the claim and engage in unreasonable or unfair behavior to gain an unfair advantage. A "fairly debatable" reason to deny a claim is not a defense against torts that may flow from engaging in oppressive and intimidating claim practices.

The court detailed the abusive investigation conducted by the insurer:

> Appellants were required to file an extremely detailed inventory of items that were in the house at the time of the fire, consisting of 275 pages. For example, they were told that they must list how many cornflakes were left in the cereal box before the fire, and how much salt was in the saltshaker. Appellants were threatened by State Farm representatives with the cooperation provision in the policy unless they did everything they were told. Appellants were required to make unreasonable reports, statements and inventories, even after State Farm had decided to reject their claim.
>
> State Farm took over the Hatch house, ousted the Hatch family from possession, and searched the house from top to bottom. State Farm conducted several unsupervised searches of the home and entered the home without permission. State Farm would not allow appellants to have free access to their house for eight days after the fire (August 4–12). A State Farm representative told Mrs. Hatch that all they would ever receive for their belongings was the same price they could get for each item at a garage sale. Hatches were given an unrealistic deadline in which to file this inventory. A team of five State Farm representatives interviewed Mrs. Hatch four different times. One interview lasted five hours with no break for lunch. Mrs. Hatch characterized the State Farm representatives as rude, abrupt, sarcastic, unprofessional, and hostile. Additionally, the sworn statements of the Hatch's twin boys, ten years old, were taken.
>
> On August 12, 1987, Mr. Hatch was told the investigation was complete; nevertheless, State Farm representatives continued to enter the house into September. Mr. Hatch asked for a copy of State Farm's investigative reports. A copy was promised, but not timely delivered. Mr. Hatch asked appellee Murphy to send a copy of the investigative report to his lawyer. Murphy refused and said that Mr. Hatch would regret having retained an attorney. Murphy also said that State Farm would not have required an itemization of the property removed from the house if they had not contacted a lawyer.

> Appellants charge State Farm with concealing information received from Northern Gas; also, exculpatory and other documents were alleged to have been withheld or concealed from the prosecutor in the arson case. State Farm required that appellants sign releases for creditors in and out of the state to give it information about the appellants. These creditors were then contacted. Medical releases were demanded from Mr. Hatch and one of his children; also, mental health records of a daughter were demanded about a problem in 1984. Mr. Hatch's military and employment records were demanded.

Id. at 1098. See also Fletcher v. W. Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 93 (Ct. App. 1970) (holding that an insurer can be liable for intentional infliction of emotional distress for extreme and outrageous behavior in claims processing); Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 68-74 (Mo. 2000) (affirming award of damages for defamation based on insurer's statement that insured committed arson); Bennett v. ITT Hartford Grp., Inc., 846 A.2d 560, 565 (N.H. 2004) (insurer's post-claim conduct taking control of product suspected of causing fire loss and misrepresenting to insured that insurer would actively pursue subrogation claim against product manufacturer and protect insured's recovery of uninsured losses justified independent tort claim against insurer notwithstanding jurisdiction's refusal to recognize first-party bad-faith tort claim).

Comment k. Fiduciary duty. In some third-party (rather than first-party) bad-faith cases, courts have characterized the insurer's duty to settle as one involving a fiduciary duty, requiring the insurer to protect the insured from an excess-coverage verdict. That conception makes sense, as, in the third-party context, the insurer takes over defense of the claim and, in effect, represents the insured's interest in avoiding an excess judgment. See Hartford Acc. & Indem. Co. v. Foster, 528 So. 2d 255, 265 (Miss. 1988) (stating "the insurer has a fiduciary duty to look after the insured's interest at least to the same extent as its own"); Hadenfeldt v. State Farm Mut. Auto. Ins. Co., 239 N.W.2d 499, 505 (Neb. 1976) (approving jury instruction characterizing third-party insurer as a fiduciary); Alt v. Am. Fam. Mut. Ins. Co., 237 N.W.2d 706, 712 (Wis. 1976) (characterizing bad-faith refusal to settle as "breach of a known fiduciary duty"); Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L. REV. 1317, 1340 (1994) (observing that "the contractual undertaking of the insurer [to defend its insured] is fundamentally a promise to act as a fiduciary").

That situation, in which an insurer, controlling the defense, would otherwise be able to jeopardize its insured's financial interest for its own benefit is not present in the first-party insurance context. See William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1229-1230 (1994) (characterizing the third-party insurer as a fiduciary with regard to defending the insured while observing that "third-party insurance is different from first-party insurance"); Mark Gergen, *Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1238-1239 (1994) (distinguishing the insurer's obligation to settle a third-party insurance claim from its obligation to resolve first-party claims); see also Pirkl v. Nw. Mut. Ins. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984) (distinguishing third-party settlement obligations, which involve a fiduciary relationship, from first-party claims).

The Seventh Circuit Court of Appeals captured the difference in Craft v. Economy Fire & Cas. Co., 572 F.2d 565, 569 (7th Cir. 1978) (applying Indiana law) (citation omitted):

> Under third party liability coverage, when the insured is sued by a third party, the insurance company takes over the defense of the suit and the insured cannot settle the matter without the permission of the insurer. It is this control of the litigation by the insurer coupled with differing levels of exposure to economic loss which gives rise to the "fiduciary" nature of the insurer's duty. In the uninsured motorist situation there is no element of "control" of the insured's side of the litigation by the insurance company which would give rise to a "fiduciary" duty. It does not necessarily follow that the insurer is completely free of any obligation of good faith and fair dealing to its insured, since the latter duty is based on the reasonable expectations of the insured and the unequal bargaining positions of the contractants, rather than the insurance company's "control" of the litigation.

Comment l. Judge and jury. The provisions of Comment *l* are reflected in virtually all of the case law on this subject. See Jeffers v. Farm Bureau Prop. & Cas. Ins. Co., 2014 WL 4259485, at *4 (D. Ariz. 2014) ("[B]oth [the objective and subjective] elements present fact questions ordinarily reserved for the jury."); Lockwood v. Geico Gen. Ins. Co., 323 P.3d 691, 696 (Alaska 2014) (assuming, without discussing, that both elements of the standard for bad faith are for jury determination); Zolman v. Pinnacol Assur., 261 P.3d 490, 497 (Colo. App. 2011) ("What constitutes reasonableness under the circumstances is ordinarily a question of fact for the jury."); Int'l Indem. Co. v. Collins, 367 S.E.2d 786, 788 (Ga. 1988) ("Ordinarily, the question of good or bad faith is for the jury, but when there is no evidence of unfounded reason for the nonpayment, or if the issue of liability is close, the court should disallow imposition of bad faith penalties."); Willis v. Swain, 304 P.3d 619, 637 (Haw. 2013) ("In general, whether an insurer has acted in bad faith is a question of fact."); Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 12 (Iowa 1990) (holding that determination of bad faith was one for the factfinder); Marquis v. Farm Fam. Mut. Ins. Co., 628 A.2d 644, 648 (Me. 1993) (explaining that jury was properly charged with deciding whether insurer breached its duty); Miss. Power & Light Co. v. Cook, 832 So. 2d 474, 484 (Miss. 2002) (approving jury instruction on whether insurer had a reasonable basis for denial of a claim); DeBruycker v. Guar. Nat'l Ins. Co., 880 P.2d 819, 821 (Mont. 1994) ("The court properly allowed the jury to decide whether Guaranty and Crop Hail had a 'reasonable basis' to deny the DeBruyckers' claim."); Lawton v. Great Sw. Fire Ins. Co., 392 A.2d 576, 580 (N.H. 1978) (explaining that the determination of whether the defendant's delay constituted bad faith is a matter for the jury); Sloan v. State Farm Mut. Auto. Ins. Co., 85 P.3d 230, 232 (N.M. 2004) ("under New Mexico law, a punitive-damages instruction should be given to the jury in every common-law insurance-bad-faith case where the evidence supports a finding either (1) in failure-to-pay cases (those arising from a breach of the insurer's duty to timely investigate, evaluate, or pay an insured's claim in good faith), that the insurer failed or refused to pay a claim for reasons that were frivolous or unfounded"); Skaling v. Aetna Ins. Co., 799 A.2d 997, 1003 (R.I. 2002) (explaining that "the issue of insurer bad faith is an issue of fact to be submitted to the jury"); Walz v. Fireman's Fund

Ins. Co., 556 N.W.2d 68, 70 (S.D. 1996) ("Whether Insurer acted in bad faith in conducting an inadequate investigation or failing to review caselaw is a question of fact for the jury or other trier of fact."); Jerry v. Ky. Cent. Ins. Co., 836 S.W.2d 812, 815 (Tex. App. 1992) (affirming lower court's finding, sitting as finder of fact, as supported by sufficient evidence that insured home was vacant at time it was destroyed by fire).

Cases holding or ruling in a way that makes the determination of reasonableness a legal matter for the court when the issue turns on the meaning of policy or statutory language include: Franceschi v. Am. Motorists Ins. Co., 852 F.2d 1217, 1219 (9th Cir. 1988) (applying California law) (affirming grant of summary judgment on insured's bad-faith claim when coverage depended on whether policy term of "medical treatment" included diagnostic treatment); Starkville Mun. Separate Sch. Dist. v. Cont'l Cas. Co., 772 F.2d 168, 170 (5th Cir. 1985) (applying Mississippi law) (affirming trial court's dismissal of bad-faith claim when coverage turned on the meaning of the word "loss" in the plaintiff's insurance policy); Whitaker v. State Farm Mut. Auto. Ins. Co., 768 P.2d 320, 324 (Kan. Ct. App. 1989) (affirming trial court's determination that insured was not entitled to statutory award of attorneys' fees for "unreasonable" denial of coverage based on dispute over the meaning of "accident"); Soniat v. Travelers Ins. Co., 538 So. 2d 210, 216 (La. 1989) (ruling that insurer had a reasonable basis for denying coverage when issue revolved on interpretation of whether the policy had been "terminated" or "cancelled" prior to when covered loss occurred); Wright v. League Gen. Ins. Co., 421 N.W.2d 647, 650 (Mich. Ct. App. 1988) (affirming trial court's grant of summary judgment on bad-faith claim when issue of reasonableness turned on meaning of the phrase "involved in the accident" contained in statute governing no-fault auto-insurance scheme); Transcon. Ins. Co. v. Wash. Pub. Utils. Districts' Util. Sys., 760 P.2d 337, 347 (Wash. 1988) (affirming trial court's determination that, while insurer's interpretation of policy language was incorrect, it acted reasonably in denying coverage and therefore was not liable for bad faith); Starczewski v. Unigard Ins. Grp., 810 P.2d 58, 62 (Wash. Ct. App. 1991) (holding, as a matter of law, that while insurer's interpretation of appropriate amount of recoverable repair costs was incorrect based on policy language, insurer had reasonable basis for its position).

For cases that rule as a matter of law whether there was a reasonable basis for denial of coverage when the facts relevant to coverage are not in dispute, see Case v. Toshiba Am. Info. Sys., Inc., 7 F.3d 771, 773 (8th Cir. 1993) (applying South Dakota law) (affirming grant of summary judgment to workers'-compensation insurer sued for bad-faith denial of insured's claim based on evidence that plaintiff had a long history of smoking, an alternative and nonoccupational explanation for plaintiff's disease); Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co., 108 Cal. Rptr. 2d 776, 787 (Ct. App. 2001) (stating "as long as there is no dispute as to the underlying facts, it is for the court, not a jury, to decide whether the insurer had 'proper cause'"); Zolman v. Pinnacol Assur., 261 P.3d 490, 499 (Colo. App. 2011) (holding that, despite the general rule that the determination of whether the insurer behaved reasonably is a question of fact, in the instant case, it is a matter of law because of evidence provided by physicians that insured did not require care for which she sought coverage); Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 474 (Iowa 2005) ("[I]f it is undisputed that evidence existed creating a genuine dispute as to

the negligence of an uninsured or underinsured motorist, the comparative fault of the insured, the nature and extent of the insured's injuries, or the value of the insured's damages, a court can almost always decide that the claim was fairly debatable as a matter of law."); Prince v. Bear River Mut. Ins. Co., 56 P.3d 524, 535 (Utah 2002) ("The trial court's conclusion that [insured's] claim was fairly debatable under the facts of this case is a question of law that we review for correctness.").

The largest pocket of decisions contrary to the first paragraph of this Reporters' Note exists in the Fifth Circuit Court of Appeals. There, in cases governed by Mississippi law, the Fifth Circuit has repeatedly asserted that the question of whether the insurer had a reasonable basis for denying (or delaying payment for) the claim is a matter of law for the court. See James v. State Farm Mut. Auto. Ins. Co., 743 F.3d 65, 70 (5th Cir. 2014) (applying Mississippi law) (providing conflicting language on whether the trial court must decide as a matter of law whether a reasonable basis for denying the claim existed); Broussard v. State Farm Fire & Cas. Co., 523 F.3d 618, 628 (5th Cir. 2008) (applying Mississippi law) ("The question of whether State Farm had an arguable basis for denying the Broussards' claim 'is an issue of law for the court.'"); Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 873 (5th Cir. 1991) (applying Mississippi law) (stating in a case that had both factual and legal issues to determine coverage and bad faith, "[w]hether State Farm had an arguable reason to deny Mrs. Dunn's claim is an issue of law for the court"); see also 2 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 17.04[2][a]-[c], at 17-76 to -86 (2d ed. 2019) (arguing that determination of whether an insurer had a reasonable basis for denial of a claim is a matter of law for the court, citing *James*).

The Fifth Circuit has persisted in this position even though Mississippi law is to the contrary. The Mississippi Supreme Court in *Cook*, 832 So. 2d at 484, approved a jury instruction on the issue of whether a reasonable basis existed. Indeed, on appeal of summary judgment for the insurer, the same court observed that, before submitting the issue to a jury, the trial court should determine that the evidence is sufficient for an affirmative finding, the usual sufficiency-review standard applicable to all determinations of fact. Jenkins v. Ohio Cas. Ins. Co., 794 So. 2d 228, 232 (Miss. 2001). In *Dunn*, the Fifth Circuit cited a Mississippi case, Bankers Life & Cas. Co. v. Crenshaw, 483 So. 2d 254, 256 (Miss. 1985), aff'd on other grounds, 486 U.S. 71 (1988), for the proposition that the court is to decide whether the insurer had a reasonable basis for denying the claim. But only a misreading of *Crenshaw* could support that proposition, as the case involved an insurer's appeal of a jury verdict that found bad faith and awarded punitive damages; the issue on appeal was only the propriety of submitting a claim for punitive damages to the jury. Similarly, the *James* court cited two Mississippi Supreme Court cases to support its statement that bad faith is a matter for the court. Neither of those cases stand for that proposition.

Other support for the proposition that bad faith is generally a matter for the court is scarce. For two such cases, see Dalrymple v. United Servs. Auto. Ass'n, 46 Cal. Rptr. 2d 845 (Ct. App. 1995) (while articulating the standard rule of submission of bad-faith issues to the jury, ruling that whether the insurer's bringing and pursuing a declaratory-judgment action to determine coverage was appropriate was a matter for the court, analogizing that determination to lack of proper cause in a malicious-prosecution claim); Koch v. Prudential Ins. Co., 470 P.2d 756, 759-760 (Kan. 1970)

(stating that the determination of whether the insurer denied the claim without "just cause or excuse" is for the court).

Comment m. State unfair-insurance-claims-practices provisions. At least 45 states have enacted model legislation developed by the National Association of Insurance Commissioners that addresses insurers' abusive-claims-processing conduct. See Diana C. White, *Liability Insurers and Third-Party Claimants: The Limits of Duty*, 48 U. CHI. L. REV. 125, 146 n.75 (1981). Professor Roger Henderson explains the genesis of these statutes (frequently called unfair-claims-practices acts) and their limitations in the task of assisting individual insureds whose insurers engaged in bad faith in its claims handling:

> In the 1970s, the National Association of Insurance Commissioners (NAIC) began to develop model legislation aimed at unfair claims settlement practices of the insurance industry. Although this legislation, or some variation of it, has now been adopted by all but a half-dozen states, it has not materially aided the individual claimant. The model legislation prohibits certain acts by an insurer only when committed flagrantly and in conscious disregard of the statute or with such frequency as to indicate a general business practice. In such circumstances, the state insurance regulator is empowered to seek injunctive relief or penalties to enforce the statutory provisions. This language, when coupled with the fact that the legislation is silent as to any remedies on behalf of individual claimants, led the courts, with only a very few exceptions, to refuse to recognize that the legislation created a private cause of action on behalf of an insured for money damages. This was a serious shortcoming.
>
> An individual insured seldom could obtain timely relief by complaining to the state insurance regulator. Without legal assistance, it was difficult for an insured to prove a flagrant and conscious violation of the law or that the insurer engaged in a general practice of abuse. Only after a large number of insureds complained against a particular insurer could the insurance commissioner act. By that time, it was usually too late for many of the insureds. Consequently, the efforts of the NAIC proved to be less than adequate for the task. As a result, many individuals who had been harmed by the wrongful acts of insurers were still without a remedy even when complaints were filed with their state insurance commissioner.
>
> In sum, the legislative and administrative responses, either through provisions for attorneys' fees and penalties or prohibitions on unfair insurer claims practices in general, did not stem the tide of social pressure for relief from unjustified delays in processing and arbitrary refusals to pay claims. This left only one other route open to claimants—the courts.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 14-15 (1992).

In some states, statutory language clearly establishes that the insured is not entitled to bring a private right of action for a violation of the unfair-claims-practices act. See, e.g., ALASKA STAT. § 21.36.125(b) ("The provisions of this section do not create or imply a private cause of action for a violation of this section."); ARIZ. REV. STAT. ANN. § 20-461(D) ("Nothing contained in this section is intended to provide any private right or cause of action to or on behalf of any insured or uninsured resident or nonresident of this state."); GA. CODE ANN. § 33-6-37 ("Nothing contained in this [Unfair Claims Practices] article shall be construed to create or imply a private cause of action for a violation of this article."); OHIO ADMIN. CODE 3901-1-54(A) ("Nothing in this rule shall be construed to create or imply a private cause of action for violation of this rule."); S.D. CODIFIED LAWS § 58-33-69 (providing that nothing in the state's Unfair Trade Practices Act "grants a private right of action"). The NAIC Model Legislation on which a number of state statutes are based, explicitly states that it does not create a private right of action. See National Association of Insurance Commissioners, Model Unfair Claims Settlement Practices Act § 1 ("nothing herein shall be construed to create or apply a private cause of action for violation of this Act").

Although uncommon, a state's unfair-claims-practices act might include a provision that provides a private right of action. See WASH. REV. CODE § 48.30.015(1)-(3) (providing the equivalent of a private right of action by authorizing recovery of up to three times actual damages plus attorneys' fees and costs for violation of specified provisions of the Unfair Claims Settlement Practices Act).

A number of unfair-claims-practices acts, meanwhile, do not provide a private right of action, but do provide other statutory remedies for insureds whose insurers fail to process claims in a reasonable fashion. See, e.g., ARK. CODE ANN. § 23-79-208(a)(1) (providing a private claim for failing to pay losses within the time specified in the insurance policy and providing remedies of an additional 12 percent of the loss and attorneys' fees); GA. CODE ANN. § 33-4-6 (providing a penalty of 50 percent of the claim or $5000, whichever is greater in addition to attorneys' fees for bad-faith breach of an insurance contract); WYO. STAT. ANN. § 26-15-124 (providing attorneys' fees and 10 percent interest for failure to pay a claim within 45 days of a claim); see generally BARKER & KENT, supra § 1.07[2], at 1-40.

When the statute does not speak explicitly to whether a private right of action exists, the vast majority of courts have denied a private right of action arising from violation of a state's unfair-claims-practices act. See, e.g., Lockwood v. Geico Gen. Ins. Co., 323 P.3d 691, 697 n.15 (Alaska 2014) (rejecting the claim that Alaska's unfair-claim-settlement-practices act creates a private right of action); Rizzo v. State Farm Ins. Co., 305 P.3d 519, 527 (Idaho 2013) (stating that the Act "does not give rise to a private right of action whereby an insured can sue an insurer for statutory violations committed in connection with the settlement of the insured's claim") (quoting White v. Unigard Mut. Ins. Co., 730 P.2d 1014, 1021 (Idaho 1986)); Weis v. State Farm Mut. Auto. Ins. Co., 776 N.E.2d 309, 311 (Ill. App. Ct. 2002) ("[A] violation of the insurance rules contained in Title 50 of the Illinois Administrative Code does not give rise to a private cause of action."); Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255, 259-260 (Iowa 1991) (holding that Iowa does not recognize a "private cause of action" under its statute governing fair-claims practices); Earth Scientists (Petro Servs.) Ltd. v. U.S.

Fid. & Guar. Co., 619 F. Supp. 1465, 1470 (D. Kan. 1985) (concluding that Kansas Supreme Court would not find a private right of action in state Unfair Trade Practices Act); Rocanova v. Equitable Life Assur. Soc'y of U.S., 634 N.E.2d 940, 944 (N.Y. 1994) ("[T]he law of this State does not currently recognize a private cause of action under Insurance Law § 2601."); Aduddell Lincoln Plaza Hotel v. Certain Underwriters at Lloyd's of London, 348 P.3d 216, 224 (Okla. Civ. App. 2015) ("The [Unfair Claims Settlement Practices Act] does not create a private remedy.").

Often, courts so ruling rely on the explanation that enforcement of the insurance regulations is the sole authority of the department of insurance. See Bernacchi v. First Chi. Ins. Co., 52 F.4th 324, 330 (7th Cir. 2022) (applying Illinois law) (holding that a violation of the insurance rules contained in Title 50 of the Illinois Administrative Code does not give rise to private cause of action because the Illinois Department of Insurance has the sole authority to enforce the codes, and the proper remedy for a party who alleges a violation is to submit a complaint to the department); Weis v. State Farm Mut. Auto. Ins. Co., 776 N.E.2d 309, 311 (Ill. App. Ct. 2002) ("The enforcement of the insurance rules was clearly delegated to the Department of Insurance, and, as such, we conclude that a plaintiff cannot plead or pursue a private cause of action based on an insurer's violation of these rules."); see also STEPHEN S. ASHLEY, BAD FAITH ACTIONS LIABILITY & DAMAGES § 9:3 (updated 2021) ("Though a few states have agreed with the conclusion that the unfair claims settlement practices statutes support private claims, most have rejected private causes of action.").

The Reporters' research has found only a few courts that recognize a private right of action arising under a state unfair-claims-practices act, and most of those cases involve third parties asserting the claim against a liability insurer. E.g., Farmer's Union Cent. Exch. Inc. v. Reliance Ins. Co., 626 F. Supp. 583, 590 (D.N.D. 1985) (stating that, in the absence of contrary state-court authority: "This court concludes that the duties imposed by [the state's unfair-claims-practices act] may be the basis for an action sounding in tort. It is apparent from the provisions of that chapter that the statute was enacted to protect persons filing claims against insurers."); Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928, 930 (Fla. 1995) (permitting private action for violation of Florida unfair-claims-practices act); Ind. Ins. Co. v. Demetre, 527 S.W.3d 12, 34 (Ky. 2017) (permitting recovery of attorneys' fees in claim against liability insurer based on Kentucky Consumer Protection Act); Nationwide Mut. Ins. Co. v. Holmes, 842 S.W.2d 335, 342 (Tex. App. 1992) (holding insured could recover damages and attorneys' fees in suit against liability insurer under Texas's Deceptive Trade Practices Act); Taylor v. Nationwide Mut. Ins. Co., 589 S.E.2d 55, 60 (W. Va. 2003) (acknowledging the court's previous holding that a private right of action exists for violations of the state's Unfair Trade Practices Act); see generally BARKER & KENT, supra § 10 (comprehensive cataloguing of state statutes addressing insurer behavior).

Apart from the question of whether there is a private right of action, there exists the question of what role (if any) the statutory violation has in the plaintiff's common-law claim. Although the doctrine of negligence per se applies to statutory violations for ordinary negligence cases, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 14 (AM. L. INST. 2010), most courts have rejected the use of statutory violations as the equivalent of a per se violation of the bad-faith standard. See Dinner v. United Servs. Auto. Ass'n Cas. Ins. Co., 29 F. App'x 823, 827

(3d Cir. 2002) (applying Pennsylvania law) (holding that a violation of the Unfair Insurance Practices Act, the regulations promulgated thereunder, and the Unfair Claims Settlement Practices provisions, does not constitute a per se violation of the bad-faith standard); Hart v. Prudential Prop. & Cas. Ins. Co., 848 F. Supp. 900, 904 (D. Nev. 1994) (rejecting plaintiff's contention that violation of the state's Unfair Practices Act constitutes per se bad faith). But see Moody v. Or. Cmty. Credit Union, 542 P.3d 24 (Or. 2023) (holding that a violation of state Unfair Claims Settlement Practices Act supported a negligence per se claim against life insurer for emotional distress damages, when the insurer allegedly failed to conduct a reasonable investigation of whether death was accidental).

However, courts have been more amenable to the admissibility of a violation of a state regulation as relevant to the factfinder's determination of bad faith. See, e.g., Jordan v. Allstate Ins. Co., 56 Cal. Rptr. 3d 312, 323 (Ct. App. 2007), as modified on denial of reh'g (Apr. 20, 2007) (holding expert's testimony about insurer's violation of state Unfair Insurance Practices Act was admissible in bad-faith suit); Miglicio v. HCM Claim Mgmt. Corp., 672 A.2d 266, 271 (N.J. Super. Ct. Law Div. 1995) ("[A]ny deviation from the [unfair-claims-practices] standards may be considered as evidence of bad faith."); Heyden v. Safeco Title Ins. Co., 498 N.W.2d 905, 909-910 (Wis. Ct. App. 1993) (violation of state statute specifying insurance unfair methods and practices may be relied on by expert testifying that insurer engaged in bad faith). However, in some instances, the state's regulation may not have relevance to the legal issues in a bad-faith claim. See Dinner v. United Serv. Auto Ass'n Cas. Ins. Co., 29 F. App'x 823, 828 (3d Cir. 2002) (applying Pennsylvania law) (holding that proposed evidence that insurer violated state regulations while handling insured's claim was properly excluded in the insured's bad-faith action because those violations were potentially prejudicial and did not bear on whether the insurer lacked a reasonable basis for denying benefits and knew or acted in reckless disregard of the lack of reasonable basis); Aduddell Lincoln Plaza Hotel v. Certain Underwriters at Lloyd's of London, 348 P.3d 216, 224 (Okla. Civ. App. 2014) ("The Unfair Claims Settlement Practices Act may provide guidance to a trial court in determining whether to grant summary judgment, but it does not function as an appropriate guide for a jury to determine bad faith.").

Another impediment to the use of Unfair Claims Practices Acts in bad-faith litigation is that, often, the statutes require a regular course of misconduct or that violations occur with sufficient frequency to demonstrate a business practice. The model NAIC's Unfair Claims Settlement Practices Act requires a prohibited act to be committed flagrantly and in conscious disregard of the Act or with such frequency to indicate a general business practice. See NAIC Resource Center Model Laws, https://content.naic.org/sites/default/files/model-law-900.pdf.

Courts have repeatedly rejected the argument that state regulation, including claims-practices regulation, preempts bad-faith tort claims based on unreasonable insurer claims processing. See, e.g., State Farm Fire & Cas. Co. v. Nicholson, 777 P.2d 1152, 1157 (Alaska 1989) ("[T]he State has limited means with which to police the insurance industry. Furthermore, the statutory remedies fail to compensate the insured for damages involved in the insurer's bad faith denial of coverage."); Aetna Cas. & Sur. Co. v. Broadway Arms Corp., 664 S.W.2d 463, 465 (Ark. 1984) ("Neither of these [statutory provisions regulating insurers and providing] remedies deals with the area of bad

faith much less pre-empts it."); McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 859 (Wyo. 1990) ("Preclusion by alternative statutory remedy has been denied acceptance in most jurisdictions unless the remedy would be as broad as the bad faith tort claim."). But cf. Spencer v. Aetna Life & Cas. Ins. Co., 611 P.2d 149, 156-158 (Kan. 1980) (holding that Kansas statutes providing recovery of attorneys' fees and penalizing unfair-claims-processing acts violations presumptively provide adequate remedies for insureds so as to render tort-based first-party bad-faith claims unnecessary).

Comment n. Negligence and honest mistakes. Illustration 4, involving the home collapse, is based loosely on Barry v. Nationwide Mut. Ins. Co., 298 F. Supp. 3d 826 (D. Md. 2018).

Comment o. Independent contractors hired to perform claims processing. The Reporters' research has failed to find a single case denying the nondelegable-duty principle stated in this Comment. Courts affirming it include Walter v. F.J. Simmons & Others, 818 P.2d 214, 223 (Ariz. Ct. App. 1991) ("[A]n insurer who owes the legally imposed duty of good faith to its insureds cannot escape liability for a breach of that duty by delegating it to another, regardless of how the relationship of that third party is characterized."); Mendoza v. McDonald's Corp., 213 P.3d 288, 305 (Ariz. Ct. App. 2009) (extending *Walter* to the award of punitive damages in a bad-faith claim based on advice provided by attorney during the processing of a claim); Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 466 (Colo. 2003), as modified on denial of reh'g (May 19, 2003) ("The duty [of good faith and fair dealing] is non-delegable so that insurers cannot escape their duty of good faith and fair dealing by delegating tasks to third parties."); De Dios v. Indem. Ins. Co. of N. Am., 927 N.W.2d 611, 621 (Iowa 2019), amended (May 14, 2019) ("An insurer cannot delegate its duty of good faith. Therefore, an agent of the insurer, while acting on the insurer's behalf by carrying out the insurer's contractual obligations, is under the same duty of good faith as the insurer itself. Under varying circumstances, the good faith requirement has been held to also apply to attorneys of the insured."); Jessen v. Nat'l Excess Ins. Co., 776 P.2d 1244, 1248 (N.M. 1989) (stating that insurer "was not relieved of liability because McManaman was an independent contractor"); Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 914 (Okla. 1982) (holding that the trial court's refusal to instruct the jury on the difference between an agent and independent contractor was not error because the insurer was liable regardless); Fair v. Nash Finch Co., 2012 WL 13173043 (D.S.D. 2012) (treating third-party administrator as an employee for purposes of vicarious liability); Natividad v. Alexsis, Inc., 875 S.W.2d 695, 696 (Tex. 1994) (holding that a "non-delegable duty of good faith and fair dealing is owed by an insurance carrier to its insureds due to the nature of the contract between them giving rise to a 'special relationship'"); Kosovan v. Omni Ins. Co., 496 P.3d 347, 361 (Wash. Ct. App. 2021) (holding that an insurer's duty for claims handling is nondelegable); Patterson v. Westfield Ins. Co., 2019 WL 11253086, at *9 (N.D. W. Va. 2019) (denying insurer's motion for summary judgment of bad-faith claim based on insurer's vicarious liability for independent contractor's actions in processing claim); Majorowicz v. Allied Mut. Ins. Co., 569 N.W.2d 472, 475 (Wis. Ct. App. 1997) ("An insurer's duty to act in good faith in its dealings with its insured is non-delegable. An insurer cannot escape liability for bad faith by delegating its responsibilities to attorneys or other agents."); see also WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 7.01[1], at 7-2 to 7-3 (2d ed. 2019) (stating the nondelegability of claims

processing and citing cases so holding); STEVEN PLITT ET AL., COUCH ON INSURANCE 3d § 198:17 (2023 Update) ("An insurer cannot delegate its duty of good faith.").

Comment p. Damages. Because bad faith is a tort, rather than contract, claim, consequential damages are determined based on tort law, which permits recovery of all damages within the tortfeasor's scope of liability (proximate cause). See Restatement of the Law, Liability Insurance § 5, Reporters' Note to Comment *a* (AM. L. INST. 2019). Because insurance bad faith is a category of conduct that has significant potential to cause emotional harm, damages for such harm are also available. Restatement Third, Torts: Liability for Physical and Emotional Harm § 47(b) (AM. L. INST. 2012) (permitting recovery for negligently inflicted emotional distress for categories of "activities, undertakings, or relationships" in which negligent conduct is especially likely to cause serious harm"); Restatement Third, Torts: Remedies § 21(a)(1) (AM. L. INST., Tentative Draft No. 2, 2023) (same). Consistent with that principle, most courts that have addressed the matter permit recovery for emotional harm. See, e.g., Time Ins. Co. v. Burger, 712 So. 2d 389, 393 (Fla. 1998) (finding that a plaintiff is authorized to recover "damages for emotional distress in a first-party bad faith claim against a health insurance company"); see also WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 9.04[4][d], at 9-18 (2d ed. 2019) ("In a few jurisdictions, recovery of emotional distress damages is not permitted or is specially limited."); STEVEN PLITT ET AL., COUCH ON INSURANCE (3d ed. updated 2022) ("In those jurisdictions where a bad-faith claim is viewed as sounding in tort, the insured can obtain a full range of damages, including those for emotional distress . . . .").

In addition, the insured's spouse and children may have a claim for loss of consortium when the insured's emotional distress had a detrimental effect on the relationship with the insured's family member. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 A, Comment *n* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (AM. L. INST., Tentative Draft No. 1, 2022)); id. § 48 C, Comment *d*; Restatement Third, Torts: Remedies § 25 (AM. L. INST., Tentative Draft No. 2, 2023) (same); BARKER & KENT, supra § 9.04[4][a], at 9-16. Courts affirming recovery for loss of consortium for insurer bad faith include: Skinner v. Metro. Life Ins. Co., 829 F. Supp. 2d 669, 687 (N.D. Ind. 2010); Poling v. Motorists Mut. Ins. Co., 450 S.E.2d 635, 638 (W. Va. 1994) (third-party insurance). But see Bornstein v. Fireman's Fund Ins. Co., 623 F. Supp. 814, 816 (E.D. Wis. 1985) (denying claim for consortium because insurer owed no contractual obligation to spouse).

Either by statute or common-law decision, nearly every state permits insureds to recover attorneys' fees required to establish coverage for the insured's loss or to obtain the full amount of indemnity to which the insured is entitled. See, e.g., GA. CODE ANN. § 33-7-11(j) (providing for recovery of attorneys' fees for successfully prosecuting a claim to establish coverage and bad faith in failing timely to pay uninsured motorist benefits); N.H. REV. STAT ANN. § 491:22-b (authorizing attorneys' fees in declaratory-judgment action to establish coverage); S.D. CODIFIED L. § 58-12-3 (authorizing attorneys' fees against insurers who without reasonable cause fail to pay the full amount of insured's loss); Mustachio v. Ohio Farmers Ins. Co., 118 Cal. Rptr. 581, 584 (Ct. App. 1975) ("It follows as a matter of course that if the insurer's tortious conduct makes it reasonable for the insured

to seek the protection of counsel, the insurer is responsible for that item of damages."); Sensat v. State Farm Fire & Cas. Co., 176 So. 2d 804 (La. Ct. App. 1965) (awarding fees pursuant to La. Rev. Stat. 22:658, which provides for fees when insurer delays payment beyond period specified by statute); Daley v. Allstate Ins. Co., 936 P.2d 1185, 1190 (Wash. Ct. App. 1997) ("An insured who is compelled to assume the burden of a legal action to obtain the benefit of an insurance contract is entitled to attorney fees."), rev'd on other grounds, 958 P.2d 990 (Wash. 1998); Hayseeds, Inc. v. State Farm Fire & Cas., 352 S.E.2d 73, 80 (W. Va. 1986) ("[W]e hold today that whenever a policyholder must sue his own insurance company over any property damage claim, and the policyholder substantially prevails in the action, the company is liable for the payment of the policyholder's reasonable attorneys' fees."). See also Restatement Third, Torts: Remedies § 16(b)(2) (AM. L. INST., Tentative Draft No. 2, 2023) ("A plaintiff who establishes a defendant's liability in tort may recover reasonable attorneys' fees if: . . . the tort alleged and proven is bad-faith conduct by an insurer."); id., Comment *d* ("An insurer that responds to an insurance claim in bad faith commits a tort and not just a breach of contract. . . . And by one route or another, nearly every state awards attorneys' fees to successful insurance-bad-faith plaintiffs. . . . These fee awards generally appear to be nondiscretionary. . . . [T]his Restatement . . . reaffirm[s] that an award of reasonable attorneys' fees is part of the remedy for plaintiffs who prove the tort of insurance bad faith.").

Numerous cases support the view contained in Comment *p* on the availability in bad-faith litigation of punitive damages for sufficiently culpable insurer behavior. Some include Rawlings v. Apodaca, 726 P.2d 565, 578 (Ariz. 1986) ("Thus, we establish no new category of punitive damages for bad faith cases. Such damages are recoverable in bad faith tort actions when, and only when, the facts establish that defendant's conduct was aggravated, outrageous, malicious or fraudulent."); Enrique v. State Farm Mut. Auto. Ins. Co., 142 A.3d 506, 512 (Del. 2016) (declaring that "punitive damages are available as a remedy for bad faith breach of the implied covenant of good faith where the plaintiff can show malice or reckless indifference by the insurer"); Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334, 347 (Haw. 1996), as amended (June 21, 1996) (adopting general standard of culpability for punitive damages in bad-faith claims); Weinstein v. Prudential Prop. & Cas. Ins. Co., 233 P.3d 1221, 1251-1253 (Idaho 2010) (analyzing whether newly enacted statute governing punitive damages was applicable to bad faith based on when that claim arose); Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 520 (Ind. 1993) ("The standard for awarding punitive damages for the commission of a [bad-faith] tort remains unchanged."); Pioneer Life Ins. Co. v. Moss, 513 So. 2d 927, 930 (Miss. 1987) (explaining that bad faith is insufficient for recovery of punitive damages, which requires, in addition, proof of "willful or malicious wrong, or act[ing] with gross or reckless disregard for the insured's rights"); U.S. Fid. & Guar. Co. v. Peterson, 540 P.2d 1070, 1072 (Nev. 1975) ("While the record supports the court's determination that there was sufficient evidence of the insurance company's bad faith to justify an instruction on consequential damages, the necessary requisites to support punitive damages are not present."); Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 379 (Wis. 1978) (declaring that bare proof of bad faith was insufficient for punitive damages, which additionally requires a showing of "aggravation, insult or cruelty, with vindictiveness or malice").

MISCELLANEOUS PROVISIONS

CHAPTER __
MISCELLANEOUS TORTS

TOPIC __
SPOLIATION

§ __. "Spoliation" Defined

For purposes of this Restatement, "spoliation" refers to the destruction, mutilation, or significant alteration of physical or tangible evidence.

Comment:

a. History.
b. Scope.
c. The definition's substantive limits.

a. History. Courts have long been concerned with the destruction of evidence. Indeed, the term "spoliation" derives from the Latin phrase *omnia praesumuntur contra spoliatorem*, meaning "all things are presumed against the destroyer or wrongdoer." Yet, no court recognized a freestanding cause of action for spoliation until 1984. Because of the tort's relatively recent vintage, spoliation was not addressed by the Restatement Second of Torts.

b. Scope. This Topic addresses a plaintiff's ability to assert a freestanding spoliation claim against an actor who destroys, mutilates, or significantly alters evidence. Spoliation may be carried out by a first or third party—and may be negligent or intentional. A "first-party" spoliation claim, addressed at § __, refers to the spoliation of evidence by a party to the underlying litigation. By contrast, a "third-party" spoliation claim, addressed at § __, refers to the spoliation of evidence by a nonparty to the underlying litigation.

This Restatement addresses only the viability and contours of a *freestanding* cause of action for spoliation in tort. It does not address a related matter: When the "spoliation" inference—an adverse inference instruction, which authorizes or instructs the jury to infer or presume that the evidence the spoliator destroyed would have been unfavorable to the spoliator—can or cannot be

furnished to the jury. Whether to provide the spoliation instruction is a question of procedure or evidence, not substantive tort law. It is, therefore, beyond the scope of this Restatement.

c. The definition's substantive limits. Consistent with the narrow definition of "spoliation" above, this Restatement addresses only claims involving the destruction, mutilation, or significant alteration of physical or tangible evidence—i.e., evidence, including electronic files, data, documents, or metadata, that can be possessed. As such, this Restatement does not address the distortion or fabrication of wholly nonphysical evidence (such as testimony). Nor does it address the delayed production or temporary concealment of evidence.

REPORTERS' NOTE

Comment a. History. A spoliation cause of action dates back to Smith v. Superior Ct., 198 Cal. Rptr. 829 (Ct. App. 1984), which created a freestanding (though, ultimately short-lived in California) tort to address the intentional destruction of evidence.[1] See Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1129 (Miss. 2002) (dating the intentional spoliation claim to the 1984 *Smith* opinion); Hills v. United Parcel Serv., Inc., 232 P.3d 1049, 1052 (Utah 2010) (same). As such, the tort's invention postdates the Restatement Second of Torts (AM. L. INST. 1965, 1977, 1979), and it is fair to say that "[r]ecognition of spoliation of evidence as an independent tort is a recent and evolving theory of liability." Ortega v. City of New York, 824 N.Y.S.2d 714 (App. Div. 2006), aff'd, 876 N.E.2d 1189 (N.Y. 2007).

That said, however, the tort of *intentional* spoliation of evidence is merely an outgrowth of another intentional cause of action—interference with economic expectation—which is long-established and well-accepted. See Restatement Third, Torts: Liability for Economic Harm § 18 (AM. L. INST. 2020) (authorizing a cause of action for the defendant's interference with an economic expectation if the defendant, inter alia, "committed an independent and intentional legal wrong"); see also Coleman v. Eddy Potash, Inc., 905 P.2d 185, 190 (N.M. 1995) (recognizing that "an individual's recovery in a civil lawsuit is a prospective economic interest that is entitled to protection" from intentional interference under traditional tort principles); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 714 (2023 update) (recognizing that spoliation claims are particular applications of an older tort: intentional interference with economic prospects); Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1895, 1921 (1997) (observing that, to sustain harm from spoliation "is no different from being deprived of a prospective economic advantage").

Comment b. Scope. As Comment *b* recognizes, spoliation can be carried out by a third or a first party. A "third-party" spoliation claim refers to the destruction, mutilation, or significant

[1] The *Smith* opinion was "short-lived" because the California Supreme Court subsequently disapproved of the decision, establishing, in California, that there is no tort remedy for the intentional spoliation of evidence by a party or nonparty, respectively. See Cedars-Sinai Med. Ctr. v. Superior Ct., 954 P.2d 511 (Cal. 1998); Temple Cmty. Hosp. v. Superior Ct., 976 P.2d 223, 225 (Cal. 1999).

alteration of evidence by a nonparty to the underlying litigation, while a "first-party" claim refers to the destruction, mutilation, or significant alteration of evidence by a party to the underlying litigation.

Sometimes, the question of whether a particular spoliator is a party to the underlying litigation, or a party's agent (rendering the spoliation claim a first-party claim) can be murky or contested. That question must be answered in accordance with established agency principles, the contours of which fall outside the scope of this Section. See generally Restatement of the Law Third, Agency (AM. L. INST. 2006). For a cogent discussion of these principles in the context of a lawyer's alleged destruction of evidence, see Hewitt v. Allen Canning Co., 728 A.2d 319, 322-323 (N.J. Super. Ct. App. Div. 1999).

Comment c. The definition's substantive limits. Consistent with the majority of courts to address the matter, this Restatement addresses conduct vis-à-vis physical or tangible evidence, including electronic files, data, documents, and metadata. For a definition of data, see Principles for a Data Economy – Data Transactions and Data Rights, Principle 3(1)(a) (AM. L. INST. & EUR. L. INST. 2023). It does not address the alteration or fabrication of testimonial evidence. See Baker v. AIG Claim Servs., Inc., 2005 WL 2977657, at *8 (N.D. Ind. 2005) ("Spoliation of evidence as a tort action has been limited to physical evidence, and the tort has not been expanded to include spoliation of testimonial evidence."); Diana v. NetJets Servs., Inc., 974 A.2d 841, 853 (Conn. Super. Ct. 2007) (clarifying that the tort of intentional third-party spoliation addresses the destruction or mutilation of physical—not testimonial—evidence); Loomis v. Ameritech Corp., 764 N.E.2d 658, 663 (Ind. Ct. App. 2002) ("For the spoliation of evidence doctrine to apply, the evidence must be exclusively possessed and must be made unavailable, destroyed, or altered. Physical evidence is readily capable of being evaluated in terms of being exclusively possessed and being made unavailable, destroyed, or altered. Testimonial evidence does not lend itself to being similarly evaluated.") (citation omitted).

As Comment *c* also makes plain, this Restatement addresses only the destruction, mutilation, or significant alteration of evidence—not the temporary concealment or delayed production of evidence. It draws this line, in part, because spoliation is commonly defined as "'destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action'"—and it is prudent to keep this Restatement's definition of spoliation within recognized and limited bounds. Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1178 (Conn. 2006) (quoting Hannah v. Heeter, 584 S.E.2d 560, 564 (W. Va. 2003) and Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995)); see also Lips v. Scottsdale Healthcare Corp., 229 P.3d 1008, 1009 (Ariz. 2010) ("Spoliation is the destruction or material alteration of evidence."); 21 SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: EDISCOVERY AND DIGITAL INFORMATION MANAGEMENT 373 (5th ed. 2020) (defining "spoliation" as "[t]he destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation, or audit"). Indeed, the majority of courts squarely to address the issue have refused to treat delayed production as a form of spoliation. E.g., Merix Pharm. Corp. v. Clinical Supplies Mgmt., Inc., 59 F. Supp. 3d 865, 880-881 (N.D. Ill. 2014) (rejecting plaintiff's spoliation claim when production of evidence was delayed but evidence was

neither lost nor destroyed); Allstate Ins. Co. v. Dooley, 243 P.3d 197, 203 (Alaska 2010) ("Intentional spoliation is not the appropriate cause of action when evidence is concealed, but not destroyed . . . ."); Elliott-Thomas v. Smith, 110 N.E.3d 1231, 1235 (Ohio 2018) ("reject[ing] an expansion of the tort of intentional spoliation of evidence to encompass allegations of intentional concealment of or interference with evidence"); Tate v. Adena Reg'l Med. Ctr., 155 Ohio App. 3d 524, 532-535 (2003) (same).

§ __. Third-Party Spoliation of Evidence

An actor who intentionally spoliates evidence, as spoliation is defined in § __, is subject to liability for the harm thus caused if:

(a) the actor knew that civil litigation was pending or probable;

(b) the actor, although not a party to the underlying litigation, was duty-bound to preserve evidence for it;

(c) the actor intentionally destroyed, mutilated, or significantly altered the evidence for the purpose of defeating or undercutting a party's ability to vindicate that party's interest in the pending or probable civil action; and

(d) the destruction, mutilation, or significant alteration of evidence prejudiced the party by significantly impairing the party's ability to vindicate the party's interest in the underlying civil action.

Comment:

a. Scope and history.
b. Support and rationale.
c. Knowledge of pending or probable litigation.
d. Duty to preserve evidence.
e. Two forms of intention are required.
f. Causation: prejudice.
g. No prior filing requirement.
h. Freestanding cause of action or additional count.
i. Damages.
j. Judge and jury.
k. Claims initiated by defendants in the underlying action.
l. Negligent third-party spoliation of evidence.

a. Scope and history. Spoliation, defined by § __, refers to the destruction, mutilation, or significant alteration of physical or tangible evidence. Spoliation can be either negligent or intentional and may be carried out by a third or first party. This Section addresses when a plaintiff is entitled to assert a freestanding "third-party" spoliation claim. A "third-party" spoliation claim refers to the spoliation of evidence by a nonparty to the underlying litigation. This Section approves of such a claim when it involves intentional conduct and disapproves of such a claim when it involves negligent or reckless conduct. See Subsection (c) and Comment *l*. A companion cause of action, first-party spoliation, is addressed in § __ of this draft. As the name suggests, a "first-party" spoliation claim refers to the spoliation of evidence by a party to the underlying litigation. That Section, similarly, approves of such a claim when it involves intentional conduct and disapproves of such a claim when it involves innocent, negligent, or reckless conduct. See § __, Comment *l*.

As § __ explains, this Restatement does not address other mechanisms that may be appropriately utilized when an actor spoliates evidence. It does not address sanctions for the spoliation of evidence. Nor does this Restatement address when the "spoliation" inference—an adverse inference instruction, which authorizes or instructs the jury to infer or presume that the evidence the spoliator destroyed would have been unfavorable to the spoliator—can or cannot be furnished to the jury. Those matters are questions of civil procedure or of evidence and, as such, fall outside the scope of this Restatement.

For a discussion of the history of the spoliation cause of action, see § __, Comment *a*.

b. Support and rationale. The majority of courts to consider whether to endorse a freestanding cause of action for *negligent* or *reckless* third-party spoliation have declined to do so. Consistent with that authority, this Section declines to recognize such a claim. See Subsection (c) (requiring intentional conduct) and Comment *l*.

Meanwhile, courts that have addressed whether to recognize a freestanding cause of action for the *intentional* destruction of evidence by a third party have divided, and, in fact, a narrow majority of courts expressly to address the matter have opted against the tort's recognition. Nevertheless, this Section recognizes a cause of action for intentional third-party spoliation. It does so in order to promote doctrinal coherence and because of the nature of the flagrantly wrongful conduct at issue.

As to doctrinal coherence, the intentional spoliation of evidence is an outgrowth of another intentional tort—interference with economic expectation—which is long-established and well-

supported. See Restatement Third, Torts: Liability for Economic Harm § 18 (providing that a defendant is subject to liability if, inter alia, the defendant engaged in "an independent and intentional legal wrong" while seeking "to interfere with the plaintiff's expectation"). It would be anomalous to impose liability on actors, *generally*, when they engage in intentionally wrongful conduct in order to deprive another of an economic advantage—but to *shield* actors from liability when that wrongful conduct interferes with judicial processes. The anomaly, in fact, would be particularly sharp because courts widely accept three other conceptually similar torts that involve wrongful interference with judicial processes: malicious prosecution (id. § 21), abuse of process (id. § 26), and wrongful use of civil proceedings (id. § 24). In recognizing these torts, courts explicitly or implicitly recognize that "[t]here is a notably strong public interest in deterring and redressing . . . misconduct" that taints, distorts, or corrupts the "judicial system." Id. § 26, Comment *b*.

Additionally, recognition is warranted in light of the seriousness of the misconduct at issue. The intentional destruction, mutilation, or significant alteration of evidence specifically to deprive a party of the use of that evidence strikes at the very heart of our adversarial system of justice. Such misconduct increases the risk of an erroneous decision on the merits; squanders scarce judicial resources; increases the cost, duration, and complexity of litigation; and undercuts public confidence in judicial processes. Furthermore, such misconduct intentionally perpetrated by nonparties to the underlying litigation should be deterred—entirely. There is, after all, no efficient level of deliberate litigation misconduct. And—critically—traditional litigation mechanisms (such as adverse inference instructions and default judgments) are poorly equipped to serve this strong deterrent function as the third-party spoliator is, by definition, not a party to the underlying litigation.

c. Knowledge of pending or probable litigation. Per Subsection (a), an actor is subject to liability pursuant to this Section only if the actor had actual knowledge of pending or probable litigation. Constructive knowledge does not suffice.

Illustrations:

1. Lucille is driving her van, recently purchased from Don's Autos, when the left-rear tire and wheel fly off, causing the van to spin out of control and crash into a highway guardrail. Lucille suffers catastrophic injuries in the collision. In the hours after the crash, the van is towed to a repair shop, Riley Repairs. Without knowledge of what transpired, a mechanic at Riley Repairs sends the now-mangled wheel and wheel assembly to the dump,

where both are destroyed before they can be inspected by Lucille's expert. Because, inter alia, Riley Repairs acted without knowledge of pending or probable litigation, it is not liable pursuant to this Section.

2. Same facts as Illustration 1, except that, two days after the crash—and before the wheel and wheel assembly are sent to the dump—Lucille retains a lawyer who immediately calls Riley Repairs. In the course of that telephone conversation, Lucille's lawyer tells Riley about the crash and informs him that litigation against Don's Autos is very likely because it had recently refurbished the faulty wheel and wheel assembly. Because, now, Riley Repairs has knowledge of probable litigation, the knowledge element of Subsection (a) is satisfied. Accordingly, Riley Repairs is subject to liability pursuant to this Section, provided Lucille is able to satisfy its other prerequisites.

d. Duty to preserve evidence. Pursuant to Subsection (b), an actor is subject to liability pursuant to this Section only if the actor was duty-bound to preserve the evidence at issue. Individuals and entities, generally, are not obligated to preserve evidence that might be of use in some future civil litigation against a third party. However, in particular circumstances, a duty to preserve evidence arises—whether by contract, agreement, statute, subpoena, special relationship, administrative rule, or voluntary action. Subsection (b) clarifies that, in order to state a claim under this Section, the plaintiff must prove the defendant had an independent duty to preserve the instant evidence.

This Section does not create a duty to preserve evidence. Nor does this Section expand, enlarge, or otherwise affect the contours of one's duty to preserve evidence. This Section merely furnishes an independent cause of action to address situations when an established duty to preserve evidence, imposed by law, contract, agreement, or voluntary action, is intentionally breached.

Illustrations:

3. Austin, a coal miner employed by Consolidated Coal, is grievously injured when an apparently defective hose that he was using to cool a welding area bursts. Two weeks after the accident, Consolidated Coal (itself shielded from suit, pursuant to the state's workers' compensation statute) deliberately destroys the hose—but only *after* giving the hose's manufacturer, and the manufacturer's lawyer and expert, the opportunity to inspect it. At the time of the hose's destruction, Consolidated Coal had not been ordered to preserve the hose, had not agreed to preserve the hose, and was not statutorily obligated to preserve

the hose. Because, at the time Consolidated Coal destroyed the hose, it was not duty-bound to preserve it, Consolidated Coal is not liable pursuant to this Section.

4. Same facts as Illustration 3, except that now, Consolidated Coal destroys the hose the day after Austin served Consolidated Coal with a valid third-party subpoena for the hose's preservation and production. Because, at the time Consolidated Coal deliberately destroyed the hose, it was obligated to preserve it, it is subject to liability pursuant to this Section, provided this Section's other requirements are satisfied.

5. Brenda is hospitalized with severe abdominal pain. Brenda's attending physician, Dr. Doolittle, orders several x-rays. Dr. Daniels, a radiologist, reads the x-rays and observes that they reveal a serious blockage; Dr. Daniels conveys that information, by telephone, to Dr. Doolittle. Once told of the blockage, Dr. Doolittle inexplicably takes no action. Hours later, Brenda dies of an intestinal blockage. Fearing that his friend, Dr. Doolittle, will be the subject of a medical malpractice suit, Dr. Daniels deliberately destroys the x-ray images and all records of the physicians' telephone call. At the time of the x-ray images' destruction, under the state's governing law, Dr. Daniels was not duty-bound to preserve them. Accordingly, he is not liable to Brenda pursuant to this Section.

6. Same facts as Illustration 5, except that now, Dr. Daniels works in a state that has adopted an X-Ray Retention Act. This Act requires radiologists to retain all x-ray images for a period of five years. Because now, Dr. Daniels had a duty (in this case, a statutory duty) to preserve Brenda's x-ray images, he is subject to liability pursuant to this Section, provided the Section's other requirements are satisfied.

e. Two forms of intention are required. An actor is subject to liability pursuant to this Section only if the actor's destruction, mutilation, or alteration of evidence was intentional. Recklessness, negligence, or inadvertence in the retention, production, or safekeeping of evidence does not give rise to liability. See Comment *l*. Furthermore, as Subsection (c) makes clear, the actor must destroy, mutilate, or significantly alter evidence with "the purpose of defeating or undercutting a party's ability to vindicate that party's interest in the pending or probable civil action."

Illustrations:

7. As in Illustrations 1 and 2, Lucille is driving her van, recently purchased from Don's Autos, when the left-rear wheel and tire fly off, causing the van to spin out of control, and Lucille suffers catastrophic injuries in the ensuing collision. In the hours after the crash,

Lucille's van is towed to a repair shop, Riley Repairs. Lucille retains a lawyer who immediately calls Riley Repairs. In the course of that telephone call, Lucille's lawyer tells Riley about the crash and informs him that litigation against Don's Autos is very likely because Don's Autos had recently refurbished the (probably defective) wheel assembly. In response, Riley vows to "keep everything safe." Soon after getting off the phone, Riley tells his mechanic: "Make sure you don't destroy anything." The mechanic nods but forgets this admonition and, later that day, sends the wheel and wheel assembly to the dump, where both are destroyed. Because, inter alia, Riley Repairs did not destroy the wheel or wheel assembly with the purpose of defeating or undercutting Lucille's ability to prevail in her civil action, it is not liable pursuant to this Section.

8. Same facts as Illustration 7, except that now, Riley gets off the phone and tells the mechanic: "Quick! Destroy the wheel and wheel assembly. Something is wrong with them, and they could get Don's Autos into a world of liability, and we can't have that because Don sends us half of our business!" Immediately thereafter, the mechanic sends the wheel and wheel assembly to the dump, where both are destroyed. Because, now, Riley Repairs is acting with the purpose of both assuring the destruction of the wheel and wheel assembly and thereby defeating or undercutting Lucille's ability to prevail in her civil action, it is subject to liability pursuant to this Section, provided this Section's other requirements are satisfied.

f. Causation: prejudice. Causation, as set forth in Subsection (d), is an essential element in a spoliation claim. A spoliation plaintiff must establish that the evidence's destruction, mutilation, or significant alteration prejudiced the plaintiff's ability to vindicate the plaintiff's rights. To satisfy this burden, the spoliation plaintiff must make two discrete showings.

First, a plaintiff must prove that "the destruction, mutilation, or significant alteration of evidence" significantly impaired—or would have significantly impaired—the plaintiff's success in a filed or contemplated suit. A slight or inconsequential impairment does not suffice. This means, in turn, that the spoliated evidence, itself, must be vitally important to the underlying claim. If the evidence is merely duplicative, cumulative, or of insubstantial or marginal value, that fact will defeat the spoliation plaintiff's prima facie case.

Second, because courts recognize that a defendant should not be forced to pay damages to a spoliation plaintiff who had only a frivolous underlying claim, a plaintiff must prove that the

underlying suit was plausibly meritorious (or would have been, if the plaintiff had had the benefit of the now-spoliated evidence). To satisfy this latter burden, a plaintiff is not required to show that it is more probable than not that the plaintiff would have prevailed in the underlying action, had such an action been filed and had the suit had the benefit of the now-spoliated evidence. This, most courts to address the matter agree, is too heavy a burden, as it may be impossible to rewind the clock and determine what the missing evidence would have shown—or how persuasive the evidence would have been. A plaintiff must show, however, that, if the evidence had been available, there is a substantial and realistic possibility that the plaintiff would have prevailed.

When articulating a causation standard to govern spoliation claims, courts have varied some on the particulars. However, this Comment's two-part causation standard—which requires a spoliation plaintiff to show that (1) the spoliated evidence's absence caused, or would have caused, the significant impairment of a filed or contemplated civil suit which, itself, (2) had a substantial and realistic chance of success—distills the dominant themes from case law. It particularly tracks the test first articulated in Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 850-852 (D.C. 1998).

g. No prior filing requirement. To state a claim for intentional spoliation, a plaintiff need not first bring a suit and lose on account of the evidence's unavailability. This Section rejects a prelitigation requirement, although such a requirement has been imposed by a minority of courts, as such a requirement breeds litigation and is, therefore, inconsistent with courts' overarching goal of ensuring the expeditious and inexpensive resolution of disputes.

h. Freestanding cause of action or additional count. If the destruction, mutilation, or significant alteration of evidence is uncovered prior to litigation such that it is realistically possible for the plaintiff to bring suit in one action, both for the initial injury *and* the spoliation of evidence, the plaintiff generally ought to do so, as consolidation promotes judicial economy and decisional consistency. Likewise, if the destruction, mutilation, or significant alteration of evidence is uncovered during the course of litigation, such that it is realistically possible for the plaintiff to amend the initial complaint to include a count against the third-party defendant spoliator, a consolidated suit is preferred to piecemeal litigation. If, however, such consolidation is not possible or practical because, for example, the spoliation prevented the plaintiff from filing a lawsuit on the underlying claim or because the spoliation is not discovered until after the time to amend the initial complaint has lapsed, the plaintiff is free to file a separate claim for intentional spoliation.

i. Damages. Once the plaintiff shows that the plaintiff is entitled to relief, some courts allow a full recovery—i.e., a prevailing plaintiff is entitled to all damages that the plaintiff would have recovered in the underlying suit. Some courts, meanwhile, opt for greater specificity, even at the expense of administrative ease, by discounting an award by its probability. In particular, these courts first determine what the plaintiff would have recovered in the underlying suit, had the plaintiff prevailed, and then discount that sum by the plaintiff's probability of success, had the spoliated evidence been available. Because of insufficient doctrinal development, the Institute declines to choose between those two reasonable alternatives. When appropriate, the spoliation plaintiff may also recover punitive damages.

j. Judge and jury. As Subsection (b) establishes and Comment *d* emphasizes, liability for spoliation arises from an actor's duty to preserve evidence. Whether an actor is duty-bound to preserve evidence is generally a legal question, decided by the court (except when there is a material dispute about underlying facts). Other matters, including whether the duty was intentionally breached, whether the breach caused injury, and the appropriate calculation of damages, are matters for the factfinder.

k. Claims initiated by defendants in the underlying action. This Section leaves to further development the question of whether third-party intentional spoliation claims can be initiated by those who were defendants, rather than plaintiffs, in the underlying litigation. Such "reverse" spoliation claims are very rare, and there is little academic commentary discussing such actions. The little case law that exists is divided, though it skews negative.

Courts may be reluctant to authorize "reverse" spoliation claims because the tort's extension raises some conceptual and practical difficulties. As to the former, as noted in Comment *b*, the spoliation tort represents a particular application of a traditional tort: intentional interference with an economic expectation. Generally, the "economic expectation" interfered with is plaintiff's claim. When flipped, this conceptual framing falters. Cf. Restatement Third, Torts: Liability for Economic Harm § 18(a) and Comment *a* (offering a cause of action to one wrongfully deprived of an "economic benefit" and further explaining that "the tort generally involves cases in which a defendant's intentional wrong prevents the plaintiff from . . . otherwise pursuing economic gain"). As to the latter, when the defendant becomes a spoliation plaintiff, there are practical difficulties, as both the causation inquiry and damage calculations become more complicated and speculative. Thus, similar to the reverse-contingency-fee context, where fee calculations are thought to be

difficult because they are pegged to what the defendant "saved" owing to the defense lawyer's efforts, it may be hard to know how much the defendant would have had to pay to the plaintiff, had the now-spoliated evidence been available.

On the other hand, strong arguments militate toward acceptance: Third-party spoliation can seriously undercut a defendant's ability to present a defense and may also prevent a defendant from impleading other parties. Worse, this flagrant misconduct should be deterred, but traditional sanctions are unlikely to serve that deterrent purpose. Recognizing these realities, courts, in a small smattering of cases, have allowed defendants to bring claims for spoliation against the third parties who deliberately jeopardized their defenses.

Still, given the relative paucity of authority authorizing such actions, this Section leaves to future development the question of whether spoliation claims should be recognized for those who were defendants, rather than plaintiffs, in the underlying litigation.

l. Negligent third-party spoliation of evidence. As is clear from Comment *e*, this Restatement only endorses a cause of action for intentional (rather than negligent) spoliation. While a stand-alone cause of action for the negligent spoliation of evidence by a nonparty to the underlying lawsuit has been recognized by a number of jurisdictions, so far, a majority of states have opted against the tort's recognition. Furthermore, compared to a claim for intentional spoliation, which is an outgrowth of a long-established cause of action—intentional interference with an economic expectation—negligent spoliation claims do not have roots in traditional doctrine. Accordingly, this Section expressly declines to recognize a freestanding cause of action for a nonparty's negligent spoliation of evidence.

REPORTERS' NOTE

Comment a. Scope and history. This Section addresses when a plaintiff may bring a freestanding claim for the third-party spoliation of evidence. Such third-party claims typically arise when the defendant "is alleged to have destroyed evidence relevant to the plaintiff's causes of action" but is "not alleged to have committed the underlying tort as to which the lost or destroyed evidence related." Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1173 n.4 (Conn. 2006) (citations and quotations omitted).

Sometimes, the question of whether a particular spoliator is a party, or the party's agent (rendering the spoliation claim a first-party claim, as addressed by § __), or, alternatively, a third party (rendering the claim a third-party claim, as addressed here) can be murky or contested. That question must be answered in accordance with established agency principles, the contours of which fall outside the scope of this Section. See generally Restatement Third, Agency (AM. L. INST.

2006). For a cogent discussion of these principles in the context of a lawyer's alleged destruction of evidence, see Hewitt v. Allen Canning Co., 728 A.2d 319, 322-323 (N.J. Super. Ct. App. Div. 1999). For further, recent discussion, see Lawrence v. Renaissance Hotel, 2024 WL 1091790, at *3-4 (D.D.C. 2024) (classifying defendants as third-party, not first-party, spoliators).

For more on the claim's history, see § __, Reporters' Note to Comment *a*.

Comment b. Support and rationale. Courts have divided on whether to recognize a freestanding tort for the intentional spoliation of evidence. A little under half of the states expressly to consider the matter have opted to recognize a freestanding tort; a little over half have declined to do so. See Andrea A. Anderson, *The Spoils of War: Arguments in Favor of Independent Claims for Spoliation Against Third Parties*, 11 WAKE FOREST L. REV. ONLINE 1, 2 (2021) ("In the thirty-six years since the first case in California, thirty-three states have considered an independent spoliation claim [of some kind]. Nineteen states declined to recognize a spoliation tort, and fourteen states recognized at least one form of the claim."); see also 22 KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE (WRIGHT & MILLER) § 5178 (2022 update) ("[A]bout half the states recognize spoliation as an actionable tort."); Hon. James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 651 (2016) (same); Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Party Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63, 70 (2017) ("A current split exists between those jurisdictions that recognize a secondary cause of action for spoliation of evidence and those that reject the tort altogether.").

Most commentators to weigh in, meanwhile, have done so on the "pro" side of the ledger. See Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1280 (2004) (noting "the general position among scholars that such actions should be maintainable"). Examples include: Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L.J. 351, 404 (1995) (advocating the tort's widespread adoption); Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1895, 1920-1922 (1997) (explaining that "evidential damage, when inflicted negligently, should normally be actionable" and that fair compensation for spoliation is necessary under a corrective justice theory since a person deprived of evidence is "deprived of something of value" and this "deprivation constrains the autonomous pursuit of her legal rights" and simultaneously "reduces the threat-value, i.e., the settlement value, of her case vis-a-vis the party opponent"); Anderson, supra at 3 (arguing that claims for the "third-party intentional [spoliation of evidence] . . . are necessary and viable tort claims within the scheme of American civil litigation"); Maurice L. Kervin, Comment, *Spoliation of Evidence: Why Mississippi Should Adopt the Tort*, 63 MISS. L.J. 227, 246 (1993) (advocating the tort's adoption in Mississippi); Virginia L. H. Nesbitt, Note, *A Thoughtless Act of A Single Day: Should Tennessee Recognize Spoliation of Evidence As an Independent Tort?*, 37 U. MEM. L. REV. 555, 557 (2007) (calling for courts in Tennessee to recognize spoliation as a separate tort in order to promote compensation and deterrence); Jay E. Rivlin, Note, *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor*, 26 HOFSTRA L. REV. 1003, 1006 (1998) ("The independent torts of intentional and negligent spoliation of evidence serve the public

policies of deterring evidence destruction, increasing the accuracy of fact-finding, and giving the victim of spoliation an avenue to pursue compensation for her injury.").

Of the four flavors of spoliation (intentional third-party, intentional first-party, negligent third-party, and negligent first-party), the claims endorsed herein (third-party claims, involving deliberate misconduct) have garnered the greatest acceptance and broadest support. See Hills v. United Parcel Serv., Inc., 232 P.3d 1049, 1056 (Utah 2010) (recognizing that states are "most likely to recognize [claims for] third-party intentional spoliation"); Anderson, supra at 2 ("Of the forms of spoliation, third-party intentional claims enjoy the largest support amongst courts.").

Courts that have recognized the cause of action include the following: Hibbits v. Sides, 34 P.3d 327, 328-330 (Alaska 2001) (formally recognizing a cause of action for intentional third-party spoliation of evidence); Diana v. NetJets Servs., Inc., 974 A.2d 841, 854 (Conn. Super. Ct. 2007) (formally recognizing "a cause of action for intentional, third party spoliation of evidence"); Shamrock-Shamrock, Inc. v. Remark, 271 So. 3d 1200, 1202 (Fla. Dist. Ct. App. 2019) ("Florida courts have recognized an independent cause of action for spoliation of evidence against third parties . . . ."); Raymond v. Idaho State Police, 451 P.3d 17, 19 (Idaho 2019) (formally recognizing the tort of "intentional interference with a prospective civil action by spoliation of evidence by a third party"); Ritter v. Loraso, 234 So. 3d 1096, 1100 (La. Ct. App. 2017) ("Louisiana recognizes a cause of action for intentional spoliation."); Oliver v. Stimson Lumber Co., 993 P.2d 11, 17 (Mont. 1999) ("[I]t is necessary to recognize the tort of spoliation . . . as an independent cause of action with respect to third parties who destroy evidence."); Rosenblit v. Zimmerman, 766 A.2d 749, 758 (N.J. 2001) (recognizing the cause of action, while framing it as one for fraudulent concealment); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995) ("[W]e hold today that New Mexico recognizes a cause of action for intentional spoliation of evidence."), overruled on other grounds, Delgado v. Phelps Dodge Chino, Inc., 34 P.3d 1148 (N.M. 2001); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (recognizing a third-party claim for intentional spoliation); Hannah v. Heeter, 584 S.E.2d 560, 571 (W. Va. 2003) ("West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party."); accord Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 848 (D.C. 1998) ("[T]he District of Columbia will allow a plaintiff to recover against a defendant who has negligently or recklessly destroyed or allowed to be destroyed evidence that would have assisted the plaintiff in pursuing a claim against a third party."); Thompson v. Owensby, 704 N.E.2d 134, 138 (Ind. Ct. App. 1998) (holding that a minor and her parents who filed a third-party negligent spoliation claim were "entitled to go forward with their claim based on the Insurance Company's duty to maintain evidence," while further observing that the plaintiffs had "chosen to pursue a tort action rather than seeking a discovery sanction or availing themselves of an evidentiary inference" and that the pursuit of that path was the plaintiffs' "prerogative").

Illinois, logically, also belongs on the pro side of the ledger because the Illinois Supreme Court has held that a plaintiff is entitled to relief for negligent spoliation if the plaintiff can prove that: "(1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence

was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages." Martin v. Keeley & Sons, Inc., 979 N.E.2d 22, 27 (Ill. 2012). Thus, a plaintiff can recover in Illinois if a defendant intentionally destroyed evidence since, as a federal court has recognized: "It would make no sense . . . for the court to hold a defendant liable for its merely negligent conduct but not for intentional conduct that resulted in the same harm." Williams v. Gen. Motors Corp., 1996 WL 420273, at *3 (N.D. Ill. 1996). But cf. Dunn v. Manicki, 2021 WL 1208990, at *10 (N.D. Ill. 2021) ("'Whether Illinois courts will recognize a cause of action for willful and wanton or intentional spoliation of evidence remains an open question.'") (quoting Rogers v. McConnaughay, 2018 WL 4622520, at *6 (Ill. App. Ct. 2018)); accord Atl. Specialty Ins. Co. v. Deere & Co., Inc., 2023 WL 3855587, at *2 (N.D. Ala. 2023) (predicting that Alabama would recognize a cause of action for negligent third-party spoliation).

Courts that have declined to recognize the cause of action endorsed herein include the following: Downen v. Redd, 242 S.W.3d 273, 275 (Ark. 2006); Temple Cmty. Hosp. v. Superior Ct., 976 P.2d 223, 225 (Cal. 1999); Owens v. Am. Refuse Sys., Inc., 536 S.E.2d 782, 784 (Ga. Ct. App. 2000); Glotzbach v. Froman, 854 N.E.2d 337, 341 (Ind. 2006); Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 422 (Mass. 2002); Teel v. Meredith, 774 N.W.2d 527, 532 (Mich. Ct. App. 2009); Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1135 (Miss. 2002).

Some other courts defy clear categorization. Sometimes, the matter has never been clearly confronted. See Andrea A. Anderson, *The Spoils of War: Arguments in Favor of Independent Claims for Spoliation Against Third Parties*, 11 WAKE FOREST L. REV. ONLINE 1, 19 (2021) (reporting, as of 2021, "[t]o date, eighteen states have yet to decide on the recognition of an independent spoliation claim"). On other occasions, a court's acceptance or rejection is murky because, although the court was poised to address the viability of independent spoliation claims, it stopped short and instead rejected the individual case on its facts. Accord id. at 19 (reporting, as of 2021, "[t]he highest courts in Hawaii, Kansas, Missouri, Oklahoma, Utah, Vermont, and Virginia have considered independent spoliation claims, but rejected the individual case on its facts without considering the merits"); e.g., Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1182 (Kan. 1987) (declining to recognize a claim for third-party intentional spoliation because, inter alia, the defendant had no duty to preserve the evidence at issue); Baugher v. Gates Rubber Co., 863 S.W.2d 905, 910 (Mo. Ct. App. 1993) ("Because no facts are alleged supporting the allegation that Hartford acted intentionally, this case presents no basis to recognize a tort of intentional spoliation in Missouri."); Hills v. United Parcel Serv., Inc., 232 P.3d 1049, 1058 (Utah 2010) (declining to decide whether to adopt an independent cause of action for intentional third-party spoliation because "the [plaintiff's] measure of damages is unaffected by the spoliated evidence because [the defendant] has admitted liability in the underlying wrongful-death action"); Austin v. Consolidation Coal Co., 501 S.E.2d 161, 163 (Va. 1998) (declining to decide whether to recognize a cause of action for intentional third-party spoliation because, under the case's facts, the defendant "had no legal duty to preserve" the spoliated evidence). On still other occasions, a court's acceptance is unclear because the decision itself is equivocal. See, e.g., Timber Tech Engineered Bldg. Prods. v. The Home Ins. Co., 55 P.3d 952, 954-955 (Nev. 2002) (declining to

"recognize an independent tort for spoliation of evidence regardless of whether the alleged spoliation is committed by a first or third party" while further explaining that a freestanding negligence claim crafted out of "existing common-law negligence" may nevertheless exist when evidence shows defendant owed a duty to plaintiff to preserve evidence).

