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## High Prices in the U.S. for Life-Saving Drugs: Collective Bargaining Through Tort Law?

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# **HIGH PRICES IN THE U.S. FOR LIFE-SAVING DRUGS: COLLECTIVE BARGAINING THROUGH TORT LAW?**

**Paul J. Zwier\***

Sudden exorbitant price hikes to patients who have long taken life-saving drugs are more and more common in today's pharmaceutical market. The anxiety caused to patients who have been prescribed these drugs by their doctors is predictable and severe. Even when initially covered by insurance or through government programs, patients and their families can soon be made destitute by the high copays or caps on payments. This Essay argues that those who buy up life-saving drugs and decide to raise their prices, despite their knowledge of the consequences to patients, are committing the torts of intentional infliction of emotional distress and negligent infliction of emotional distress.

Despite challenges presented by class certification law, these patients should be allowed to qualify as a class for purposes of pursuing a price reduction in these drugs. Through class action collective bargaining, courts can avoid the pitfalls of waiting for piecemeal legislation for consumers of individual drugs and still receive the advantages of free market principled pricing through collective bargaining. And, in combination with legislation, patterned on statutes designed to address bad faith insurance practices, the courts can most effectively moderate high pricing and curtail pricing practices that may otherwise soon bankrupt our healthcare system.

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\* Paul J. Zwier is a Professor of Law, Emory University School of Law. Many thanks to my Emory colleagues, David Partlett and Lisa Vertinsky, and the members of the Remedies Conference, held December 4, 2015, for their excellent edits and suggestions on an earlier version of this article.

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## I. INTRODUCTION

The acts of Valeant Pharmaceuticals (Valeant) buying up the rights to Cuprimine (a drug used to treat Wilson's disease), and raising its price,<sup>1</sup> and of Turing Pharmaceuticals' (Turing) buying up the rights to Daraprim (an AIDS and Cancer drug),<sup>2</sup> and increasing its cost to more than twenty-five times its original price, without regard for the emotional distress caused to the patients that take these drugs, are common law torts.<sup>3</sup>

Public reaction seems to be one of outrage, felt by patients<sup>4</sup> and prescribing physicians,<sup>5</sup> and even reaching into current political debates.<sup>6</sup> As of the time of the date of this Essay, there are two different, Senate-led efforts on the subject of high-priced

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1. See Andrew Pollack & Sabrina Tavernise, *A Drug Company's Price Tactics Pinch Insurers and Consumers*, N.Y. TIMES, Oct. 5, 2015, at A1. See also Robert Pear, *Health Spending in the U.S. Topped \$3 Trillion Last Year*, N.Y. TIMES (Dec. 2, 2015), [http://www.nytimes.com/2015/12/03/us/politics/health-spending-in-us-topped-3-trillion-last-year.html?\\_r=0](http://www.nytimes.com/2015/12/03/us/politics/health-spending-in-us-topped-3-trillion-last-year.html?_r=0) ("Retail spending on prescription drugs increased sharply last year, rising 12.2 percent to \$297.7 billion.").

2. Linda A. Johnson, *Exorbitant drug price hikes are becoming more common*, ASSOCIATED PRESS (Sept. 27, 2015), available at [http://www.denverpost.com/business/ci\\_28879430/exorbitant-drug-price-hikes-are-becoming-more-common](http://www.denverpost.com/business/ci_28879430/exorbitant-drug-price-hikes-are-becoming-more-common); Rafi Mohammed, *It's Time to Rein in Exorbitant Pharmaceutical Prices*, HARV. BUS. REV., Sept. 15, 2015, <https://hbr.org/2015/09/its-time-to-rein-in-exorbitant-pharmaceutical-prices>. See generally John Russell, *Turing won't cut list price of lifesaving drug Daraprim sold at Walgreens*, CHICAGO TRIB. (Nov. 25, 2015), <http://www.chicagotribune.com/business/ct-daraprim-price-walgreens-1126-biz-20151125-story.html>.

3. To make matters worse, the EpiPen has recently been price-hiked. Gretchen Morgenson, *EpiPen Price Rises Could Mean More Riches for Mylan Executives*, N.Y. TIMES (Sept. 1, 2016), [http://www.nytimes.com/2016/09/04/business/at-mylan-lets-pretend-is-more-than-a-game.html?\\_r=1](http://www.nytimes.com/2016/09/04/business/at-mylan-lets-pretend-is-more-than-a-game.html?_r=1).

4. Andrew Pollack & Sabrina Tavernise, *Valeant's Drug Price Strategy Enriches It, but Infuriates Patients and Lawmakers*, N.Y. TIMES (Oct. 4, 2015), [http://www.nytimes.com/2015/10/05/business/valeants-drug-price-strategy-enriches-it-but-infuriates-patients-and-lawmakers.html?\\_r=0](http://www.nytimes.com/2015/10/05/business/valeants-drug-price-strategy-enriches-it-but-infuriates-patients-and-lawmakers.html?_r=0).

5. Andrew Pollack, *Drug Goes From \$13.50 a Tablet to \$750, Overnight*, N.Y. TIMES (Sept. 20, 2015), <http://www.nytimes.com/2015/09/21/business/a-he-overnight-increase-in-drug-price-raises-protests.html>; Andrew Pollack, *Big Price Increase for Tuberculosis Drug Is Rescinded*, N.Y. TIMES (Sept. 21, 2015), <http://www.nytimes.com/2015/09/22/business/big-price-increase-for-tb-drug-is-rescinded.html>. But see Andrew Pollack, *Martin Shkreli's Arrest Gives Drug Makers Cover*, N.Y. TIMES (Dec. 17, 2015), <http://www.nytimes.com/2015/12/18/business/martin-shkreli-arrest-gives-drug-makers-cover.html>.

6. Meg Tirrell & Dan Mangan, *Clinton calls drug price hike 'outrageous,' vows plan*, CNBC (Sept. 21, 2015), <http://www.cnn.com/2015/09/21/clinton-calls-drug-price-hike-outrageous-vows-plan.html>.

drugs.<sup>7</sup> Although the pricing of U.S. drugs is many times higher than that of any of its neighbors,<sup>8</sup> and even though the U.S. consumer appears accustomed to high prices, the issue is whether there are any limits to what drug companies can charge for life-saving drugs. Perhaps it is time for U.S. law to make clear that when a company sells life-saving drugs,<sup>9</sup> it owes more to its patient-consumers than to price it according to free market principles. The nature of the market—lack of choices and exigent need—should dictate a higher degree of care by the manufacturer in its pricing of its product.

Valeant purchased the rights to Cuprimine, and quadrupled its price overnight.<sup>10</sup> The Mayo Clinic defines Wilson’s disease as a “rare, inherited disorder that causes too much copper to accumulate in your liver, brain and other vital organs.”<sup>11</sup> Symptoms of the disease typically present between ages twelve and twenty-three.<sup>12</sup> When diagnosed early, Wilson’s disease is treatable, and many people with the disorder live long and normal lives.<sup>13</sup> Cuprimine is the vital drug of choice that, while not a cure for the disease, makes that long life possible.<sup>14</sup> Without

7. *Senate Hearings Investigate Rising Price of Medications*, NPR (Dec. 9, 2015), <http://www.npr.org/2015/12/09/459026284/senate-hearings-to-investigate-rising-price-of-medications>. See Andrew Pollack, *Senators Condemn Big Price Increases for Drugs*, N.Y. Times (Dec. 9, 2015), [http://www.nytimes.com/2015/12/10/business/senators-condemn-big-price-increases-for-drugs.html?\\_r=0](http://www.nytimes.com/2015/12/10/business/senators-condemn-big-price-increases-for-drugs.html?_r=0).

8. Kai Rugerri & Ellen Nolte, *Pharmaceutical pricing: The use of external reference pricing*, RAND CORP. (2013), [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR200/RR240/RAND\\_RR240.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR240/RAND_RR240.pdf) (comparing pharmaceutical company pricing and profits in European, Canadian, and other regulated markets with U.S. pharmaceutical company profits).

9. Of course, one of the difficulties in designing a cause of action and a remedy is to defining what constitutes a life-saving drug. This Author believes that Cuprimine and Daraprim would qualify, as would most Cancer drugs that either fight tumors, control pain, or significantly improve the life span and quality of life of the patient. Perhaps the Canadian’s classification of drugs could also be used to help reward the breakthrough drug, but not one that is simply marketed by a new owner. See *infra*, note 235 and accompanying text.

10. Pollack & Tavernise, *supra* note 1.

11. *Wilson’s Disease*, MAYO CLINIC (Aug. 28, 2014), <http://www.mayoclinic.org/diseases-conditions/wilsons-disease/basics/definition/con-20043499>.

12. *Id.* (“Copper plays a key role in the development of healthy nerves, bones, collagen, and the skin pigment melanin. Normally, copper is absorbed from your food, and any excess is excreted through bile—a substance produced in your liver. But in people with Wilson’s disease, copper isn’t eliminated properly and instead accumulates, possibly to a life-threatening level.”).

13. *Id.*

14. *Id.*

Cuprimine, the patient will develop severe liver disease, and, eventually, dementia.<sup>15</sup> Physical symptoms include arm tremors, fits, difficulty speaking, slow movements, and difficulty swallowing.<sup>16</sup> Prior to Valeant's takeover, patients paid \$888 for Cuprimine per year in order to live normal lives.<sup>17</sup> Now, those same patients must pay \$26,189 each year.<sup>18</sup> While Medicare will cover up to \$35,000 per year of the cost,<sup>19</sup> patients may now have to pay \$1,800 each month, out-of-pocket.<sup>20</sup> In retrospect, it appears Valeant's price point for Cuprimine was specifically picked to hide under Medicare's yearly cap on costs of a prescription drug to a patient.<sup>21</sup>

In August 2015, Turing, a startup company designed to seek out underpriced drugs,<sup>22</sup> paid \$55 million to purchase the rights to Daraprim.<sup>23</sup> Daraprim is the only approved treatment for toxoplasmosis, a rare parasitic infection that strikes pregnant women, cancer patients, and AIDS patients.<sup>24</sup> Soon after the purchase of Daraprim patents, former hedge fund manager and Turing's CEO, Martin Shkreli, raise Daraprim's price from \$13.50 to \$750 per pill.<sup>25</sup> As a reward for the company's ability to seek out underpriced drugs, Turing's stock initially rose.<sup>26</sup> While to

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15. *Id.*

16. Colin Tidy, *Wilson's Disease*, PATIENT (Nov. 11, 2014), <http://patient.info/health/wilsons-disease-leaflet>.

17. *Id.* See also Andrew Pollack & Sabrina Tavernise, *Valeant's Drug Price Strategy Enriches It, But Infuriates Patients and Lawmakers*, N.Y. TIMES (Oct. 4, 2015), [http://www.nytimes.com/2015/10/05/business/valeants-drug-price-strategy-enriches-it-but-infuriates-patients-and-lawmakers.html?\\_r=1](http://www.nytimes.com/2015/10/05/business/valeants-drug-price-strategy-enriches-it-but-infuriates-patients-and-lawmakers.html?_r=1).

18. Pollack & Tavernise, *supra* note 1.

19. John Russell, *Turing won't cut list price of lifesaving drug Daraprim sold at Walgreens*, CHICAGO TRIBUNE (Nov. 25, 2015), <http://www.chicagotribune.com/business/ct-daraprim-price-walgreens-1126-biz-20151125-story.html>.

20. Pollack & Tavernise, *supra* note 1.

21. *Id.*

22. TURING PHARMACEUTICALS, <http://www.turingpharma.com/about/company/> (last visited Aug. 18, 2016).

23. Press Release, Impax Investors, Impax Announces Sale of Daraprim® to Turing Pharmaceuticals AG (Aug. 10, 2015), *available at* <http://investors.impaxlabs.com/Media-Center/Press-Releases/Press-Release-Details/2015/Impax-Announces-Sale-of-Daraprim-to-Turing-Pharmaceuticals-AG/default.aspx>.

24. Linda A. Johnson, *Fury Over Drug Price Spikes Rising, but Increases Aren't New*, ALTERNATIVE PRESS (Sept. 23, 2015), <http://bigstory.ap.org/article/00e14eb3d4804393b4281f1dd2e0c3d5/fury-over-drug-price-spikes-rising-increases-arent-new>.