In evaluating whether to adopt a freestanding cause of action for spoliation, courts tend to agree that the intentional spoliation of evidence is an "unqualified wrong" that threatens the integrity and reliability of judicial processes. Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 426 (Mass. 2002) ("The destruction of relevant evidence is an unqualified wrong that has a pernicious effect on the truth-finding function of our courts.") (quotation marks omitted); see also, e.g., Cedars-Sinai Med. Ctr. v. Superior Ct., 954 P.2d 511, 515 (Cal. 1998) ("No one doubts that the intentional destruction of evidence should be condemned. Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation . . . ."); Justin J. Hawal, Note, *Sanctions or Tort? A Review of Ohio's Treatment of Independent Causes of Action for Spoliation of Evidence*, 62 CLEV. ST. L. REV. 501, 502 (2014) ("Courts universally recognize that spoliation can destroy fairness and justice by increasing the likelihood of erroneous decisions.") (quotation marks and citation omitted); Virginia L. H. Nesbitt, Note, *A Thoughtless Act of A Single Day: Should Tennessee Recognize Spoliation of Evidence As an Independent Tort?*, 37 U. MEM. L. REV. 555, 614 (2007) ("The practice of spoliation is universally acknowledged as an affront to the integrity of the judicial system.").

Yet, there is some disagreement as to whether a freestanding tort is actually necessary or even, on balance, beneficial. Central to courts' analyses is the fact that, even without recognition of a freestanding tort, a court, confronted with the malicious destruction of evidence, has tools at its disposal to address the misconduct. These tools include, among other things, an award of attorney's fees or costs to the aggrieved party; the exclusion of evidence, testimony, or argument; the exclusion of a party's pleading; an adverse inference instruction, which instructs the jury to infer or presume that the evidence the spoliator destroyed would have been unfavorable thereto; and a default judgment (against a defendant spoliator) or a dismissal (if the spoliator is the plaintiff). Plus, many jurisdictions have enacted obstruction-of-justice statutes that criminalize certain types of spoliation. For a discussion of these and other remedies, see Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 21 (Tex. 2014) (cataloging these remedies and noting that "[t]he trial court also has discretion to craft other remedies it deems appropriate"); Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 647-649 (1998) (similar).

Meanwhile, to the extent that attorneys are complicit in the misconduct, they are subject to discipline. See, e.g., AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 3.4(a) ("A lawyer shall not . . . unlawfully alter [or] destroy . . . a document or other material having potential evidentiary value" or "counsel or assist another person to do any such act . . . ."); id. R. 3.4(b) (prohibiting the falsification of evidence).

Canvassing those tools, some suggest that the problem of evidence destruction is *already* adequately deterred—and that layering on a spoliation claim would be overkill. See O'Neal v.

Remington Arms Co., LLC, 2012 WL 3834842, at *3 (D.S.D. 2012) ("Courts . . . have found that existing remedies can address adequately the spoliation problem."); Meyn v. State, 594 N.W.2d 31, 34 (Iowa 1999) ("[C]ourts have felt no need for another cause of action when other remedies are available."); Rosenblit v. Zimmerman, 766 A.2d 749, 756 (N.J. 2001) ("Some courts have refused to recognize any tort action to remedy spoliation, holding instead that the evidentiary rules, along with adverse inferences will suffice."); Benjamin T. Clark, *The License to Spoliate Must Be Revoked: Why Missouri Should Recognize a Tort for Third-Party Spoliation*, 59 J. MO. B. 308, 309 (2003) (noting that courts declining to recognize a cause of action for spoliation "generally explain that traditional remedies are sufficient to address spoliation concerns").

Many courts and commentators, on the other hand, conclude that, notwithstanding these tools and mechanisms, persistent gaps remain. See, e.g., Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089, 2104 (2019) ("[S]ometimes a new tort emerges, in part, because there is no adequate regulatory regime already addressing the problem. The tort of spoliation of evidence seems to us to fit this pattern.").

For example, although Federal Rule of Civil Procedure 37 (and state-court counterparts) authorize courts to impose sanctions against parties for failure to comply with discovery demands and for failure to follow court orders, Rule 37 does not apply to third parties and, with the exception of Rule 37(e), which addresses electronically stored information, Rule 37 does not provide sanctions for prelitigation spoliation. See Drew D. Dropkin, Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1829 n.54 (2002); Brooks Morel, Note, *Now You See It, Now You Don't: A Georgia Perspective on Spoliation of Evidence*, 17 GA. ST. U. L. REV. 1163, 1175 (2001).

Criminal prosecution is similarly unsatisfactory, as "the destruction of evidence in the context of a civil matter is rarely criminally prosecuted." Nesbitt, supra at 575. See, e.g., Smith v. Superior Ct., 198 Cal. Rptr. 829, 835 (Ct. App. 1984) ("We know of no reported prosecution under [California Penal Code] section 135—adopted in 1872— . . . for destroying or concealing documentary evidence relevant only to prospective civil action."). And, even if a prosecutor *does* prosecute a wrongdoer for obstruction of justice, that prosecution does nothing to compensate the victim who has been deprived of valuable evidence. See Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1177 (Conn. 2006) (considering various sanctions, including criminal prosecution, and noting that such a remedial action, while potentially salutary, fails to "compensate the plaintiff for the loss of his underlying civil action"); Kristin Adamski, Comment, *A Funny Thing Happened on the Way to the Courtroom: Spoliation of Evidence in Illinois*, 32 J. MARSHALL L. REV. 325, 345-346 (1999) (explaining why "criminal sanctions are an ineffective remedy").

These gaps and deficiencies are particularly pronounced in the third-party context. As the Utah Supreme Court has aptly summarized: "Almost all states—including those that have refused to adopt a tort of spoliation—acknowledge that when dealing with third-party spoliators, traditional nontort remedies such as evidentiary inferences, discovery sanctions, and attorney disciplinary measures are unavailable or largely ineffectual." Hills v. United Parcel Serv., Inc.,

232 P.3d 1049, 1056 (Utah 2010); see also Hannah v. Heeter, 584 S.E.2d 560, 568 (W. Va. 2003) (creating a cause of action for third-party spoliation because "a third party spoliator is not subject to an adverse inference instruction or discovery sanctions" and, as a consequence, "when a third party destroys evidence, the party who is injured by the spoliation does not have the benefit of existing remedies"); MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 101 (11th ed. 2021) (explaining that "[s]anctions and adverse inferences are unavailable . . . when third parties destroy or lose evidence"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 715 (2023 update) (explaining that, when a third-party spoliates evidence, "a tort action against the spoliator may be the plaintiff's only hope of compensation"); Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Party Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63, 87 (2017) ("Where the spoliator is not a party in the underlying suit, court sanctions do little to deter spoliation. Adverse inferences, default judgments and stricken pleadings do not apply to third-party spoliators."); Kristin Adamski, Comment, *A Funny Thing Happened on the Way to the Courtroom: Spoliation of Evidence in Illinois*, 32 J. MARSHALL L. REV. 325, 337 (1999) (recognizing that "traditional remedies for spoliation of evidence . . . do not have any effect in a situation where a third person, not a party to the action, has destroyed or spoliated the evidence"); Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 667-668 (1998) ("Unlike the circumstance of intentional spoliation by an adverse party, the traditional remedies of sanctions and the spoliation inference do not apply in third-party situations because the spoliator is not involved in the underlying lawsuit. Thus, the traditional remedies are not adequate in this circumstance.").

Beyond the notion—addressed above—that the spoliation tort is unnecessary or superfluous, courts that have declined to recognize the cause of action have offered other justifications for their forbearance. Five such justifications merit additional discussion. These include the following:

(1) Recognition of a spoliation cause of action undercuts the finality of judgments and invites duplicative or collateral litigation. See, e.g., Cedars-Sinai Med. Ctr. v. Superior Ct., 954 P.2d 511, 516-517 (Cal. 1998); Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1135 (Miss. 2002); James T. Killelea, Note, *Spoliation of Evidence Proposals for New York State*, 70 BROOK. L. REV. 1045, 1071 (2005) ("[C]ourts rejecting an independent spoliation tort often stress the 'important interest of finality in adjudication.'").

(2) Recognition of a spoliation claim represents a sharp departure from conventional tort doctrine. See, e.g., Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 426 (Mass. 2002).

(3) Recognition of a spoliation claim requires "rank speculation . . . as to (a) whether the evidence would have affected the underlying action, (b) whether the complaining party would have prevailed, and (c) the amount of damages that would have been recovered." Superior Boiler Works, Inc. v. Kimball, 259 P.3d 676, 685 (Kan. 2011) (citation omitted).

(4) Spoliation is akin to perjury, and there is no independent cause of action for perjury. See, e.g., Trevino v. Ortega, 969 S.W.2d 950, 953 (Tex. 1998).

(5) If a cause of action for spoliation were recognized, "the scope of the duty would be limitless." *Superior Boiler Works, Inc*., 259 P.3d at 685 (citation omitted); see also MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 88 (2d ed. 2006) ("Courts have also voiced concerns about imposing additional duties upon litigants as a result of this new tort."); Killelea, supra at 1069-1070 (stating that some courts reject a cause of action for spoliation because its recognition "imposes a duty on the owner or custodian of the evidence to preserve it").

None of these arguments is especially convincing. Regarding the first argument—that spoliation claims undercut finality—many spoliation claims do not involve a prior judgment; there is, therefore, no prior judgment to unsettle or undermine. See Comments *g* and *h*. In addition, some might argue that a judgment manufactured by intentional misconduct is not a judgment entitled to finality. See Oliver v. Stimson Lumber Co., 993 P.2d 11, 17 (Mont. 1999) ("There can be no truth, fairness, or justice in a civil action where relevant evidence has been destroyed before trial."); cf. Strickler v. Greene, 527 U.S. 263, 281 (1999) (reiterating that, if a criminal defendant is deprived of exculpatory evidence because of the prosecutor's misconduct, and if "there is a reasonable probability that the suppressed evidence would have produced a different verdict," the conviction, even though final, cannot stand—the defendant is entitled to habeas relief); FED. R. CIV. P. 60(b)(3) & (d)(3) (establishing that a party may be entitled to relief from a final judgment if the judgment was procured by "fraud . . . or misconduct" and further underscoring courts' power to "set aside a judgment for fraud on the court").

Furthermore, to the extent that a cause of action for third-party spoliation *does* undercut the finality of judgments, in so doing, it is hardly alone. Both retaliatory RICO suits and wrongful-use-of-civil-proceeding actions undermine the finality of judgments but have been at least cautiously permitted. For retaliatory RICO, see Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 666-674, 703-706 (2017) (describing defendants' initiation of "retaliatory RICO" suits to seek damages against those who filed allegedly fraudulent civil suits against them). For suits targeting the wrongful use of civil proceedings, see Restatement Third, Torts: Liability for Economic Harm § 24 (AM. L. INST. 2020).

As to the second argument—the notion that spoliation claims should be rejected because they represent a sharp departure from conventional tort doctrine—as Comment *b* makes plain, spoliation is not a newfangled creation but merely a focused application of a longstanding tort: intentional interference with an economic expectation. See Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Alaska 1986) (referring to the tort as the "intentional interference with prospective civil action by spoliation of evidence"); Fox v. Mercedes-Benz Credit Corp., 658 A.2d 732, 735 (N.J. Super. Ct. App. Div. 1995) (explaining that the spoliation tort is "designed to remediate tortious interference with a prospective economic advantage" and that the "prospective economic advantage being protected is a plaintiff's opportunity to bring a cause of action for which damages may be awarded"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 714 (2023 update) (recognizing that spoliation claims are not, in fact, so new but are, rather, particular instances of an older tort—intentional interference with economic prospects);

Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1895, 1921 (1997) (observing that, to sustain damages from spoliation "is no different from being deprived of a prospective economic advantage"); Adamski, supra at 349 (explaining that spoliation should be recognized for what it is: "an outgrowth of the interference with prospective business advantage tort"); but see Temple Community Hosp. v. Superior Ct., 976 P.2d 223, 231 (Cal. 1999) (resisting the relationship because "the outcome of litigation is peculiarly uncertain"). For the precise contours of that traditional cause of action, see Restatement Third, Torts: Liability for Economic Harm § 18 (AM. L. INST. 2020).

Regarding the third argument—that spoliation claims ought to be rejected because they force courts to engage in rank speculation—it is true that spoliation claims involve some level of guesswork as to what would have happened but for the defendant's spoliation. But that, itself, need not be dispositive. Legal malpractice claims often involve similar speculation, as plaintiffs must prove a "case within a case" to show what would have happened in the underlying litigation but for the defendant-lawyer's breach. See Restatement Third, The Law Governing Lawyers § 53, Comment *b* (AM. L. INST. 2000); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 857 (2011). Courts cope with that uncertainty frequently and without apparent difficulty. See Maurice L. Kervin, Comment, *Spoliation of Evidence: Why Mississippi Should Adopt the Tort*, 63 MISS. L.J. 227, 246 (1993) ("[T]he 'case within a case' dilemma arises often in the course of litigation, and courts have competently dealt with this situation in the past.").

Likewise, crashworthiness cases involve guesswork to gauge how badly the plaintiff would have been injured, if the plaintiff's car had not been defective. Courts have developed mechanisms to handle that uncertainty—and the uncertainty has not stunted the claim's recognition. See Restatement Third, Torts: Products Liability § 16 (AM. L. INST. 1998). Likewise, when it comes to lost-chance claims, some speculation is needed to forecast how the plaintiff would have fared in the absence of the defendant physician's negligence. Yet the lost-chance cause of action has been quite broadly accepted. See Restatement Third, Torts: Medical Malpractice § 8 (AM. L. INST., Tentative Draft No. 2, 2024); Restatement Third, Torts: Liability for Physical and Emotional Harm § 26, Comment *n* (AM. L. INST. 2010); Restatement Third, Torts: Apportionment of Liability § 4, Comment *f* (AM. L. INST. 2000).

Furthermore, even if there is some uncertainty, there is good reason to believe that the brunt of that uncertainty should be borne by the one who intentionally destroyed evidence, rather than the aggrieved plaintiff. As the Supreme Court of the United States has observed in another context: "[T]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow v. R.K.O. Pictures, Inc., 327 U.S. 251, 264-265 (1946); see also Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."); Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927) ("[A] defendant whose wrongful conduct has rendered difficult the

ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."); Gilbert v. Kennedy, 22 Mich. 117, 130 (Mich. 1871) ("To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law . . . .").

Fourth—regarding the perjury comparison—there are differences between evidence destruction and false testimony, which strain the analogy. As one commentator has explained:

> Witnesses testify in open court and are subject to vigorous cross-examination by opposing parties. Attorneys can resort to a variety of tactics to impeach or otherwise draw out contradictions in the witness's testimony. Furthermore, the trier of fact is able to observe a witness's demeanor as he testifies and form its own opinion as to his credibility. Physical evidence, on the other hand, cannot be contested, examined, or relied upon by the opposition once it has been irrevocably destroyed, altered, or lost. This lack of equal access makes spoliation a weightier encumbrance on a litigant's ability to prevail in his underlying suit. In addition, once an element of physical evidence has gone missing, the jury is deprived of any opportunity to determine the reliability or probative value of the critical proof. When the trier of fact cannot evaluate the plaintiff's claim using all relevant information, the reliability of the litigation process is seriously weakened. The dissimilarities between the two types of evidence should, at the very least, give the courts pause and guide against associating the two causes of action as one in the same.

Nesbitt, supra at 613.

Fifth and finally, there is a ready reply to courts' concern that, if spoliation claims were permitted, "the scope of the duty would be limitless." *Superior Boiler Works, Inc*., 259 P.3d at 685 (citation omitted). In fact, the spoliation claims endorsed by courts and accepted here do not expand preservation duties one iota. As Subsection (b) and Comment *d* make plain, a cause of action for spoliation merely offers a remedy for the actor's deliberate breach of an already existing duty. The perimeters of the underlying duty remain entirely unaffected.

Comment c. Knowledge of pending or probable litigation. As the Connecticut Supreme Court has put it: There is a "consensus" that, in order to state a claim for intentional spoliation, the plaintiff must show, inter alia, "the defendant's knowledge of a pending or impending civil action involving the plaintiff." Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1179 (Conn. 2006); see, e.g., Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995) (establishing that, "[i]n order to prevail on an intentional spoliation of evidence theory, a plaintiff must allege and prove" inter alia, "the defendant's knowledge of the potential lawsuit"); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (establishing that, to state a claim for intentional spoliation, the plaintiff must establish "knowledge on the part of defendant that litigation exists or is probable"); MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 88 (2d ed. 2006) ("[M]ost

states that have adopted the tort agree that the elements of intentional spoliation consist of . . . knowledge on the part of defendant that litigation exists or is probable . . . ."); Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 644 (1998) (observing that, to state a claim, the plaintiff must show that the spoliator knew "that litigation is pending or probable"); Virginia L. H. Nesbitt, Note, *A Thoughtless Act of A Single Day: Should Tennessee Recognize Spoliation of Evidence As an Independent Tort?*, 37 U. MEM. L. REV. 555, 591 (2007) ("To maintain an action for intentional spoliation, the plaintiff must . . . demonstrate that the defendant had actual knowledge of the existence of or potential for the underlying lawsuit.").

For application of this standard, see, e.g., Williams v. Werner Enters., Inc., 770 S.E.2d 532, 542 (W. Va. 2015). Illustrations 1 and 2 are loosely based on Smith v. Superior Ct., 198 Cal. Rptr. 829 (Ct. App. 1984).

Comment d. Duty to preserve evidence. "[T]he general rule is that there is no duty to preserve possible evidence for another party to aid that other party in some future legal action against a third party." Koplin v. Rosel Well Perforators, 734 P.2d 1177, 1179 (Kan. 1987); see also Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 521 (D. Md. 2010) ("Absent some countervailing factor, there is no general duty to preserve documents, things, or information, whether electronically stored or otherwise.") (quoting Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 388 (2008)); Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 424-425 (Mass. 2002) ("Nonparty witnesses may have evidence relevant to a case . . . and may know of its relevance, but that knowledge, by itself, does not give rise to a duty to cooperate with litigants. . . . A nonparty witness is not required to preserve and store an item merely because that item may be of use to others in pending or anticipated litigation."); MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 18 (2d ed. 2006) ("As a general rule, there is no duty to retain evidence to aid in future legal action against a third party absent some special relationship or duty arising by reason of an agreement, contract, statute, or other special circumstance") (quotation marks and alteration omitted).

On occasion, however, a duty to preserve evidence can arise, whether "through a contract, agreement, statute, administrative rule, voluntary assumption of duty by the third party, or other special circumstances." Hannah v. Heeter, 584 S.E.2d 560, 569 (W. Va. 2003). For discussion of when third parties may become duty-bound to preserve evidence, see KOESEL & TURNBULL, supra at 1-23; Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Party Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63, 88-110 (2017).

As Subsection (b) establishes and Comment *d* emphasizes, in order to state a claim under this Section, the plaintiff must demonstrate that the third-party spoliator was, in this particular instance, obliged to preserve a given piece of evidence. This Section does not create, expand, or otherwise affect that duty.

Subsection (b) is well-supported. See, e.g., Smith v. Atkinson, 771 So. 2d 429, 432 (Ala. 2000) ("[T]he plaintiff in a third-party spoliation case must also show. . . that a duty was imposed upon the defendant [to preserve evidence] through a voluntary undertaking, an agreement, or a specific request . . . ."); Shamrock-Shamrock, Inc. v. Remark, 271 So. 3d 1200, 1203 (Fla. Dist. Ct. App. 2019) (stating that, in order to state a claim for third-party spoliation, the plaintiff must show, inter alia, that the defendant was under "a legal or contractual duty to preserve evidence"); see also, e.g., Martin v. Keeley & Sons, Inc., 979 N.E.2d 22, 27 (Ill. 2012) (affirming a grant of summary judgment for defendant because defendant had no duty to preserve evidence and "[i]n the absence of a duty, plaintiffs' . . . spoliation of evidence claims cannot stand"); Teel v. Meredith, 774 N.W.2d 527, 534 (Mich. Ct. App. 2009) (rejecting a spoliation claim because, inter alia: "Plaintiff has not articulated any basis for imposing a specific duty on Allstate to preserve or maintain the evidence. . . . Absent an articulable, legally recognized duty, there can be no cause of action for the alleged tort of spoliation of evidence."); MetLife Auto & Home v. Joe Basil Chevrolet, Inc., 807 N.E.2d 865, 868 (N.Y. 2004) (rejecting a spoliation claim because "Royal had no duty to preserve the vehicle"); Austin v. Consolidation Coal Co., 501 S.E.2d 161, 163 (Va. 1998) (rejecting a spoliation claim because, under the case's facts, the third-party defendant "had no legal duty to preserve" the spoliated evidence).

Illustration 3, involving the allegedly defective hose, is based on Austin v. Consolidation Coal Co., 501 S.E.2d 161 (Va. 1998). For an X-Ray Retention Act, as discussed in Illustration 6, see 210 ILL. COMP. STAT. ANN. 90/1.

Comment e. Two forms of intention are required. As Subsection (c) establishes and Comments *e* and *l* underscore, an actor is only liable pursuant to this Section if the actor's destruction, mutilation, or significant alteration of evidence was intentional. Furthermore, the spoliation plaintiff must show that the defendant destroyed, mutilated, or altered evidence with the purpose of defeating or undercutting the plaintiff's ability to prevail in the pending or potential civil action. As one court has explained: "[P]roof that evidence was deliberately destroyed is not sufficient; a plaintiff must prove that the defendant acted with the intent to deprive another of the evidence that it deliberately destroyed." Ed Schmidt Pontiac-GMC Truck, Inc. v. Chrysler Motors Co., LLC, 575 F. Supp. 2d 837, 840 (N.D. Ohio 2008) (citation omitted).

This requirement is well supported. See Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1179 (Conn. 2006) (noting that there is a "consensus among our sister states" that, in order to state a claim for intentional spoliation, the plaintiff must show, inter alia, that the defendant destroyed or altered evidence "in bad faith, that is, with intent to deprive the plaintiff of his cause of action"); MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 88 (2d ed. 2006) ("[M]ost states that have adopted the tort agree that the elements of intentional spoliation consist of . . . willful destruction of evidence by defendant designed to disrupt the plaintiff's case . . . .").

For cases in accord, see, for example, Carovac v. Lake Cnty. Bd. of Developmental Disabilities/Deepwood, 2020 WL 5423966, at *8 (N.D. Ohio 2020) (explaining that "the tort requires willful physical destruction of evidence . . . designed to disrupt the plaintiff's case"); Oliver

v. Stimson Lumber Co., 993 P.2d 11, 22 (Mont. 1999) (establishing that, in order to state a claim, the spoliation plaintiff must show "the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit"); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995) (establishing that, "[i]n order to prevail on an intentional spoliation of evidence theory, a plaintiff must allege and prove" inter alia, "intent on part of the defendant to disrupt or defeat the lawsuit"); Hannah v. Heeter, 584 S.E.2d 560, 573 (W. Va. 2003) (stressing that "[t]he gravamen of the tort of intentional spoliation is the *intent to defeat a person's ability to prevail in a civil action*").

Comment f. Causation: prejudice. A spoliation plaintiff must show that the plaintiff was significantly prejudiced by the evidence's destruction, mutilation, or alteration. Such a showing can be difficult, however, as "there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim's favor." Cedars-Sinai Med. Ctr. v. Superior Ct., 954 P.2d 511, 518 (Cal. 1998). Indeed, some courts have made much of this difficulty—and have used it to justify a refusal to recognize a cause of action for intentional spoliation. See Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089, 2102-2103 (2019) (discussing causation challenges and their effect).

However, numerous courts insist that the causation challenge can—and should—be overcome. For example, the Connecticut Supreme Court has explained:

> [Defendant] claims . . . that the tort of intentional spoliation of evidence is unworkable and provides an ineffective remedy. Specifically, [defendant] contends that causation and damages would be difficult to prove because "there will typically be no way of telling what precisely the spoliated evidence would have shown and how much it would have weighed in the spoliation victim's favor." We agree that this difficulty of proof is endemic to the tort of spoliation; but we disagree that it should preclude recognition of the tort. The difficulty in determining the harm caused by a defendant's spoliation of evidence is attributable solely to the defendant's intentional bad faith litigation misconduct. If the plaintiff could establish precisely what the spoliated evidence would have shown, the tort would be unnecessary because the plaintiff would possess sufficient evidence to satisfy his burden of production in the underlying litigation. Accordingly, there would be an inequity in preventing a plaintiff from recovering because of his inability, allegedly caused by the defendant, to prove his underlying case.

Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1179 (Conn. 2006) (quotation marks, citations, and alterations omitted); see also Smith v. Atkinson, 771 So. 2d 429, 438 (Ala. 2000) ("When a third party deprives another of his day in court, through tortious destruction of indispensable evidence, that third party commits a wrong; that wrong deserves a remedy, and the fact that damages will be difficult to determine should not preclude a recovery.").

Indeed, in numerous other areas of tort law, the burden of proof on causation is changed or altered when the imposition of a causation requirement—in an unmodified form—would inequitably defeat the plaintiff's claim. See, e.g., Restatement Third, Torts: Liability for Physical

and Emotional Harm § 27 (AM. L. INST. 2010) (involving multiple sufficient causes); id. § 28(b) (involving alternative liability, as exhibited in the well-known case Summers v. Tice); id. § 28, Comment *p* (involving market-share liability); Restatement Third, Torts: Products Liability § 16 (AM. L. INST. 1998) (involving crashworthiness cases).

Although causation challenges should not ipso facto defeat spoliation claims—the causation element remains a substantial hurdle for the spoliation plaintiff. As Comment *f* explains, to satisfy the causation requirement, the spoliation plaintiff must make two discrete showings.

First, the plaintiff must prove that that the defendant's actions "significantly impaired" the plaintiff's ability to prevail on the underlying claim. Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 852 (D.C. 1998); Oliver v. Stimson Lumber Co., 993 P.2d 11, 21 (Mont. 1999) (same); see also Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37, 58 (1994) ("[A] judgment against the spoliator will not lie where there has been no significant impairment of a party's ability to prove the underlying action.").

This means, in turn, that the spoliated evidence must be vitally important to the underlying claim. If the evidence is of insubstantial or marginal value, its absence will not significantly impair the plaintiff's ability to prevail on the underlying claim—and that fact will defeat the prima facie case. See *Rizzuto*, 905 A.2d at 1170-1171 ("[M]ost states that recognize the tort of intentional spoliation of evidence require a plaintiff to establish, inter alia, that the spoliated evidence was vital to a party's ability to prevail in a pending or potential civil action.") (quotation marks and alterations omitted); see also, e.g., *Smith*, 771 So. 2d at 432 (requiring a showing "that the missing evidence was vital to the plaintiff's pending or potential action").

Second, in recognition of the fact that "[t]he defendant should not be forced to pay damages to a plaintiff who had only a frivolous underlying claim," the plaintiff must further demonstrate that "plaintiff's underlying claim was, at some threshold level, meritorious." *Holmes*, 710 A.2d at 850-851. Given this imperative, Comment *f* requires the spoliation plaintiff to show that, if the evidence had been available, there is a "substantial and realistic possibility" that the plaintiff would have prevailed. Id. at 852; see also State v. Carpenter, 171 P.3d 41, 64 (Alaska 2007) (establishing that "a viable underlying cause of action must accompany a spoliation claim"); Hartmann Realtors v. Biffar, 13 N.E.3d 350, 357 (Ill. App. Ct. 2014) ("A plaintiff must demonstrate . . . that but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit."); *Oliver*, 993 P.2d at 19-22 (requiring a plaintiff to show, inter alia, that "the underlying action would enjoy a significant possibility of success if the spoliated evidence still existed," while further clarifying that, to show a "significant possibility of success," the plaintiff "must demonstrate a substantial and realistic possibility of succeeding" because a "spoliator should not be forced to pay damages to a plaintiff who had only a frivolous underlying claim").

As Comment *f* establishes, a plaintiff is not required to show that it is more probable than not that the plaintiff would have prevailed in the underlying action, had such an action been brought with the benefit of the missing evidence. "This," courts agree, "is too difficult a burden,

as it may be impossible to know what the missing evidence would have shown." Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 271 n.2 (Ill. 1995), as modified on denial of reh'g (June 22, 1995); see also, e.g., Williams v. BASF Catalysts LLC, 765 F.3d 306, 321 (3d Cir. 2014) (applying New Jersey law) (rejecting defendant's argument that, in order to show causation, plaintiffs must "demonstrate that they would have prevailed in the underlying action" had the spoliated evidence been available; concluding that, when the trial court imposed this causation standard at defendant's behest, the court set "the bar . . . too high"); *Holmes*, 710 A.2d at 850 (rejecting a preponderance-of-the-evidence requirement as "both impractical and inequitable") (quotation marks omitted); *Hartmann Realtors*, 13 N.E.3d at 357 ("A plaintiff need not show that, but for the loss or destruction of the evidence, the plaintiff would have prevailed in the underlying action. This is too difficult a burden, as it may be impossible to know what the missing evidence would have shown."); *Oliver*, 993 P.2d at 21 (rejecting a requirement that the plaintiff show that but for the spoliation plaintiff would have more likely than not succeeded).

Expounding on this principle, the Seventh Circuit explains:

> [T]he spoliation plaintiff does *not* have to prove that he would have actually won his case with the missing piece [of evidence] . . . . If the spoliation plaintiff had to prove that he would have won the underlying suit if he had the missing evidence, he would be in a hopeless Catch–22: if he could prove that he would have won the underlying case even without the lost evidence, then he could not show that the loss of that evidence actually harmed him. In other words, it would be impossible for the spoliation plaintiff to show both that without the lost evidence he would necessarily lose the underlying case, and that with it, he would win.

Schaefer v. Universal Scaffolding & Equip., LLC, 839 F.3d 599, 610-611 (7th Cir. 2016) (applying Illinois law).

As Comment *f* recognizes, "[w]hen articulating a causation standard to govern spoliation claims, courts have varied some on the particulars." However, Comment *f*'s rigorous two-part causation standard extracts the dominant themes from case law and particularly echoes the test first articulated in Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 850-852 (D.C. 1998). For other articulations, see, for example, *Smith*, 771 So. 2d at 432 (adopting a rebuttable presumption, in case involving third-party spoliation); *Rizzuto*, 905 A.2d at 1180-1181 (adopting a rebuttable presumption); Hannah v. Heeter, 584 S.E.2d 560, 570 (W. Va. 2003) (requiring a spoliation plaintiff to show that, "without the spoliated evidence, a summary judgment would have been entered on behalf of the adverse party in the underlying action").

Comment g. No prior filing requirement. As Comment *g* establishes, the plaintiff is not compelled to first bring a suit and suffer an adverse judgment in order to state a spoliation claim. In rejecting a prelitigation requirement, Comment *g* follows the lead of most courts expressly to consider the matter. See Virginia L. H. Nesbitt, Note, *A Thoughtless Act of A Single Day: Should Tennessee Recognize Spoliation of Evidence As an Independent Tort?*, 37 U. MEM. L. REV. 555, 602 (2007) ("Most courts today do not require spoliation victims to pursue their underlying suits to finality before seeking redress for the loss of proof.").

For courts hewing to this approach, see, for example, Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1172 (Conn. 2006) ("[R]equiring a plaintiff to pursue and to lose the underlying litigation prior to bringing a spoliation claim is too harsh and ignores the plaintiff's interest in securing a reasonable recovery for the alleged loss of the underlying action.") (quotation marks omitted); Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 851 (D.C. 1998) (rejecting the imposition of a prefiling requirement as "too harsh"); St. Mary's Hosp., Inc. v. Brinson, 685 So. 2d 33, 35 (Fla. Dist. Ct. App. 1996) ("There is little reason to wait for final judgment in the underlying lawsuit before bringing an action for the spoliation of evidence."); Oliver v. Stimson Lumber Co., 993 P.2d 11, 21 (Mont. 1999) (in the negligent spoliation context, rejecting a prelitigation requirement as "too harsh"); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (establishing that a first-party or third-party claim for spoliation "may be brought at the same time as the primary action"); Hannah v. Heeter, 584 S.E.2d 560, 570 (W. Va. 2003) (establishing that "a plaintiff in a spoliation claim does not have to file an action in which the spoliated evidence would have been vital to proving or defending his or her case"). For a discussion of why the imposition of a prelitigation requirement is wasteful and inefficient, see Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionabl*e, 18 CARDOZO L. REV. 1891, 1932-1933 (1997). For a collection of cases that, by contrast, hold that a cause of action for spoliation "would not lie unless and until the underlying claim has been resolved, thereby causing a concrete injury to the spoliation plaintiff," see Metlife Auto & Home v. Joe Basil Chevrolet, Inc., 303 A.D.2d 30, 36 (N.Y. App. Div. 2002), aff'd, 807 N.E.2d 865 (N.Y. 2004).

Comment h. Freestanding cause of action or additional count. As Comment *h* recognizes, when a plaintiff can bring a spoliation claim alongside the underlying claim, the plaintiff should do so. See MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 100 (2d ed. 2006) (detailing the advantages of trying spoliation claims, alongside underlying claims, when possible—and noting that this is the preference of most courts). For cogent discussions of relevant procedural issues, see Robertet Flavors, Inc. v. Tri-Form Constr., Inc., 1 A.3d 658, 671 (N.J. 2010); Rosenblit v. Zimmerman, 766 A.2d 749, 758 (N.J. 2001); Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1895, 1932-1933 (1997); Virginia L. H. Nesbitt, Note, *A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?*, 37 U. MEM. L. REV. 555, 602-603 (2007); see also St. Mary's Hosp., Inc. v. Brinson, 685 So. 2d 33, 35 (Fla. Dist. Ct. App. 1996) (concluding that "the trial court did not abuse its discretion in consolidating the spoliation and negligence actions"); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (clarifying that a cause of action for intentional first- or third-party spoliation "may be brought at the same time as the primary action").

Comment i. Damages. Courts have grappled with how best to quantify damages in spoliation claims. See Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1181 (Conn. 2006) ("We acknowledge that the most difficult aspect of a spoliation of evidence tort is the calculation of damages.") (quotation marks and citation omitted); Petrik v. Monarch Printing Corp., 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986) ("The most difficult aspect of a spoliation of evidence tort is the

calculation of damages."); Hannah v. Heeter, 584 S.E.2d 560, 570 (W. Va. 2003) ("The determination of damages in a claim for spoliation of evidence is generally considered to be a task fraught with uncertainty and speculation.").

Recognizing this difficulty, in an effort to avoid giving a windfall to plaintiffs, some courts discount awards by their probability. The Montana Supreme Court explains:

> [D]amages arrived at through reasonable estimation based on relevant data should be multiplied by the significant possibility that the plaintiff would have won the underlying suit had the spoliated evidence been available. For example, if a jury determined that the expected recovery in the underlying suit was $200,000 and that there was an estimated 60 percent possibility that the plaintiff would have recovered that amount in the underlying suit had it not been impaired by the spoliated evidence, then the award of damages would be $120,000 (60 percent of $200,000).

Oliver v. Stimson Lumber Co., 993 P.2d 11, 21 (Mont. 1999); see also Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 853 (D.C. 1998) (holding that, in an action for "negligent or reckless spoliation of evidence" against a third party, damages arrived at through just and reasonable estimation based on relevant data should be multiplied by the probability that the plaintiff would have won the underlying suit had the spoliated evidence been available").

Some courts, meanwhile, allow a full (nondiscounted) recovery. Adopting this approach, the Connecticut Supreme Court explains:

> To restore a victim of intentional spoliation of evidence to the position he or she would have been in if the spoliation had not occurred, the plaintiff is entitled to recover the full amount of compensatory damages that he or she would have received if the underlying action had been pursued successfully.

Rizzuto, 905 A.2d at 1181; see also, e.g., *Hannah*, 584 S.E.2d at 571 (authorizing a full recovery). These courts tend to reason that "the plaintiff's probability of success is too tenuous a measure to be consistently applied and that any attempt to apply it would constitute pure speculation." *Hannah*, 584 S.E.2d at 571 (quotation marks omitted). Furthermore, these courts observe that, "[t]o the extent that some risk of a windfall to the plaintiff persists . . . the defendant should bear this risk in light of its egregious litigation misconduct." *Rizzuto*, 905 A.2d at 1182. As Comment *i* notes, the Institute declines to express a position on these two reasonable calculation methods.

It is uncontroversial that, when circumstances warrant, a prevailing plaintiff may also be entitled to punitive damages. See Smith v. Atkinson, 771 So. 2d 429, 438 (Ala. 2000) "[I]f the spoliator is found to have acted willfully or wantonly in the destruction of the evidence, then punitive damages can be levied against the spoliator in an amount adequate to punish the spoliator for its misconduct and to deter others in similar situations."); *Rizzuto*, 905 A.2d at 1173 (recognizing that a prevailing plaintiff may be entitled to punitive damages); Hannah v. Heeter, 584 S.E.2d 560, 573 (W. Va. 2003) ("[P]unitive damages may be awarded in cases where evidence was intentionally spoliated."); see also Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L.J. 351, 397 (1995) ("When a defendant intentionally or willfully destroys evidence, the spoliation tort should give rise to punitive damages.").

Comment j. Judge and jury. For a brief discussion of the decisional allocation between judge and jury, see Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Party Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63, 75 (2017); see also Kolanovic v. Gida, 77 F. Supp. 2d 595, 602 (D.N.J. 1999) (recognizing that "[t]he existence of a duty to preserve evidence is a question of law to be determined by the court") (quotation marks omitted).

Comment k. Claims initiated by defendants in the underlying action. As Comment *k* explains, scant authority addresses spoliation claims when those claims are initiated by former defendants (rather than former plaintiffs).

The little authority that currently exists tends to skew negative (although some of the negative discussion could be dismissed as dicta). See, e.g., Ingham v. United States, 167 F.3d 1240, 1246 (9th Cir. 1999) (involving Internal Revenue Code) (stating, albeit in dicta: "To be actionable, the spoliation of evidence must damage the right of a party to bring an action."); Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 371 (9th Cir. 1992) (applying Washington law) ("[T]he spoliation tort has only been applied when a defendant—or a third party with a duty to the plaintiff—has spoliated evidence."); Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1134 (Miss. 2002) ("[T]ort of spoliation of evidence is available only to those who have seen their prospective economic advantage, reflected in a tort suit for some unrelated injustice, extinguished by a spoliating defendant. Therefore, the spoliation tort would be available only to dissatisfied plaintiffs and never to dissatisfied defendants."); Hewitt v. Allen Canning Co., 728 A.2d 319, 322 (N.J. Super. Ct. App. Div. 1999) ("The spoliation and concealment tort remedy of money damages is inapplicable . . . where the destruction of evidence, or its concealment, occurs in the context of a defendant's ability to defend against a plaintiff's cause of action."); Hirsch v. Gen. Motors Corp., 628 A.2d 1108, 1119 (N.J. Super. Ct. Law. Div. 1993) ("The protective function of the spoliation tort is inapplicable where spoliation of evidence interferes with a defendant's ability to defend a lawsuit."); see also Christopher B. Major, Comment, *Where's the Evidence? Dealing with Spoliation by Plaintiffs in Product Liability Cases*, 53 S.C. L. REV. 415, 417 (2002) ("[N]o jurisdiction has made an independent tort cause of action available to defendants.").

Some courts and commentators, on the other hand, have displayed at least tentative receptivity. E.g., *Hewitt*, 728 A.2d at 183 (observing, in dicta, that "a defendant who has been deprived of the ability to defend an action brought by a plaintiff because a third party has destroyed evidence may have an action for money damages against the spoliator"); MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 100 (2d ed. 2006) ("Even though damages are not ordinarily available to a defendant prejudiced by spoliation, when a third party deprives a defendant of the ability to defend an action brought by a plaintiff because the third party destroyed evidence it had a duty to retain, then a defendant may have an action for money damages against the third party spoliator.").

Further, at least two courts have, in fact, permitted defendant-initiated spoliation claims to proceed against third parties. In Fada Indus., Inc. v. Falchi Bldg. Co., L.P., 730 N.Y.S.2d 827 (Sup.

Ct. 2001), a commercial tenant defending an underlying suit for property damage caused by its leaky water heater commenced a third-party spoliation action against its insurer, alleging that the insurer's loss of the offending water heater had impaired its ability to defend itself and to implead other defendants. The court noted that, while sanctions may suffice when a party destroys evidence, "[n]one of the sanctions traditionally available" apply to third-party spoliators. Id. at 835. And, the court further observed: "Here, the missing water heater and [the insurer's] failure to preserve it will make it extremely difficult, if not impossible, for [the commercial tenant] to defend itself in the main action, which [is] based solely upon the offending water heater." Id. at 837. Accordingly, the court permitted the negligent third-party spoliation claim to proceed, stating: "The recognition of spoliation of evidence as an independent tort is the logical next step in the evolving recognition that there is a remedy for spoliation of evidence, as between parties to an action, separate and apart from sanctions." Id. at 838.

Likewise, in Stinnes Corp. v. Kerr-McGee Coal Corp., 722 N.E.2d 1167 (Ill. 1999), injured coal miners sued the manufacturer of an allegedly defective mining vehicle. When it examined the vehicle, the manufacturer discovered that certain parts were missing and, upon that discovery, filed a third-party claim for spoliation against the vehicle's owner. Id at 1169. The appellate court declined to dismiss the claim, since the manufacturer had adequately pleaded the elements of negligent spoliation. The fact that the manufacturer was the defendant in the underlying suit did not factor into the analysis; the court simply looked to whether the manufacturer had pleaded duty, breach, injury, and damages. Id. at 1172-1175.

Given the (mostly) negative commentary and limited authority permitting such actions, Comment *k* leaves to future development the question of whether spoliation claims could be appropriately asserted by those who were defendants, rather than plaintiffs, in the litigation below. Having deferred that primary question, it also defers a subsidiary inquiry: If reverse spoliation claims are accepted, how relevant causation and damages standards can best be modified. It should be noted, however, that simple tweaks to the causation and damages standards could prove workable. For example, to show causation, a defendant asserting a claim for spoliation might be required to prove the following: (1) the deliberately destroyed evidence significantly impaired its success in the defense of the underlying action (or significantly impaired the defendant's impleader or contribution action), and (2) if the evidence had been available, there is a substantial and realistic possibility that it would have succeeded in the action's defense. In terms of damages, recovery may be available if the onetime defendant (now spoliation plaintiff) demonstrates that the loss of evidence caused it to assume liability it would not have assumed or to incur litigation expenses that it would not have incurred. Cf. Tartaglia v. UBS PaineWebber Inc., 961 A.2d 1167, 1190 (N.J. 2008) (explaining that a spoliation plaintiff "who is deprived of evidence due to . . . spoliation and is therefore required to hire additional experts or to develop and rely on alternate proofs might well sustain" compensable damages). In addition, when appropriate, the onetime defendant (now spoliation plaintiff) should be able to recover punitive damages.

Comment l. Negligent third-party spoliation of evidence. As Subsection (c) and Comment *e* make plain, recovery under this Section demands a showing of intent. An actor is subject to liability

pursuant to this Section only if the actor's destruction, mutilation, or alteration of evidence was intentional, *and* the actor destroyed, mutilated, or altered evidence in order to defeat or undercut a third party's ability to vindicate that party's interests in the pending or probable civil action. This line is drawn because a solid majority of courts invited to recognize a freestanding cause of action for the negligent spoliation of evidence by a third party have declined to do so. See Pyeritz v. Com., 32 A.3d 687, 694 (Pa. 2011) ("[T]he overwhelming majority of other states that have considered the tort have rejected it."); Benjamin J. Vernia, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R.5th 61 (originally published in 2002) ("The majority of jurisdictions considering the actionability of negligent spoliation . . . have not recognized the tort, either for parties or nonparties to the underlying dispute.") (citations omitted); see also DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 716 (2023 update) ("[L]iability of a third person for negligent interference with evidence is frequently rejected."); 1 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 15:61 (2022 update) ("The majority of jurisdictions have refused to recognize negligent spoliation.").

Courts refusing to recognize the cause of action include (in alphabetical order by state): Lips v. Scottsdale Healthcare Corp., 229 P.3d 1008, 1009 (Ariz. 2010); Coprich v. Superior Ct., 95 Cal. Rptr. 2d 884, 890 (Ct. App. 2000); Johnson v. Liberty Mut. Fire Ins. Co., 653 F. Supp. 2d 1133, 1139 (D. Colo. 2009), aff'd, 648 F.3d 1162 (10th Cir. 2011); Owens v. Am. Refuse Sys., Inc., 536 S.E.2d 782, 784 (Ga. Ct. App. 2000); Meyn v. State, 594 N.W.2d 31, 34 (Iowa 1999); Reynolds v. Bordelon, 172 So. 3d 589, 600 (La. 2015); Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 422 (Mass. 2002); Teel v. Meredith, 774 N.W.2d 527, 532 (Mich. Ct. App. 2009); Richardson v. Sara Lee Corp., 847 So. 2d 821, 824 (Miss. 2003); Ortega v. City of New York, 876 N.E.2d 1189, 1190, 1196-1197 (N.Y. 2007); Frank v. Good Samaritan Hosp. of Cincinnati, Ohio, 2019 WL 6698363, at *4 (S.D. Ohio 2019), aff'd sub nom. Frank v. Good Samaritan Hosp. of Cincinnati, LLC, 843 F. App'x 781 (6th Cir. 2021); Marok v. Ohio State Univ., 2014 WL 1347535, at *8 (Ohio Ct. App. 2014); *Pyeritz*, 32 A.3d at 694; Cole Vision Corp. v. Hobbs, 714 S.E.2d 537, 541 (S.C. 2011).

Contrary to the position taken in Comment *l*, some courts have recognized the cause of action. These courts include: Smith v. Atkinson, 771 So. 2d 429, 432 (Ala. 2000) ("We hereby recognize a claim against a third party for spoliation of evidence, under the traditional doctrine of negligence."); Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 848 (D.C. 1998) ("[T]he District of Columbia will allow a plaintiff to recover against a defendant who has negligently or recklessly destroyed or allowed to be destroyed evidence that would have assisted the plaintiff in pursuing a claim against a third party."); Shamrock-Shamrock, Inc. v. Remark, 271 So. 3d 1200, 1202 (Fla. Dist. Ct. App. 2019) ("Florida courts have recognized an independent cause of action for spoliation of evidence against third parties that accrues when a person or entity, though not a party to the underlying action causing the plaintiff's injuries or damages, loses, misplaces, or destroys evidence critical to that action."); Martin v. Keeley & Sons, Inc., 979 N.E.2d 22, 27 (Ill. 2012) (explaining that a plaintiff can state a cause of action for spoliation in Illinois if the plaintiff can prove that: (1) "the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached

that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages"); Oliver v. Stimson Lumber Co., 993 P.2d 11, 17 (Mont. 1999) ("[I]t is necessary to recognize the tort of spoliation of evidence, which may be negligent or intentional, as an independent cause of action with respect to third parties who destroy evidence."); Callahan v. Stanley Works, 703 A.2d 1014 (N.J. Super. Ct. Law. Div. 1997) (recognizing freestanding claim for third-party negligent spoliation); Hannah v. Heeter, 584 S.E.2d 560, 574 (W. Va. 2003) (recognizing a stand-alone claim for a third-party's negligent spoliation of evidence when the third party had a special duty to preserve the evidence); accord Thompson v. Owensby, 704 N.E.2d 134, 138 (Ind. Ct. App. 1998) (holding that a minor and her parents who filed a third-party negligent spoliation claim were "entitled to go forward with their claim based on the Insurance Company's duty to maintain evidence," while further observing that the plaintiffs had "chosen to pursue a tort action rather than seeking a discovery sanction or availing themselves of an evidentiary inference" and the pursuit of that path was the plaintiffs' "prerogative"); cf. Timber Tech Engineered Bldg. Prods. v. The Home Ins. Co., 55 P.3d 952, 954-955 (Nev. 2002) (declining to "recognize an *independent* tort for spoliation of evidence" while further explaining that a freestanding claim crafted out of "existing common-law negligence" may nevertheless exist when evidence shows defendant owed and breached a duty to preserve evidence) (emphasis added); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995) (expressly "declin[ing] to recognize the negligent destruction of potential evidence as a separate tort" while noting that "traditional negligence principles have direct relevance"); Elias v. Lancaster Gen. Hosp., 710 A.2d 65, 67 (Pa. Super. Ct. 1998) (similar to *Timber Tech*).

To the extent a state opts to recognize such a cause of action, the action's elements are frequently set forth as follows: An actor who negligently spoliates evidence is subject to liability for the harm thus caused if:

(a) the actor knew that civil litigation against a third party was pending or possible;

(b) the actor was duty-bound to preserve the evidence;

(c) the actor negligently failed to preserve the evidence; and

(d) the evidence's spoliation significantly prejudiced the third-party litigant by significantly impairing the litigant's ability to vindicate the litigant's interest in the underlying civil suit.

§ __. First-Party Spoliation of Evidence

An actor who intentionally spoliates evidence, as spoliation is defined in § __, is subject to liability for the harm thus caused if:

(a) the actor knew that civil litigation involving the actor was pending or probable;

(b) the actor was duty-bound to preserve the evidence;

(c) the actor intentionally destroyed, mutilated, or significantly altered the evidence for the purpose of defeating or undercutting an opponent's ability to vindicate the opponent's interest in the pending or probable civil action; and

(d) the destruction, mutilation, or significant alteration of evidence prejudiced the opponent by significantly impairing the opponent's ability to vindicate the opponent's interest in the underlying civil action.

Comment:

a. Scope and history.
b. Support and rationale.
c. Knowledge of pending or probable litigation.
d. Duty to preserve evidence.
e. Two forms of intention are required.
f. Causation: prejudice.
g. No prior filing requirement.
h. Freestanding cause of action or additional count.
i. Damages.
j. Judge and jury.
k. Claims initiated by defendants in the underlying action.
l. Negligent first-party spoliation of evidence.

a. Scope and history. Spoliation, as defined by § __, refers to the destruction, mutilation, or significant alteration of physical or tangible evidence. Spoliation can be either negligent or intentional and may be carried out by a first or third party. This Section addresses when a plaintiff is entitled to assert a freestanding "first-party" spoliation claim. A first-party spoliation claim refers to the spoliation of evidence by a party to the underlying claim. This Section approves of such a claim when it involves intentional conduct and disapproves of such a claim when it involves innocent, negligent, or reckless conduct. See Subsection (c) and Comment *l*. A companion cause of action, third-party spoliation, is addressed in § __ of this draft. As the name suggests, a "third-party" spoliation claim refers to the spoliation of evidence by a nonparty to the underlying litigation. That Section, similarly, approves of such a claim when it involves intentional conduct and disapproves of such a claim when it involves innocent, negligent, or reckless conduct. See § __, Comment *l*.

As § __ explains, this Restatement does not address other mechanisms that may be appropriately utilized when a party spoliates evidence. It does not address sanctions. Nor does this

Restatement address when the "spoliation" inference—an adverse inference instruction, which authorizes or instructs the jury to infer or presume that the evidence the spoliator destroyed would have been unfavorable to the spoliator—can or cannot be furnished to the jury. Those matters are questions of civil procedure or of evidence and, as such, fall outside the scope of this Restatement.

For a discussion of the history of the cause of action for spoliation, see § __, Comment *a*.

b. Support and rationale. The vast majority of courts to consider whether to endorse a freestanding cause of action for *negligent* or *reckless* first-party spoliation have declined to do so. Consistent with that authority, this Section declines to recognize such a claim. See Subsection (c) and Comment *l*.

Courts that have addressed whether to recognize a freestanding cause of action for the *intentional* destruction of evidence by a party or prospective party have divided, and, in fact, a narrow majority of courts that have expressly addressed the matter have opted against the tort's recognition. Nevertheless, this Section recognizes a cause of action for intentional first-party spoliation. It does so in order to promote doctrinal coherence and in light of the nature of the flagrantly wrongful conduct at issue.

As to doctrinal coherence, the intentional spoliation of evidence is merely an outgrowth of another intentional cause of action—interference with economic expectation—which is long-established and well-supported. See Restatement Third, Torts: Liability for Economic Harm § 18 (establishing that a defendant is subject to liability if, inter alia, the defendant engaged in "an independent and intentional legal wrong" while seeking "to interfere with the plaintiff's expectation"). It would be anomalous to impose liability on actors, *generally*, when they engage in intentionally wrongful conduct in order to deprive another of an economic advantage—but to *shield* actors from liability when their wrongful conduct interferes with protected judicial processes. The anomaly, in fact, would be particularly sharp because courts widely accept three other conceptually similar torts that involve wrongful interference with judicial processes: malicious prosecution (id. § 21), abuse of process (id. § 26), and wrongful use of civil proceedings (id. § 24). In recognizing these torts, courts explicitly or implicitly recognize that "[t]here is a notably strong public interest in deterring and redressing . . . misconduct" that taints, distorts, or corrupts the "judicial system." Id. § 26, Comment *b*.

In addition, this Section recognizes this cause of action in light of the seriousness of the misconduct at issue. The intentional destruction of evidence specifically to deprive an adversary

of the use of that evidence strikes at the very heart of our adversarial system of justice. Such misconduct increases the risk of an erroneous decision on the merits of the underlying cause of action; squanders scarce judicial resources; increases the cost, duration, and complexity of litigation; and undercuts public confidence in judicial processes. Furthermore, there is no efficient level of deliberate litigation misconduct. Such conduct should be powerfully deterred.

c. Knowledge of pending or probable litigation. Per Subsection (a), an actor is only subject to liability pursuant to this Section if the actor had actual knowledge of pending or probable litigation. Constructive knowledge does not suffice.

Illustrations:

1. Lucille is driving her van when the left-rear wheel flies off, causing the van to spin out of control and crash into a highway guardrail. Lucille suffers catastrophic injuries in the collision. In the hours after the crash, the van is towed to the dealer, Don's Autos, for repair. Lucille had purchased the van from Don's Autos three months before—and, before that, Don's Autos had customized the van with "deep-dish mag wheels." Unaware of Lucille's crash, a mechanic at Don's Autos sends the now-mangled wheel and wheel assembly to the dump, where they are promptly destroyed. Because, inter alia, Don's Autos acted without knowledge of pending or probable litigation, it is not liable pursuant to this Section.

2. Same facts as Illustration 1, except that, two days after the crash—and before the wheel and wheel assembly are sent to the dump—Lucille retains a lawyer who immediately calls Don's Autos. In the course of that telephone conversation, Lucille's lawyer tells Don, the dealer's owner, about the crash and informs him that litigation is very likely. In response, Don vows to "retain everything." Subsequent to that conversation, however, the wheel and wheel assembly are sent to the dump and destroyed. Because, now, Don's Autos sent the wheel and wheel assembly to the dump for their destruction, with knowledge of probable litigation, the knowledge element of Subsection (a) is satisfied. Accordingly, Don's Autos may be subject to liability pursuant to this Section, provided Lucille is able to satisfy the Section's other prerequisites.

d. Duty to preserve evidence. Pursuant to Subsection (b), an actor is only subject to liability pursuant to this Section if the actor was duty-bound to preserve the evidence at issue. Document preservation obligations are governed by state, and sometimes federal, law. Whether an actor is duty-bound to preserve evidence is a matter outside the scope of this Section—and, critically, this

Section does not create, expand or otherwise affect the contours of that duty. This Section merely furnishes an independent cause of action when an *existing* duty to preserve evidence, imposed by law, contract, agreement, or voluntary action, is intentionally breached.

e. Two forms of intention are required. An actor is only subject to liability pursuant to this Section if the actor's destruction, mutilation, or significant alteration of evidence was intentional. Recklessness, negligence, or inadvertence in the retention, production, or safekeeping of evidence does not give rise to liability. See Comment *l*. Furthermore, as Subsection (c) makes clear, the actor must destroy, mutilate, or significantly alter evidence with "the purpose of defeating or undercutting" an adversary's "ability to vindicate" the adversary's "interest in the pending or probable civil action."

Illustrations:

3. Same facts as Illustration 2, except that now, Don gets off the phone and tells the mechanic: "Make sure you don't destroy anything." The mechanic nods but forgets this admonition and, later that day, sends the wheel and wheel assembly to the dump, where both are immediately destroyed. Because, inter alia, Don's Autos did not act with the purpose to defeat or undercut Lucille's ability to prevail in the probable civil action, it is not liable pursuant to this Section.

4. Same facts as Illustration 2, except that now, Don gets off the phone and tells the mechanic: "Destroy that wheel and wheel assembly. Something is wrong with them, and they could get us into a world of liability!" Because, now, Don's Autos has acted with knowledge, as well as with the purpose to defeat or undercut Lucille's ability to prevail in the probable civil action, it is subject to liability pursuant to this Section, provided the Section's other requirements are satisfied.

f. Causation: prejudice. Causation, as set forth in Subsection (d), is an essential element in a spoliation claim. A spoliation plaintiff must establish that the evidence's destruction, mutilation, or significant alteration prejudiced the plaintiff's ability to vindicate the plaintiff's rights. To satisfy this burden, the spoliation plaintiff must make two discrete showings.

First, a plaintiff must prove that "the destruction, mutilation, or significant alteration of evidence" significantly impaired—or would have significantly impaired—the plaintiff's success in an actual or contemplated suit. A slight or inconsequential impairment does not suffice. This means, in turn, that the spoliated evidence, itself, must be vitally important to the underlying claim.

If the evidence is merely duplicative, cumulative, or of insubstantial or marginal value, that fact will defeat the spoliation plaintiff's prima facie case.

Second, because courts recognize that a defendant should not be forced to pay damages to a spoliation plaintiff who had only a frivolous underlying claim, a plaintiff must prove that the underlying suit was plausibly meritorious (or would have been, if the plaintiff had had the benefit of the now-destroyed, -mutilated, or -altered evidence). To satisfy this latter burden, a plaintiff is not required to show that it is more probable than not that the plaintiff would have prevailed in the underlying action, had such an action been filed and had the suit had the benefit of the now-spoliated evidence. This, most courts to address the matter agree, is too heavy a burden, as it may be impossible to rewind the clock and determine what the missing evidence would have shown—or how persuasive the evidence would have been. A plaintiff must show, however, that, if the evidence had been available, there is a substantial and realistic possibility that the plaintiff would have prevailed.

When articulating a causation standard to govern spoliation claims, courts have varied some on the particulars. However, Comment *f*'s two-part causation standard—which requires a spoliation plaintiff to show that (1) the spoliated evidence was vitally important and its absence caused, or would have caused, the significant impairment of an actual or contemplated civil suit which, itself, (2) had a substantial and realistic chance of success—distills the dominant themes from case law. It particularly tracks the test first articulated in Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 850-852 (D.C. 1998).

g. No prior filing requirement. To state a claim for intentional spoliation, a plaintiff need not first bring a suit and lose on account of the evidence's unavailability. This Section rejects a prelitigation requirement, although such a requirement has been imposed by a minority of courts, as such a requirement breeds litigation and is, therefore, inconsistent with the goal of promoting the expeditious and inexpensive resolution of disputes.

h. Freestanding cause of action or additional count. If the destruction, mutilation, or significant alteration of evidence is uncovered prior to litigation such that it is realistically possible for the plaintiff to bring suit in one action, both for the initial injury *and* the spoliation of evidence, the plaintiff generally ought to do so, as consolidation promotes judicial economy and decisional consistency. Likewise, if the destruction, mutilation, or significant alteration of evidence is uncovered during the course of litigation, such that it is realistically possible for the plaintiff to

amend the initial complaint to include a spoliation claim, a consolidated suit is preferred to piecemeal litigation. If, however, such consolidation is not possible or practical because, for example, the spoliation prevented the plaintiff from filing a lawsuit on the underlying claim, or because the spoliation is not discovered until after the time to amend the initial complaint has lapsed, the plaintiff is free to file a separate claim for intentional spoliation.

Illustration:

5. Same facts as Illustration 4, except that Lucille's lawyer initially (but wrongly) litigated the case believing that the destruction of the wheel and wheel assembly was accidental and inadvertent (similar to Illustration 3). Don's intent to destroy the evidence is only revealed months into the underlying litigation, when the mechanic is deposed and testifies to Don's admonition to destroy the evidence. If it is realistically possible for Lucille to amend her complaint to add a count for spoliation of evidence, she should do so. If the underlying claim against Don's Autos has been finally resolved or the amendment of her complaint is no longer possible, Lucille may file a separate action against Don's Autos for intentional spoliation.

i. Damages. Some courts hold that a prevailing spoliation plaintiff is entitled to a full recovery—i.e., prevailing spoliation plaintiffs are entitled to all damages that they would have recovered in the underlying claim. Some courts, meanwhile, opt for greater specificity, even at the expense of administrative ease, by discounting an award by its probability. In particular, these courts first determine what the plaintiff would have recovered in the underlying suit, had the plaintiff prevailed, and then discount that sum by the plaintiff's odds of success, had the spoliated evidence been available. Because of insufficient doctrinal development, the Institute declines to choose between those two reasonable alternatives. When appropriate, the plaintiff may also recover punitive damages.

j. Judge and jury. As Subsection (b) establishes and Comment *d* emphasizes, liability for spoliation arises from a party's independent duty to preserve evidence. Whether a party is duty-bound to preserve evidence is generally a legal question, decided by the court (except when there is a material dispute about underlying facts). Other matters, including whether the duty was deliberately breached, whether the breach caused injury, and the appropriate calculation of damages, are matters for the factfinder.

k. Claims initiated by defendants in the underlying action. This Section leaves to further development the question of whether intentional spoliation claims can be initiated by those who are or were defendants, rather than plaintiffs, in the underlying litigation. Limited case law addresses such "reverse" spoliation claims, and there is little academic commentary discussing such actions. Courts have, in a few cases, allowed defendants to pursue spoliation claims against third parties. However, the Reporters' research has failed to uncover *any* jurisdiction that has extended a cause of action for first-party spoliation to defendants.

Courts' resistance may be justified on the following conceptual and practical grounds. First, as noted in Comment *b*, intentional spoliation is a particular application of a traditional cause of action: intentional interference with an economic expectation. Generally, the "economic expectation" interfered with is plaintiff's claim. When flipped to involve the wrongful imposition of a loss, this conceptual framework falters. Cf. Restatement Third, Torts: Liability for Economic Harm § 18(a) and Comment *a* (offering a cause of action to one wrongfully deprived of an "economic benefit" and further explaining that "the tort generally involves cases in which a defendant's intentional wrong prevents the plaintiff from . . . otherwise pursuing economic gain"). Second, when the defendant becomes a spoliation plaintiff, both the causation inquiry and damage calculations may become more complicated, because it may be hard to know how much the defendant would have had to pay, had the evidence been available. Third, spoliation claims are arguably most needed when the deliberate destruction of evidence compromises a party's ability even to *assert* a cause of action (e.g., where, with the evidence gone, a victim cannot even find a lawyer willing to take the victim's case). That situation does not exist in the defendant-as-spoliation-plaintiff context; in that context, by definition, a lawsuit has been filed and in-court penalties (such as an involuntary dismissal or sanctions imposed pursuant to Federal Rule of Civil Procedure 11 or 37, or state-court counterparts) are apt to have greater power. Fourth and finally, other tort actions—such as wrongful use of civil proceedings—already exist in some jurisdictions to offer a tort remedy to defendants who were victimized by a plaintiff's improper litigation conduct. See Restatement Third, Torts: Liability for Economic Harm § 24.

Given the paucity of authority endorsing or supporting such actions, the Institute leaves to future development the question of whether first-party intentional spoliation claims should be recognized for those who are or were defendants, rather than plaintiffs, in the underlying litigation.

l. Negligent first-party spoliation of evidence. A stand-alone cause of action for the negligent spoliation of evidence by a party to the underlying lawsuit has not garnered widespread support—and, in fact, has been broadly rejected. Furthermore, compared to a claim for *intentional* spoliation, which is a particularized application of a long-established cause of action—intentional interference with an economic expectation—negligent spoliation claims do not have deep roots in traditional doctrine. Accordingly, and consistent with the law in the overwhelming majority of states, this Restatement declines to recognize a cause of action for a party's negligent spoliation of evidence.

REPORTERS' NOTE

Comment a. Scope and history. This Section addresses when a plaintiff may bring a freestanding claim for first-party spoliation of evidence. For the history of this cause of action, see § __, Reporters' Note to Comment *a*.

Comment b. Support and rationale. Courts have divided on whether to recognize a freestanding tort for the intentional spoliation of evidence. A little under half of the states expressly to consider the matter have opted to recognize a freestanding tort; a little over half have declined to do so. See Andrea A. Anderson, *The Spoils of War: Arguments in Favor of Independent Claims for Spoliation Against Third Parties*, 11 WAKE FOREST L. REV. ONLINE 1, 2 (2021) ("In the thirty-six years since the first case in California, thirty-three states have considered an independent spoliation claim [of some kind]. Nineteen states declined to recognize a spoliation tort, and fourteen states recognized at least one form of the claim."); see also 22 KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE (WRIGHT & MILLER) § 5178 (2022 update) ("[A]bout half the states recognize spoliation as an actionable tort."); Hon. James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 651 (2016) (same); Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Party Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63, 70 (2017) ("A current split exists between those jurisdictions that recognize a secondary cause of action for spoliation of evidence and those that reject the tort altogether.").

Most commentators to weigh in, meanwhile, have done so on the "pro" side of the ledger. See Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1280 (2004) (noting "the general position among scholars that such actions should be maintainable"). Examples include the following: Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L.J. 351, 404 (1995) (advocating for the tort's widespread adoption); Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1895, 1920-1922 (1997) (explaining that fair compensation for spoliation is necessary under a corrective justice theory since a person deprived of evidence is "deprived of something of value" and this "deprivation constrains the autonomous pursuit of her legal rights" and simultaneously "reduces the threat-value, i.e., the settlement value, of her case vis-a-vis the party opponent"); Maurice L. Kervin, Comment, *Spoliation of Evidence: Why Mississippi Should Adopt the Tort*, 63

MISS. L.J. 227, 246 (1993) (advocating the tort's adoption in Mississippi); Philip A. Lionberger, *Interference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 212 (1989) (advocating that Texas recognize both intentional and negligent spoliation); Virginia L. H. Nesbitt, Note, *A Thoughtless Act of A Single Day: Should Tennessee Recognize Spoliation of Evidence As an Independent Tort?*, 37 U. MEM. L. REV. 555, 557 (2007) (calling for courts in Tennessee to recognize spoliation as a separate tort in order to promote compensation and deterrence); Jay E. Rivlin, Note, *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor*, 26 HOFSTRA L. REV. 1003, 1006 (1998) ("The independent torts of intentional and negligent spoliation of evidence serve the public policies of deterring evidence destruction, increasing the accuracy of fact-finding, and giving the victim of spoliation an avenue to pursue compensation for her injury."); John K. Stipancich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1154 (1992) ("[T]he destruction of evidence is conduct that must be deterred, and alternatively, compensated for when it does occur. Since the present systems in most jurisdictions do not adequately deter nor compensate aggrieved parties, the adoption of an independent cause of action for the negligent spoliation of evidence may be the only acceptable alternative.").

Given recent judicial activity, some have observed that there is a trend in favor of the cause of action's recognition. Mendez v. Hovensa, L.L.C., 49 V.I. 826, 839 (D.V.I. 2008) (observing that there "is a recent trend" in favor of recognizing "the tort of intentional spoliation against a first-party spoliator"); Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation As A Separate Tort*, 30 IDAHO L. REV. 37, 71 (1994) ("[T]here is an unmistakable trend toward the universal adoption of one or both of the spoliation torts."); Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 647 (1998) (recognizing "a cautious trend toward the recognition of a tort for spoliation of evidence"). Others are unconvinced. E.g., Goff v. Harold Ives Trucking Co., 27 S.W.3d 387, 391 (Ark. 2000) (as of 2000, rejecting the notion that the recognition of the cause of action is a "growing trend"). Meanwhile, in 2006, at least two commentators discerned a trend—but in the opposite direction. MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 104 (2d ed. 2006) (observing a "trend against recognizing the spoliation tort"). Given this divide, as well as the Reporters' independent research, it is fair to conclude—as stated in Comment *b*—that, as of the date of publication of this Restatement, there is no genuine, discernible trend, either for or against acceptance.

Courts that have expressly recognized the cause of action include the following, in alphabetical order by state: Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Alaska 1986) (recognizing a first-party "common-law cause of action in tort for intentional interference with prospective civil action by spoliation of evidence"); Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1173 (Conn. 2006) (recognizing a cause of action when "a first party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case"); Ritter v. Loraso, 234 So. 3d 1096, 1100

(La. Ct. App. 2017) ("Louisiana recognizes a cause of action for intentional spoliation."); Rosenblit v. Zimmerman, 766 A.2d 749, 758 (N.J. 2001) (recognizing the cause of action, while framing it as one for fraudulent concealment); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995) ("[W]e hold today that New Mexico recognizes a cause of action for intentional spoliation of evidence."); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (recognizing a first-party claim for intentional spoliation); Hannah v. Heeter, 584 S.E.2d 560, 571 (W. Va. 2003) ("West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party."); see also *Mendez*, 49 V.I. at 840 (predicting that the Supreme Court of the Virgin Islands would recognize some version of the tort to combat the deliberate destruction of evidence).

Illinois, logically, also belongs on the pro side of the ledger because the Illinois Supreme Court has recognized a claim for negligent spoliation of evidence if the plaintiff can prove that: "(1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages." Martin v. Keeley & Sons, Inc., 979 N.E.2d 22, 27 (Ill. 2012). Thus, a plaintiff can, logically, recover in Illinois if a defendant intentionally destroyed evidence since, as one federal court has put it: "It would make no sense . . . for the court to hold a defendant liable for its merely negligent conduct but not for intentional conduct that resulted in the same harm." Williams v. Gen. Motors Corp., 1996 WL 420273, at *3 (N.D. Ill. 1996). But cf. Dunn v. Manicki, 2021 WL 1208990, at *10 (N.D. Ill. 2021) ("'Whether Illinois courts will recognize a cause of action for willful and wanton or intentional spoliation of evidence remains an open question.'") (quoting Rogers v. McConnaughay, 2018 WL 4622520, at *6 (Ill. App. Ct. 2018)).

Numerous other courts, meanwhile, have expressly declined to adopt a claim for the intentional first-party spoliation of evidence. These include: Kaufmann & Assocs., Inc. v. Davis, 908 So. 2d 246, 251 (Ala. Civ. App. 2004); Goff v. Harold Ives Trucking Co., 27 S.W.3d 387, 391 (Ark. 2000); Cedars-Sinai Med. Ctr. v. Superior Ct., 954 P.2d 511, 513 (Cal. 1998); Lucas v. Christiana Skating Ctr., Ltd., 722 A.2d 1247, 1250-1251 (Del. Super. Ct. 1998); Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342, 347 (Fla. 2005); Richardson v. Simmons, 538 S.E.2d 830, 832 (Ga. Ct. App. 2000); Raymond v. Idaho State Police, 451 P.3d 17, 21 (Idaho 2019); Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 355 (Ind. 2005); Miller v. Montgomery County, 494 A.2d 761, 767-768 (Md. Ct. Spec. App. 1985); Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 422 (Mass. 2002); Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1135 (Miss. 2002); Oliver v. Stimson Lumber Co., 993 P.2d 11, 17 (Mont. 1999); Trevino v. Ortega, 969 S.W.2d 950, 951 (Tex. 1998); cf. Superior Boiler Works, Inc. v. Kimball, 259 P.3d 676, 690 (Kan. 2011) (concluding "that an independent tort of spoliation will not be recognized in Kansas for claims by a defendant against codefendants or potential codefendants, including potential indemnitors under a theory of comparative implied indemnification").

Numerous federal trial courts, sitting in diversity, have likewise predicted that the state would reject such a claim. E.g., Gomez v. Sam's W., Inc., 2017 WL 3503652, at *3 (D. Colo.

2017); Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 372 F. Supp. 3d 709, 724 (N.D. Ind. 2019) (applying Michigan law); Gagne v. D.E. Jonsen, Inc., 298 F. Supp. 2d 145, 147-148 (D. Me. 2003); Landis v. Remington Arms Co., 2012 WL 6098269, at *3 (N.D.N.Y. 2012); Schueller v. Remington Arms Co., LLC, 2012 WL 2370109, at *2 (D.N.D. 2012), report and recommendation adopted, 2012 WL 2370108 (D.N.D. 2012); Napier v. Cinemark USA, Inc., 635 F. Supp. 2d 1248, 1250 (N.D. Okla. 2009); Blincoe v. W. States Chiropractic Coll., 2007 WL 2071916, at *8 (D. Or. 2007); O'Neal v. Remington Arms Co., LLC, 2012 WL 3834842, at *2 (D.S.D. 2012); cf. Coletti v. Cudd Pressure Control, 165 F.3d 767, 775 (10th Cir. 1999) (applying Wyoming law) (predicting that Wyoming would not endorse the plaintiff's "new claim for fraudulent creation of evidence").

Some states defy clear classification. In some, the tort's status is murky because the matter has never been clearly confronted or squarely addressed. See Andrea A. Anderson, *The Spoils of War: Arguments in Favor of Independent Claims for Spoliation Against Third Parties*, 11 WAKE FOREST L. REV. ONLINE 1, 19 (2021) (reporting that, as of 2021, "[t]o date, eighteen states have yet to decide on the recognition of an independent spoliation claim"). On other occasions, the court's acceptance or rejection is uncertain because, although the court was poised to address the viability of an independent spoliation claim, it stopped short and instead rejected the individual case on its facts. See Anderson, supra at 19 (reporting, as of 2021, "[t]he highest courts in Hawaii, Kansas, Missouri, Oklahoma, Utah, Vermont, and Virginia have considered independent spoliation claims, but rejected the individual case on its facts without considering the merits"). Sometimes, meanwhile, classification is difficult because the decisions themselves are equivocal. See, e.g., Timber Tech Engineered Bldg. Prods. v. The Home Ins. Co., 55 P.3d 952, 954-955 (Nev. 2002) (declining to "recognize an independent tort for spoliation of evidence regardless of whether the alleged spoliation is committed by a first or third party" while further explaining that a freestanding negligence claim crafted out of "existing common-law negligence" may nevertheless exist, when evidence shows defendant owed a duty to plaintiff to preserve evidence).

For further discussion of the wisdom of recognizing a cause of action for first-party intentional spoliation, notwithstanding the above, see § __, Reporters' Note to Comment *b*.

Comment c. Knowledge of pending or probable litigation. For discussion of the knowledge requirement, see § __, Reporters' Note to Comment *c*.

Comment d. Duty to preserve evidence. As Subsection (b) establishes and Comment *d* underscores, an actor is liable pursuant to this Section only if the actor was duty-bound to preserve the evidence at issue. Critically, this Section does not create, expand, or otherwise affect the contours of such a duty.

For a discussion of a party's duty to preserve relevant evidence, which varies some by state, see Trevino v. Ortega, 969 S.W.2d 950, 955-957 (Tex. 1998) (Baker, J., concurring) (exploring the scope of parties' common-law duty to preserve evidence); MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 1-23 (2d ed. 2006) (cataloging preservation responsibilities while summarizing: "[g]enerally, no duty to preserve evidence arises before litigation is filed, threatened, or reasonably foreseeable unless the duty is voluntarily assumed or imposed by a statute,

regulation, contract, or another special circumstance"); Jeffrey A. Parness, *Presuit Lawyer Information Duties Relevant to Civil Litigation*, 105 MARQ. L. REV. 921, 944-954 (2022) (similar).

Comment e. Two forms of intention are required. As Subsection (c) establishes and Comments *e* and *l* explain, an actor is only liable pursuant to this Section if the actor's destruction, mutilation, or significant alteration of evidence was deliberate. For discussion of the intent requirement, see § __, Reporters' Note to Comment *e.*

Comment f. Causation: prejudice. For a discussion of Comment *f*'s two-part causation requirement, see § __, Reporters' Note to Comment *f.*

Comment g. No prior filing requirement. For a discussion, see § __, Reporters' Note to Comment *g*.

Comment h. Freestanding cause of action or additional count. As Comment *h* recognizes, when a spoliation plaintiff can bring a spoliation claim alongside the underlying claim, the plaintiff should do so. See MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 100 (2d ed. 2006) (detailing the advantages of trying spoliation claims alongside underlying claims when possible—and noting that this is the preference of most courts). For cogent discussions of relevant procedural issues, see Robertet Flavors, Inc. v. Tri-Form Constr., Inc., 1 A.3d 658, 671 (N.J. 2010); Rosenblit v. Zimmerman, 766 A.2d 749, 758 (N.J. 2001); Virginia L. H. Nesbitt, Note, *A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?*, 37 U. MEM. L. REV. 555, 602-603 (2007); see also St. Mary's Hosp., Inc. v. Brinson, 685 So. 2d 33, 35 (Fla. Dist. Ct. App. 1996) (concluding that "the trial court did not abuse its discretion in consolidating the spoliation and negligence actions"); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (clarifying that a cause of action for intentional first- or third-party spoliation "may be brought at the same time as the primary action").

Comment i. Damages. For a discussion of damages, see § __, Reporters' Note to Comment *i*.

Comment j. Judge and jury. For commentary discussing the decisional allocation between judge and jury, see § __, Reporters' Note to Comment *j*.

Comment k. Claims initiated by defendants in the underlying action. As Comment *k* explains, scant authority addresses "reverse" spoliation claims. In the first-party spoliation realm, the little authority that does exist is negative.

Arguably the most prominent of these cases is Hewitt v. Allen Canning Co., 728 A.2d 319 (N.J. Super. Ct. App. Div. 1999). There, the plaintiff filed a lawsuit asserting that he fell ill after consuming a can of spinach that had been contaminated by the presence of a grasshopper. When the can was in the possession of the plaintiff's law firm, it was discarded, reportedly because it emanated a "strong and offensive odor." Id. at 320. Frustrated by the can's destruction, defendant sought to file a third-party complaint against the law firm "asserting the tort of spoliation of evidence." Id. at 321. The trial court denied defendant's motion, and the court of appeals affirmed, reasoning:

> Essentially, the tort action for spoliation affords damages to a plaintiff where the spoliator knows that litigation exists or is probable, the spoliator willfully

> or negligently destroys evidence with a design to disrupt plaintiff's case, or where such disruption is foreseeable, plaintiff's case is in fact disrupted, and plaintiff suffers damages proximately caused by the spoliator's acts.
>
> Both the spoliation and concealment torts are designed to remediate tortious interference with a prospective economic advantage. The prospective economic advantage being protected is a plaintiff's opportunity to bring a cause of action for which damages may be awarded.
>
> In such cases, the plaintiff's remedy is money damages. The spoliation and concealment tort remedy of money damages is inapplicable, however, where the destruction of evidence, or its concealment, occurs in the context of a defendant's ability to defend against a plaintiff's cause of action. In such cases, the rules of court provide more than sufficient remedy.

Id. at 321-322 (quotation marks, citations, and alteration omitted).

In Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 371 (9th Cir. 1992) (applying Washington law), the Ninth Circuit addressed a similar question, reasoning that "the spoliation tort has only been applied when a defendant—or a third party with a duty to the plaintiff—has spoliated evidence." See also Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1134 (Miss. 2002) ("[T]ort of spoliation of evidence is available only to those who have seen their prospective economic advantage, reflected in a tort suit for some unrelated injustice, extinguished by a spoliating defendant. Therefore, the spoliation tort would be available only to dissatisfied plaintiffs and never to dissatisfied defendants.").

Consistent with the above, a leading spoliation treatise declares: "Generally, a defendant cannot avail itself of a claim for intentional spoliation because the defendant cannot establish that it lost a potential cause of action as a result of spoliation by the plaintiff or a third party." MARGARET M. KOESEL & TRACY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 99 (2d ed. 2006); Christopher B. Major, Comment, *Where's the Evidence? Dealing with Spoliation by Plaintiffs in Product Liability Cases*, 53 S.C. L. REV. 415, 417 (2002) ("[N]o jurisdiction has made an independent tort cause of action available to defendants."); accord Ingham v. United States, 167 F.3d 1240, 1246 (9th Cir. 1999) (stating, in dicta: "To be actionable, the spoliation of evidence must damage the right of a party to bring an action.").

Given the relative paucity of authority permitting or disapproving of such actions, Comment *k* leaves to future development the question of whether spoliation claims could be appropriately asserted by those who are or were defendants, rather than plaintiffs, in the underlying litigation. Having deferred that primary question, it, logically, defers a subsidiary inquiry: If reverse spoliation claims are accepted, how relevant causation and damages standards can best be modified. We do note, however, that simple tweaks to the causation and damages standards could prove workable. For example, to show causation, a defendant asserting a claim for spoliation might be required to prove: (1) the deliberately destroyed evidence significantly impaired its success in the defense of the underlying action (or significantly impaired its impleader or contribution action),

and (2) if the evidence had been available, there is a substantial and realistic possibility that it would have succeeded in the action's defense. In terms of damages, recovery may be available if the onetime defendant (now spoliation plaintiff) demonstrates that the loss of evidence caused it to assume liability it would not have assumed or to incur litigation expenses that it would not have incurred but for the spoliation. Cf. Tartaglia v. UBS PaineWebber Inc., 961 A.2d 1167, 1190 (N.J. 2008) (explaining that, a spoliation plaintiff "who is deprived of evidence due to . . . spoliation and is therefore required to hire additional experts or to develop and rely on alternate proofs might well sustain" compensable damages). In addition, if the cause of action is recognized, the defendant in the underlying litigation (now, the spoliation plaintiff) should be able to recover punitive damages.

Comment l. Negligent first-party spoliation of evidence. Consistent with this Restatement, the vast majority of courts reject a freestanding cause of action for negligent first-party spoliation. See Pyeritz v. Com., 32 A.3d 687, 694 (Pa. 2011) ("[T]he overwhelming majority of other states that have considered the tort have rejected it."); 1 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 15:61 (2022 update) ("The majority of jurisdictions have refused to recognize negligent spoliation."); Benjamin J. Vernia, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R.5th 61 (originally published in 2002) ("The majority of jurisdictions considering the actionability of negligent spoliation . . . have not recognized the tort, either for parties or nonparties to the underlying dispute.") (citations omitted).

Indeed, the Reporters' research has identified only one state—Illinois—where the claim is clearly recognized. See Martin v. Keeley & Sons, Inc., 979 N.E.2d 22, 27 (Ill. 2012) (explaining that a plaintiff can state a cause of action for negligent spoliation in Illinois if the plaintiff can prove that: "(1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages").

Nevada's law is difficult to classify. In Timber Tech Engineered Bldg. Prods. v. The Home Ins. Co., 55 P.3d 952 (Nev. 2002), the Nevada Supreme Court declined to "recognize an *independent* tort for spoliation of evidence regardless of whether the alleged spoliation is committed by a first or third party." Id. at 954 (emphasis added). But, the court further explained that a freestanding negligence claim crafted out of "existing common-law negligence" may nevertheless exist, when the defendant owed a duty to the plaintiff to preserve evidence. Id. at 954-955.

DEFENSES APPLICABLE TO ALL TORT CLAIMS

§ __. Equitable Estoppel as a Defense to Tort Liability

(a) If a person makes a definite misrepresentation of fact to an actor expecting, or with reason to expect, that the actor will rely upon it, and the actor, relying upon the misrepresentation, engages in conduct that is tortious but that would not be tortious if the facts were as they were represented to be, the person is not entitled to:

(1) assert a claim in tort against the actor for the tortious conduct, or

(2) regain property or its value that the actor thus acquired.

(b) A person is not entitled to assert a claim in tort against an actor if a person realizes that an actor, because of the actor's mistaken belief of fact, is about to engage in conduct that is tortious but that would not be tortious if the facts were as the actor believes them to be, and the person (1) could easily inform the actor of the actor's mistake but (2) fails to do so.

Comment:

a. History.
b. Scope.
c. Burden of proof.
d. Judge and jury.
e. Definite misrepresentation of fact.
f. Knowledge, intent, and due care.
g. Anticipated reliance.
h. Reliance and whether it must be reasonable.
i. Rationale.
j. Mistaken belief of fact.
k. Failure to inform must be negligent, reckless, or intentional.

a. History. Published in 1979, Volume 4 of the Restatement Second of Torts addressed this topic in § 894 titled "Equitable Estoppel as a Defense." This Section is substantively similar to § 894, although it differs insofar as it recognizes that equitable estoppel may be asserted as a defense to tortious conduct, regardless of whether that conduct constitutes an act or omission. See generally Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 37-44 (recognizing that, in appropriate circumstances, an actor has an affirmative duty to act). This Section supersedes § 894.

b. Scope. The rule stated in this Section offers a focused application of equitable estoppel—a broad doctrine with numerous applications. Equitable estoppel, in turn, is one of at least six variations of estoppel, which is an expansive legal principle that, per *Black's Law Dictionary* (11th ed. 2019), "prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." In addition to equitable estoppel, which was formerly known as *estoppel in pais* and is occasionally referred to as estoppel by conduct or estoppel by representation, other forms of estoppel include: estoppel by record, estoppel by deed, collateral estoppel, promissory estoppel, and judicial estoppel.

This Section's coverage is narrow. Like the Restatement Second of Torts § 894, this Section addresses only situations in which a defendant invokes equitable estoppel as an affirmative defense to tort liability. Like the Second Restatement's § 894, this Section does not address the use of equitable estoppel by tort plaintiffs in order to overcome a defendant's defense. [Cross-reference Miscellaneous Provisions material discussing statutes of limitations.]

c. Burden of proof. Equitable estoppel is an affirmative defense. As is true of affirmative defenses generally, the defendant bears the burden of pleading and proving that this Section's requirements are satisfied.

d. Judge and jury. Whether this Section's requirements are satisfied is a question for the factfinder.

Comment Specifically on Subsection (a):

e. Definite misrepresentation of fact. In order for a defendant to invoke the affirmative defense of Subsection (a), the plaintiff's statement must constitute a definite statement concerning past or present facts. Vague statements and mere expressions of opinion or belief do not qualify.

Illustrations:

1. Rhonda, age 16, seeks a medical procedure for which parental consent is required during minority. Reluctant to tell her parents of her need for the procedure, Rhonda, instead, informs her physician, Dr. Carum, that she is 18 years old—and shows Dr. Carum a fake birth certificate to this effect. Relying upon Rhonda's misrepresentation, Dr. Carum performs the procedure without seeking the consent of Rhonda's parents. If Rhonda asserts a claim for failure to obtain parental informed consent, based on this Section, Dr. Carum is not liable because Rhonda's misrepresentation of her age constitutes a definite misrepresentation of fact.

2. Same facts as Illustration 1, except that now, in order to avoid the parental-consent requirement, Rhonda tells Dr. Carum, "I don't think my parents will object." Relying on this statement, Dr. Carum performs the procedure without seeking the consent of Rhonda's parents. Different result from Illustration 1; now, if Rhonda asserts a claim for failure to acquire parental informed consent, Dr. Carum cannot rely on equitable estoppel as a defense because, inter alia, Rhonda's representation was one of opinion, not fact.

f. Knowledge, intent, and due care. In order for a defendant to invoke the affirmative defense of Subsection (a), the defendant need not show that the plaintiff knew, or even had reason to know, that the statement was false. Indeed, the rule stated in Subsection (a) is operative even if the plaintiff—when making the statement—reasonably believed that the statement was accurate.

Illustrations:

3. Lisa and Rakesh are neighbors with abutting property. Rakesh, who is uncertain where his property line begins, asks Lisa whether a particular tree is rooted in his property or her property. Lisa, honestly believing the tree is Rakesh's, tells him so, and Rakesh cuts down the tree in reasonable reliance upon Lisa's representation. In fact, the tree was Lisa's, and Lisa subsequently sues Rakesh for the tree's destruction. Under this Section, Rakesh is not liable to Lisa for the tree's destruction because, even though Lisa did not know, or even suspect, that her assurance was false, she made a definite representation of fact, and Rakesh reasonably relied upon it.

4. Same facts as Illustration 3, except that now, Lisa consults documents from a recent survey of her property, which reveal that the tree belongs to Rakesh. Lisa shares this information with Rakesh, who cuts down the tree in reasonable reliance on Lisa's representation. In fact, the documents were incorrect; the tree actually belongs to Lisa. Same result as Illustration 3. Under this Section, Rakesh is still not liable to Lisa for the tree's destruction, even though her statement was made with due care. As in Illustration 3, even though Lisa did not know, or even suspect, that her assurance was false, she made a definite representation of fact, and Rakesh reasonably relied upon it.

g. Anticipated reliance. A defense is not available under Subsection (a) unless the plaintiff expected, or had to reason to expect, that the defendant would rely upon the representation.

Illustration:

5. Herbert and Rasheeda are friends, and one day, Rasheeda invites Herbert over to tour her property. Unbeknownst to Rasheeda, Herbert is considering purchasing the property abutting Rasheeda's, which is owned by Felipe. While pointing out the boundaries of her property, Rasheeda erroneously omits a small grove that borders her lot and Felipe's; that grove, in fact, belongs to Rasheeda. Felipe later sells his property to Herbert. Relying on Rasheeda's description of her property, Herbert cuts down a tree in the grove. Notwithstanding this Section, Herbert is subject to liability to Rasheeda for the tree's destruction. Although Rasheeda furnished incorrect information to Herbert regarding the grove, Rasheeda had no reason to expect that Herbert would rely upon her statement as to the grove's ownership.

h. Reliance and whether it must be reasonable. A defense is not available under Subsection (a) unless the defendant relied upon the misrepresentation. Whether the reliance must additionally be reasonable under the circumstances depends on the nature of the plaintiff's misrepresentation. If a plaintiff's misrepresentation is innocent or negligent, a defense is not available under Subsection (a) unless the defendant *reasonably* relied upon the misrepresentation. Reliance on the plaintiff's misrepresentation is reasonable only when the defendant did not know, and, under the circumstances, should not have known, that the representation was false.

The requirement of reasonable reliance runs from the time of the innocent or negligent misrepresentation until the time when the defendant engages in tortious conduct. Thus, a defendant cannot invoke equitable estoppel if, when committing the tort, the defendant knew or should have known that the plaintiff's representation was false.

Illustration:

6. As in Illustration 3, Lisa and Rakesh are neighbors, with abutting property. Rakesh, who is uncertain of where his property line begins, asks Lisa whether a particular tree is rooted in his property or, instead, is rooted in her property. Honestly believing the tree is Rakesh's, Lisa tells him so, and, in reliance on Lisa's statement, Rakesh contracts with a tree-cutting service and schedules their visit. However, the day before the tree service is to arrive, Rakesh happens to pull up the deed to his property and sees that the tree, in fact, belongs to Lisa. Nevertheless, he carries through with the tree-cutting. Under this Section, Rakesh cannot assert an equitable estoppel defense to Lisa's claim for

conversion because, although Lisa furnished a definite misrepresentation of fact, at the time Rakesh committed the tortious act, he knew that Lisa's statement was false.

As noted above, if the plaintiff innocently or negligently makes a misrepresentation, in order to assert an equitable estoppel defense, the defendant's reliance on the misrepresentation must be reasonable. If, however, a plaintiff *intentionally* makes a misrepresentation, the defendant's reliance need not be reasonable. See Restatement Second, Torts § 894, Comment *d* (creating this bifurcated standard based on whether the misrepresentation was innocently or negligently made, on the one hand, or intentionally made, on the other).

Comment Specifically on Subsection (b):

i. Rationale. The rule stated in Subsection (b) is based upon the principle that the law will not aid those who stand by and fail to use the means at their disposal to protect their own interests, if the giving of the aid would be at the expense of those who are innocent of intent to do wrong. This principle prevents a person from claiming property from another who has taken it innocently based on a mistake of fact that the person could have corrected. In addition, the principle's application sometimes prevents a person from claiming that an act was tortious when the person did not object to the act at the time it was done. Under these conditions, as Subsection (b) provides, silence has the legal effect of a misrepresentation.

j. Mistaken belief of fact. As the black letter specifies, Subsection (b) relieves a defendant from liability only when the defendant lacks knowledge of the facts rendering the defendant's action tortious. Subsection (b) furnishes no defense when the defendant is aware of those facts, even if the plaintiff knew of the impending tortious conduct and took no action to stop it.

Illustrations:

7. Olivia and Jing are neighbors, with abutting property. Jing mistakenly believes a tree located near their property line is rooted on her property when, in fact, it is rooted in Olivia's. Olivia knows that the tree is located on her property. Nevertheless, she decides not to intervene when she sees Jing preparing to cut down and dispose of the tree. Under this Section, Jing is not liable to Olivia for the tree's destruction.

8. Same facts as Illustration 7, except that now, Jing knows that the tree located near the line between her property and Olivia's is in fact rooted in Olivia's property. Jing decides to cut the tree down anyway. Olivia also knows the tree is rooted in her property but does not intervene when she sees Jing preparing to fell the tree. Notwithstanding

Olivia's inaction, Jing is subject to liability for the tree's destruction, because Jing had no mistaken belief about the tree's ownership.

k. Failure to inform must be negligent, reckless, or intentional. A defense under Subsection (b) is available only when a plaintiff's failure to inform a defendant of the defendant's mistaken belief of fact is negligent, reckless, or intentional. If the plaintiff's failure is reasonable, then, this branch of the defense is unavailable.

Subsection (b) differs in this respect from Subsection (a), which, per Comment *f*, furnishes a defense even when the adverse party's misrepresentation is reasonable under the circumstances.

REPORTERS' NOTE

Comment a. History. Courts of equity minted the doctrine of equitable estoppel—originally called *estoppel in pais*—"as a means of preventing [a party] from taking an inequitable advantage of a predicament in which his own conduct had placed his adversary." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 733 (5th ed. 1984); see Penny v. Giuffrida, 897 F.2d 1543, 1545 (10th Cir. 1990) (involving a federal agency) ("The purpose of the doctrine of equitable estoppel is to ensure that no one will be permitted to 'take advantage of his own wrong.'") (quoting R.H. Stearns Co. v. United States, 291 U.S. 54, 62 (1934)); Weiss v. Rojanasathit, 975 S.W.2d 113, 120 (Mo. 1998) ("The purpose of the doctrine of equitable estoppel is to prevent a party from taking inequitable advantage of a situation he or she has caused."). As the Dobbs treatise explains: "Equitable estoppel arises when one party communicates something upon which the other reasonably relies and the relying party would be materially prejudiced if the other is permitted to assert something contrary to the original communication." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 108 n.25 (2023 update); see also Henry E. Smith, *Equitable Defences as Meta-Law in* DEFENCES IN EQUITY 31 (Paul S. Davis et al. eds., 2018) ("Estoppel is a prototypical equitable defence, in which a court will refuse to allow someone to create an expectation and then defeat it to the prejudice of the other party.").

"Estoppel, of course, is not confined to tort cases, and runs throughout the entire field of law." KEETON ET AL., supra § 105, at 733. For a discussion of the conceptually similar concept, promissory estoppel, see Restatement of the Law Second, Contracts § 90 (AM. L. INST. 1981); id., Comment *a* ("Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation.").

Both the first Restatement of Torts § 894 and the Second Restatement of Torts § 894 addressed equitable estoppel as a defense to tort claims. See Restatement of Torts § 894 (AM. L. INST. 1939); Restatement Second, Torts § 894 (AM. L. INST. 1979). Those Restatement Sections are nearly identical to each other and are also very similar to this Section.

The Supreme Court of the United States relied upon Subsection (a) of the Second Restatement's estoppel principles in Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467

U.S. 51 (1984). There, quoting the Restatement Second of Torts § 894 (AM. L. INST. 1979), the Court wrote:

> Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. While a hallmark of the doctrine is its flexible application, certain principles are tolerably clear:
>
> > If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act . . . the first person is not entitled (b) to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired.

Id. at 59 (internal quotation marks and citation omitted). See also Dobrowski v. Jay Dee Contractors, Inc., 571 F.3d 551, 555 (6th Cir. 2009) (explaining that, in *Heckler*, the Supreme Court "adopted" § 894); Minard v. ITC Deltacom Commc'ns, Inc., 447 F.3d 352, 359 (5th Cir. 2006) (applying federal law) (observing that the Supreme Court has adopted "the Restatement's estoppel principles" as set forth in § 894); Michael Van Kleunen, *What the FMLA Can Learn from ERISA: Invoking the Doctrine of Equitable Estoppel*, 103 MARQ. L. REV. 695, 712 (2019) (explaining that, in recent decades, "circuit courts have accepted the Restatement (Second) of Torts' definition of equitable estoppel that was originally adopted by the U.S. Supreme Court in *Heckler v. Community Health Services of Crawford Cty*.," while the circuit courts have also, on occasion, adapted the standard in various ways).

Notably, however, like the vast majority of published cases (see Reporters' Note to Comment *b*), *Heckler* does not apply equitable estoppel specifically within the tort context. Instead, *Heckler* concerns a healthcare provider's challenge to the government's attempt to recoup an alleged overpayment of Medicare funds, and it presents the question of whether the government may be estopped from reclaiming those funds in light of its agent's misrepresentations.

Because *Heckler* arose outside of the tort context, *Heckler* does not supply direct precedent for this Section. *Heckler*'s heavy reliance on § 894 does indicate, however, that there is a broad consensus about equitable estoppel's fundamental requirements. Given this consensus, the Reporters' Note to this Section draws support from *various* applications of equitable estoppel, including those outside the tort domain.

Comment b. Scope. Very few cases address the particular species of equitable estoppel restated here: equitable estoppel as an affirmative defense to a tort cause of action. In the decades since the publication of the Restatement Second of Torts, the vast majority of courts applying equitable estoppel—and even the vast majority of courts to cite to or rely upon § 894—have done so in non-tort contexts. Particularly prevalent are applications of the doctrine to breach-of-contract and federal statutory cases, especially those concerning the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). In these non-tort cases, equitable estoppel is frequently invoked not by the defendant (as here) but, rather, by the plaintiff to overcome a defense

raised by the defendant. See, e.g., Riegelsberger v. Air Evac EMS, Inc., 970 F.3d 1061, 1063 (8th Cir. 2020) (FLSA plaintiff arguing defendant employer is equitably estopped from claiming exemption from FLSA requirements because employment-offer letter implied employer was nonexempt from FLSA); Palan v. Inovio Pharms. Inc., 653 F. App'x 97, 100 (3d Cir. 2016) (FMLA plaintiff arguing defendant employer was equitably estopped from denying plaintiff FMLA protections because employer handbook stated employer maintained FMLA compliant policy); Weissberg v. Chalfant Mfg. Co., 2016 WL 541466, at *4 (N.D. Ohio 2016) (FMLA plaintiff arguing defendant employer was equitably estopped from asserting defense of FMLA ineligibility because employer's agent informed her that her job was protected by the FMLA).

Although relatively few tort defendants invoke the doctrine of equitable estoppel, the doctrine retains its vitality, as the Reporters' research has not surfaced a single case in which a court has refused to apply the doctrine when the facts support doing so—and several cases, published since 1979 (the year the Restatement Second of Torts § 894 was published), discuss the doctrine, at least in passing. See, e.g., Curtiss-Wright Corp. v. Edel-Brown Tool & Die Co., 407 N.E.2d 319, 324-325 (Mass. 1980) (endorsing possibility of equitable estoppel defense to misappropriation-of-trade-secrets claim); Foley Mach. Co. v. Amland Contractors, Inc., 506 A.2d 1263, 1266-1267 (N.J. Super. Ct. App. Div. 1986) (endorsing possibility of equitable estoppel defense to conversion claim, while concluding that "the facts do not warrant imposing any estoppel in this case").

Furthermore, commentators suggest that the defense remains available to tort defendants. See, e.g., 1 JOEL W. MOHRMAN & ROBERT J. CALDWELL, HANDLING BUSINESS TORT CASES § 9:4 (2020 update) ("Equitable estoppel is a defense applicable to all torts."); 1A STUART M. SPEISER, AMERICAN LAW OF TORTS § 5.5 (2024 update) ("Estoppel in pais, or equitable estoppel . . . has some application as a defense in the law of torts.").

Like the Restatement Second of Torts § 894 (AM. L. INST. 1979), this Section does not address the use of equitable estoppel by tort plaintiffs in order to overcome a defendant's defense. For examples of a tort plaintiff utilizing the doctrine of equitable estoppel in this manner, see, e.g., Rustico v. Intuitive Surgical, Inc., 424 F. Supp. 3d 720, 732 (N.D. Cal. 2019) (addressing when a defendant may be equitably estopped from invoking a statute-of-limitations defense), aff'd, 993 F.3d 1085 (9th Cir. 2021); Bottega v. Halstead, 2005 WL 8174485, at *10 (D.R.I. 2005) (discussing plaintiff's argument, in a negligence suit initiated pursuant to the Jones Act, that defendant should be estopped from claiming that it was not plaintiff's employer); Perkins v. United States, 183 F. Supp. 2d 69, 72 (D.D.C. 2002) (addressing plaintiff's argument, in damages suit following automobile accident, that defendant should be estopped from claiming he is an employee of the District of Columbia and thus immune from suit).

For equitable estoppel in the context of a plaintiff's effort to overcome a defendant's assertion that a claim is time-barred, see Statutes of Limitations and Statutes of Repose for Common-Law Tort Causes of Action § 9 of this draft ("If a defendant, by words or conduct, or by silence when the defendant has a duty to speak, causes a plaintiff not to bring a timely action, and the plaintiff's reliance on the defendant's words, conduct, or silence in forbearing to bring a timely

action is reasonable, equitable estoppel bars the application of the statute of limitations until after the plaintiff's reasonable reliance has ceased.").

Comment c. Burden of proof. As is true, generally, of affirmative defenses, "[t]he burden of proof is on the party asserting the estoppel." Foley Mach. Co. v. Amland Contractors, Inc., 506 A.2d 1263, 1266 (N.J. Super. Ct. App. Div. 1986). Accord Statutes of Limitations and Statutes of Repose for Common-Law Tort Causes of Action § 9, Comment *g* of this draft (stating, in the context of statutes of limitations, "[t]he burden of proof is on the plaintiff seeking to employ the doctrine of equitable estoppel to defeat the application of a statute of limitations defense").

Comment d. Judge and jury. "Estoppel depends on the facts of each case and ordinarily presents a question for the jury." Bollom v. Brunswick Corp., 453 F. Supp. 3d 1206, 1230 (D. Minn. 2020) (involving equitable estoppel raised to overcome a statute-of-limitations defense); accord Statutes of Limitations and Statutes of Repose for Common-Law Tort Causes of Action § 9, Comment *h* of this draft ("Whether the requirements of the doctrine of equitable estoppel have been met is a question for the factfinder."). However, "[w]here the facts are undisputed and can support only one reasonable conclusion, the question of equitable estoppel may be resolved as a matter of law." Rustico v. Intuitive Surgical, Inc., 424 F. Supp. 3d 720, 732 (N.D. Cal. 2019), aff'd, 993 F.3d 1085 (9th Cir. 2021) (internal quotation marks omitted) (involving equitable estoppel raised as to overcome a statute-of-limitations defense).

Subsection (a):

Comment e. Definite misrepresentation of fact. It is well established that, in order for a defendant to invoke the affirmative defense of equitable estoppel, the plaintiff must have offered a definite misrepresentation of fact. See Restatement Second, Torts § 894(1) (AM. L. INST. 1979) (establishing that a "definite misrepresentation of fact" is required in order to raise an equitable estoppel defense); see also Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 59 (1984) (finding it "tolerably clear" that a "definite misrepresentation of fact" is a required element of an equitable estoppel defense); Palan v. Inovio Pharms. Inc., 653 F. App'x 97, 101 (3d Cir. 2016) (interpreting FMLA) ("The first element necessary to establish equitable estoppel requires a definite misrepresentation . . . ."); Guerra-Delgado v. Popular, Inc., 774 F.3d 776, 782 (1st Cir. 2014) (interpreting ERISA) (explaining that equitable estoppel necessarily involves "a definite misrepresentation of fact"); Hardcastle v. Harris, 170 S.W.3d 67, 85 (Tenn. Ct. App. 2004) (involving statute of limitations) ("Evidence of vague statements . . . by a defendant will not carry the day for a plaintiff asserting equitable estoppel. The plaintiff must identify specific promises, inducements, representations, or assurances . . . ."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 733 (5th ed. 1984) (stating that, for equitable estoppel to serve as a defense to a tort action, there must be a "definite misrepresentation of fact"); 1 JOEL W. MOHRMAN & ROBERT J. CALDWELL, HANDLING BUSINESS TORT CASES § 9:4 (2020 update) (offering the elements of equitable estoppel as a defense to a tort cause of action—and noting that the first is a "definite misrepresentation of fact"); 1A STUART M. SPEISER, AMERICAN LAW OF TORTS § 5.5 (2022 update) (stating that, for the doctrine to apply, there must be "some actual misrepresentation of fact"); T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in*

Modern Litigation, 27 REV. OF LITIG. 377, 401 (2008) ("Generally, only factual misrepresentations and not opinions or legal conclusions can form the basis of equitable estoppel.").

For examples of representations that are insufficiently definite (albeit outside of the tort context), see, e.g., Rodowicz v. Mass. Mut. Life Ins. Co., 192 F.3d 162, 178 (1st Cir. 1999); Alsbrook v. Concorde Career Colleges, Inc., 469 F. Supp. 3d 805, 841 (W.D. Tenn. 2020); Meyer v. Interstate Improvement, Inc., 2015 WL 7253761, at *4 (D. Minn. 2015); E. Orange Bd. of Educ. v. New Jersey Schs. Constr. Corp., 963 A.2d 865, 873 (N.J. Super. Ct. App. Div. 2009); Aleo v. Weyant, 2013 WL 6529571, at *6 (Tenn. Ct. App. 2013).

Illustrations 1 and 2, involving the minor who misrepresents her age in order to receive a medical procedure without parental consent, are drawn from Boykin v. Magnolia Bay, Inc., 570 So. 2d 639, 640 (Ala. 1990).

Comment f. Knowledge, intent, and due care. Consistent with the Second Restatement, Comment *f* clarifies that a defendant may invoke an equitable estoppel defense even when the plaintiff who furnished the misrepresentation had no intent to deceive the defendant and, in fact, reasonably believed that the representation was accurate. See Restatement Second, Torts § 894, Comment *b* (AM. L. INST. 1979) ("The rule stated in this Subsection is operative although the one making the representation believes that his statement is true"); see also Palan v. Inovio Pharms. Inc., 653 F. App'x 97, 101 (3d Cir. 2016) (interpreting FMLA) (recognizing that a speaker need not intend "to deceive"); Dobrowski v. Jay Dee Contractors, Inc., 571 F.3d 551, 557 (6th Cir. 2009) (interpreting FMLA) (explaining that a party can invoke equitable estoppel even if the speaker was not "aware of the true facts"); Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 726 (2d Cir. 2001) (interpreting FMLA) (holding that equitable estoppel is available "regardless of whether the person making the misrepresentation intended to deceive"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 734 (5th ed. 1984) (observing that it is "quite clearly established that entirely innocent misrepresentation may be sufficient" to establish equitable estoppel); T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. OF LITIG. 377, 400 (2008) ("Essentially, the mental state of the party to be estopped can be good, bad, or in-between."). But see Foley Mach. Co. v. Amland Contractors, Inc., 506 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1986) (holding estoppel defense unavailable when the plaintiff asserting a conversion claim against the purchaser of the stolen machine was both unaware that the machine had been stolen and nonnegligent in not having learned that the machine was stolen).

Comment g. Anticipated reliance. To invoke the defense of equitable estoppel, the defendant must show that the party making the misrepresentation made it "with the expectation that the other party would act upon it." Contel Glob. Mktg., Inc. v. Cotera, 2010 WL 2836386, at *5 (D.N.J. 2010), report and recommendation adopted sub nom. Contel Glob. Mktg., Inc. v. Cortera, 2010 WL 3906892 (D.N.J. 2010). See Restatement Second, Torts § 894, Comment *b* (AM. L. INST. 1979) ("[O]ne is not prevented from maintaining a suit because of misleading conduct that has induced another to act unless he had reason to believe that the other might act upon his statement"); accord Foley Mach. Co. v. Amland Contractors, Inc., 506 A.2d 1263, 1266 (N.J. Super. Ct. App. Div. 1986) ("Equitable estoppel requires proof of a misrepresentation . . . [made] with the intention or

expectation that [the misrepresentation] will be acted upon by the other party.") (internal quotation marks omitted); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 733 (5th ed. 1984) (stating that, in order to set forth a defense of equitable estoppel, there must be a "definite misrepresentation of fact made with reason to believe that another will rely upon it"); 1 JOEL W. MOHRMAN & ROBERT J. CALDWELL, HANDLING BUSINESS TORT CASES § 9:4 (2020 update) (offering the elements of equitable estoppel as a defense to tort cases—and noting that the misrepresentation must be made "with reason to believe the other will rely on it").

Illustration 5, concerning the landowner who misrepresents the boundaries of her property without expecting that her misrepresentation will be relied upon, is drawn from the Restatement Second of Torts § 894, Illustration 3 (AM. L. INST. 1979).

Comment h. Reliance and whether it must be reasonable. To invoke the defense of equitable estoppel, the defendant must show that the defendant relied on the plaintiff's representation. T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. OF LITIG. 377, 389-398 (2008) (describing the reliance element); Michael Van Kleunen, *What the FMLA Can Learn from ERISA: Invoking the Doctrine of Equitable Estoppel*, 103 MARQ. L. REV. 695, 732 (2019) (explaining that, at least when interpreting FMLA, all circuits have "required that detrimental reliance be present"). But cf. T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under A Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 640 n.45 (2007) (collecting cases in which, for one reason or another, the court dispensed with the reliance requirement).

When the misrepresentation was innocently or negligently made, the defendant must further show that the defendant's reliance on it was reasonable under the circumstances. See Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 59 (1984) ("[The] reliance [of the party claiming the estoppel] must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.") (quotation marks omitted); Dobrowski v. Jay Dee Contractors, Inc., 571 F.3d 551, 557 (6th Cir. 2009) (interpreting FMLA) (explaining that a prerequisite to equitable estoppel is "reasonable reliance on the misrepresentation" and "resulting detriment to the party reasonably relying on the misrepresentation"); Rustico v. Intuitive Surgical, Inc., 424 F. Supp. 3d 720, 732 (N.D. Cal. 2019) (stating, albeit in a somewhat different context: "Under California law, reliance by the party asserting the estoppel on the conduct of the party to be estopped must have been reasonable under the circumstances."), aff'd, 993 F.3d 1085 (9th Cir. 2021) (internal quotation marks and alterations omitted); Mich. United Conservation Clubs, Inc. v. United States, 635 F. Supp. 932, 933 (W.D. Mich. 1985) (involving entitlement to tax refund) ("[T]he party claiming estoppel must show at the very least a misrepresentation, reasonable reliance on the misrepresentation, and a change of circumstance for the worse.") (citing Restatement Second of Torts § 894); Foley Mach. Co. v. Amland Contractors, Inc., 506 A.2d 1263, 1266 (N.J. Super. Ct. App. Div. 1986) ("The reliance must be reasonable and justifiable."); 1 JOEL W. MOHRMAN & ROBERT J. CALDWELL, HANDLING BUSINESS TORT CASES § 9:4 (2020 update) (offering the elements of equitable estoppel as a

defense to tort cases—and noting that the defendant must show that the defendant reasonably relied on the other's "definite misrepresentation of fact").

The assessment of whether reliance was reasonable can be fact-intensive. See, e.g., Riegelsberger v. Air vac EMS, Inc., 970 F.3d 1061, 1064 (8th Cir. 2020) (interpreting FLSA) (holding that employee's reliance on misrepresentation in employer's letter was unreasonable because employee did not use "reasonable diligence" in investigating letter's inconsistency); *Foley Mach. Co*., 506 A.2d at 1267 (holding purchaser of stolen equipment's reliance on seller's statements was unreasonable when purchaser took "none of the steps that a purchaser should reasonably have taken to ascertain the provenance of [the] equipment"). Accord Statutes of Limitations and Statutes of Repose for Common-Law Tort Causes of Action § 9, Comment *d* of this draft (stating that, in the statute-of-limitations context, "[e]quitable estoppel requires reasonable reliance by the plaintiff").

However, the reliance need not be reasonable when the misrepresentation was intentional. See Restatement Second, Torts § 894, Comment *d* (AM. L. INST. 1979). Very few, if any, tort cases specifically endorse this carve-out, but the special treatment of intentional misrepresentation accords with equity's underlying principle, which is, of course, that "[e]quity will not allow a wrongdoer to profit from his own wrong." Henry E. Smith, *Equity As Meta-Law*, 130 YALE L.J. 1050, 1123 (2021); T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under A Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 662 (2007) (recognizing that "the paramount purpose of equitable estoppel is to prevent the unconscionable conduct of the plaintiff and, concomitantly, withhold aid to the wrongdoer"). A person who intentionally lies and, with the lie, induces another to act should not be able to benefit from the falsehood.

Subsection (b):

Comment i. Rationale. This Comment echoes Restatement Second, Torts § 894, Comment *e* (AM. L. INST. 1979); see also Restatement of the Law Third, Restitution and Unjust Enrichment § 63 (AM. L. INST. 2011) ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability."); Restatement of the Law Second, Agency § 8B, Comments *a* and *c* (AM. L. INST. 1958) (recognizing that, on occasion, equitable estoppel may arise "from a failure to reveal facts" and that a person "may be deprived of a right of action" or "even lose his property" if the person fails "to reveal the truth if he knows that another is acting or will act under a misapprehension"). Or, as the Prosser treatise explains: "The second branch [of equitable estoppel] does not depend upon positive misrepresentation, but is based upon a mere failure to take action. It arises where the party 'stands by' and allows another to deal with his property, or to incur some liability toward him, without informing the other of his mistake." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 734 (5th ed. 1984). For further discussion of equitable estoppel, see DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES, DAMAGES-EQUITY-RESTITUTION § 2.3(2), at 64-65 (3d ed. 2018).

Comment j. Mistaken belief of fact. For an example of a court rejecting a Subsection (b) defense because of the defendant's knowledge of the facts, see Curtiss-Wright Corp. v. Edel-

Brown Tool & Die Co., 407 N.E.2d 319, 324-325 n.5 (Mass. 1980) (rejecting equitable estoppel defense to plaintiff's misappropriation of trade-secrets claim because defendant "had notice" that it had violated plaintiff's proprietary rights).

For a case somewhat similar to Illustration 7, see Jordan v. Judy, 776 S.E.2d 96 (S.C. Ct. App. 2015). There, the court reiterated the following: "'[I]f a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interest[s] are affected. His silence is acquiescence and it estops him.'" Id. at 100 (quoting McClintic v. Davis, 90 S.E.2d 364, 366 (S.C. 1955)). In accord is Halverson v. Village of Deerwood, 322 N.W.2d 761 (Minn. 1982). There, the Minnesota Supreme Court ruled: "If the Village of Deerwood had knowledge of the true boundary line and did not inform the Halversons, who suffered the expense of improvements which would not have occurred had they been aware that the line was not located where their predecessor told them it was located, then Deerwood will be estopped from denying the boundary as determined by practical location." Id. at 769.

Comment k. Failure to inform must be negligent, reckless, or intentional. As the Prosser treatise explains, under this second "branch" of equitable estoppel, there is no defense "where [the plaintiff] has remained silent reasonably and in good faith. . . . [T]his branch of estoppel requires either an intent to mislead or unreasonable conduct amounting to negligence in failing to act . . . ." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 734 (5th ed. 1984); see also Restatement of the Law Second, Agency § 8B, Comment *c* (AM. L. INST. 1958) ("When one realizes that another is or may come under a misapprehension as to the . . . ownership of his property—a misapprehension for which he is not at fault—his duty to give information is a duty of due care. It is proportioned to the likelihood of harm and to its extent.").

For an example of a failure to inform which satisfies the requirements of Subsection (b), see Ariz. Farmers Prod. Credit Ass'n v. Northside Hay Mill & Trading Co., 736 P.2d 816, 819 (Ariz. Ct. App. 1987) (holding equitable estoppel defense sufficient to defeat summary judgment on plaintiff's conversion claim for sale of cattle, when defendant informed plaintiff of potential sale but plaintiff "remained silent and made no claim to the cattle").

For an example of a court rejecting a Subsection (b) defense because the party to be estopped had not acted negligently or intentionally in failing to warn the adverse party of that party's mistake, see Brown v. Portland Sch. Dist. No. 1, 628 P.2d 1183, 1188 (Or. 1981) ("[T]his branch of estoppel requires either an intent to mislead or unreasonable conduct amounting to negligence in failing to act, rather than the strict responsibility imposed in estoppel by misrepresentation.").

Tort Liability Based on Estoppel

The Second Restatement of Torts contained a separate Section titled "Tort Liability Based on Estoppel." That provision, which was exceedingly narrow in scope, provided:

> If one person makes to another person a definite misrepresentation of fact concerning the ownership of property or its disposition, knowing that the other intends to act in reliance on it, and subsequently does an act or makes a refusal that would be tortious if the statement were true, the first person is subject to liability to the other as if the statement were true, provided that the other in reasonable reliance upon the statement has so changed his position that it would be inequitable to deny an action for the act or refusal.

Restatement Second, Torts § 872.

This topic does not require a separate black-letter provision within the Restatement Third of Torts. It can, instead, be addressed through the application of general rules or principles of estoppel, including those stated in the Restatement of the Law Fourth, Property, and some of its predecessor Restatements, and the Restatement of the Law Third, Restitution and Unjust Enrichment. Equitable estoppel as a defense to tort liability is addressed in § __ of this draft.

HARM BEFORE AND REGARDING BIRTH

§ __. Prenatal Injury

(a) If an actor tortiously causes harm to a fetus, and the fetus is later born alive, the actor is subject to liability to the child for the harm thus caused.

(b) If an actor tortiously causes harm to a fetus, and the fetus is not born alive, the existence and extent of liability depend upon the applicable wrongful-death statute.

Comment:

a. History.
b. Distinguishing fetal death and injury claims from other causes of action.
c. Duty, tortious conduct, factual cause, and scope of liability.
d. Injury inflicted prior to point of viability.
e. Injury inflicted prior to conception.
f. Conduct by the mother.
g. Other negligence by parent.
h. Injury arising out of, and in the course of, mother's employment.
i. Death after birth.
j. If the fetus is not born alive.

a. History. Traditionally, courts did not authorize recovery for harm to fetuses, frequently reasoning that no duty could be owed to a person not yet in existence and that harm inflicted in utero would be too difficult to trace. In time, however, criticism of that bright-line rule mounted. Commentators pointed out that other sources of law (including the law of property and even the criminal law) afford the unborn some protection, and that, in terms of causal tracing, the difficulties of proof are real—but not unsurmountable. These arguments, together with considerable progress in the field of embryology, finally led courts to change the rule in favor of one generally permitting recovery.

Published in 1979, Volume 4 of the Restatement Second of Torts reflected and reified this shift. Titled "Harm to Unborn Child," its § 869 declared: "One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive." For those not born alive, the Restatement Second explained "there is no liability unless the applicable wrongful death statute so provides."

In the intervening decades, numerous courts have followed the lines drawn by § 869. Today, all states impose liability for at least some tortiously inflicted fetal injuries, and, in fact, the vast majority of states impose at least some liability, even when the fetus is not born alive. Accordingly, this Section supersedes § 869, while reaffirming its core elements.

b. Distinguishing fetal death and injury claims from other causes of action. This Section addresses tortiously inflicted harm to the unborn, including harm inflicted prior to conception (see Comment *e*) and at any stage of pregnancy, including during the birth process. It does not address a facially similar claim—a claim for "wrongful life." That latter claim, asserted by an impaired child after birth, asserts that an actor breached a duty to the child, not because the actor *inflicted* tortious injury, but rather, because the actor allowed the child (often saddled with underlying impairments) to be born at all. This Restatement addresses wrongful-life claims at § __ of this draft.

Likewise, Subsection (a) addresses the child's claim for the tortious injury the child sustained while in utero. It does not address other claims that may arise from the same incident that injured the fetus. Thus, Subsection (a) does not address whether the parents of the child may have a claim for their own emotional distress stemming from the tortiously inflicted injury to their fetus. These bystander claims are addressed at Restatement Third of Torts: Liability for Physical and Emotional Harm § 48. Nor does Subsection (a) address whether the mother of the fetus may have a claim for her own physical injury or, alternatively, her own emotional distress owing to her fear of tortiously inflicted personal injury (because, frequently, when a fetus is injured, the mother is in the zone of danger). For the discussion of claims involving physical injury to the mother, see id., Chapter 2 (involving general negligently inflicted physical harm) and Restatement Third of Torts: Medical Malpractice (Tentative Draft No. 2, 2024) (involving harm specifically inflicted in the course of a patient-care relationship). For the discussion of emotional distress claims, see Restatement Third of Torts: Liability for Physical and Emotional Harm § 47 (addressing emotional distress claims when the plaintiff was in the zone of danger). Nor does Subsection (a) address whether the parents may have a claim for their lost consortium stemming from the impairment of the parent–child relationship. This Restatement addresses parent–child consortium claims involving fetal injury at § 48 B, Comment *r* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)), which provides: "When tortious conduct causes injury to a fetus that is later born alive, parents may make a child consortium claim for any harm the injury causes to the parent–child

relationship. Such an action would not accrue and damages would not be available until at least the time of birth."

Illustration:

1. On the advice of her obstetrician, Dr. Mazry, Gertrude opts for an amniocentesis to detect fetal abnormalities. Amniocentesis is a procedure performed on a pregnant woman whereby a physician inserts a needle through the woman's abdominal wall into the amniotic sac containing the fetus. The physician then takes a sample of amniotic fluid and studies it. Unfortunately, in the course of inserting the needle into Gertrude's abdomen, Dr. Mazry's hand slips, and the needle enters the fetus's skull. Gertrude and the fetus's father, Lionel, who is watching the procedure via an ultrasound screen, see the injury as it is inflicted, and, as a consequence, both suffer severe emotional distress. Subsequently, their infant, Luke, is born with brain damage, as a consequence of Dr. Mazry's error. Pursuant to Subsection (a), Dr. Mazry is subject to liability to Luke for fetal injury. Additionally, because Gertrude and Lionel witnessed the injury as it was inflicted, Dr. Mazry is subject to liability to Gertrude and Lionel for bystander emotional distress. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 48. Dr. Mazry is additionally subject to liability to Gertrude for direct negligent infliction of emotional distress, as she was in the zone of danger. Id. § 47(a). Finally, because Luke's neurological injury will, predictably, impair the parent–child relationship, Dr. Mazry is subject to liability to Gertrude and Lionel for lost consortium after Luke's birth. See id. § 48 B, Comment *r*.

On those occasions when a fetus dies before birth—and when, for whatever reason, no wrongful-death claim can be maintained under Subsection (b), the unavailability of such a claim does not necessarily preclude a parent from asserting a claim for the parent's own physical injury or emotional distress.

c. Duty, tortious conduct, factual cause, and scope of liability. An actor is subject to liability under this Section only if the actor owes a duty to the injured fetus, has acted tortiously, the tortious conduct is a factual cause of the fetus's injury, and the injury is within the actor's scope of liability. For duty, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 7. For factual cause, see id. § 26. For scope of liability (frequently called proximate cause), see id. § 29. The actor's conduct may be negligent, reckless, or intentional. Or the actor may be subject to liability under principles of strict liability or product liability law.

d. Injury inflicted prior to point of viability. Consistent with the Restatement Second of Torts § 869, Comment *d*, the rule stated in Subsection (a) is not limited to fetuses that are "viable" at the time of the original injury, that is, capable of independent life, if only in an incubator. An actor is subject to liability under Subsection (a) even if the fetus sustained injury at a time when the fetus was not capable of independent life.

e. Injury inflicted prior to conception. Sometimes, a fetus is injured by tortious conduct that occurred prior to the fetus's conception. On those occasions, the timing of conception does not necessarily bar the child's claim. Liability may be imposed for tortious conduct that causes injury to a not-yet-conceived fetus—and the moment of conception supplies no bright-line demarcation to bar (or, conversely, to authorize) a cause of action. However, *certain* preconception claims may be defeated on other familiar grounds, including that the actor did not owe a duty to the plaintiff—or because the actor's conduct is so far removed from the fetus's injury that it falls outside the scope of liability. See Comment *c* (establishing that a plaintiff who asserts a claim under this Section must satisfy the basic tort-law elements, including that the defendant must owe the plaintiff a duty of care, breach that duty of care, cause the plaintiff's injury, and the plaintiff's injury must be within the actor's scope of liability).

Illustration:

2. Jasmine is RH-negative; her first child, born in 2019, was RH-positive. The well-recognized standard of care calls for RhoGAM to be administered to RH-negative mothers after the birth of an RH-positive child. It is broadly understood that, if RhoGAM is not so administered, the mother's blood becomes sensitized to the D antigen present in RH-positive blood, imperiling the mother's future pregnancies. Nevertheless, acting negligently, Jasmine's physician, Dr. Little, fails to administer RhoGAM after that 2019 birth. Subsequently, in 2021, Jasmine becomes pregnant with a second child: Henry. Henry dies of erythroblastosis fetalis (EBF) four days after his birth. (EBF is a type of anemia caused by RH incompatibility.) Henry was not conceived in 2019 at the time of Dr. Little's negligence. Nevertheless, Dr. Little is subject to liability for Henry's injuries and, as provided in Comment *i* below, his subsequent death.

f. Conduct by the mother. Sometimes, during the course of pregnancy, a mother's conduct may cause a fetal injury. Whether to permit fetuses, once born, to sue their mothers raises vexing

questions, particularly because, during gestation, nearly *every* maternal action or decision may affect the developing fetus.

The Restatement Second of Torts § 869, which addressed "Harm to Unborn Child," did not address this issue. In the decades since § 869's publication, a small number of courts have grappled with these difficult cases. These courts have tended to assess the claims under the rubric of duty—and have generally concluded that, for the narrow purposes of tort law, mothers owe no duty of care to their unborn fetuses. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(b) (establishing that, "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification"); id., Reporters' Note to Comment *e* (noting that numerous courts have held that "mothers owe no duty of care to their unborn fetuses" and collecting authority). In rejecting claims for maternal liability, courts have appropriately recognized that permitting fetuses, once born, to sue their mothers would have far-reaching consequences and could significantly interfere with the mothers' independence, bodily autonomy, personal privacy, and right to control their own lives.

A few courts have made a partial exception to the general rule that a mother is not liable for injuries that occur in utero. In particular, a few courts have concluded that a mother *may* be said to owe a duty of care to her fetus when the claim involves not traditional gestational activity (such as the decision to ingest, or not ingest, a medication or vitamin) but, rather, activity that might be said to occur "outside the gestational relationship" (typically, negligent driving). Courts have been particularly willing to impose such a duty when a liability insurer, rather than the mother, is the real party in interest and the claim would benefit—rather than deplete—the family's coffers. Cf. Restatement Third, Torts: Liability for Physical and Emotional Harm § 2, Comment *c* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (noting that the erosion of parental immunity has been entangled with the rise of the "availability of liability insurance").

If a duty of care on the mother is imposed, that duty may be modified in accordance with the special parental standard of care. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 10A (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (specifying the parental standard of care). Pursuant to § 10A, whenever a parent's conduct involves a child's

discipline, supervision, or (as relevant here) care, the parent is subject to tort liability "only when the parent acts recklessly." When the parent's conduct does not involve the child's discipline, supervision, or care, the parent is subject to liability "when the parent fails to exercise reasonable care under all of the circumstances."

g. Other negligence by parent. Sometimes, a parent's tortious conduct may contribute to the prenatal injury. When the fetus's mother's conduct is implicated, the court will need to evaluate whether imposition of a duty of care is appropriate. See Comment *f* above (citing Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(b)). If no duty exists, no contribution claim may be asserted.

When a duty of care *is* owed to the fetus, the defendant tortfeasor may, when appropriate, seek contribution from the child's parent. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 10A, Comment *h* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (discussing when a third party sued by a child may assert a contribution claim against the child's parent). But the parent's tortious conduct is not imputed to the fetus (which means, of course, that the defendant may not defend by alleging that the fetus was comparatively responsible for the harm).

Illustration:

3. Charles is driving his wife Clarissa, who is six-months pregnant with their unborn fetus, when their car collides with Fernando's vehicle. Charles and Fernando were both negligent. The crash causes Clarissa to go into premature labor—and Clarissa and Charles's infant, Corinne, is born within hours of the collision. Corinne suffers significant impairment, owing to her prematurity. Under Subsection (a), Fernando is subject to liability to Corinne. Furthermore, Fernando is entitled to assert a contribution claim against Charles for his negligent driving.

As Comments *i* and *j* explain, sometimes prenatal injuries give rise to wrongful-death claims. When a parent is partially responsible for the fetus's wrongful death, the parent's ability to recover for the wrongful death (as a beneficiary) is proportionately reduced. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 70 [approximately], Comment *n* and Illustration 5 (of this draft) (addressing "Effect of beneficiary fault").

Illustration:

4. Same facts as Illustration 3, except that, now, Corinne dies three hours after her premature birth. Furthermore, in the wrongful-death action that ensues, the factfinder, applying the standard of care in Restatement Third, Torts: Liability for Physical and Emotional Harm § 10A(a) (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)), assigns 40 percent comparative responsibility to Charles (Corinne's father) and 60 percent to Fernando (the other motorist). The applicable wrongful-death statute makes Corinne's parents, Charles and Clarissa, the beneficiaries of any recovery. Clarissa is entitled to recover the full amount of her share of the wrongful-death damages. Charles's recovery is reduced by the 40 percent of comparative responsibility assigned to him.

As in Comment *f*, when a duty of care is imposed, that duty may be modified in accordance with the special parental standard of care. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 10A (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (specifying the parental standard of care). Pursuant to § 10A, whenever a parent's conduct involves a child's discipline, supervision, or (as may be relevant in cases involving prenatal injury) care, the parent is subject to tort liability "only when the parent acts recklessly." When the parent's conduct does not involve the child's discipline, supervision, or care, the parent is subject to liability "when the parent fails to exercise reasonable care under all of the circumstances."

h. Injury arising out of, and in the course of, mother's employment. Sometimes, a fetus is injured by tortious conduct that arises out of and in the course of the mother's employment. This fact implicates the workers' compensation schemes in place in every state, as *workers* who suffer injury within the scope of employment may recover workers' compensation benefits, but under the exclusive remedy provision of state workers' compensation statutes, they are generally precluded from suing the employer in tort. That reality, in turn, raises the question of whether a fetus is subject to the exclusive remedy provision of a workers' compensation statute, owing to the fetus's mother's employment.

Numerous courts have addressed this question. These courts have consistently and reasonably concluded that prenatal injuries are not sustained by workers, but instead by (unemployed) fetuses—and, because the injury is not sustained by a worker, the exclusivity

provisions of state workers' compensation acts do not bar the fetus's claim. (Workers' compensation, after all, does not provide any compensation to the fetus who is not an employee.) Accordingly, even if a fetus is injured while the fetus's mother is acting within the scope of employment, that fact does not preclude the fetus from asserting a claim against the employer in tort.

Illustration:

5. Adelaide, 35-weeks pregnant, is working a shift at a fast-food restaurant when she loses her footing and falls; as she falls, she twists her knee and, more consequentially, strikes her abdomen on the sharp corner of the counter. Later that evening, Adelaide suffers a placental abruption and is rushed to the hospital where she delivers her baby, Winston. Winston is born with severe injuries, traceable to the placental abruption, which is, in turn, traceable to Adelaide's on-the-job injury. Adelaide's personal injury claims are subject to the exclusivity provision of the state's workers' compensation system. Winston's claim, however, is not subject to that exclusivity provision; Winston is entitled to assert a claim against Adelaide's employer, consistent with Subsection (a).

i. Death after birth. If the child is born alive and then dies as a result of the injury inflicted prior to birth, an action can be maintained for the child's wrongful death. If appropriate under the state's statutory scheme, a survival action may also be initiated. For discussion of wrongful-death claims, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 70 [approximately] of this draft. For discussion of survival actions, see §§ 71 [approximately] and 72 [approximately] of this draft. If a child is not born alive, the matter is addressed not by this Comment but rather by Subsection (b) and Comment *j*.

Illustration:

6. Veronica is pregnant and is in an automobile accident, caused by another motorist's negligent driving. The accident injures her 22-week-old fetus. As a result of the accident, the fetus is delivered prematurely; Veronica's son lives for one hour, prior to his death. The negligent motorist is subject to liability for Veronica's son's wrongful death, and, depending on the relevant statutory language, for damages the infant suffered before death under the state's survival statute.

j. If the fetus is not born alive. If the fetus is not born alive, as Subsection (b) makes plain, the matter is governed by the state's wrongful-death act. Whether a wrongful-death action can or cannot be maintained will depend upon the language of the applicable statute. When a wrongful-

death statute governs, its proper interpretation is a matter outside the scope of this Restatement. For further discussion, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 B, Comment *r* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (involving Loss of Child Consortium and, in particular, fatal injury to a fetus). For a discussion of how to allocate damages when a parent's tortious conduct has contributed to the fetus's death and that parent is the beneficiary of the state's wrongful-death statute, see id., Comment *g* and also Illustration 4 above.

Illustration:

7. Same facts as Illustration 6, except that, now, Veronica's fetus dies while in utero. Pursuant to Subsection (b), whether the negligent motorist is subject to liability for the fetus's wrongful death depends upon the language of the state's wrongful-death statute.

REPORTERS' NOTE

Comment a. History. As Comment *a* explains, traditionally, courts did not authorize recovery for harm to fetuses. See Farley v. Sartin, 466 S.E.2d 522, 526 (W. Va. 1995) ("The common law did not permit recovery for prenatal torts in general."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 366 (2023 update) (summarizing this traditional rule and its basis); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 367 (5th ed. 1984) (explaining that, traditionally, "when a pregnant woman was injured, and her child as a result was subsequently born in an injured or deformed condition, nearly all of the decisions denied recovery to the child"). As to why, the Virginia Supreme Court explains: "The reasons usually assigned for such rulings were that defendant owed no duty to one not in existence at the time of the wrongful act and that fictitious claims would be prevalent due to the great difficulty of proving any causal connection between the negligence and damage." Kalafut v. Gruver, 389 S.E.2d 681, 683 (Va. 1990).

However, that bright-line no-recovery rule was subject to "devastating criticism," and, starting in 1946, the "criticism finally had its effect." KEETON ET AL., supra § 55, at 368. In that year, beginning with the landmark decision, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), there was a sudden and dramatic shift—and, today, there is universal agreement that, if born alive, a child is entitled to recover for tortiously inflicted prenatal injuries. See Wilson v. Kaiser Found. Hosps., 141 Cal. App. 3d 891, 897 (1983) ("[A]ll American jurisdictions permit a tort action to be maintained to recover damages for prenatal injuries negligently inflicted if the injured child is born alive."); *Farley*, 466 S.E.2d at 528 ("[T]oday, every jurisdiction permits recovery for prenatal injuries if a child is born alive."); Restatement Second, Torts § 869, Reporter's Note to Subsection (1) (AM. L. INST. 1979) ("There now appears to be no American jurisdiction with a decision still standing refusing recovery."); DOBBS, HAYDEN & BUBLICK, supra § 366 ("[Courts] now universally hold that no one is to be denied compensation for injury merely because the harm was

inflicted before that person's birth."); KEETON ET AL., supra § 55, at 368 (describing the "spectacular reversal of the no-duty rule" that, for years, barred children from recovery and explaining that "[t]he child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries"); Roland F. Chase, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (originally published in 1971) (charting the evolution and noting that, "[o]ne by one the decisions rejecting a right of action for prenatal injuries were toppled by overruling decisions, and jurisdictions facing the issue for the first time ruled in favor of allowing suits for prenatal injuries, until now the rule recognizing the right to bring an action for prenatal injuries is as well established as was the contrary rule a half century ago").

For the fact that the vast majority of states impose at least some liability, even when the fetus is not born alive, see Reporters' Note to Comment *j*.

Comment b. Distinguishing fetal death and injury claims from other causes of action. For discussion of wrongful-life claims, in which the defendant's negligence does not cause the infant's impaired condition—but is, rather, the cause of the infant's birth, see MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES 331 (11th ed. 2021). For discussion of the differences between pre-birth injury claims (as addressed here) and wrongful-life claims (as addressed in § __), see Empire Cas. Co. v. St. Paul Fire & Marine Ins. Co., 764 P.2d 1191, 1195-1197 (Colo. 1988); Walker v. Rinck, 604 N.E.2d 591, 593-594 (Ind. 1992); Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851, 855 (Mo. 1993).

In addition to distinguishing between claims under this Section and claims for wrongful life, Comment *b* also distinguishes between claims under this Section and *other* independent claims (such as those for physical injury, emotional harm, or lost consortium), brought by the fetus's or child's parents. For parents' claims, when the child, injured in utero, is born alive, see, e.g., Castle v. Lester, 636 S.E.2d 342, 353 (Va. 2006) (reaffirming "that a mother can recover, as an element of her own cause of action, damages for her mental suffering resulting from the birth of an impaired child").

For parents' claims when the fetus dies in utero, see, e.g., Spangler v. Bechtel, 958 N.E.2d 458 (Ind. 2011) (finding that, even though Indiana's wrongful-death statute precluded any claim for wrongful-death damages, the fetus's death supported the parents' claim for negligent infliction of emotional distress under the bystander rule); Smith v. Borello, 804 A.2d 1151, 1163 (Md. 2002) (finding that, even though a claim for the wrongful death of a nonviable fetus was not cognizable, an expectant mother was entitled to recover for her own "psychic injury"); Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 395 S.E.2d 85, 86 (N.C. 1990) (holding that, in addition to a claim for the wrongful death of the fetus, "the father and mother of a stillborn fetus have individual claims for negligent infliction of emotional distress against the defendants whose alleged negligence caused the stillbirth"); Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc., 425 A.2d 92, 95 (Vt. 1980) (authorizing a wrongful-death claim for the fetus's death as well as a claim for the mother's emotional distress, since "she was necessarily within the zone of danger and subject to a reasonable fear for her own safety"); Pierce v. Physicians Ins. Co. of Wis., Inc., 692 N.W.2d

558, 567 (Wis. 2005) (finding, under the facts presented, "the mother may recover as a parent, for the wrongful death of the stillborn infant" and the mother was, separately, entitled to recover "as a patient, for her personal injuries including the negligent infliction of emotional distress"). For further discussion, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 47, Reporters' Note to Comment *f* (AM. L. INST. 2012) (observing that "one area in which courts have been sympathetic to permitting the recovery of emotional harm is when a physician's negligence results in a stillbirth").

Indeed, some states have fashioned a distinct cause of action "for the recovery of emotional damages resulting from a negligently caused stillbirth." Spangler v. Bechtel, 958 N.E.2d 458, 469 n.6 (Ind. 2011) (collecting authority from California, Florida, Michigan, New Jersey, New York, and Wisconsin).

The facts of Illustration 1 are drawn loosely from Azarbal v. Med. Ctr. of Del., Inc., 724 F. Supp. 279 (D. Del. 1989).

Comment c. Duty, tortious conduct, factual cause, and scope of liability. As is typically the case in tort actions, a plaintiff stating a claim under this Section must show duty, breach, factual cause, and that the injury is within the defendant's scope of liability. See, e.g., C.R.M. v. United States, 2020 WL 4904243, at *9 (E.D. Va. 2020) (dismissing the plaintiff's claims, for failure "to allege any facts that make plausible" that the physician's negligence caused the fetal injury); Rush v. Blanchard, 426 S.E.2d 802, 804 (S.C. 1993) (assessing a factual cause question, in case of fetal injury).

The Second Restatement included a similar requirement. See Restatement Second, Torts § 869, Comments *b* and *c* (AM. L. INST. 1979) (establishing that, as a prerequisite for liability, the plaintiff must establish that "the act or conduct of the defendant that causes harm to the unborn child [was] itself tortious" and "a legal cause of the harm to the child").

Comment d. Injury inflicted prior to point of viability. Consistent with Comment *d*, the great majority of courts agree that it does not matter if the injury is sustained prior to, or after, the point of viability. See Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995) ("[I]t generally does not matter whether the injury occurred prior to or after the point of viability."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 366 (2023 update) ("So long as the living plaintiff can prove the elements of a tort claim, the fact that the harm was initially done to a pre-viable fetus does not defeat the claim."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368-369 (5th ed. 1984) (explaining that the majority of courts, when confronting injury to fetuses, have "allowed recovery, even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick"); accord Smith v. Brennan, 157 A.2d 497, 504 (N.J. 1960) (observing that "no jurisdiction which has approved recovery for injury to a viable fetus has later denied recovery to a child who survived an injury suffered before it was viable").

Like courts, commentators agree that courts should not hinge recovery on the fetus's viability at the time of injury. Torigian v. Watertown News Co., 225 N.E.2d 926, 927 (Mass. 1967) ("To the extent that the views of textwriters and legal commentators have come to our attention,

they are unanimously of the view that nonviability of a fetus should not bar recovery."); 3 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 18.3, 791 n.16 (3d ed. 2007) ("Commentators seem to be virtually united in rejecting the requirement of viability at the time of injury at least when the child is later born alive.").

For a persuasive discussion of the peril of hinging liability on the fetus's viability (or nonviability) at the time of injury, see Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1252-1253 (Ill. 1977); Smith v. Brennan, 157 A.2d 497, 504-505 (N.J. 1960); KEETON ET AL., supra § 55, at 369.

Comment e. Injury inflicted prior to conception. The majority of courts expressly to consider the matter have held, consistent with Comment *e*, that, if other tort-law prerequisites are satisfied (see Comment *c*), liability may be imposed for tortious conduct that causes injury to a not-yet-conceived fetus. See Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851, 853 (Mo. 1993) ("Most jurisdictions that have addressed the question have permitted preconception tort actions."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 368 (2023 update) (explaining that, of the courts to consider the matter, "most . . . expressly or implicitly recognize that the ordinary duty of care does not disappear merely because the child was not conceived at the time of the defendant's negligent conduct"); Julie A. Greenberg, *Reconceptualizing Preconception Torts*, 64 TENN. L. REV. 315, 320-335 (1997) (cataloging case law as of 1997 and finding that the majority of courts directly to weigh in had recognized preconception causes of action).

This does not mean that preconception torts are blindly or universally recognized. Rather, what Comment *e* establishes is that there is no *bright-line* rule to extinguish the claims of all of those not yet conceived. Notwithstanding Comment *e*, preconception claims may well falter, including because of an absence of duty or because the injury falls outside the defendant's scope of liability. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 6 (AM. L. INST. 2010) (involving the duty of care); id. § 7(b) (involving limits to the duty of care, imposed in "exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability"); id. § 29 (involving scope of liability and specifying: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."); id., Comment *m* (noting techniques courts may employ to cabin an actor's liability when particular circumstances warrant). In short, as the Missouri Supreme Court has aptly explained: "Just as there is not a duty in every case when a plaintiff is alive at the time of some allegedly negligent conduct, there will not be a duty in every case where allegedly negligent conduct harms a plaintiff not yet conceived." *Lough*, 866 S.W.2d at 854; accord Tracey I. Batt, Note, *DES Third-Generation Liability: A Proximate Cause*, 18 CARDOZO L. REV. 1217, 1238-1239 (1996) (noting a theme running through case law, that "each preconception tort case should be decided on its facts").

In reaching this conclusion, some also note that, in many other contexts, liability is imposed for negligent conduct that takes place at time 1, even if the plaintiff is not conceived until months or years after time 1. As the Dobbs treatise explains:

> If the defendant negligently manufactures a dangerous product, no one asks whether the harm it causes was done to a person who was in existence when the

> product was manufactured. If the defendant negligently constructs a balcony so that two years later it falls upon a one[-]year-old child, no one believes that the child should be denied recovery on the ground that she was not in existence when the defendant's negligent acts took place.

DOBBS, HAYDEN & BUBLICK, supra § 368; see also *Lough*, 866 S.W.2d at 854 (offering a spin on the balcony scenario and stating: "It would be ludicrous to suggest that only the mother would have a cause of action against the builder but, because the infant was not conceived at the time of the negligent conduct, no duty of care existed toward the child.").

Courts in accord with Comment *e* include: Bergstreser v. Mitchell, 577 F.2d 22, 25 & n.4 (8th Cir. 1978) (applying Missouri law) (concluding that "the courts of Missouri would permit an infant, born alive, to bring an action for injuries arising out of preconception negligent conduct" while observing that the holding is "in agreement with the small number of decisions from other jurisdictions" and also that "[t]he commentary is overwhelmingly favorable to the trend toward recognition of causes of action for prenatal and preconception injury"); Jorgensen v. Meade Johnson Labs., Inc., 483 F.2d 237, 239-240 (10th Cir. 1973) (applying Oklahoma law) (refusing to adopt a hard-and-fast rule to extinguish the claims of those not yet conceived at the time of injury); C.R.M. v. United States, 2020 WL 4904243, at *8 (E.D. Va. 2020) (concluding that "each child had a claim for negligence against the Defendant, even though that negligence (but not the injuries) pre-dated the children's conception"); Domion v. Triquint Semiconductor, Inc., 2017 WL 7310643, at *1 (D. Or. 2017) (rejecting the defendant's argument that "'preconception' claims are not cognizable under Oregon tort law"), report and recommendation adopted, 2018 WL 847240 (D. Or. 2018); Empire Cas. Co. v. St. Paul Fire & Marine Ins. Co., 764 P.2d 1191 (Colo. 1988) (recognizing claim when the defendant's mismanagement of the mother's second pregnancy caused injury to her third child); Torres v. Sarasota Cnty. Pub. Hosp. Bd., 961 So. 2d 340, 346 (Fla. Dist. Ct. App. 2007) (concluding that "Dr. Easterling's duty extended to Luis" even though Luis had not yet been conceived at the time of Dr. Easterling's actions); McAuley v. Wills, 303 S.E.2d 258, 260 (Ga. 1983) (rejecting a bright-line rule and holding that, in "at least in some situations, a person should be under a duty of care toward an unconceived child"); Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1253 (Ill. 1977) (finding that a duty was owed and the injury was foreseeable when a transfusion of Rh-positive blood was given to an Rh-negative patient which caused birth defects to her baby, conceived eight years later); Ledeaux v. Motorola Inc., 101 N.E.3d 116, 127-129 (Ill. App. Ct. 2018) (applying Arizona and Texas law) (refusing to draw a bright line to preclude liability for "preconception torts"); Walker v. Rinck, 604 N.E.2d 591, 595 (Ind. 1992) (finding that a physician owed a duty of reasonable care to the future children of a patient in the administration of RhoGAM); Sweeney v. Preston, 642 So. 2d 332, 333-335 (Miss. 1994) (allowing recovery for the death of a child two days after his birth when the mother was not properly treated for Rh sensitivity during her first pregnancy, 10 years earlier); Lough v. Rolla Women's Clinic, 866 S.W.2d 851, 854-855 (Mo. 1993) (holding that a physician owed a duty of care to an as-yet-unconceived child and that a contrary rule would be "unjust and arbitrary"); Lynch v. Scheininger, 744 A.2d 113, 126-127 (N.J. 2000) (concluding that "in appropriate circumstances a physician's duty should extend to children

conceived after the physician's negligence occurred"); Graham v. Keuchel, 847 P.2d 342, 364-365 (Okla. 1993) (rejecting the defendants' argument "that they are shielded from liability because the negligence that caused Donald's death took place before his conception"); cf. Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1157 (La. 1988) (finding no duty to protect the child under the facts alleged, while rejecting "defendant's arguments calling for a categorical denial of any duty on the part of physician to protect an unconceived child from being born with a birth defect" because "[l]ogic and sound policy require a recognition of a legal duty to a child not yet conceived but foreseeably harmed"); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (stating, in the course of analyzing (conceptually distinct) wrongful-life claims, "we recognize the existence of a duty to the . . . unconceived child").