25. *Id.*

26. Paul R. La Monica, *Drug stock soars 400% after Martin Shkreli buys it*, CNN

some, free market means that a company has the right to set prices according to whatever the market can bear,<sup>27</sup> a majority the public expressed outrage at the stock price, and demanded that Turing moderate its price.<sup>28</sup> As of the date of this Essay, however, Turing has refused to do so; instead, it has bragged that it was “selling up market” (e.g., to wealthy people who can afford the drug).<sup>29</sup>

One can easily imagine the emotional distress that may be caused to patients when they learn of the increase in prices for their life-saving drugs. For some patients, foregoing treatment is the only viable response to such increases. Other patients will encounter difficulty with respect to finding adequate funding to fill the “donut hole” in the drug coverage.<sup>30</sup> The conduct of companies such as Turing presents the U.S. with a clash between two fundamental values: the market, not the government, sets prices of goods, and the belief borne out through its history that compassion and moral integrity are required on behalf of businesses in order for the market to function.<sup>31</sup> Without some

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MONEY (Nov. 19, 2015), <http://money.cnn.com/2015/11/19/investing/martin-shkreli-turing-kalobios-drug/>.

27. Jonathon D. Rockoff, *Lawmakers Seek Answers on Valeant’s Price Increases*, WSJ (Sept. 28, 2015), <http://www.wsj.com/articles/congressional-democrats-seek-subpoena-of-valeant-over-drug-prices-1443468385> (reporting that company spokesman defended pricing by indicating it was selling mostly to “upscale” market). And, without anything stopping him, Shkreli is continuing to use his strategy to use government funding designed for the poor, in order to make millions for himself. See Andrew Pollack, *Martin Shkreli’s Latest Plan to Sharply Raise Drug Price Prompts Outcry*, N.Y. Times (Dec. 11, 2015), <http://www.nytimes.com/2015/12/12/business/martin-shkreli-latest-plan-to-sharply-raise-drug-price-prompts-outcry.html>.

28. *See id.*

29. *See* Russell, *supra* note 19.

30. Others will hardly notice the increase because it may be covered by Medicare or by private insurance policies, or because the deductible has been paid for by the patients. In these cases, any outrage expressed is by the community, rather than by the individual. As we will see, absent such individual “severe emotional distress,” the tort law will have difficult deterring the behavior as a tort.

31. Kenneth Abraham, *Liability for Bad Faith and the Principle Without a Name (Yet)*, 19 CONN. INS. L. J. 1, 12 (2013). In his article, Professor Abraham outlines the following conflicting values associated with the development of an obligation to moderate insurance behavior in dealing with insureds:

Hidden Beliefs in the Covenant of Good Faith and Fair Dealing:

1. Market power can be used unfairly;
2. Power corrupts;
3. Unchecked and unrestrained self-interest leads to justifications of harm;
4. Market depends on virtuous actors to moderate power and greed;

form of creative thinking by common law judges, or legislation that makes such exorbitant pricing illegal—and that provides a civil enforcement remedy—no legal regime can act to deter exorbitant drug pricing of life-saving drugs.<sup>32</sup> Unless, that is, courts recognize there is one already hidden in the law of torts (particularly in torts concerning intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED)), no present legal entity has acted to deter such actions.

Takeovers designed to take advantage of “underpriced” drugs presents an excellent case study for how the U.S. might develop policies for dealing with excesses in the marketplace. Is it best to “sue the bastard,” and use the courts to investigate these matters on a case-by-case basis (or is it better to investigate a claim as a class action)? Would it be best for Congress to investigate the situation, and then promulgate regulations designed to remedy the matter? Or, is some combination of the two approaches feasible?<sup>33</sup>

This Essay argues that a cause of action for IIED or for NIED should play a significant role in moderating exorbitant pricing of lifesaving drugs. Additionally, for real change to occur in the market, lawyers should use class action rules on behalf of all patients who are prescribed the particular drug. Most importantly, such cases should seek an injunction, to enjoin the price increase for all patients taking the drug, in order to force a collective bargaining by the patients to bring the cost to a reasonable level.<sup>34</sup> The advantage to using tort law, in

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5. Market depends on virtuous actors to moderate power and greed;

6. The example of insurance and “bad faith.”

Professor Abraham concludes:

The character of the principle I discern in insurance law is one of obligation resting on the nature and contemporary importance of insurance, not resting on the consent and trust that are part of governance. Few individuals trust their insurers or consent to anything meaningful in connection with their purchase of insurance. . . . [T]he principle is lurking in our law, and recognition of the principle’s existence will enhance our understanding of what insurance law is, and what insurance does.

*Id.* at 11-12.

32. *See id.*

33. JEB BARNES & THOMAS F. BURKE, HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION (Oxford University Press ed., 2015)

34. In determining the best method of structuring a proposed class action settlement, one of the first areas of inquiry may concern the rule under which the settlement class will be certified. The most common options available consist of

combination with certifying a class for settlement purposes, is that such a combination would provide a forum for collective bargaining between those who take the drug and the drug's manufacturer—a forum that is currently prohibited by private insurance companies under antitrust law<sup>35</sup> and Medicare insurers under healthcare law.<sup>36</sup> Litigation might be the best method to bring about the collective bargaining forces that are needed to ensure fair market pricing for life-saving drugs by providing for direct bargaining between patients and the pharmaceutical companies.

This Essay further employs the work of Jeb Barnes and Thomas Burke to assist in understanding the advantages of using an adversarial litigation approach to the problem of exorbitant

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certification under Sections 23(b) and 23(b)(3) of the Federal Rules of Civil Procedure, or their equivalents under state rules of civil procedure. Rule 23(b)(2) authorizes certification when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” FED. R. CIV. P. 23(b)(2). Certification under this Section is conditioned upon a determination that “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3). For settlement purposes, the primary advantage of Rule 23(b)(2) is the mandatory nature of the class, which precludes class members from opting out of the settlement. However, certification under this Rule is only appropriate if the requested declaratory or injunctive relief predominates. Therefore, most courts will limit monetary damages under such a class to those that are “incidental” to the injunctive relief, such that the damages “flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief,” and are not dependent upon factors unique to each individual claim. *Allison v. Citgo Petroleum Co.*, 151 F.3d 402, 415 (5th Cir. 1998). These limitations on monetary damages often lead settling parties to favor certification of a Rule 23(b)(3) settlement class, notwithstanding the potential for opt-outs.

35. The McCarran-Ferguson Act provides, in relevant part: “[T]he Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.” 15 U.S.C. § 1012(b) (1976). However, [t]o the extent a state regulates such business by state law, the Sherman Act and other federal antitrust laws are not applicable.” *Crawford v. American Title Ins. Co.*, 518 F.2d 217, 218 (5th Cir. 1975).

36. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066. “In 2003, Congress and President Bush enacted the “Medicare Prescription Drug, Improvement, and Modernization Act,” which established a prescription drug program for Medicare. The legislation expressly prohibited Medicare from negotiating drug prices with pharmaceutical companies. Rather, any negotiation that takes place is to be between pharmaceutical companies and the insurance companies that administer the Medicare prescription drug program.” David Hogberg, *Letting Medicare ‘Negotiate’ Drug Prices: Myths vs. Reality*, NAT’L CTR. FOR PUB. POLICY RESEARCH (January 2007), <https://www.nationalcenter.org/NPA550MedicareDrugPrices.html>.

drug prices over legislative or bureaucratic remedies.<sup>37</sup> Their analysis will aid in understanding why, if the courts recognize a tort and certify a class of patients, the courts should fashion a remedy not solely for Medicare patients,<sup>38</sup> but should also use their equitable powers to oversee a lowering of prices for all patients.<sup>39</sup> In addition, the analysis will assist in showing that IIED or NIED may be the first step in providing a final remedy for exorbitant pricing of a drug.<sup>40</sup> Some may argue that courts are notoriously ill-suited for the task of dealing with mass numbers of claims involving patients with different financial, medical, and insurance-related circumstances.<sup>41</sup> However, in such cases, the courts can most quickly and efficiently respond to individual cases and provide remedies to groups of affected patients, while giving legislatures time to sort out a price refereeing system that will best balance market principles with compassion for the patients.

As a corollary to the Barnes and Burke analysis, this Essay will show that, at the federal level, Medicare regulation amendments to prohibit predatory pricing might not be the best approach.<sup>42</sup> While a Medicare approach may assist in guarding against some predatory pricing, it will most likely contribute to

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37. BARNES & BURKE, *supra* note 33, at 6-11.

38. *Id.*

39. *Id.*

40. *Id.* On the other hand, the state legislations seem caught in a race to the bottom when it comes to business regulations. The problem is that high prices for goods in high demand are a key feature of a free market, supported by basic beliefs that such pricing leads to efficient development of breakthrough pharmaceuticals.

41. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (Univ. of Chicago Press ed., 1991). *See also* David Partlett, *Asbestos Wars: In Three Parts*, 71 WASH. & LEE L. REV. 759, 763-64 (2014). On the other hand, there is little evidence of the drawbacks to litigation that these critiques raise. BARNES & BURKE, *supra* note 33, at 17. And, there are significant drawbacks, for patients, to waiting for a legislative remedy for high-priced pharmaceuticals. First, there is the impact of the Presidential campaign, and, second, there is the impact of Citizen's United, and the ability of money to capture the legislature and to delay remedies to patients in the throes of losing life savings, fighting disease, and suffering emotional distress.

42. Medicare Advantage (MA) and Prescription Drug (PD) plans are permitted to participate in the Medicare Program pursuant to Sections 1857 and 1860D-12 of the Social Security Act, and under regulations at 42 C.F.R., Section 422.500. If the Centers for Medicare and Medicaid Services (CMS) denies an application to qualify as a MA or PD plan, or takes adverse action (e.g., termination, non-renewal, intermediate sanction) against an existing MA or PD plan, the applicant or existing plan is entitled to request a hearing before a CMS Hearing Officer. 42 C.F.R. 422.660, 423.650 (2010). Additionally, the CMS Hearing Officer's decision may be reviewed by the CMS Administrator. 42 C.F. R. §§ 423.666, 422.690 (2010).

even higher prices for patients with private insurance plans.<sup>43</sup> Antitrust prohibitions against insurance companies combining to negotiate lower prices are at the center of this problem. In other words, Medicare legislation will not keep separate patient groups from pursuing multiple and divisive strategies that may pit one drug user against another.

Instead, what is necessary—but not yet politically palpable—is legislation similar to that used by Europe and Canada.<sup>44</sup> The U.S. needs a “price referencing system,” either used by the government in a single payer system, or by an agency to address the prices private insurers will pay for drugs. In the agency context, the agency should use a price-referencing model, and reimburse for life-saving drugs only in an amount that is determined either by an “internal” price referencing system or in reference to “external markets” of similar drug pricing for the drugs. However, such solutions are not in our near future, and the next best solution will be one developed through tort law. In fact by educating the drug manufacturers and public of the harm from exorbitantly priced life-saving drugs, can be an essential force to drive the eventual enactment of price referencing legislation for all drugs.<sup>45</sup>

Part II of this Essay examines the evolution of IIED, in order to determine whether the actions of Turing and Valeant fit within the *prima facie* elements of this tort. Next, Part III looks to NIED, and examines whether this tort will provide a method of relief against exorbitant pricing of life-saving drugs.<sup>46</sup> The NIED

43. Hogberg, *supra* note 36.

44. Rugerri & Nolte, *supra* note 8.

45. As such, these cases present good case studies for considering the basic assumptions behind free market principles, as well as the countervailing and virtue-based assumptions submerged in these torts, and the covenants of good faith and fair dealing. Which of these hidden beliefs is stronger, or, which will be the winner in the U.S. pricing of drugs? Perhaps there is a way for common law torts to help rebalance the market equation.

46. What follows, then, will be what may look to some as a rather conventional and outdated recapitulation of the case law that gave birth to the tort of intentional infliction of emotional distress (IIED). Yet, as Robert Sokolowski has said in *The Science of Being as Being in Aristotle, Aquinasm, and Wipple*:

Such rethinking, moreover, is not just a matter of reconfiguring signs and symbols in a hermetically closed system; it is a response to the way things are, but it is a response we make with the help of others, those we recapitulate and those with whom we converse. These other people will help us to see *things* and to understand what they are; we do not just repeat what other people have said and we do not just live in meanings and in opinions.