On the other hand, New York has squarely rejected any duty of care for the benefit of an unconceived child. Albala v. City of New York, 429 N.E.2d 786 (N.Y. 1981). In so holding, however, New York has numerous critics and few acolytes. For criticism, see *Lough*, 866 S.W.2d at 853 (rejecting *Albala* as "draconian"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 369 (5th ed. 1984) (criticizing the New York rule as "thinly reasoned" and observing that legitimate concerns, including involving proximate cause, must be addressed but "by no means require that a blanket no-duty rule be applied in pre-conception injury cases"). For the lack of peers, see DOBBS, HAYDEN & BUBLICK, supra § 368 ("New York stands virtually alone as a clear authority for the complete rejection of a duty of care."). Courts that, like New York, take a restrictive line include: Whitlock v. Pepsi Americas, 681 F. Supp. 2d 1123, 1126 (N.D. Cal. 2010) (observing that, in California, "a duty has never been found, nor has liability been imposed, in a preconception negligence case where defendant was not a medical professional or product liability manufacturer") (quotation marks omitted); Peters v. Tex. Instruments Inc., 2011 WL 4686518, at *7 (Del. Super. Ct. 2011) (applying Texas law) (concluding "Texas appellate courts have not recognized preconception tort liability"); Grover v. Eli Lilly & Co., 591 N.E.2d 696, 700-701 (Ohio 1992) ("A pharmaceutical company's liability for the distribution or manufacture of a defective prescription drug does not extend to persons who were never exposed to the drug, either directly or *in utero*.").

In other states, the law is conflicted or unclear. Compare Carr v. Wittingen, 451 N.W.2d 584, 586 (Mich. Ct. App. 1990) (denying recovery under the state's wrongful-death act when the plaintiff's May 1985 laparotomy led to a uterine rupture and the death of a fetus in March 1986), with Monusko v. Postle, 437 N.W.2d 367, 369-370 (Mich. Ct. App. 1989) ("We hold that defendants owed a duty to Andrea, even though she was not conceived at the time of the alleged wrongful act."), and Martin v. St. John Hosp. & Med. Ctr. Corp., 517 N.W.2d 787, 790 (Mich. Ct. App. 1994) (concluding that a wrongful-death action could be maintained for the performance of an allegedly negligent cesarean section during the mother's prior pregnancy, in 1987, even though the affected fetus was not conceived until 1988; observing that a "blanket no-duty rule disallowing all claims based upon alleged pre-conception torts is unnecessary, unjust, and contrary to fundamental and traditional principles of . . . tort law") (quotation marks omitted); see also McNulty v. McDowell, 613 N.E.2d 904, 906 (Mass. 1993) (declining to adopt a bright-line rule that "the duty

owed by a physician may never extend to those not yet conceived," although the instant case "does not require us to address the more generalized question of the viability of preconception torts").

Illustration 2, involving Henry's death from Dr. Little's failure to administer RhoGAM, is based loosely on Graham v. Keuchel, 847 P.2d 342 (Okla. 1993). Yeager v. Bloomington Obstetrics & Gynecology, Inc., 585 N.E.2d 696 (Ind. Ct. App.), aff'd, 604 N.E.2d 598 (Ind. 1992), Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851 (Mo. 1993), and Matharu v. Muir, 86 A.3d 250 (Pa. Super. Ct. 2014), are similar and in accord.

Comment f. Conduct by the mother. The Reporters' research has uncovered only a handful of cases that address whether a mother may be held liable to her child for the mother's prenatal injury-causing conduct. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 367 (2023 update) ("Few cases deal with the parents' duty to the fetus."). The few courts that have addressed the question have tended to rule that mothers cannot be sued by their fetuses for their prebirth conduct. In rejecting liability, courts have recognized the substantial burden that exposing mothers to liability for prenatal injury would have on women's bodily integrity, autonomy, safety, privacy, and personal choice.

Voicing these concerns, for instance, the Massachusetts Supreme Judicial Court has recognized that, "during the period of gestation, almost all aspects of a woman's life may have an impact, for better or for worse, on her developing fetus." Remy v. MacDonald, 801 N.E.2d 260, 263 (Mass. 2004). Likewise, the Illinois Supreme Court has explained: "Since anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child." Stallman v. Youngquist, 531 N.E.2d 355, 359 (Ill. 1988). Accordingly, any liability determination "would involve an unprecedented intrusion" into women's "privacy and autonomy." Id. at 361. Furthermore, as the Texas Court of Appeals has recognized, in its opinion refusing to impose liability on a mother, because a duty of care to a fetus may arise before the child is conceived, see Comment *e* supra, "it is possible that a woman could be held liable for conduct affecting her own body that impacts her reproductive capabilities many years before her child is conceived." Chenault v. Huie, 989 S.W.2d 474, 477 (Tex. App. 1999). Accordingly: "Arguably every woman would be obligated to maintain her body in the best possible reproductive condition so long as it was reasonably foreseeable she might bear a child at some point in the future." Id.

Recognizing these sensitivities, as noted, the majority of courts to consider the matter have held that, although mothers do owe a (modified) duty of care to their children once the children are born, for purposes of tort law, mothers owe no duty of care to their unborn fetuses. Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Reporters' Note to Comment *e* (AM. L. INST. 2010) (collecting authority); see Castro v. Melchor, 414 P.3d 53, 68 (Haw. 2018) ("Based on significant policy considerations, we agree with the jurisdictions that have held as a matter of law that a pregnant woman does not owe a legal duty of care to the fetus she carries."); *Stallman*, 531 N.E.2d at 360 ("Logic does not demand that a pregnant woman be treated in a court of law as a stranger to her developing fetus."); *Remy*, 801 N.E.2d at 267 (concluding that "there are inherent and important differences between a fetus, in utero, and a child already born, that permits a bright

line to be drawn around the zone of potential tort liability of one who is still biologically joined to an injured plaintiff"); *Chenault*, 989 S.W.2d at 474 ("conclud[ing] that we should not judicially create a legal duty that would have the effect of dictating a pregnant woman's conduct toward her unborn child").

State legislative activity is in accord. In recent decades, numerous states have enacted legislation to clarify that the states' wrongful-death statute extends to the protection of fetuses. See Reporters' Note to Comment *j* infra (collecting state legislative enactments). But, many of these state statutes have a carve-out. In particular, the statutes tend specifically to protect mothers from liability—arguably demonstrating a legislative consensus that pregnant mothers, and other tortfeasors, are and ought to be treated differently. See, e.g., ALASKA STAT. ANN. § 09.55.585 (establishing that, with a few exceptions, "[a] parent of an unborn child may maintain an action as plaintiff for the death of an unborn child that was caused by the wrongful act or omission of another" while clarifying that "[t]his section does not apply to acts or omissions that . . . are committed by a pregnant woman against herself and her unborn child"); ARK. CODE ANN. § 16-62-102(a) (establishing that a wrongful-death claim may be initiated for the death of a "person or an unborn child," while specifically shielding "the pregnant woman carrying the unborn child" from liability); KAN. STAT. ANN. § 60-1901 (establishing that a wrongful-death action may be maintained for the death of a fetus, while excluding from liability "[a]ny act committed by the mother of the unborn child"); MICH. COMP. LAWS § 600.2922a (establishing that "[a] person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth" while establishing an exception for, inter alia, "[a]n act committed by the pregnant individual"); NEB. REV. STAT. § 30-809 (establishing that "an unborn child in utero at any stage of gestation" is entitled to the protection of the state's wrongful-death statute, while clarifying that wrongful-death actions may not be initiated against, among others, "[t]he mother of the unborn child"); VA. CODE ANN. § 8.01-50(B) (entitling a fetus's mother to assert an action for a fetus's tortious death and further clarifying that "[n]othing in this section shall be construed to create a cause of action for a fetal death against the natural mother of the fetus").

Further supporting courts' reluctance to open the door to such suits, there are numerous other mechanisms—besides tort law—that seek to address and deter serious maternal misconduct. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 10A, Comment *k* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (discussing child welfare laws and the fact that "criminal provisions exist that provide minimal standards of care"); Thomas M. Fleming, *Right of Child to Action Against Mother for Infliction of Prenatal Injuries*, 78 A.L.R.4th 1082 (originally published in 1990) ("[P]rosecutors and judges in a number of states have recently invoked child abuse, neglect, support, and homicide statutes in an effort to deter, punish, or remedy maternal conduct during pregnancy deemed harmful to the unborn child, or to require pregnant women to undergo medical procedures thought necessary to preserve fetal life or health.").

As Comment *f* recognizes, on the handful of occasions that courts have opted to impose a duty on pregnant mothers for the care or protection of their fetuses, they have tended to do so for

activities that might be said to occur "outside the gestational relationship" (typically, negligent driving) and in the face of insurance coverage, such that the imposition of liability would enrich, rather than deplete, the family's resources. E.g., Nat'l Cas. Co. v. N. Trust Bank, 807 So. 2d 86, 87 (Fla. Dist. Ct. App. 2001) (finding that the child stated a claim against her mother for prenatal injuries sustained when the mother was seven-months pregnant but limiting such claims to automobile accidents and the limits of liability insurance); Bonte v. Bonte, 616 A.2d 464, 464 (N.H. 1992) (refusing to dismiss a lawsuit alleging that the pregnant mother was negligent in failing to use reasonable care when crossing the street; taking pains to note that "defendant is represented by counsel provided by her insurance company, American Global"); Tesar v. Anderson, 789 N.W.2d 351, 361 (Wis. Ct. App. 2019) (authorizing a wrongful-death suit against an insurer who insured the mother whose careless driving allegedly caused the fetus's death; emphasizing that the case involved "holding insurance companies liable for the negligent acts of insured drivers" and stressing that its decision would not "open the door" to other suits, such as "husbands suing wives for not exercising properly or not taking the proper vitamins during pregnancy"); accord Thomas M. Fleming, *Right of Child to Action Against Mother for Infliction of Prenatal Injuries*, 78 A.L.R.4th 1082 (originally published in 1990) ("Insurance coverage will be an important consideration in any child's prenatal injury claim against its mother for negligence in driving an automobile, or for other conduct typically covered by liability insurance."). But see City of Louisville v. Stuckenborg, 438 S.W.2d 94, 97 (Ky. 1968) (finding that Wilma, who was eight-months pregnant, was "guilty of contributory negligence" because she clumsily fell on a defective sidewalk; failing to address policy implications of maternal responsibility); Grodin v. Grodin, 301 N.W.2d 869, 870-871 (Mich. Ct. App. 1980) (reversing summary judgment that had been granted for the mother, based on her prenatal conduct; asserting that "a woman's decision to continue taking [prescription] drugs during pregnancy is an exercise of her discretion. The focal question is whether the decision reached by a woman in a particular case was a reasonable exercise of parental discretion.") (quotation marks omitted), disapproved of by Mayberry v. Pryor, 352 N.W.2d 322 (Mich. Ct. App. 1984); Hogle v. Hall, 916 P.2d 814 (Nev. 1996) (affirming a judgment that assigned the mother a 40 percent share of responsibility for the infant's injuries because she took "Accutane for her acne during the early stages of pregnancy" without assessing broader policy implications of maternal responsibility).

Comment g. Other negligence by parent. As Comment *f* explains, when the mother's prenatal conduct is implicated, the court will need to evaluate whether it is appropriate to impose a duty of care, running from the mother to her fetus. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Reporters' Note to Comment *e* (AM. L. INST. 2010) ("A number of courts have decided that mothers owe no duty of care to their unborn fetuses because of the infringement on autonomy and personal choice that such a duty would impose."). If no duty is owed, no contribution claim may be asserted. See, e.g., Nat'l R.R. Passenger Corp. v. Terracon Consultants, Inc., 13 N.E.3d 834, 837 (Ill. App. Ct. 2014) (explaining that, under Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988), a mother owes no duty of care to her fetus "and that a contribution claim . . . pursuant to [a] nonexistent duty is not sustainable").

When a duty of care does run from the parent to the fetus, the defendant tortfeasor may, when appropriate, seek contribution from the parent. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 10A, Comment *h* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (discussing when a "third party sued by a child may assert a contribution claim against the child's parent"). But the parent's tortious conduct is not imputed to the fetus. See Fallaw v. Hobbs, 147 S.E.2d 517, 519 (Ga. Ct. App. 1966) (involving prenatal injuries and stating: "The negligence of a parent in driving an automobile in which the child is riding cannot be imputed to the child."); Hogle v. Hall, 916 P.2d 814, 819 (Nev. 1996) (stating, in a case involving prenatal injury, that "the negligence of a parent cannot be imputed to an innocent child").

Illustration 4, involving the fatal injury to Corinne, is very similar to Illustration 6 in Restatement Third, Torts: Liability for Physical and Emotional Harm § 10A (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). It is also somewhat similar to City of Louisville v. Stuckenborg, 438 S.W.2d 94, 97 (Ky. 1968), in which the court found that Wilma, who was eight-months pregnant, was "guilty of contributory negligence" because she clumsily fell on a defective sidewalk, fatally injuring her fetus. The court further found that, during the era of contributory negligence, Wilma's negligence barred "any recovery for her share by the administrator of the estate under the Wrongful Death Act." Id.

Comment h. Injury arising out of, and in the course of, mother's employment. Consistent with Comment *h*, the vast majority of courts to address the matter have held that prenatal injuries are separate from injuries to the employee. Accordingly, even when the fetus's injury and mother's injury are simultaneously inflicted—and even when the mother is on the job at the time of injury—the infant's claim is not barred by the exclusive remedy provision of the state workers' compensation statute. See Snyder v. Michael's Stores, Inc., 945 P.2d 781, 786 (Cal. 1997) (observing that, with one exception (that it proceeds to overrule), every court to consider the matter has held that, when a fetus is injured in utero, that fetus is not an employee, and the fetus's claim is not subject to an exclusive remedy provision of a state workers' compensation statute); Omori v. Jowa Haw. Co., 981 P.2d 714, 718 (Haw. Ct. App.) ("[T]he overwhelming majority of courts that have addressed the issue have concluded that the exclusive remedies provision of a workers' compensation law does not bar a child from bringing a lawsuit for in utero injuries the child independently sustained as a result of the work-related negligence of the child's mother's employer towards the child's mother."), aff'd as modified, 981 P.2d 703 (Haw. 1999); Ledeaux v. Motorola Inc., 101 N.E.3d 116, 124 (Ill. App. Ct. 2018) (recognizing that "cases consistently hold that the respective exclusive remedy provisions of the state's workers' compensation laws do not bar a cause of action brought by an employee's offspring based on injuries he or she sustained independent of any injuries sustained by the employee-mother"); Meyer v. Burger King Corp., 26 P.3d 925, 929 (Wash. 2001) (observing that fellow jurisdictions have "unanimously concluded" that the exclusivity provisions of their respective workers' compensation acts do not bar a fetus's claims for injuries sustained while in utero).

For courts in accord see, for example: Thompson v. Pizza Hut of Am., Inc., 767 F. Supp. 916 (N.D. Ill. 1991); Namislo v. Akzo Chems., Inc., 620 So. 2d 573 (Ala. 1993); *Snyder*, 945 P.2d 781; Pizza Hut of Am., Inc. v. Keefe, 900 P.2d 97 (Colo. 1995); Sena v. Mount Sinai Hosp., 1994 WL 411142 (Conn. Super. Ct. 1994); Globe Sec. v. Pringle, 559 So. 2d 720 (Fla. Dist. Ct. App. 1990); Hitachi Chem. Electro-Prods., Inc. v. Gurley, 466 S.E.2d 867 (Ga. Ct. App. 1995); Omori v. Jowa Haw. Co., 981 P.2d 703 (Haw. 1999); *Ledeaux*, 101 N.E.3d at 123-126 (applying Arizona and Texas law); Ransburg Indus. v. Brown, 659 N.E.2d 1081 (Ind. Ct. App. 1995); Cushing v. Time Saver Stores, Inc., 552 So. 2d 730 (La. Ct. App. 1989); Jackson v. Tastykake Inc., 648 A.2d 1214 (Pa. Super. Ct. 1994); Pupo v. Janney Cylinder Co., 12 Pa. D. & C.3d 617 (Ct. Com. Pl. 1979); *Meyer*, 26 P.3d at 926. But see Peters v. Tex. Instruments Inc., 2011 WL 4686518, at *1 (Del. Super. Ct. 2011) (applying Texas law) (concluding: "Christopher's claim is 'legally dependent' and thus derivative of Grady's. As such, the exclusivity provision of the Texas Workers' Compensation Act bars the plaintiffs' claims.").

Illustration 5, involving the injury at the fast-food restaurant, is drawn from Meyer v. Burger King Corp., 26 P.3d 925 (Wash. 2001).

Comment i. Death after birth. As Comment *i* explains, if the child is born alive and then dies as a result of the injury inflicted prior to, or during, the child's delivery, an action can be maintained for the child's wrongful death; if appropriate, a survival action may also be initiated. See Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995) (observing that "recovery generally is allowed for prenatal injuries for a child 'born alive'"); Restatement Second, Torts § 869, Reporter's Note to Subsection (2) (AM. L. INST. 1979) ("If the child is born alive, and subsequently dies as a result of the original injury, the courts allow recovery for wrongful death."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984) (explaining that, if a child born alive dies after birth, as a result of injuries inflicted while in utero, "an action will lie for his wrongful death"); 4 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 30.5 (2022 update) ("Where the child is born alive, the modern rule allows recovery for prenatal torts.").

Numerous cases are in accord. E.g., Pizza Hut of Am., Inc. v. Keefe, 900 P.2d 97, 101 (Colo. 1995) ("If a child dies after birth as a result of prenatal injuries, a surviving parent may bring a wrongful death claim derived from the child's injuries."); Grp. Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198, 1207 (Md. 1983) ("[A] cause of action lies for the wrongful death of a child born alive who dies as a result of injuries sustained while *en ventre sa mere*."); Thibert v. Milka, 646 N.E.2d 1025, 1026 (Mass. 1995) ("There is recovery where a child is born alive . . . ."); Hudak v. Georgy, 634 A.2d 600, 603 (Pa. 1993) ("reaffirming the unremarkable proposition that an infant born alive is, without qualification, a person" and that, when a person dies because of the defendant's tortious conduct, an "action for wrongful death and survival can be maintained"); Kalafut v. Gruver, 389 S.E.2d 681 (Va. 1990) (authorizing a cause of action when the child died less than two hours after birth); see also Restatement Second, Torts § 869, Reporter's Note to Subsection (2) (AM. L. INST. 1979) (collecting copious authority).

Illustration 6, regarding the child who lived for one hour prior to dying, is based on Gonzales v. Mascarenas, 190 P.3d 826, 828 (Colo. App. 2008).

Comment j. If the fetus is not born alive. As Comment *j* explains, if a child is not born alive, liability is a matter of state statutory law, not state common law. As such, it falls outside the four corners of this Section. See Restatement Second, Torts § 869, Reporter's Note to Subsection (2) (AM. L. INST. 1979) ("If the child is stillborn the question becomes one of statutory construction and whether it was ever a 'person' within the language of the wrongful death act of the particular jurisdiction.").

The vast majority of states interpret their wrongful-death statutes to permit recovery—and courts are particularly receptive to the claim if the fetus had reached the point of viability prior to the fatal injury.[1] See Castro v. Melchor, 366 P.3d 1058, 1066 (Haw. Ct. App. 2016) (explaining that the "overwhelming majority" of states permit wrongful-death claims to be initiated, especially when the fetus has reached the point of viability), aff'd, 414 P.3d 53 (Haw. 2018); Erika L. Amarante & Laura Ann P. Keller, *Dramatically Different Thresholds: Wrongful Death Before Birth*, 61 DRI FOR DEF. 30 (2019) (explaining that, as of 2019, 14 "states allow an embryo, or fetus, to maintain a wrongful death action any time after fertilization" while an additional 25 states "permit wrongful death actions for unborn fetuses" but use "viability as the threshold"); Sheldon R. Shapiro, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (originally published in 1978) (collecting authority).

For states that broadly authorize recovery regardless of the fetus's viability at the time of death, see, for example, ALASKA STAT. ANN. § 09.55.585(a) (establishing that, with a few exceptions, "[a] parent of an unborn child may maintain an action as plaintiff for the death of an unborn child that was caused by the wrongful act or omission of another"); KAN. STAT. ANN. § 60-1901(b) & (c) (defining the word "person" to include "an unborn child" and further establishing that "'unborn child' means a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth"); MICH. COMP. LAWS § 600.2922a(1) (establishing, with certain exceptions, that "[a] person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus"); NEB. REV. STAT. § 30-809(1) (including, with certain exceptions, "an unborn child in utero at any stage of gestation" in the wrongful-death statute); TENN. CODE ANN. § 20-5-106(d) (defining the word "person" in the

[1] The viability threshold is popular, but it has also been subject to criticism. See, e.g., Hamilton v. Scott, 97 So. 3d 728, 746 (Ala. 2012) (Parker J., concurring) ("Quite simply, the use of viability as a standard in prenatal-injury or wrongful-death law is incoherent."); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996) (dismissing viability, for purposes of tort law, as an "outmoded" and "arbitrary milestone"); Farley v. Sartin, 466 S.E.2d 522, 533 (W. Va. 1995) ("In our judgment, justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 369 (5th ed. 1984) (dismissing viability as a "most unsatisfactory criterion" since, inter alia, it is "a relative matter, depending on the health of the mother and child"); Douglas E. Rushton, *The Tortious Loss of A Nonviable Fetus: A Miscarriage Leads to A Miscarriage of Justice*, 61 S.C. L. REV. 915, 916 (2010) (criticizing the viability line as unjustifiably "harsh"); Sarah J. Loquist, Note, *The Wrongful Death of A Fetus: Erasing the Barrier Between Viability and Nonviability*, 36 WASHBURN L.J. 259, 288 (1997) (criticizing the "viability requirement" as "arbitrary" and "difficult to apply because it is so hard to determine exactly when a fetus becomes viable"); Daniel S. Meade, Comment, *Wrongful Death and the Unborn Child: Should Viability Be a Prerequisite for a Cause of Action?*, 14 J. CONTEMP. HEALTH L. & POL'Y 421, 442 (1998) (criticizing the viability line as both "unjust" and "arbitrary").

state's Wrongful Death Act to include "an unborn child at any stage of gestation in utero"); Mack v. Carmack, 79 So. 3d 597, 611-612 (Ala. 2011) (expressly holding "that the Wrongful Death Act permits an action for the death of a previable fetus"); Connor v. Monkem Co., 898 S.W.2d 89, 93 (Mo. 1995) (concluding that "a wrongful death claim may be stated for a nonviable unborn child"); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996) ("South Dakota's wrongful death statute preserves the interests of parents in their unborn child and authorizes a remedy when a third party wrongfully ends their child's life before birth. Parents may seek redress regardless of whether their unborn child was viable."); Farley v. Sartin, 466 S.E.2d 522, 535 (W. Va. 1995) ("[I]f death ensues as a result of a tortiously inflicted injury to a nonviable unborn child, the personal representative of the deceased may maintain an action pursuant to our wrongful death statute.").

In addition to claims for wrongful death, many states have enacted freestanding survival acts. See generally § 71 [approximately] (of this draft) (addressing survival actions). In these states, depending on relevant statutory language, survival act claims for tortiously inflicted prebirth injury may be cognizable. E.g., Castro v. Melchor, 414 P.3d 53, 67-69 (Haw. 2018) (holding that, under Hawaii's survival act, a fetus's estate was entitled to recover for the fetus's loss of enjoyment of life).

Roughly a half-dozen states, by contrast, interpret their wrongful-death statutes to disallow recovery for tortiously inflicted fatal fetal injury. See *Castro*, 366 P.3d at 1065 & n.6 (reporting that "only six states—California, Florida, Iowa, Maine, New Jersey, and New York—prohibit wrongful death claims from being brought on behalf of unborn children"); Amarante & Keller, supra (stating, as of 2019, "[s]ix states do not allow any unborn fetuses to bring wrongful death cause of actions"). In these states, the parents of the deceased fetus may be entitled to recover for their own emotional distress stemming from the fetus's death. E.g., Tanner v. Hartog, 696 So. 2d 705, 706-709 (Fla. 1997) (reiterating "that there is no cause of action under Florida's Wrongful Death Act for the death of a stillborn fetus" but nevertheless authorizing a cause of action, held by parents, "for negligent stillbirth," and clarifying that damages in such an action are "limited to mental pain and anguish and medical expenses incurred incident to the pregnancy").

Additionally, a small number of states have not yet addressed such claims. See *Castro*, 366 P.3d at 1065 & n.8 (stating that courts have not yet addressed the action in Colorado and Wyoming); Amarante & Keller, supra (observing that, in an additional "handful of states, there is no appellate authority and little statutory guidance on whether and when a fetus can bring a cause of action for wrongful death").

WRONGFUL PREGNANCY, BIRTH, AND LIFE

§ __. Wrongful Pregnancy

An actor who tortiously causes a woman to suffer an unwanted pregnancy or the unwanted continuation of a pregnancy and the subsequent birth of a child is subject to liability for the unwanted pregnancy and the subsequent birth of an unplanned child.

Comment:

a. History and scope.
b. Support and rationale.
c. The elements of a wrongful-pregnancy claim.
d. Duty.
e. Breach of duty.
f. Factual cause.
g. Scope of liability (proximate cause).
h. Unwanted pregnancy that results in birth as legally cognizable harm.
i. Relationship to wrongful-birth and wrongful-life claims.
j. New cause of action or application of traditional tort principles?
k. Beyond medical malpractice.
l. Informed consent.
m. Wrongful pregnancy without birth.
n. Intentional torts, enabling torts, and negligent impregnation.
o. Damages.
p. Avoidable consequences.
q. Procreative autonomy as harm.

a. History and scope. Cases recognizing claims for wrongful pregnancy did not emerge until the late 1960s, after the volumes of the Restatement Second of Torts that might have addressed these claims were completed and published.

This Section recognizes a cause of action for wrongful pregnancy. Damages for violations of this Section are specified in Restatement Third, Torts: Remedies § 26 (Tentative Draft No. 3, 2024). Central to this tort is recognition that the imposition of an unwanted pregnancy and birth of a child interferes with important personal interests in modern society, including reproductive freedom and bodily integrity.

As the black letter and Comments *h* and *m* explain, to state a wrongful-pregnancy claim, courts have so far only confronted cases in which a child was born as a consequence of the defendant's breach. It does not matter, however, whether the child is or is not born with a disability. Accordingly, unlike a wrongful-birth claim addressed in § __, which demands a showing that the child is disabled, the gist of a wrongful-pregnancy claim is that the mother or parents did not want *any* child and the affiliated pregnancy. When a woman becomes pregnant and bears no live child as a result of the defendant's breach, this Section takes no position on whether the woman has a wrongful-pregnancy claim. See Comment *m*. Typically, however, such a woman will have a conventional claim, such as for physical injury or cognizable emotional distress, addressed through traditional tort principles. See Illustrations 5 and 6.

Illustrations:

1. Dr. Pagoof negligently performs a sterilization procedure on Marguerite; Marguerite sought the sterilization procedure because, for financial reasons, she did not want to bear or raise another child. Not realizing her error, Dr. Pagoof tells Marguerite that she doesn't have to worry about becoming pregnant. Relying on Dr. Pagoof's false assurance, Marguerite engages in unprotected sex and bears a nondisabled, but unwanted, child. Dr. Pagoof is subject to liability for wrongful pregnancy. Because the child is not disabled, Dr. Pagoof is not liable to Marguerite for wrongful birth. See § __ Wrongful Birth, Comment *f*.

2. Same facts as Illustration 1, except that now, the child is born with a limb-reduction birth defect unrelated to the botched sterilization procedure. Still, same result as in Illustration 1. Dr. Pagoof is subject to liability to Marguerite for wrongful pregnancy. Dr. Pagoof is not liable to Marguerite for wrongful birth because the risk of a child being born with a birth defect is not one of the risks the sterilization procedure was intended to address and therefore is not within Dr. Pagoof's scope of liability. See Comment *g*.

Typically, although not exclusively, the tortious conduct that results in an unwanted pregnancy is a failed sterilization procedure (on either the mother, as in Illustrations 1 and 2, or the father); a failed abortion; an inaccurate diagnosis of a pregnancy; neglect in providing the requisite information for informed consent in connection with a sterilization procedure or abortion; negligent misrepresentation about a patient's fertility; or error in connection with, or a defect in, a birth-control device or pharmaceutical.

b. Support and rationale. The wrongful-pregnancy claim is widely accepted by a substantial majority of jurisdictions, including the vast majority of jurisdictions to consider the matter.

The rationale for recognition of the wrongful-pregnancy claim is largely congruent with the reasons for recognizing tort claims generally: deterring socially harmful conduct, providing compensation for the victims of that conduct, and fairness in requiring a wrongdoer to provide that compensation. Notwithstanding these basic principles, initially, some objected to recognition of the wrongful-pregnancy tort, uncomfortable with the notion that the birth of a child could constitute legally cognizable harm. Thus, some argued that the birth of a child, whether wanted or unwanted, is *always* a benefit. In time, however, that resistance faded as courts and commentators recognized that many people—quite rationally—seek to avoid having a child, and they do so by employing (frequently costly) contraception or subjecting themselves to sometimes painful and expensive sterilization procedures. These individuals are entitled to compensation when, because of an actor's tortious conduct, those efforts to avoid having a child fail.

c. The elements of a wrongful-pregnancy claim. To establish a claim under § __, a plaintiff must establish that the defendant had a duty of care to the plaintiff and prove that the defendant breached that duty of care. In addition, a plaintiff must prove that the defendant's breach was a factual cause of an unwanted pregnancy, or the continuation of an unwanted pregnancy, that leads to the birth of a child—and that the harm for which recovery is sought (the unwanted pregnancy and subsequent birth) is within the defendant's scope of liability. Because this tort recognizes an unwanted pregnancy and the birth of a child resulting from that pregnancy as legally cognizable harm, the final element is established with proof that such a birth occurred. No special rules exist for this claim; established tort rules that generally govern the duty, breach, factual-cause, and scope-of-liability inquiries equally apply to claims initiated under this Section. Each of the elements identified in this Comment is addressed in the Comments below.

d. Duty. As in Illustrations 1 and 2, wrongful-pregnancy claims frequently involve medical malpractice. In that scenario, one or the other of the parents will be in a patient-care relationship with the physician defendant—and that patient-care relationship will provide the basis for a duty of reasonable care running from the physician to the patient-parent. See Restatement Third, Torts: Medical Malpractice § 3 (reproduced in Appendix B of Tentative Draft No. 2, 2024). What is less clear in those situations is whether the physician-defendant also owes a duty of care to the *other* (nonpatient) parent. While the patient-care relationship is not a basis for a duty in these

circumstances, performing a sterilization procedure creates a risk of harm, i.e., a failure that results in an unwanted pregnancy and subsequent birth, providing a basis for a duty to the nonpatient parent. See id. § 3(b) (providing that, in addition to duties arising from patient-care relationships, professionals are subject to general tort-law duties); Restatement Third, Torts: Liability for Physical and Emotional Harm § 7 (providing a general tort-law duty for misfeasance). Accordingly, the duty of reasonable care is typically owed to both parents. See Restatement Third, Torts: Remedies § 26 (Tentative Draft No. 3, 2024) (providing for the recovery of damages by both parents in a wrongful-pregnancy claim).

e. Breach of duty. As noted, frequently, the defendants in wrongful-pregnancy actions are health-care professionals (very frequently, physicians); these professionals are subject to the standard of care set forth in Restatement Third, Torts: Medical Malpractice § 5 (Tentative Draft No. 2, 2024). Meanwhile, product manufacturers are subject to liability for defective products pursuant to Restatement Third, Torts: Products Liability §§ 2, 3, and 6. And, when the defendant is neither a health-care provider nor a product manufacturer, such as a pharmacist who misfills a prescription for a birth-control drug, the defendant is subject to the ordinary duty of reasonable care, as provided in Restatement Third, Torts: Liability for Physical and Emotional Harm § 7.

f. Factual cause. To establish a wrongful-pregnancy claim, a plaintiff must prove that an unwanted pregnancy and subsequent birth would not have occurred absent the defendant's tortious conduct. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 26.

g. Scope of liability (proximate cause). As with all negligence claims, defendants are liable only for harms within their scope of liability (frequently called proximate cause). See id. § 29. This means that the risk of an unwanted pregnancy must have been a risk that made the defendant's conduct tortious. Ordinarily, a procedure or product designed to prevent a pregnancy that, because of tortious conduct, is unsuccessful will fall squarely within the defendant's scope of liability.

Illustration:

3. Same facts as Illustration 1, except that Marguerite does not want to become pregnant because of her concern about having a child with a disability, a matter she explains to Dr. Pagoof. Ultimately, the child that is born has no disability. Dr. Pagoof is not subject to liability to Marguerite for wrongful pregnancy because the risk that the sterilization procedure addressed was the birth of a child with a disability, not the birth of one without a disability. Because Marguerite's child is born without a disability, Dr. Pagoof is also not

liable for wrongful birth. See § __ [Wrongful Birth]. Although Dr. Pagoof is not liable to Marguerite for wrongful pregnancy or wrongful birth, he may be liable to her for her unwanted pregnancy and damages consequential to the pregnancy. See Illustration 5.

Most courts rule the same way as in Illustration 3 but ground their decision in public policy rather than scope of liability. That doctrinal hook has the litigative-efficiency advantage of being a matter of law for the court, as opposed to scope of liability, which is to be resolved by the factfinder. Employing public policy to deny recovery could comfortably be grounded in a limitation of duty based on public policy. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(b) (explaining how courts may withdraw or limit the duty of care based on policy considerations). Both of these approaches to denying recovery are reasonable, and there is no strong reason for preferring one or the other.

A person or couple may have multiple reasons for wanting to avoid a pregnancy. Or there may be a dispute about what *actually* motivated a plaintiff's decision to use birth control or undergo a sterilization procedure. In such instances, in a situation like Illustration 3, the factfinder would be required to determine, based on the facts of the case, whether avoiding *that* pregnancy and the subsequent birth of *that* child was *among* the various risks that the patient sought to avoid and were the basis of the physician's negligence in performing the procedure. Because only foreseeable risks can be the basis for finding an actor's conduct negligent, the physician performing a sterilization procedure must be aware of the risks the patient sought to avoid by undergoing the sterilization procedure.

Illustration:

4. Same facts as Illustration 1, except that Marguerite did not want to become pregnant because of her concern about having a child with a disability and *also* because the birth of a child—and the associated pregnancy and childcare responsibilities—would stunt her career. The child is born without a disability. Now, Dr. Pagoof is subject to liability to Marguerite for wrongful pregnancy. Because Marguerite's child is not disabled, Dr. Pagoof is not liable for wrongful birth. See § __ [Wrongful Birth] of this draft.

h. Unwanted pregnancy that results in birth as legally cognizable harm. Essential to the existence of the wrongful-pregnancy claim is judicial recognition of an unwanted pregnancy that results in the birth of a child as a legally cognizable harm. All of the courts comprising the majority

that recognize this cause of action have identified an unwanted pregnancy and the subsequent birth of a child as legally compensable harm.

Illustrations:

5. Jasmine has an IUD manufactured by D-Secure inserted into her uterus. She opts for the IUD because she wants to finish medical school before starting her family—and also because, given her medical training, she is particularly concerned about pregnancy-related risks and complications. Unfortunately, the IUD is defectively designed, and, owing to the defect, Jasmine becomes pregnant. Like roughly two percent of pregnancies, Jasmine's pregnancy is ectopic—and the ectopic pregnancy, which does not result in the birth of a child, causes her fallopian tube to burst. Because no child is born, this Section takes no position on whether D-Secure is subject to liability for wrongful pregnancy. See Comment *m*. However, pursuant to general product liability principles, D-Secure may be subject to liability for Jasmine's bodily harm and the usual consequential damages for such harm. See Restatement Third, Torts: Products Liability § 2(b); Restatement Third, Torts: Remedies § 2 (Tentative Draft No. 1, 2022); Restatement Third, Torts: Remedies §§ 18-20 (Tentative Draft No. 2, 2023).

6. Same facts as in Illustration 5, except that Jasmine carries the fetus to the fifth month, at which time she suffers a spontaneous miscarriage. In order to remove the deceased fetus from her uterus, she undergoes a painful dilation and curettage (D&C) procedure. Same result as in Illustration 5. While this Section takes no position on whether D-Secure is subject to liability for Jasmine's wrongful pregnancy, see Comment *m*, pursuant to general product liability principles, D-Secure may be subject to liability for the bodily harm and the consequential damages available for such harm. See Restatement Third, Torts: Products Liability § 2(b); Restatement Third, Torts: Remedies § 2 (Tentative Draft No. 1, 2022); Restatement Third, Torts: Remedies §§ 18-20 (Tentative Draft No. 2, 2023).

To date, courts have not addressed claims in which a woman suffers an unwanted pregnancy but avoids bearing a child either because of miscarriage, stillbirth, or other termination of the pregnancy. Thus, as Comment *m* explains, this Section takes no position on whether, when the unwanted pregnancy is terminated prior to birth, a *wrongful-pregnancy* claim exists. As Illustrations 5 and 6 show, however, many women who suffer an unwanted pregnancy will suffer affiliated emotional distress, medical expenses, lost wages, or loss of consortium, traceable to that

unwanted pregnancy, and these women will frequently be entitled to recover for that cognizable harm under conventional tort principles.

i. Relationship to wrongful-birth and wrongful-life claims. As explained in Comment *a*, the gist of the wrongful-pregnancy claim is that a child was born as a result of an unwanted pregnancy due to an actor's tortious conduct. Such a claim will ordinarily involve the birth of a child without a disability, but, as explained in Comment *a*, there is no requirement that the child is nondisabled. Thus, if an unwanted pregnancy results in the birth of a child with a disability, a wrongful-pregnancy claim may still proceed. See Illustration 2.

By contrast, essential to a wrongful-birth claim, addressed in § __, is a child born with a disability—a birth that would not have existed in the absence of negligence. When an unwanted pregnancy results in the birth of a child with a disability, a plaintiff may assert both a wrongful-pregnancy claim (under this Section) *and* a wrongful-birth claim (pursuant to § __ of this draft).

Illustrations:

7. Dr. Fried negligently fails to diagnose Nikki's pregnancy until her second trimester, well after an abortion ceases to be an option, and Nikki ultimately bears a nondisabled child. Nikki saw Dr. Fried early in her first trimester because she already had seven children and explained to him that she did not want another child. Pursuant to this Section, Dr. Fried is subject to liability for wrongful pregnancy, but, because Nikki's child is born without a disability, Dr. Fried is not liable for wrongful birth.

8. Dr. Fried performs a tubal ligation on Nikki for the purpose of sterilizing her, after she explains to him that she does not want to have any more children for financial reasons. As a result of Dr. Fried's negligence in performing the procedure, Nikki becomes pregnant and bears a child who (due to a genetic disorder) suffers from a birth defect. Dr. Fried's error did not cause the birth defect but enables an unwanted child with a birth defect to be born. Pursuant to this Section, Dr. Fried is subject to liability for wrongful pregnancy, but, because the risk of a child being born with a genetic defect was not among the risks that made Dr. Fried negligent in his performing the tubal ligation, he is not liable for wrongful birth.

9. Same facts as Illustration 8, except that, because of her advanced age, Nikki also expresses to Dr. Fried her concern that any child she might have could be born with a birth defect and Nikki, because of Dr. Fried's negligence, bears a child with Down syndrome (a

birth defect associated with advanced maternal age). Pursuant to this Section, Dr. Fried is subject to liability for wrongful pregnancy, and, because the risk of a child being born with a birth defect was among the foreseeable risks making Dr. Fried negligent, see Comment *g*, pursuant to § __, he is also subject to liability for wrongful birth.

A wrongful-life claim, addressed in § __, is different from either a wrongful-pregnancy or wrongful-birth claim because it is brought by a child, rather than the parent or parents, and the child's claim is that being born with a disability constitutes legally cognizable harm. Wrongful-life claims thus rest on the uncomfortable notion that nonexistence (hence the label "wrongful life") is better than life with a disability. Courts have been unwilling to so hold. Accordingly, § __, like nearly all courts, declines to recognize claims for wrongful life.

j. New cause of action or application of traditional tort principles? Some courts conceive of wrongful-pregnancy claims as a new and distinct cause of action. Other courts insist that wrongful-pregnancy claims do not involve a new cause of action; they merely apply traditional tort principles to the reproductive context. In favor of the former characterization, the recognition of a wrongful-pregnancy tort entails acceptance that an unwanted pregnancy is a legally compensable harm—and no court so held until 1967. In favor of the latter view, traditional principles of duty, breach, factual causation, and scope of liability apply to these claims. See Comment *c*. Nothing much turns on how the claim is characterized, and this Section leaves that matter to local norms and preferences. Characterizing claims under this Section as "wrongful pregnancy" does have the modestly salutary benefit of honing in on the harm for which a plaintiff seeks to recover.

k. Beyond medical malpractice. As the Illustrations above suggest and as Comments *d* and *e* explain, many wrongful-pregnancy claims are brought against physicians. Nevertheless, as Illustrations 5 and 6 demonstrate, a claim under this Section does not *require* that the defendant be a physician or other health-care provider. If the plaintiff satisfies the elements set out in Comment *c*, other actors may be liable, including a manufacturer of a defective birth-control drug or device or a pharmacist who negligently fills a prescription.

l. Informed consent. As Comment *k* explains, wrongful-pregnancy claims are often based on professional malpractice—and they frequently arise when physicians negligently perform sterilization or abortion procedures. In addition, liability under this Section can, in some cases, arise based on a physician's breach of the duty of informed consent before performing a procedure or other course of treatment. See Restatement Third, Torts: Medical Malpractice § 12 (Tentative

Draft No. 2, 2024). Informed-consent liability applies to procedures that are unsuccessful for reasons other than provider malpractice.

Illustration:

10. Dr. Fried performs a vasectomy on Ken, as Ken and his spouse, Roni, decide not to have any more children. In the course of obtaining Ken's consent to the vasectomy, Dr. Fried does not provide any information to Ken about the risk of a failed procedure. In neglecting to divulge this information, Dr. Fried breaches his duty to obtain informed consent. See id. Dr. Fried performs the vasectomy competently, but it nevertheless fails. Unaware of the risk of failure, Ken and Roni resume their sex life, and Roni becomes pregnant, which results in the birth of an unplanned and unwanted child. Dr. Fried is subject to liability to Ken and Roni for wrongful pregnancy based on his failure to obtain informed consent from Ken.

m. Wrongful pregnancy without birth. Conceptually, a wrongful-pregnancy claim might be asserted by a woman who suffers an unwanted pregnancy that does not result in the birth of a child, whether due to miscarriage, because the woman is able to terminate the pregnancy before delivery, or for some other reason. Such a claim could proceed via traditional tort principles independent of wrongful pregnancy, and the woman might recover for pain and suffering of the pregnancy, emotional distress at the prospect of an unwanted pregnancy or miscarriage, medical expenses associated with the pregnancy and its termination, lost earnings or earnings capacity, and loss of consortium by the woman's spouse. See Comment *h* and Illustration 5. Because of the absence of case law addressing whether such claims constitute wrongful pregnancy, this Restatement leaves the matter to future development. However, not much would seem to ride on whether such a claim is based on traditional tort principles or denominated a wrongful-pregnancy suit. What makes the latter distinctive is recognition of the birth of an unwanted child as a legally cognizable harm, a recognition unnecessary in suits based on an unwanted pregnancy that is terminated without a live birth.

n. Intentional torts, enabling torts, and negligent impregnation. Although research has not revealed such a case, an intentional tortfeasor who rapes a woman would, logically, be subject to liability under this Section if the rape resulted in the birth of a child. By extension, a third-party who tortiously enabled the rape of a woman, such as by providing defective locks on a hotel door, that resulted in the birth of a child would also be subject to liability under this Section. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 19 (addressing conduct

that is negligent because of the prospect of improper conduct by the plaintiff or a third party). Finally, liability under this Section could theoretically exist for someone who negligently impregnates a woman by, say, failing to exercise reasonable care in employing birth control that he agreed to employ.

o. Damages. Restatement Third of Torts: Remedies § 26(a) (Tentative Draft No. 3, 2024) addresses the damages recoverable for wrongful-pregnancy claims. That Section provides for recovery of damages for: "(1) lost earnings or earning capacity, medical expenses, pain and suffering, and loss of consortium resulting from pregnancy or childbirth or from the need to repeat any failed medical procedure to prevent conception, and (2) emotional harm resulting from the tort and suffered between the discovery of the pregnancy and the mother's recovery from childbirth, or suffered later and resulting from a second medical procedure to prevent conception or from continuing bodily harm resulting from the pregnancy or birth. (cross-references omitted)." Costs of childrearing and damages for emotional harm resulting from raising an unwanted child are not recoverable. Id.

p. Avoidable consequences. A woman need not terminate the unwanted pregnancy nor put her child up for adoption to recover, in full, for wrongful pregnancy. See Restatement Third, Torts: Remedies § 26, Comment *f* (Tentative Draft No. 3, 2024).

q. Procreative autonomy as harm. Commentators have identified interference with procreative autonomy as a distinct harm to plaintiffs in both wrongful-pregnancy and wrongful-birth cases. Just as with informed-consent cases, courts have not, to date, recognized that specific consequence, independent of an unwanted pregnancy and subsequent birth of a child, as a legally compensable harm. Thus, the dignitary harm due to interfering with a parent's reproductive choice is not an independent element for which damages can be recovered. Restatement Third, Torts: Remedies § 22 (Tentative Draft No. 2, 2023).

REPORTERS' NOTE

Comment a. History and scope. The Restatement Second of Torts did not contain a provision addressing wrongful pregnancy. Cases asserting claims for wrongful pregnancy did not emerge until the late 1960s. See Casenote*, The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808, 809 (1965) ("There is relatively little authority on the question of whether legally compensable damage is incurred from the birth of a normal, healthy child subsequent to an ineffective, nontherapeutic sterilization operation."). Custodio v. Bauer, 59 Cal. Rptr. 463 (Ct. App. 1967), is credited as the seminal case recognizing

a claim for an unwanted pregnancy that resulted from a negligently performed sterilization. Not until the 1980s, though, did a substantial number of courts recognize wrongful-pregnancy claims.

While Marguerite may maintain a wrongful-pregnancy claim in Illustration 2, she would not succeed in a wrongful-birth claim, because the child's suffering the *unanticipated* birth defect is outside Dr. Pagoof's scope of liability (proximate cause). See Comment *g*.

Comment b. Support and rationale. As commentators and case law make clear, the wrongful-pregnancy tort is well accepted; it is now recognized by a substantial majority of jurisdictions. The Dobbs treatise reports: "The great majority [of courts] now recognize the claim . . . ." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 369 (2023 update); see also 2 STEIN ON PERSONAL INJURY DAMAGES § 12:4 (2022 update) (stating that, currently, almost all jurisdictions recognize wrongful pregnancy); Reed v. Campagnolo, 630 A.2d 1145, 1149 (Md. 1993) ("The clear majority of courts that has considered the [wrongful-pregnancy claim] . . . has concluded that there is legally cognizable injury . . . ."); Burke v. Rivo, 551 N.E.2d 1, 3 (Mass. 1990) ("The great weight of authority permits the parents of a normal child born as a result of a physician's negligence to recover damages directly associated with the birth."); Restatement Third, Torts: Remedies § 26, Reporters' Note to Comment *c* (AM. L. INST., Tentative Draft No. 3, 2024) (identifying the few states that do not recognize wrongful-pregnancy claims and the four states in which there is no relevant case law). Independent research by the Reporters found that 39 of 41 jurisdictions to consider the wrongful-pregnancy tort have adopted it. Of the two that did not, one refused to accept it. See Szekeres v. Robinson, 715 P.2d 1076, 1076 (Nev. 1986). The Iowa Supreme Court held that the parents of a "healthy child" could not recover child-rearing expenses from a physician who negligently performed an abortion but did not rule on whether plaintiffs could obtain other remedies for wrongful pregnancy. See Nanke v. Napier, 346 N.W.2d 520, 521, 523 (Iowa 1984). In dicta in a later case, the court claimed a broader holding for *Nanke*. See Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 395 (Iowa 2017) ("We previously held parents have no right to sue for wrongful pregnancy based on a medical mistake that led to the birth of a 'normal, healthy child.'") (quoting *Nanke*).

Troppi v. Scarf, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971), makes a compelling case about understanding an unwanted pregnancy and subsequent birth of a child as harm to the parents:

> To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.

The Massachusetts Supreme Judicial Court makes a similarly compelling argument:

> The very fact that a person has sought medical intervention to prevent him or her from having a child demonstrates that, for that person, the benefits of parenthood did not outweigh the burdens, economic and otherwise, of having a child. The extensive use of contraception and sterilization and the performance of numerous abortions each year show that, in some instances, large numbers of people do not

> accept parenthood as a net positive circumstance. We agree with those courts that have rejected the theory that the birth of a child is for all parents at all times a net benefit.

Burke v. Rivo, 551 N.E.2d 1, 4 (Mass. 1990). The *Burke* court also rejected other arguments that had been made against recognizing the wrongful-pregnancy tort. With regard to harming the unwanted child who might learn at some point that the parents desired not to have the child, the court observed that making such an assessment was for the parents and not the courts. The court, in addition, rejected the claim that determining damages was too speculative and that the damages might be disproportionate to the wrongful conduct by defendant, observing that determining damages for wrongful pregnancy is no more difficult than determination of damages for other types of future damages that are routinely calculated and which may be far greater in magnitude than the damages awarded in a wrongful-pregnancy case. *Burke*, 551 N.E.2d at 4-5.

Comment d. Duty. Very few courts addressing wrongful-pregnancy claims explicitly address the matter of whether a medical professional's duty of care extends to the nonpatient parent. In many cases, whether such a duty is owed is of no practical importance because the patient-parent can recover all available damages. However, when there are elements of damages particular to each parent, duty becomes critical. Most courts, without confronting the issue, have permitted both parents to recover (thus implicitly recognizing that a duty is owed to both). Courts permitting both parents to recover, albeit when all of the damages are common to both parents, include Univ. of Ariz. Health Scis. Ctr. v. Superior Ct. of State In & For Maricopa Cnty., 667 P.2d 1294, 1301 (Ariz. 1983); Macomber v. Dillman, 505 A.2d 810, 813 (Me. 1986); Jones v. Malinowski, 473 A.2d 429, 438 (Md. 1984); Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971) (permitting both parents to pursue wrongful-pregnancy claim against pharmacist who filled mother's birth-control prescription with the wrong drug). For cases that permit both parents to recover damages when some damages are specific to each, see, e.g., Johnston v. Elkins, 736 P.2d 935, 940 (Kan. 1987) (negligent vasectomy; mother permitted to recover for pain and suffering in connection with the pregnancy, childbirth, and subsequent tubal ligation); Burke v. Rivo, 551 N.E.2d 1, 5 (Mass. 1990) (approving both parents' recovery for emotional distress in suit against physician who performed botched tubal ligation on mother); Miller v. Rivard, 585 N.Y.S.2d 523, 526 (App. Div. 1992) (ruling that wife could maintain action against husband's urologist for failed vasectomy that resulted in birth of child despite the absence of physician–patient relationship between wife and urologist).

Only one court has denied the physician's duty to the nonpatient parent. In Dehn v. Edgecombe, 865 A.2d 603, 615 (Md. 2005), the husband underwent an unsuccessful vasectomy. His claim was unsuccessful because of his contributory negligence (contributory negligence being a complete bar to recovery in Maryland) in failing to follow postoperative instructions to assess whether the procedure was successful. Without addressing whether the husband's contributory negligence would be attributable to the wife's claim, the court held that the defendant owed no duty to her because she was not a patient.

Comment g. Scope of liability (proximate cause). Illustration 2 is based on dicta in Univ. of Ariz. Health Scis. Ctr. v. Superior Court, 667 P.2d 1294, 1300 (Ariz. 1983); see also Hartke v.

McKelway, 707 F.2d 1544, 1553-1555 (D.C. Cir. 1983) (applying District of Columbia law) (denying recovery of expenses for raising child when sterilization was sought solely because of woman's fear of childbirth and citing cases in accord); Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D. W. Va. 1967) ("remarking with regard to scope of liability: "The operation in question was allegedly undertaken to safeguard Mrs. Bishop's health . . . , it follows that if the condition which it sought to avoid subsequently occurred . . . the victim has been injured."); Jones v. Malinowski, 473 A.2d 429 (Md. 1984) (observing that "the assessment of damages associated with the healthy child's birth, if any, should focus upon the specific interests of the parents that were *actually* impaired by the physician's negligence, i.e., was the sterilization sought for reasons that were (a) genetic—to prevent birth of a defective child, or (b) therapeutic—to prevent harm to the mother's health or (c) economic—to avoid the additional expense of raising a child"); Burke v. Rivo, 551 N.E.2d 1, 5 (Mass. 1990) ("If the parents' desire to avoid the birth of a child was founded on eugenic reasons (avoidance of a feared genetic defect) or was founded on therapeutic reasons (concern for the mother's health) and if a healthy normal baby is born, the justification for allowing recovery of the costs of rearing a normal child to maturity is far less than when, to conserve family resources, the parents sought unsuccessfully to avoid conceiving another child."); Christensen v. Thornby, 255 N.W. 620, 622 (Minn. 1934) (denying recovery for failed sterilization procedure on the ground that its purpose was to protect the health of the woman and therefore the expenses incident to having a child were "remote from the avowed purpose of the operation"); Speck v. Finegold, 408 A.2d 496, 513 n.4 (Pa. Super. Ct. 1979) (Spaeth, J., concurring and dissenting) (distinguishing the instant case from a "case in which a child that resulted from the defendant's negligence had been unwanted because its birth presented a risk that in the end did not materialize. For example, it might be that a couple desired no more children because they feared a risk to the mother's health in childbirth, or, as here, a hereditary disease. If a child was because of the defendant's negligence nevertheless born, but with no damage to the mother's health and itself healthy, arguably the damages should not include the expenses of raising the child.") aff'd in part, rev'd in part on other grounds, 439 A.2d 110 (Pa. 1981). Several commentators are in agreement. See David J. Mark, Comment, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1187, 1197 (1976) ("Couples sometimes use birth control measures to preserve the mother's health, or to avoid having an abnormal child. If contraceptive measures fail here, but a normal child is born, damages might properly be denied on the theory that no injury was suffered."); *Recent Case,* 28 DEPAUL L. REV. 249, 257 (1978) (suggesting that instead of application of the "benefits rule" in wrongful pregnancy cases, the purpose of the sterilization be used to determine "the actual damage caused by the negligent act"); Brian McDonough, Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 78 (1981) ("[I]f plaintiffs in a failed sterilization case hope to gain maximum recovery, they will have to prove that the purpose of sterilization was to prevent pregnancy and not possible injury to the woman because of pregnancy.").

Burns v. Hanson, 734 A.2d 964 (Conn. 1999), is arguably in conflict with this Comment. There, the plaintiff-mother had an advanced and disabling case of multiple sclerosis. She and her husband decided not to have any more children because of her difficulty functioning due to her

compromised condition and a concern that pregnancy might exacerbate her condition. Plaintiff alleged that, due to her gynecologist's negligence, she became pregnant and that her doctor also negligently failed to diagnose her pregnancy. A healthy child was born, and plaintiff sued her gynecologist for wrongful pregnancy. The trial court dismissed her claim for the costs of raising a healthy child, and, on appeal, the Connecticut Supreme Court rejected the defendant's effort to uphold the dismissal on the ground that the plaintiff's reasons for avoiding pregnancy did not include the costs of raising a healthy child:

> In our view, the defendant's argument is fundamentally inconsistent with our reasoning in [a prior case that recognized wrongful pregnancy]. We declined to carve out any exception, grounded in public policy, to the normal duty of a tortfeasor to assume liability for all the damages that he or she has caused. We held that any such exception would improperly burden the exercise of a constitutionally protected right to employ contraceptive measures to limit the size of one's family. That constitutional right is similarly a part of the background in the present case. Moreover, unlike the cases upon which the defendant relies, the risk that the plaintiff sought to avoid in fact did come to pass in the present case. We are, therefore, not persuaded at this juncture to follow what may be contrary precedents in other state courts.

Id. at 969. The generic public-policy limitation that the court rejected is actually the matter of scope of liability (proximate cause) and is an element of a prima facie case in all negligence suits. The court's rejection of defendant's claim that the issue justified ruling in its favor as a matter of law seems correct, as scope of liability is a factual matter for the jury and, given the desire of the plaintiff to avoid the burdens of raising a child, well within the jury's prerogative to decide the matter either way. Nevertheless, the language of the court could be understood to eliminate the issue from *any* consideration at the retrial ordered by the court. If so, *Burns* is inconsistent with this Comment and the well-settled principle of scope of liability limiting the damages for which a defendant can be held liable.

Comment h. Unwanted pregnancy that results in birth as legally cognizable harm. Prior to the recognition of wrongful-pregnancy claims, defendants successfully fended them off for two overlapping reasons: because an unwanted pregnancy was not a legally cognizable harm or because, in the courts' view, the benefits of having a child necessarily offset (or eclipsed) any harm the parents suffered. See Hartke v. McKelway, 707 F.2d 1544, 1552 (D.C. Cir. 1983) (applying District of Columbia law) (affirming wrongful-pregnancy verdict, but commenting: "A number of courts have ruled that as a matter of law no healthy child can ever be considered an injury to its parents, because, as one court put it, 'it is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable "benefits" of parenthood far outweigh any of the mere monetary burdens involved.'") (quoting Public Health Tr. v. Brown, 388 So. 2d 1084, 1085-1086 (Fla. Dist. Ct. App. 1980)); Custodio v. Bauer, 59 Cal. Rptr. 463, 467 (Ct. App. 1967) (explaining, but ultimately rejecting, defendants' argument that "pregnancy, the ensuing birth of a child, and the costs and expenses of the delivery and rearing of a child, are not legally cognizable injuries").

In time, however, this position receded. Reflecting this transition, in 1971, one court responded to the "child-always-a-benefit justification" for denying wrongful-pregnancy claims:

> To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.

Troppi v. Scarf, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971); see also Terrell v. Garcia, 496 S.W.2d 124, 131 (Tex. Civ. App. 1973) (Cadena, J., dissenting) ("The birth of [an 'unwanted'] child may be a catastrophe not only for the parents and the child itself, but also for previously born siblings.").

In more recent years, numerous courts, in the course of recognizing a claim for wrongful pregnancy, have held that an unwanted pregnancy and a child's subsequent birth constitute legally cognizable harm. See, e.g., Dotson v. Bernstein, 207 P.3d 911, 914 (Colo. App. 2009) (concluding that the birth of an unwanted healthy child after an unsuccessful abortion constituted a legally cognizable injury). But see Johnson v. Univ. Hosps. of Cleveland, 540 N.E.2d 1370, 1378 (Ohio 1989) (limiting damages in wrongful-pregnancy claim to harm suffered by mother during the pregnancy and denying recovery of child-rearing costs because "the birth of a normal, healthy child cannot be an injury to her parents").

Comment i. Relationship to wrongful-birth and wrongful-life claims. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 369 (2023 update) (addressing the difference among and between wrongful-pregnancy, wrongful-birth, and wrongful-life claims); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 8.2 at 688-689 (3d ed. 2018); MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 329-331 (11th ed. 2021).

Doctrinally, the reason no recovery is available for wrongful birth in Illustration 8 is that the child's disability is not one of the risks that made Dr. Fried negligent, so this harm is not within Dr. Fried's scope of liability (proximate cause). Illustration 8 is based loosely on Simmerer v. Dabbas, 733 N.E.2d 1169 (Ohio 2000). Similar are LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976); Garrison v. Foy, 486 N.E.2d 5, 10 (Ind. Ct. App. 1985); Conner v. Stelly, 830 So. 2d 1102 (La. Ct. App. 2002). Williams v. Rosner, 7 N.E.3d 57, 69 (Ill. App. Ct. 2014), supports the outcome of Illustration 9, which, in contrast to Illustration 8, entails a sterilization procedure whose purpose included avoiding the birth of a child with a disability; thus, the extraordinary costs of raising such a child *were* within the defendant's scope of liability.

DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 370 (2023 update) articulates the scope-of-liability issue in wrongful-pregnancy cases when parents seek to recover for the consequences of a child born with a disability. The treatise suggests that employing scope of liability to deny recovery may be mistaken because:

> The parents sought to avoid having any child and the defendant's obligation was to use reasonable care to prevent conception that would lead to birth of any child. No greater care is required to perform the sterilization procedure when its purpose is to

> prevent a genetically damaged child. This line of reasoning suggests that the limitation is not appropriate. At least when the physician is on notice that genetic defects are possible, liability for the extraordinary expenses of child-rearing has been permitted.

Id. The Dobbs argument recognizes that the reason that made the defendant's conduct tortious is the risk of the birth of a child that the parents do not want to have. However, the risk of a child with a disability is not, unlike wrongful-birth claims, a risk making the defendant's conduct negligent in a wrongful-pregnancy case nor is that a foreseeable risk in an ordinary wrongful-pregnancy case. That no greater care is required to prevent a child with a disability is not a reason to reject the scope-of-liability limitation—in all cases of harm outside the scope of a defendant's liability, the harm could have been avoided if the defendant had not acted tortiously. The case is quite different when the defendant has information that there is a risk of a genetic defect and that the parents seek to avoid pregnancy because of the risks of having a child with a genetic birth defect.

Comment j. New cause of action or application of traditional tort principles? A good example of a court asserting that a wrongful-pregnancy claim is merely an existing tort is Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000), which declined to characterize the tort it recognized as "wrongful pregnancy" and insisted that it was one for medical malpractice. See also Macomber v. Dillman, 505 A.2d 810, 812 (Me. 1986) (observing that "the plaintiffs' [wrongful-pregnancy] action does not represent a new cause of action in the state of Maine"); Jones v. Malinowski, 473 A.2d 429, 432 (Md. 1984) (commenting that a claim for wrongful pregnancy is a tort based on "traditional medical malpractice principles"); Emerson v. Magendantz, 689 A.2d 409, 414 n.2 (R.I. 1997) (explaining disagreement with concurrence on whether wrongful-pregnancy claim is a "routine common law negligence case" or, instead, requires previously unrecognized position that the birth of a healthy child can support recovery of damages); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 369 (2023 update) (observing that "some authority discards the labels, emphasizing that the claim is merely a negligence claim subject to the ordinary negligence rules"); Philip Braverman, Note, *Wrongful Conception: Who Pays for Bringing Up Baby?*, 47 FORDHAM L. REV. 418, 421 (1978) (discussing the issue while addressing whether courts or legislatures are the better forum in which to address whether such a claim should be recognized).

Comment k. Beyond medical malpractice. For cases in which a wrongful-pregnancy claim was brought against nonprofessional health-care providers, see, e.g., Cockrum v. Baumgartner, 447 N.E.2d 385, 386 (Ill. 1983) (dismissing count in suit seeking child-rearing expenses against laboratory that tested husband's sperm postvasectomy and against physician who performed the vasectomy); Doherty v. Merck & Co., 154 A.3d 1202 (Me. 2017) (involving claim against birth-control-implant manufacturer); Troppi v. Scarf, 187 N.W.2d 511, 512 (Mich. Ct. App. 1971) (addressing claim against pharmacist who filled birth-control prescription with the wrong drug). For discussion of the theories asserted against medical professionals, see Philip Braverman, Note, *Wrongful Conception: Who Pays for Bringing Up Baby?*, 47 FORDHAM L. REV. 418, 422-425 (1978).

Comment l. Informed consent. Illustration 9 is based on Carr v. Strode, 904 P.2d 489, 501 (Haw. 1995), in which the defendant-urologist failed to explain to the patient the risk of

recanalization and consequent fertility in vasectomy patients. See also Burke v. Rivo, 551 N.E.2d 1, 2 (Mass. 1990) (addressing the issue of damages for parents who successfully asserted in the trial court that if physician had informed wife of the risk that recanalization could occur after a tubal ligation, she would have opted for different sterilization procedure).

Comment m. Wrongful pregnancy without birth. Mark Strasser, *Misconceptions and Wrongful Births: A Call for a Principled Jurisprudence*, 31 ARIZ. ST. L.J. 161, 168 (1999), discusses the claims addressed in this Comment but cites no cases in the course of that discussion. The Reporters' independent research has also failed to identify such a case. Another variation involves the birth of an unwanted child without there being an unwanted pregnancy, resulting in involuntary and unwanted parenthood. This unusual situation occurred in Pressil v. Gibson, 477 S.W.3d 402 (Tex. Ct. App. 2015), in which an involuntary father sued a fertility clinic that enabled a former sexual partner to surreptitiously use his sperm, gathered from condoms he had used when they had sex, to inseminate her without the father's knowledge or consent. The insemination resulted in the birth of healthy twins. In a legal malpractice action against his former attorneys, the court concluded that the father had not suffered any damages that were legally recoverable and, thus, affirmed the trial court's grant of summary judgment for the defendants.

Comment n. Intentional torts, enabling torts, and negligent impregnation. While the Reporters' research found no cases with these fact patterns, Comment *n* applies settled legal principles to the harm of an unwanted pregnancy and the subsequent birth of a child. That harm—unwanted pregnancy and birth of a child—has been recognized as legally cognizable by the substantial majority of courts recognizing the wrongful-pregnancy tort.

Comment q. Procreative autonomy as harm. Some commentators have argued that, regardless of whether they suffer bodily harm, patients who are deprived of information required for informed consent have suffered a cognizable injury—namely, the dignitary harm of being deprived of the ability to make an informed choice about the course of their medical care. See, e.g., Alan Meisel, *A "Dignitary Tort" as a Bridge Between the Idea of Informed Consent and the Law of Informed Consent*, 16 LAW MED. & HEALTH CARE 210, 211-214 (1988) (articulating this conception); Aaron D. Twerski & Neil B. Cohen, *Informed Decision-Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 655 (same). Wrongful-birth claims can entail similar interference with parents' autonomy in their reproductive choices. For one of the few cases recognizing interference with procreative autonomy as an independent legally compensable harm, see Provenzano v. Integrated Genetics, 22 F. Supp. 2d 406, 417 (D.N.J. 1998) (holding, in wrongful-birth case, that plaintiffs could recover for being deprived of the opportunity to consider whether to abort their fetus even if they are unable to prove that they ultimately would have decided to abort).

Wrongful pregnancy, rather than interfering with the decisionmaking *process*, often only negates the *choice* that the parents in fact made—to not have a child. Regardless, Professor Sofia Yakren contends that interference with procreative autonomy is a harm that should be recognized in the wrongful-birth context. Such recognition might spare women the anguish involved in a wrongful-birth suit, which, in its traditional guise, necessarily involves the assertion that the

mother would have preferred not having a child that she has had and is raising. See Sofia Yakren, *"Wrongful Birth" Claims and the Paradox of Parenting a Child with Disability*, 87 FORDHAM L. REV. 583, 622-626 (2018).

Professor Dov Fox, who comprehensively analyzes interference with reproductive freedom, addresses tortious conduct that imposes an unwanted pregnancy or parenthood on individuals as well as tortious conduct that interferes with parents' efforts to avoid having a child with genetically induced disabilities. See generally DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019).

Introductory Note on "Parent" in Wrongful-Birth Claims: Wrongful-birth cases arise when parents are denied the opportunity to conceive or terminate a pregnancy with information about the risks of bearing a child with a disability. In some wrongful-birth claims, both parents agree that they would have avoided conceiving a child or continuing a pregnancy when there is a risk that the child will be born with a disability, and they both assert a claim for wrongful birth. See Comment *d.* If the parents disagree about terminating a pregnancy, the mother is by law solely entitled to make that decision. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70 (1976). In such instances, if the mother would not have terminated her pregnancy, neither parent has a wrongful-birth claim. See Comment *f.* In some other cases, only the woman would have been involved in making a decision about termination if the opportunity had been provided, and, in such instances, only the mother would be entitled to pursue a wrongful-birth claim. For ease of exposition, § __ refers to "parents." The Section's reference to "parents" should be understood in light of this Introductory Note.

§ __. Wrongful Birth

(a) An actor is subject to liability to the parents for the wrongful birth of a child born with a disability when the actor's tortious conduct denies parents the opportunity to decide whether:

(1) to conceive a child who may be born with a disability, if, had they known of the risk of such a birth, the parents would have chosen not to conceive the child; or

(2) to terminate the pregnancy of a fetus who may be born with a disability, if, had they known of the risk of such a birth, the parents would have chosen to terminate the pregnancy.

(b) When local law does not permit the parents to recover damages for the extraordinary costs of care for their child for the period after the child reaches majority, the actor is subject to liability to the child for any such costs.

Comment:

a. History and scope.
b. Rationale and support.
c. The elements of a wrongful-birth claim.
d. Duty.
e. Negligence.
f. Factual cause.
g. Scope of liability (proximate cause).
h. Legally cognizable harm.
i. Relationship with wrongful-pregnancy and wrongful-life claims.
j. Relationship with prenatal-injury claims.
k. New cause of action or application of traditional tort principles?
l. Relationship with medical malpractice.
m. Informed consent.
n. Damages.
o. Claims by children for the extraordinary costs of care after majority.
p. Avoidable consequences.

a. History and scope. Cases recognizing claims for wrongful birth did not emerge until the late 1970s, after the volumes of the Restatement Second of Torts that might have addressed these claims were completed and published. Thus, this is the first Torts Restatement to address wrongful birth.

Wrongful-birth claims involve an actor's tortious conduct in failing to identify and adequately communicate the risk of a birth defect. The crux of the claim is that parents, the plaintiffs in wrongful-birth cases, are harmed when they are deprived of the opportunity to make an informed decision about whether to conceive a child or to continue a pregnancy and a child with a disability is born as a result. Typically, although not exclusively, wrongful-birth claims involve physicians or other health-care professionals, and they arise when the physician negligently fails to conduct genetic testing or to provide genetic counselling, negligently conducts such genetic testing or counselling, negligently fails to conduct fetal testing, negligently conducts

fetal testing, negligently fails to diagnose a condition in a parent or relative that poses a risk of a child being born with a disability, or negligently fails to provide appropriate information to the parents so that the parents can make an informed decision whether to conceive or to continue a pregnancy. In addition, a wrongful-birth claim can arise from the failure of measures taken to prevent or terminate a pregnancy that the parents sought to avoid because of the risk of the child being born with a disability.

Illustration:

1. Charles suffers from neurofibromatosis, a disorder caused by a genetic variation. To avoid siring a child who might also suffer from neurofibromatosis, Charles undergoes a vasectomy negligently performed by Dr. Speck. Given Dr. Speck's negligence, the procedure fails, and, as a consequence, Catarina, Charles's wife, becomes pregnant. Because of the risk of bearing a child with neurofibromatosis, Catarina decides to terminate her pregnancy and undergoes an abortion by Dr. Livingston. The abortion fails due to Dr. Livingston's negligence, and Catarina ultimately bears a child with neurofibromatosis. Both Dr. Speck and Dr. Livingston are subject to liability to Charles and Catarina for wrongful birth.

b. Rationale and support. Approximately three-fourths of the 40 states that have ruled on the availability of a wrongful-birth claim have endorsed it. This Section reflects the contours of the wrongful-birth claim adopted in those states.

To a large extent, the rationale for a wrongful-birth claim is the same as it is for other recognized tort claims: deterring socially harmful conduct, compensating victims of that conduct, and fairness in requiring the wrongdoer to provide that compensation to the victim. This is the case because other recognized torts dovetail closely with wrongful birth. See Comments *d*-*g*. Even the core recognition of a legally cognizable harm based on the birth of a child with a disability, along with the concomitant costs, is not unique to the wrongful-birth tort, as such awards are made in cases in which the defendant caused the child's birth defect. See § __ [Prenatal Injury] of this draft].

Notwithstanding these basic principles, initially, some objected to recognition of a cause of action for wrongful birth. One objection was that it would be illegal to terminate a pregnancy. Roe v. Wade largely removed that impediment and, even today, after Dobbs v. Jackson Women's Health Organization (which removed U.S. Constitutional protection for abortions), many pregnant women who desire to end their pregnancy are legally entitled to do so. Meanwhile, others resisted

the tort's recognition, uncomfortable with the notion that the birth of a child could constitute legally cognizable harm. Thus, some argued that the birth of a child, whether wanted or unwanted, or healthy or unhealthy, is *always* a benefit to the parents. As with wrongful-pregnancy claims, addressed at § __, that view, too, has largely been rejected. Another objection raised is the difficulty of determining damages, but the many jurisdictions recognizing wrongful-birth claims demonstrate that determination of the amount of damages suffered by plaintiffs is not an insurmountable difficulty. This Restatement addresses the damages-calculation issue in Restatement Third, Torts: Remedies § 27 (Tentative Draft No. 3, 2024).

c. The elements of a wrongful-birth claim. To establish a claim under this Section, a plaintiff must establish that the defendant had a duty of care to the plaintiff and breached that duty of care. In addition, plaintiff must prove that the breach was a factual cause of the birth of a child—one with a disability—that the plaintiff-parent, if properly treated or informed, would have prevented and that the harm (arising from the birth of the child with a disability for which recovery is sought) is within the defendant's scope of liability (sometimes called proximate cause). Because this tort recognizes the birth of a child with a disability that the parents would have avoided as a legally compensable harm, the final element of this tort exists upon proof of the birth of a child with a disability that the plaintiffs would have avoided.