Robert, Sokolowski, *The Science of Being as Being in Aristotle, Aquinasm, and Wipple*,

analysis also addresses the essential obligation imbedded in the common law that everyone, including those who act in the marketplace, must conduct themselves in a manner that will not cause undue emotional harm. Part II concludes that there are likely to be significant, but not insurmountable, hurdles to the recognition of causes of action in common law torts.

Part IV begins by questioning whether class certification can provide the means for patients to negotiate a lower price for their drugs. The Part next addresses whether tort cases, combined with class action certifications that seek injunctions, will likely bring about a significant moderation of high prices for life-saving drugs. Again, current law presents obstacles for patients seeking remedies for high-priced drugs; but those obstacles are not hopeless. Part IV uses the Barnes and Burke framework to provide support for the use of class action certification and equitable relief as important features of the litigation approach. This framework will also be used to examine whether it would be better to wait for legislation like that developed in other areas of personal injury compensation.<sup>47</sup> Part IV further considers whether legislation that empowers Medicare to negotiate lower prices is likely to lower such prices without creating unintended pricing effects on the drug market as a whole.

Finally, Part V describes and employs a case study designed to provide compensation for victims of outrageous business practices. Using the history of bad faith insurance laws and breach of covenants of good faith and fair dealing, this Part will exhibit the advantages of a state-driven, integrated approach to developing laws designed to remedy market improprieties. Part V concludes that legislation patterned on bad faith insurance legislation could help overcome the common law limitations to tort class actions that might be raised by overly cautious courts.

Limiting exorbitant drug pricing can occur faster, fairer, and more efficiently when courts are involved. Court decisions using long-established doctrines of common law torts better remedy the problem of exorbitant pricing of life-saving drugs. Additionally, such court decisions avoid the problems inherent in waiting for legislation. Finally, where courts utilize their equity powers, life-

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*in* 55 THE SCIENCE OF BEING AS BEING: METAPHYSICAL INVESTIGATIONS 9, 10 (Gregory T. Doolan ed., 2012). This is the spirit with which I wish to explore the common law development of IIED.

47. BARNES & BURKE, *supra* note 33 (describing different approaches taken to Social Security Disability Insurance, Asbestos Injury Compensation, and Vaccine Injury Compensation). Barnes and Burke conclude that there are advantages to using adversarial litigation to shape policy for injury compensation. *Id.*

saving drug pricing can occur without problems that result from bureaucratic solutions. Therefore, while it may ultimately be preferable to implement legislation of a federally moderated price-referencing system, the better and more realistic approach in the U.S. is for courts to take the lead in efforts to combat the harmful effects of corporate greed.

## II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Since the mid-1940s, IIED has served as a limitation on behavior at the extremes of marketplace activity.<sup>48</sup> The key elements of IIED require (1) proof of “extreme and outrageous conduct” (2) that causes “severe emotional distress.”<sup>49</sup>

### *A. EVEN AS IIED EMERGED IT WAS USED TO DISCIPLINE MARKET EXCESSES*

*Nickerson v. Hodges*<sup>50</sup> is one of the first cases to validate a claim of IIED, specifically with respect to behavior directed at an individual with an impairment. In *Nickerson*, Miss Nickerson, who had been a patient in a mental asylum, was told by a fortune teller that Miss Nickerson’s relatives had buried gold on a particular man’s land.<sup>51</sup> After the man welcomed Miss Nickerson onto his property, she began to search for the gold.<sup>52</sup> Shortly thereafter, the man’s daughter and two of her acquaintances filled a container with rocks and dirt and buried it on the premises with the intention that Miss Nickerson would discover this “pot of gold.”<sup>53</sup> They also placed a note in the container, which stated that it should not be opened for three days and to notify all heirs of its existence.<sup>54</sup> Miss Nickerson discovered the container that had been placed into the property, took it to the bank, and notified all heirs as the note instructed.<sup>55</sup> Once all had gathered for the

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48. RESTATEMENT (SECOND) OF TORTS § 46 (1965); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939); Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982).

49. *See id.*

50. 84 So. 37(La. 1920).

51. *Id.* at 37.

52. *Id.*

53. *Id.* at 38.

54. *Id.*

55. *Id.*

opening of the container, it was opened and its contents revealed.<sup>56</sup> Immediately upon discovering that the container did not contain gold, Miss Nickerson flew into a rage and threw herself at one of the pranksters until she could be restrained.<sup>57</sup>

While the *Nickerson* court recognized that the entire incident was a practical joke and that there was no serious, malicious intent, it also recognized that the defendants knew Miss Nickerson had at one time been a patient in a mental institution, and the joke had severely humiliated her.<sup>58</sup> The court ultimately awarded Miss Nickerson's estate damages for the emotional distress that she had experienced.<sup>59</sup>

*Nickerson* provides us with a number of important insights. First, the court found that a valid claim existed, despite the fact that the defendants did not force Miss Nickerson to incur the costs related to the time and expense to dig for the treasure. Further, in addition to the costs incurred by the plaintiff, the court awarded damages for the distress caused by the defendant, even though the extreme nature of distress may have been caused by the existing mental conditions of the plaintiff.<sup>60</sup> The court's decision implicitly embraced a recognition of the common vulnerability of persons with medical conditions.

One subset of IIED claims particularly analogous to the drug pricing examples, are those involving bill collection companies that attempt to induce debtors to pay their debts. For example, in *Public Finance Corp. v. Davis*,<sup>61</sup> the debtor sued for severe emotional distress after a creditor, having been informed that the debtor was in the hospital tending to her very ill daughter, called the debtor at the hospital.<sup>62</sup> In a well-reasoned dissent, Judge Dooley detailed the extensive case law that supported a cause of action for IIED where bill collectors used dunning tactics to coerce payments.<sup>63</sup> Judge Dooley, while admitting that the bill collector had every right in the market to demand payment, declared that its repeated and harassing phone calls and dunning letters threatening the debtor with a prison sentence constituted intentional conduct that warranted the label of "extreme and

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56. *Id.*

57. *Id.* at 39.

58. *Id.*

59. *Id.*

60. *Id.*

61. 360 N.E.2d 765 (Ill. 1976).

62. *Id.* at 768.

63. *Id.* at 770-71 (Dooley, J. dissenting).

outrageous.”<sup>64</sup>

Many early IIED cases involved insurance companies that recklessly denied coverage under their policies.<sup>65</sup> Again, the outrageousness of the conduct is in direct proportion to the common vulnerability created by an insurance company that wrongfully denies coverage in cases of fire, liability, or poor health, and where the plaintiff may be forced to forgo basic needs and services because of the company’s behavior. Therefore, where defendant insurance company tries to avoid paying on a policy, IIED is often paired with a cause of action for a breach of covenant of good faith and fair dealing.<sup>66</sup> For example, in *Fletcher v. Western Nat’l Life Ins. Co.*,<sup>67</sup> the defendants, an insurance company and its claim adjuster, sent “false and threatening letters” and “employ[ed] economic pressure” on the plaintiff in an attempt to force the plaintiff to “surrender” his insurance policy.<sup>68</sup> Although the defendants conceded that the conducted was outrageous, they argued that the plaintiff’s emotional distress did not rise to a sufficient level of severity to establish a valid claim of IIED.<sup>69</sup> The court disagreed, however, holding that the resulting distress incurred by the plaintiff was sufficient to give rise to a claim for IIED against the defendants.<sup>70</sup>

IIED exists even where the parties have entered into a voluntary association with one another. Take for instance, the

64. *Id.* at 773.

65. The story of insurance bad faith claims in California begins with its Supreme Court’s decision in *Comunale v. Traders & General Ins. Co.*, 328 P.2d 198 (1958) (in banc). In *Comunale*, the plaintiffs were injured by the defendant’s insured in an automobile accident. *Comunale v. Traders & General Ins. Co.*, 328 P.2d 198, 200 (1958) (in banc). The insurance policy had limits of liability in the sum of \$10,000 for each person injured and \$20,000 for each accident. *Id.* The insurance company refused to defend the action, arguing that the truck driven by the insured did not belong to him. *Id.* The insured retained counsel to represent him. *Id.* On the second day of trial, the plaintiffs indicated that they would settle the case for \$4,000, and the insured communicated this offer to the defendant, explaining that he did not have enough money to effect the settlement. *Id.* The insurance company refused to settle, and the trial proceeded to judgment in favor of the plaintiffs for a total of \$26,250. *Id.* For an excellent history of the development of the law of bad faith in California, see J. Clark Kelso & Kari C. Kelso, *Jury Verdicts in Insurance Bad Faith Cases*, INSTITUTE FOR LEGISLATIVE PRACTICE (1999).

66. See *Fletcher v. Western Nat’l Life Ins. Co.*, 10 Cal. App. 3d 376, 403 (Cal. Ct. App. 1970).

67. 10 Cal. App. 3d 376 (Cal. Ct. App. 1970).

68. *Id.* at 392.

69. *Id.* at 394.

70. *Id.*

case of *George v. Jordan Marsh Co.*<sup>71</sup> There, a company and its employee were alleged to have badgered and harassed a woman by “dunning tactics” in an attempt to intimidate the plaintiff into paying her son’s debt to the company.<sup>72</sup> The complaint further alleged that such acts caused the plaintiff “great mental anguish and emotional distress as intended by the defendant(s)” and that, as a result thereof, the plaintiff’s health deteriorated and she suffered a heart attack.<sup>73</sup> Further, notwithstanding the woman’s attorney’s request that the “harassing tactics be discontinued,” the company persisted in its harassment, which caused the woman to suffer even greater emotional distress that resulted in a second heart attack.<sup>74</sup> The court held that all such acts by the company prevented the woman from enjoying gainful employment and caused her to incur expenses for medicine, medical attendance, and nursing.<sup>75</sup>

Perhaps most analogous to situations of exorbitant drug pricing is the early IIED case of *Rockhill v. Pollard*.<sup>76</sup> In *Rockhill*, woman and her ten-month-old baby were injured in an automobile accident.<sup>77</sup> The baby appeared lifeless at the scene of the accident and was rushed to a nearby hospital where the woman had to ask a doctor several times to examine the baby.<sup>78</sup> Although the doctor finally agreed to examine the baby, all that he did was perform a simple examination and tell the woman that there was nothing wrong with her child.<sup>79</sup> The woman took her baby to an entirely different hospital where the baby was treated for shock and a head injury.<sup>80</sup> The doctor’s rude remarks, disdain, and disregard for the feelings of the woman and her baby in *Rockhill* were legendary.<sup>81</sup> Important to the discussion in this Essay was the doctor’s seeming indifference to the life-threatening situation confronting the woman and her child. Despite the fact that the

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71. 268 N.E.2d 915 (Mass. 1971).

72. *Id.* at 916 (internal quotation omitted).

73. *Id.* (internal quotation omitted).

74. *Id.*

75. *Id.*

76. 485 P.2d 28 (Or. 1971).

77. *Id.* at 29.

78. *Id.*

79. *Id.* at 29-30.

80. *Id.* at 30.

81. The doctor was impatient, hardly examined the child, and shrugged his shoulders when questioned by the baby’s mother. He also made the woman wait with her baby outside in below-freezing temperatures for someone to pick her up. *See id.* at 29-30.

child fully recovered,<sup>82</sup> the *Rockhill* court found that the emotional distress inflicted upon the woman was severe enough to warrant a new trial.<sup>83</sup> In so holding, the court stated:

[The woman] must show not only that [the doctor's] conduct was outrageous, but also that she in fact suffered emotional distress as a result, and that it was severe. There is not much evidence on this point, but it is direct and the court must take it as true. [The woman], corroborated by her husband, testified that as a result of [the doctor's] behavior she became nervous and had to take tranquilizers, and that her nervousness caused sleeplessness and loss of appetite over a considerable period of time up to the date of the trial. [The doctor] belittles these symptoms, but it is the distress which must be severe, not the physical manifestations. Mental distress would have to be more than mild and transitory in order to cause these symptoms over a two-year period.<sup>84</sup>

Also among the early IIED cases is *DiCicco v. Trinidad Area Health Association*,<sup>85</sup> which involved a hospital administrator who refused to provide emergency services to a patient. The administrator, whose hospital provided the only ambulance in the county, had refused to dispatch the ambulance unless the patient's doctor consented to having the patient sent to the administrator's hospital—not the hospital the doctor had deemed best suited to treat the patient's condition.<sup>86</sup> Due to the administrator's refusal to send an ambulance, the doctor was forced to request an ambulance from a location more than twenty miles away, which resulted in substantial delay in transporting the patient the hospital (where she died within one hour of arrival).<sup>87</sup> The patient's husband thereafter sued the hospital administrator and the operator of the ambulance service for outrageous conduct arising from the patient's death.<sup>88</sup> The court held that the defendants' "refusal of ambulance service to the critically ill [patient] on grounds irrelevant to her need for, or the availability of the service. . . ." could constitute extreme and

82. *Id.* at 31.

83. *Id.* at 33.

84. *Id.* at 32-33 (internal citations omitted).

85. 573 P.2d 559 (Colo. App. 1977).

86. *Id.* at 560-61.

87. *Id.* at 561.

88. *Id.* at 560.

outrageous conduct.<sup>89</sup> Finding the existence of a tort also fit within the overall policies of intentional torts that, to deny recovery creates the risk of a breach of peace and the risk of violence—for without a remedy, plaintiffs will be tempted to take the law into their own hands.<sup>90</sup>

**B. DOES THE CONDUCT OF TURING AND VALEANT MEET THE “EXTREME AND OUTRAGEOUS” STANDARD?**

The parallels between the early IIED cases, discussed *supra*, and the corporate conduct of Turing and Valeant are striking. Prescription drugs, like the ambulance in *DiCicco*, are integral to emergency medical treatment. The emergency nature of the situation in *DiCicco* necessitated a level of care that is reasonably under the circumstance, and the court was outraged that a market actor would take advantage of the patient strictly due to financial reasons. In medical emergencies, a price demand can border on extortion and coercion, and belies the word “free” in free market. *DiCicco* and the other cases provide, therefore, that limits do exist on the extremes of free market behavior and such limits are grounded in community reaction to the behavior—as determined by a jury. It is not sufficient for the plaintiff to show his individual reaction to the defendant’s behavior; the reaction must also be shared by a jury. In examining the arguments made by attorneys to juries, we can rediscover the reasoning behind common law limitations on market excesses.

Perhaps most important—because it is a principle that emerges from the appellate courts affirmance of jury findings—is tort law’s special concern in emergency situations for the parent, child, elderly, and mentally ill.<sup>91</sup> What courts emphasize is that,

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89. *Id.* at 562.

90. RESTATEMENT (THIRD) OF TORTS §§1-3 (AM. LAW. INST. 1998). The defenses to intentional torts reflect the concern that individuals are likely to engage in violence out of necessity, *see Vincent v. Lake Erie*, 124 N.W. 221, 222 (Minn. 1910); or for the protection of life, *see Courvoisier v. Raymond*, 47 P. 284, 285 (Colo. 1896); or for the protection of others, *see id.*; or defense of property, *see Katko v. Briney*, 183 N.W.2d 657, 661 (Iowa 1971).

91. Prosser, *supra* note 48, 878-881. The Restatement (Second) of Torts offers an illustration to explain this type of situation:

A, an eccentric and mentally deficient old maid, has the delusion that a pot of gold is buried in her back yard, and is always digging for it. Knowing this, B buries a pot with other contents in her yard, and when A digs it up causes her to be escorted in triumph to the city hall, where the pot is opened under circumstances of public humiliation to A. A suffers severe emotional disturbance and

while we are not all vulnerable to the ravages of disease, some of us are more resilient than others.<sup>92</sup> As a result of this distinction, courts may be holding that our common vulnerability presents us with the ability to recognize the outrageousness of conduct, and the lack of resilience of particular populations (e.g., the young, the old, the widow). In such cases, the courts describe a “golden” thread. Marketplace behavior must moderate out a concern for the vulnerability of all those in the throes of life-threatening disease and, in particular, for those less resilient individuals who will suffer the consequences of exorbitant pricing.

Second, a trial lawyer might present evidence that many drugs may have been developed, in large part, through government funding.<sup>93</sup> There is something misleading, if not deceitful, about the claim that high prices are necessary to cover the costs of development. While increased prices may be necessary to develop future drugs where government funding is

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resulting illness. B is subject to liability to A for both.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. f, illus. 9. This illustration is taken from the *Nickerson* case. See *supra* notes 48-58, and accompanying text. The facts are somewhat different from the Restatement’s illustration; in *Nickerson* there were multiple defendants and the digging occurred on another’s property. Nevertheless, the *Nickerson* court, many years before the Restatement’s 1948 amendment, found the conduct actionable: The conspirators, no doubt, merely intended what they did as a practical joke, and had no willful intention of injuring the lady. “However, the results were quite serious indeed, and the mental suffering and humiliation must have been quite unbearable, to say nothing of the disappointment and conviction, which she carried to her grave some two years later.” *Nickerson v. Hodges*, 84 So. 37, 39 (La. 1920).

In support of the view that protecting the vulnerable is an important aim of tort law, see John Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 803 (2007); Jane Stapleton, *The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable*, in 44 CENTENARY ESSAYS FOR THE HIGH COURT OF AUSTRALIA 242, 242-255 (Peter Cane ed., 2004); Carl F. Stychin, *The Vulnerable Subject of Negligence Law*, Int’l J. L. Context 337, 345 (2012). See generally Martha Fineman, *The Vulnerable Subject*, 20 YALE J.L. & FEMINISM 1 (2008); STUDIES IN FEMINIST THEORY, VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY (Catriona Mackenzie, Wendy Rogers, & Susan Dodds eds., 2013).

92. I am particularly grateful to my colleague, Martha Fineman, for her helpful suggestions derived from her Vulnerability Theory. See Martha Albertson Fineman, “Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 U. ILL. ELDER L.J. 71, 92 (2012).

93. Bob Young & Michael Surrusco, *RX R&D Myths: The Case Against the Drug Industry’s R&D “Scare Card”*, PUBLIC CITIZEN (July 2001), <http://www.citizen.org/documents/ACFDC.PDF>. Cf. Ezekiel K. Emanuel, *I Am Paying for Your Expensive Medicine*, N.Y. TIMES (Nov. 7, 2015), [http://www.nytimes.com/2015/11/08/opinion/sunday/i-am-paying-for-your-expensive-medicine.html?emc=eta1&\\_r=1](http://www.nytimes.com/2015/11/08/opinion/sunday/i-am-paying-for-your-expensive-medicine.html?emc=eta1&_r=1) (citing the example of PCSK0 inhibitors, which lower the bad type of cholesterol, LDL, priced at \$14,000 per year, developed by publically funded research).

not adequate, it was not necessary to the development of many of the drugs that were at the center of the price explosion.

Next, a trial lawyer could argue that conduct is outrageous when it takes advantage of government funding designed to alleviate the suffering of those in need of life-saving drugs. This “taking advantage” of government funding is “unjust enrichment.”<sup>94</sup> Note that unjust enrichment is the equitable remedy provided against tobacco companies who used state healthcare dollars to free ride in the market with the sale of tobacco.<sup>95</sup> It is nonetheless relevant to a jury determination of the outrageous nature of the defendant’s conduct. Similar to tobacco companies, the pharmaceutical companies externalize the costs of their behavior onto other government programs.<sup>96</sup> They depend on tax-funded programs that lack the necessary market protections in the case of life-saving medications,<sup>97</sup> and price them, not based on costs of development or special insights into their development, but simply by buying up the patients and then hoisting the costs onto the public as a whole.<sup>98</sup> The companies are enriched through their public use of funds, but it is to the detriment of both the patient and the public at large.<sup>99</sup> Moreover, unjust enrichment will not only be important for understanding the outrageousness of the behavior, it will also be particularly important to understanding what remedies the court should approve once a class action lawsuit has been authorized.

Finally, the common vulnerability of every member of the community in life-threatening situations to the exorbitant pricing schemes is what distinguishes the conduct as particularly outrageous. It is not just certain populations, or those who do not

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94. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011) (“A person who is unjustly enriched at the expense of another is subject to liability in restitution.”). See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT Foreword (AM. LAW INST. 2011).

95. *But see* Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 Ga. L. Rev. 847, 848 (1999) (Professor Rendleman has criticized the application of restitution to the tobacco litigation). I am grateful for this insight from Professor Candace Kovacic-Fleischer, who reviewed a copy of this article in connection with the Louisville Remedies Forum. Professor Kovacic-Fleischer’s analysis of unjust enrichment, in connection with Walmart’s use of wage and price strategies to keep their workers on food stamps is simply brilliant.

96. Rockoff, *supra* note 27.

97. *See id.*

98. *Id.*

99. Robert Kneller, *The importance of new companies for drug discovery: origins of a decade of new drugs*, 9 NATURE REVIEWS: DRUG DISCOVERY 867, 873 (Nov. 2010).

take care of themselves, or even a select minority population that is at risk to these high prices. We will all face death, but we potentially have our lives extended and their quality enhanced through access to life-saving drugs. Whether for Cancer,<sup>100</sup> high blood pressure, heart attack, or Wilson's disease, drugs will be vital both to survival and to our quality of life. Our common vulnerability is what helps expose the outrageous nature of the pricing act, which has the potential to rob us all of our life's savings in times where we have little choice but to spend the money. It could happen to any one of us—we are all vulnerable to the practice.<sup>101</sup>

### 1. *Intent Element*

The intent element of IIED is met even without the existence of a specific intent to cause harm to a particular person.<sup>102</sup> Early

100. Andrew Pollock, *Doctors Denounce Cancer Drug Prices of \$100,000 a Year*, N.Y. TIMES (Apr. 25, 2013), [http://www.nytimes.com/2013/04/26/business/cancer-physicians-attack-high-drug-costs.html?\\_r=0](http://www.nytimes.com/2013/04/26/business/cancer-physicians-attack-high-drug-costs.html?_r=0).

101. Let's take a closer look at the concept of vulnerability and then determine if it can help support a cause of action for IIED. Martha Fineman describes the vulnerability thesis and its fundamental assertion as follows:

Often narrowly understood as merely “openness to physical or emotional harm,” vulnerability should be recognized as *the* primal human condition. As embodied beings, we are universally and individually constantly susceptible to harm, whether caused by infancy and lack of capacity, disease and physical decline, or by natural or manufactured disasters. This form of dependency, although episodic, is universally experienced and could be thought of as the physical manifestation or realization of our shared vulnerability as human persons, which is constant throughout the life course. This realized form of human vulnerability has a social or relational component, as well as physical implications, because we are innately dependent on the provision of care by others when we are infants and often when we are ill, aged, or disabled. In this way, human vulnerability should be understood as providing the compelling impetus for the creation of social relationships and institutions, necessitating the formation of families, communities, associations, and even political entities and nation-states. The social roles defined by and through these relationships and institutions are not universally experienced, nor are their functions inevitable or inherent in the human condition. Rather, they are socially constructed and contingent in nature; built and maintained within institutions such as the family, the school, and the workplace.

Martha Albertson Fineman, *Equality and Difference – The Restrained State*, 66 ALA. L. REV. 609, 614 (2015) (internal citations omitted). I would also add “the hospital” to Professor Fineman's list of institutions.

102. Joseph H. King, *The Torts Restatement's Inchoate Definition of Intent for*

common law cases in intentional torts established these principles, including the case of *Vosburg v. Putney*.<sup>103</sup> In *Vosburg*, the intent element was established for a battery claim despite the dual intent nature of the defendant's action, when the defendant kicked the plaintiff to get the plaintiff's attention—not to harm the plaintiff.<sup>104</sup> Additionally, in *Garrett v. Dailey*,<sup>105</sup> intent was again established even though the defendant's action was meant as a joke—moving the plaintiff's chair as the plaintiff was sitting down when the defendant knew “with substantial certainty” that the plaintiff would hit the ground.<sup>106</sup> Intent, therefore, can be defined as general knowledge of *unlawful* contact, apprehension of contact, imprisonment to a bounded area, or trespass to land, despite a secondary lawful intent.<sup>107</sup> Mistake is no defense.<sup>108</sup>

Moreover, the Restatement's definition of IIED loosens the intent requirement:

One who by extreme and outrageous conduct intentionally *or recklessly* causes severer emotional

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*Battery, and Reflections on the Province of Restatements*, 38 PEPP. L. REV. 623, 624 (2011).

103. 50 N.W. 403 (Wis. 1891).

104. *Id.*

105. 304 P.2d 681 (Wash. 1956).