Established tort rules that generally govern the duty, breach, factual-cause, and scope-of-liability inquiries equally apply to claims initiated under this Section. The final element of the cause of action—interference with the plaintiffs' informed decision whether to have a child when there is a risk of the child being born with a disability and the birth of a disabled child is unique to the wrongful-birth tort. Each of the elements identified in this Comment is addressed in the Comments below.

d. Duty. The claim for wrongful birth is not based on the defendant's having *caused* the underlying condition that resulted in the child's disability. Frequently, as in Illustration 1, the child's disability is traceable to a genetic abnormality or is of unknown origin. Instead, as explained above, the gist of the wrongful-birth claim is that the defendant's negligence prevented the plaintiffs from deciding whether to conceive or to continue a pregnancy in the face of a risk that the child would be born with a disability and second, that subsequently a child is born with that or a related disability.

As in Illustration 1, wrongful-birth claims frequently involve medical malpractice. In some cases, both parents may have been a patient of the defendant-physician—and that patient-care relationship will provide the basis for a duty of reasonable care running from the physician to both parents. See Restatement Third, Torts: Medical Malpractice § 3 (reproduced in Appendix B of Tentative Draft No. 2, 2024) (setting forth duty of medical providers to patients and others). In other circumstances, such as a sterilization procedure, one or the other of the parents will be in a patient-care relationship with the physician-defendant, raising the issue of whether the physician owed a duty of care to the *other* parent. When the recoverable damages for wrongful birth do not include any items peculiar to one parent but not the other, whether the other parent is owed a duty is of no practical significance. However, when there are elements of damage specific to the nonpatient parent, such as emotional harm, the issue of duty to the other parent has bite. Although the doctrinal basis for a duty to the other parent in these instances is fuzzy, the vast majority of courts confronting wrongful-birth claims by both parents have affirmed that both may recover for harm suffered.

e. Negligence. As Comment *a* makes plain and as also explained directly above, defendants in wrongful-birth suits are typically physicians, subject to the standard of care applicable to those professionals. See Restatement Third, Torts: Medical Malpractice § 5 (Tentative Draft No. 2, 2024) (providing standard of care applicable to medical professionals). For non-health-care providers, the ordinary duty of reasonable care is applicable. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 3. Cases involving conduct more culpable than negligence appear to be rare to nonexistent, but the provisions of this Section apply to such actors as well.

f. Factual cause. To establish a wrongful-birth claim, plaintiffs must prove that, but for defendant's negligence, they would not have had a child born with a disability. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 26. Some, though not all, wrongful-birth claims require proof that the woman would have terminated her pregnancy. Such proof is more difficult today, after the Supreme Court's decision in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), which held that the United States Constitution does not protect the right to elect to abort. Nevertheless, as before *Dobbs*, the matter is a factual one that, if disputed, requires resolution by the factfinder. Thus, even in jurisdictions with stringent limitations on terminations, a pregnant woman would be free to attempt to prove that she might have been able to obtain a legal abortion in her home state or another state. In some wrongful-pregnancy cases, the parent-plaintiffs assert that they would not have conceived if they had been properly informed

of the risks of bearing a child with disabilities; in such cases, the parents do not need to prove an abortion would have been available.

g. Scope of liability (proximate cause). As with all negligence claims, defendants are liable only for harms within their scope of liability (frequently called proximate cause). See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29. This means that the risk of a child being born with a disability must have been one of the foreseeable risks that made the defendant negligent.

Illustration:

2. Concerned about the cost of child-rearing, Jerilynn decides after the birth of her fourth child that she does not want to have another child and, explaining her reason, requests that Dr. Tim, her gynecologist, perform a sterilization procedure. Dr. Tim performs a tubal ligation but negligently fails to cut one of Jerilynn's fallopian tubes and also negligently fails to review a pathology report that reveals the procedure was unsuccessful. Jerilynn becomes pregnant and bears twins with Down syndrome. Dr. Tim is not liable to Jerilynn for costs arising from the twins' Down syndrome because the risk of a birth disability was not, as a matter of law, one of the foreseeable risks that was the basis for Dr. Tim's negligence in performing the procedure and hence is outside his scope of liability. Dr. Tim, however, is subject to liability for wrongful pregnancy because the risk of Jerilynn having another child is one of the foreseeable risks that Dr. Tim's sterilization procedure was designed to avoid. See Restatement Third, Torts: Liability for Physical and Emotional Harm § __ [Wrongful Pregnancy].

Most courts rule the same way as in Illustration 2, but some ground their decision in public policy rather than scope of liability. The former doctrinal hook has the litigative-efficiency advantage of being a matter of law for the court as opposed to scope of liability, which is a factual matter, and the categorical limitation here is not affected by the particular facts of a case. Nevertheless, courts rule as a matter of law on factual matters like scope of liability when no reasonable factfinder could rule otherwise and that is the basis for a court determination that the harm in Illustration 2 is outside Dr. Tim's scope of liability. Employing public policy to deny recovery could be grounded in a limitation of duty based on public policy. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(b) (explaining withdrawing or limiting duties based on policy considerations).

A woman or couple may have multiple reasons for wanting to avoid a pregnancy. Or there may be a dispute about what *actually* motivated the plaintiff's decision to use birth control or undergo a sterilization procedure. In such instances, the factfinder would be required to determine, based on the facts of the case, whether avoiding *that* pregnancy and the subsequent birth of *that* child was *among* the risks that were the basis of the physician's negligence in performing the procedure.

Illustration:

3. Same facts as Illustration 2, except that Jerilynn does not want to become pregnant because of her concern about the cost of child-rearing and *also* because she is worried that, given her advanced maternal age, she will bear a child with a disability. As before, Dr. Tim is subject to liability for wrongful pregnancy pursuant to § __. Additionally, Dr. Tim is now *also* subject to liability to Jerilynn for wrongful birth because the risk that Jerilynn would bear a child with a disability is one of the risks that made Dr. Tim negligent in performing the tubal ligation.

h. Legally cognizable harm. The essential and final element of the wrongful-birth claim is the birth of a child that the parents would have avoided. Since the seminal case recognizing a wrongful-birth claim, Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978), courts recognizing the wrongful-birth claim have identified the unwanted birth of such a child as a legally compensable harm.

i. Relationship with wrongful-pregnancy and wrongful-life claims. Central to a wrongful-birth claim, addressed in this Section, is that a child with a disability or disabilities was born and that the parents would not have had the child if they had been appropriately informed of the relevant risk by an actor with a duty to do so. Addressed in § __, a wrongful-pregnancy claim, by contrast, has no disability requirement. The wrongful-pregnancy claim is based on a parent's desire not to have *any* child—and the gravamen of such a claim is the birth of an unplanned and unwanted child (whether with a disability or not).

A wrongful-life claim, addressed in § __, is different from either a wrongful-pregnancy or wrongful-birth claim because it is brought by a child, rather than the parent or parents, and the essence of the child's claim is that being born with a disability constitutes legally cognizable harm. Wrongful-life claims thus rest on the uncomfortable notion that nonexistence (hence the label "wrongful life") is a preferable outcome to life with a disability. Courts have been unwilling to so

hold. Accordingly, § __ [Wrongful Life] of this draft, like nearly all courts, declines to recognize claims for wrongful life.

j. Relationship with prenatal-injury claims. An actor who tortiously harms a fetus is subject to liability. See § __ [Prenatal Injury] of this draft. That Section authorizes suit on behalf of the child, once born, for harm tortiously inflicted in utero. By contrast, the wrongful-birth claim in this Section applies to actors who have not *caused* the child's birth defect but who act tortiously in enabling the birth of such a child. Meanwhile, prenatal-injury cases are brought by children (or, in the case of the fetus's wrongful death, the fetus's wrongful-death beneficiaries), while, as Comment *a* explains, wrongful-birth claims are asserted by the child's parent or parents.

k. New cause of action or application of traditional tort principles? Some courts conceive of wrongful-birth claims as new torts, while others insist that wrongful-birth claims are not new—but rather represent the application of traditional principles to the reproductive context. In favor of the former characterization, the wrongful-birth tort entails the recognition that the interest in reproductive freedom to choose not to have a child who is at risk of being born with a disability and the subsequent birth of such a child is a legally cognizable harm, a matter that was first recognized by the New York Court of Appeals' seminal decision in Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978). In favor of the latter view, traditional principles of duty, breach, factual causation, and scope of liability, as detailed in Comments *c*-*g*, apply to these claims. Thus, claims denominated here as wrongful birth often can be viewed as straightforward medical malpractice claims. Nothing much turns on how the claim is characterized, and this Section leaves that matter to local norms and preferences.

l. Relationship with medical malpractice. As Comment *a* explains, wrongful-birth defendants are often physicians who inadequately assess the risk of a child being born with a disability, conduct deficient genetic or other testing to identify the risk of conceiving or bearing a child with a disability, or provide deficient counseling regarding those matters. Nevertheless, a claim under this Section does not *require* that the defendant be a physician or other health-care provider. So, for example, a testing laboratory that negligently conducts reproductive testing may be liable for wrongful birth.

m. Informed consent. In explaining the wrongful-birth claim, courts often advert to the parents being deprived of the opportunity to make an "informed decision." Sometimes, they also loosely suggest that the parents were deprived of information necessary to furnish informed

consent. Nevertheless, as revealed in Illustration 1, a wrongful-birth claim does not require proof of the elements of an informed consent claim, although some wrongful-birth claims may predicate liability on a physician's breach of the duty to obtain informed consent. The obligation to obtain the patient's informed consent arises only in the course of providing treatment. See Restatement Third, Torts: Medical Malpractice § 12 (Tentative Draft No. 2, 2024). Thus, whether parents claiming wrongful birth can rely on informed consent depends on the factual circumstances surrounding the medical care they received. Only when the risk of a child being born with a disability is consequent to a medical procedure or course of treatment that, itself, was preceded by inadequate disclosures will an informed-consent claim be available.

Illustrations:

4. Yinhong bears a child with a genetic birth defect. Yinhong sues Dr. Jones, her obstetrician, asserting that she failed to inform her of the risks of bearing a child with such a birth defect and the availability of testing to determine the risk of the fetus having such a defect. Dr. Jones is not liable for failing to obtain informed consent because she did not perform a procedure or otherwise provide treatment that involved the risk of a child being born with a birth defect. See id. (providing that informed consent must be obtained "[b]efore initiating a course of treatment"). Because she was in a patient-care relationship with Yinhong, Dr. Jones may, however, be liable for breaching the standard of care owed to obstetrical patients. See Restatement Third, Torts: Medical Malpractice § 5 (Tentative Draft No. 2, 2024) (providing standard of care applicable to medical professionals).

5. Because she previously had a child with Down syndrome, Kaitlyn, who is pregnant, undergoes amniocentesis to determine if the fetus she is carrying is afflicted with Down syndrome. Dr. Holden performs the procedure competently but fails to tell Kaitlyn of the risk of error in such tests, thereby breaching his duty to obtain informed consent. After the results of the test are available, Dr. Holden informs Kaitlyn that the test is negative. Based on this information, Kaitlyn decides to continue her pregnancy, and she then bears a child with Down syndrome. Dr. Holden is subject to liability for wrongful birth based on his failure to obtain informed consent for the amniocentesis test.

6. When Dyani, a Native American, becomes pregnant, her physician, aware that Native Americans have a significantly increased risk of autosomal abnormalities, tells her of fetal testing but does not disclose the reason for suggesting the test. Unaware of her

heightened risk, Dyani declines the test and bears a child with an autosomal disease. Whether Dyani has an informed-consent claim against her physician for wrongful birth depends, inter alia, on whether the jurisdiction recognizes an informed-consent obligation for "informed refusal." See Restatement Third, Torts: Medical Malpractice § 12, Comment *j* (Tentative Draft No. 2, 2024).

n. Damages. The damages recoverable for wrongful-birth claims are addressed in Restatement Third of Torts: Remedies § 27 (Tentative Draft No. 3, 2024). Pursuant to § 27, successful wrongful-birth plaintiffs are entitled to recover, inter alia, the extraordinary costs of raising a child with the disability, the extraordinary medical costs and other expenses to care for the child, and damages for their emotional harm arising from the difficulties of raising a child with a disability and observing the child's disability. Where the defendant's breach entailed a failure to prevent the pregnancy, i.e., wrongful pregnancy, the plaintiffs may also recover damages for the lost earnings, medical expenses, and pain and suffering the mother sustained in connection with the pregnancy to the extent they exceed the costs of a normal pregnancy. Id., Comment *h*.

o. Claims by children for the extraordinary costs of care after majority. Ordinarily, the parents should be entitled to recover all damages authorized for this tort. However, in some jurisdictions, parents may not be legally responsible for the costs of raising a child after the child reaches majority and, given that restriction, the parents may be unable to recover the extraordinary costs that will be incurred, once their child, born with a disability, reaches adulthood. In such cases, Subsection (b) authorizes the child, who would in such instances be responsible for these costs, to recover them. See Restatement Third, Torts: Remedies § 27(b), Comment *e* (Tentative Draft No. 3, 2024) ("[A] jurisdiction that does not compensate the parents for the cost of supporting the child throughout the child's life should recognize the child's claim and award to the child the extraordinary costs that the parents cannot recover."). Thus, for instance, a disabled child expected to live until age 54 may recover for those damages traceable to the disability that the child will incur between age 18 and 54.

p. Avoidable consequences. Parents need not put their child up for adoption to recover in full their damages for wrongful birth. See id. § 27, Comment *i*.

REPORTERS' NOTE

Comment a. History and scope. As one court explained the wrongful-birth action:

> [A] "wrongful birth action" refers to a claim for relief by parents who allege they would have avoided conception or would have terminated the pregnancy but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child. The underlying premise is that prudent medical care would have detected the risk of a congenital or hereditary genetic disorder either before conception or during pregnancy. In such an action, the parents allege that as a proximate result of this negligently performed or omitted genetic counseling or prenatal testing they were foreclosed from making an informed decision whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate it.

Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993).

To a significant extent, scientific advances in understanding the genetic role in causing birth defects and technological developments in prenatal screening, including amniocentesis, ultrasound, and chorionic villa sampling have fueled the development and growth of wrongful-birth claims. See Jeffrey R. Botkin, *Prenatal Diagnosis and the Selection of Children*, 30 FLA. ST. U. L. REV. 265, 278-283 (2003) (explaining the development of technology that has enabled a dramatic change in the ability to examine an embryo and fetus); Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 619 (1979). As with other scientific and technological advances, these developments generally improve the human condition but come with the costs that necessarily arise when human error occurs in their use.

A claim for wrongful birth frequently depends on the parents' ability to terminate an existing pregnancy. Before the Supreme Court's decision in Roe v. Wade, 410 U.S. 113, 153 (1973), development of the wrongful-birth claim was inhibited by courts' concern that an abortion could well constitute a criminal act under the state's prohibition of abortions. See Gleitman v. Cosgrove, 227 A.2d 689, 694 (N.J. 1967) (refusing to recognize a wrongful-birth claim and expressing concern about whether an abortion would have been illegal under the circumstances); id. at 694 (Francis, J., concurring) (expressing the view, after canvassing the history of the abortion statute, that a eugenic abortion of the child would be illegal). In 1979, the New Jersey Supreme Court, relying in part on abortion having become legal, overturned *Gleitman* and recognized a wrongful-birth claim. See Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979). The New York Court of Appeals, in the seminal decision accepting wrongful birth, had so held the year before. See Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).

Donald L. DeVries & Alan M. Rifkin, *Wrongful Life, Wrongful Birth, and Wrongful Pregnancy: Judicial Divergence in the Birth-Related Torts*, 20 FORUM 207, 209-210 (1985), identify the typical claims of tortious conduct in wrongful-birth claims:

> Wrongful birth cases have generally been based on the premise that, if properly informed of a potential genetic defect, the parents would have aborted the fetus. Actions for wrongful birth have been filed against medical entities for negligent failure to advise, or properly perform amniocentesis or genetic tests, or for failure

to properly interpret or convey test results when there was a possibility of birth defects. Suits have also arisen for failure to detect pregnancy after rape or after birth control use until so late that the abortion has become dangerous to the mother's health. Lastly, actions have been asserted for failure to successfully complete an abortion.

In Norman v. Xytex, 848 S.E.2d 835 (Ga. 2020), a sperm bank represented to potential purchasers that it engaged in a rigorous screening of potential donors. It sold a donor's sperm to plaintiffs and told them that the donor was a PhD candidate with an IQ of 160 and a clean bill of mental health, all of which was false. The donor, while providing sperm to the defendant over a 16-year period, managed to accumulate a substantial criminal record, had mental-health issues, and had no academic degrees. The donor made numerous misrepresentations to the sperm bank, some a product of an employee of defendant who encouraged the donor to exaggerate his intelligence and education. The plaintiffs' child was born with several disabilities and after the plaintiffs discovered defendant's false representations, they brought suit against the sperm bank. The *Xytex* case, while an unusual one, reflects a rare instance of a wrongful-birth claim in which the defendant was not a health-care professional and in which the tortious conduct did not entail professional negligence. Although the *Xytex* court pointed out this difference, it made no effort to explain why the difference was a distinction that mattered and later commented that the claim that the plaintiffs would not have purchased the sperm in the absence of the misrepresentations "is a classic wrongful-birth claim." Id. at 842. The plaintiffs were unsuccessful in their wrongful-birth claim but only because Georgia does not recognize such claims. Professors Heled, Levin, Lytton, and Vertinsky make the case for legislation that would promote wrongful-birth claims against unscrupulous reproductive-tissue providers, after explaining the inadequacy of current regulatory and tort regimes to address the problem. See Yaniv Heled, Hillel Y. Levin, Timothy D. Lytton & Liza Vertinsky, *Righting a Reproductive Wrong: A Statutory Tort Solution to Misrepresentation by Reproductive Tissue Providers*, 60 HOUS. L. REV. 1 (2022).

Comment b. Rationale and support. Of states to have considered the matter, a large majority (approximately three-quarters) permit wrongful-birth claims. See Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 399 (Iowa 2017) (reporting that 26 states had approved wrongful-birth claims, although the legislature in three of those states had overturned the decision and that three state high courts had refused to recognize such claims). The Reporters' research (conducted in 2023) found that 29 of 40 jurisdictions with court decisions addressing the matter have recognized wrongful-birth claims.

Political opposition to abortion influenced a small number of legislatures to enact statutes barring wrongful-birth actions. See Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2018 & n.6 (1987) (citing lobbying efforts by pro-life groups and arguing that such legislation violates the U.S. Constitution).

While the majority of courts to address the matter permit such claims, approximately 10 do not. Initially, before Roe v. Wade, courts were explicit about public policy regarding abortion as a reason for denying wrongful-birth claims. See, e.g., Gleitman v. Cosgrove, 227 A.2d 689, 693

(N.J. 1967). After *Roe*, those refusing to accept the cause of action have cited three primary concerns. First, some express the view that the existence of human life, even if compromised, does not constitute a legally cognizable injury. See, e.g., Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985) ("We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury."); see also Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 561 (Ga. 1990) (denying a wrongful-birth claim, on the reasoning of *Azzolino*, because defendants did not cause the child's birth defect, and in light of the difficulty of determining which damages might be recovered for such a claim); Luke Isaac Haqq, *Reconsidering Wrongful Birth*, 95 NOTRE DAME L. REV. REFLECTION 177, 187-189 (2020) (arguing that Christians should attempt to roll back wrongful-birth claims because they fail to recognize the sanctity of life). Second, other courts that have refused to adopt wrongful-birth claims appear uncomfortable with the role that abortion plays in most such cases. See, e.g., Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 689 (Ky. 2003), as amended (Aug. 27, 2003) (explaining that "we are unwilling to equate the loss of an abortion opportunity resulting in a genetically or congenitally impaired human life, even severely impaired, with a cognizable legal injury"). Third, relying on concerns about how to determine damages, some courts have declined recognition. See, e.g., *Gleitman*, 227 A.2d at 693 (expressing concern about the difficulty of evaluating "intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries"); see also Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*, 29 HOUS. L. REV. 149, 152-155 (1992) (explaining courts' opposition to recognizing a wrongful-birth claim).

As noted above, some state legislatures have enacted statutes barring wrongful-birth claims. See, e.g., IDAHO CODE ANN. § 5-334(1) ("A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."); see also Michael A. Berenson, *The Wrongful Life Claim—The Legal Dilemma of Existence Versus Nonexistence: "To Be or Not to Be,"* 64 TUL. L. REV. 895, 900-901 (1990) (reporting, as of 1988, that seven states had enacted statutes addressing wrongful life, wrongful birth, and wrongful pregnancy and detailing the provisions of each state statute).

Most courts have overcome these objections and provided reasons why wrongful-birth claims should be permitted. As Comment *b* explains, denying a wrongful-birth claim frustrates the core purposes of tort law: providing compensation to those who have suffered injury; deterring tortious conduct; and correcting the wrong that defendant has visited on the parents. See Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 705 (Ill. 1987) (citing cases).

With regard to the specific arguments rehearsed above for not recognizing wrongful-birth claims, courts have convincingly explained why the birth of a child—one the parents sought to avoid—with a disability constitutes a real harm:

> The [plaintiffs] allege, at a minimum, that but for the defendants' negligence they would not be burdened by extraordinary medical and education expenses associated with the treatment of Pierce's blindness. That monetary burden is no different from

> medical or rehabilitation expenses associated with any personal injury, and, contrary to *Azzolino*'s suggestion, we need not find that "life, even life with severe defects," constitutes a legal injury in order to recognize the plaintiffs' claim for relief.

Lininger v. Eisenbaum, 764 P.2d 1202, 1206 (Colo. 1988); see also, e.g., Reed v. Campagnolo, 630 A.2d 1145, 1149 (Md. 1993) ("The clear majority of courts that has considered [wrongful-birth claims] has concluded that there is legally cognizable injury, proximately caused by a breach of duty."); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 492 (Wash. 1983) (same as *Lininger*).

Second, addressing the abortion concern, after Roe v. Wade, a number of courts concluded that public policy no longer stood in the way of wrongful-birth claims and indeed encourage the kind of screening that would enable parents to decide whether to conceive or continue a pregnancy. See, e.g., Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695-696 (E.D. Pa. 1978).

Third, courts have reasoned that wrongful-birth claims provide appropriate incentives for professionals prudently to conduct prenatal screening and facilitate parents' reproductive choices. See, e.g., id.

Finally, determining the extraordinary expenses of raising a child with a birth defect (or a physical injury suffered early in childhood) is similar to the calculation required in cases against those who caused the birth defect or injury (it is different in that the latter must consider the additional costs from what would exist if the child were healthy while the former requires reference to the difference in costs from a child who was never born). As such, courts already have experience in determining such damages. See, e.g., Wells v. Ortho Pharm. Corp., 788 F.2d 741, 747 (11th Cir. 1986) (applying Georgia law) (awarding costs of medical expenses incurred by mother for child born with birth defects); 2 STEIN ON PERSONAL INJURY DAMAGES § 12:15 (2022 update) (explaining parents' recovery of medical expenses incurred because of injury to child); see also Becker v. Schwartz, 386 N.E.2d 807, 813 (N.Y. 1978) (stating that the pecuniary costs for the future care and treatment of child was readily determinable).

Illustration 1, involving Charles and Catarina, is based on Speck v. Finegold, 439 A.2d 110 (Pa. 1981).

Comment c. The elements of a wrongful-birth claim. Courts have recognized that wrongful-birth plaintiffs must satisfy the general tort-law elements of duty, breach, factual cause, scope of liability (frequently called proximate cause), and cognizable injury. See, e.g., Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 489 (Wash. 1983) ("These elements are merely particularized expressions of the four concepts fundamental to any negligence action: duty, breach, proximate cause, and damage or injury.").

Comment d. Duty. In some cases, both parents will have a patient-care relationship with the defendant-physician. In such instances, any duty determination is straightforward. See Restatement Third, Torts: Medical Malpractice § 3 (reproduced in Appendix B of AM. L. INST., Tentative Draft No. 2, 2024). When only one parent has a patient-care relationship with the defendant-physician, the question of whether a duty is also owed to the nonpatient parent is more difficult. Consistent with Comment *d*, however, the clear majority of cases have found that a physician owes a nonpatient

parent a duty of reasonable care. See, e.g., Keel v. Banach, 624 So. 2d 1022, 1030 (Ala. 1993) (concluding that defendants deprived mother-patient and "derivatively, her husband" of decision about having a child); Turpin v. Sortini, 643 P.2d 954, 960 (Cal. 1982) (concluding that defendants, who treated older sister with genetic defect, could reasonably foresee that parents and subsequently born child were at risk of harm due to the genetic defect and therefore were owed a duty); Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 413 (Iowa 2017) ("We find particularly compelling the father's joint legal obligation to support a disabled child. The physician-patient relationship is with the mother, not the father, but doctors providing prenatal care can easily foresee harm to both parents who must raise a profoundly disabled child."); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1156 (La. 1988) (deciding that physician who performed a tubal ligation owed a duty to both the wife and husband); Geler v. Akawie, 818 A.2d 402, 414 (N.J. Super. Ct. App. Div. 2003) (holding husband could recover emotional-distress damages arising from birth (and death) of child born with Tay-Sachs disease from obstetrician who negligently provided genetic counselling); Est. of Amos v. Vanderbilt Univ., 62 S.W.3d 133, 138 (Tenn. 2001) (ruling that nonpatient husband could recover damages arising from failing to warn mother of the risk of HIV infection); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 494 (Wash. 1983) (permitting both parents to recover from the mother's physicians for both extraordinary costs of care and for emotional harm suffered by both parents); Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 646 (1979) (concluding, by analogy to constitutional reproductive privacy cases, that "the duties of the counselor are owed to both prospective parents, although the prospective mother retains exclusive authority over decisions concerning the termination of her pregnancy"); cf. Lab'y Corp. of Am. v. Hood, 911 A.2d 841, 852 (Md. 2006) (rejecting categorical no-duty ruling for father when defendant laboratory erred in analyzing amniocentesis fluid, instead relying on whether facts established a sufficient relationship between father and defendant for a duty to be imposed); Schroeder v. Perkel, 432 A.2d 834, 839 (N.J. 1981) (holding that physician who negligently failed to diagnose first daughter's cystic fibrosis owed duty to parents with regard to wrongful birth of second child). But see Fruiterman v. Granata, 668 S.E.2d 127, 137 (Va. 2008) (concluding that advice provided by obstetrician about genetic testing was exclusively for the patient-mother, which required overturning the jury's separate award for the father's emotional harm).

Some cases implicitly decide the duty issue without explicitly addressing it. For cases that authorize damages that include items specific to the nonpatient parent, see Rich v. Foye, 976 A.2d 819, 829 (Conn. Super. Ct. 2007) (upholding right of parents to recover emotional-distress damages); Quinn v. Blau, 1997 WL 781874, at *6 (Conn. Super. Ct. 1997) (same as *Rich*); Kush v. Lloyd, 616 So. 2d 415, 423 (Fla. 1992) (permitting each parent to recover for emotional harm against several physicians, including one who performed genetic testing); Blake v. Cruz, 698 P.2d 315, 320 (Idaho 1984) (permitting both parents to recover for emotional harm when doctor failed to diagnose mother with rubella during pregnancy); Clark v. Children's Mem'l Hosp., 955 N.E.2d 1065, 1088 (Ill. 2011) (permitting both parents to recover damages for emotional distress against genetic counsellor and second counsellor who provided a second opinion to the mother); Maggard

v. McKelvey, 627 S.W.2d 44, 48 (Ky. Ct. App. 1981) (permitting the mother to recover damages when the urologist negligently performed vasectomy on the father).

In some cases, courts have sanctioned damages to both parents that were not specific to a given parent or in which it was impossible to tell if that was the case. See Provenzano v. Integrated Genetics, 22 F. Supp. 2d 406, 417 (D.N.J. 1998) (concluding claim arising out of errors in performing and analyzing amniocentesis and ultrasounds on the mother could be pursued by both); Gildner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695 (E.D. Pa. 1978) (holding parents could recover for emotional distress due to birth of child with Tay-Sachs disease from defendant-doctor who allegedly negligently performed amniocentesis procedure on the mother while she was pregnant); Lininger v. Eisenbaum, 764 P.2d 1202, 1206 (Colo. 1988) (involving claim for only the extraordinary costs required by child's disability); Ochs v. Borrelli, 445 A.2d 883, 884 (Conn. 1982) (affirming award of damages to patient and her husband for medical care required for daughter's disability and for the costs of raising daughter); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 706 (Ill. 1987) (parents permitted to recover extraordinary expenses of raising child born with a disability in suit against mother's genetic counsellors); Thibeault v. Larson, 666 A.2d 112, 115 (Me. 1995) (interpreting statute to permit wrongful-birth claim in a suit brought by both parents); Schroeder v. Perkel, 432 A.2d 834, 842 (N.J. 1981) (holding both parents can recover extraordinary medical costs in a wrongful-birth suit); Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (seeking recovery of only expenses of raising the child wherein the court concluded: "The plaintiffs George and Dortha Jacobs have stated a cause of action against Dr. Theimer.").

Comment e. Negligence. Defendants in wrongful-birth claims are typically physicians and, as such, are subject to liability if they breach well-established professional standards of care. See Restatement Third, Torts: Medical Malpractice § 5 (AM. L. INST., Tentative Draft No. 2, 2024). For nonprofessional defendants, the ordinary duty of care would apply. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 3 (AM. L. INST. 2010). Genetic counsellors may be physicians or nonphysicians with training in the field of genetics. See Tabitha M. Powledge, *Genetic Counselors Without Doctorates*, in GENETIC COUNSELING: FACTS, VALUES, AND NORMS 103, 104 (Alexander M. Capron et al. eds., 1979). Nevertheless, they are undoubtedly professionals and, as such, are subject to a professional standard of care. See National Society of Genetic Counselors, States Issuing Licenses for Genetic Counselors (last update Nov. 2023) (revealing existing regulation of genetic counselors in majority of states), available at https://www.nsgc.org/Policy-Research-and-Publications/State-Licensure-for-Genetic-Counselors/States-Issuing-Licenses; Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 629 (1979) (addressing how to determine whether counselor provided appropriate counseling).

Comment f. Factual cause. Like tort claims generally, the factual-cause element of a wrongful-birth claim requires a showing that the harm for which plaintiff seeks recovery would not have occurred in the absence of defendant's tortious conduct. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 26 (AM. L. INST. 2010). Here, what must be shown is that, but for the defendant's tortious conduct, the impaired child would not have been born. The plaintiff need not show that the defendant caused the child's impairment. See Keel v. Banach, 624

So. 2d 1022, 1029 (Ala. 1993) ("The nature of the tort of wrongful birth has nothing to do with whether a defendant caused the injury or harm to the child, but, rather, with whether the defendant's negligence was the proximate cause of the parents' being deprived of the option of avoiding a conception or, in the case of pregnancy, making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child.").

Betraying confusion on this essential point, some have objected to recognition of the wrongful-birth claim because the medical professional has not caused the child's disability:

> The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. In addition it is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's handicap is an inexorable result of conception and birth.

Becker v. Schwartz, 386 N.E.2d 807, 816 (N.Y. 1978) (Wachtler, J., dissenting in part); see also Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 689 (Ky. 2003), as amended (Aug. 27, 2003) (quoting Judge Wachtler in the course of denying a claim for wrongful birth). One commentator explains that similar thinking impeded initial development of the wrongful-birth claim:

> Courts initially resisted recognizing a cause of action for wrongful birth. The early cases befuddled the courts because, unlike traditional malpractice cases, nothing that the health care provider could have done would have prevented the harm to the child. The logic behind these early suits was that if the parents of the affected child had received proper counseling or diagnosis, they could have decided not to conceive or to seek an abortion. Early case law dealing with wrongful birth actions rejected the notion that the failure to warn the parents of a fetus' risk of serious defect was actionable because the physician was not the proximate cause of the defect.

Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*, 29 HOUS. L. REV. 149, 152-153 (1992).

True it is that the physician has not caused the congenital anomaly, but that observation elides the physician's duty to take reasonable care in addressing conditions of a patient that the doctor had no role in causing. Failing to do so in the wrongful-birth context results in the birth of a child with a disability that the parents would have chosen not to have. As well explained by the court in Greco v. United States, 893 P.2d 345, 349 (Nev. 1995):

> We also reject the United States' second argument that [the child's] physicians did not cause any of the injuries that [the child] might have suffered. We note that the mother is not claiming that her child's defects were caused by her physicians' negligence; rather, she claims that her physicians' negligence kept her ignorant of those defects and that it was this negligence which caused her to lose

her right to choose whether to carry the child to term. The damage . . . sustained is indeed causally related to her physicians' malpractice.

Comment g. Scope of liability (proximate cause). Cases supporting the proposition that the purpose for the health intervention, if the provider is aware of it, frames the scope of liability are cited in § __ [Wrongful Pregnancy], Reporters' Note to Comment *g*. The scope-of-liability limitation addressed in this Comment is sometimes reflected in courts' limiting the recoverable damages by parents to the extraordinary expenses of raising a child with a disability that exceed the costs of raising a child without such a disability. See, e.g., Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288, 292 (Del. 1989) (adopting such a limitation on recoverable damages but not identifying scope of liability as the basis, instead explaining that recovering full damages would be a windfall and disproportionate to the wrong involved); Fassoulas v. Ramey, 450 So. 2d 822, 823 (Fla. 1984) (holding "that ordinary rearing expenses for a [child with a disability] are not recoverable as damages").

Some have argued that the ordinary costs of raising a child should be recoverable because but for the defendant's negligence, no child would have been born. See, e.g., Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 565 (Ga. 1990) (Hunt, J., dissenting) ("'[B]ut for' the defendants' negligence there would have been no child at all, not a normal child. And the damages which would ensue from such injury would logically include the ordinary, as well as extraordinary, expenses of the child's existence."). Restatement Third of Torts: Remedies § 27 (AM. L. INST., Tentative Draft No. 3, 2024) rejects this position, explaining this limitation as courts forging a compromise born of public policy confronting difficult conceptual and moral issues about childrearing, disability, and the value of life. In this compromise, defendants pay the extraordinary and often huge damages for a child with a disability, while parents pay for the ordinary expenses of raising a child that often is a loved and cherished member of the family.

Illustration 2, addressing Jerilynn, is based on Conner v. Stelly, 830 So. 2d 1102 (La. Ct. App. 2002). Unlike Illustration 2, there are cases in which the provider is unaware of the risk that the patient seeks to avoid by having the procedure. Some courts rule that, as a matter of law, scope of liability is absent and the plaintiff cannot recover. See Williams v. Univ. of Chi. Hosps., 688 N.E.2d 130, 134, 135 (Ill. 1997) ("[W]e are reluctant to permit the recovery of the special costs of raising children who allegedly fail to fit that description, in the absence of allegations and proof that the defendant performing the sterilization procedure knew or should have known of the parents' particular need to avoid conception."); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1162 (La. 1988) ("[W]e cannot infer that the doctor reasonably could have foreseen an unreasonable risk of a birth defect in this case."); Williams v. Van Biber, 886 S.W.2d 10, 14 (Mo. Ct. App. 1994) (relying on confusing reasoning but concluding that a negligently performed vasectomy is "too far removed" from the child's birth defects); Simmerer v. Dabbas, 733 N.E.2d 1169, 1173 (Ohio 2000) (relying on, and ruling similar to, *Williams*).

Pacheco v. United States, 515 P.3d 510, 525 (Wash. 2022) is an outlier. Answering a certified question from the Ninth Circuit Court of Appeals, the court stated that plaintiff, who was receiving an injectable contraceptive, could recover the extraordinary costs of raising a child with birth defects.

The community health care center negligently injected her with a vaccine instead of the contraceptive; she became pregnant and bore a child with permanent disabilities. The court accepted the role of scope of liability, ruling that it was a matter for the factfinder and should be based only on whether the birth of a child with birth defects was an intervening cause and that the reasons for seeking reproductive health care should not play a role in the scope of liability determination.

Comment h. Legally cognizable harm. See, e.g., Lininger v. Eisenbaum, 764 P.2d 1202, 1206 (Colo. 1988) (recognizing the birth of a child with a disability is a legally cognizable harm for the parents); Reed v. Campagnolo, 630 A.2d 1145, 1149 (Md. 1993) ("The clear majority of courts that has considered [wrongful-birth claims] has concluded that there is legally cognizable injury, proximately caused by a breach of duty."); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 492 (Wash. 1983) (same as *Lininger*).

Comment k. New cause of action or application of traditional tort principles? For an emphatic endorsement of the idea that a wrongful-birth claim requires stepping outside traditional tort doctrine, see Azzolino v. Dingfelder, 337 S.E.2d 528, 533-534 (N.C. 1985):

> Courts which purport to analyze wrongful birth claims in terms of "traditional" tort analysis are able to proceed to this point but no further before their "traditional" analysis leaves all tradition behind or begins to break down. In order to allow recovery such courts must then take a step into *entirely untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable at law. Far from being "traditional" tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction. We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury.

See also Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 563 (Ga. 1990) (concluding wrongful-birth claim is "unique" and decision whether to adopt it should be left to the legislature); Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 415 (Iowa 2017) (Mansfield, J., dissenting) (asserting wrongful-birth tort "did not exist at common law and is contrary to traditional common law concepts"); Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 691 (Ky. 2003), as amended (Aug. 27, 2003) (describing wrongful-birth claim as a "new and complex [cause] of action").

Exemplary of the courts that recognize claims for wrongful birth but assert that it merely entails a straightforward medical malpractice case is Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 398 (Iowa 2017), where the court held: "We conclude that wrongful birth fits within common law tort principles governing medical negligence claims . . . ." See also Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288, 289 (Del. 1989) ("While characterized in many jurisdictions as 'wrongful birth,' the actionable claim that we recognize is an act of negligence or medical malpractice based on negligent performance of a medical procedure and negligent delay in transmitting the results of diagnostic tests."); Reed v. Campagnolo, 630 A.2d 1145, 1148 (Md. 1993) (applying "traditional medical malpractice principles for negligence" in wrongful-birth case); Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (characterizing the plaintiff's claim

as one of professional negligence and declining to label it with the "new name of 'wrongful birth'"); Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 684 (1979) (characterizing the New York Court of Appeals' decision recognizing wrongful birth in Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978), as "an unexceptional application of basic tort rules").

Comment l. Relationship with medical malpractice. For a case in which a wrongful-birth claim was made against a non-health-care professional, see Provenzano v. Integrated Genetics, 22 F. Supp. 2d 406 (D.N.J. 1998) (wrongful-birth claim against laboratory that negligently tested amniocentesis samples).

Comment m. Informed consent. For an example of a court invoking the concept of informed decisionmaking unrelated to any claim for lack of informed consent, see Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288, 289 (Del. 1989) (observing that "parents may be deprived of making an informed choice whether to continue the pregnancy or to terminate the pregnancy"). Illustration 4, regarding Yinhong bearing a child with a genetic birth defect, is based on Reed v. Campagnolo, 630 A.2d 1145 (Md. 1993). The *Reed* court explained why an informed-consent claim was not available but that a malpractice claim might be: "The Reeds, emphasizing that they were not told by the defendants about AFP and amniocentesis tests, say that they lacked informed consent. But one's informed consent must be to some treatment. Here, the defendants never proposed that the tests be done. Whether the defendants had a duty to offer or recommend the tests is analyzed in relation to the professional standard of care." Id. at 1152. See also Rich v. Foye, 976 A.2d 819, 833-834 (Conn. Super. Ct. 2007) (rejecting informed-consent claim in case in which defendants negligently failed to convey the results and implications of an ultrasound because the plaintiffs were not alleging "the defendants failed to inform them of the risks related to [the mother's] undergoing a fetal ultrasound study").

Comment o. Claims by children for the extraordinary costs of care after majority. A handful of courts (the vast majority have not ruled on this issue) have permitted children to recover for the extraordinary costs resulting from their disability after they reach majority. See Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (permitting child to recover extraordinary costs of care but denying claim for damages for "wrongful life"); Procanik v. Cillo, 478 A.2d 755, 757 (N.J. 1984) (same as *Turpin*); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 494 (Wash. 1983) (same as *Turpin*); see also Rosen v. Katz, 4 Mass. L. Rep. 660 (Super. Ct. 1996) (permitting recovery by child of extraordinary expenses not covered by insurance because neither biological nor adoptive parents could assert claim for those damages); cf. Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288, 294 (Del. 1989) (concluding that, because the parents had recovered extraordinary expenses of care for the life of the child, there were no such damages to be recovered by the child); Viccaro v. Milunsky, 551 N.E.2d 8, 13 (Mass. 1990) (acknowledging the possibility that child with a disability might recover extraordinary costs for the period after the parents' death). These claims are sometimes characterized as wrongful-life claims, but they are better conceptualized as claims for damages resulting from wrongful birth. As the New Jersey Supreme Court compellingly explained:

> Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice. Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child's own right to recover those expenses, must yield to the inherent injustice of that result. The right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the "wholly fortuitous circumstance of whether the parents are available to sue."

Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (quoting *Turpin*, 643 P.2d at 965).

By contrast to the approach taken in these cases, some courts award the costs of postmajority extraordinary care to the parents. See Restatement Third, Torts: Remedies § 27, Comment *e* (AM. L. INST., Tentative Draft No. 3, 2024) (explaining that either the parents or the child should be able to recover the extraordinary expenses incurred during the child's adulthood).

For a cogent argument that children should be permitted to recover the extraordinary costs of their support and that such recoveries do not run afoul of the central objection to wrongful-life claims (i.e., that such claims require a comparison between life with a disability and never being born), see Philip G. Peters, Jr., *Rethinking Wrongful Life: Bridging the Boundary Between Tort and Family Law*, 67 TUL. L. REV. 397 (1992). Professor Peters's argument supports the award of damages permitted by Subsection (b). Id. at 404-406.

The Reporters have found only one case that holds to the contrary on this issue. See Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 701 (Ill. 1987) (denying recovery to child for extraordinary expenses incurred after the child reaches majority on the grounds that the child had not suffered any legally cognizable harm). Its rationale is unpersuasive because the harm of being born with a disability, the harm central to a wrongful-life claim, is not the harm the child seeks to recover in this limited claim. Rather, it is the same damages parents recover: the extraordinary costs of caring for a child born because of defendant's negligence.

§ __. Wrongful Life

A child born with a disability who would not have been born but for an actor's tortious conduct has not suffered a legally cognizable harm and therefore has no tort claim against the actor for being born with the disability.

Comment:

a. History and scope.

b. Relationship with prenatal injury, wrongful pregnancy, and wrongful birth.

c. Claims by children for the extraordinary costs of care after majority.

d. Wrongful prolongation of life.

a. History and scope. Claims for "wrongful life" initiated by children born with a disability did not emerge until the 1960s and were not addressed in the Restatement Second of Torts. Since the Second Restatement, children have asserted wrongful-life claims for the harm they sustained by being born with the disability, often alongside wrongful-birth claims asserted by their parents.

These wrongful-life claims are conceptually difficult, however, as, through the provision of damages, tort law seeks to restore (as best it can) the successful plaintiff to the position that the plaintiff would have occupied if the defendant had not committed the tort. In the case of wrongful life, that position would be the child's nonexistence. Wrongful-life claims thus necessarily depend on the proposition that being born with a disability is a harm and that damages entail the difference between life with the disability and the absence of life. As such, wrongful-life claims rest on the uncomfortable notion that nonexistence is better than life with a disability. Courts have been unwilling to so hold. Accordingly, this Section, like nearly all courts, declines to recognize claims for wrongful life.

b. Relationship with prenatal injury, wrongful pregnancy, and wrongful birth. As stated in Comment *a*, the crux of a wrongful-life claim is a child asserting that the child has been harmed by being born. As such, a wrongful-life claim is distinct from a prenatal-injury claim, asserted by a child (or, in the case of the fetus's wrongful death, the fetus's beneficiaries), that seeks to recover for physical harm tortiously inflicted on the child while the child was in utero. As explained in § __, those prenatal-injury claims are broadly accepted.

Meanwhile, a wrongful-life claim is also distinct from wrongful-pregnancy and wrongful-birth claims, addressed in §§ __ [Wrongful Pregnancy] and __ [Wrongful Birth] respectively. These latter claims, which are also broadly accepted, are asserted by parents based on the conception and birth of a child that the parents did not desire (wrongful pregnancy) or the birth of a child with a disability that the parents, if properly informed of the risks of that child being born with such a disability, would have prevented (wrongful birth).

c. Claims by children for the extraordinary costs of care after majority. Section __(b) [Wrongful Birth] and Comment *o* provide that, if local law does not permit the parents to recover the costs, a child born with a disability may recover the extraordinary costs that the child will incur because of the disability after the child reaches majority. Thus, for instance, a disabled child expected to live until age 54 may recover for those damages traceable to the disability that the child will incur between age 18 and 54. At least some courts have denominated such claims as

wrongful-life claims. This Restatement situates that authority in the wrongful-birth Section because the damages recoverable are the same as the damages recoverable for wrongful birth but merely shift recovery to the person who is legally authorized to recover those damages.

d. Wrongful prolongation of life. This Section's rejection of wrongful-life claims does not extend to the similar-sounding, but quite distinct claim for wrongful living or wrongful prolongation of life. These claims arise from an unreasonable failure to honor a patient's wishes to forgo life-sustaining treatment. This includes a patient's wishes recorded in an advance directive, such as a living will, and those documented in a doctor's order, such as a do-not-resuscitate order. Treatment contrary to patient wishes could also constitute a battery, although this Section does not speak to that cause of action.

Many jurisdictions have not yet confronted the validity of such claims. Among those that have, there has been a subtle shift. Most earlier decisions refused to recognize such claims, articulating concerns similar to those expressed in wrongful-life cases, while some recent decisions are more receptive, viewing the wrongful prolongation of life as being sufficiently distinct from wrongful life to merit some acceptance. Appellate decisions on these issues are not sufficiently developed, however, for the Institute to take a position on which of these contrasting views it should adopt.

REPORTERS' NOTE

Comment a. History and scope. An early case, denying a wrongful-life claim, provided an oft-quoted explanation:

> Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967); see also MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 331, 339 (11th ed. 2021) (explaining the wrongful-life claim).

Legions of courts have rejected wrongful-life claims, concluding that claims that require comparison to not being born should not be recognized. See, e.g., Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978) ("We hold that there is no legal right not to be born and the plaintiff has no cause of action for 'wrongful life.'"); Lininger v. Eisenbaum, 764 P.2d 1202, 1210 (Colo. 1988) ("We

agree with the overwhelming majority of courts which have addressed the issue that a person's existence, however handicapped it may be, does not constitute a legally cognizable injury relative to non-existence."); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 700 (Ill. 1987) ("Because no right not to be born, even into a life of hardship, has ever been recognized in our judicial system, [the plaintiff-child] has suffered no legally cognizable injury by being brought into existence afflicted with hemophilia."); Bruggeman v. Schimke, 718 P.2d 635, 639 (Kan. 1986) ("The majority of American jurisdictions have refused to recognize an action for wrongful life."); Procanik v. Cillo, 478 A.2d 755, 761 (N.J. 1984) ("Other courts have uniformly found that the problems posed by the damage issues in wrongful life claims are insurmountable and have refused to allow the action on behalf of the infant."); Azzolino v. Dingfelder, 337 S.E.2d 528, 532 (N.C. 1985) (observing that "we conclude that life, even life with severe defects, cannot be an injury in the legal sense").

While there are two or three Connecticut trial-court decisions recognizing a wrongful-life claim, several more recent, and better reasoned, decisions in Connecticut reach contrary results. For the latter cases, see Lynch v. State, 2019 WL 7630786, at *5 (Conn. Super. Ct. 2019); Bujak v. State, 2010 WL 625836, at *7 (Conn. Super. Ct. 2010); Rich v. Foye, 976 A.2d 819, 824-825 (Conn. Super. Ct. 2007).

The wrongful-life claim has been overwhelmingly rejected by courts despite considerable commentary supporting such claims. See Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. CIV. RIGHTS-CIV. LIBS. L. REV. 141, 143 & n.14 (2005) (citing the academic support for wrongful-life claims, while recognizing courts "have overwhelmingly rejected wrongful-life actions"); James A. Henderson, Jr., *Things of Which We Dare Not Speak: An Essay on Wrongful Life*, 86 GEO. WASH. L. REV. 689 (2018) (recommending a method to calculate damages in wrongful-life claims that would address the arguments that determining such damages is difficult or impossible). But see W. Ryan Schuster, Note, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 WM. & MARY L. REV. 2329, 2332 (2016) (concluding that recognizing wrongful-life claims would require courts to resolve philosophical questions about the meaning and valuation of life that courts should avoid).

A commentator provides a compendium of the reasons on which courts have relied to deny wrongful-life claims:

> 1) the value of human life makes existence in any form preferable to nonexistence; 2) a child's damages cannot be measured because a court cannot measure the difference between life in a defective condition and nonexistence; 3) a defendant's actions are not the proximate cause of the child's defects; 4) the issue of granting a wrongful life cause of action to a child should be left to the legislature; 5) a child does not have the right not to be born, or the right to be born a whole functioning human being; 6) if the courts recognize a cause of action for wrongful life then there will be a flood of claims, including many fraudulent ones; and 7) an excessive economic burden would be placed on the medical profession if the courts grant a child and its parents full recovery for a tortiously caused birth.

Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for A New Framework*, 22 J. FAM. L. 677, 702-703 (1984).

d. Wrongful prolongation of life. The most widely cited decision rejecting a claim for wrongful prolongation of life (which the court termed "wrongful living") is Anderson v. St. Francis-St. George Hosp., 671 N.E.2d 225 (Ohio 1996) (3-1-3 decision). There, the court framed the issue as whether "continued living" constituted a compensable injury. Id. at 227. The court explained that while all other elements of a tort claim existed, continued life, which it analogized to wrongful-life claims, was not a legally compensable injury and thus required denying such a claim. The court concluded that "[t]here are some mistakes, indeed even breaches of duty or technical assaults, that people make in this life that affect the lives of others for which there simply should be no monetary compensation." Id. at 228. A more recent decision allowing a wrongful-prolongation claim is Greenberg v. Montefiore New Rochelle Hosp., 164 N.Y.S.3d 615, 617-618 (App. Div. 2022), which framed the harm as the pain and suffering occurring during the wrongful prolongation of decedent's life. That framing led the court to reason that wrongful-life cases are distinguishable because a wrongful-prolongation claim requires "no philosophical guesswork" to determine ordinary pain and suffering damages. For recent reviews, see generally Nathaniel Clark, Note, *Refusing Unwanted Medical Treatment: An Unprotected Right*, 85 ALB. L. REV. 635 (2022); Alberto B. Lopez & Fredrick E. Vars, *Wrongful Living*, 104 IOWA L. REV. 1921 (2019).

Numerous studies show that medical providers in institutional settings often disregard, or are slow to recognize, patients' advance directives refusing end-of-life treatment. See Clark, supra at 643 (noting that, "depending on the study, between 25%, 58%, or 65% of advance directives are ignored or deviated from by physicians"). Observers suggest that one reason for this disregard is courts' reluctance to allow substantial recovery for administering life support against a patient's wishes; this reluctance results in the theoretical legal costs of wrongful treatment being less than potential liability for wrongful-treatment termination. Some analysts write, however, that this historical judicial reluctance may be abating, as contemporary social and professional norms more firmly embrace a "right to die" and as legal standards governing refusal of life-sustaining treatment have become more clearly established. See, e.g., Samuel D. Hodge, Jr., *Wrongful Prolongation of Life—A Cause of Action That May Have Finally Moved into the Mainstream*, 37 QUINNIPIAC L. REV. 167 (2019); Thaddeus Mason Pope, *Clinicians May Not Administer Life-Sustaining Treatment Without Consent: Civil, Criminal, and Disciplinary Sanctions*, 9 J. HEALTH & BIOMEDICAL L. 213 (2013); Nadia N. Sawicki, *A New Life for Wrongful Living*, 58 N.Y.L. SCH. L. REV. 279 (2014).

§ __. Liability for the Provision of Alcohol

(a) If a statute governs liability for injury caused by the provision of alcohol, an actor's liability for furnishing alcohol to another is governed by that statute.

(b) In the absence of a governing statute, a commercial establishment:

(1) is subject to liability for negligently providing alcohol to underage patrons when the underage patrons' intoxication factually causes subsequent injury; and

(2) is subject to liability for negligently providing alcohol to visibly intoxicated patrons (whether or not of legal drinking age) when the patrons' intoxication factually causes subsequent injury.

(c) In the absence of a governing statute, a social host:

(1) is subject to liability for recklessly providing alcohol to underage guests when the underage guests' intoxication factually causes subsequent injury; and

(2) is not liable for providing alcohol to guests of legal drinking age, even if the guests are served past the point of intoxication and even if the guests' intoxication factually causes subsequent injury.

Comment:

a. History.

b. Scope.

c. Rationale and support.

d. Definition of "commercial establishment" and "social host."

e. When social hosts are relieved of liability, it is a matter of duty.

f. Additional grounds for liability.

g. Commercial establishment liability: Service must be negligent.

h. Commercial establishment liability: Service of underage patrons.

i. Commercial establishment liability: Service of visibly intoxicated patron.

j. Social host liability: Service to underage guests must be at least reckless.

k. Social host liability: No liability for providing alcohol to guests age 21 or older.

l. Factual cause and scope of liability.

m. Relationship with liability for aiding and abetting another's negligent conduct.

n. Apportionment of liability: Injury to first party.

o. Apportionment of liability: Victim who encourages drinker's intoxication.

p. Apportionment of liability: Injury to third party.
q. Beyond alcohol: Other "intoxicating" substances.
r. Procedural aspects of duty determination.
s. Judge and jury.

a. History. The traditional common-law rule provided that those who furnished alcohol to minors and to obviously intoxicated persons were not liable for the injuries those persons subsequently inflicted. This rule, which represented an exception to the general principle that one owes a duty of reasonable care when one's conduct foreseeably imperils others, was usually justified on the ground that the consumption of alcohol, not its provision, was "the" proximate cause of the subsequent injury.

In time, however, as road fatalities—often traceable to drunk driving—mounted, many began to question the above exception. First, a handful of legislatures stepped in, enacting "Dram Shop" or "Civil Damage" Acts, which expressly subjected commercial suppliers of alcohol to civil liability. Then, in the 1960s, courts got in the act, and, reversing earlier positions, many imposed liability on suppliers of alcohol, in at least certain instances. Then, in some states, this activity was followed by another wave of legislation, as legislators endeavored to clarify or, in some instances, soften, judicial decisionmaking. These actions and revisions created the checkerboard pattern of liability for furnishing alcohol that exists across the United States today.

The Restatement Second of Torts did not address the liability of actors who furnish alcohol to others. Previous projects of the Third Restatement noted the issue, albeit in passing. In particular, Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(a) discussed the fact that, generally, there is a "duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." However, its Subsection (b) went on to note that, "[i]n exceptional cases," courts "may decide that the defendant has no duty or that the duty of reasonable care requires modification." Id. § 7(b). Then, Comment *a* to that Section specifically identified the social host context as an "exceptional" circumstance, when typical duty rules are relaxed. Comment *a* explained:

> [A] number of modern cases involve efforts to impose liability on social hosts for serving alcohol to their guests. A jury might plausibly find the social host negligent in providing alcohol to a guest who will depart in an automobile. Nevertheless, imposing liability is potentially problematic because of its impact on a substantial

slice of social relations. Courts appropriately address whether such liability should be permitted as a matter of duty.

b. Scope. This Section addresses when commercial establishments and social hosts are and are not liable when they provide alcohol to patrons and guests, respectively.

As Comment *a* explains, a strong majority of states have enacted legislation to establish—or alternatively, restrict—an actor's liability for furnishing alcohol to another. As Subsection (a) makes clear, where such a statute exists, and when the statute fully or partially displaces the common law, the statute's provisions govern, although common-law principles can, when useful, be utilized to fill gaps in statutory coverage.

c. Rationale and support. Consistent with the majority of states, Subsections (b) and (c) draw a clear line between "commercial establishments" and "social hosts" as those terms are defined in Comment *d*. Courts appropriately treat these providers differently. The different treatment is justified on four primary grounds. First, commercial establishments, unlike social hosts, profit from the provision of alcohol. Given this pecuniary motive to sell alcohol, in the absence of liability, commercial establishments may be tempted to *oversell* alcohol (given that, the more alcohol a bar or restaurant sells, the more money it makes). The imposition of liability can appropriately deter such antisocial conduct. Second, commercial establishments, unlike social hosts, tend to be enterprises. Generally, enterprises are more efficient bearers and spreaders of losses—and many believe it is also fair for enterprises to bear the costs that accompany their industry, rather than internalizing profits while externalizing costs to others. Third, compared to their noncommercial counterparts, commercial establishments—with trained staffs, and, often, liquor licenses—are more adept at monitoring and restricting patrons' consumption of alcohol. Fourth and finally, there is the matter of cultural norms and mores. In particular, *if* social hosts were saddled with potential liability for negligently serving beer, wine, or spirits to their adult guests, the imposition of liability could disrupt deeply rooted patterns of hospitality, social interaction, and fellowship.

Also, consistent with the majority of states, Subsection (c) draws a further line: distinguishing between social hosts who supply alcohol to underage guests as against those who supply alcohol to adults. This delineation is justified on the ground that, in every state, the elected branches of government have determined that persons under 21 years of age are incompetent to drink alcoholic beverages. Indeed, those who supply alcohol to underage individuals have, very

often, violated criminal laws. Owing to these criminal laws, while the provision of alcohol to adult guests is common, permissible, and broadly accepted, the opposite is true when the guest is underage—justifying different treatment in the tort-law context.

d. Definition of "commercial establishment" and "social host." A "commercial establishment" is (1) an actor in the business of selling alcoholic beverages, (2) an actor licensed to sell alcoholic beverages, or (3) an actor that sells alcohol for profit. As Illustrations 2, 6, and 11 make plain, "commercial establishments" are not limited to bars, restaurants, or taverns. To the contrary, convenience stores, grocery stores, social groups, and even individuals may qualify as "commercial establishments" if they satisfy one of these three criteria.

A "social host," meanwhile, is the residual category. It encompasses all other providers of alcohol. It frequently includes, among others, individuals, friends, colleagues, employers, and even businesses, as long as the business is not in the business of furnishing alcohol, licensed to do so, or profiting from the alcohol's sale.

When an actor, not in the business of furnishing alcohol or licensed to do so, charges for alcohol (or for entry into a gathering where alcohol is served), the determination of whether the actor is, on that occasion, a commercial establishment or social host can be murky. In that circumstance, a court should assess whether the charge is merely to defray costs (or, alternatively, to turn a profit), as well as whether the charging scheme gives the actor an incentive to encourage excessive consumption (as would be the case, for example, if there is a charge per drink).

Illustrations:

1. Rachel, age 22, opts to host a keg party in her father's townhouse while he is away on business. To defray the cost of the party, she has her friend, Melvin, stand at the door and charge every entrant $4. Rachel is a social host. Although she is charging guests for entry, the charge is nominal and merely covers costs. Furthermore, the scheme she has devised does not give her a pecuniary motive to encourage the excessive consumption of alcohol.

2. Darwin and Duane, both age 22, need to raise money to finance their internet start-up. To do so, they decide to host dance parties in their rented garage, charging $16 per cocktail. Darwin and Duane are a commercial establishment, as they are seeking to profit from the provision of alcohol, and their funding scheme motivates them to sell as much alcohol as possible.

For a discussion of the procedural aspects of this social-host-versus-commercial-establishment determination, see Comments *r* and *s* below.

e. When social hosts are relieved of liability, it is a matter of duty. As Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Comments *a* and *c* explain, the determination of whether to subject commercial establishments or social hosts to liability for the provision of alcohol is appropriately addressed as a matter of duty, not as a matter of scope of liability (sometimes called proximate cause).

Traditionally, as Comment *a* explains, it was otherwise. In the early and even middle years of the last century, courts viewed the question through a proximate-cause lens—and, viewing the question through that lens, courts tended to rule that the *sole* proximate cause of the plaintiff's injury was the *consumption* of alcohol, not its provision, which was "too remote" in time and space. However, such an artificial, bright-line rule was always questionable, as proximate-cause questions are decided, not on a per se basis by judges, but by factfinders, based on the particular facts of the case. See id. § 29, Comment *q* (explaining the proper resolution of such determinations); accord id. § 34, Comment *f* (explaining the peril of "[s]ole proximate-cause terminology" which improperly "implies that there can be only one proximate cause of harm"). Partly as a consequence, the proximate-cause approach has been broadly rejected. Reflecting this modern consensus, the proximate-cause approach was (as noted) rejected by a prior project of the Third Restatement of Torts, and its rejection is reaffirmed here.

f. Additional grounds for liability. Subsections (b) and (c) impose limitations on the liability of commercial establishments and social hosts, respectively, for the irresponsible provision of alcohol. In particular, Subsection (b) establishes that commercial establishments are subject to liability only if they negligently supply alcohol to individuals who are either underage and/or visibly intoxicated, and Subsection (c) establishes that social hosts are subject to liability only if they recklessly supply alcohol to underage individuals.

Importantly, however, even as Subsections (b) and (c) restrict when commercial establishments and social hosts can be liable *for the provision of alcohol*, neither Subsection affects *other* possible bases for liability. In particular, commercial establishments and social hosts, like anyone else, may, in certain situations, undertake and subsequently breach a duty of reasonable care to assist or protect their guests or patrons. If they do, they can be subject to liability. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 42 (regarding affirmative obligations

that stem from undertakings). Commercial establishments and social hosts may likewise stand in a special relationship with those who consume alcohol, giving rise to a duty to protect or to control. If there is a duty to protect or to control and that duty is breached, liability may follow. See id. §§ 40 and 41 (regarding affirmative obligations that stem from special relationships). Likewise, in some instances, the responsibilities that accompany land ownership or possession may subject the landowner–commercial establishment or landowner–social host to potential liability. See id. § 51.

Illustrations:

3. Jessup, age 24, hosts a lake party attended by six of his close friends, all in their late 20s. Over the course of the afternoon, all except Jessup become heavily intoxicated, downing the beer Jessup supplies. Late in the afternoon, Regina, a guest, slurs: "I really want to swim, but I'm not sure I'm sober enough." Jessup replies, "Don't worry. I haven't been drinking. I will keep an eye on you and make sure you stay safe." Reassured, Regina stumbles down to the lake and jumps in. Soon thereafter, and without notifying Regina, Jessup leaves the lake to walk to a nearby convenience store, in search of more beer for his guests. With Jessup away, Regina drowns. Pursuant to Comment *d*, Jessup is a social host. Pursuant to Subsection (c)(2), Jessup, as a social host, is not liable to Regina for the provision of alcohol. However, because he promised he would keep an eye on Regina, general tort principles establish that Jessup owed Regina a duty of reasonable care. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 42, Comment *e* (regarding an affirmative duty of reasonable care that stems from an undertaking, including a gratuitous promise to protect). Accordingly, pursuant to those general principles, Jessup had a duty of reasonable care to protect Regina during her swim. If a factfinder concludes that Jessup breached his duty of reasonable care and that that breach caused Regina's drowning, he is subject to liability for Regina's wrongful death.

4. Jerome, age 36, throws a housewarming party in his new home, and he invites his friends from work, who are all in their late 30s, to attend. One colleague, Larissa, drinks far too many martinis and, at the end of the evening, while bidding Jerome goodbye, falls down Jerome's poorly lit and rickety front stairs, sustaining injury. Pursuant to Comment *d*, Jerome is a social host. Pursuant to Subsection (c)(2), Jerome, as a social host, is not liable to Larissa for the provision of alcohol. However, Jerome is subject to liability as a possessor of land. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 51(b)

(explaining that "a land possessor owes a duty of reasonable care to entrants on the land with regard to . . . artificial conditions on the land that pose risks to entrants on the land"). If a factfinder concludes that Jerome, as a land possessor, breached his duty of reasonable care and that that breach caused Larissa's injury, he is subject to liability for Larissa's fall.

5. Han Lee, age 42, goes to Bob's Bar after work, where he downs five beers over the course of the evening; however, he does not exhibit any outward signs of visible intoxication. When returning to his car, he trips and falls in Bob's Bar's icy and snow-covered parking lot, sustaining injury. Pursuant to Comment *d*, Bob's Bar is a commercial establishment. Pursuant to Subsection (b)(2) and Comment *i*, Bob's Bar is not liable to Han Lee for the provision of alcohol because Han Lee was not visibly intoxicated. However, for the reasons articulated in Illustration 4, Bob's Bar is subject to liability as a possessor of land. See id. § 51(b). If a factfinder concludes that Bob's Bar, as a land possessor, breached its duty of reasonable care and that that breach caused Han Lee's injury, it is subject to liability for Han Lee's fall.

Of course, in all three Illustrations above, plaintiffs' negligent conduct—whether in drowning, falling, or tripping—will very likely affect (and could even extinguish) their recoveries if they are otherwise successful in their claims against defendants. See Restatement Third, Torts: Apportionment of Liability §§ 7 and 8 (describing apportionment principles). And in the calculation of each plaintiff's fault, there is no accommodation made for voluntary intoxication. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 12, Comment *c* ("When an actor's intoxication is voluntary, it is not considered as an excuse for the actor's conduct that is otherwise lacking in reasonable care. Moreover, actors can be found negligent precisely because they consume alcohol knowing that they will shortly be undertaking a dangerous task or because they undertake such a task knowing that they are under the influence of alcohol.").

g. Commercial establishment liability: Service must be negligent. In order for a commercial establishment to be subject to liability under Subsection (b), the plaintiff must show that the commercial establishment's conduct was unreasonable under the circumstances. It is not enough for a plaintiff to show that a commercial establishment served alcohol and that, owing to provision of alcohol, injury ensued.

Generally, to show that the commercial establishment was negligent, the plaintiff will be obligated to show that the commercial establishment furnished alcohol to a patron who the

establishment knew, or should have known, was underage or visibly intoxicated. Under general principles of agency law, knowledge by an establishment's employee or agent satisfies this knowledge element. See Restatement of the Law Third, Agency §§ 5.01-5.03. For more on service to underage patrons—where statutes tend to play a prominent role—see Comment *h*. For more on service to intoxicated patrons, see Comment *i*.

h. Commercial establishment liability: Service of underage patrons. When a commercial establishment serves an underage patron and injury ensues, the plaintiff need not show that the underage patron was visibly intoxicated. Instead, the relevant question (for purposes of breach) is whether the establishment (or its employees or agents) knew, or reasonably should have known, that it was furnishing alcohol to someone under age 21.

As a shortcut to showing that the establishment knew or should have known that the patron was underage, the plaintiff—like plaintiffs generally—may be able to rely on the establishment's violation of a criminal statute or other enactment. Legislative enactments come to the fore in cases involving underage patrons (pursued pursuant to Subsection (b)(1)), as every state imposes a minimum age of 21 for the purchase of alcohol. Given these statutes, if a commercial establishment sells alcohol to an underage patron, the sale is contrary to law.

Depending on the jurisdiction, the defendant's unexcused violation of such a provision may establish negligence per se or it may give rise to an inference or presumption of negligence. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 14 ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect."). In jurisdictions where an unexcused statutory violation merely gives rise to an inference or presumption of negligence, the defendant may be able to rebut that inference or presumption by showing that it exercised reasonable care. Likewise, in jurisdictions where an unexcused statutory violation establishes negligence per se, the defendant may be able to establish that, under the particular facts and circumstances, the statutory violation was properly excused. See id. § 15(b) ("An actor's violation of a statute is excused and not negligence if . . . the actor exercises reasonable care in attempting to comply with the statute . . . ."); id., Comment *c* ("[T]he common law recognizes that the person can rebut negligence per se by showing that the person made a reasonable effort to comply with the statute.").

Illustration:

6. Duane, age 17, enters a Fast Mart and heads to the checkout counter with four 12-packs of beer. The clerk asks for identification, and Duane shows him a fake driver's license. The clerk looks at the "license," nods, and completes the transaction. In the jurisdiction, it is illegal to sell alcohol to a person under age 21. Furthermore, in the jurisdiction, a statutory violation gives rise to a rebuttable presumption of negligence. It is for the factfinder to determine whether, under the circumstances, Fast Mart—by requesting and viewing Duane's identification—has rebutted the presumption of negligence. This assessment is to be based, in part, on Duane's physical appearance and the apparent authenticity of the fake driver's license. If the factfinder determines that the clerk did not know, and, under the circumstances, it was reasonable for the clerk not to know, that Duane was underage, Fast Mart is not liable for harm that ensued as a consequence of the alcohol sale.

Even if a commercial establishment serves alcohol to an underage individual, the commercial establishment may fulfill its duty of reasonable care by taking reasonable steps after service to ensure that the individual makes it to a place of safety, without incident. See Illustration 7 below.

i. Commercial establishment liability: Service of visibly intoxicated patron. Pursuant to Subsection (b)(2), commercial establishments are under no obligation to investigate each patron's level of intoxication (or sobriety) before service. However, before furnishing alcohol to patrons, commercial establishments' agents or employees must use their powers of observation to perceive readily visible outward signs that a patron is intoxicated, and they must refrain from serving or selling alcohol to visibly intoxicated patrons. If the commercial establishment ignores a patron's visible intoxication and serves the intoxicated patron notwithstanding that visible intoxication, the establishment is subject to liability.

A plaintiff seeking to prove that the commercial establishment served the patron in question while the patron was visibly intoxicated can proceed using direct or circumstantial evidence. Direct evidence may include evidence of the patron's slurred speech or uneven gait, including security-camera recordings of the patron. Circumstantial evidence may include point-of-sale data about the amount of alcohol the patron has consumed, as well as evidence that the patron had an elevated blood-alcohol content sometime after the patron was served alcohol, although this latter evidence must typically be combined with competent expert testimony. (In particular, the expert would

testify that a given blood-alcohol content (at time *x*) indicates that the patron was—or was not—likely visibly intoxicated at the time of service (at all-important time *y*)). Likewise, a factfinder, confronted with evidence that the patron drank a certain quantity of alcohol, can properly infer, based on common sense and experience, that the patron would (or would not) have displayed obvious outward signs of intoxication.

As stated above, even if a commercial establishment serves alcohol to a visibly intoxicated individual, the commercial establishment may fulfill its duty of reasonable care by taking reasonable steps after service to ensure that the patron makes it to a place of safety, without incident.

Illustration:

7. Ken, a patron at The Gondolier Tavern, downs two bottles of wine in quick succession; by the end of the evening, he is slurring his speech and is unable to stand. Recognizing Ken's intoxication, Gondolier's bartender calls Ken a taxi from a reputable taxi company, accompanies Ken outside, speaks to the driver to ensure that the driver will take Ken straight home, and even gives the driver money to cover Ken's fare. Unfortunately, on the way home, when the taxi is stopped at a red light, Ken leaps out of the taxi and into traffic, sustaining serious injury. As a matter of law, The Gondolier Tavern is not liable for Ken's injury. Although The Gondolier Tavern over-served Ken, after that service, as a matter of law, it behaved reasonably in an effort to ensure that Ken would make it home safely.

j. Social host liability: Service to underage guests must be at least reckless. The majority of states impose some liability on social hosts for the provision of alcohol to underage guests. However, particulars vary. Some states impose liability when the social host is merely negligent. These states often reason that statutes prohibit the provision of alcohol to underage persons, and actors who violate those statutes are presumptively negligent or negligent per se—and, thus, appropriately subject to liability. Meanwhile, on the other end of the continuum, some states ratchet up the culpability requirement, demanding some showing of actual knowledge and/or willfulness before subjecting social hosts to liability, although *what* must actually be known or intended, itself, varies.

In the face of this inconsistent authority, and mindful of the competing policies set forth in Comment *c*, Subsection (c)(1), charts a middle path. Consistent with the law in a majority of states, a social host who is merely negligent is not subject to liability. Yet, also consistent with the law in

the majority of states, a social host who provides alcohol to an underage individual may be liable, in at least some instances. In particular, pursuant to Subsection (c)(1), a social host is subject to liability when the social host provides alcohol to a person under age 21, and the social host acts at least recklessly in so doing. Circumstances that bear on this recklessness determination include but are not limited to: the guest's youth, the social host's actual or constructive knowledge of the guest's youth, the guest's state of intoxication, the quantity of alcohol served, whether the social host is merely passive or instead active in the provision of alcohol, and the guest's foreseeable future activity (including whether it is reasonably foreseeable that the guest will drive while under the influence of alcohol). For the definition of "recklessness," see Restatement Third, Torts: Liability for Physical and Emotional Harm § 2 (explaining that "[a] person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk").

Illustrations:

8. Silda and Jerome host a Passover Seder at their home, attended by their teenage son's friend, Lev, age 16. Over the course of the Seder, Lev drinks four cups of wine, as is the traditional custom at some families' Passover celebrations. While driving home, Lev, who has become intoxicated, collides with a tree, suffering injury. As social hosts, pursuant to Subsection (c)(1), Silda and Jerome are subject to liability to Lev if a factfinder adjudges their provision of alcohol reckless under all of the circumstances.

9. Roslyn and Larissa leave town for the weekend, and, while they are away, their 19-year-old child, Bertram, who is home from college, invites his 19-year-old friend, Teresa, over for the evening. Together, they drink several beers out of Roslyn and Larissa's refrigerator. While driving home, Teresa, who has become intoxicated, collides with a tree, suffering injury. As social hosts, pursuant to Subsection (c)(1), Roslyn and Larissa are not liable to Teresa for her injuries because, as a matter of law, they are not reckless under the circumstances. Restatement Third, Torts: Liability for Physical and Emotional Harm § 2 (defining recklessness).