106. *Id.*

107. Joseph H. King, *The Torts Restatement's Inchoate Definition of Intent for Battery, and Reflections on the Province of Restatements*, 38 Pepp. L. Rev. 623, 624 (2011). King writes:

The new *Restatement (Third)* defines intent in its first section, stating that “[a] person acts with the intent to produce a consequence if . . . the person acts with the purpose of producing that consequence; or . . . acts knowing that the consequence is substantially certain to result.” This definition is an umbrella one, providing an all-inclusive definition of what it means to “intend” something. It simply defines the state of mind needed to support a finding that a defendant intended “something” as a “consequence.” But, before a person may be determined to have entertained the necessary intent for a specific tort, we have to also know what “consequence” must have been intended for that tort. The Section 1 definition does not address that aspect of intent—the nature of the “consequence” that must have been intended to support various traditional torts that require intent, such as battery. Rather, for the present, it expressly defers to the *Restatement (Second)* sections that address the substantive details and elements of those torts. The comments state that the “Restatement (Second), Torts, remains largely authoritative in explaining the details of the specific torts encompassed by this Section and in specifying the elements and limits of the various affirmative defenses that might be available.”

*Id.* (internal citations omitted).

108. *Id.*

distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.<sup>109</sup>

The comments to the Restatement elaborate on this point:

The rule stated in this section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain or substantially certain, to result from his conduct. It applies also where he acts recklessly . . . in complete disregard of a high degree of probability that the emotional distress will follow.<sup>110</sup>

In other words, hospitals and pharmaceutical companies should be treated just as those employers who, without sufficient policies to prevent race discrimination and sexual harassment, are found liable for IIED, despite their lack of specific intent to cause a plaintiff emotional distress.<sup>111</sup> Where corporate executives describe market strategies that show intent to take advantage of the patients' need for the drugs in order to coerce exorbitant prices, they have shown the necessary intent and the knowledge, with "substantial certainty," needed to fulfill the intent element.<sup>112</sup>

## 2. *Severe Emotional Distress*

While the "outrage" element of IIED is met in these cases, the "severe emotional distress" element may be more difficult for a plaintiff to establish. Commentators have noted that the more egregious the conduct by the institution, the less it is required to

109. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW. INST. 1965) (emphasis added).

110. *Id.* cmt. i.

111. Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment At Will: The Case Against 'Tortification' of Labor and Employment Law*, 74 B.U. L. REV. 387, 392 (1994). Tort doctrine has difficulty with imposing vicarious liability for intentional torts. Yet there are examples of vicarious liability for employees' bad faith decisions on behalf of insurance companies: sexual harassment and quid pro quo sex by managers, beatings by bouncers, and hazing by sports players, to name a few. The key ingredient in imposing liability is notice to the institution of the employee's behavior—something evidenced by the pharmaceutical company's board in its pricing and profit projection reports.

112. Andrew Pollack, *Martin Shkreli's Arrest Gives Drug Makers Cover*, N.Y. Times (Dec. 18, 2015). Pollack reports a twitter post from Skreli where he admits to knowing that some people may not be able to afford the drug: "If you can afford our drugs with insurance, great. . . . If you can't you can have it for free. Our system works." *Id.* (quoting @MartinShkreli, TWITTER (Dec. 16, 2015, 10:24 AM), <https://twitter.com/MartinShkreli/status/677192472490065920>).

establish physical manifestations of the harm.<sup>113</sup> Even then, subsequent decisions show just how difficult it is for plaintiffs to prove this element. For example, in *Figueiredo-Torres v. Nickel*,<sup>114</sup> the court denied a motion to dismiss but noted that the plaintiff would face significant obstacles in establishing the severity of the emotional distress and whether it had been proximately caused by the defendant's conduct.<sup>115</sup> To further illustrate, in *Figueiredo-Torres*, a marriage counselor told the plaintiff to take some time away from his wife, all while engaging in his own sexual relationship with the wife.<sup>116</sup> The plaintiff's wife subsequently left him, and he sued the marriage counselor, claiming the events had caused him to seek counseling and affected his ability to enter into future intimate relationships.<sup>117</sup> The court held that, to sort out the cause of the plaintiff's distress (whether from the end of his marriage or the behavior of the counselor) would be the plaintiff's burden to prove.<sup>118</sup>

In *Caldor, Inc. v. Bowden*,<sup>119</sup> a young black man was falsely accused of theft by his white employers, and wrongfully detained in a dark room of the business for hours until he agreed to confess to stealing money.<sup>120</sup> Just as with the aforementioned cases, the *Bowden* court found it difficult to accept the young man's proof of "severe emotional distress."<sup>121</sup> Despite the fact that the young man testified to being worried and distraught, as well as ashamed, the court agreed with the lower court's decision that the emotional distress suffered by the young man did not "meet the standards" of the tort of IIED.<sup>122</sup>

Since *Bowden*, there have been few cases in the U.S. finding IIED, alone, as a basis for liability.<sup>123</sup> However, IIED has had potency as a *ride along*, or parasitic, tort in the areas of labor and

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113. DAN B. DOBBS, *THE LAW OF TORTS* 826-27 (WEST GROUP ed., 2000).

114. 584 A.2d 69 (Md. 1991).

115. *Id.* at 77.

116. *Id.* at 71.

117. *Id.*

118. *Id.* at 74.

119. 625 A.2d 959 (Md. 1993).

120. *Id.* at 961.

121. *Id.* at 964.

122. *Id.* (internal quotation omitted).

123. See Erica Goldberg, *Emotional Distress*, 47 CONN. L. REV. 809, 824 (2015) (Describing resistance to "stand alone" emotional distress cases that are not parasitic to other economic losses) [hereinafter *Emotional Duties*].

employment law,<sup>124</sup> defamation,<sup>125</sup> and privacy.<sup>126</sup> IIED works best when it accompanies a legislative cause of action that evidences a public policy to protect against emotional distress. Accordingly, we turn to the question of whether the common law already provides public policy support for preventing purposefully inflicted, if not intentionally inflicted, emotional distress.

### III. EXPLORING NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AS A COMPANION TORT

As noted in Goldberg's seminal article on emotional distress, the conduct involved in cases at the extreme of free market practices can often be analyzed under both negligence and IIED.<sup>127</sup> Some courts may balk at seeing enough of a specific intent to harm individual patients and feel uncomfortable with the intent element being met. In anticipation of such a reaction, this Essay next examines whether a cause of action for NIED provides companion support for recovery by a patient in an exorbitant pricing case.

This Part first summarizes the tort duties to "rescue," or to come to the aid of, another, as well as the limitations on those duties of protection of others from emotional harms. The Part then examines exceptions to those exceptions, located in cases involving direct breaches of duty to specifically identifiable plaintiffs, which, in turn, cause emotional harm. Part A. begins with an overview of tort law affirmative duty. Again, tort law provides a well-grounded basis for courts to conclude that a class of patients has been subjected to a tort: NIED from defendants' pricing practices.

#### A. CURRENT LAW

First, a quick overview of tort law concerning affirmative duty.<sup>128</sup> One paradox in this area of law is that it recognizes

124. Duffy, *supra* note 111, at 392.

125. RESTATEMENT (THIRD) OF TORTS § 47 (AM. LAW INST. 2012).

126. Eugene Volokh, *Evolution of the Duty of Care: Some Thoughts*, 114 COLUM. L. REV. 1, 24 (2014).

127. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 56 (1982).

128. What is immediately apparent is that tort law appears to contain a number of paradoxes regarding the way it views and judges human nature. Its goals are both to provide compensation and encourage risk-taking. It requires only reasonable

individuals as responsible for their own actions and safety.<sup>129</sup> However, affirmative duty also recognizes that much of what happens to people is a product of other causes, whether natural or simply accidental.<sup>130</sup> In situations where a plaintiff could not have taken reasonable precautions, affirmative duty may demand compensation from a defendant, but only where there exists proof that the defendant's actions are the cause of the harm to a plaintiff.<sup>131</sup> And, while affirmative duty provides for the freedom to act (so long as that act does not cause harm),<sup>132</sup> it only requires that a person take action to prevent harm where there exists a special relationship to the one injured,<sup>133</sup> to a person whose acts they have a duty to control,<sup>134</sup> or where there is a direct and immediately foreseeable harm that would result from the failure to act.<sup>135</sup>

In some jurisdictions, affirmative duty provides judges with the responsibility to find affirmative duties in new situations and relationships.<sup>136</sup> For example, some state courts have ruled that food and drug retailers have a duty to inspect their products and to protect their customers from injury.<sup>137</sup> In other cases (in California, in particular), courts have placed the responsibility of imposing affirmative duties with juries.<sup>138</sup> The modern majority rule is that judges are to make duty determinations in individual cases.<sup>139</sup> Professor Leon Green, known to many as the "Dean of Tort Law," points out the confusing state of this element in tort doctrine:

How does the stating of the problem in terms of duties enable a judge to pass judgment? Where shall he [or she] find the source of duties? Do judges find them ready made? Do they assume them? Do they create

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behavior, but demands compensation where the injured is innocent. It sees cause as requiring only *cause in fact* and yet only counts causes it determines to be "legal" or "proximate."

129. Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1024 (1928).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Thomas v. Winchester*, 6 N.Y. 397, 397 (1852).

138. *See supra* notes 65-67.

139. Green, *supra* note 129, at 1024.

them, and if so, do they create them in wholesale, or must each court create a particular duty which fits the particular case before it? So far as I have been able to discover, the common law courts have stumbled through the whole period of their existence without committing themselves on this inquiry. Perhaps it is a subject which is not to be talked about. We are clearly dealing with the very processes by which law is generated. And doubtless the questions as to the paternity of these duties brought forth in case after case is embarrassing enough at best.<sup>140</sup>

Judges often answer the duty question by establishing that, absent a special relationship between the actor and plaintiff, and absent specific foreseeability of injury, there is no duty to act where the defendant has “not acted,” and the case, therefore, is one of nonfeasance.<sup>141</sup> Where the defendant’s actions cause harm, that defendant’s acts are judged according to the “reasonably prudent person” standard.<sup>142</sup>

Justice Holmes is one of the prime defenders of the fault principle in tort law: to be liable in tort, the defendant must be “at fault” or “blameworthy.”<sup>143</sup> Inherent to fault, Homes finds, is that the defendant must have acted.<sup>144</sup> Holmes, as the originator and defender of this nonfeasance misfeasance division of tort law,<sup>145</sup> makes four arguments for the fault principle: (1) the general principle of law is that people are free to act in society and loss from an accident must lay where it falls, and its corollary, that state interference that shifts responsibility absent active fault is an evil when it cannot be shown to be good;<sup>146</sup> (2) the words commonly associated with fault require the person to act, and the term “act” implies choice;<sup>147</sup> (3) the public generally profits from individuals acting;<sup>148</sup> and (4) to impose liability without an act, or fault, would violate a *sense* or *common intuition* of justice.<sup>149</sup>

On the other hand, common intuitions or senses of justice

140. *Id.*

141. *Id.*

142. *Id.*

143. OLIVER W. HOLMES, JR., *THE COMMON LAW AND OTHER WRITINGS* 94-96 (Univ. Press 1881) (emphasis added).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

also argue in favor of imposing liability even where the defendant has not been said to have acted.<sup>150</sup> As many first year torts students learn in their casebooks, we are to put our own intuitions for justice and morality on hold when it comes to imposing liability for nonfeasance.<sup>151</sup>

It turns out that it is more difficult to distinguish acts of misfeasance and acts of nonfeasance in the real world. For example, if a person is involved in a car accident where one car pulls out in front of a driver who has the right of way, the problem for the driver can be framed as the driver's driving too fast for the conditions, driving negligently, the driver's failure to stop in time, or his failure to keep a proper look out, depending on the conditions. If framed the first way, the act is said to be misfeasance, and if framed the second way it is said to be nonfeasance.<sup>152</sup> Is the distinction then arbitrary? Commenting on the distinction between misfeasance and nonfeasance, Justice Cardoza stated:

It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all. The plaintiff would bring its case within the orbit of that principle. The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. A time-honored formula often phrases the distinction as one between misfeasance and non-feasance. Incomplete the formula is, and so at times misleading. Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty thus recognized by law. What we need to know is not so much the conduct to be avoided when the relations and its attendant duty are

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150. Feminists argue for such a duty. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 4 (1988).

151. Commentators are often quoted in trying to defend and socialize the lawyer into accepting the nonfeasance distinction as being the right one, including James Ames, Richard Epstein, and Richard Posner (who is brought in to explore the morality of a duty to rescue rule). See, e.g., Marcia M. Ziegler, Comment, *Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome*, 104 DICK. L. REV. 525, 528 (2000); Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 194 (1973); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQ. L. 145, 150-51 (2003).