Sometimes, the guest and the social host are *both* underage, presenting the question of whether an underage social host can be subject to liability for furnishing alcohol to an underage guest (provided that the other requirements of this Section are satisfied). Generally, minors engaged in adult activities are held to an unmodified standard of care, despite their immaturity. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 10(c). But, it is also reasonable to conclude that minors, who are (as a matter of legislative policy) incompetent to handle the effects of alcohol, should be relieved from bearing responsibility for certain of the adverse consequences that flow from its provision. Few courts have addressed that question, and those that have have split. Accordingly, the Institute takes no position on this matter, deferring to further judicial development.

k. Social host liability: No liability for providing alcohol to guests age 21 or older. Consistent with the large majority of states, Subsection (c)(2) provides that social hosts are "not liable for providing alcohol to guests of legal drinking age, even if the guests are served past the point of intoxication and even if the guests' intoxication factually causes subsequent injury." In so doing, Subsection (c)(2) fits somewhat uncomfortably within tort law's broader fabric. The protection Subsection (c)(2) affords social hosts is arguably inconsistent with tort law's foundational principles, including tort law's twin goals of providing adequate compensation and promoting efficient deterrence. Subsection (c)(2) also deviates from other well-established tort doctrines, including: (1) the general rule that a defendant may be subject to liability if the defendant's negligent conduct "increases the likelihood that the plaintiff will be injured on account of the misconduct of a third party," Restatement Third, Torts: Liability for Physical and Emotional Harm § 19, Comment *e*; (2) the general rule that a defendant may be subject to liability if the defendant aids or abets a tortfeasor's negligent conduct, § __ [Aiding and Abetting Negligence Torts], Comment *q* of this draft; and (3) the traditional duty rule, which establishes that one owes a "duty to exercise reasonable care" whenever "the actor's conduct creates a risk of physical harm," Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(a); accord Restatement Second, Torts § 302, Comment *a*.

Nevertheless, Subsection (c)(2) is currently warranted given the strong case-law support, as well as the practical challenges and policy considerations set forth above in Comment *c*. These include that the imposition of civil liability may unduly burden social hosts, who are not apt to be adept at monitoring and restricting guests' consumption of alcohol, as well as the fact that the

imposition of such liability could disrupt deeply rooted patterns of hospitality, social interaction, and fellowship.

Illustration:

10. Same facts as Illustration 8, in that Silda and Jerome host a Passover Seder at their home. Now, however, Lev is age 29, rather than 16. As social hosts who served alcohol to a person over age 21, pursuant to Subsection (c)(2), Silda and Jerome are not liable for Lev's injuries.

l. Factual cause and scope of liability. A defendant is subject to liability only if the defendant breaches a duty of care. That breach involves negligence for commercial establishments (per Comments *g*, *h*, and *i*) and recklessness for social hosts, for service to underage individuals (per Comment *j*). Additionally, a defendant is subject to liability only if the defendant's breach is a factual cause of the plaintiff's injury, and the plaintiff's injury is within the defendant's scope of liability. For factual cause, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 26. For scope of liability (often called proximate cause), see id. § 29.

When the defendant supplies alcohol to a young person or to a visibly intoxicated adult and that individual subsequently becomes impaired (or further impaired), drives drunk, and inflicts injury, the scope-of-liability (also called proximate cause) determination is straightforward. Drunk driving is an all-too-common harm associated with the irresponsible consumption of alcohol. However, when the inebriated individual does something that is unexpected, the factfinder may find that the drinker's conduct is so unforeseeable that it relieves the alcohol supplier from liability. See id. § 29, Comments *j* (discussing foreseeability) and *q* (explaining that, if the question is one where "reasonable minds can differ as to whether the type of harm suffered by the plaintiff is among the harms whose risks made the defendant's conduct tortious," the scope-of-liability determination is to be made by a properly instructed factfinder).

Illustrations:

11. One Friday evening, Duane, age 16, purchases three gallons of vodka from Liquor Mart; at the time of purchase, the Liquor Mart cashier makes no effort to check his age. After exiting Liquor Mart, Duane shares the vodka with his 16-year-old friends, Deon and Fatima. Fatima subsequently suffers alcohol poisoning and sustains permanent liver damage. In the suit that ensues, Liquor Mart zeroes in on scope of liability (often called proximate cause), insisting that it was not foreseeable that Duane would share the vodka

with others—and that, owing to the lack of foreseeability, it is not liable for Fatima's injuries. Whether Fatima's injury is within Liquor Mart's scope of liability is a question for the factfinder, applying the principles of Restatement Third, Torts: Liability for Physical and Emotional Harm § 29.

12. One Friday evening at 6:00 p.m., Robert enters Willoughby's, a neighborhood bar, where the bartender serves him seven stiff drinks over the course of two hours, even as he slurs and slumps on his barstool. At 8:00 p.m., Robert, slurring slightly, asks for an eighth drink, but the bartender replies: "You've had enough. You need to pay up and go." Instead of paying, however, Robert becomes belligerent, at which point the bartender summons the police who come and arrest Robert for disorderly conduct. The police take Robert to the local detention center, where he remains for over 72 hours. Unfortunately, however, on his fourth day of confinement, Robert becomes agitated, removes his belt, and, with his belt, attempts to hang himself in his holding cell. The attempt causes permanent brain damage. Willoughby's, a commercial establishment, breached its duty to Robert by serving him alcohol even after he was visibly intoxicated. However, Willoughby's is not liable for Robert's ensuing injury because, as a matter of law, Robert's days-later and self-inflicted injury is not within Willoughby's scope of liability. See id.

13. Jamison, who is age 18 and 180 pounds, attends his cousin's graduation party. At the party, Jamison's cousin serves him a small flute of champagne. While driving away from the graduation party, Jamison runs a red light and injures Letitia in a car accident. Even if a factfinder were to conclude that the cousin's service was reckless (per Subsection (c)(1)), as a matter of law, Jamison's cousin is not liable for Letitia's injuries because, given Jamison's weight, a single flute of champagne could not have produced sufficient impairment to cause Jamison to run the red light. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 26 (discussing factual cause).

m. Relationship with liability for aiding and abetting another's negligent conduct. An actor is subject to liability for aiding and abetting—a form of concert of action—if the actor actually knew that another individual might engage in wrongful conduct posing a risk to third parties, and the actor substantially assisted or encouraged the other to engage in that wrongful conduct. See § __ [Aiding and Abetting Negligence Torts] of this draft; Restatement Second, Torts § 876.

When liability is imposed on commercial establishments and/or social hosts under the principles of this Section, liability under this Section and liability for aiding and abetting may overlap. If the requirements of both causes of action are independently satisfied, an actor can be liable under both theories simultaneously, although, of course, a plaintiff is never entitled to more than a single recovery. See Restatement Third, Torts: Remedies § 3 (Tentative Draft No. 1, 2022) (furnishing the general rule that "a plaintiff cannot recover an amount of compensatory damages that exceeds one full compensation for each harm that plaintiff suffered").

Illustration:

14. Spiros, Omar, and Sigma plan an outdoor party in a remote field; they agree that the party will be open to minors and that beer and other alcoholic beverages will be served. Sigma, a senior in college (age 24), serves as the bartender at the party. Sigma serves 12 cocktails to Omri, who he knows is a college freshman (age 18). Omri assures Sigma that it is okay to serve him that many drinks because he will drive home carefully, notwithstanding his intoxication. While driving home, Omri runs into and injures Tau, a pedestrian. Pursuant to Subsection (c)(1), Sigma, a social host, is subject to liability to Tau (assuming a factfinder concludes that Sigma behaved recklessly under the circumstances). In addition, Spiros and Omar may also be liable to Tau for aiding and abetting for their role in planning and hosting the party. See § __ [Aiding and Abetting Negligence Torts] of this draft. Omar and Sigma may additionally be liable to Tau based on civil agreement, see § __ [Agreements to Engage in Conduct that is Negligent or Reckless] of this draft.

n. Apportionment of liability: Injury to first party. Sometimes, a person will drink to excess—and then the person will injure himself or herself, owing to the intoxication. On that occasion, the person may initiate what is sometimes called a "first-party claim," filing suit against the commercial vendor, pursuant to Subsection (b), or the social host, pursuant to Subsection (c), essentially for fueling his or her intoxication.

States have grappled with whether to permit these first-party claims—and, in so doing, they have divided. By some counts, currently, the majority of states bar first-party claims, although case counts are muddied by the fact that many states that formally bar first-party claims have carved out exceptions to the prohibition, including (depending on the jurisdiction) for underage individuals (those under 21), minors (those under 18), and/or so-called "habitual drunkards."

Contrary to the law of these states, this Section recognizes no *automatic* bar to the drinker's cause of action. When the state's statutory scheme is equally susceptible to either interpretation, a bright-line prohibition (sometimes called "the noninnocent-party doctrine") is disfavored for four reasons. First, a bright-line prohibition on the drinker's claim is inconsistent with broad principles of comparative responsibility, which apportion—rather than mechanistically shift or extinguish—blame. See § 18 A, Comment *h* of this draft (explaining that comparative responsibility embodies the "principle that sharing costs among those who wrongfully cause a loss should be a strong default unless there are very good reasons to depart from that default"). Second, such a bright-line prohibition is inconsistent with this Restatement's abrogation of the wrongful acts doctrine. Abrogating that doctrine, Restatement Third, Torts: Apportionment of Liability § 4 A (added by Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)), establishes that a person's recovery in tort "is not barred . . . merely because the person was engaged in an illegal, tortious, or otherwise wrongful act at the time of suffering harm." Third, as noted, in practice, the rules that prohibit these first-party claims are complex and difficult to apply, as they are studded with exceptions and qualifiers, including (depending on the jurisdiction) for those under 21, those under 18, and so-called "habitual drunkards." By permitting first-party claims and subjecting them to familiar apportionment principles, this Section avoids this checkerboard approach (and also sidesteps the difficult questions embedded within that approach, such as whether an individual is or is not a "habitual drunkard"). Fourth and finally, permitting first-party recovery aligns with the general principle of negligent entrustment, which has no first-party prohibition. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 19 ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct *of the plaintiff* or a third party."); id., Comment *b* (explaining that the negligent entrustment plaintiff is still entitled to recover against a tortfeasor who supplied the dangerous instrumentality to that plaintiff); Restatement Second, Torts § 390 ("One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of *physical harm to himself* and others whom the supplier should expect to share in or be endangered by its use, *is subject to liability* for physical harm resulting to them.") (emphasis added); id., Illustration 7 (addressing first-party claim involving "intoxicated" individuals fatally injured in a

boating accident and explaining that their beneficiaries can nevertheless recover; applying no bright-line rule to exclude irresponsible drinkers from recovering in tort).

That said, while the intoxicated victim's cause of action is not *automatically* extinguished, it is adversely affected. In particular, the drinker's own unreasonable conduct in drinking to excess will affect any ensuing recovery under the principles set forth in Restatement Third, Torts: Apportionment of Liability §§ 7 and 8. See id. § 4 B (added by Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)) (establishing that, when a "victim violates a criminal statute or other regulatory safety provision designed to protect against the type of accident caused by the victim's conduct" and his or her violation is a "factual cause of the victim's harm," then the violation will affect the victim's recovery pursuant to the familiar standards set forth in §§ 7 and 8). Furthermore, in assigning shares of comparative responsibility between the defendant (alcohol supplier) and the plaintiff (who was voluntarily intoxicated and subsequently injured), no accommodation is to be made for the latter's voluntary intoxication. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 12, Comment *c*.

Given all this, in states with pure comparative responsibility systems, the intoxicated individual's recovery is apt to be much reduced. And, in states with modified comparative responsibility systems—or in the handful of states that retain the traditional all-or-nothing system of contributory negligence—the intoxicated individual's decision to drink to or past the point of intoxication will frequently preclude the intoxicated individual's recovery altogether. Restatement Third, Torts: Apportionment of Liability § 7, Comment *a*.

Illustration:

15. After a punishing day at work, Ferdinand drives to his favorite watering hole, "Charley's Angels," where he bellies up to the bar and downs three pitchers of beer in quick succession. He then gets up from his bar stool and, weaving precariously, stumbles to the door. The bartender, Joe, asks Ferdinand if he is "good to drive," and Ferdinand slurs in reply: "I'm right as rain." Minutes after exiting the bar, Ferdinand is injured when he drives into a telephone pole. In the lawsuit that ensues, when assigning shares of comparative responsibility, the factfinder is to assess Ferdinand's decision to drink to excess and then drive while inebriated in violation of state law. See Restatement Third, Torts: Apportionment of Liability § 3, Comment *a* (establishing that, when a plaintiff is

injured because of the plaintiff's violation of a statute, that statutory violation will be taken into account in the same way it is taken into account when evaluating a defendant's conduct). In modified comparative negligence jurisdictions—or in the handful of jurisdictions that retain contributory negligence—Ferdinand's tortious conduct may well entirely extinguish Charley's Angels's potential liability. See id. §§ 7 and 8.

Sometimes, the intoxicated individual dies as a result of the intoxication, and a wrongful-death suit is initiated by the decedent's beneficiaries. Unless otherwise provided by statute, in a wrongful-death action, the decedent's (here, the intoxicated individual's) fault is imputed to the decedent's beneficiaries. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 70 [Approximately], Comment *m* (discussing decedent fault, in cases of wrongful death) of this draft; Restatement Third, Torts: Apportionment of Liability § 6, Comment *c* (explaining how decedent fault is imputed to beneficiaries in wrongful-death claims).

Illustration:

16. Same facts as Illustration 15, except that Ferdinand dies when he crashes into the telephone pole. In the wrongful-death action that ensues, his fault in drinking to excess and then driving while intoxicated is imputed to his beneficiaries, with the same consequence as in Illustration 15.

o. Apportionment of liability: Victim who encourages drinker's intoxication. Sometimes, an actor will encourage another individual's intoxication and then the actor will sustain injury as a consequence of the encouragement and intoxication. Confronting that scenario, some states hold that the actor's encouragement precludes the actor's recovery, under what is sometimes known as the "complicity defense." Pursuant to that defense, a plaintiff may not recover "where the plaintiff either caused the intoxication, encouraged the drinking which caused the intoxication, or participated to a material and substantial extent in the drinking which led to the intoxication of the inebriate." Parsons v. Veterans of Foreign Wars Post 6372, 408 N.E.2d 68 (Ill. App. Ct. 1980). The stated justification for the rule is that only "innocent" persons are entitled to the law's protection.

For reasons similar to those discussed above in Comment *m*, this Section rejects the complicity defense. That bright-line prohibition is disfavored because, among other things, it: conflicts with general principles of comparative responsibility; is inconsistent with this Restatement's abrogation of the wrongful acts doctrine, see Restatement Third, Torts: Apportionment of Liability § 4 A (added by Restatement Third, Torts: Concluding Provisions

(now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)); and creates a knife-edge problem as the factfinder is made to assess just how "material and substantial" the participation must be, in order to "count" and, therefore, bar a plaintiff's claim.

Although it will not necessarily preclude the at-fault victim's recovery, the victim's unreasonable conduct in encouraging—or participating in—the drinker's excessive consumption of alcohol will reduce the victim's recovery under familiar principles of comparative responsibility. See Restatement Third, Torts: Apportionment of Liability §§ 7 and 8.

Illustration:

17. Eager to celebrate the end of the work week, Baxter and Reynolds, friends from their college days, go to Shady Grove Truck Stop and Café. Together, over an order of wings, they polish off six pitchers of beer—and, throughout the evening, they take turns encouraging the other's alcohol consumption. At the end of the evening, Baxter opts to ride home with Reynolds, even though Reynolds is stumbling and slurring his words. Soon after leaving the Shady Grove parking lot, Reynolds's car smashes into a tree, and Baxter sustains serious injury in the collision. In the lawsuit that ensues, Baxter's claim against both Shady Grove Truck Stop and Café and Reynolds is not automatically extinguished, whether by the complicity doctrine or otherwise. However, when assigning shares of comparative responsibility, the factfinder is to consider Baxter's fault in encouraging Reynolds's excessive consumption of alcohol and then opting to ride with an inebriated driver. In modified comparative negligence jurisdictions—or in the handful of jurisdictions that retain contributory negligence—Baxter's tortious conduct may entirely extinguish both Shady Grove's and Reynolds's liability. See id. §§ 7 and 8; see also id. § 3, Comment *c* (explaining that a plaintiff's secondary assumption of risk is to be considered pursuant to comparative fault principles and further clarifying that "the plaintiff's awareness of a risk is relevant to the plaintiff's degree of responsibility").

p. Apportionment of liability: Injury to third party. Sometimes, an actor will drink and then, owing to the ensuing intoxication, the actor will injure a third party. When a third party is injured and sues both the alcohol supplier and the actor who drank while underage or to excess (the direct tortfeasor), the factfinder is to apportion the liability of the two defendants pursuant to general comparative responsibility principles. See Restatement Third, Torts: Apportionment of Liability § 8 (establishing the factors to be considered when "assigning percentages of responsibility");

accord Restatement Second, Torts § 390, Illustration 7. As above, in determining fault, no accommodation is to be made for the direct tortfeasor's voluntary intoxication. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 12, Comment *c*.

q. Beyond alcohol: Other "intoxicating" substances. As certain states have relaxed laws that previously barred the sale and consumption of cannabis and other controlled substances, some have started to question whether dram shop liability will be—or should be—extended beyond alcohol. Given the paucity of relevant authority, the Institute takes no position on the matter.

r. Procedural aspects of duty determination. As Comment *e* explains, when an alcohol provider is relieved of liability because of the actor's identity as a social host, the relevant tort principle is one of duty. In that instance, as Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Comment *b* explains: "A defendant has the procedural obligation to raise the issue of whether a no-duty rule or some other modification of the ordinary duty of reasonable care applies in a particular case. The appropriate method for a defendant to raise this issue is a matter for the procedural rules of the jurisdiction. The jurisdiction's rules should provide adequate notice to the plaintiff that the defendant claims he or she did not owe the plaintiff a duty of reasonable care." Because the question of whether a provider of alcohol is a social host or commercial establishment is a duty question, it is a question for the court, although when disputed facts bear on the existence of a duty, those facts are to be determined by the factfinder. See Comment *s* (explaining the allocation of authority between the judge and jury).

s. Judge and jury. As Comment *r* explains, when an alcohol provider is relieved of liability because of the actor's identity as a social host, the relevant tort principle is one of duty; it is because, for exceptional reasons of policy and tradition, social hosts do not owe a duty of reasonable care in the provision of alcohol to those foreseeably injured by inebriated guests (including the guests themselves). See Comment *e* above. Duty questions are for the judge. This means that the determination of whether a provider of alcohol is a social host or commercial establishment is typically a question for the court. But when disputed facts bear on the existence of a duty, those facts are to be determined by the factfinder. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Comment *b*.

Once the duty determination is made, the Section's other elements—including whether the defendant breached, whether the defendant's breach factually caused the plaintiff's injury, whether

the plaintiff's injury was within the scope of the risk, and the different actors' relative share of comparative responsibility—are matters for the factfinder.

REPORTERS' NOTE

Comment a. History. As the Kansas Supreme Court has explained: "At common law . . . no redress exists against persons selling, giving or furnishing intoxicating liquor for resulting injuries or damages due to the acts of intoxicated persons . . . ." Kudlacik v. Johnny's Shawnee, Inc., 440 P.3d 576, 579 (Kan. 2019). For a case articulating that traditional common-law principle, see Joyce v. Hatfield, 78 A.2d 754, 756 (Md. 1951) ("The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor."). For further discussion of the traditional common-law rule of no liability, see FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 17.5, at 697 n.21 (3d ed. 2007) (describing courts' reasoning that "only the consumption of the alcohol, and not its wrongful serving" caused injuries).

For a discussion of the subsequent history, see Mary M. French et al., *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058, 1065-1068 (1985); Kacey R. Scott, Note, *"In Heaven There Is No Beer, That's Why We Drink It Here:" Making Kansas Roads Safer with Dram Shop Liability*, 57 WASHBURN L.J. 543, 547-553 (2018); Diane Schmauder Kane, *Social Host's Liability for Death or Injuries Incurred by Person to Whom Alcohol Was Served*, 54 A.L.R.5th 313, § 2 (originally published in 1997). For a window into how this broad history unfolded in a particular state, see, e.g., Hickingbotham v. Burke, 662 A.2d 297, 299-300 (N.H. 1995) (tracing the history of liability for the provision of alcohol in New Hampshire).

Comment b. Scope. The vast majority of states have enacted some kind of dram shop statute. See Westco Agronomy Co., LLC v. Wollesen, 909 N.W.2d 212, 222 (Iowa 2017) ("Dram-shop laws exist in the vast majority of states."); Godfrey v. Bos. Old Colony Ins. Co., 718 So. 2d 441, 445 (La. Ct. App. 1998) ("Currently, a vast majority of the states in this country have some type of dram shop law.").

For examples of state enactments, see, e.g., COLO. REV. STAT. § 44-3-801; GA. CODE ANN. § 51-1-40; IDAHO CODE ANN. § 23-808; IND. CODE ANN. § 7.1-5-10-15.5; MICH. COMP. LAWS ANN. § 436.1801; MINN. STAT. ANN. § 340A.801; MONT. CODE ANN. § 27-1-710; N.Y. GEN. OBLIG. LAW § 11-101; TENN. CODE ANN. §§ 57-10-101 and -102; TEX. ALCO. BEV. CODE ANN. § 2.02; UTAH CODE ANN. § 32B-15-201; VT. STAT. ANN. tit. 7, § 501; WIS. STAT. ANN. § 125.035.

In some states, the dram shop act occupies the field, fully displacing the common law. In these states, Subsection (b) has no purchase. For examples of states where the common law is fully displaced, see, e.g., Shea v. Matassa, 918 A.2d 1090, 1092 (Del. 2007) ("The General Assembly heavily regulates the sale and use of alcohol and by so doing has clearly announced its intent to occupy exclusively the field of policy making in that subject area."); Wakulich v. Mraz, 785 N.E.2d 843, 848 (Ill. 2003) ("Through its passage and continual amendment of the Dramshop Act, the General Assembly [of Illinois] has preempted the entire field of alcohol-related liability.").

In many other states, by contrast, the dram shop act addresses only particular conduct, leaving other kinds of claims subject to common-law principles. For examples of states where the common law is only partially displaced, see, e.g., MINN. STAT. ANN. § 340A.801 ("Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years."); Piontkowski v. Agan, 2009 WL 2505717, at *5 (Conn. Super. Ct. 2009) (explaining that, in Connecticut, the "dram shop act is the exclusive remedy for injuries arising from the sale of alcohol to an intoxicated adult" but that the act does not speak to social host liability); Klingerman v. SOL Corp. of Maine, 505 A.2d 474, 477 (Me. 1986) (rejecting the defendant's argument that the dram shop statute supplies "an exclusive remedy in the absence of express language to that effect"); Mendoza v. Tamaya Enters., Inc., 258 P.3d 1050, 1056-1058 (N.M. 2011) (holding that New Mexico's dram shop statute applied only to taverns licensed under the state's laws and that, as a consequence, the statute did not preempt common-law claims against nonlicensees); Matthews v. Konieczny, 527 A.2d 508, 514 (Pa. 1987) (concluding that the relevant state statute conferred immunity on those who sell alcohol to adults but not to those who sell alcohol to under-age customers—and that, as a consequence, the latter claims were governed by common-law principles); Swett v. Haig's, Inc., 663 A.2d 930, 931 (Vt. 1995) (explaining that, in Vermont, the Dram Shop Act's "preemptive effect is limited").

Finally, in still other states, liability depends *exclusively* on common-law principles, sometimes informed by criminal statutes and their violation. See Comment *h* (discussing the importance of statutory violations); Restatement Third, Torts: Liability for Physical and Emotional Harm § 14 (AM. L. INST. 2010) (establishing that "[a]n actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect"). For an example of a state where, per statute, the matter is one exclusively of the common law, see R.I. GEN. LAWS § 3-14-9 ("Common law claims and defenses applicable to tort actions based on negligence and recklessness in this state shall not be limited by this chapter."); 4 FLEM K. WHITED III, DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 29:3 (2022 update) (discussing Rhode Island's relevant scheme).

Comment c. Rationale and support. Consistent with Subsection (b), "[m]ost courts not constrained by statute now impose . . . liability when the licensed seller of alcohol negligently sells to a minor or intoxicated person who, as a result, causes injury to the plaintiff." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 424 (2023 update); see also Jackson v. Cadillac Cowboy, Inc., 986 S.W.2d 410, 412 (Ark. 1999) (observing that "the vast majority of jurisdictions now recognize vendor liability for the sale of alcohol to high-risk groups"). But see, e.g., Acker v. S.W. Cantinas, Inc., 586 A.2d 1178 (Del. 1991) (declining to impose common-law liability, even on commercial sellers of alcohol); Kudlacik v. Johnny's Shawnee, Inc., 440 P.3d 576, 582 (Kan. 2019) ("We remain unpersuaded that a duty of care runs from tavern owners to third-parties injured by their patrons after leaving the tavern owner's premises."); Warr v. JMGM Grp., LLC, 70 A.3d 347 (Md. 2013) (refusing to recognize a cause of action against a commercial establishment for harm caused by an intoxicated patron, off premises, in the absence of a special

relationship between the commercial establishment and the direct tortfeasor or victim); Robinson v. Matt Mary Moran, Inc., 525 S.E.2d 559, 562 (Va. 2000) (reiterating that, in Virginia, a "vendor of alcoholic beverages is not liable for injuries sustained by a third party that result from the intoxication of the vendor's patron").

In imposing (or advocating for the imposition of) such a duty, some courts have looked to the fact that drunk driving presents a serious public health problem. E.g., Narleski v. Gomes, 237 A.3d 933, 941 (N.J. 2020) (discussing the fact that "[i]ntoxicated driving remains one of the preeminent public safety threats in New Jersey"). As the National Highway Traffic Safety Administration reports: "Every day, about 37 people in the United States die in drunk-driving crashes—that's one person every 39 minutes. In 2021, 13,384 people died in alcohol-impaired driving traffic deaths . . . ." Drunk Driving Overview, NHTSA, https://www.nhtsa.gov/risky-driving/drunk-driving (last visited Nov. 15, 2023). Others have looked to the empirical evidence supporting liability, including the fact that "[s]cientific studies have consistently found strong evidence showing that dram shop liability 'reduce[s] motor vehicle crash deaths in general and alcohol-related crash deaths in particular.'" *Warr*, 70 A.3d at 365 (Adkins, J., dissenting) (quoting Veda Rammohan, et al., *Effects of Dram Shop Liability and Enhanced Overservice Law Enforcement Initiatives on Excessive Alcohol Consumption and Related Harms*, 41 AM. J. PREV. MED. 334, 340 (2011)); see also Task Force on Community Preventive Services, *Recommendations on Dram Shop Liability and Overservice Law Enforcement Initiatives to Prevent Excessive Alcohol Consumption and Related Harms*, 41 AM. J. PREVENTATIVE MED. 344, 345 (2011) (concluding, on the "basis of strong evidence of effectiveness that dram shop liability is effective in preventing and reducing alcohol-related harms," and, in particular, reporting that a meta-analysis of 11 studies reveals that "[d]ram shop liability was associated with a median reduction of 6.4% (range of values 3.7%–11.3%) in alcohol-related motor vehicle fatalities").

The line the black letter draws between commercial establishments, on the one hand, and social hosts, on the other, also enjoys widespread doctrinal support. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Comment *c* (AM. L. INST. 2010) (explaining that "many courts have held that commercial establishments that serve alcoholic beverages have a duty to use reasonable care to avoid injury to others who might be injured by an intoxicated customer, but that social hosts do not have a similar duty to those who might be injured by their guests"); accord Reeder v. Daniel, 61 S.W.3d 359, 363 (Tex. 2001) (noting courts' relative reluctance "to recognize a social-host cause of action").

As Comment *c* explains, courts tend to justify that line-drawing by pointing to the fact that commercial establishments and social hosts are subject to different licensing requirements, have different motivations and capacities, and are subject to different societal and cultural influences. In addition, it is sometimes said that the imposition of social host liability might impose on these (sometimes uninsured) hosts unpredictable and crushing liability. See McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 144 (Mass. 1986) (explaining that "courts have found it easier to impose a duty of care on the licensed operator than on the social host" and further explaining that this divergent treatment stems from the fact that "[t]he threat of tort liability may serve the public

purpose of offsetting the commercial operator's financial incentive to encourage drinking" and also "[t]he means of serving beverages in a bar, tavern, or restaurant normally permits closer control and monitoring of customers and their consumption than is typically possible in private gatherings"); id. at 160 (further explaining that courts' "reluctance" to impose liability on social hosts is based "rightly or wrongly, on policy considerations, particularly consideration of the effect that a rule of social host liability would have on a multitude of personal relationships in a variety of social settings"); Hickingbotham v. Burke, 662 A.2d 297, 300 (N.H. 1995) (justifying the divergent treatment because "[s]ocial hosts, unlike [commercial establishments], lack pecuniary motives in their decisions to serve alcohol to guests," and, compared to social hosts, "commercial vendors generally can monitor more closely, and are better trained at monitoring, consumption"); Busby v. Quail Creek Golf & Country Club, 885 P.2d 1326, 1331 (Okla. 1994) ("The public regulates and licenses commercial vendors to sell and distribute alcohol for profit. The public has a right to demand that a commercial vendor act more prudently . . . than is asked of a private person who hosts a party."); Klar v. Dairy Farmers of Am., Inc., 300 A.3d 361, 378 (Pa. 2023) (justifying the divergent treatment on the following grounds: "Liquor licensees are aware of the responsibilities that they undertake by becoming commercial purveyors of alcohol. They generally (or should) train their employees to deny service to visibly intoxicated persons. They often post signs in their establishments that communicate their legal obligation to deny such service. They purchase liquor liability insurance policies specifically to hedge against their legal exposure. Ordinary people do none of these things before hosting a social gathering."); Ferreira v. Strack, 652 A.2d 965, 968 (R.I. 1995) ("The imposition of liability upon social hosts for the torts of guests has such serious implications that any action taken should be taken by the Legislature after careful investigation, scrutiny, and debate."); Burkhart v. Harrod, 755 P.2d 759, 760-761 (Wash. 1988) (emphasizing the many practical challenges that would burden social hosts if hosts were responsible for policing guests' consumption of alcohol and further emphasizing that the imposition of social host liability "would touch most adults in this state on a frequent basis"); accord 4 FLEM K. WHITED III, DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 28:18 (2022 update) (explaining that the divergent treatment is justified because "social hosts do not have the same capacity to cover their potential liability with insurance, and since social hosts usually do not charge their guests for drinks, they are unable to spread the cost as readily"; further explaining that social hosts are also "less likely" to be adept at "determining when a person should no longer be served"; lastly explaining that, due "to social pressure, a social host may be more reluctant to refuse serving an intoxicated guest than is a commercial vendor who generally does not have the same ties of companionship or friendship with the person being served"); 313 AM. JUR. *Proof of Facts* 3d 697 (originally published in 1989) ("Several justifications have been offered for the rule of nonliability [when adults are over-served by social hosts]. Among the more compelling arguments are that it would be extremely, perhaps impossibly, burdensome on social hosts to expect them to police their guests, that social hosts might be subjected unpredictably to financially crushing judgments, and that a rule of liability would create a myriad of difficulties in heretofore friendly social situations.").

Finally, and also consistent with Subsection (c)(1) and (2), when addressing the liability of social hosts, numerous states draw the line based on the drinker's age—and, in particular, whether the drinker is over or under 21. Thus, although only a small minority of states impose liability on social hosts who serve alcohol to adults, see Krystyna D. Gancoss, Note, *"I'm Not A Regular Mom . . . I'm A Cool Mom": An Argument for Broader Civil Social Host Liability in Connecticut*, 35 QUINNIPIAC L. REV. 351, 360 & 362 (2017) (collecting authority); John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1227 (2009) (stating that "common law courts have overwhelmingly rejected claims against social hosts for drunk driving by their adult guests"), the majority of states impose at least some liability on social hosts who furnish alcohol to minors, see Heather Morton, *Social Host Liability for Underage Drinking Statutes*, NAT'L CONF. OF STATE LEGISLATURES, Mar. 27, 2014 ("Thirty-one states allow social hosts to be civilly liable for injuries or damages caused by underage drinkers."). Accordingly, as one compilation summarizes: "Those states which allow actions based on minors' consumption of alcohol do not generally extend the reasoning to adults." Michael Steinberg, *Cause of Action Against Social Host for Injuries Caused by Provision of Alcohol to Guest*, 29 CAUSES OF ACTION 2d 435, § 13 (originally published in 2005).

For further discussion of the different standards that govern social hosts who serve underage individuals and adults, respectively, see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 424 (2023 update); Diane Schmauder Kane, *Social Host's Liability for Death or Injuries Incurred by Person to Whom Alcohol was Served*, 54 A.L.R.5th 313 (originally published in 1997); see also Martin v. Watts, 513 So. 2d 958, 963 (Ala. 1987) ("The trend in recent decisions of other jurisdictions is to allow causes of action where adults have assisted in furnishing alcoholic beverages to minors."); 1 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 3:53 (2022 update) (recognizing that the "majority position" is that "it is . . . a breach of an adult social host's duty of care to a minor guest to serve such guests alcohol and the host may be liable for" the injuries that ensue); 313 AM. JUR. *Proof of Facts* 3d 697 (originally published in 1989) (observing that, "even in jurisdictions where there is no liability for the acts of an adult guest, some statutes and decisions have imposed liability on social hosts where the guest was a minor"). But see Ritchie v. Goodman, 161 S.W.3d 851 (Mo. Ct. App. 2005) (holding that, in Missouri, there is no social-host liability, even when the host furnishes alcohol to a minor); Reeder v. Daniel, 61 S.W.3d 359, 360-361 (Tex. 2001) (same in Texas).

Illustrating this division, in Pennsylvania, social hosts are not liable for furnishing alcohol to adult guests, even if the guest is visibly intoxicated. Klein v. Raysinger, 470 A.2d 507 (Pa. 1984). But social hosts who serve alcohol to guests under 21 years old are subject to liability. Orner v. Malick, 527 A.2d 521 (Pa. 1987). Likewise, in South Carolina, "courts have declined to impose a common law duty on social hosts who serve intoxicated adults," Marcum v. Bowden, 643 S.E.2d 85, 89 (S.C. 2007), but have held that those who knowingly and intentionally serve those under age 21 are appropriately subject to liability, id. at 86. But cf. Hickingbotham v. Burke, 662 A.2d 297, 302 (N.H. 1995) (holding that *all* social hosts are subject to liability for reckless

conduct, regardless of whether the inebriated guest is under 21; declining to "allow or disallow a cause of action based on social host liability solely because of the plaintiff's age"); Smith v. Merritt, 940 S.W.2d 602, 607 (Tex. 1997) (drawing the line at age 18, rather than age 21).

As Comment *c* explains, courts tend to justify the under 21/over 21 line-drawing by pointing to the fact that states tend to criminalize the provision of alcohol to those under age 21—and, for numerous reasons, it makes sense for tort law to follow suit. See Ely v. Murphy, 540 A.2d 54, 58 (Conn. 1988) ("In view of the legislative determination that minors are incompetent to assimilate responsibly the effects of alcohol and lack the legal capacity to do so, logic dictates that their consumption of alcohol does not, as a matter of law, constitute the intervening act necessary to break the chain of proximate causation and does not, as a matter of law, insulate one who provides alcohol to minors from liability for ensuing injury."); Garcia v. Jennings, 427 So. 2d 1329, 1333 (La. Ct. App. 1983) ("Although the statute [that forbids the provision of alcohol to a minor] does not directly impose civil responsibility, it serves as a guideline for the determination of an adult's civil duty to refrain from procuring alcoholic beverages for use by a minor."); *Orner*, 527 A.2d at 523 (explaining that "our legislature has made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol"); *Marcum*, 643 S.E.2d at 89 (relying on the fact that "the public policy of this State treats [those under 21] as lacking full adult capacity to make informed decisions concerning the ingestion of alcoholic beverages"); Hansen v. Friend, 824 P.2d 483, 485-487 (Wash. 1992) (interpreting the state's criminal statute, which criminalized the provision of alcohol to minors, as imposing "a duty of care on social hosts not to serve liquor to minors"); Gancoss, supra at 363 ("The rationale behind social host liability for the intoxication of minors is that minors are a special class that legislatures and courts have specifically sought to protect from the dangers of alcohol.") (quotation marks and alterations omitted).

Comment d. Definition of "commercial establishment" and "social host." Consistent with Comment *d*, even for-profit businesses are frequently considered social hosts, provided the business is neither in the business of furnishing alcohol, licensed to do so, or profiting directly from the beverage's sale. E.g., McCray v. Lockheed Martin Corp., 437 F. Supp. 3d 907, 912 (D. Colo. 2020) ("Colorado courts broadly interpret the term 'social host' to include employers who provide alcohol to their employees . . . ."); Rojas v. Engineered Plastic Designs, Inc., 68 P.3d 591, 593 (Colo. App. 2003) (holding that an employer that kept a keg of beer on its premises for employee social gatherings was a social host, rather than commercial establishment, because the employer "was not in the business of providing or selling alcohol beverages, was not licensed to sell alcohol beverages, and the employee did not purchase or pay for the beer provided by [the employer]"); Meany v. Newell, 367 N.W.2d 472, 474 (Minn. 1985) (holding that employer who hosted an office Christmas party was a social host); State Farm Mut. Auto. Ins. Co. v. King, 2006 WL 216051, at *4 (Ohio Ct. App. 2006) (finding that an employer that hosted a golf outing and supplied alcohol to its employees retained social host status); accord 4 FLEM K. WHITED III, DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 28:18 (2022 update) (explaining that employers "sponsoring a company picnic or Christmas party" may be appropriately denominated social hosts).

For the general standard, see WHITED, supra at § 28:18 (explaining that courts "most often" distinguish between commercial establishments and social hosts based on licensure status and whether the entity "profit[s] from the provision of alcohol").

Illustration 1, involving Rachel's $4 entry fee, is drawn from Koehnen v. Dufuor, 590 N.W.2d 107 (Minn. 1999). Also consistent with both Illustrations 1 and 2 are McGee v. Alexander, 37 P.3d 800, 804-805 (Okla. 2001) (concluding that a hospital that hosted a fundraiser was a social host even though the hospital charged an entry fee; reasoning that the fee was nominal and intended merely to "defray costs" such that the hospital did not "inten[d] to make a profit from the sale of alcohol"; declaring that "if a distinction between a social host and a commercial provider is to be made, the basis for that distinction is whether the provider sells or intends to make a profit from the sale of alcohol"), Childress v. Sams, 736 S.W.2d 48, 50 (Mo. 1987) (finding that the defendants were social hosts, even though they "charged a nominal fee" intended to "defray expenses"; reasoning that the fee was not intended to generate a profit and the single cover charge provided no incentive for the hosts to encourage excessive alcohol consumption), and Klar v. Dairy Farmers of Am., Inc., 300 A.3d 361, 379 (Pa. 2023) (explaining that, in determining whether a provider of alcohol is a commercial establishment or a social host, a key determinant is whether the provider "inten[ded] to reap a profit"). Inconsistent with Illustration 1 is Ennabe v. Manosa, 319 P.3d 201, 205 (Cal. 2014) (involving "an admission fee of $3 to $5 per person").

Comment e. When social hosts are relieved of liability, it is a matter of duty. For discussion, see Graff v. Beard, 858 S.W.2d 918, 919-922 (Tex. 1993) and Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Comments *a* and *c* (AM. L. INST. 2010).

The restriction established by Subsection (c)(2) departs from the default duty rule. That default establishes that one owes a "duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement Third, Torts: Liability for Physical and Emotional Harm § 7(a) (AM. L. INST. 2010). For further articulations of the general standard, see Restatement Second, Torts § 302, Comment *a* (AM. L. INST. 1965) ("In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act."); River Prod. Co. v. Baker Hughes Prod. Tools, Inc., 98 F.3d 857, 859 (5th Cir. 1996) (applying Mississippi law) ("Whenever a person does some act, the law imposes a duty upon that person to take reasonable care in performing that act."); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 355 (Tenn. 2008) ("As a general rule, persons have a duty to others to refrain from engaging in affirmative acts that a reasonable person should recognize as involving an unreasonable risk of causing an invasion of an interest of another or acts which involve an unreasonable risk of harm to another.") (internal quotation marks and alteration omitted).

Comment f. Additional grounds for liability. For general discussion, see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 424 (2023 update); see also Schutz v. La Costita III, Inc., 436 P.3d 776, 787 (Or. 2019) (explaining that, even when "[d]efendants are immune from liability for their conduct in their roles as social hosts," defendants are not necessarily shielded "from liability for their tortious conduct, if any, in their other roles").

For a duty of care arising from an undertaking, see, for example, Wilson v. Granzow, 886 So. 2d 1050, 1053 (Fla. Dist. Ct. App. 2004) (holding that the defendant was not liable for furnishing alcohol but rather because he "took charge" of the intoxicated guest "when he was helpless and unable to adequately aid or protect himself"); Wakulich v. Mraz, 785 N.E.2d 843, 854-857 (Ill. 2003) (reasoning that, although defendants could not be liable as social hosts, defendants could be liable for the negligent performance of a voluntary undertaking, when the complaint alleged that, after their 16-year-old guest lost consciousness, the defendants placed her in the family room, observed her vomiting profusely, checked on her periodically, replaced her vomit-saturated blouse, and placed a pillow under her head to prevent aspiration—but did not seek medical attention or otherwise summon assistance); Harris v. Gower, Inc., 506 N.E.2d 624, 625-626 (Ill. App. Ct. 1987) (reasoning that, although the defendant was not subject to dram shop liability, it was subject to liability for placing "the decedent in peril" when, on a cold night, tavern employees moved the patron, who had lost consciousness, from the tavern into the patron's car and the patron subsequently "froze to death").

For a duty of care arising from a common-law duty to protect and/or control, see, for example, Ah Mook Sang v. Clark, 308 P.3d 911, 924 (Haw. 2013) (holding that an adult who gave "large amounts of hard liquor to a fifteen-year-old minor" and then failed to "render or summon aid after [the minor] became visibly ill while on his property" was in a special relationship with—and thus duty bound to protect—the minor); Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 507 N.E.2d 1193, 1198 (Ill. App. Ct. 1987) (finding it possible that plaintiff, grievously injured in the course of forced alcohol consumption in the midst of hazing, had stated a cause of action based on his "voluntary custodian-protectee relationship" with the defendant fraternity); Gariup Constr. Co. v. Foster, 519 N.E.2d 1224 (Ind. 1988) (concluding that an employer that failed to exercise reasonable care in supervising a raucous party on its premises was not liable as a social host—but that the employer was *otherwise* subject to liability pursuant to various provisions of the Second Restatement of Torts, including §§ 308, 317, and 319); Martin v. Marciano, 871 A.2d 911, 916 (R.I. 2005) (holding that "parent-hosts who provide alcohol to underage guests" are duty bound "to take reasonable steps to protect their guests from injury," not as social hosts per se, but given the special parental relationship); Biscan v. Brown, 160 S.W.3d 462, 480-486 (Tenn. 2005) (finding that the adult defendant was duty bound to protect the plaintiff when the teenage plaintiff attended a party at the defendant's home where "it was foreseeable that guests would drink and drive" and "would ride with drivers who had been drinking"; further explaining that "[a]n adult host who is 'in charge' of a party held for minors . . . certainly has some ability to control the conduct of his guests").

For a duty of care arising from the possession or control of land, see, for example, Colon v. Pohl, 995 N.Y.S.2d 139, 139 (App. Div. 2014) (recognizing that "a landowner may have responsibility for injuries caused by an intoxicated guest" when the injuries occurred "on the defendant's property, or in an area under defendant's control, where defendant had the opportunity to supervise the intoxicated guest and was reasonably aware of need for such control"); Forsman v. Blues, Brews & Bar-B-Ques, Inc., 820 N.W.2d 748, 753-754 (N.D. 2012) (holding that the plaintiff was entitled simultaneously to pursue both dram shop act and premises liability causes of action).

For liability stemming from an employer's negligent supervision of an underage employee, who was permitted "to consume alcohol while at work," see McGuire v. Curry, 766 N.W.2d 501, 509 (S.D. 2009).

Illustration 5, involving the icy and snow-covered parking lot, is loosely based on Mann v. Shusteric Enters., Inc., 683 N.W.2d 573, 576 (Mich. 2004).

Comment g. Commercial establishment liability: Service must be negligent. As the influential Dobbs treatise aptly explains: "The regime is not one of strict liability; the plaintiff must prove negligence." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 424 (2023 update); accord 45 AM. JUR. 2d *Intoxicating Liquors* § 455 (2022 update) ("The law imposes no absolute liability against providers of alcohol.").

A minority of states demand a heightened showing (beyond negligence) in order to establish that a commercial establishment has breached its duty of care. E.g., Mendoza v. Tamaya Enters., Inc., 258 P.3d 1050, 1059 (N.M. 2011) (establishing that, in order to hold a commercial establishment liable for injuries to the patron, "the claimant must show that the tavernkeeper acted with gross negligence and reckless disregard for the safety of the patron").

Comment h. Commercial establishment liability: Service of underage patrons. As Comment *g* makes plain, liability depends on negligence—and, as Comment *h* explains, in the context of service to minors, an establishment's duty of care "is breached when the establishment knew or reasonably should have known that it was furnishing alcohol to minors." Tobin v. Norwood Country Club, Inc., 661 N.E.2d 627, 633 (Mass. 1996). Unlike for adults (see Comment *i* infra), liability does not hinge on whether the patron was visibly intoxicated. See, e.g., Nunez v. Carrabba's Italian Grill, Inc., 859 N.E.2d 801, 807 (Mass. 2007) (explaining that, when the patron is underage, to show negligence, "the plaintiff must present evidence to show that those establishments served him alcoholic beverages knowing, or having reason to know, that he was under twenty-one years of age" and clarifying that "[u]nlike the duty of taverns to refrain from serving obviously intoxicated adults, the duty to refrain from serving alcohol to youths does not depend on whether they are or appear to be intoxicated"); Ross v. Scott, 386 N.W.2d 18, 22 (N.D. 1986) ("For liability under the Dram Shop Act to attach to an illegal sale of alcoholic beverages to a minor who becomes intoxicated, the minor need not have been intoxicated at the time of the sale."). Furthermore, as Comment *h* explains, when establishing that the commercial establishment breached, plaintiffs can often point to the defendant's violation of a criminal statute or other enactment in order to establish negligence per se or an inference or presumption of negligence, see FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 17.5, at 692-696 n.21 (3d ed. 2007) (collecting copious authority). For an example, see Purchase v. Meyer, 737 P.2d 661 (Wash. 1987).

Statutes are frequently implicated when the patron is underage because, in 1984, Congress enacted the National Minimum Drinking Age Act, which induced states to impose a minimum age of 21 for the purchase or public consumption of alcoholic beverages. See 23 U.S.C. § 158; South Dakota v. Dole, 483 U.S. 203 (1987). Now, in the aftermath of that Act's enactment, every state prohibits those under age 21 from purchasing alcohol. See Lorillard Tobacco Co. v. Reilly, 533

U.S. 525, 589 (2001) (Thomas, J., concurring in part) (observing that "every State prohibits the sale of alcohol to those under age 21"); 1 THOMAS R. YOUNG, THE LEGAL RIGHTS OF CHILDREN § 11.9 (2021 update) ("The sale of alcohol to young people below the age of 21 is now forbidden in every state.").

Support for Illustration 6, involving the fake driver's license, is found in Tomlinson v. Love's Country Stores, Inc., 854 P.2d 910 (Okla. 1993). There, the Oklahoma Supreme Court explained that, per statute, a commercial establishment has a duty not to sell beer to underage individuals. "If beer is then sold to a person under the age of twenty-one, the vendor has breached his duty . . . . However, this *prima facie* showing of the breach of duty may be rebutted by demonstrating that the purchaser appeared to be of age and that the vendor used reasonable means of identification to ascertain his age." Id. at 915. Many cases are in accord. E.g., Brannigan v. Raybuck, 667 P.2d 213, 218 (Ariz. 1983) (holding that, although a statutory violation typically gives rise to negligence per se, "where a violation of the statutes pertaining to furnishing liquor to those who are underage . . . is shown. . . under proper facts[,] the jury may be allowed to find that the violation was excusable"; clarifying that a commercial establishment "may be able to show such violation excusable" if "the minor appeared to be of age and had what appeared to be proper identification"); Anderson v. Moulder, 394 S.E.2d 61, 68 (W. Va. 1990) ("A licensee who sells beer to a minor in violation of [statute] may rebut the *prima facie* showing of negligence by demonstrating that the purchaser appeared to be of age and that the vendor used reasonable means of identification to ascertain his age."); accord Richard Smith, *A Comparative Analysis of Dramshop Liability and A Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 561 (2000) (explaining that, pursuant to the majority approach, "a dramshop that has made good faith efforts to verify the age of a customer does not expose itself to dramshop liability").

Comment i. Commercial establishment liability: Service of visibly intoxicated patron. Numerous states hold that, for those over 21, "a tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated." Cimino v. Milford Keg, Inc., 431 N.E.2d 920, 924 (Mass. 1982). Given that prevailing standard, liability tends to hinge on whether the adult patron was "visibly intoxicated" at the time of service—recognizing that, if the adult patron was not visibly intoxicated, the commercial establishment is not subject to liability. See O'Dell v. Kozee, 53 A.3d 178, 187 (Conn. 2012) (observing that there is a "clear consensus among other jurisdictions—that evidence of perceivable intoxication is required"); 45 AM. JUR. 2d *Intoxicating Liquors* § 455 (2022 update) (similar). Examples include: *O'Dell*, 53 A.3d at 182; Bayless v. TTS Trio Corp., 49 N.E.3d 217, 225 (Mass. 2016); Cusenbary v. Mortensen, 987 P.2d 351, 358 (Mont. 1999); Trigoso v. Correa, 55 N.Y.S.3d 130, 133, 1043 (App. Div. 2017); Battles v. Cough, 947 P.2d 600, 604 (Okla. Civ. App. 1997); Bailey v. Black, 394 S.E.2d 58, 60 (W. Va. 1990).

Whether the patron was more-likely-than-not exhibiting outward signs of intoxication can be proved with direct or circumstantial evidence. See Gariup Constr. Co. v. Foster, 519 N.E.2d 1224, 1230 (Ind. 1988) ("Proof that an alcohol provider knew of the recipient's intoxication may be made by indirect or circumstantial evidence."); Poppke v. Portugese Am. Club of Mineola, 924

N.Y.S.2d 834 (App. Div. 2011) ("Proof of visible intoxication can be established by circumstantial evidence, including expert and eyewitness testimony.").

For discussion of how the plaintiff can use evidence that the patron had an elevated blood-alcohol level at some point after service, see Adamy v. Ziriakus, 704 N.E.2d 216, 218-220 (N.Y. 1998). For examples, see Pierson v. Serv. Am. Corp., 9 N.E.3d 712, 718 (Ind. Ct. App. 2014); *Cusenbary*, 987 P.2d at 359-360; Copeland v. Tela Corp., 996 P.2d 931, 933-934 (Okla. 1999).

A plaintiff can also point to the quantity of alcohol consumed, as that fact can supply circumstantial evidence that the patron was visibly intoxicated. See Rivera v. Club Caravan, Inc., 928 N.E.2d 348, 351 (Mass. App. Ct. 2010) (explaining that "a jury confronted with evidence of a patron's excessive consumption of alcohol, properly could infer, on the basis of common sense and experience, that the patron would have displayed obvious outward signs of intoxication") (internal quotation marks omitted); id. at 352 (further clarifying: "Although there was no direct evidence that [the patron] was exhibiting outward signs of intoxication before he was served his last drink (and some testimony to the contrary), the plaintiffs' proof did not fail as a matter of law. Where the jury could have concluded that [the patron] was served fourteen drinks over a two-hour period and drank 'most' of them, it was for the jury to decide whether [the patron] likely appeared intoxicated before he was served his last drink."); see also *Pierson*, 9 N.E.3d at 716 ("When determining whether a furnisher of alcoholic beverages knew a person was intoxicated, we look to what and how much a person was known to have consumed, the person's behavior at the time, and the person's condition.").

Illustration 7, involving The Gondolier Tavern, is based on Montgomery v. Kali Orexi, LLC, 303 S.W.3d 281 (Tenn. Ct. App. 2009). There, the court found: "The facts and the inferences from the facts in this case are such that a reasonable person can reach only one conclusion: by calling a cab, seeing the Deceased safely into it as a passenger and paying the Deceased's fare, Gondolier fulfilled any duty it might have." Id. at 291. Accord Tobin v. Norwood Country Club, Inc., 661 N.E.2d 627, 636 (Mass. 1996) (suggesting, albeit in dicta, that liability could have been averted if, after the minors became intoxicated, the commercial establishment had taken steps to "enlist[] the adults present to monitor the teenagers' departure, since that was the occasion of real and obvious danger").

Comment j. Social host liability: Service to underage guests must be at least reckless. Addressing social host liability for service to those who are under age 21, courts have splintered. See Bland v. Scott, 112 P.3d 941, 949 (Kan. 2005) ("The states are widely split on liability to third parties arising from the dispensing of alcohol in social settings."). For a broad discussion, see generally Peter A. Slepchuk, Note, *Social Host Liability and the Distribution of Alcohol and Narcotics: A Survey and Guide*, 44 SUFFOLK U. L. REV. 933 (2011).

Whether by statute or common law, some states impose a threshold similar to that imposed by Comment *j*. See, e.g., Hickingbotham v. Burke, 662 A.2d 297, 301 (N.H. 1995) (predicating liability on recklessness—but breaking with Subsection (c) by declining to draw a line based on whether the intoxicated guest is or is not underage); Delfino v. Griffo, 257 P.3d 917, 928 (N.M. 2011) (similarly predicating social host liability on recklessness, although not limiting liability to

the service of underage drinkers); MINN. STAT. ANN. § 340A.90 (predicating liability on recklessness but requiring that the adult defendant have "control over the premises").

As a matter of statute or common law, some states, in contrast, shield all social hosts from liability, including those who serve underage individuals. See, e.g., ARK. CODE ANN. § 16-126-105 ("Except in the knowing sale of alcohol to a minor or to a clearly intoxicated person, the General Assembly hereby finds and declares that the consumption of any alcoholic beverage, rather than the furnishing of any alcoholic beverage, is the proximate cause of injuries or property damage inflicted upon persons or property by a legally intoxicated person."); CAL. CIV. CODE § 1714(c) (establishing that "no social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages"); Wakulich v. Mraz, 785 N.E.2d 843, 849 (Ill. 2003) (rejecting claim for social host liability, reasoning that "any decision to expand civil liability of social hosts should be made by the legislature"); Reeder v. Daniel, 61 S.W.3d 359, 364 (Tex. 2001) (reasoning that "the Legislature has actively regulated alcoholic beverage consumption, . . . and declined to include social hosts in the Dram Shop Act's civil liability scheme" and finding that, in light of this legislative activity, it would be inappropriate to "judicially recogniz[e] a cause of action against social hosts who 'make alcohol available' to guests under age eighteen").

Some states, meanwhile, permit some social host liability when an underage guest is served but predicate liability on the social host's knowledge and/or intention, although *what exactly* must be known or intended varies, and, at times, this knowledge or intention requirement creates a standard that closely resembles general negligence. E.g., N.Y. GEN. OBLIG. LAW § 11-100 ("Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of twenty-one years . . . shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years."); Kiriakos v. Phillips, 139 A.3d 1006, 1015, 1023 (Md. 2016) (concluding that, in Maryland, there "exists a limited form of social host liability sounding in negligence" but that liability only arises when adults "knowingly and willfully allow consumption of alcoholic beverages on their property"); Thaut v. Finley, 213 N.W.2d 820, 822 n.5 (Mich. Ct. App. 1973) (holding that a social host may be subject to liability if it "knowingly gave or furnished an alcoholic beverage to a minor"); Narleski v. Gomes, 237 A.3d 933, 941 (N.J. 2020) (holding that a social host is subject to liability to third parties if the host serves alcohol to a visibly intoxicated underage guest with actual or constructive knowledge that the guest will leave the premises and operate a motor vehicle and the host takes no "reasonable steps to prevent the intoxicated guest from getting behind the wheel of the vehicle"); Marcum v. Bowden, 643 S.E.2d 85, 86 n.1 (S.C. 2007) (holding that "[a]n adult social host who knowingly and intentionally serves, or causes to be served, an alcoholic beverage to a person he knows or reasonably should know is between the ages of 18 and 20 is liable to the person served and to any other person for damages

proximately resulting from the host's service of alcohol" while "leav[ing] for another day the question whether an adult social host who is merely negligent in allowing the consumption of alcoholic beverages by a minor guest under the age of 18 may incur liability"); WIS. STAT. ANN. § 125.035(4)(b) (subjecting a social host to liability for injuries to third parties when the social host "knew or should have known that the underage person was under the legal drinking age").

Then, similar to certain standards above, some states hold that mere negligence suffices. E.g., ME. REV. STAT. ANN. tit. 28-A, § 2506 ("A server who negligently serves liquor to a minor is liable for damages proximately caused by that minor's consumption of the liquor."); Hernandez v. Ariz. Bd. of Regents, 866 P.2d 1330, 1342 (Ariz. 1994) ("Arizona courts . . . will entertain an action for damages against a non-licensee who negligently furnishes alcohol to those under the legal drinking age when that act is a cause of injury to a third person."); Brattain v. Herron, 309 N.E.2d 150, 156 (Ind. Ct. App. 1974) (recognizing that, an Indiana statute provides that "[n]o alcoholic beverages shall be sold, bartered, exchanged, given, provided or furnished, to any person under the age of twenty-one" and that "any person who violates the statute as it pertains to a minor can be liable in a civil action for negligence, since the violation of the statute as it pertains to a minor is negligence per se"; further clarifying: "The Legislature has not seen fit to distinguish between a seller and a social provider of alcoholic beverages to a minor and it is our opinion that no such distinction would be either logical or equitable."); Bauer v. Dann, 428 N.W.2d 658, 660 (Iowa 1988) (holding that a social host has a duty to refrain from negligently serving underage persons); Mitseff v. Wheeler, 526 N.E.2d 798 (Ohio 1988) (holding that a social host has a duty to refrain from furnishing alcohol to a minor and may be civilly liable for damages to a third person if such a duty is violated); Congini v. Portersville Valve Co., 470 A.2d 515, 518 (Pa. 1983) (applying a negligence standard when social hosts served an underage individual past the point of intoxication).

For the operation of Comment *j*'s recklessness standard—including the fact that both the drinker's youth and state of intoxication may inform the inquiry into whether the social host was reckless in the host's provision of alcohol to underage persons—see Michael Steinberg, *Cause of Action Against Social Host for Injuries Caused by Provision of Alcohol to Guest*, 29 CAUSES OF ACTION 2d 435, § 17 (originally published in 2005).

As Comment *j* notes, when confronting *underage* social hosts, courts have split. Some courts have held underage social hosts liable to third-party victims. See, e.g., Fullmer v. Tague, 500 N.W.2d 432 (Iowa 1993) (holding minor social host liable for death of a minor guest who was a passenger in vehicle driven by another intoxicated guest); Narleski v. Gomes, 237 A.3d 933, 949 (N.J. 2020) (holding that "a plaintiff injured by an intoxicated underage social guest may succeed in a cause of action against an underage social host if the plaintiff can prove" five separate requirements, including that the underage "social host did not take any reasonable steps to prevent the intoxicated guest from getting behind the wheel of the vehicle"); Muntz v. Commw., Dep't of Transp., 630 A.2d 524, 526-527 (Pa. Commw. Ct. 1993) (holding that "persons under the age of twenty-one may be held liable as social hosts for the consequences of furnishing other persons under the age of twenty-one with alcohol, or for planning a social event at which alcohol is served").

Other courts have taken an opposite tack. E.g., Trainor v. Est. of Hansen, 740 So. 2d 1201, 1202 (Fla. Dist. Ct. App. 1999) (interpreting Florida's "House Party" statute which is, by its terms, limited to adult social hosts); Kiriakos v. Phillips, 139 A.3d 1006, 1015, 1023 (Md. 2016) (holding that only adult social hosts can be liable for providing alcohol to minors); VanWagner v. Mattison, 533 N.W.2d 75, 77 (Minn. Ct. App. 1995) (noting that Minnesota's Civil Damage Act does not permit a claim against social hosts under age 21); Kapres v. Heller, 612 A.2d 987, 988 (Pa. Super. Ct. 1992) (holding that social hosts under age 21 are not liable for providing liquor to individuals under age 21 because the legislature has found all individuals under 21 incompetent to handle the effects of alcohol); Currie v. Phillips, 70 Pa. D. & C.4th 401, 412-413 (Pa. Ct. Com. Pl. 2005) (reiterating "that a minor is not liable to another minor for injuries that might have been sustained as a result of the host minor's distribution of alcohol to another under the age of 21"); 17 DEAN PATRICK KELLY, BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 501:2 (2023 update) ("There is no liability imposed when an underage social host serves alcohol to minor guests.").

Comment k. Social host liability: No liability for providing alcohol to guests age 21 or older. As the Dobbs treatise explains, "[s]ocial hosts or companions are generally under no duty to protect adult drinkers or their victims from harms resulting from the host's provision of alcohol." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 424 (2023 update); see also 17 DEAN PATRICK KELLY, BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 501:1 (2023 update) ("Under the common law, a social host does not incur a legal duty simply by providing alcohol to an individual who is above the legal drinking age. Thus, social hosts generally bear no liability for serving an adult guest alcohol if the guest is later involved in an automobile accident, even if the guest was already intoxicated. Moreover, a social host has no duty to prevent a guest from driving an automobile after consuming alcohol."); John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1227 (2009) (stating that "common law courts have overwhelmingly rejected claims against social hosts for drunk driving by their adult guests"). For further discussion, see generally Edward L. Raymond, Jr., *Social Host's Liability for Injuries Incurred By Third Parties as a Result of Intoxicated Guest's Negligence*, 62 A.L.R.4th 16 (originally published in 1988).

In contrast to Comment *k*, whether by common law or statute, a minority of states impose liability on social hosts who supply alcohol to their of-age guests. E.g., N.J. STAT. ANN. § 2A:15-5.5 through 5.8; Kowal v. Hofher, 436 A.2d 1, 3 (Conn. 1980) (imposing liability on a social host who serves alcohol to an intoxicated person when doing so manifests wanton and reckless misconduct); Hickingbotham v. Burke, 662 A.2d 297, 301 (N.H. 1995) (holding that an intoxicated adult may bring an action against a social host, "so long as the plaintiff can allege that the service was reckless"). For additional authority, see Hugo L. Garcia, *Florida's Anti-Dram Shop Liability Act: Is It Time to Extend Liability to Social and Commercial Hosts?*, 29 ST. THOMAS L. REV. 95, 124 (2016).

Comment l. Factual cause and scope of liability. For the uncontroversial proposition that a plaintiff must prove, not only breach, but factual cause and that the harm was within the

defendant's scope of liability, see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 424 & n.17 (2023 update).

As Comment *l* explains, when the defendant supplies alcohol to a minor or to a visibly intoxicated person and that individual subsequently drives drunk and inflicts injury, the scope-of-liability (also called proximate cause) determination is straightforward. See Ontiveros v. Borak, 667 P.2d 200, 207 (Ariz. 1983) ("Common sense, common experience and authority all combine to produce the irrefutable conclusion that furnishing alcohol, consumption of alcohol and subsequent driving of a vehicle which is then involved in an accident are all foreseeable, ordinary links in the chain of causation leading from the sale to the injury."); Ono v. Applegate, 612 P.2d 533, 540-541 (Haw. 1980) (explaining that, when a tavern serves alcohol to an intoxicated individual, an automobile accident is "foreseeable"); Cusenbary v. Mortensen, 987 P.2d 351, 358 (Mont. 1999) (emphasizing that, when a patron is overserved, drunk driving—and accompanying injury—is "reasonably foreseeable as a matter of law"); Kelly v. Falin, 896 P.2d 1245, 1247 (Wash. 1995) ("A tavern or other commercial vendor may be held liable if it serves alcohol to an obviously intoxicated patron who injures or kills a bystander in a drunk driving accident.").

For less clear-cut scenarios, see, e.g., Carey v. New Yorker of Worcester, Inc., 245 N.E.2d 420, 422 (Mass. 1969) (affirming jury verdict for the plaintiff when the plaintiff was shot by a fellow bar patron); Henson v. Uptown Drink, LLC, 922 N.W.2d 185 (Minn. 2019) (concluding that a proximate-cause jury question was presented when customer tripped, fell, and suffered fatal traumatic brain injury in the course of trying to help the bar's staff eject a fellow patron, who had become intoxicated and belligerent); Pittman v. Rivera, 879 N.W.2d 12, 17 (Neb. 2016) (affirming summary judgment for the tavern where a patron became inebriated and then combative and thereafter "intentionally tr[ied] to run over a person outside the bar"; finding it "not reasonably foreseeable that [the inebriated patron] would use his vehicle to assault [a third party]"); Griesenbeck v. Walker, 488 A.2d 1038, 1042-1043 (N.J. Super. Ct. App. Div. 1985) (affirming the trial court's judgment that there was no proximate cause as a matter of law when a mother had two drinks at her parents' house, returned home, and then left a cigarette burning on her sofa and burned her home to the ground, causing her death and the death of her husband and son).

For a general discussion of scope of liability, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 29 (AM. L. INST. 2010), which establishes that "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." For further discussion, see H. B. Chermside, *Right to Recover Under Civil Damage or Dramshop Act for Death of Intoxicated Person*, 64 A.L.R.2d 705 (originally published in 1959) (discussing the issue and appropriately noting: "While it is frequently ruled that the supplier of intoxicants may be held liable only for the natural and probable results of his actions, it is not necessary that the precise end result should have been foreseen in order to establish liability. Whether or not particular situations may be considered the natural or foreseeable results of intoxication depends largely on the facts and circumstances of the individual case."); id. ("Sufficient causation to entail liability under a civil damage act has frequently been found in cases involving the death of

intoxicated persons as a result of railroad accidents, exposure, drowning, falls, the mismanagement of horses, automobile accidents, physical violence, and disease.").

Illustration 11, regarding Fatima's alcohol poisoning, is supported by Anderson v. Moulder, 394 S.E.2d 61 (W. Va. 1990). There, the West Virginia Supreme Court instructed:

> The question, then, becomes whether one who sells beer or alcoholic beverages to a minor can ever reasonably foresee that the underage purchaser will share such beverages with other minors, who will, in turn, become intoxicated and cause injury to themselves or others. Other jurisdictions have concluded that in certain circumstances, such a result is reasonably foreseeable at the time of the unlawful sale. [providing numerous citations] Factors to be considered in determining whether the vendor might reasonably foresee that someone other than the underage purchaser would consume the beverages include: (1) the quantity and character of the beverages purchased; (2) the time of day of the sale; (3) the vendor's observation of other persons on the premises or in a vehicle with the underage purchaser; (4) statements made by the purchaser; and (5) any other relevant circumstances of the sale or of the vendor's knowledge.

Id. at 73. See also Schooley v. Pinch's Deli Mkt., Inc., 951 P.2d 749 (Wash. 1998) (holding that a vendor who sells alcohol to a minor who subsequently furnishes alcohol to another minor can be held liable for foreseeable alcohol-related injuries arising from the initial sale); Richard Smith, *A Comparative Analysis of Dramshop Liability and A Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 561 (2000) (stating that "the majority of jurisdictions to consider the issue" have imposed liability when one minor buys alcohol but another minor becomes intoxicated owing to its purchase). Inconsistent with Illustration 11 is Salem v. Superior Ct., 259 Cal. Rptr. 447 (Ct. App. 1989), which interpreted California's statutory scheme to preclude recovery when a minor purchases liquor and then shares it with another.

Illustration 12, involving the holding cell, is drawn from Crolley v. Hutchins, 387 S.E.2d 716 (S.C. Ct. App. 1989). There, the court explained: "One does not expect a person to attempt suicide as a natural and probable result of being served a drink while intoxicated. The only inference to be drawn from the evidence is that the attempted suicide was an act which [the bartender] could not reasonably have foreseen and anticipated when he last served [Robert Crolley]. Thus, there was no proximate causation, as a matter of law." Id. at 718.

Comment m. Relationship with liability for aiding and abetting another's negligent conduct. For a comprehensive discussion of liability for aiding and abetting another's negligent conduct, see § __ [Aiding and Abetting Negligence Torts] of this draft.

Comment n. Apportionment of liability: Injury to first party. Contrary to Comment *n*, numerous courts—by some counts, a majority—have held that an alcohol provider is not liable to the intoxicated individual when that individual subsequently sustains injury. See Bridges v. Park Place Ent., 860 So. 2d 811, 816 (Miss. 2003) (stating that "[a] majority of the states which have addressed this issue do not recognize a first party cause of action against a vendor of alcoholic beverages" and collecting authority from 17 states); Miller v. Gastronomy, Inc., 110 P.3d 144, 147

(Utah Ct. App. 2005) (stating that "the majority of jurisdictions that have addressed this issue resolved that no first-person cause of action against an alcohol provider exists at common law"); accord 1 BARRY A. LINDAHL, MODERN TORT LAW § 3:49 (2022 update) ("[T]he majority of jurisdictions have held that the tavern keeper has no duty to protect the intoxicated patron from his or her own injuries on the rationale that an individual should not be able to profit from injuries arising from his or her voluntary intoxication."); 2A STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 9:87 (2022 update) (explaining that "courts seem to be divided" on the question of whether the "inebriated person" is entitled to recover for the person's own injuries).

Examples include: Bertelmann v. Taas Assocs., 735 P.2d 930, 933 (Haw. 1987) ("Drunken persons who harm themselves are solely responsible for their voluntary intoxication and cannot prevail under a common law or statutory basis.");[1] Panagakos v. Walsh, 749 N.E.2d 670, 672-673 (Mass. 2001) (concluding that the plaintiff "as an adult drinker, was responsible for his own conduct" and thus reaffirming that "an adult but underage drinker who was later injured as a result of his intoxication could not bring a claim against the social hosts who had supplied him with alcoholic beverage"); Narleski v. Gomes, 237 A.3d 933, 943 n.7 (N.J. 2020) (explaining that, pursuant to New Jersey's statutory scheme, "the intoxicated social guest who causes injury to himself has no recourse against the social host"); Searley v. Wegmans Food Markets, Inc., 24 A.D.3d 1202, 1202 (N.Y. App. Div. 2005) ("It is well settled that [the relevant New York statutes] do not create a cause of action in favor of one injured as a result of his own intoxicated condition."); Klever v. Canton Sachsenheim, Inc., 715 N.E.2d 536, 538 (Ohio 1999) (concluding that "Ohio's Dramshop Act does not provide an intoxicated, underage adult with a cause of action against a liquor permit holder for self-inflicted injuries"); MeGee v. El Patio, LLC, 524 P.3d 1283, 1287 (Okla. 2023) ("A voluntarily intoxicated adult patron who is injured as a result of his own intoxication cannot maintain a civil action against the commercial vendor."); Ohio Casualty Ins. Co. v. Todd, 813 P.2d 508, 510-511 (Okla. 1991) (concluding that "the duty of the tavern owner does not extend to an adult customer who voluntarily consumes intoxicants and is injured" and reasoning that "[i]f this Court were to create a cause of action against the tavern owner, the inebriate could be rewarded for his own immoderation"); Tobias v. Sports Club, Inc., 504 S.E.2d 318, 319 (S.C. 1998) (holding "that South Carolina does not recognize a 'first-party' cause of action against a tavern owner by an intoxicated adult"); Montgomery v. Kali Orexi, LLC, 303 S.W.3d 281, 282 (Tenn. Ct. App. 2009) (concluding that, in Tennessee, there is no first-party liability for commercial suppliers of alcohol); *Miller*, 110 P.3d at 148 (concluding that "there is no common-law first-party action against a dramshop"); Kelly v. Falin, 896 P.2d 1245, 1248-1249 (Wash. 1995) (refusing to make "commercial establishments pay for the self-inflicted injuries of an intoxicated [adult] patron"; clarifying that "while commercial vendors have a duty to minors and innocent bystanders, no duty arises when intoxicated adults harm themselves"); White v. HA, Inc., 782 P.2d 1125, 1132 (Wyo. 1989) (concluding that "the tavern keeper has no duty to protect

[1] It is unclear whether Bertelmann v. Taas Assocs., 735 P.2d 930 (Haw. 1987), remains good law, in the wake of Kuahiwinui v. Zelo's Inc., 453 P.3d 254 (Haw. 2019).

the intoxicated habitue from injuries he causes to himself" because "an individual should not be able to profit from injuries arising from his own voluntary intoxication").

Some states reach this result by statute. See, e.g., GA. CODE ANN. § 51-1-40(b) ("Nothing contained in this Code section shall authorize the consumer of any alcoholic beverage to recover from the provider of such alcoholic beverage for injuries or damages suffered by the consumer."); IDAHO CODE ANN. § 23-808(4)(a) ("No claim or cause of action . . . shall lie on behalf of the intoxicated person nor on behalf of the intoxicated person's estate or representatives."); MICH. COMP. LAWS ANN. § 436.1801(8) ("The alleged visibly intoxicated person does not have a cause of action under this section and a person does not have a cause of action under this section for the loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of the alleged visibly intoxicated person."); MINN. STAT. ANN. § 340A.90 (creating a statutory cause of action against social hosts who knowingly or recklessly provide alcohol to minors, but excluding any cause of action by an intoxicated minor); N.D. CENT. CODE ANN. § 5-01-06.1 ("A claim for relief under this section may not be had on behalf of the intoxicated individual nor on behalf of the intoxicated individual's estate or personal representatives, nor may a claim for relief be had on behalf of an adult passenger in an automobile driven by an intoxicated individual or on behalf of the passenger's estate or personal representatives."); WIS. STAT. ANN. § 125.035(4)(b) (predicating liability on, among other things, whether the alcohol caused "injury to a 3rd party").