152. See Bender, *supra* note 150, at 4.

established as existing. What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance. If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. . . . The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.<sup>153</sup>

Individualism had its limitations in particular acts that the defendant may have taken, and the particular relationships the actor may have been in at the time.<sup>154</sup> In other words, driving a car might, by itself, put a person in a relationship with other drivers on the road, just as in maritime law, where ship captains owed duties to help other ships based on the commonality of their endeavors.<sup>155</sup>

In spite of the push for individualism, the common law has developed significant exceptions to the “no duty” rule. First, an exception exists where an individual stands in an already recognized or special relationship with the plaintiff or victim (e.g., a school teacher and a child in that teacher’s class).<sup>156</sup> The second exception is where an individual stands in a special relationship with a person they have a duty to control (e.g., parent controlling their child from harming another child).<sup>157</sup> The third exception most specifically involves application of the “Good Samaritan” ideal.<sup>158</sup> This ideal implicates the creation of a duty where a person has special knowledge of the potential for harm to a

153. *H.R. Moch Co., Inc., v. Rensselaer Water Co.*, 159 N.E. 896, 898 (N.Y. App. 1928) (internal quotations omitted) (internal citations omitted). Justice Cardozo goes on to hold that a contract for providing a city water did not give rise to a duty to the citizens individually. *Id.* at 899.

154. *See* Bender, *supra* note 148, at 4.

155. *See id.*

156. Thomas J. Murphy, *Affirmative Duties in Tort Following Tarasoff*, 58 ST. JOHN’S L. REV. 492, 507 (1984).

157. *See* RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (Am. Law Inst. 1965); F. H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219-21 (1908); Fowler V. Harper & P.M. Kline, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 886 (1934); McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1287-88 (1949).

158. *See* McNiece & Thornton, *supra* note 157, at 1287-88.

particular person and a concomitant obligation (where little burden, cost, or damage exists) to come to the aid of that person.<sup>159</sup>

### ***B. THE “GOOD SAMARITAN EXCEPTION”***

The aforementioned “Good Samaritan” exception is represented in three relevant California cases, which arose out of a foreseeability of harm: (1) *Tarasoff v. Regents of the University of California*,<sup>160</sup> (2) *Thompson v. County of Alameda*,<sup>161</sup> and (3) *Saldono v. O’Daniels*.<sup>162</sup> Each case is discussed in more detail below.

#### *1. Tarasoff v. Regents of the University of California*

In October 1969, Proenjit Poddar (Poddar) murdered Tatiana Tarasoff (decedent).<sup>163</sup> The decedent’s parents (the Tarasoffs) brought suit against the University of California, where Poddar had been seeing a therapist. The Tarasoffs contended that, only a short time prior to decedent’s murder, Poddar had expressed, in a session with his therapist (employed by the University of California), that he planned to kill decedent.<sup>164</sup> The Tarasoffs alleged that although the therapist had notified campus police of Poddar’s intentions, the police released Poddar after only briefly detaining him.<sup>165</sup> The parents asserted two grounds for their action: (1) the failure to confine Poddar despite his expressed intention to kill decedent, and (2) the failure to warn decedent or her parents of Poddar’s intentions.<sup>166</sup> The University of California maintained that it owed no duty of care to the decedent, and that it was immune from suit.<sup>167</sup>

The court held that the University therapist had a duty to warn based on his knowledge that Poddar was likely to carry out his threat against decedent, and that this duty was breached when only the police, not decedent were notified.<sup>168</sup> This holding was made in spite of the fact that the therapist lacked the legal

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159. *Id.*

160. 551 P.2d 334 (Cal. 1976).

161. 614 P.2d 728 (Cal. 1980).

162. 190 Cal. Rptr. 310 (Cal. Ct. App. 1983).

163. *Tarasoff*, 551 P.2d at 339.

164. *Id.*

165. *Id.* at 339-40.

166. *Id.* at 340.

167. *Id.*

168. *Id.*

ability to control the acts of Poddar.<sup>169</sup> At the most, the University's duty to decedent rode parasitic to its duty to Poddar, the patient. *Tarasoff*, therefore, is widely viewed as support for the proposition that a legal duty can arise out of the foreseeability of harm to a third party.

## 2. *Thompson v. County of Alameda*

In *Thompson*, James, a juvenile offender, had been in the custody of the County and confined in an institution for a prior incident.<sup>170</sup> The County was aware that James had "latent, extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children and violence connected therewith were a likely result of releasing [him] into the community."<sup>171</sup> The County was also aware that James had specifically stated that if he were released, he would "take the life of a young child residing in the neighborhood" where James lived.<sup>172</sup> Despite the knowledge of James' intentions, the County released him on temporary leave into his mother's custody at her home,<sup>173</sup> and never advised the parents of the young children in the neighborhood of James' statements and threats.<sup>174</sup> Within twenty-four hours of his release, James murdered a young boy in the neighborhood.<sup>175</sup>

The court in *Thompson* distinguished *Tarasoff* on the basis that James' threat, as opposed to Poddar's, was not directed at any particular person,<sup>176</sup> and, therefore, was not sufficiently "foreseeable" to give rise to a duty to warn.<sup>177</sup> In his dissent, Justice Tobriner argued that the holding in *Tarasoff* was not dependent on the knowledge of a particular victim, but was dependent on *foreseeability* of harm to a person.<sup>178</sup>

In any event, it is important to note that, in cases where pharmaceutical companies are selling to patients, they may

169. *Id.*

170. *Thompson*, 614 P.2d at 72.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 76.

177. *Id.* at 76-77 ("Although the intended victim as a precondition to liability need not be specifically named, he must be 'readily identifiable.'") (internal citation omitted).

178. *Id.* at 81-82.

already be in a relationship that gives rise to a duty of care, (unless with each prescription, the duty ends when the medicine is consumed). Therefore, these companies must provide warning of the harmful effects of their drugs,<sup>179</sup> and may have a duty to pull their drugs from the market should they learn of drug defects that exist.<sup>180</sup> In other words, these pharmaceutical companies already have duty of care, and the question is whether such duty covers action that cause emotional harm. The importance of an existing relationship between the defendant and the plaintiff was made clear in *Soldano*.

### 3. *Soldano v. Daniels*

In *Soldano*, a Good Samaritan entered a public establishment and asked an employee if he could use the telephone to call the police when a patron at a nearby saloon had been threatened.<sup>181</sup> The employee refused, and a man was subsequently shot and killed at the saloon.<sup>182</sup> The daughter of the victim sued the public establishment for wrongful death, alleging that the establishment owed a legal duty to the victim, and that the establishment breached that duty when its employee refused access to the telephone.<sup>183</sup> The court held that a duty did exist for the for-profit, public establishment to come to the aid to someone in danger.<sup>184</sup>

Thus, in the case of a pharmaceutical company selling a drug, which, by its nature, is used to prevent a medical emergency from occurring, the duty must be stronger than one that runs between a public establishment and the public. In a pharmaceutical drug situation, there is no dispute about the nature of the emergency, the foreseeability of harm, or the identity of those who will be harmed by exorbitant pricing. The harm is to everyone who is faced with the choice of whether or not they should purchase the drug.

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179. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11 (Am. Law Inst. 1997).

180. See M. Stuart Madden, *Modern Post-Sale Warnings and Related Obligations*, 27 PACE L. FAC. PUBLICATIONS 33, 57 (2000); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 13(a)(1), (2) (Am. Law Inst. 1997). Section 13(b) provides indicia for determining whether “[a] reasonable person in the position of the successor would provide a warning.” *Id.*

181. *Soldano*, 190 Cal. Rptr. at 312.

182. *Id.*

183. *Id.*

184. *Id.* at 317.

In *Soldano*, the California Supreme Court found that, a legal duty, which corresponded with a moral duty, was at the heart of what the common law is meant to provide.<sup>185</sup> The court further quoted from Francis Bohlen's article, *The Moral Duty to Aid Others as a Basis of Tort Liability*:

Nor does it follow that because the law has not as yet recognized the duty to repair harm innocently wrought, that it will continue indefinitely to refuse it recognition. While it is true that the common law does not attempt to enforce all moral, ethical, or humanitarian duties, it is, it is submitted, equally true that all ethical and moral conceptions, which are not the mere temporary manifestations of a passing wave of sentimentalism or puritanism, but on the contrary, find a real and permanent place in the settled convictions of a race and become part of the normal habit of thought thereof, of necessity do in time color the judicial conception of legal obligation. . . . While courts of law should not yield to every passing current of popular thought, nonetheless, it appears inevitable that unless they adopt as legal those popular standards which they themselves, as men, regard as just and socially practicable, but which, as judges, they refuse to recognize solely because they are not the standards of the past of Brian, of Rolle, of Fineux, and of Coke; they will more and more lose their distinctive common law character as part of the machinery whereby free men do justice among themselves.<sup>186</sup>

The *Soldano* court concluded, citing *Rowland v. Christian*:

We turn now to the concept of duty in a tort case. The Supreme Court has identified certain factors to be considered in determining whether a duty is owed to third persons. These factors include: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of

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185. *See id.* at 312-13.

186. *Id.* at 313 (quoting Francis Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 316 (1908)).

imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.”<sup>187</sup>

*Soldano* stands for the common law’s recognition of the relationship between moral duty and legal duty. It reminds other courts that they are not powerless to act to address the emotional harm caused by the reckless and amoral reasoning of the market.

### C. DUTY TO AID OTHERS AND PROTECTION FROM EMOTIONAL DISTRESS

While emotional distress damages are awarded in cases where there is physical harm, courts have raised the proof requirements in order for plaintiffs to recover in cases where harm is solely emotional.<sup>188</sup> Accordingly, where there is a claim for NIED, the plaintiff typically must prove that his emotional distress is a result of some *contemporaneous sensory* observation,<sup>189</sup> or that he was in the *zone of danger* or *target zone*,<sup>190</sup> in relation to harm caused to a close family member. Otherwise, a flood of litigation may result.<sup>191</sup> A court may also be wary that the claimed emotional distress was faked, or that it was not as substantial as claimed.<sup>192</sup>

Yet, the practice of exorbitant drug pricing fits nicely into an exception to these cases, because patients’ emotional distress does not depend on harm to others (though family members might share in the emotional distress), it is based on harm that is undoubtedly experienced by the patients themselves. As such, these cases are more akin to NIED cases involving emotional distress based on instances such as the misreporting of medical conditions or death,<sup>193</sup> the mishandling of dead bodies by a funeral

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187. *Soldano*, 190 Cal. Rptr. at 315 (quoting *Rowland v. Christian*, 69 Cal. 2d 108, 113 (Cal. 1968), *superseded by statute*, CAL. CIV. CODE § 847 (West 1985), *as recognized in* *Calvillo-Silva v. Home Grocery*, 18 Cal. 4th 714 (1998).

188. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 cmt. f; *Kircher*, *supra* note 91, at 806.

189. *Id.*

190. *Id.*

191. *Thing v. La Chusa*, 771 P.2d 814, 828 (Cal. 1989); *Dillon v. Legg*, 441 P.2d 912, 915 (Cal. 1968); *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513, 524 (Cal. 1963), *overruled by* *Dillon v. Legg* 441 P.2d 912 (Cal. 1968). See Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 506 (1982).

192. Aaron Smith, *The 9/11 fund: Putting a price on life*, CNN MONEY (Sept. 7, 2011), [http://money.cnn.com/2011/09/06/news/economy/911\\_compensation\\_fund/](http://money.cnn.com/2011/09/06/news/economy/911_compensation_fund/).

193. James C. Maroulis, *Can HIV-Negative Plaintiffs Recover Emotional Distress*

home or hospital,<sup>194</sup> or distress suffered by an insured as a result of a bad faith denial of his or her insurance claim.<sup>195</sup> Additionally, as described above, a patient enters into a relationship with a drug manufacturer once that patient is prescribed a drug by their doctor, and takes that drug under an existing price. Indeed, the price hike might occur in the midst of an ongoing treatment where the doctor's prescription includes regular refills. If the manufacturer learns of a defect in the drug that is not known to consumers, then that manufacturer clearly has a pre-existing duty to warn the consumers about the defect.<sup>196</sup> Where there is a pre-existing duty, formed by a relationship that exists between market actor and patient, the cause of action does not depend on the plaintiff's relationship to others, it depends on the actor's relationship to its patient-customer. Moreover, where the emotional distress rides parasitic to the direct economic harm suffered, the requirements of NIED are most likely satisfied.<sup>197</sup>

Assuming a colorable and plausible claim can be made by a particular plaintiff for either IIED or NIED, it must next be determined whether a class action might be brought on behalf of all those plaintiffs who are taking the drug. If such a class could be certified, there would be obviously significant advantages to those patients bargaining for a lower priced drug. And, with the certified class subsequently garnering the attention of the pharmaceutical company, the company would be able to sufficiently lower its exposure to continuing distress claims by lowering its price of the drug (and whatever punitive damages that might otherwise be justified). One might expect that a price increase for a particular drug would create enough commonality

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*Damages for Their Fear of AIDS?* 62 *FORDHAM L. REV.* 225, 225 (1993).