By contrast, numerous cases, like Comment *n*, authorize "first-party" suits (i.e., suits by the intoxicated individual), in at least some instances. See Brannigan v. Raybuck, 667 P.2d 213, 216 (Ariz. 1983) (explaining that, although "[t]here are cases holding that the seller of liquor is not liable for the mere sale of liquor to an intoxicated person who subsequently causes injury to himself as the result of intoxication," in fact, "modern authority has increasingly recognized that one who furnishes liquor to a minor or intoxicated patron breaches a common law duty owed both to innocent third parties who may be injured and to the patron himself"). Examples include: McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 (Ala. 1991) ("To allow a plaintiff's . . . participation in the drinking to bar the plaintiff's recovery would be contrary to the purpose of the Dram Shop Act, as interpreted in prior cases decided by this Court."); Sowinski v. Walker, 198 P.3d 1134, 1152-1156 (Alaska 2008) (affirming, although modifying, wrongful-death verdict against liquor store, where an inebriated minor was fatally injured in an accident involving an all-terrain vehicle); *Brannigan*, 667 P.2d at 216 (holding that "a supplier of liquor is under a common law duty of reasonable care in furnishing liquor to those who, by reason of immaturity or previous over-indulgence, may lack full capacity of self-control and may therefore injure themselves, as well as others"); Gray v. D & G, Inc., 938 N.E.2d 256, 260 (Ind. Ct. App. 2010) (interpreting Indiana's Dram Shop Act to "allow[] for recovery by one who is voluntarily intoxicated"); Horak v. Argosy Gaming Co., 648 N.W.2d 137 (Iowa 2002) (affirming wrongful-death verdict when an inebriated adult patron was fatally injured in a single-car accident after leaving defendant's casino); Sixty-Eight Liquors, Inc. v. Colvin, 118 S.W.3d 171, 175 (Ky. 2003) (concluding that "we have no doubt that a minor has a valid claim against the dram shop that sells him alcohol thereby causing or contributing to his injuries"); Garcia v. Jennings, 427 So. 2d 1329, 1333 (La. Ct. App. 1983) ("The decedent's

contributory negligence or assumption of the risk in voluntarily getting intoxicated does not necessarily bar his parents[’] recovery for his wrongful death . . . .”); Klingerman v. SOL Corp. of Maine, 505 A.2d 474, 477 (Me. 1986) (concluding, as a matter of first impression, that an “intoxicated person may recover damages on a negligence theory from the person who sold him alcoholic beverages”); Nunez v. Carrabba’s Italian Grill, Inc., 859 N.E.2d 801 (Mass. 2007) (holding that underage patron could assert a claim against a restaurant and nightclub for negligence in selling him alcohol when he was later injured in auto crash); Longstreth v. Gensel, 377 N.W.2d 804, 813 (Mich. 1985) (holding that decedent’s beneficiaries could state a claim when the minor decedent consumed alcohol at a wedding reception prior to his death); Hickingbotham v. Burke, 662 A.2d 297 (N.H. 1995) (authorizing first-party suits against social hosts); Lee v. Kiku Rest., 603 A.2d 503, 510 (N.J. 1992) (holding that “a tavern cannot escape all liability for its negligence in serving an intoxicated patron by blaming the patron for unreasonable conduct caused wholly or in part by the tavern’s actions”); Baxter v. Noce, 752 P.2d 240, 243 (N.M. 1988) (authorizing first-party claims); Busby v. Quail Creek Golf and Country Club, 885 P.2d 1326 (Okla. 1994) (authorizing a minor’s first-party claim); Congini v. Portersville Valve Co., 470 A.2d 515, 518 (Pa. 1983) (explaining that, “for the purpose of deciding whether a cause of action exists, we see no valid distinction which would warrant a limitation on the action to third parties alone”); Cook v. Spinnaker’s of Rivergate, Inc., 878 S.W.2d 934, 935 (Tenn. 1994) (reversing the dismissal of the plaintiff’s complaint, in which the plaintiff, a minor, asserted a claim against a restaurant that had served her alcohol shortly before she drove and crashed); Smith v. Sewell, 858 S.W.2d 350, 351 (Tex. 1993) (holding that “a provider of alcoholic beverages may be responsible for an intoxicated individual’s injury to himself”); Kelley v. Moguls, Inc., 632 A.2d 360, 363 (Vt. 1993) (authorizing causes of action by intoxicated individuals; reasoning that “[c]ommon sense tells us that an imbiber is just as likely to be injured as third parties are” and that, when the plaintiff acts unreasonably in drinking to excess, “[t]he factfinder may . . . apportion the fault accordingly”); Hansen v. Friend, 824 P.2d 483 (Wash. 1992) (holding that social hosts are subject to liability when a minor’s intoxication causes the minor’s subsequent injury); Bailey v. Black, 394 S.E.2d 58, 60 (W. Va. 1990) (concluding that a drinker is entitled to assert a claim against a commercial establishment for his or her own injuries); cf. Kuahiwinui v. Zelo’s Inc., 453 P.3d 254, 259 (Haw. 2019) (concluding that Hawaii’s “complicity defense” which, previously, barred an individual from asserting a dram shop claim if the individual “actively contributed to or procured the intoxication of” the drunk driver was inconsistent with the state’s adoption of comparative negligence and thus abolished).

As Comment *n* explains, when the state’s statutory scheme is equally susceptible to either interpretation, Comment *n*’s approach is, for at least four reasons, preferable. For discussion of how a ban on first-party claims conflicts with states’ acceptance of comparative responsibility, see *Baxter*, 752 P.2d at 243-244 (explaining that a doctrine that “bar[s] completely an intoxicated person’s recovery” represents merely an attempt to resurrect contributory negligence); Nora Freeman Engstrom & Robert L. Rabin, *Felons, Outlaws, and Tort’s Troubling Treatment of the Wrongdoer Plaintiff*, 16 J. TORT L. 43, 61-63 (2023) (arguing that a ban on first-party suits represents a “piecemeal resurrection of contributory negligence”). For more on the value of

channeling disputes to comparative responsibility schemes, see § 18 A, Comment *h* of this draft (discussing "the fundamental fairness of comparative responsibility and the principle that sharing costs among those who wrongfully cause a loss should be a strong default unless there are very good reasons to depart from that default").

For more on the "checkerboard" problem Comment *n* identifies (and seeks to avoid), see generally Joel E. Smith, *Liability of Persons Furnishing Intoxicating Liquor for Injury to or Death of Consumer, Outside Coverage of Civil Damage Acts*, 98 A.L.R.3d 1230 (originally published in 1980) (discussing some states' no-recovery rules and the inevitable—and complex—exceptions thereto); H. B. Chermside, *Right to Recover Under Civil Damage or Dramshop Act for Death of Intoxicated Person*, 64 A.L.R.2d 705 (originally published in 1959) (same). For an example, see Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042, 1047 (Fla. 1991) (authorizing first-party claims when a commercial establishment negligently sells alcohol to a minor or to a "habitual drunkard").

Meanwhile, although states have a valid interest in ensuring that the tort system does not "reward" those who drink to excess, Comment *n*, very often, will achieve that end. Even in states that adhere to the position of Comment *n*, a person's excessive consumption will very frequently reduce his or her recovery—and, often, will preclude it entirely. See *Hickingbotham*, 662 A.2d at 301-302 (discussing these dynamics); Voss v. Tranquilino, 19 A.3d 470, 472 (N.J. 2011) (expressing confidence "that the application of established principles of comparative negligence will properly apportion responsibility for damages as between dram shop parties and the injured drunk driver"). For further discussion—and criticism—of this "no-profit rationale," see Engstrom & Rabin, supra at 67-68.

For examples, see Davis v. Hulsing Enters., LLC, 810 S.E.2d 203, 206 (N.C. 2018) (finding that the state's contributory negligence scheme precluded recovery on the beneficiary's wrongful-death claim when the adult decedent drank to such excess that she died of alcohol poisoning); Schooley v. Pinch's Deli Mkt., Inc., 951 P.2d 749, 756 (Wash. 1998) (explaining that "a minor who purchases, possesses, or consumes alcohol . . . may be found to be" comparatively negligent, and "if the minor's intoxication results in that person being more than 50 percent at fault for his or her own injuries[,] then no recovery is allowed"); *Bailey*, 394 S.E.2d at 60 (explaining that, in a first-party suit, "the drunk driver's own negligence would be balanced against the negligence of the seller of the alcohol").

Illustration 15, involving Charley's Angels and the motorist who downed three pitchers of beer, is drawn from Smith v. Sewell, 858 S.W.2d 350, 351 (Tex. 1993).

Comment o. Apportionment of liability: Victim who encourages drinker's intoxication. For general discussion of the traditional complicity defense, see Graham v. United Nat'l Invs., Inc., 745 N.E.2d 1287, 1291 (Ill. App. Ct. 2001); 4 FLEM K. WHITED III, DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 29:38 (2022 update); Nora Freeman Engstrom & Robert L. Rabin, *Felons, Outlaws, and Tort's Troubling Treatment of the Wrongdoer Plaintiff*, 16 J. TORT L. 43, 59-61 (2023).

For practical difficulties that arise when courts try to apply the complicity defense, see Engstrom & Rabin, supra at 60-61; James R. Myers, Comment, *Dramshop Liability: The Blurry*

Status of Drinking Companions, 34 ST. LOUIS U. L.J. 1153, 1176 (1990) ("Complicity has reached the point where it cannot be doctrinally categorized in a neat, definitional manner. This makes it difficult to predict the outcome of a given scenario, especially if the fact-pattern is not clearcut. For example, should a participant be able to recover if he or she just purchased one of the driver's many drinks? What if the driver was already partially intoxicated prior to joining the companion and the participant just purchased the final drink or two? If 'active participation' means 'buying drinks,' what if a party of people contributes equally for several pitchers of beer, but do not individually consume equal amounts?"); cf. Oursler v. Brennan, 67 A.D.3d 36, 42 (N.Y. App. Div. 2009) (collecting cases that "support [defendant's] contention that the purchase of even a single drink for the intoxicated person in question precludes a plaintiff's recovery under the Dram Shop Act as a matter of law" but nevertheless concluding that "the mere act of purchasing drinks for a companion prior to his or her visible intoxication, without more" does not appropriately trigger the complicity defense).

For the defense's traditional justification, see Cox v. Rolling Acres Golf Course Corp., 532 N.W.2d 761, 763-764 (Iowa 1995) ("Complicity on the part of the injured party is an absolute bar to recovery under [the state's dram shop act]. The rationale supporting this defense is that the goal of the dram shop statute is to protect innocent parties, not those who have participated in the intoxicated person's intoxication.") (citations omitted); WHITED III, supra § 29:38 ("The purpose of the complicity defense is to ensure that the individual seeking recovery is an 'innocent person' who is entitled to recover under the dram shop act. The judiciary is reluctant to permit individuals who participated in or contributed to the intoxication of the person who caused the injuries to profit from their own wrongdoing, or to recover for injuries which were set in motion by their own wrongful acts."). For a critique of that justification, see Passini v. Decker, 467 A.2d 442, 444 (Conn. Super. Ct. 1983).

For a recognition that the complicity defense is difficult to reconcile with states' widespread rejection of contributory negligence as a complete bar to recovery, see Kuahiwinui v. Zelo's Inc., 453 P.3d 254, 259 (Haw. 2019) ("The comparative negligence defense applicable in this jurisdiction is inconsistent with the complicity defense."); Engstrom & Rabin, supra at 61-63; Myers, supra at 1177 (complaining that "attempts to differentiate complicity are simply an excuse for retaining a contributory negligence defense by giving it a different label").

Illustration 17 involving Reynolds and Baxter is drawn from Baxter v. Noce, 752 P.2d 240 (N.M. 1988). It is also in line with *Kuahiwinui*, 453 P.3d at 259, Robbins v. McCarthy, 581 N.E.2d 929, 931-933 (Ind. Ct. App. 1991), and Aanenson v. Bastien, 438 N.W.2d 151 (N.D. 1989). Accord Sowinski v. Walker, 198 P.3d 1134 (Alaska 2008) (affirming a wrongful-death verdict against a liquor store, where an inebriated minor was fatally injured in an accident involving an all-terrain vehicle, driven by his intoxicated friend); Anderson v. Am. Fam. Mut. Ins. Co., 671 N.W.2d 651, 660 (Wis. 2003) (concluding that a drinker's companion has a cause of action when the companion is injured by the drinker's consumption of alcohol, although the companion's recovery may be affected by principles of comparative responsibility).

In some states, statutes address and resolve the question. Sometimes, these statutes compel the same approach as taken by Comment *o*. E.g., K.R. v. Sanford, 605 N.W.2d 387 (Minn. 2000) (concluding that an amendment to a comparative fault statute, which expanded the definition of "fault" to include the defense of complicity under the state's dram shop act, statutorily eliminated the judicially created bar against recovery by complicit parties and, instead, made complicity a factor to be considered in assessing a party's comparative responsibility); *Aanenson*, 438 N.W.2d at 157 (holding that "between the liquor merchant and a drinking companion, we believe the legislature intended the responsibility and liability for serving alcoholic beverages to an intoxicated person to fall on the merchant (the dram shop)").

Other times, statutes compel a different approach than that taken by Comment *o*. E.g., OR. REV. STAT. ANN. § 471.565(2)(b)(B) (establishing that a plaintiff may not assert a dram shop claim if he or she "substantially contribute[d]" to the drinker's intoxication, including by "[e]ncouraging the patron or guest to consume or purchase alcoholic beverages or in any other manner"); Mason v. BCK Corp., 426 P.3d 206, 220 (Or. Ct. App. 2018) (concluding that "read as a whole, we understand [Oregon's statute] to bar recovery by a plaintiff who has engaged in conduct that encouraged the patron or guest to purchase alcoholic beverages, drink alcoholic beverages, or otherwise engage in drinking activities, such as drinking with the person or 'bar hopping.'"); cf. Craig v. Larson, 439 N.W.2d 899, 903 (Mich. 1989) (finding that amendments to Michigan's dramshop act do not "reflect any legislative intention to adopt comparative negligence in place of the established bar to recovery for the intoxicated person or a plaintiff partially responsible for the intoxication of the person who causes injury").

Some states, applying common-law principles, reach a result inconsistent with Comment *o*. E.g., Conrad v. Beck-Turek, Ltd., Inc., 891 F. Supp. 962, 970 (S.D.N.Y. 1995) ("Under New York law, a person who actively causes or procures the intoxication of the person responsible for the accident may not recover under the Dram Shop Act."); Walter v. Carriage House Hotels, Ltd., 646 N.E.2d 599, 602 (Ill. 1995) (explaining that, in Illinois, "[t]he complicity doctrine is a judicially created, affirmative defense to the statutory liability of those who own or operate establishments that sell liquor"); Martin v. Heddinger, 373 N.W.2d 486, 488 (Iowa 1985) (stating that, in Iowa, "the dramshop act is meant to protect only those who have not participated in the intoxicated person's intoxication by their complicity or assumption of risk").

Comment p. Apportionment of liability: Injury to third party. It is well established that "[t]he provider's liability to the intoxicated person does not, of course, displace the intoxicated person's own liability to the injured victim." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 424 (2023 update). For further discussion, see F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 686 (Tex. 2007) (rejecting any suggestion that a "provider of alcohol is responsible, without regard to fault, for one hundred percent of the damages caused by an intoxicated patron"). For discussion of how, exactly, to apportion fault between the intoxicated individual and the commercial establishment/social host, see Restatement Third, Torts: Apportionment of Liability § 8 (AM. L. INST. 2000).

Comment q. Beyond alcohol: Other "intoxicating" substances. For discussion of what some dub "gram shop liability," see Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, 58 B.C. L. REV. 863, 864 (2017); Hayley Dean, *Through the Haze: Fashioning A Workable Model for Imposing Civil Liability on Marijuana Vendors*, 49 GONZ. L. REV. 611, 616-621 (2014); Ian A. Stewart & B. Otis Felder, *Gram Shop Liabilities are Creating New Coverage Risks—Part 2*, PROPERTY CASUALTY 360, Feb. 4, 2022 (describing recent legislative activity in Nevada and Michigan, respectively and noting that "[a]t this stage in the development of the regulations and civil tort liability around on-site cannabis consumption, much remains uncertain"). For an early discussion, see Michael E. Bronfin, Comment, *"Gram Shop" Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers*, 1994 U. CHI. LEGAL F. 345 (1994). For examples of legislative enactments applicable to the illegal drug market, see OKLA. STAT. ANN. tit. 63, § 2-422 et seq. (codifying Oklahoma's "Drug Dealer Liability Act"); TENN. CODE ANN. § 29-38-101 et seq. (same for Tennessee).

Comment r. Procedural aspects of duty determination. For discussion, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Reporters' Note to Comment *b* (AM. L. INST. 2010).

Comment s. Judge and jury. Comment *s*'s allocations are well established. Discussing breach, see Anderson v. Moulder, 394 S.E.2d 61, 68 (W. Va. 1990) ("Whether the licensee was negligent in making the sale is a question of fact that ordinarily must be resolved by a jury."). Discussing proximate cause (now called scope of liability), see Osborne v. Twin Town Bowl, Inc., 749 N.W.2d 367, 373 (Minn. 2008) ("Whether proximate cause exists in a particular case is a question of fact for the jury to decide."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 424 (2023 update) (emphasizing that "the scope of liability issue . . . is for the jury where reasonable people could differ").

Occasionally, a statute will preempt the typical inquiry. E.g., S.D. CODIFIED LAWS § 35-11-1 ("The Legislature finds that the consumption of alcoholic beverages, rather than the serving of alcoholic beverages, is the proximate cause of any injury inflicted upon another by an intoxicated person."); TENN. CODE ANN. § 57-10-101 ("The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person."); Build It & They Will Drink, Inc. v. Strauch, 253 P.3d 302, 307 (Colo. 2011) (explaining that, under Colorado's dram shop statute, "when there is a willful and knowing sale of alcohol to a visibly intoxicated person, the sale of alcohol is [automatically] the proximate cause of the plaintiff's injuries").

NEGLIGENCE LIABILITY OF PRODUCT SUPPLIERS

Introductory Note: The Restatement Third of Torts: Products Liability addresses the liability of *commercial* product sellers and distributors for defects in the products they distribute. That project explains its scope:

> The rule stated in this Section applies only to manufacturers and other commercial sellers and distributors that are engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff. The rule does not apply to a noncommercial seller or distributor of such products. Thus, it does not apply to one that sells foodstuffs to a neighbor, nor does it apply to the private owner of an automobile that sells it to another.

Id. § 1, Comment *c*.

The Restatement Third of Torts: Products Liability expanded the breadth of coverage of §§ 402 A and 402 B of the Restatement Second of Torts and updated and superseded those Second Restatement Sections. Those Second Restatement Sections similarly were limited to *commercial* sellers and distributors of defective products.

Elsewhere, however, the Restatement Second of Torts addressed the negligence liability of those supplying products (denominated there as "chattels"); those negligence provisions encompassed, but were not limited to, commercial sellers. Id. §§ 388-408. Many of those provisions were quite granular, separately addressing in different Sections the liability of, among others, independent contractors, donors, sellers, manufacturers, and manufacturers using a secret formula.

These materials, added to the Restatement Third of Torts as part of the Miscellaneous Provisions Restatement, carry forward the work of the Second Restatement in §§ 388-408, but with some key differences. Here, for instance, no distinction is made among different suppliers or different product uses, as the assessment of whether conduct is unreasonable *under all the circumstances* provides ample room to make such distinctions if they are warranted. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 3 and § __, Comment *g* below [cross-reference to Section immediately below]. The same is true, for example, with regard to whether reasonable care requires that nonmanufacturing distributors inspect the products they distribute. See Comment *d* below.

Another difference stems from the fact that the Second Restatement's provisions regarding "chattel" suppliers reflected a system of contributory negligence, the dominant doctrine of the day that eliminated liability when the injured person acted unreasonably in some fashion. See Restatement Second, Torts § 389 (limiting the liability of those who supply unsafe products when, inter alia, the plaintiff is "contributorily negligent"). Now, of course, comparative responsibility has supplanted contributory negligence in nearly all states—and these Sections reflect that reform. See Restatement Third, Torts: Apportionment of Liability § 7 (addressing the elimination of contributory negligence in favor of comparative responsibility).

Those differences aside, these Sections carry forward provisions in the Restatement Second of Torts to address the liability of noncommercial suppliers and, in a number of instances, the liability of commercial suppliers for their negligence. It does so cognizant that there is a very small role for noncommercial sellers, as the vast majority of suits for product-related harm are against commercial sellers and distributors. Often, claims against commercial sellers assert both defect-based and negligence-based claims and, so long as those claims are not entirely duplicative, the latter claims can be maintained along with the defect-based claims. See § __, Comment *b* [cross-reference to Section immediately below] (explaining that, when the defect-based and negligence claims completely overlap, the negligence claims should not be submitted to the jury).

It should also be emphasized that these Sections cover a particular aspect of negligence liability for causing physical harm. Thus, these Sections leave some basic principles of negligence applicable to suppliers of products to the Restatement Third of Torts: Liability for Physical and Emotional Harm. This includes such matters as duty, including to whom the supplier owes its duty, negligence (unreasonable conduct), factual cause, and scope of liability (proximate cause). In addition, the provisions of these Sections reflect doctrine that has developed to address the unique aspects of liability for supplying products that is reflected in the Restatement Third of Torts: Products Liability, some of whose provisions can usefully be consulted to inform resolution of issues that might arise in negligence suits against product suppliers.

Finally, it bears mention that if an actor has not *supplied a product*, either because the conduct at issue involves product use, rather than product provision, or the provision of something other than a product, such as a service, the liability of the actor would be determined by general negligence principles, not by these Sections. See, e.g., In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., 2023 WL 7524912, at *21-35 (N.D. Cal. 2023) (addressing whether various

alleged defects in defendants' social-media platforms were cognizable products liability claims under Georgia and New York law); Coordinated Proceeding on Social Media Cases, No. JCCP 5255, Ruling on Defendants' Demurrer to Master Complaint and Three Short Form Complaints (Cal. Super. Ct. Oct. 13, 2023) (concluding that social-media platforms are not "products," but that defendant operators of social-media platforms are subject to liability for negligence).

§ __. Negligence Liability of Product Suppliers[*]

A product supplier breaches its duty of reasonable care if the supplier:

(a) fails to provide information:

(1) about a dangerous condition of a product; or

(2) necessary to enable safe use of a product it distributes when the lack of such information makes the product unreasonably unsafe; or

(b) distributes a product whose dangers make it unreasonably unsafe even when appropriate information about those dangers is provided.

If a product supplier breaches its duty of care, it is subject to liability if, additionally, the supplier's breach is a factual cause of bodily injury, property damage, or legally cognizable emotional harm that is within the supplier's scope of liability.

Comment:

a. History and scope.

b. The relationship between Chapter 14 of the Restatement Second of Torts and the Restatement Third, Torts: Products Liability.

c. Supersession of Chapter 14 of the Restatement Second of Torts.

d. Suppliers.

e. Terminology: "product," not "chattel."

f. Reasonable care as the crux of the duty owed by product suppliers.

g. Reasonable care as context- and circumstance-specific inquiry.

h. Reasonable care to inspect for latent hazards.

i. Manufacturing defects.

[*] Placement: could be added to the Restatement Third of Torts: Products Liability, in a new Chapter entitled "Negligence Liability of Product Suppliers," or just kept in the Restatement Third of Torts: Miscellaneous Provisions. Although insertion in the Products Liability Restatement is not seamless (it would follow coverage of non-defect-based claims against successors) that is likely where users would first look and these and § 402 A were all together in the Restatement Second of Torts.

j. Negligently recommending an unsuitable product.
k. The relationship between Subsection (a) and Subsection (b).
l. Factual cause and scope of liability (proximate cause).
m. Unforeseeable plaintiffs.
n. To whom warnings must be provided.
o. Prescription-drug design defects.
p. Misuse.
q. Physical harm and the economic-loss rule.
r. Pure emotional harm.
s. Disclaimers, limitations, waivers, and other contractual exculpations as defenses to products-liability claims for harm to persons.
t. Judge and jury.

a. History and scope. Chapter 14, which contained §§ 388 through 408 of the Restatement Second of Torts, addressed the liability of suppliers of "chattels" for their negligence with regard to risks posed by those chattels. Various Sections in Chapter 14 addressed suppliers generally and different subsets of suppliers, such as manufacturers. For those different suppliers, particular provisions framed the negligence inquiry. Those provisions addressed, among other matters: (1) the use to which the chattel was put, (2) the persons who could make a claim, (3) the requisite knowledge by the supplier of both the danger posed by the product and of the knowledge of those for whom the chattel was supplied, and (4) those suppliers that were charged with a duty to inspect. No distinction was made in those provisions as to whether the supplier was a commercial supplier, i.e., one in the business of supplying such products. In failing to distinguish between commercial and noncommercial suppliers, these original provisions of Chapter 14 differed from §§ 402 A and 402 B, which were subsequently added to the Second Restatement—and which imposed strict liability on commercial suppliers only.

In particular, §§ 388 and 389 of the Restatement Second of Torts were general provisions that addressed the liability of all suppliers of chattels for negligently failing to provide appropriate information about a product's dangerous condition and for negligently supplying an unreasonably unsafe product. Section 390 addressed negligent entrustment. Sections 391, 392, and 393 addressed a subset of suppliers—those that provided a chattel for use for the supplier's business purposes—and made the provisions of §§ 388 and 389 applicable to those suppliers as well as imposing a duty to act reasonably with regard to inspecting the products they supplied. (Sections

388 and 389 did not impose a general inspection duty, limiting suppliers' obligation to provide information about hazards of which the supplier knew or "had reason to know." That phrase was employed to distinguish it from the related "should have known," which imposed a duty to act reasonably with regard to investigating in order to find unknown dangers.) Sections 394 and 395 addressed another subset of suppliers: those that manufactured dangerous chattels or that failed to exercise reasonable care in their construction. Section 396 imposed a duty to inspect on those manufacturer-suppliers. Section 397 addressed a quite unusual supplier: one that used a secret formula in manufacturing the product. Section 398, addressing another subset of §§ 388 and 389, made clear that a manufacturer that negligently designed a product was liable for harm caused by the deficient design. Section 399 reiterated that a nonmanufacturer seller that knows of the product's dangers can be liable for harm caused by the dangerous condition. Section 400 imposed the same liability on apparent manufacturers as the actual manufacturer would have. Section 401 addressed the subset of suppliers covered in § 388 that are nonmanufacturing suppliers and added nothing to what § 388 already provided. Section 402 limited the duty of nonmanufacturing sellers to inspect products they sold (now covered in Comment *g* of this Section). Sections 403 and 404 addressed the duties of independent contractors hired to make, rebuild, or repair a product; provisions about those product suppliers are dealt with separately in § __ [cross-reference to Section below that addresses Negligence Liability of Independent Contractors that Manufacture, Rebuild, Repair, Maintain, Assemble, or Install Products] in this Restatement to take account of the issue of contract specifications, which is unique to these suppliers. Sections 405 through 408 set forth the duties of donors, lenders, and lessors. The Restatement Third of Torts: Products Liability provided an alternative basis for liability of commercial sellers and distributors from the ones provided in §§ 388, 389, 391, 392, 394, 395, 398, 399, 400, 401, and 405-408 when liability is based on a defect (whether the product of negligent conduct or not).

This Section does not carry forward the specific rules contained in Chapter 14 of the Restatement Second of Torts for different subsets of product suppliers. General negligence doctrine addresses the foreseeability required for breach of the duty of reasonable care, the scope of liability of a negligent defendant for harm caused, plaintiffs who are unforeseeable, and other matters relevant to whether reasonable care was exercised by providing that determining whether reasonable care was exercised depends on all of the circumstances in the case. There is nothing different about product suppliers—save for those commercial suppliers that are subject to liability

based on defective products—that requires special rules to determine their negligence. Hence, this Section distills Chapter 14's provisions for negligence liability of product suppliers into one comprehensive Section (and one auxiliary Section) that relies on basic principles of negligence as well as doctrines that have developed over the past half century for product-related injury, such as product alteration and product misuse. These sections address the liability of product suppliers for harms caused by the condition of the products they distribute; it does not address bases for liability that may arise from other sources, such as negligently installing or servicing a product. That basis for liability is addressed by general negligence principles provided in Restatement Third of Torts: Liability for Physical and Emotional Harm.

b. The relationship between Chapter 14 of the Restatement Second of Torts and the Restatement Third of Torts: Products Liability. Published in 1998, the Products Liability Restatement significantly, but not entirely, superseded Chapter 14 of the Second Restatement. In particular, it superseded Chapter 14 for claims against commercial product sellers or distributors based on a product defect (in warning, manufacture, or design). A commercial product seller or distributor is one "engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff." Restatement Third, Torts: Products Liability § 1, Comment *c*.

The Products Liability Restatement also superseded Chapter 14's coverage of negligence claims that are identical to a claim based on a product's defectiveness. As to these copycat claims, the Products Liability Restatement provides that these claims cannot be submitted to the factfinder: "two or more factually identical defective design claims or two or more factually identical failure-to-warn claims should not be submitted to the trier of fact in the same case under different doctrinal labels." Restatement Third, Torts: Products Liability § 2, Comment *n*. It continued: "To allow two or more factually identical risk-utility claims to go to a jury under different labels, whether 'strict liability,' 'negligence,' or 'implied warranty of merchantability,' would generate confusion and may well result in inconsistent verdicts." Id.

Yet, even for commercial sellers or distributors of products, one aspect of Chapter 14 is not encompassed within the Products Liability Restatement. Namely, the Products Liability Restatement does not address negligence claims against commercial distributors arising out of supplying a product that differ from the product-defect claims (i.e., that are not mere copycats). Those noncopycat claims—along with claims asserted against noncommercial product sellers or distributors—are addressed here.

Illustrations:

1. Joe's Job Shop, which fabricates metal parts specified by its customers, sells to Mark's Job Shop a 1968 punch press that it has owned and used for 40 years. Shortly after Mark's puts the press to use, Eleanor, while operating the press, has her left hand injured when the press malfunctions. Eleanor's suit against Joe's Job Shop is governed by the provisions of this Section, not the Products Liability Restatement, because Joe's is not a commercial distributor of the press. See Restatement Third, Torts: Products Liability § 1, Comment *c*.

2. David's Distributing, a retailer of industrial machinery, sells to Mark's Job Shop a punch press manufactured by Berson Allsteel Press Company. Shortly after the sale, owing to a manufacturing defect, the punch press malfunctions by "double cycling," and, as it does, it injures Eleanor's left hand. Eleanor may pursue a defect-based strict-liability claim against David's Distributing based on § 2(a) (manufacturing defect) of the Products Liability Restatement and a negligent failure to inspect and discover the manufacturing defect based on this Section. Both claims may be asserted because the two claims differ in that the latter requires proof of negligent conduct by David's Distributing while the former does not.

3. Same facts as Illustration 2, except that, rather than pointing to a manufacturing defect, Eleanor asserts that David's Distributing failed to warn operators of the possibility of a double cycle and that, consequently, operators should never insert a body part into the "pinch point" of the machine. Eleanor may assert only a failure-to-warn claim against David's based on § 2(c) (inadequate warnings) of the Products Liability Restatement. Only the failure-to-warn claim may be asserted because the requirements for liability for failure to warn are the same based on § 2(c) and this Section, both of which impose liability for failing to warn of a foreseeable risk that creates an unreasonable danger in the product.

Ordinarily, a design-defect claim under this Section would meet the same fate as the failure-to-warn claim in Illustration 3. Section 2(b) of the Restatement Third of Torts: Products Liability predicates liability on a showing that a reasonable alternative design was available that could have avoided foreseeable risks of the existing design and could be implemented at lower cost than the cost of the risk avoided. That is a classic negligence formulation, which requires identification of the "untaken precaution" to perform the analysis. Accordingly, a negligence design-defect claim

under this Section against a commercial supplier should not be employed to do an end-run around the requirements in § 2(b). Similarly, this Section should not be employed to modify the requirements for categorical liability (finding the risks of a product are so unreasonable that it can be found defective without proof of a reasonable alternative design) contained in § 2, Comment *e* of the Products Liability Restatement and applicable to commercial suppliers.

Determining whether a defendant is liable for negligence, in addition to being strictly liable, as in Illustration 2, can be important for determining the comparative share of responsibility assigned to the parties, contribution claims, and the ultimate amount of a party's liability when there are multiple defendants. Retailer negligence is also of importance in those jurisdictions that have enacted statutes that immunize innocent retailers from strict liability (typically when the manufacturer is subject to suit in the jurisdiction and sufficiently solvent to satisfy any judgment obtained by the plaintiff). Finally, waivers of tort liability may be enforceable for negligence claims, but they cannot be employed to limit liability for a product-defect claim. Compare Restatement Third, Torts: Apportionment of Liability § 2 (providing conditions for effectiveness of a contractual waiver of negligence), with Restatement Third, Torts: Products Liability § 18 (establishing that disclaimers are ineffective for products-liability claims against commercial product sellers or distributors).

c. Supersession of Chapter 14 of the Restatement Second of Torts. As explained above, the Third Restatement of Torts' treatment of the liability of product suppliers contained in Chapter 14 of the Second Restatement of Torts has been disaggregated—and what was in Chapter 14 is now found in different parts of the Third Restatement. In the end, all of Chapter 14 is superseded by the defect-based provisions for liability of product suppliers provided in Restatement Third of Torts: Products Liability, this Section, § __ (addressing the negligence liability of independent contractors for certain product-related defects), and Restatement Third of Torts: Liability for Physical and Emotional Harm § 19 (covering negligent entrustment, which was addressed in § 390 in Chapter 14 of the Second Restatement of Torts).

d. Suppliers. This Section applies to all product suppliers and, as Comment *b* explains, is broader than comparable provisions in the Restatement Third of Torts: Products Liability, which is limited to "manufacturers and other commercial sellers and distributors that are engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff." Id. § 1, Comment *c*. See also id., Comment *b*; § 20 (defining "one who sells or otherwise distributes").

"Suppliers" as used in this Section includes *noncommercial* suppliers—those that are not in the business of selling or otherwise distributing products of the type that the occasional supplier distributed—and it covers *other forms of product provision* by noncommercial suppliers, including, but not limited to, lending, donating, bartering, renting, and leasing. Thus, "suppliers," as used by this Section, includes, but is not limited to, nonmanufacturing sellers, manufacturers, independent contractors, lenders, donors, barterers, renters, and lessors.

Illustrations:

4. Dalia modifies her pickup truck so that it starts even when the transmission is in gear. She trades in the vehicle when purchasing an electric pickup and neglects to inform Dealer of the modification and hazard. Florissa, shopping for a car at Dealer, is injured when Graglia, an employee of Dealer, inadvertently starts the car in gear, with the result that it moves forward and runs into Florissa, injuring her. Dalia is subject to liability to Florissa under this Section. Because Dalia is a noncommercial seller, any liability she may have is not addressed in the Restatement Third, Torts: Products Liability. See id. § 1, Comment *c*.

5. Gencon, Inc. is the general contractor for a project to construct a flour-processing plant for Flourman, which will own and operate the plant. Mechsu is the mechanical subcontractor on the same job. Flourman contracts with Gencon to supply all of the equipment needed for operations at the plant and provides, pursuant to that contract, that Gencon will supply a machine to sift flour. Flourman provides detailed instructions to Gencon for the safe installation of the machine. While Gencon lifts the machine with a crane to enable it to be installed as provided in Flourman's instructions, a defectively designed counterweight in the machine shifts, resulting in a component of the machine falling and injuring Manny, an employee of Mechsu. Gencon is subject to liability under this Section as a supplier of the machine. Flourman, although it owns and operates, and arranged for the installation of, the sifting machine, is not a supplier of it. Flourman may nevertheless be subject to liability if it was negligent in its instructions for installation.

6. Washington Manufacturing Company shares warehouse space with Jefferson Manufacturing Company. When Jefferson's forklift breaks down one day, Washington lends a spare forklift to Jefferson. While Rip, Jefferson's employee, is using the forklift to raise a pallet, a portion of the forklift shears off, and the pallet falls on Tyde, another Jefferson employee, causing injury. Washington is not a commercial supplier or distributor

of forklifts and therefore is not liable under the Products Liability Restatement. See Restatement Third, Torts: Products Liability § 1, Comment *c*. As a forklift supplier, it is nevertheless subject to liability under this Section.

A product owner that does not possess it or direct its transfer to another is not a supplier. Thus, if a manufacturer contracts with a supplier to operate a machine made by the supplier, which the manufacturer owns but does not possess, the manufacturer is not a supplier of the machine notwithstanding its ownership of it.

Illustrations:

7. Hinger buys a manufacturing operation that fabricates door hinges. Hinger installs Fabrication, Inc. in the plant to operate it and produce hinges. Pursuant to the contract, Fabrication manufactures a machine for Hinger that expedites finishing hinges produced in Hinger's factory. Harriet, an employee of Fabrication, is injured when the machine malfunctions and double cycles. Hinger is not liable to Harriet under this Section because, although it is the legal owner of the malfunctioning machine, it has not distributed the machine to anyone and thus is not a supplier.

8. Same facts as Illustration 7, except that Hinger sells the machine to Gigante, another hinge manufacturer. Gladys, an employee of Gigante, is injured while operating the machine, again due to a malfunction. Hinger is a noncommercial supplier of the machine and, pursuant to this Section, subject to liability to Gladys.

e. Terminology: "product," not "chattel." The Restatement Second of Torts employed the term "chattel" (as did the first Restatement of Torts) in setting forth provisions for the liability of suppliers of moveable goods. In 1965, when two new Sections providing for strict liability were added to the Chapter entitled "Liability of Persons Supplying Chattels for the Use of Others," one, § 402 A, employed the term "product" rather than chattel. Curiously, the other new Section, addressing strict liability for misrepresentations, resorted to the former usage of "chattel." No explanation was provided for the different usage or adoption of "product" in § 402 A, although some statements in those two Sections imply that the two were considered equivalent. One might surmise that the switch to "product" in § 402 A of the Second Restatement was motivated by a desire to remove usage of an antiquated word that is associated with enslavement, but, of course, that surmise leaves unexplained the usage of chattel in the new § 402 B.

Black's Law Dictionary suggests that the word "product" is limited to tangible goods that have been processed into their final state, thereby excluding raw materials. See *Product*, Black's Law Dictionary 1461 (11th ed. 2019). But the Products Liability Restatement does not so limit the term. See Restatement Third, Torts: Products Liability § 19 ("Raw materials are products . . . ."). Perhaps most importantly for purposes of this Section, the Reporters have found no case in which the different usages created a legal issue or, indeed, were even discussed. Consistent with the Restatement Third of Torts: Products Liability, "product" is used in lieu of the word "chattel" throughout this Section, and it encompasses raw materials.

f. Reasonable care as the crux of the duty owed by product suppliers. Suppliers of virtually all products create risks to others by supplying the products. Those risks may be trivial or huge, patent or latent, easily eliminated or so built into the product that it cannot be used without encountering the risk, as is the case with drugs. Pursuant to § 7(a) of the Restatement Third of Torts: Liability for Physical and Emotional Harm, all those who create risks to others—including product suppliers—owe a duty of reasonable care.

Articulating this core reasonable-care obligation, the Second Restatement of Torts stated:

> In all of these particulars the amount of care which the manufacturer must exercise is proportionate to the extent of the risk involved in using the article if manufactured without the exercise of these precautions. Where, as in the case of an automobile or high speed machinery or high voltage electrical devices, there is danger of serious bodily harm or death unless the article is substantially perfect, it is reasonable to require the manufacturer to exercise almost meticulous precautions in all of these particulars in order to secure substantial perfection. On the other hand, it would be ridiculous to demand equal care of the manufacturer of an article which, no matter how imperfect, is unlikely to do more than some comparatively trivial harm to those that use it.

Restatement Second, Torts § 395, Comment *g*. Of course, the burden of taking precaution, as Learned Hand's famous algebraic formulation for negligence revealed, is also relevant to whether reasonable care has been exercised. See United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947).

g. Reasonable care as context- and circumstance-specific inquiry. Assessing whether a product supplier failed to exercise reasonable care requires consideration of all the relevant

circumstances. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 3. The circumstances that might inform a factfinder's assessment of reasonable care by a supplier are quite extensive and diverse, as the Washington Court of Appeals explained:

> Under particular circumstances, then, the supplier may have a duty to inspect and repair the chattel so that a reasonable person would think it safe; to warn of the chattel's condition in such fashion that a reasonable person would expect the recipient to correct or avoid any unsafe condition; or to engage in some combination of these approaches. Under other circumstances, the supplier may have a duty not to deliver the chattel at all—as, for example, where a reasonable person in the supplier's shoes would know (a) that the chattel is not reasonably safe and (b) that the recipient or other user is unlikely to use it safely even if warned. Under still other circumstances, the supplier may not have a duty to do anything—as, for example, where a reasonable person in the supplier's position would have no reason to know the chattel is unreasonably dangerous, or where the chattel's dangers are so obvious that a reasonable person in the supplier's position would expect those exposed to the chattel to perceive such dangers and avoid the consequences thereof.

Gall v. McDonald Indus., 926 P.2d 934, 939-940 (Wash. Ct. App. 1996).

The assessment of whether a supplier acted reasonably under the circumstances also depends on the role that the supplier played. A manufacturer of a product ordinarily will have far greater information and an easier time discovering the dangers in the products it produces. Passive sellers of such products may have little or no opportunity, and their failure to commit the resources to investigate any such risks may be entirely reasonable. Importantly, as well, all nonmanufacturing suppliers are not alike. Some sellers, for instance, may sell a product in such a high volume; or may be so entwined with it; or may make representations about its safety, such that it may well be unreasonable to fail to investigate and ameliorate the product's risks. See Comment *h* below.

Noncommercial product suppliers that are not in the business of supplying the product that caused harm would ordinarily have less information about the product and face higher search costs to determine whether there are unknown and hidden latent risks in a given product. In addition, noncommercial sellers are unlikely to be known, to have reputations that induce consumer confidence, or to have made relevant representations in marketing the products that they sell. All

of these aspects peculiar to noncommercial sellers are appropriately considered under the all-of-the-facts-and-circumstances framing of reasonable care.

h. Reasonable care to inspect for latent hazards. Restatement Second of Torts § 402 set forth a rule that a nonmanufacturing seller that neither knew nor had "reason to know" of a dangerous aspect of a product that it sold was not subject to negligence liability for failure to inspect or test the product before selling it. The "reason to know" language was used to mean that the supplier had no obligation to inspect a product unless the supplier had actual knowledge of facts that pointed to a dangerous condition; the language was used in contrast with the more standard "should have known" formulation which employs an objective standard for whether an inspection is required. Commentary and Illustrations to § 402 emphasized three important conditions that informed the reason-to-know rule: (1) a reputable distributor supplied the product, (2) a retailer had a reasonable belief that the product was not dangerous, and (3) the manufacturer had a record of supplying nondefective products. Section 402, thus, stated an uncontroversial position: A passive retailer that doesn't know and has no reason to know of a latent danger in a product does not, as a matter of law, act unreasonably by failing to inspect the product. The vast majority of courts adhere to this rule.

Beyond the situation described above, a supplier's duty of reasonable care includes taking reasonable steps to discover latent hazards posed by the products it distributes. Thus, a supplier is subject to liability for failing to take appropriate precautions to address dangers that are known or should be known. Consistent with the context-specific nature of reasonable care, as explained in Comment *g*, different suppliers may have differential knowledge or access to information that would inform the appropriate steps they should reasonably take. But no hard and fast rules can be stated for different nonmanufacturing suppliers. Some very large retailers may have greater resources and control of the manufacturing process than the manufacturer itself.

i. Manufacturing defects. Sometimes, a supplier may have actual or constructive knowledge that, among multiple products, one or more may have a manufacturing defect. But, the supplier may not know *which* specific product(s) has such a defect. In such an instance, the supplier must act reasonably to discover which product(s) is defective and, if such efforts are unavailing, to act reasonably to inform those that may be exposed to the risk of such a product defect of the risk.

Illustration:

9. Alpha Assembly, Inc. assembles desk chairs from parts produced by other component manufacturers. Alpha knows that, on rare occasions, one of its assemblers may neglect to install a load-bearing connector. Alpha initiates a mediocre quality-control program that can catch most, but not all, instances of chairs with this problem. One of Alpha's chairs collapses, injuring David, who purchased the chair for use in his home office. The factfinder must determine whether Alpha acted negligently in distributing a chair whose dangers make it unreasonably unsafe. If the factfinder so finds, Alpha is subject to liability to David under this Section.

j. Negligently recommending an unsuitable product. A supplier that provides or recommends a product for a particular purpose of the person acquiring it and that knows or should know that such use poses an unreasonable danger is liable for actionable harm that results. Unlike other claims covered by this Section, such a claim is not based on a product defect but on negligently provided advice. Such a claim may overlap with or even duplicate a claim for breach of the warranty of fitness for a particular purpose under UCC § 2-315.

Illustration:

10. Pat, shopping at High-Value Ropes and Pulleys, requests from Jason, the store's roping specialist, rope that has adequate strength to support a 150-pound prop guillotine that is to be hung above the stage at a community theater. Jason selects and sells a length of rope that is in perfect condition but inadequate to support the weight involved, resulting in injury to Lucinda, an actor in a production at the theater. The factfinder must determine if Jason was negligent in recommending the rope that Pat bought. If the factfinder so finds, Jason and High-Value, vicariously, are subject to liability for Lucinda's injuries.

k. The relationship between Subsection (a) and Subsection (b). The obligation to take reasonable measures to eliminate or reduce risks takes precedence over merely providing warnings of those risks. See Restatement Third, Torts: Products Liability § 2, Comment *l* ("In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks."). As well, the open and obvious nature of a risk often serves the same purpose as a warning; like a warning, the open and obvious nature of the risk can inform the product user of the hazard the user should avoid. This fact leads to the oft-repeated dictum that there is no duty to

warn of open and obvious dangers, although a better rationale for such a rule is the fact that the absence of a warning of an open and obvious danger would not be a factual cause of any harm that resulted. Providing a warning would have added no information to that already provided by the open and obvious nature of the danger. See id., Comment *j*.

However, the duty to eliminate or ameliorate a product hazard is not obviated by its open and obvious nature. The old rule that a supplier has no duty with regard to an open and obvious danger has been rejected in the modern era of strict-products liability and comparative responsibility. See Restatement Third, Torts: Apportionment of Liability § 7 (addressing the elimination of contributory negligence in favor of comparative responsibility).

Illustration:

11. Leslie's Power Tools sells new and used power equipment. Leslie's sells an old snowblower that it had obtained as a trade-in to Marvin, a customer seeking an inexpensive snowblower. The snowblower has a visible, unguarded spinning blade. While using the snowblower the next week, Marvin slips on ice and falls into the snowblower's spinning blade, causing injury to his arm. Marvin sues Leslie's for negligence in supplying the snowblower. Pursuant to Subsection (a), Leslie's is not, as a matter of law, negligent for failing to provide information about the product's dangerous condition (because the snowblower's danger was open and obvious). Leslie's, however, may be subject to liability under Subsection (b) for negligently distributing a product whose dangers make it unreasonably unsafe.

l. Factual cause and scope of liability (proximate cause). Liability for negligent conduct requires that the negligent conduct be a factual cause of the harm suffered by the victim and that the harm fall within the defendant's scope of liability. As to the former, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 26. For the latter, see id. § 29.

m. Unforeseeable plaintiffs. Section 388 of the Restatement Second of Torts provided that a defendant could be held liable to those whom the supplier "should expect to use the chattel with the consent [of the person to whom the product was supplied]." The matter of unforeseeable plaintiffs is addressed today in Restatement Third of Torts: Liability for Physical and Emotional Harm § 29, Comment *n*. Essentially, Comment *n* explains that § 29's general scope-of-liability provisions (sometimes called proximate cause) address claims involving unforeseeable plaintiffs.

n. To whom warnings must be provided. Sometimes, as in Illustration 3, a person other than the product purchaser foreseeably uses a product, raising the question of whom a supplier must warn. The question arises with regard to both commercial and noncommercial suppliers. The Products Liability Restatement addressed the matter (regarding commercial suppliers) by stating:

> Depending on the circumstances . . . instructions and warnings [should] be given not only to purchasers, users, and consumers, but also to others that a reasonable seller should know will be in a position to reduce or avoid the risk of harm. There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. The standard is one of reasonableness in the circumstances. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user. Thus, when the purchaser of machinery is the owner of a workplace that provides the machinery to employees for their use, and there is reason to doubt that the employer will pass warnings on to employees, the seller is required to reach the employees directly with necessary instructions and warnings if doing so is reasonably feasible.

Restatement Third, Torts: Products Liability § 2, Comment *i.* The same principles govern the instructions and warnings prescribed by Subsection (a).

o. Prescription-drug design defects. Claims that a drug's design is defective are problematic for a variety of reasons, including that it is often not possible to reformulate a drug in a marginal way to make it safer, unlike the case with most durable goods. Thus, "you get what you get" when consuming prescription drugs, and liability issues for prescription drugs most often focus on whether an adequate warning was furnished. In jurisdictions in which strict-liability drug design-defect claims are not recognized or are quite limited, sometimes, plaintiffs assert a negligent-design claim, relying on Restatement Second of Torts §§ 395 and 398. Yet the difficulties that exist with strict-liability prescription-drug design-defect claims are no less for negligent-design claims, so this Section should not be used as an end-run around any barriers to strict-liability design claims for prescription drugs.

p. Misuse. Restatement Second of Torts § 388 limited its scope to uses of the product "in the manner for which . . . it is supplied." At the same time, id. § 389 provided more expansively that it applied to unreasonably unsafe products put to uses that the supplier should "expect it to be put." In extending liability to foreseeable, if unintended, uses, § 389 anticipated a development in the strict products-liability era in which a commercial distributor's duty to provide a nondefective product was extended beyond uses *intended* by the distributor to reasonably foreseeable uses. See Restatement Third, Torts: Products Liability § 2, Comment *p.* Thus, because it is reasonably foreseeable that individuals will stand on chairs or pry open paint cans with screwdrivers, manufacturers have an obligation to act reasonably with regard to the risks of those uses—although the makers of chairs and screwdrivers did not *intend* for their products to be used in these ways. That well-established extension, which draws on negligence law's reliance on foreseeability to determine breach of the duty of reasonable care, is incorporated in this Section as well.

"Misuse" is sometimes employed to address different aspects of a products-liability claim beyond whether a product is reasonably safe. Those uses are addressed in Restatement Third of Torts: Products Liability § 15, Comment *b*, which explains the different issues such usage may address and the source of the law for resolving them. Section 15, Comment *b* is incorporated by reference for this Section and § __, which addresses the negligence liability of independent contractors for certain product-related defects.

q. Physical harm and the economic-loss rule. Both Restatement Second of Torts §§ 388 and 389 were limited to physical harm (bodily injury and property damage) suffered by the plaintiff, thereby eliminating recovery for pure economic loss and adopting what later became known as the economic-loss rule, which substantially limits tort liability for negligently inflicted pure economic loss. This Section, similarly, limits liability for negligently inflicted pure economic harm. The Restatement Third of Torts: Products Liability also limits liability to harm to persons or property; § 21 defines "harm to persons or property" and elaborates on when a commercial product seller or distributor is liable for economic loss. That rule is incorporated by reference.

Section 395, Comment *n* of the Restatement Second of Torts provided that a product manufacturer was subject to liability for harm caused to the product itself. The economic-loss rule has overtaken the rule in Comment *n*, and it is abrogated by this Section.

r. Pure emotional harm. In the decades since Chapter 14 of the Restatement Second of Torts was adopted, courts have expanded recovery for the negligent infliction of pure emotional

harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 46-48. That expansion is equally applicable to negligence by product suppliers.

Illustration:

12. Same facts as Illustration 11, involving the unguarded snowblower, except that, now, Marvin's wife, Minerva, is watching out the window while he operates the snowblower, and so she sees his fall and the bloody amputation of his arm. As a result of witnessing this grisly accident, Minerva suffers profound emotional distress. Pursuant to this Section and Restatement Third of Torts: Liability for Physical and Emotional Harm § 48, which governs the claims of bystanders, Leslie's is subject to liability for Minerva's emotional distress.

s. Disclaimers, limitations, waivers, and other contractual exculpations as defenses to products-liability claims for harm to persons. Restatement Third of Torts: Products Liability § 18 declares that disclaimers are invalid for products-liability claims covered by that Restatement. By contrast, for negligence claims based on these Sections, disclaimers, limitations of remedies, waivers, and other contractual exculpations are addressed in Restatement Third of Torts: Apportionment of Liability § 3.

t. Judge and jury. As is the case generally for negligence, issues of whether reasonable care was exercised, whether factual causation exists, and whether the harm is within the defendant's scope of liability (sometimes called proximate cause), are for the factfinder. In addition, here, whether the plaintiff was a member of the class of foreseeable victims (as discussed in Comment *m*), and whether the use to which the product was put was reasonably foreseeable (as discussed in Comment *p*) are also for the factfinder.

REPORTERS' NOTE

Comment a. History and scope. The Washington Court of Appeals pithily cut to the core of the Restatement Second of Torts' treatment of suppliers: "Generally, the supplier of a chattel owes a duty of reasonable care when it delivers a chattel for use by another." Gall v. McDonald Indus., 926 P.2d 934, 938 (Wash. Ct. App. 1996). Moncibaiz v. Pfizer Inc., 532 F. Supp. 3d 452, 461 (S.D. Tex. 2021) (citation omitted) elaborates: "A manufacturer owes a duty to its customers . . . to design a product such that its use doesn't involve an unreasonable risk of harm. With that particular duty in mind, the elements of a negligent-design claim are otherwise the same as that of a traditional negligence claim—duty, breach, causation, and damages." A number of courts have made the useful observation that Restatement Second of Torts § 389 (AM. L. INST. 1965) (as well as id. § 388) merely reflects the application of the basic principles of negligence to

the specific context of those that supply products to others. See, e.g., Buckingham v. R.J. Reynolds Tobacco Co., 713 A.2d 381, 385 (N.H. 1998) ("Section 389 is simply a statement of basic negligence principles of foreseeability and fault in the supplier context."); Bougopoulos v. Altria Grp., Inc., 954 F. Supp. 2d 54, 63 (D.N.H. 2013) (quoting *Buckingham*).

Sections 388 and 389 of the Restatement Second of Torts (AM. L. INST. 1965) are widely accepted and employed. See, e.g., Sowell v. Am. Cyanamid Co., 888 F.2d 802, 804 (11th Cir. 1989) ("Florida also has adopted § 388."); Merklin v. United States, 788 F.2d 172, 177 (3d Cir. 1986) ("New Jersey courts recognize the rule that a supplier of a dangerous chattel owes a duty to take reasonable measures to warn adequately those that will foreseeably come in contact with the product of the product's inherent risks."); Lockett v. Gen. Elec. Co., 376 F. Supp. 1201, 1207 (E.D. Pa. 1974) ("This section [§ 388] has been adopted as the law of Pennsylvania, which is the law applicable to this case."), aff'd sub nom. Gen. Elec. Co. v. Sun Shipbuilding & Drydock Co., 511 F.2d 1393 and 1394 (3d Cir. 1975); Metz v. Haskell, 417 P.2d 898, 900 (Idaho 1966) (citing §§ 388 and 389 and applying negligence principles to hotel owner that furnished ladder to antenna repairman); McGlothlin v. M & U Trucking, Inc., 688 N.E.2d 1243, 1245 (Ind. 1997) (observing that principles of §§ 388 and 392 are consistent with Indiana law); Bloemker v. Detroit Diesel Corp. (Bloemker II), 687 N.E.2d 358, 359 (Ind. 1997) (adopting §§ 391 and 392); Buckingham v. R.J. Reynolds Tobacco Co., 713 A.2d 381, 385 (N.H. 1998) ("We accept the plaintiff's invitation and adopt section 389 as a proper statement of the law of supplier negligence."); Fleming v. Stoddard Wendle Motor Co., 423 P.2d 926 (Wash. 1967) (adopting § 388).

Comment b. The relationship between Chapter 14 of the Restatement Second of Torts and the Restatement Third of Torts: Products Liability. As this Comment explains, whether a plaintiff may maintain and submit to the trier of fact both a defect-based liability claim along with a negligence claim depends on whether the two claims are identical. When addressing whether there is such a difference for the three different defect-based theories and their negligence counterparts, courts have not marched in lock step. Thus, resort must be had to the particular jurisdiction's treatment of defect-based and negligence-based claims. Compare Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66, 69-70 (Ky. 1973) ("We think it apparent that when the claim asserted is against a manufacturer for deficient design of its product the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care."), Wright v. Brooke Grp. Ltd., 652 N.W.2d 159 (Iowa 2002) (adopting a single design defect standard based on risk-utility analysis without labeling it as either strict liability or negligence), and Thompson v. Hirano Tecseed Co., 456 F.3d 805, 809 (8th Cir. 2006) ("Minnesota merges negligence and strict liability claims into a single products liability theory, which employs a reasonable-care balancing test to determine whether a product is defective."), with Syrie v. Knoll Int'l, 748 F.2d 304, 309 (5th Cir. 1984) (applying Texas law) (observing that "strict liability and negligence, although sharing similar and common elements, are two entirely separate theories of recovery in a products liability action"), and Williams v. Beechnut Nutrition Corp., 229 Cal. Rptr. 605, 607-608 (Ct. App. 1986) (concluding that both the plaintiff's products-liability and negligent-design claims were

proper). See also Stanley v. Schiavi Mobile Homes, Inc., 462 A.2d 1144, 1148 (Me. 1983) (declining to resolve the issue after citing courts that came to different conclusions on the matter).

Cases addressing apportionment of liability when a supplier is liable based only on strict liability, or alternatively also liable based on negligence, include Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1072-1073 (5th Cir. 1986) (applying Texas law) (distinguishing between a passively liable retailer and an "independently culpable" retailer for purposes of obtaining indemnity from manufacturer); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 863-864 (Iowa 1994) (observing that a lack of negligence liability of settling retailers justified not submitting settlors to jury for assignment of comparative fault to determine comparative-share credit to which nonsettling defendants were entitled); In re Shigellosis Litigation, 647 N.W.2d 1, 9, 11 (Minn. Ct. App. 1992) (addressing contribution claim by restaurant against importer of contaminated food); Casa Ford, Inc. v. Ford Motor Co., 951 S.W.2d 865, 872 (Tex. App. 1997) ("Texas common law permits 'a retailer or other member of the marketing chain to receive indemnity from the manufacturer of the defective product when the retailer or other member of the marketing chain is merely a conduit for the defective product and is not independently culpable.'"); Sanns v. Butterfield Ford, 94 P.3d 301, 305-307 (Utah Ct. App. 2004) (distinguishing between passive retailer and negligent retailer for purposes of assigning comparative fault), overruled on other grounds by Bylsma v. R.C. Willey, 416 P.3d 595 (Utah 2017).

Supporting the outcome in Illustration 3 is Picher Indus., Inc. v. Balbos, 604 A.2d 445, 455 (Md. 1992), which held that the standard for knowledge of danger in connection with a warning claim is the same for strict products and negligence liability.

Professor Mark Grady explains the need, in negligence claims, for the plaintiff to identify the "untaken precaution" that renders the defendant negligent for failure to adopt it, in Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139 (1989). The untaken precaution in negligence claims is the equivalent of the reasonable alternative design for product design-defect claims.

Comment d. Suppliers. Restatement Second of Torts § 388, Comment *c* (AM. L. INST. 1965) provided that a supplier is:

> any person that for any purpose or in any manner gives possession of a chattel for another's use, or that permits another to use or occupy it while it is in his own possession or control, without disclosing his knowledge that the chattel is dangerous for the use for which it is supplied or for which it is permitted to be used.

On the scope of those that are encompassed as "suppliers," see DeLeon v. Com. Mfg. & Supply Co., 195 Cal. Rptr. 867, 874 (Ct. App. 1983) ("[Defendant] was not an occasional seller but was manufacturing and selling machinery parts as a full time commercial activity and the uniqueness of [its customer's] order did not alter [defendant]'s responsibilities."); Gall v. McDonald Indus., 926 P.2d 934, 938 (Wash. Ct. App. 1996) ("The supplier may be a manufacturer, a retail seller, a non-commercial vendor, a lessor, a repairer, a lender, a donor, or some other type of transferor."). See also Seekins v. CHEP USA, 20 F.4th 345 (7th Cir. 2021) (applying Indiana law) (company hired by retailer to manage processing of pallets was not a supplier of pallet jacks that it occasionally borrowed from retailer in light of lack of evidence that company sold, leased,

donated, or lent pallet jack to another company also providing services at site or to its employee who suffered a crushed foot due to brake failure in riding pallet jack owned by retailer); Wright v. Newman, 735 F.2d 1073, 1082 (8th Cir. 1984) (applying Missouri law) (finance company that repossessed truck and arranged for it to be transported to dealer was a supplier subject to liability under § 392); Genus v. Pride Container Corp., 491 N.E.2d 95 (Ill. App. Ct. 1986) (holding owner that modified corrugated-box machine before selling it was subject to liability under § 388).

Illustration 4, involving the modified pickup truck, is based on Fleming v. Stoddard Wendle Motor Co., 423 P.2d 926 (Wash. 1967). Illustration 5, involving the flour-processing plant, is based on O'Keefe v. Sprout-Bauer, Inc., 970 F.2d 1244, 1256 (3d Cir. 1992). Illustration 6, involving the borrowed forklift, is inspired by Restatement Second of Torts § 392, Comment *b* (AM. L. INST. 1965).

Cases holding, consistent with this Comment, that legal owners, without more, are not suppliers include Dooley v. Parker-Hannifin Corp., 7 F.3d 218 (1st Cir. 1993) (applying Rhode Island law) (affirming summary judgment for owner that never possessed nor controlled holding die on grounds that it owed no duty to plaintiff); United States v. Page, 350 F.2d 28, 32-33 (10th Cir. 1965) (Federal Tort Claims Act case employing Utah law) (holding that, although government was owner of mold that exploded, the government was not a supplier because its subcontractor had sole possession of the mold and the government never exercised control over it); Bloemker v. Detroit Diesel Corp., 720 N.E.2d 753, 761 (Ind. Ct. App. 1999) (holding that a defendant that owned a machine but that did not possess or exercise control over it was not a supplier).

Numerous cases extend the obligation to exercise reasonable care in connection with supplying a product to noncommercial suppliers and transactions. See Andrulonis v. United States, 924 F.2d 1210, 1221 (2d Cir.) (Federal Tort Claims Act case in which New York law applied) (holding that a supplier in a noncommercial transaction—one that involved purely scientific endeavors—was nevertheless subject to a duty of reasonable care), vacated sub nom. on other grounds New York State Dep't of Health v. Andrulonis, 502 U.S. 801 (1991), and on reconsideration, 952 F.2d 652 (2d Cir. 1991); Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 923 (9th Cir. 1987) (applying Montana law) (concluding that Montana Supreme Court would adopt Restatement Second of Torts § 407 and hold lessor of helicopter to standard of care provided in § 407); Papastathis v. Beall, 723 P.2d 97, 100 (Ariz. Ct. App. 1986) (adopting duty of reasonable care for donors of products and those that undertake gratuitously to inspect products); Bjork v. Mason, 92 Cal. Rptr. 2d 49, 57 (Ct. App. 2000) (owner of boat that supplied two "very old" and "frayed" ropes for water skiing that broke during ski activity had duty of reasonable care with regard to supplying rope); Dingler v. Moran, 479 S.E.2d 469, 470 (Ga. Ct. App. 1996) (endorsing duty of reasonable care for relative who lent circular saw to plaintiff but concluding that, because the hazardous condition was open and obvious, defendant was not liable); Pagano v. Occidental Chem. Corp., 629 N.E.2d 569, 575 (Ill. App. Ct. 1994) (stating "a gratuitous bailor may be liable for physical harm caused by the use of his chattel when he knows or has reason to know that the chattel is or is likely to be dangerous when put to the use for which it is supplied; has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and

fails to exercise reasonable care to inform the user of its dangerous condition or of the facts which make it likely to be dangerous"); Williamson-Green v. Equip. 4 Rent, Inc., 46 N.E.3d 571, 575, 580, 581 (Mass. App. Ct. 2016) (affirming judgment for plaintiff against boom-lift lessor that "had reason to know that the lift was likely to be dangerous for the use for which the lift was supplied, such that it owed a duty to inform the user or operator of the lift" and failed to do so); Villanueva v. Nowlin, 420 P.2d 764, 766 (N.M. 1966) (similar to *Dingler*); Weaver v. Flock, 603 P.2d 1194, 1196 (Or. Ct. App. 1979) (reversing summary judgment for hotel that provided a chair that collapsed because the issue of whether the defendant should have known of the chair's condition in the exercise of reasonable care was a matter requiring jury resolution). But see Schenk v. Mercury Marine Div., Lowe Indus., 399 N.W.2d 428, 431 (Mich. Ct. App. 1986) (holding defendant who lent plaintiff waders while they were duck hunting had no duty to plaintiff in connection with doing so); Williams v. Herrera, 496 P.2d 740, 744 (N.M. Ct. App. 1972) (holding homeowner who provided ladder to a tradesperson not liable when owner "had no business interest in the ladder, had no reason to know that it was defective and dangerous for the use for which it was supplied, and had no duty to inspect it for defects").

Comment e. Terminology: "product," not "chattel." Restatement Second of Torts § 402 A, Comment *a* (AM. L. INST. 1965) suggests that the switch to usage of "product" in that Section of the Second Restatement was not intended to mean something different from "chattel." Comment *a* contrasts strict liability for the sale of products with the negligence provisions in the same Chapter without mentioning the different usages in the two different provisions; as well, Restatement Second of Torts § 402 B, Comment *b* (AM. L. INST. 1965), explains the difference between the two new Sections without mentioning the different terms employed in them.

Comment f. Reasonable care as the crux of the duty owed by product suppliers. Reflecting that Restatement Second of Torts §§ 388 and 389 (AM. L. INST. 1965) simply bring negligence principles to the specific application of suppliers of products, the Utah Supreme Court explained that the duties imposed by those Sections were augmented under Utah law to require suppliers to "use reasonable care to safeguard against the danger." Alder v. Bayer Corp., AGFA Div., 61 P.3d 1068, 1079 (Utah 2002); see also Gall v. McDonald Indus., 926 P.2d 934, 938 (Wash. Ct. App. 1996) ("Generally, the supplier of a chattel owes a duty of reasonable care when it delivers a chattel for use by another.").

Restatement Second of Torts §§ 388 and 389 (AM. L. INST. 1965) were limited to suppliers of "chattels," and both id., § 402 A, and Restatement Third of Torts: Products Liability § 2 (AM. L. INST. 1998) address the sale and distribution of "products." Sometimes, the issue of whether what the supplier provided constitutes a "product," which Restatement Third of Torts: Products Liability § 19 (AM. L. INST. 1998) defines as "tangible personal property," arises. See, e.g., Hammond v. N. Am. Asbestos Corp., 454 N.E.2d 210, 216 (Ill. 1983) (holding that, for purposes of § 402 A, raw asbestos is a product); Dubin v. Michael Reese Hosp. & Med. Ctr., 415 N.E.2d 350, 352 (Ill. 1980) (holding that strict liability was inapplicable to radiation overdose to which plaintiff was exposed because the crux of the claim was professional judgment in determining appropriate radiation dose). Where strict liability is applicable, the product vel non question is

important because strict liability does not extend to the provision of nonproducts such as services. See Whitaker v. T.J. Snow Co., 151 F.3d 661, 664 (7th Cir. 1998) (applying Indiana law) (observing that "[t]rying to tell the difference between a product and a service may not be harder than deciding if a glass is half full or half empty, or if a tomato is better characterized as a fruit than as a vegetable, but it is certainly not easy" and concluding that refurbisher of a catalytic converter seam welder provided a service rather than supplied a product); Nora Freeman Engstrom, *3-D Printing and Product Liability: Identifying the Obstacles*, 162 U. PA. L. REV. ONLINE 35, 38-39 (2013) (analyzing the "product" qualifier).

However, the need to determine whether the defendant provided a product for purposes of this Section is not critical because whether product, service, or something else, if the defendant creates risk to others, negligence is the appropriate standard of care. Thus, while this Section is drafted in terms of supplying a product, nothing turns on whether what the defendant supplied was technically a product. Echoing the above idea, the court in Musgrave v. Union Carbide Corp., 493 F.2d 224, 229 (7th Cir. 1974) (applying Illinois law) held that it was unnecessary to determine if defendant knew or should have known of the defect in a trailer hitch that it provided, as required by Restatement Second of Torts § 392 (AM. L. INST. 1965), because there was evidence to support a finding that defendant was negligent in causing the defect in the hitch. See also Lilge v. Russell's Trailer Repair, Inc., 565 N.E.2d 1146, 1152 (Ind. Ct. App. 1991) (Baker, J., concurring) (explaining in case in which truck was refurbished by defendants that whether defendant supplied a product or service was determinative for whether a strict products-liability claim was available but that, regardless of that delineation, defendant was subject to liability for negligence).

Comment h. Reasonable care to inspect for latent hazards. Restatement Second of Torts § 402 (AM. L. INST. 1965) provided that a nonmanufacturing distributor, unaware of any danger in the product, had no duty to inspect the products it distributed. The vast majority of courts addressing this issue concur. See Guglielmo v. Klausner Supply Co., 259 A.2d 608, 614 (Conn. 1969) ("It is the majority view that one that purchases from a reputable manufacturer and sells a product under circumstances where he is a mere conduit of the product is under no affirmative duty to inspect the product or to test for a latent defect . . . ."); E.L. Kellett, *Seller's Duty to Test or Inspect as Affecting His Liability for Product-Caused Injury*, 6 A.L.R.3d 12, at § 3 (originally published in 1966) (stating that the standard in § 402 has "usually been upheld" and this is especially "true where the product is sold in its original package or container, as it came from the manufacturer, and the seller acts as a mere marketing conduit between producer and consumer").

Cases accepting and applying the rule in Restatement Second of Torts § 402 (AM. L. INST. 1965) include: Vandelune v. 4B Elevator Components Unlimited, 148 F.3d 943, 947 (8th Cir. 1998) (applying Iowa law) (concluding that retailer was not liable for negligent failure to inspect or test because no evidence existed that it "knew or had reason to know that the [product sold] 'is, or is likely to be, dangerous'"); Schmidt v. Int'l Playthings LLC, 503 F. Supp. 3d 1060, 1122-1123 (D.N.M. 2020) (applying § 402 to store manager who, assuming she was a seller, neither knew nor had reason to know of danger posed by small toys and hence had no duty to inspect or test); Shuras v. Integrated Project Servs., Inc., 190 F. Supp. 2d 194, 200 (D. Mass. 2002) (concluding that

retailer of industrial tank was not liable for negligence because no evidence was presented that it had more information about the danger in the tank's design than did the buyer); Tekavec v. Van Waters & Rogers, Inc., 12 F. Supp. 2d 672, 682 (N.D. Ohio 1998) (concluding that retailer had no "reason to know" of defect in 55-gallon drum and thus had no duty to inspect); Guglielmo v. Klausner Supply Co., 259 A.2d 608, 614 (Conn. 1969) ("It is the majority view that one that purchases from a reputable manufacturer and sells a product under circumstances where he is a mere conduit of the product is under no affirmative duty to inspect the product or to test for a latent defect . . . ."); Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 456 (Md. 1992) (observing that "when a seller or other nonmanufacturing supplier is nothing more than a conduit between a manufacturer and a customer, the retailer ordinarily has no duty in negligence to discover the defects or dangers of a particular product"); Fernandes v. Union Bookbinding Co., 507 N.E.2d 728, 732 (Mass. 1987) (adhering to § 402 in suit against nonmanufacturing seller of die press); Sutton v. Major Prods. Co., 372 S.E.2d 897, 899 (N.C. Ct. App. 1988) (affirming summary judgment for nonmanufacturing distributors of potato whitener because they were a "mere conduit of the product"). Indeed, while there are exceptions to the rule—discussed below—the Reporters' research has not identified a single case disavowing the rule stated in § 402. A number of states have "sealed-container" statutes that exempt from liability a nonmanufacturing supplier who distributes the product in the same container in which the supplier received it. See, e.g., DEL. CODE ANN. tit. 6, § 2501I; IDAHO CODE ANN. § 6-1407(1).

Beyond passive distributors that serve only as conduits, Restatement Second of Torts § 392(b) (AM. L. INST. 1965) and its Comment *a* impose an inspection duty on nonmanufacturing suppliers that supply the product to a third party to use for the supplier's business purposes. Similarly, the Second Restatement imposed a higher search standard on manufacturers, adopting a "knew-or-should-have-known" standard for them while limiting other distributors to a "knew-or-have-reason-to-know" standard before an obligation to inspect arose. Compare Restatement Second, Torts § 395 (AM. L. INST. 1965) (manufacturers), with id. § 388 (suppliers). No such rigid rules are imposed by this Section. That a product is supplied to a third party for use for the supplier's business purposes is a fact relevant to whether the supplier exercised reasonable care, as that fact means that there will be no one else in the distribution chain to conduct an inspection.

Likewise, nonmanufacturers that supply a product for another's use may fail to exercise reasonable care if they do not inspect the product they supply—but, again, the determination is context-specific; there is no hard-and-fast rule. As the court in Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 456 (Md. 1992) stated:

> [W]hen a seller or other nonmanufacturing supplier is nothing more than a conduit between a manufacturer and a customer, the retailer ordinarily has no duty in negligence to discover the defects or dangers of a particular product.
>
> The nonmanufacturing supplier, however, may do something more than merely act as a conduit of goods, and those additional acts may impose a higher standard of care upon the supplier. In this case, [defendant] was not merely a conduit of goods. [Defendant] not only supplied asbestos products to the shipyards,

> its employees also installed those products, and that installation created danger to other workers. In many cases retailer-installers have been held to a duty to inspect or test a product, although the standard of care is not necessarily as high as that imposed on a manufacturer.