194. *See, e.g.*, *Wilson v. Houston Funeral Home*, 50 Cal. Rptr. 2d 169, 173 (Cal. Ct. App. 1996) (involving a mortician's contract to prepare a body for burial that was negligently performed, causing emotional distress)

195. *See, e.g.*, *Olson v. Rugloski*, 277 N.W.2d 385, 387-88 (Minn. 1979) (finding an insurer's liability for refusal to pay benefits includes liability for lost profits that are a direct and proximate result of breach).

196. *Canto v. Ametek, Inc.*, 328 N.E.2d 873, 878 (Mass. 1985). *See also* Restatement (Third) of Torts: Products Liability § 10 cmt. a (Am. Law Inst. 1997) ("Courts recognize that warnings about risks discovered after sale are sometimes necessary to prevent significant harm to persons and property."). *See generally* Michael L. Matula, *Manufacturer's Post-Sale Obligations in the 1990's*, 32 *TORT & INS. L.J.* 87, 87-88 (1996).

197. *See, e.g.*, *Molien v. Kaiser Found. Hosp.*, 616 P.2d 813, 820 (Cal. 1980) (en banc) ("We agree that the unqualified requirement of physical injury is no longer justifiable."). *See* W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 334-35 (4th ed. 1971). (noting that duty and breach are essential elements of a negligence cause of action).

of injury to allow each patient to qualify as a member of a class. On the other hand, defendants would be quick to argue that, where some patients' insurance plans cover the drugs regardless of the price, there is little in the way of emotional distress that would allow patients whose plans cover the drug regardless of the price or where Medicare plans provide coverage to claim injuries. Without injury, there is no standing.<sup>198</sup>

Again, the element for damages under a claim for NIED can be proved through the same arguments we see made in IIED cases. The proof of damages is found in the reckless indifference for delivering price hike information to patients in the throes of fighting life-threatening diseases.<sup>199</sup> In addition, just as with negligent delivery of misinformation to loved ones concerning the death of a family member, proof of distress can be presumed as growing out of both the common vulnerability concerning news about death and the lack of resilience, in particular, experienced by those left behind. Further, the "physical" harm threatened by disease, itself, along with the threat to receiving lifesaving medication, puts patients and their loved ones squarely in the "zone of danger."<sup>200</sup>

As we will see, commonality of the distress caused should be sufficient for class certification, at least for the purpose of negotiating a lower price, and might be sufficient to provide the adequate incentive for an adequate remedy.<sup>201</sup> This is especially true where cases involve a defendant's takeover of existing drugs and their subsequent changes in pricing. These cases might also seek to enjoin the price increase on the basis of Rule 65 of the Federal Rules of Civil Procedure, which permits injunctions in cases where there exists a burden to the plaintiffs in excess of that on the defendant, and where an adequate remedy at law cannot be obtained.<sup>202</sup> Before getting to the question of remedy, however,

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198. See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("To establish an Art. III case or controversy, a litigant must first clearly demonstrate that he has suffered an 'injury in fact.'").

199. Pollack & Tavernise, *supra* note 1.

200. See *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1300 (Mass. 1978).

201. For example, in cases brought by individuals against banks for data breaches (invasions of privacy), some courts have held that, where there is no showing of harm, there is no foul. Alan Charles Raul & Edward McNicholas, *Federal Court of Appeals Dismisses Data Breach Class Action Following Hack of Bank's Marketing Web Site, PRIVACY & DATA SECURITY* L.J. (Oct. 2007), available at [http://www.sidley.com/~media/Files/Publications/2007/10/Federal%20Court%20of%20Appeals%20Dismisses%20Data%20Breach%20C\\_/Files/View%20PDF/FileAttachment/Pisciotta](http://www.sidley.com/~media/Files/Publications/2007/10/Federal%20Court%20of%20Appeals%20Dismisses%20Data%20Breach%20C_/Files/View%20PDF/FileAttachment/Pisciotta).

202. FED. R. CIV. P. 65.

these cases will be able to obtain price relief if they are able to get over the hurdle of class certification.

#### IV. CLASS ACTIONS, OR WAIT FOR LEGISLATION?

##### A. CLASS ACTIONS CAN LEAD TO PRICE REDUCTIONS.

Rule 23 of the Federal Rules of Civil Procedure (FRCP) is the starting point in any analysis of class action lawsuits.<sup>203</sup> To qualify as a class action under FRCP 23, the case must satisfy the four prerequisites of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.<sup>204</sup> Federal case law is fairly liberal in finding the four prerequisites under Rule 23(a) requirements.<sup>205</sup> As a result, it is usually difficult for the defendant to satisfy these requirements.<sup>206</sup>

A defendant's use of Rule 23(b), however, presents plaintiffs with more significant challenges. In addition to satisfying all requirements under Rule 23(a), federal class actions require that plaintiffs satisfy the requirements of Rule 23(b). The majority of class actions seek certification pursuant to Rule 23(b), which states, in part:

[T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Additionally, Rule 23(b)(3) provides that the matters pertinent to the findings include:

[T]he class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely

203. FED. R. CIV. P. 23.

204. Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States (2000), from Conference, Debates Over Group Litigation in Comparative Perspective, *available at* <https://www.law.duke.edu/groupplit/papers/classactionalexander.pdf>.

205. *Id.* at 4.

206. *Id.*

difficulties in managing a class action.<sup>207</sup>

Amassing the damages claims of a large number of class members supports a claim for a large amount of attorney's fees, and poses a severe financial threat to a defendant.<sup>208</sup> Thus, plaintiffs often focus on a defendant's arguments opposing proposed Rule 23(b)(3) classes.<sup>209</sup> Most states have rules that parallel Rule 23.<sup>210</sup> Additionally, most state supreme courts interpret those rules by following the federal decisions that interpret Rule 23.<sup>211</sup>

### **B. CLASS ACTION CHALLENGES**

In order for the advantages of using tort law to address the problem of exorbitant drug prices, there remains the question of whether the courts will also permit all users of a particular drug—subject to the price increases—to join as a class for the purposes of pursuing a remedy.<sup>212</sup> The court may balk at certification of a class because it might not view state tort law across jurisdictions as being adequately uniform, to make for a common question of law.<sup>213</sup> In addition, a court may not view each patient as being able to establish the level of “severe emotional distress” required to be successful in pursuing the remedy. Some patients may be covered by Cadillac insurance plans, some may end up paying substantially less out-of-pocket because of their insurance plans, or because of the amount covered by Medicare or backed by Medicaid. Some patients, on the other hand, may simply be oblivious to the cost of the drugs. These variations may, in effect, cause the common questions of law to fail the predominance requirement.

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207. FED. R. CIV. P. 23(b)(3)(A)-(D).

208. Alexander, *supra* note 204.

209. Caroline H. Gebtry, American Bar Association: Corporate Counsel CLE Seminar, A Primer On Class Certification Under Federal Rule 23 (Feb. 16, 2014), *available* *at* [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014\\_corporate\\_counselclemseminar/b2\\_2\\_a\\_primer\\_class\\_certification\\_under\\_federal\\_rule.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_corporate_counselclemseminar/b2_2_a_primer_class_certification_under_federal_rule.authcheckdam.pdf).

210. CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1753.1 (Thomson West ed. 2009).

211. *Id.*

212. FED. R. CIV. P. 23(b)(3)(A)-(D).

213. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). Alexander, *supra* note 204, at 4. I hope that the foregoing analysis alleviates these concerns by showing the cause of action exists and has common requirements in all fifty states. See RESTATEMENT (SECOND) OF TORTS § 46 (Am. Law Inst. 1965).

While the above variations may present significant challenges to plaintiffs, the unity of the legal question presented and the equity of allowing for the collective bargaining of the patient group for a reasonable price should overcome these objections.<sup>214</sup> The courts have done as much in consumer rights cases,<sup>215</sup> civil rights cases,<sup>216</sup> asbestos cases,<sup>217</sup> various medical device cases (silicone breast implants as the most prominent example),<sup>218</sup> and products liability cases (including cases involving Volkswagen and General Motors).<sup>219</sup>

After the famous Wal-Mart case,<sup>220</sup> where 1.5 million female employees accused Wal-Mart of discrimination against women in violation of Title VII of the Civil Rights Act of 1964, and where the Supreme Court denied class certification for failure of proof that individual employment decisions were motivated by discrimination, the issue in most class certifications may come down to expert testimony on the issue of damages.<sup>221</sup> Such instances could involve a *Daubert* challenge<sup>222</sup> on whether an expert can provide sufficient support that a portion of the class experienced significant emotional distress due to the actions of the defendant.<sup>223</sup> This hurdle, however, can be met by an expert

214. Alexander, *supra* note 204, at 5-10.

215. *Id.*

216. *Id.*

217. *Id.*

218. David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 457-510 (1999).

219. In re: Volkswagen "Clean Diesel" MDL, 15-MD-2672-CRB (JSC), available at <http://www.cand.uscourts.gov/crb/vwmdl>; In re: General Motors LLC Ignition Switch Litigation, Case No. 1:14-md-02543-JMF, in the U.S. District Court for the Southern District of New York.

220. Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011).

221. *See id.*

222. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

223. *Id.* Support for this approach comes from court holdings in analogous cases in England and Australia. *See Andrews and Ors v. Australia & New Zealand Banking Group Ltd.* [2012] HCA 30, available at [http://www.hcourt.gov.au/cases/case\\_m48-2012?Itemid=62&qh=YToxOntpOjA7czozOjJhbnoiO30%3D](http://www.hcourt.gov.au/cases/case_m48-2012?Itemid=62&qh=YToxOntpOjA7czozOjJhbnoiO30%3D). It appears two cases before the United Kingdom Supreme Court involved the issue of genuine pre-estimate damages and were heard in July 2015. *See ParkingEye Ltd. v. Beavis* (2015) (UKSC); *Cavendish Square Holding BV v. Talal El Makdessi* (2015) (UKSC). The court in *ParkingEye* agreed with the owners of the Riverside Retail Park to manage the car park at the site. *ParkingEye Ltd.* (2015) (UKSC) [119]. *ParkingEye* displayed numerous notices throughout the car park, saying that a failure to comply with a two-hour time limit would "result in a Parking Charge of £85." *Id.* On April 15, 2014, Beavis parked in the car park, but overstayed the two-hour limit by almost an hour. *Id.* at [92]. Beavis argued that the £85 charge was unenforceable at common law as a penalty, and that it was unfair and unenforceable by virtue of the Unfair Terms in

analysis that presents a look at the specific impact on different classes of patients, including individual uninsured patients and those patients who do not qualify for Medicaid to see how high deductibles will bleed family savings. The expert should be able to provide evidence using healthcare statistics to a devastating effect on these classes of patients, forcing some to choose between food, education, and basic necessities, or paying for the deductible and causing, at the very least, anxiety. For those many on Medicare, the issue can be their deductibles. Often, the deductible can be up to \$1,600 per month,<sup>224</sup> and could also include paying a “donut hole” amount, where Medicare requires patient payment prior to providing access to additional coverage.<sup>225</sup>

Importantly, as will become plain from the discussion in Part III, with respect to ways in which to avoid the problems of individualization that can arise from litigation approaches to the development of compensation for injury victims, the experts’ analysis should not end in segregating harm to subgroups of patients.<sup>226</sup> The plaintiffs’ counsel should not segregate patients into their financial situations, for, as we will see using the Barton and Burke analysis, this would only pit groups of patients against each other, and end up pushing off the higher prices onto those less severely injured emotionally. In the cases against Turing and Valeant, the difference between the pre-takeover price of the drug and the post-takeover price should provide sufficient evidence of significant anxiety for their individual economic situation, to overcome the commonality hurdle.