See also Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1073 (5th Cir. 1986) (applying Texas law) (holding that retailer that installed windshields on mopeds that it sold and customarily inspected could be found liable for negligence in failing to conduct an inspection or conducting a shoddy one and remarking "[th]is is not a case involving a closed package which a retailer would not be required to inspect"); In re Mattel, Inc., 588 F. Supp. 2d 1111, 1118-1119 (C.D. Cal. 2008) (holding that retailers that sold children's toys were subject to negligence liability for failure to inspect, notwithstanding § 402, because retailers had reason to know toys were dangerous based on recalls of some and Consumer Product Safety Commission report on other types of toys); Mirchandani v. Home Depot U.S.A., Inc., 470 F. Supp. 2d 579, 584 (D. Md. 2007) (addressing Maryland "sealed container" immunity statute and concluding that recall of similar products made by manufacturer and volume of complaints about manufacturer's products required jury resolution of whether retailer could have discovered latent defect in ladder with the exercise of reasonable care that would render statute's immunity inapplicable); Lykes Bros. S.S. Co., Inc. v. Waukesha Bearings, 502 F. Supp. 1163, 1173 (E.D. La. 1980) (holding that system manufacturer that incorporated product it did not manufacture in system had the same duty to inspect and test as the manufacturer of the component part); In re Asbestos Litig., 832 A.2d 705, 709 (Del. 2003) (holding § 402 inapplicable to supplier of asbestos because asbestos is not manufactured and § 402 is limited to manufactured products); Glynn Plymouth, Inc. v. Davis, 170 S.E.2d 848, 855 (Ga. Ct. App. 1969) (holding general rule that nonmanufacturing seller had no duty to inspect inapplicable when statute existed requiring that automobile dealer inspect a vehicle before selling it), aff'd sub nom. Chrysler Motors Corp. v. Davis, 173 S.E.2d 691 (Ga.), and supplemented, 175 S.E.2d 410 (Ga. Ct. App. 1970); Huckabee v. Bell & Howell, Inc., 265 N.E.2d 134, 138 (Ill. 1970) (addressing the inspection obligation of the nonmanufacturing lessor of scaffolding, which, based on incidents before providing the scaffolding, created a jury question about whether lessor failed to exercise reasonable care with regard to inspecting scaffolding); *Eagle-Picher Indus*., 604 A.2d at 457 (holding supplier-installer of asbestos products subject to the ordinary "should have known" negligence standard rather than more lenient "reason to know" standard of § 402); Groves v. Phillips Petroleum Co., 257 N.E.2d 759, 764 (Ohio Ct. App. 1969) (concluding that seller-bailor of tanks containing liquified propane gas had duty to inspect tanks because it was in position to know how many times tank had been used and when deterioration of parts required replacement); cf. Ritter v. Narragansett Elec. Co., 283 A.2d 255, 258-259 (R.I. 1971) (concluding that retailer that uncrated and inspected range could be liable for negligence in failing to discover tipping hazard of range). As well, a supplier may have a considerably more active role in the risk posed by the product than the typical nonmanufacturing supplier that merely serves as a passive conduit for moving a product through the chain of distribution.

In Fischer v. Red Lion Inns Operating L.P., 972 F.2d 906, 910 (8th Cir. 1992) (applying Nebraska law), a guest at a hotel was shocked by a Pepsi vending machine whose electrical wiring had lost its insulation. Although Pepsi was unaware of the hazard, the court held that, as a supplier of a product that served the supplier's business interests, as the vending machine did, Pepsi had an obligation to inspect its vending machines. See also Downey v. Union Pac. R.R., 411 F. Supp. 2d 977, 981 (N.D. Ind. 2006) (defendant-railroad that owned boxcar and used it to transport goods had duty of reasonable care to inspect because "Indiana law now recognizes that the supplier of chattel has a duty to inspect for defects that may harm people that use the chattel"); Case v. Consumers Power Co., 615 N.W.2d 17, 21 (Mich. 2000) (observing that what constitutes reasonable care must be determined by all of the facts and circumstances and holding that jury must decide whether supplier of electricity breached duty of reasonable care by failing to inspect for stray voltage); Schuck v. Beck, 497 P.3d 395, 408 (Wash. Ct. App. 2021) (imposing duty to inspect on seller of scrap metal that included sealed tank containing chlorine); Gall v. McDonald Indus., 926 P.2d 934, 939 (Wash Ct. App. 1996) ("Generally speaking, the supplier performs its duty by taking such action or combination of actions as a reasonable person would take under the same or similar circumstances. Under particular circumstances, then, the supplier may have a duty to inspect and repair the chattel so that a reasonable person would think it safe; to warn of the chattel's condition in such fashion that a reasonable person would expect the recipient to correct or avoid any unsafe condition; or to engage in some combination of these approaches.").

Some opinions, generally of older vintage, do follow the limitation of § 392 of the Restatement Second of Torts (AM. L. INST. 1965) with regard to a duty of reasonable inspection, thus limiting the duty to inspect to nonmanufacturing suppliers of products who use the product in the supplier's business. See, e.g., Williams v. Herrera, 496 P.2d 740, 744 (N.M. 1972) (declining to impose an inspection duty on homeowner that loaned ladder to plaintiff-brickmason).

In sum, because of varied exceptions to the rule provided in § 402 of the Restatement Second of Torts (AM. L. INST. 1965) that extend to nonpassive sellers not serving as mere conduits, it is difficult to determine where the majority of courts line up with regard to imposing an objective standard to determine if reasonable care requires some inspection obligation. See generally E.L. Kellett, Seller's Duty to Test or Inspect as Affecting His Liability for Product-Caused Injury, 6 A.L.R.3d 12 (originally published in 1966).

Comment i. Manufacturing defects. Section 395, Comment *f* of the Restatement Second of Torts (AM. L. INST. 1965) identifies aspects of the manufacturing process that require attention in order for a manufacturer to act reasonably in fabricating a product:

> *f. Particulars which require care.* A manufacturer is required to exercise reasonable care in manufacturing any article which, if carelessly manufactured, is likely to cause harm to those that use it in the manner for which it is manufactured. The particulars in which reasonable care is usually necessary for protection of those whose safety depends upon the character of chattels are (1) the adoption of a formula or plan which, if properly followed, will produce an article safe for the use for which it is sold, (2) the selection of material and parts to be incorporated in the

finished article, (3) the fabrication of the article by every member of the operative staff no matter how high or low his position, (4) the making of such inspections and tests during the course of manufacture and after the article is completed as the manufacturer should recognize as reasonably necessary to secure the production of a safe article, and (5) the packing of the article so as to be safe for those that must be expected to unpack it.

Comment j. Negligently recommending an unsuitable product. See Restatement Second, Torts § 401, Comment *f* (AM L. INST. 1965) (imposing liability for negligence when the buyer relies on the seller's special competence to provide an appropriate product for the buyer's use). Illustration 10, involving the rope that was of inadequate strength for the purchaser's purpose, is similar to id., Illustration 4. For a court addressing this basis for supplier liability, see McCormick v. B. F. Goodrich Co., 393 N.E.2d 416, 418 (Mass. App. Ct. 1979).

Comment k. The relationship between Subsection (a) and Subsection (b). For affirmation that failure to warn of an obvious danger is not actionable, see, e.g., Plante v. Hobart Corp., 771 F.2d 617, 620 (1st Cir. 1985) (applying Maine law) ("[I]f the law required suppliers to warn of all obvious dangers inherent in a product, '[t]he list of foolish practices warned against would be so long, it would fill a volume.'") (citation omitted); McPhail v. Municipality of Culebra, 598 F.2d 603, 606 (1st Cir. 1979) (applying Puerto Rico law) (holding that the danger of sailing an aluminum-mast sailboat into a power line is an open and obvious danger for which there was no duty to warn but that plaintiff might have prevailed on design defect theory if it had been properly presented); Krawitz v. Rusch, 257 Cal. Rptr. 610, 614 (Ct. App. 1989) (affirming grant of demurrer on claim that former owner of automobile that removed seatbelts owed a duty to warn of that fact on the ground that the seatbelts' absence was open and obvious).

Courts sometimes express the limitation on the duty to warn of open and obvious dangers by stating that there is no obligation to warn when the supplier has no better knowledge of the risks than the person to whom such a warning would be directed. See, e.g., Merklin v. United States, 788 F.2d 172, 178 (3d Cir. 1986) (Federal Tort Claims Act case applying New Jersey law) ("Because both the supplier's and user's appreciation of the risks involved are equivalent, the supplier is no longer in a better position to warn and prior notice of the product's dangerous propensities would be superfluous: 'no one needs notice of that which he already knows.'") (quoting Billiar v. Minn. Mining and Mfg. Co., 623 F.2d 240, 243 (2d Cir. 1980)).

In the era of contributory negligence, that a danger was obvious often meant that the consumer that used the product without taking appropriate precautions was contributorily negligent—and because contributory negligence constituted a complete bar to recovery, use of the open-and-obvious rule to bar recovery was less consequential than it is today. It simply did not matter what route was taken (whether the plaintiff was said to be contributorily negligent or the product was said to contain an obvious danger); the same conclusion—no recovery for the plaintiff—resulted. See Merced v. Auto Pak Co., 533 F.2d 71, 76-77 (2d Cir. 1976) (applying New York law) (describing the open-and-obvious no-duty rule and explaining that the rule sometimes functioned as an alternative to contributory negligence).

For courts rejecting the "open-and-obvious" (sometimes called the "patent-danger") rule for negligent design claims, see, e.g., Franchetti v. Intercole Automation, Inc., 529 F. Supp. 533, 538 (D. Del. 1982) (declaring that "the Court concludes that if the Delaware Supreme Court were faced with the issue, it would follow the modern trend in rejecting the patent danger rule"); Dorsey v. Yoder Co., 331 F. Supp. 753, 759 (E.D. Pa. 1971) (holding "that even though the danger of unguarded rotary blades was obvious to plaintiff, this does not ipso facto preclude recovery"), aff'd, 474 F.2d 1339 (3d Cir. 1973); Calles v. Scripto-Tokai Corp., 864 N.E.2d 249, 264 (Ill. 2007) ("The open and obvious nature of a danger is just one factor in evaluating whether a manufacturer acted reasonably in designing its product. It is not dispositive."); Blue v. Env't Eng'g, Inc., 803 N.E.2d 187, 193 (Ill. App. Ct. 2003) (holding the open and obvious nature of a dangerous condition was but one factor to consider in negligent design claim); Palmer v. Massey-Ferguson, Inc., 476 P.2d 713 (Wash. Ct. App. 1970) (holding trial court properly refused to charge the jury that manufacturer had no duty to safely design for dangers that are patent).

Section 388 of the Restatement Second of Torts (AM. L. INST. 1965) limited its application to instances when the supplier "has no reason to believe that those for whom the product is supplied will realize its dangerous condition." This Section does not adopt that restriction, which has played very little role in decided cases. The limitation is problematic because others that may foreseeably confront the product may need to be provided with information about its hazards. The product supplier's duty is one of reasonable care under the circumstances.

Comment l. Factual cause and scope of liability (proximate cause). For courts applying these requirements for supplier liability, see, e.g., Hawley v. Del. and Hudson Ry. Co., 514 F. Supp. 2d 650, 657-659 (M.D. Pa. 2007) (denying summary-judgment motion by defendant railroad that conducted negligent inspection based on subsequent railroad's failure to inspect properly; defendant was concurrently liable with latter railroad whose negligence was not a superseding cause of harm); Downey v. Union Pac. R.R., 411 F. Supp. 2d 977, 982 (N.D. Ind. 2006) (granting summary judgment to supplier despite breach of its duty to inspect because inspection would not have discovered defect that resulted in plaintiff's injury); Olson v. U.S. Indus., Inc., 649 F. Supp. 1511, 1520 (D. Kan. 1986) (holding that purchaser's failure to attend to obvious danger of machine sold by manufacturer constituted a superseding cause of harm, thereby relieving manufacturer of any liability for plaintiff's harm).

Comment m. Unforeseeable plaintiffs. Addressing unforeseeable plaintiffs, Restatement Third of Torts: Liability for Physical and Emotional Harm § 29, Comment *f* (AM. L. INST. 2010), explains:

> Generally, application of the risk standard [the scope-of-liability (proximate-cause) rule] should avoid much of the need for consideration of unforeseeable plaintiffs, as revealed above [which explains why, on the facts of *Palsgraf*, defendant would not be liable based on scope-of-liability principles]. In those cases in which the plaintiff was, because of time or geography, truly beyond being subject to harm of the type risked by the tortious conduct, but the plaintiff somehow suffers such harm, the defendant is not liable to that plaintiff for the harm.

Comment o. Prescription-drug design defects. Just as courts have not spoken in one voice on the questions of design defect claims for prescription drugs, so they have also split on whether a negligent design claim can be asserted against a drug manufacturer. In Tersigni v. Wyeth, 817 F.3d 364, 368 (1st Cir. 2016) (applying Massachusetts law), the court confronted the issue of whether Massachusetts would recognize a negligent design claim for Pondimin, a weight-loss drug, in light of the Massachusetts Supreme Judicial Court's adoption of Comment *k* to § 402 A. Avoiding resolution of that issue, the court held that even if a negligent design claim existed, plaintiff's claim would fail for failure to provide a reasonable alternative design for the drug, the same impediment that exists for strict-liability design defect claims involving drugs. Thus, even if a negligent design claim existed, it provided no greater basis for liability than its strict-liability cousin. Accord Ackley v. Wyeth Lab'ys, Inc., 919 F.2d 397, 403 (6th Cir. 1990) (applying Ohio law) (applying unavoidably unsafe principle of § 402 A, Comment *k* to plaintiff's negligent design claim); see also Moncibaiz v. Pfizer Inc., 532 F. Supp. 3d 452, 462 (S.D. Tex. 2021) (applying the same standard to plaintiff's negligent design claim as for strict-liability design claim). But see Garrett v. Howmedica Osteonics Corp., 153 Cal. Rptr. 3d 693, 699 (Ct. App. 2013) ("The California Supreme Court in *Brown* . . . held that a manufacturer of prescription drugs cannot be strictly liable for a design defect and that the appropriate test for determining a prescription drug manufacturer's liability for a design defect involves an application of the ordinary negligence standard."); Toner v. Lederle Labs., 732 P.2d 297, 311 (Idaho 1987) ("We conclude that the principles of comment k do not literally apply to negligence claims. More specifically, comment k does not shield sellers of products from negligence claims."); Lance v. Wyeth, 85 A.3d 434 (Pa. 2014) (holding that Comment *k* does not apply to negligent design claim for a drug that had been removed from the market because of its risks); cf. Sanchez v. Bos. Sci. Corp., 38 F. Supp. 3d 727, 737 (S.D. W. Va. 2014) (holding medical-device manufacturer subject to negligent design claim under California law).

Comment p. Misuse. The seminal case extending strict products liability to foreseeable uses is Larsen v. Gen. Motors Corp., 391 F.2d 495 (8th Cir. 1968) (applying Minnesota law) (holding automobile manufacturer's design obligation extended beyond the intended uses for the vehicle and included designing it to be reasonably safe for the unintended, but foreseeable, environment of being involved in an accident and thereby spawning the "crashworthiness" doctrine). See generally DAVID G. OWEN & MARY J. DAVIS, OWEN AND DAVIS ON PRODUCTS LIABILITY § 13.21 (2023 update) (explaining evolution of misuse doctrine that currently subjects product suppliers to liability for uses that "are deemed reasonably foreseeable—a formulation that widely prevails in products liability litigation today"); see also Restatement Third, Torts: Products Liability § 2, Comment *m* (AM. L. INST. 1998) (explaining that liability is limited to use "that it is reasonable to expect a seller or distributor to foresee"). See also Foster v. Ford Motor Co., 616 F.2d 1304, 1310 (5th Cir. 1980) (applying Texas law) (hayfork designed for use with a fork lift that lifted hay bales to a height of three-to-four feet should also be designed to be safe for lifts that extend as high as 10 feet based on their foreseeability); Schell v. AMF, Inc., 567 F.2d 1259, 1263 (3d Cir. 1977) (applying Pennsylvania law) (observing in strict products-liability case that "the principle of

foreseeability carries over from traditional negligence to strict liability cases and 'whether a particular use of a product is abnormal depends on whether the use was reasonably foreseeable by the seller'"); Maddox v. River & Sea Marine, Inc., 925 P.2d 1033, 1037 (Alaska 1996) (holding summary judgment for supplier improper when issue existed as to whether plaintiff's manual attempt to disengage trailer from hitch was foreseeable); Ramsey v. Georgia S. Univ. Advanced Dev. Ctr., 189 A.3d 1255, 1280 (Del. 2018) (holding that laundering work clothes covered by asbestos fibers is foreseeable use of asbestos provided by defendant supplier); Moran v. Faberge, Inc., 332 A.2d 11, 15-16 (Md. 1975) (holding manufacturer has duty to warn of latent dangers not only for intended uses but also for uses that are reasonably foreseeable).

Comment q. Physical harm and the economic-loss rule. Only one of the cases cited in the Reporter's Notes in support of Restatement Second, Torts § 395, Comment *n* (AM. L. INST. 1965), which permitted recovery for harm limited to the product itself, actually addressed the issue and held that a plaintiff could recover for such harm in a tort action. See Fentress v. Van Etta Motors, 323 P.2d 227, 228 (Cal. App. Dep't Super. Ct. 1958). Courts since the Second Restatement have declined to permit tort actions for harm caused to the product itself, leaving plaintiffs to the remedies provided by contract and the Uniform Commercial Code. See, e.g., Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1580 (10th Cir. 1984) (applying Kansas and Pennsylvania law) (reversing summary judgment for defendant on contract claim, while affirming summary judgment on tort claim, observing "there is no cause of action in tort for a purely economic loss"); Karshan v. Mattituck Inlet Marina & Shipyard Inc., 785 F. Supp. 363, 366 (E.D.N.Y. 1992) (admiralty law) (denying negligence claim for harm to the product even when it occurs in an abrupt accident-like event); State of Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962, 971 (D. Ariz. 1975) (concluding installation of defendant's polyurethane foam insulation resulted only in failure of product to meet plaintiffs' performance expectations, which constituted pure economic loss that was not actionable in tort), aff'd, 541 F.2d 226 (9th Cir. 1976); Clark v. Int'l Harvester Co., 581 P.2d 784, 794 (Idaho 1978) (holding plaintiff could not recover for loss resulting from product's failing to perform adequately). But cf. Fordyce Concrete, Inc. v. Mack Trucks, Inc., 535 F. Supp. 118, 125 (D. Kan. 1982) (adopting minority position of permitting recovery for damage to the product itself when damage is caused by a sudden and calamitous event).

Comment r. Pure emotional harm. For case law acknowledging that pure emotional harm can be recovered in a products-liability action in which plaintiff asserted, inter alia, a negligence claim, see, e.g., Prescott v. Slide Fire Sols., LP, 410 F. Supp. 3d 1123, 1143 (D. Nev. 2019) (holding plaintiffs' claims for bystander emotional distress against "bump-stock" manufacturer arising from mass shooting in Las Vegas could be pursued if plaintiffs had the appropriate familial relationship with victims); Harrison v. Davol, Inc., 2017 WL 10109447, at *4 (D.S.C. 2017) (recognizing that husband of victim asserting a products-liability action could assert a claim as a bystander for his pure emotional distress); cf. Walters v. Mintec/Int'l, 758 F.2d 73, 78 (3d Cir. 1985) (applying Virgin Islands law) (permitting recovery of emotional distress that resulted in "bodily harm"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS' LAW OF TORTS § 476 (2023 update) (stating that bystanders who suffer emotional distress can recover from product suppliers in

negligence action); see generally Dale Joseph Gilsinger, *Bystander Recovery Under State Law for Emotional Distress from Witnessing Another's Injury in Products Liability Context*, 90 A.L.R.5th 179 (originally published in 2001) ("Most jurisdictions allow a plaintiff under some circumstances to recover damages from the manufacturer or seller of a defective product for emotional distress caused by the plaintiff's witnessing another's injury due to a defect in the product in question. Recovery for such bystander emotional distress is [also] available under . . . negligence.").

Comment t. Judge and jury. See, e.g., Parker v. Allentown, Inc., 891 F. Supp. 2d 773, 790 (D. Md. 2012) (concluding that, whether plaintiff's holding onto top of rack of animal-cage shelving while standing on her tip toes was a foreseeable use was a matter for the jury); Weaver v. Flock, 603 P.2d 1194, 1196 (Or. Ct. App. 1979) (holding that whether defendant knew or should have known of dangerous condition of product was a matter for the jury).

§ __. Negligence Liability of Independent Contractors that Manufacture, Rebuild, Repair, Maintain, Assemble, or Install Products

(a) An independent contractor that negligently manufactures, rebuilds, repairs, maintains, assembles, or installs a product is subject to liability for bodily injury, property damage, or legally cognizable emotional harm factually caused by the contractor's negligence and within the contractor's scope of liability.

(b) An independent contractor that manufactures, rebuilds, repairs, maintains, assembles, or installs a product for another and returns the product to the other is liable for bodily injury, property damage, or legally cognizable emotional harm factually caused by the contractor's negligence in failing to identify and disclose an unreasonably dangerous condition when the harm sustained is within the contractor's scope of liability.

Comment:

a. History and scope.
b. Contractors that manufacture, rebuild, repair, maintain, assemble, or install a product.
c. Negligence by independent contractor in conducting work.
d. Contract specifications provided by principal.
e. Duty to identify and warn of unreasonably dangerous condition of product.

a. History and scope. The independent contractors addressed in this Section, with the exception of manufacturers, are technically not "suppliers" as defined in § __ [Negligence Liability of Product Suppliers], Comment *d.* Thus, this Section is required to extend § ___ [cross-reference to Negligence Liability of Product Suppliers] to independent contractors who perform

work on products but do not supply them. Chapter 14 of the Restatement Second of Torts also addressed the liability of independent contractors that make, rebuild, or repair products along with product suppliers.[1] This Section supersedes §§ 403 and 404 of the Second Restatement of Torts and extends the scope of those Sections to independent contractors that maintain, assemble, or install a product.

b. Contractors that manufacture, rebuild, repair, maintain, assemble, or install a product. An actor may hire an independent contractor to manufacture, rebuild, repair, maintain, assemble, or install a product. The transaction may not entail the contractor taking legal ownership of the product, which may instead remain with the principal. Nevertheless, the independent contractor that negligently performs work related to a product is subject to liability for bodily injury, property damage, or legally cognizable emotional harm caused by the contractor's negligence. See Restatement Second, Torts §§ 403 and 404 (expressly addressing negligence liability of independent contractors that make, rebuild, or repair products). Independent contractors retained to manufacture component parts for a finished-product manufacturer are addressed neither by § __ Negligence Liability of Product Suppliers nor by this Section as they are suppliers of the component products that they manufacture. See Restatement Third, Torts: Products Liability § 5 (addressing liability of commercial seller or distributor of component parts).

c. Negligence by independent contractor in conducting work. Imposing liability when an independent contractor's negligence is responsible for a condition in the product that causes harm to another is a straightforward application of negligence principles contained in the Restatement Third of Torts: Liability for Physical and Emotional Harm. The imposition of liability is also consistent with Restatement Second of Torts §§ 403 and 404.

d. Contract specifications provided by principal. A principal who retains an independent contractor to manufacture a new product or modify an existing product may provide specifications for the product or supervise other aspects of the contractor's work. Those specifications may result in a dangerous condition in the product if followed—and, when harm ensues, a negligent design claim may be asserted against the contractor. Courts have, quite sensibly, rejected those claims, providing such contractors qualified protection from liability. The "contract-specifications defense,"

[1] One minor distinction is that §§ 403 and 404 used the terminology "chattels" rather than "products." This Section avoids use of that antiquated term for reasons explained in § __, Comment *e* [cross-reference to Negligence Liability of Product Suppliers]. For the definition of "products," see Restatement Third, Torts: Products Liability § 19.

as it is often termed, limits the liability of a contractor that follows specifications the contractor was provided by the principal who hired the contractor to perform work on the product. However, courts qualify this protection when the specifications are so obviously dangerous that a reasonable contractor would not follow them. This Section adopts the qualified contract-specifications defense.

Illustrations:

1. Aristotle Shipping hires Modifier, Inc. to customize standard forklifts for Aristotle's use on its ships. Because of low ceilings, Aristotle specifies to Modifier that overhead safety cages should be removed from the forklifts that Modifier modifies. Modifier complies with Aristotle's specification. Some years later, Aristotle sells the forklift to a warehouse, and Jack, a worker at the warehouse, is injured due to the absence of a safety cage. Pursuant to the contract-specifications defense, Modifier is not liable to Jack for negligent design of the forklift.

2. Kidney Care, Inc. hires Renal Restoration to manufacture a number of kidney dialysis machines to be used in Kidney Care's clinic, and it provides Renal with detailed plans to construct the machines. The plans neglect to provide for grounding of the electrical system—and that failure creates a serious risk of electrocution for those who are connected to the machine. Renal fails to identify the electrocution risk, and it builds the dialysis machines exactly according to the plans Kidney Care, Inc. supplied. Renatto, while undergoing dialysis on one of the machines, suffers an electrical shock that causes serious burns. If a factfinder determines that the failure to ground the machines is so obviously dangerous that a reasonable contractor would not follow them, Renal Restoration is subject to liability to Renatto notwithstanding the contract-specifications defense.

e. Duty to identify and warn of unreasonably dangerous condition of product. Section 403 of the Restatement Second of Torts adopted a theory of misrepresentation for independent contractors that knew or had reason to know of a dangerous condition in a product before returning the product to the principal. The idea was that the contractor's return of the product was an implicit representation that it was reasonably safe for use: "The fact that an inadequately rebuilt or repaired automobile or other chattel is turned over by the contractor gives it a deceptive appearance of safety." Id. § 403, Comment *b*. At the same time, § 403 provided a Caveat that expressed no view on whether an independent contractor that negligently failed to inform its principal of a dangerous condition that the independent contractor is not hired to repair but discovers during the course of

other work on the product could be liable for such a failure. Although case law is not robust in imposing a duty of reasonable care to address dangerous conditions in a product that a contractor is hired to perform work on, it is sufficient to clear the Second Restatement of Torts' Caveat and impose such a duty. Supporting that result is the rationale that the relationship of agent–independent contractor imposes an affirmative duty on contractors to exercise reasonable care with regard to dangerous conditions in products that they are retained to work on. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 40. Thus, when an independent contractor is retained to perform work on a product and, in the course of so doing, the independent contractor becomes aware, or should become aware, that the product has a hazardous condition, the independent contractor is subject to liability if the independent contractor fails to provide that information to the owner.

Important to whether an independent contractor acts reasonably in identifying dangerous conditions in a product is the scope of the work for which the contractor is retained, which affects the knowledge that the contractor would or should have about the dangerous condition. A contractor that is retained to rebuild an entire product might reasonably be expected to find virtually any dangerous condition in the product. By contrast, an automobile mechanic changing the oil in a vehicle would not reasonably be expected to find a defective condition in the car's brakes. Thus, whether an independent contractor acts reasonably with regard to identifying and warning of dangerous conditions in a product is highly dependent on the scope of the work agreed to by the principal and the contractor and whether the contractor's work would or should reasonably have revealed the dangerous condition.

Illustrations:

3. Adaya takes her automobile to Rattle and Hum for an oil change. During the course of the oil change, Rattle and Hum discovers that the tires on Adaya's car have almost no tread and pose a danger of losing control on wet pavement. Rattle and Hum does not inform Adaya of this condition, and Adaya is injured a week later when her car slides off the road during a storm. Rattle and Hum is, as a matter of law, negligent and subject to liability to Adaya notwithstanding that Rattle and Hum was not hired to address the car's tires because Rattle and Hum actually discovered their dangerous condition.

4. Same facts as Illustration 3, except that Adaya takes her car to Rattle and Hum to replace the tires on her car, which Rattle and Hum does. The car has a loose connection

in the engine compartment that enables engine emissions to enter the passenger compartment. Rattle and Hum does not inspect the engine compartment and consequently does not find the loose connection. After the car is returned to Adaya, she suffers injury from her inhalation of emissions during a long cross-country trip. Rattle and Hum is not liable to Adaya because the scope of its work did not include work on the engine compartment, and therefore Rattle and Hum was not, as a matter of law, negligent in failing to discover the danger.

If the dangerous condition of the product is open and obvious, no "misrepresentation" would ordinarily occur because the principal would have the information that a warning would provide. If the independent contractor knows or should know that the principal is nevertheless unaware of the dangerous condition, the contractor would have a duty to exercise reasonable care in informing the principal.

REPORTERS' NOTE

Comment b. Contractors that manufacture, rebuild, repair, maintain, assemble, or install a product. Restatement Second of Torts §§ 403 and 404 (AM. L. INST. 1965) were limited to independent contractors that make, rebuild, or repair a product. This Section also includes those that maintain, assemble, or install a product. This group can, if negligent, create risks to others just as do those that make, rebuild, or repair products. For a court imposing a duty of reasonable care on an installer, see Ladwig v. Ermanco Inc., 504 F. Supp. 1229, 1236 (E.D. Wis. 1981). For courts extending the duty of reasonable care to an assembler, see Goebel v. Dean & Assocs., 91 F. Supp. 2d 1268, 1278 (N.D. Iowa 2000) (concluding that § 404 is applicable to an independent contractor that "assembles," as opposed to one that "rebuilds" or "repairs" a product); Yost v. Fuscaldo, 408 S.E.2d 72, 76-77 (W. Va. 1991) (addressing duty of assembler and observing that duty of reasonable care for assembler is not as stringent as for manufacturer because the assembler does not design the product).

For courts applying the principles of Restatement Second of Torts §§ 403 and 404 (AM. L. INST. 1965) to various types of independent contractors, see Campbell v. Otis Elevator Co., 808 F.2d 429, 434 (5th Cir. 1987) (applying Louisiana law) (holding elevator-maintenance contractor to a duty of reasonable care); Winans v. Rockwell Int'l Corp., 705 F.2d 1449, 1453 (5th Cir. 1983) (applying Louisiana law) (stating that aircraft repairers are held to a duty of reasonable care); Reeves v. Power Tools, Inc., 474 F.2d 375, 380 (6th Cir. 1973) (applying Tennessee law) (holding lender of a power tool that employed a powder-charged cartridge that had cleaned and serviced the tool 10 days before it exploded subject to liability for negligence in failing to discover defects in the tool during its maintenance of it); Cincotta v. United States, 362 F. Supp. 386, 399 (D. Md. 1973) (Federal Tort Claims Act case in which Maryland law applied) (stating that Air Force technicians that reassembled and inspected rebuilt actuator assembly for aircraft had a duty of

reasonable care); Reader v. Gen. Motors Corp., 483 P.2d 1388, 1395 (Ariz. 1971) (establishing that a vehicle dealer that performed work on truck could be found liable for using wrong clip to secure cable that resulted in loss of brakes and injury to plaintiffs); Jackson v. Ryder Truck Rental, Inc., 20 Cal. Rptr. 2d 913, 917 (Ct. App. 1993) (contractor that maintained truck); S. H. Kress & Co. v. Godman, 515 P.2d 561, 564 (Idaho 1973) (contractor retained to repair boiler); Anderson v. Glynn Constr. Co., 421 N.W.2d 141, 144 (Iowa 1988) (contractor that rebuilt and repaired grain auger); Williams v. La. Mach. Co., 387 So. 2d 8, 12 (La. Ct. App. 1980) ("A repairer has a duty, arising in tort, to exercise reasonable care and skill in the design and repair of the object to be repaired commensurate with the risk of harm flowing from the normal use of that product."); Youmans v. Douron, Inc., 65 A.3d 185, 203 n.15 (Md. Ct. Spec. App. 2013) (contractor that agreed to "purchase, install and maintain office furniture"); Slate v. Bethlehem Steel Corp., 510 N.E.2d 249, 252-253 (Mass. 1987) (repairer of industrial press); Kussman v. V & G Welding Supply, Inc., 585 So. 2d 700, 704 (Miss. 1991) (contractor that performed warranty work on electrical tool subject to liability under § 388 of Second Restatement of Torts).

Comment d. Contract specifications provided by principal. Restatement Second of Torts § 404, Comment *a* (AM. L. INST. 1965) provided:

> [O]ne that employs a contractor to make a chattel for him, like one that employs a contractor to erect a structure on his premises (as to which see § 385), usually provides not only plans but also specifications, which often state the material which must be used. Indeed, chattels are often made by independent contractors from materials furnished by their employers. In such a case, the contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer. The contractor is not subject to liability if the specified design or material turns out to be insufficient to make the chattel safe for use, unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe. The same is true in regard to materials furnished by the employer.

The vast majority of courts follow the rule set forth in Restatement Second of Torts § 404, Comment *a* (AM. L. INST. 1965). See, e.g., Hatch v. Trail King Indus., Inc., 656 F.3d 59, 70 (1st Cir. 2011) (applying Massachusetts law) (affirming lower court's use of contract-specifications defense); Mesman v. Crane Pro Servs., 512 F.3d 352, 359 (7th Cir. 2008) (applying Indiana law) (quoting Restatement Second of Torts § 404, Comment *a* as providing relevant rule of law); Spangler v. Kranco, Inc., 481 F.2d 373, 375 (4th Cir. 1973) (applying Virginia law) (affirming directed verdict for defendant manufacturer, relying in part on the principle that a manufacturer is not liable for an allegedly defective product "where the product has been manufactured in accordance with plans and specifications of the purchaser except where the plans are so obviously dangerous that they should not reasonably be followed"); Herrod v. Metal Powder Prods., 886 F. Supp. 2d 1271, 1275 (D. Utah 2012) ("With a few exceptions, most jurisdictions apply the contract specifications defense regardless of the theory of liability."); Castaldo v. Pittsburgh-Des Moines Steel Co., Inc., 376 A.2d 88, 90 (Del. 1977) (holding that the contract manufacturer of a tank,

which was built according to the employer's specifications, could not be held liable for any defect in the specifications since the plans were not so obviously dangerous that no reasonable person would follow them); Cooper v. Garmon Bros. Contractors, Inc., 305 S.E.2d 499, 500 (Ga. Ct. App. 1983) (holding contractor was not liable for plaintiff's injury because he followed the plans and specifications of the owner, while remarking that a contractor cannot ignore obviously dangerous defects in the plans); Luna v. Shockey Sheet Metal & Welding Co., 743 P.2d 61, 62 (Idaho 1987) (endorsing the standard in § 404, Comment *a* for a contract manufacturer that was provided specifications); Miller Metal Fabrication, Inc. v. Wall, 999 A.2d 1006, 1010 n.5 (Md. 2010) (suggesting, without holding, that Maryland would follow the contract-specifications defense); see generally 2 DAVID G. OWEN & MARY J. DAVIS, OWEN AND DAVIS ON PRODUCTS LIABILITY § 14:2 (2023 update).

Comment e. Duty to identify and warn of unreasonably dangerous condition of product. Emblematic of the misrepresentation theory of liability adopted in Restatement Second of Torts § 403 (AM. L. INST. 1965) is Beasock v. Dioguardi Enters., Inc., 499 N.Y.S.2d 558, 559 (App. Div. 1986), in which a tire recapper (providing replacement tread on a used tire) recapped a tire and returned the tire to the owner; the tire exploded because it was mounted on an undersized rim. Relying on § 403, Comment *b*, the court held that the return of the tire "gives it a deceptive appearance of safety" and thus the defendant had a duty of reasonable care to inspect for defects (even if not the result of the recapper's work) and to warn the owner of them. See also Levine v. Sears Roebuck & Co., 200 F. Supp. 2d 180, 187 (E.D.N.Y. 2002) ("Underlying a negligent repair claim is the concern that a repairer will hand over an unsafe product that appears fixed, but which is actually still in an unsafe condition.").

Cases supporting the broader duty to act reasonably to discover dangerous conditions and inform the principal of such dangers include Woolard v. JLG Indus., Inc., 210 F.3d 1158, 1170 (10th Cir. 2000) (applying Oklahoma law) (stating the duty of a repairer "includes not only 'perform[ing] the repair properly, but also the duty to inspect and test the [chattel] in order to determine whether [it] could be operated without danger to plaintiff and the public'") (quoting Stuckey v. Young Expl. Co., 586 P.2d 726, 730 (Okla. 1978)); Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co., 604 P.2d 1113, 1118 (Alaska 1980) (holding contractor that was retained to repair and reinstall hydraulic ram assembly on truck was subject to liability for negligence in failing to discover that weld on assembly was defective).

Also supportive of the broader duty imposed by this Section is Reeves v. Power Tools, Inc., 474 F.2d 375, 380 (6th Cir. 1973) (applying Tennessee law). There, the owner of a power tool that used a powder-activated mechanism to attach fasteners directly to steel or concrete lent the device to another company. When in the possession of that other company, the power tool (which was defective) exploded and caused injury to a company employee. Although the owner was not an independent contractor, the court, relying on § 403 of the Restatement Second of Torts (AM. L. INST. 1965), held that it was a jury question whether the defendant (the tool's owner) should have discovered the device's defect.

Hoffman v. Simplot Aviation, Inc., 539 P.2d 584, 590 (Idaho 1975), is similar. There, an aviation repairer did field work on a damaged plane that required temporary repair in order to be ferried to a facility for complete repair. The court held the temporary repairer subject to liability for negligence in failing to find a damaged bolt that was required to hold the wing strut braced in a proper position and that failed during the ferry flight, resulting in a crash. The court based its decision on a warranty theory, while emphasizing that fault on the part of the defendant was necessary for a breach to be found.

A case contrary to Subsection (b) that limits a contractor's liability for failing to discover and warn of dangerous conditions not the result of the contractor's work to only those situations in which the return of the product creates a misimpression of safety is Anderson v. Glynn Constr. Co., 421 N.W.2d 141, 143 (Iowa 1988) (defendant repairer's work on auger in grain elevator did not, as a matter of law, create a deceptive appearance with regard to risks posed by open hopper boxes negating negligence liability for repairer).

That the scope of the undertaking by the contractor informs the scope of the duty of reasonable care is supported by LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1073 (3d Cir. 1996) (applying Delaware law) (explaining that "it is the scope of the undertaking, as defined in the contract, which gives shape to the independent contractor's duty in tort"); Thompson v. F.B. Cross & Sons, Inc., 798 A.2d 1036, 1040 (Del. 2002) ("In the words of the *LeJeune* court, 'it is the scope of the undertaking, as defined in the contract, which gives shape to the independent contractor's duty in tort.' We agree."); Ayala v. V & O Press Co., 512 N.Y.S.2d 704, 709 (App. Div. 1987) (holding that repairer that had no ongoing service agreement with owner of press and that had serviced the press 10 years before plaintiff's accident was not liable for failing to warn that design of product was defective).

Illustrations 3 and 4, involving automobile maintenance, are based loosely on Diaz v. Phoenix Lubrication Serv., Inc., 230 P.3d 718, 723 (Ariz. Ct. App. 2010).

———

Other provisions in Restatement Second of Torts, Division Two, Chapter 14 addressed in this Restatement:

Restatement Second of Torts § 390 (AM. L. INST. 1965), entitled Chattel for Use by Person Known to be Incompetent, is superseded by Restatement Third of Torts: Liability for Physical and Emotional Harm § 19 (AM. L. INST. 2010).

Restatement Second of Torts § 393 (AM. L. INST. 1965), entitled Effect of Third Person's Duty to Inspect, is superseded by Restatement Third of Torts: Liability for Physical and Emotional Harm §§ 29 and 34 (AM. L. INST. 2010).

Restatement Second of Torts § 396 (AM. L. INST. 1965), entitled Effect of Third Person's Duty to Inspect, is superseded by Restatement Third of Torts: Liability for Physical and Emotional Harm §§ 29 and 34 (AM. L. INST. 2010).

Restatement Second of Torts § 397 (AM. L. INST. 1965), entitled Chattel Made Under Secret Formula, is obsolete.

Restatement Second of Torts § 397 (AM. L. INST. 1965) is a particular instance of id. § 388, which generally covers the specific and unusual circumstance to which § 397 is addressed. Only three cases are cited in the Reporter's Notes for this Section in the Restatement Second of Torts, and all three preceded the publication of the first Restatement of Torts. Only six cases have cited this Section in the half century since the Second Restatement was published, and five of those cases cited this Section for propositions for which it does not stand: Mercer v. Pittway Corp., 616 N.W.2d 602, 626 (Iowa 2000); Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980); Post v. Am. Cleaning Equip. Corp., 437 S.W.2d 516, 520 (Ky. 1968); Gutowski v. M & R Plastics & Coating, Inc., 231 N.W.2d 456, 461 n.3 (Mich. Ct. App. 1975); Kohn v. La Manufacture Francaise Des Pneumatiques Michelin, 476 N.W.2d 184, 187 (Minn. Ct. App. 1991), while one cites § 397 in obiter dictum. Sumsion v. J. Lyne Roberts & Sons, Inc., 443 P.3d 1199, 1204 (Utah 2019).

Restatement Second of Torts § 400 (AM. L. INST. 1965), entitled Selling as Own Product Chattel Made by Another, is superseded by Restatement Third of Torts: Products Liability § 19 (AM. L. INST. 1998) for commercial sellers. Section 400 is obsolete as applied to noncommercial sellers.

Restatement Second of Torts § 402 A (AM. L. INST. 1965), entitled Special Liability of Seller of Product for Physical Harm to User or Consumer is superseded by Restatement Third of Torts: Products Liability (AM. L. INST. 1998).

Restatement Second of Torts § 402 B (AM. L. INST. 1965), entitled Misrepresentation by Seller of Chattels to Consumer is superseded by Restatement Third of Torts: Products Liability § 9 (AM. L. INST. 1998).

APPENDIX A

BLACK LETTER OF TENTATIVE DRAFT NO. 3

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

§ . Medical Monitoring

An actor is subject to liability to a person for the reasonable expenses of medical monitoring, even absent manifestation of present bodily harm, if all of the following requirements are satisfied:

(1) the actor exposed the person to a significantly increased risk of a particular serious future bodily harm;

(2) the actor, in exposing the person to a significantly increased risk of the particular serious future bodily harm, has acted tortiously;

(3) the actor's tortious conduct factually causes the person to be at a significantly increased risk of the particular serious future bodily harm, and the increased risk is within the actor's scope of liability;

(4) a medical monitoring regimen exists that makes expedited detection and treatment of the particular serious future bodily harm both possible and beneficial;

(5) the medical monitoring regimen is different from that normally recommended in the absence of the exposure; and

(6) the medical monitoring regimen is reasonably necessary, according to generally accepted contemporary medical practices, to enable expedited detection and treatment of the particular serious bodily harm, so as to prevent or mitigate the harm.

When an actor is liable for medical monitoring expenses, barring exceptional circumstances, monies should not be paid on a lump-sum basis. Instead, appropriate steps should be taken to ensure that funds earmarked for medical monitoring are used as intended and are not diverted to other purposes.

STATUTES OF LIMITATIONS AND STATUTES OF REPOSE FOR COMMON-LAW TORT CAUSES OF ACTION

§ 1. Definition of Statute of Limitations

A statute of limitations is a statute that provides a plaintiff a legislatively defined period of time to sue on a cause of action against a defendant and that bars the cause of action after the legislatively defined period has expired without suit being brought.

§ 2. When the Statute of Limitations Begins to Run—All-Elements Rule

Except as otherwise provided in § 3 (discovery rule) or § 4 (continuing torts), the statute of limitations begins to run on a cause of action when all of the necessary elements of the cause of action have occurred.

§ 3. When the Statute of Limitations Begins to Run—Discovery Rule

Even if the statute of limitations would otherwise begin to run on a cause of action pursuant to § 2 (the all-elements rule), the statute of limitations does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the existence of all of the necessary factual elements of the cause of action against the defendant.

§ 4. When the Statute of Limitations Begins to Run—Continuing Torts

Certain repetitive or continuous conduct by a defendant against a plaintiff gives rise to a "continuing tort." In such cases, special rules, other than those set forth in §§ 2 and 3, govern when the statute of limitations accrues. These special rules apply in the following narrow circumstances:

(a) If a rule of law requires all damages resulting from repeated or continuous tortious conduct to be sought in a single action, the statute of limitations begins to run as soon as the statute of limitations begins to run for any tort that is part of the continuing tort.

(b) If the plaintiff's injury is a cumulative and progressive result of repeated or continuous tortious conduct, none of which separately causes identifiable discrete cognizable injury, and if further exposures to the defendant's tortious conduct incrementally exacerbate the plaintiff's condition, the statute of limitations does not begin to run until after the cessation of the tortious conduct affecting the plaintiff.

(c) If the cause of action is for false imprisonment, the statute of limitations begins to run only after the cessation of the false imprisonment.

§ 5. Statutory Tolling Rules

Most tolling rules are created by statute. This Restatement does not restate statutory tolling rules.

§ 6. Continuous Representation

The running of the statute of limitations on a client's cause of action against a lawyer or law firm for legal malpractice is tolled for any period of time during which the lawyer or law firm continues to represent the client with respect to the same or a substantially related matter.

§ 7. Continuous Medical Treatment

The running of the statute of limitations on a patient's cause of action against a medical professional or medical institution for medical malpractice is tolled for any period of time during which the medical professional or medical institution continues to treat the patient for the same or a substantially related condition.

§ 8. Equitable Tolling

Equitable tolling suspends the statute of limitations when both of the following conditions are satisfied:

(a) The plaintiff has been diligently pursuing the plaintiff's rights, and

(b) Some extraordinary circumstance prevents the plaintiff from bringing a timely action.

§ 9. Equitable Estoppel

If a defendant, by words or conduct, or by silence when the defendant has a duty to speak, causes a plaintiff not to bring a timely action, and the plaintiff's reliance on the defendant's words, conduct, or silence in forbearing to bring a timely action is reasonable, equitable estoppel bars the application of the statute of limitations until after the plaintiff's reasonable reliance has ceased.

§ 10. Fraudulent Concealment

If a defendant, by words or conduct, or by silence when the defendant has a duty to speak, commits fraud that causes a plaintiff not to bring a timely action, the doctrine of fraudulent concealment bars the application of the statute of limitations until after the plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, the defendant's fraud.

§ 11. Contracts Shortening or Lengthening the Statute-of-Limitations Period

(a) A plaintiff and a defendant may agree by an otherwise valid contract to shorten the statute-of-limitations period applicable to a present or future cause of action by the plaintiff against the defendant, provided that the contract affords the plaintiff a reasonable opportunity to bring an action.

(b) A plaintiff and a defendant may agree by an otherwise valid contract to lengthen the statute-of-limitations period applicable to a present or future cause of action by the plaintiff against the defendant.

(c) If either the plaintiff or the defendant is a consumer, any contract shortening or lengthening the statute-of-limitations period is governed by the rules restated in Restatement of the Law, Consumer Contracts (Revised Tentative Draft No. 2, 2022).

§ 12. Definition of Statute of Repose

A statute of repose is a statute that provides a plaintiff a legislatively defined period of time running from the date of a specified event, such as a tortious act, the sale of a product, or the completion of a building project, to sue on a cause of action against a defendant, and that bars the plaintiff's cause of action after the legislatively defined period has expired without suit being brought, regardless of whether the plaintiff could have sued during that period.

§ 13. When the Statute of Repose Begins to Run

The statute of repose begins to run on a cause of action by a plaintiff against a defendant on the date of the event specified in the statute of repose, such as a tortious act, the sale of a product, or the completion of a building project, regardless of whether the plaintiff is yet able to sue on the cause of action.

§ 14. The Statute of Repose Is Not Suspended by Common-Law Tolling Rules

The running of the statute of repose is not suspended by common-law tolling rules.

§ 15. Effect of Defendant Misconduct

The rules of § 9 (equitable estoppel) and § 10 (fraudulent concealment) apply to statutes of repose just as they do to statutes of limitations.

§ 16. Contracts Shortening or Lengthening the Statute-of-Repose Period

The rules of § 11 (contracts shortening or lengthening the statute-of-limitations period) apply to statutes of repose just as they do to statutes of limitations.

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

CHAPTER 3
THE NEGLIGENCE DOCTRINE AND NEGLIGENCE LIABILITY

§ 18 A. Negligent Misrepresentation Causing Physical Harm

(a) An actor who negligently furnishes false information is subject to liability for any physical harm factually caused by another's reliance on the information that is within the actor's scope of liability.

(b) An actor's negligence may occur in ascertaining the accuracy of the information, in the manner in which it is communicated, or in other ways that result in the communication of false information.

(c) An actor is subject to liability pursuant to this Section regardless of whether the person who received or relied upon the actor's misrepresentation is the person who suffered physical harm.

CHAPTER 12
LIABILITY IN EVENT OF DEATH

§ 70 [Approximately]. Actions for Causing Death (Wrongful Death)

An actor's liability for tortiously causing the death of another is determined by the statute creating the right of action and its interpretation. The measure of damages for

wrongful death is addressed by § 23 of the Restatement Third of Torts: Remedies (Tentative Draft No. 2, 2023).

§ 71 [Approximately]. Survival of Tort Actions Upon the Death of the Victim

Under statutes providing for the survival or revival of tort actions, a person's cause of action may proceed, even if the person dies before the final resolution of the claim. The measure of damages for such an action is addressed by § 24 of the Restatement Third of Torts: Remedies (Tentative Draft No. 2, 2023).

§ 72 [Approximately]. Survival of Tort Actions Upon the Death of the Tortfeasor

Under statutes providing for the survival of a tort action, a person's cause of action may proceed even if the tortfeasor dies before the final resolution of the claim.

CHAPTER 8A
INTERFERENCE WITH FAMILY RELATIONSHIPS

§ 48 F. Spousal Abduction and Enticement Abolished

One who compels or otherwise induces a spouse physically to separate or remain apart from the other spouse is not liable for the harm thus caused to the marital relationship.

§ 48 G. Alienation of Betrothed's Affections Abolished

An actor who alienates one fiancé or fiancée's affections from the other is not liable for inducing a breach of the marriage contract or for the harm thus caused to the premarital or future marital relationship.

§ 48 H. Alienation of a Child's Affections Abolished

An actor who alienates a child's affections from a parent is not liable for the harm thus caused to the parent due to the impairment or destruction of the parent–child relationship.

§ 48 I. Parental Claim for Seduction of a Minor Abolished

An actor who has sexual intercourse with a minor is not liable to the minor's parent because of the sexual intercourse. This Section does not address the actor's liability to the minor or the actor's responsibility under other law.

§ 48 J. Tortious Interference with Parental Rights

An actor is subject to liability to a parent who has custodial responsibilities over a minor child if the actor, with knowledge that the parent does not consent, intentionally and by affirmative conduct:

(a) compels or induces the child to leave the parent, or

(b) detains the child and prevents the child from returning to the parent's custody.

§ 48 K. Alienation of Parent's Affections Abolished

An actor who alienates a parent's affections from a child is not liable for the harm thus caused to the child due to the impairment or destruction of the parent–child relationship.

AIDING AND ABETTING NEGLIGENCE TORTS

§ . Aiding and Abetting Negligence Torts

An actor is subject to liability for aiding and abetting if:

(a) another commits a negligence tort causing physical, emotional, or dignitary harm to a third person;

(b) the actor had actual knowledge that the other might engage in negligent or reckless conduct posing a risk to a third person or persons; and

(c) the actor substantially assisted or encouraged the other to engage in, and thereby increased the risk of, that negligent or risky conduct.

§ . Agreements to Engage in Conduct that is Negligent or Reckless

(a) Actors are subject to liability for harm resulting from concerted action if:

(1) they agree to engage in conduct that is negligent or reckless;

(2) each actor engages in the conduct to which they agreed;

(3) at least one of the actors' agreed-to conduct factually causes cognizable physical, emotional, [or dignitary harm] to another; and

(4) the harm is within the scope of liability of the agreed-to negligent or reckless conduct.

(b) Liability of multiple actors under this Section is joint and several, in the absence of a statute modifying the rule. If a statute modifies the rule of joint and several liability for claims under this Section, apportionment of liability among those found liable is in accordance with the statute.

FIREFIGHTER'S RULE

Firefighter's Rule

An actor who innocently or negligently creates a peril that occasions the presence of a professional rescuer owes no duty to that professional rescuer when the rescuer is injured by the very same peril that occasioned the rescuer's presence, and the rescuer is injured while (1) on duty, (2) acting within the scope of employment, and (3) engaged in the performance of emergency activities.

LIABILITY FOR ECONOMIC HARM

CHAPTER 3
INTERFERENCE WITH ECONOMIC INTERESTS

§ 20 A. Bad-Faith Performance of First-Party Insurance Contract

An insurer is subject to tort liability to its insured when:

(a) the insurer's claims processing of a first-party insurance policy lacks a reasonable basis;

(b) the insurer acted with knowledge of the lack of a reasonable basis or acted in reckless disregard of the lack of a reasonable basis; and

(c) the insurer's deficient performance is a factual cause of harm to the insured and the harm is within the insurer's scope of liability.

MISCELLANEOUS PROVISIONS

CHAPTER __
MISCELLANEOUS TORTS

§ . "Spoliation" Defined

For purposes of this Restatement, "spoliation" refers to the destruction, mutilation, or significant alteration of physical or tangible evidence.

§ . Third-Party Spoliation of Evidence

An actor who intentionally spoliates evidence, as spoliation is defined in § __, is subject to liability for the harm thus caused if:

(a) the actor knew that civil litigation was pending or probable;

(b) the actor, although not a party to the underlying litigation, was duty-bound to preserve evidence for it;

(c) the actor intentionally destroyed, mutilated, or significantly altered the evidence for the purpose of defeating or undercutting a party's ability to vindicate that party's interest in the pending or probable civil action; and

(d) the destruction, mutilation, or significant alteration of evidence prejudiced the party by significantly impairing the party's ability to vindicate the party's interest in the underlying civil action.

§ . First-Party Spoliation of Evidence

An actor who intentionally spoliates evidence, as spoliation is defined in § __, is subject to liability for the harm thus caused if:

(a) the actor knew that civil litigation involving the actor was pending or probable;

(b) the actor was duty-bound to preserve the evidence;

(c) the actor intentionally destroyed, mutilated, or significantly altered the evidence for the purpose of defeating or undercutting an opponent's ability to vindicate the opponent's interest in the pending or probable civil action; and

(d) the destruction, mutilation, or significant alteration of evidence prejudiced the opponent by significantly impairing the opponent's ability to vindicate the opponent's interest in the underlying civil action.

DEFENSES APPLICABLE TO ALL TORT CLAIMS

§ . Equitable Estoppel as a Defense to Tort Liability

(a) If a person makes a definite misrepresentation of fact to an actor expecting, or with reason to expect, that the actor will rely upon it, and the actor, relying upon the misrepresentation, engages in conduct that is tortious but that would not be tortious if the facts were as they were represented to be, the person is not entitled to:

(1) assert a claim in tort against the actor for the tortious conduct, or

(2) regain property or its value that the actor thus acquired.

(b) A person is not entitled to assert a claim in tort against an actor if a person realizes that an actor, because of the actor's mistaken belief of fact, is about to engage in conduct that is tortious but that would not be tortious if the facts were as the actor believes them to be, and the person (1) could easily inform the actor of the actor's mistake but (2) fails to do so.

HARM BEFORE AND REGARDING BIRTH

§ . Prenatal Injury

(a) If an actor tortiously causes harm to a fetus, and the fetus is later born alive, the actor is subject to liability to the child for the harm thus caused.

(b) If an actor tortiously causes harm to a fetus, and the fetus is not born alive, the existence and extent of liability depend upon the applicable wrongful-death statute.

WRONGFUL PREGNANCY, BIRTH, AND LIFE

§ . Wrongful Pregnancy

An actor who tortiously causes a woman to suffer an unwanted pregnancy or the unwanted continuation of a pregnancy and the subsequent birth of a child is subject to liability for the unwanted pregnancy and the subsequent birth of an unplanned child.

§ . Wrongful Birth

(a) An actor is subject to liability to the parents for the wrongful birth of a child born with a disability when the actor's tortious conduct denies parents the opportunity to decide whether:

(1) to conceive a child who may be born with a disability, if, had they known of the risk of such a birth, the parents would have chosen not to conceive the child; or

(2) to terminate the pregnancy of a fetus who may be born with a disability, if, had they known of the risk of such a birth, the parents would have chosen to terminate the pregnancy.

(b) When local law does not permit the parents to recover damages for the extraordinary costs of care for their child for the period after the child reaches majority, the actor is subject to liability to the child for any such costs.

§ . Wrongful Life

A child born with a disability who would not have been born but for an actor's tortious conduct has not suffered a legally cognizable harm and therefore has no tort claim against the actor for being born with the disability.

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

§ . Liability for the Provision of Alcohol

(a) If a statute governs liability for injury caused by the provision of alcohol, an actor's liability for furnishing alcohol to another is governed by that statute.

(b) In the absence of a governing statute, a commercial establishment:

(1) is subject to liability for negligently providing alcohol to underage patrons when the underage patrons' intoxication factually causes subsequent injury; and

(2) is subject to liability for negligently providing alcohol to visibly intoxicated patrons (whether or not of legal drinking age) when the patrons' intoxication factually causes subsequent injury.

(c) In the absence of a governing statute, a social host:

(1) is subject to liability for recklessly providing alcohol to underage guests when the underage guests' intoxication factually causes subsequent injury; and

(2) is not liable for providing alcohol to guests of legal drinking age, even if the guests are served past the point of intoxication and even if the guests' intoxication factually causes subsequent injury.

NEGLIGENCE LIABILITY OF PRODUCT SUPPLIERS

§ . Negligence Liability of Product Suppliers

A product supplier breaches its duty of reasonable care if the supplier:

(a) fails to provide information:

(1) about a dangerous condition of a product; or

(2) necessary to enable safe use of a product it distributes when the lack of such information makes the product unreasonably unsafe; or

(b) distributes a product whose dangers make it unreasonably unsafe even when appropriate information about those dangers is provided.

If a product supplier breaches its duty of care, it is subject to liability if, additionally, the supplier's breach is a factual cause of bodily injury, property damage, or legally cognizable emotional harm that is within the supplier's scope of liability.

§ . Negligence Liability of Independent Contractors that Manufacture, Rebuild, Repair, Maintain, Assemble, or Install Products

(a) An independent contractor that negligently manufactures, rebuilds, repairs, maintains, assembles, or installs a product is subject to liability for bodily injury, property damage, or legally cognizable emotional harm factually caused by the contractor's negligence and within the contractor's scope of liability.

(b) An independent contractor that manufactures, rebuilds, repairs, maintains, assembles, or installs a product for another and returns the product to the other is liable for bodily injury, property damage, or legally cognizable emotional harm factually caused by the contractor's negligence in failing to identify and disclose an unreasonably dangerous condition when the harm sustained is within the contractor's scope of liability.

APPENDIX B

BLACK LETTER OF SECTIONS APPROVED BY MEMBERSHIP

Note: The text shown below is for reference only. It may not yet have been revised to reflect discussion at the applicable meeting.

APPORTIONMENT OF LIABILITY

Topic 6: Tort Claims for Economic Harm

§ 27. Apportionment of Liability for Tort Claims for Economic Harm—General Principle (T.D. No. 1) (approved 2022)

The rules stated in the Restatement Third, Torts: Apportionment of Liability, apply to tort claims for economic harm.

§ 28. Apportionment of Liability Issues and Outline of This Topic (T.D. No. 1) (approved 2022)

(a) Apportionment of liability in a tort case involves one or more of four principal issues:

(1) situations in which harm can be divided by factual causation, so that the factfinder first divides the harm into its indivisible component parts based on factual causation and then separately apportions liability for each such part (addressed in § 29 below);

(2) application of comparative responsibility between a plaintiff and a defendant (§§ 30 and 31 below);

(3) application of comparative responsibility between a defendant and another tortfeasor (§§ 32 and 33); and

(4) reallocation of damages from one defendant to another, by way of either indemnity (§ 35) or contribution (§ 36).

(b) Other apportionment of liability issues include:

(1) settlement (§§ 34 and 36(b)); and

(2) situations involving multiple theories of recovery for the same indivisible harm (§ 37).

§ 29. Apportionment of Liability When Harm Can be Divided by Factual Causation (T.D. No. 1) (approved 2022)

(a) When harm can be divided by factual causation, the factfinder first divides the harm into its component parts and separately determines which parties are responsible for each component part and then apportions liability for each such part under Topics 1 through 4 of the Restatement Third, Torts: Apportionment of Liability.

(b) Harm can be divided by factual causation into component parts when the evidence provides a reasonable basis for the factfinder to determine:

(1) that a portion of the harm for which the plaintiff seeks recovery was factually caused by the tortious conduct of a defendant, multiple defendants, or another relevant person or persons to whom the factfinder assigns a percentage of comparative responsibility; and

(2) what portion of the harm was separately caused by the conduct described in (1) above.

Otherwise, the harm cannot be divided by factual causation. Liability for such indivisible harm is apportioned among the parties under Topics 1 through 4 of the Restatement Third, Torts: Apportionment of Liability.

(c) Regardless of whether the harm the plaintiff has suffered is divisible or indivisible, any party's liability depends on the factfinder's determination that the party's conduct is sufficient for liability to be imposed on that party for an indivisible or divisible component of harm.

§ 30. Comparing Responsibility of Plaintiff and Intentional Tortfeasor Defendant (T.D. No. 1) (approved 2022)

A plaintiff's negligent or reckless conduct may not be the basis for apportioning comparative responsibility to the plaintiff in a claim against a tortfeasor who intended to cause harm on which the tortfeasor's liability is based.

§ 31. Comparing Responsibility of Plaintiff and Non-Intentional Tortfeasor Defendant (T.D. No. 1) (approved 2022)

A plaintiff's negligent conduct that is a cause of harm to that plaintiff and is within that plaintiff's scope of responsibility reduces that plaintiff's recovery against a non-

intentional tortfeasor defendant in proportion to the share of comparative responsibility the factfinder assigns to that plaintiff for that harm.

§ 32. Joint and Several Liability of Intentional Tortfeasors (T.D. No. 1) (approved 2022)

Each defendant who intended to cause harm on which that defendant's liability is based is jointly and severally liable to the plaintiff for any indivisible injury that the defendant's tortious conduct factually caused.

§ 33. Comparative Responsibility Share of Non-Intentional Tortfeasor Defendant (T.D. No. 1) (approved 2022)

(a) Except as provided in Subsections (b) through (d) below, a defendant found to be a non-intentional tortfeasor is assigned a share of comparative responsibility determined as set forth in Restatement Third, Torts: Apportionment of Liability § 8. The effect of that assignment on the share of damages payable by the defendant is determined pursuant to the applicable Track A through E, as described in Topic 2 of the Restatement Third, Torts: Apportionment of Liability.

(b) A defendant who is liable to a plaintiff based on a failure to protect the plaintiff from the specific risk of an intentional tort committed by another person is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the defendant for failure to protect.

(c) A defendant whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.

(d) When two or more defendants are liable because they acted in concert, all of those defendants are jointly and severally liable for the share of comparative responsibility assigned to each defendant engaged in that concerted activity.

§ 34. Effect of Settlement on Apportionment of Liability (T.D. No. 1) (approved 2022)

(a) When two or more persons are or may be liable for the same harm and one such person discharges only that person's liability to the plaintiff by settlement and the nonsettling

person is found liable to the plaintiff, the nonsettling person is entitled to a credit against any judgment awarding damages to plaintiff in the amount of the settling person's share of comparative responsibility.

(b) In such a case, neither the settling person nor the nonsettling person may make a contribution claim against the other.

§ 35. Indemnity (T.D. No. 1) (approved 2022)

(a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses incurred in connection with plaintiff's claim, if:

(1) the indemnitor has agreed by contract to indemnify the indemnitee; or

(2) the indemnitee was not liable except vicariously for the tort of the indemnitor.

(b) A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.

§ 36. Contribution (T.D. No. 1) (approved 2022)

(a) Except as provided in Subsections (b) and (c) below, a person who has paid more than that person's share of comparative responsibility for plaintiff's damages, and has thereby discharged in whole or in part the liability of another person to plaintiff for the same harm, is entitled to contribution from the other for the amount paid to plaintiff in excess of the payor's share of comparative responsibility, to the extent that the other has not paid its share of comparative responsibility and is no longer subject to liability to the plaintiff.

(b) When two or more persons are or may be liable for the same harm and one of them discharges only that person's liability to the plaintiff by settlement, neither the settling person nor the nonsettling person may make a contribution claim against the other.

(c) A person who has a right of indemnity against another person under § 35 does not have a right of contribution against that person and is not subject to liability for contribution to that person.

§ 37. Apportionment of Liability When a Plaintiff Prevails on More Than One Legal Theory (T.D. No. 1) (approved 2022)

When a plaintiff asserts multiple legal theories of recovery against the same defendant for the same indivisible injury, and when the plaintiff prevails on two or more such theories, the defendant's liability for the plaintiff's injury is calculated separately for each such legal theory pursuant to the rules of the Restatement Third, Torts: Apportionment of Liability. Judgment then is entered for the plaintiff against the defendant for the highest amount to which the plaintiff is entitled under any such legal theory.

APPORTIONMENT OF LIABILITY

Topic 1: Basic Rules of Comparative Responsibility

§ 4 A. Wrongful Acts Doctrine (T.D. No. 1) (approved 2022)

A person injured by an actor's tortious conduct is not barred from recovery merely because the person was engaged in an illegal, tortious, or otherwise wrongful act at the time of suffering harm. A person's illegal, tortious, or otherwise wrongful act affects that person's recovery only when the conditions set forth in § 4 B are satisfied.

§ 4 B. Criminal Conduct and Other Statutory Wrongs as Plaintiff Negligence Per Se (T.D. No. 1) (approved 2022)

(a) An injured victim is negligent if, without excuse, the victim violates a criminal statute or other regulatory safety provision designed to protect against the type of accident caused by the victim's conduct and if he or she is within the class of persons the statute is designed to protect.

(b) If the negligence in Subsection (a) is a factual cause of the victim's harm, the effect of that negligence on his or her recovery is provided in Restatement Third of Torts: Apportionment of Liability § 7. Otherwise, the victim's negligence has no effect on his or her recovery.

(c) If an injured victim acts wrongfully but does not violate a criminal or other regulatory safety provision, and if the wrongful act is a factual cause of his or her harm, and if the harm suffered by the victim is within his or her scope of responsibility (scope of liability), the effect of that conduct on the victim's recovery is provided in Restatement Third

of Torts: Apportionment of Liability § 7. Otherwise, the victim's wrongful conduct has no effect on his or her recovery.

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

Chapter 11: Liability of Medical Professionals and Institutions*

§ 1. Patient and Provider Defined (T.D. No. 1) (approved 2022)

In this Chapter:

(a) "Medical provider" means a professional who offers and provides medical care. For issues addressing communication, holding out, representation, or the like, "medical provider" includes an entity or individual who, in the circumstances, is appropriately regarded as acting on behalf of the provider.

(b) "Patient" means a person receiving medical care. For issues addressing awareness, information, understanding, agreement, consent, or the like, "patient" includes a representative legally authorized in the particular circumstances to stand in for the patient.

§ 2. Patient-Care Relationship (T.D. No. 1) (approved 2022)

(a) A patient-care relationship arises when a medical provider manifests an intent to care for a patient and:

(1) the provider initiates care without the patient's objection;

(2) the patient reasonably believes that the provider has undertaken to provide care; or

(3) the patient reasonably relies on the provider to provide care.

(b) The scope of a patient-care relationship is determined by a patient's reasonable understanding of its scope, based on common understandings and on what the provider undertakes or holds out as offering.

(c) A patient-care relationship ceases when:

(1) the patient indicates he or she wants the provider to cease care, and the provider complies;

* In 2023, Medical Malpractice was approved as a stand-alone project. All of the Medical Malpractice material is now contained in that project.

(2) the medical conditions that the provider undertook to treat no longer require care, and the patient does not have a reasonable basis to believe that the provider has continued the relationship;

(3) the provider gives clear notice to the patient of the provider's intent to terminate the relationship; or

(4) the provider becomes legally, physically, or mentally incapable of providing care and, if able, gives the patient timely notice of that incapacity.

§ 3. Duties to Patients and Others (T.D. No. 1) (approved 2022)

(a) A medical provider's duties to a patient within the scope of any patient-care relationship include:

(1) to exercise reasonable care, as described in § 4;

(2) to comply with the requirements of informed consent provided in § 9;

(3) to use reasonable care in protecting confidential patient information from release without justification; and

(4) to not terminate the relationship in a manner that fails to give the patient a reasonable opportunity to obtain an alternative source of care without significantly compromising the patient's health.

(b) In addition to duties arising from a patient-care relationship, medical providers are also subject to general tort-law duties, both to patients and to others, specified in other portions of the Restatement Third of Torts, when applicable.

(c) Medical providers who breach a duty identified in Subsection (a) or (b) are subject to liability for physical harm caused by the breach.

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

Chapter 8A: Interference with Family Relationships

§ 48 D. Alienation of Spousal Affections Abolished (T.D. No. 1) (approved 2022)

An actor who alienates one spouse's affections from the other spouse is not subject to liability for the harm caused to the other spouse due to the deterioration or destruction of the marital relationship.

§ 48 E. Criminal Conversation Abolished (T.D. No. 1) (approved 2022)

An actor who has sexual intercourse with one spouse is not subject to liability to the other spouse for any harm caused to the other spouse due to the impairment or destruction of the marital relationship.

IMMUNITIES

Chapter 1: Intra-Family Immunities

§ 1. Spousal Immunity (T.D. No. 1) (approved 2022)

A spouse is not immune from tort liability to the other spouse because of the marital relationship.

§ 2. Parental Immunity (T.D. No. 1) (approved 2022)

A parent is not immune from tort liability to his or her child.

§ 3. Child Immunity (T.D. No. 1) (approved 2022)

A child is not immune from tort liability.

§ 4. No Immunity for Other Familial Relationships (T.D. No. 1) (approved 2022)

As with spouses, parents, and children, other family members are not immune from tort liability to another family member.

Chapter 2: Miscellaneous Immunities

§ 5. Charitable Immunity (T.D. No. 1) (approved 2022)

Subject to contrary statutory provisions, an actor engaged in charitable, educational, religious, or other benevolent activity is not immune from tort liability.

§ 6. Immunity of a Minor (T.D. No. 1) (approved 2022)

(a) A minor is not immune from tort liability.

(b) The effect of a minor's age and incapacity on whether the minor has committed a tort is addressed in Restatement Third of Torts: Liability for Physical and Emotional Harm § 10 (negligence) and Restatement Third of Torts: Intentional Torts to Persons § 2, Comment *a* (intent to commit a battery).

§ 7. Immunity of an Actor with a Mental or Emotional Disability (T.D. No. 1) (approved 2022)

(a) An adult actor with a mental or emotional disability is not immune from tort liability.

(b) The effect of an actor's mental or emotional disability on whether the actor has committed a tort is addressed in Restatement Third of Torts: Liability for Physical and Emotional Harm § 11(c) (negligence) and Restatement Third of Torts: Intentional Torts to Persons § 2, Comment *a* (intent to commit a battery).

Chapter 3: Governmental Entities and Public Officials and Employees Immunities

§ 9. State Immunity (T.D. No. 1) (approved 2022)

(a) Unless a state consents to suit or otherwise abrogates its immunity, it is immune from tort liability.

(b) Even when a state generally consents to tort liability, it remains immune from tort liability for acts and omissions that:

(1) are specifically immunized by statute,

(2) constitute the exercise of a judicial or legislative function, or

(3) constitute the exercise of an administrative function involving the discretionary determination of important governmental policy.

§ 10. Local Governmental Entity Immunity (T.D. No. 1) (approved 2022)

(a) Except as stated in Subsection (b), a local governmental entity is not immune from tort liability.

(b) A local governmental entity is immune from tort liability for acts or omissions that:

(1) are specifically immunized by statute,

(2) constitute the exercise of a legislative or judicial function, or

(3) constitute the exercise of an administrative function involving the discretionary determination of important governmental policy.

PARENTAL STANDARD OF CARE

§ 10A. Parental Standard of Care (T.D. No. 1) (approved 2022)

(a) When conduct of a parent does not involve an unemancipated minor child's discipline, supervision, or care, the parent is subject to tort liability when the parent fails to exercise reasonable care under all of the circumstances.

(b) When conduct of a parent involves an unemancipated minor child's discipline, supervision, or care, the parent is subject to tort liability to his or her unemancipated child only when the parent acts recklessly.

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

Chapter 8: Liability for Emotional Harm

§ 48 A. Loss of Spousal Consortium (T.D. No. 1) (approved 2022)

The spouse of a person who suffers physical or emotional harm, factually caused by an actor's tortious conduct and within the actor's scope of liability, may recover for the loss of society resulting from the other spouse's harm. Loss of society includes loss of affection, comfort, companionship, love, and support, impairment of conjugal relations, and loss of services.

§ 48 B. Loss of Child Consortium (T.D. No. 1) (approved 2022)

The parent of an unemancipated minor child who suffers physical or emotional harm factually caused by an actor's tortious conduct and within the actor's scope of liability may recover for the loss of society resulting from the child's injury. Loss of society includes loss of affection, comfort, companionship, love, and support, and loss of services.

§ 48 C. Loss of Parental Consortium (T.D. No. 1) (approved 2022)

A minor child of a parent who suffers physical or emotional harm, factually caused by the tortious conduct of an actor and within the actor's scope of liability, may recover for the loss of society resulting from the parent's injury. Loss of society includes loss of affection, comfort, companionship, love, and support, and the loss of services.

SEPULCHER (INTERFERENCE WITH HUMAN REMAINS)

§ 48 D. The Right of Sepulcher (Disposition of Human Remains) Defined (T.D. No. 2) (approved 2023)

The "right of sepulcher" is the right of a person or group of persons:

(1) to control the remains of a deceased individual; and

(2) to determine the place and manner of the disposition of such remains.

§ 48 E. Interference with the Right of Sepulcher (T.D. No. 2) (approved 2023)

An actor who, without privilege, intentionally, recklessly, or negligently interferes with the right of sepulcher, as defined by § 48 D, is subject to liability to the holder(s) of such right.

§ 48 F. Infliction of Emotional Harm by Mistreatment of Human Remains (T.D. No. 2) (approved 2023)

An actor who, without privilege, intentionally, recklessly, or negligently mistreats human remains is subject to liability for emotional harm suffered as a result of such mistreatment by:

(1) the person or persons who hold the right of sepulcher, as defined by § 48 D, and

(2) close family members of the decedent.