In the alternative, a court might choose to exercise its settlement oversight responsibilities<sup>227</sup> by requiring that the expert suggest a price that would fairly provide for the value of the drug in the market—with an eye towards its development costs—and manufacturing costs, as well as a reasonable return.<sup>228</sup> In this regard, the expert would likely turn to other markets to

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Consumer Contracts Regulations 1999. *Id.* at [119]. The Court of Appeals upheld the decision that rejected Beavis’ arguments. *Id.* at [214]; *see also* Cavendish Square Holding BV (2015) (UKSC) [214].

224. *Medicare Part D Donut Hole – Medicare Coverage Gap*, eHealth Medicare, <http://www.ehealthmedicare.com/medicare-part-d-prescription/donut-hole/> (last visited Aug. 24, 2016).

225. *Id.*

226. *See supra*, Part III. B.

227. FED. R. CIV. P. 23(e). *See also* Alexander, *supra* note 204, at 9.

228. *Id.*

determine the value of the drug or similar drugs.<sup>229</sup> The expert might provide information using a “price referencing” model,<sup>230</sup> such as that employed by the Canadian government in determining what it will pay for a drug.<sup>231</sup> This method is also used in Europe to determine the price the insurance providers will pay for the drugs.<sup>232</sup>

It is important to note that in setting a drug’s price, the court should require the expert to provide an opinion on a price for the drug for the class of patients as a whole. Otherwise, the unintended effect on lowering the price for Medicare patients will likely raise the price for everyone else.<sup>233</sup> This is the exact effect Congress was worried about when it prohibited Medicare from negotiating lower prices for drugs.<sup>234</sup> If this were to be a court’s requirements for pricing class actions, the insurance companies may even join these cases on behalf of their patients. Their interests are aligned regarding pricing, for while their insureds are protected, they all pay for drugs far in excess of the drugs’ anticipated costs (and premiums charged). The unjust enrichment that occurs to the drug company comes from the antitrust prohibitions on insurers to collectively bargain for drug prices.<sup>235</sup> Insurers are held hostage by the “free market” to pay the exorbitant prices. Absent the lawsuit, they have no means to “negotiate” for lower prices for individual patients with those drug needs.

Other arguments for certifying a class of all drug users of a particular life-saving drug, despite the exact commonality and severity of their emotional distress, comes from the monopoly

229. Rugerri & Nolte, *supra* note 8.

230. *Id.*

231. *Id.*

232. Rugerri & Nolte, *supra* note 8 (reporting on how value is determined on an internal price referencing model).

233. See Robert H. Ballance, *Market and Industrial Structure, in* CONTESTED GROUND: PUBLIC PURPOSE AND PRIVATE INTEREST IN THE REGULATION OF PRESCRIPTION DRUGS 95, 103-104 (Peter Davis ed., 1996); David J. Gross et al., *Prices for Prescription Drugs: The Roles of Market Forces and Government Regulation, in* Contested Ground 124, 134; PATRICIA M. DANZON, PHARMACEUTICAL PRICE REGULATION: NATIONAL POLICIES VERSUS GLOBAL INTERESTS 3-4 (1997), available at [https://www.aei.org/wp-content/uploads/2014/07/-pharmaceutical-price-regulation-global-interests\\_11361924090.pdf](https://www.aei.org/wp-content/uploads/2014/07/-pharmaceutical-price-regulation-global-interests_11361924090.pdf).

234. See Hogberg, *supra* note 34.

235. Editorial Board, *Sneaky Ways to Raise Drug Profits*, N.Y. TIMES (June 8, 2015), [http://www.nytimes.com/2015/06/08/opinion/sneaky-ways-to-raise-drug-profits.html?\\_r=1](http://www.nytimes.com/2015/06/08/opinion/sneaky-ways-to-raise-drug-profits.html?_r=1). See *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); Drug Price Competition and Patent Term Restoration Act 1984, Pub. L. No. 98-417, 98 Stat. 1585.

effect on the markets of patents<sup>236</sup>—and the lack of transparency and information in the market concerning competitive drugs, generics, and prices.<sup>237</sup> Again, without a class certification, not even collective bargaining can overcome the monopoly effect of the patent in the case of life-saving drugs. Instead of involving the government or a bureaucracy as the representative of the patients, the advantage of the class action tort lawsuit is that the patients’ attorney acts as a direct representative of the group.<sup>238</sup>

### C. ADVERSARIAL LITIGATION VS. LEGISLATIVE REGULATION

Assuming then, at least for settlement purposes, that a class could be certified, there are a number of advantages that would

236. By definition, patents grant a monopoly. David R. Henderson, *Patents*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc1/Patents.html> (last visited Aug. 24, 2016).

237. Jeffrey C. Lerner, Daniel M. Fox, Todd Nelson & John B. Reiss, *The Consequence of Secret Prices: The Politics of Physician Preference Items*, 6 HEALTH AFFAIRS 1560 (2008).

238. Rugerri & Nolte, *supra* note 8, at 16-17. There are two different types of pricing. The first is “external reference” pricing, which refers to the cost of the same drugs in “baskets” of other markets the country selects for comparison prices. The second is called “internal pricing,” and allows some room for higher prices for new drugs, based on their value in the market, and based on their costs to manufacture. *Id.* There is no clear winner between these two different models. *Id.* Rugerri and Nolte describe the French system with respect to “how value is determined”:

[T]he Transparency Commission at the French National Authority for Health determines the added therapeutic benefit for all new drugs, the amelioration du service médical rendu (ASMR). The Transparency Commission distinguishes five ASMR levels:

- I. [M]ajor improvement (new therapeutic area, reduction of morality)
- II. [S]ignificant improvement in efficacy and/or reduction of side-effects
- III. [M]odest improvement in efficacy and/or reduction of side-effects
- IV. [M]inor improvement
- V. [N]o improvement

New pharmaceutical products are evaluated according to the following criteria:

- [E]ffectiveness and possible side-effects
- [P]osition in the therapeutic spectrum relative to other [A]vailable treatments
- [S]everity of disease or condition
- [C]linical profile of the drug
- [P]ublic health impact.

There are no separate schemes for different categories of drugs. All new drugs fall under the same scheme. *Id.*

redound to the patients and the U.S. healthcare consumer in general. As a matter of policy, tort litigation can provide a superior approach to waiting for legislative action. Barnes and Burke, in their book, “How Policy Shapes Politics: Rights, Courts, Litigation, and the Struggle Over Injury Compensation,”<sup>239</sup> analyze various approaches taken in the U.S. to address issues of injury compensation.<sup>240</sup> The authors use a case study approach, examining Social Security Disability Insurance (SSDI) legislation, asbestos litigation, and vaccine injury compensation to help determine the advantages and disadvantages that exist as a result of taking an adversarial approach, rather than waiting for legislation to address a question of injury compensation.<sup>241</sup> Barnes and Burke anticipate four serious objections to adversarial litigation:

- (1) [I]t crowds out other forms of political action, especially lobbying for legislative change, (2) it is particularly “sticky” and path-dependent, potentially locking governments into bad policies, (3) it creates polarizing backlashes, and (4) it individualizes interests, thus undermining social solidarity.<sup>242</sup>

Barnes and Burke determined that the first three objections are overstated, at least in the cases they studied.<sup>243</sup> This Essay suggests that these same objections will also overstate difficulties to the use of the courts to remedy exorbitant pricing of lifesaving drugs. For example, concerning the question of whether litigation will foreclose efforts on the legislative front, as of the time of this writing, Congress is conducting at least two hearings on the questions of high-priced drugs.<sup>244</sup> Senator Bernie Sanders is leading the charge on behalf of Veterans,<sup>245</sup> and others (e.g., Senator McCaskill) are investing through hearings on the Special Committee on Aging.<sup>246</sup> On the other hand, election year in

239. BARNES & BURKE, *supra* note 31.

240. *Id.* at 15.

241. *Id.*

242. *Id.*

243. *Id.*

244. Sarah N. Lynch & Bill Berkot, *Senate Panel Focuses on Toll of Valeant, Turing Drug Price Spikes*, REUTERS (Dec. 8, 2015) <http://www.reuters.com/article/us-senate-drugs-hearing-idUSKBN0TS2L120151209..>

245. Press Release, Majority News, Senate Panel Probes Exorbitant Prices for Hepatitis C Dugs (Dec. 3, 2014), <http://www.veterans.senate.gov/newsroom/majority-news/senate-panel-probes-exorbitant-prices-for-hepatitis-c-drugs>.

246. Senators Collins, McCaskill Announce that Former Turing CEO Martin Shkreli has Invoked the fifth Amendment, 114th Cong. (2016).

politics may make it very difficult for legislation to make its way through. In any event, courts are unlikely to foreclose a legislative remedy, but may, in fact, educate the public to the problem and drum up support for any future legislative solution.

Further, as to whether a litigation approach becomes “sticky” and path dependent, as in other areas of injury compensation,<sup>247</sup> there is nothing that locks a legislature in to court decisions with regard to common law torts. On the contrary, the inability to create a legislative solution may, in part, be related to path dependencies that are created by other legislation. For example, the Sherman Antitrust Act has already prohibited insurance companies from aligning in order to negotiate lower prices for drugs where the state does not already act to regulate pricing.<sup>248</sup> Since individual insureds are scattered across multiple insurance companies, the focus of patients is to get coverage from their insurance providers, not to pay lower prices for drugs. On an individual patient basis, it is seldom worth it for insurance companies to litigate for lower prices, especially where they can pass on costs by raising insurance premiums. Perhaps as insurance companies merge, these incentives will change. On the other hand, the less competition among insurers also presents worrisome effects on user services and costs.<sup>249</sup> If prices moderate, more companies may be able to compete with respect to the services they provide.

To add to the path dependency problem caused by other legislation, Congress enacted healthcare legislation in 2003,<sup>250</sup> which prohibited Medicare from negotiating with drug companies for lower prices.<sup>251</sup> Drug companies were worried that, by enlarging Medicare and shrinking state-funded Medicaid, their profits would be severely affected, restricting research and development for new drugs.<sup>252</sup> Also, worried that giving the Centers for Medicare and Medicaid Services (CMS) the power to

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247. BARNES & BURKE, *supra* note 31, at 15.

248. The McCarran-Ferguson Act provides, in relevant part, that “the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.” 15 U.S.C. § 1012(b) (2012).

249. Hogberg, *supra* note 34.

250. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066.

251. *Id.*

252. *Negotiating for Lower Drug Costs in Medicare Part D*, Nat’l Comm. to Pres. Soc. Sec. & Medicare, <http://www.ncpssm.org/EntitledtoKnow/entryid/2061/negotiating-for-lower-drug-costs-in-medicare-part-d> (last visited Aug. 24, 2016).

negotiate lower prices would only raise the price of those drugs for private insurers,<sup>253</sup> Congress seemingly elected for competition between insurers on the quality of the services they provided rather than give the government the ability to use their collective bargaining power to moderate drug prices. Accordingly, any legislation that would be designed to set prices would also have to take on the task of amending both antitrust legislation and other healthcare legislation.

As we have seen, the courts' equitable powers can overcome these legislative path dependencies without violating the legislation.<sup>254</sup> Patients could bargain directly with drug companies for original or lower prices on lifesaving drugs. Insurance companies could be left to compete on the basis of the quality of services they provide, and there is no harm done to principles of antitrust law. Moreover, should the need arise, legislatures can always overrule courts and preempt them.

As to the third objection described by Barnes and Burke,<sup>255</sup> there appears to be little potential for backlash from court decisions against exorbitant drug pricing. In fact, absent court decisions, the drug behavior may be normalized, hidden from view by the lack of transparency in the market. Drug companies themselves may justify more increases, in light of the fact that "everyone" is doing it. Court decisions are, at least initially, directed at individual companies masquerading as drug companies. Assuming the court certifies a class of patients, there is little chance of backlash from private insurers or employer-provided plans. After all, these groups are in favor paying lower prices for lifesaving drugs.

With respect to the fourth objection, Barnes and Burke do find some evidence to support the argument that adversarial litigation individualizes the injury compensation problem and potentially pits one patient, drug company, or insurance scheme against another when it comes to seeking remedies for a particular lifesaving drug.<sup>256</sup> Next to be considered, then, is whether bringing individual class action cases for specific pricing of lifesaving will send adequate signals to drug manufacturers to moderate their pricing. Or, would it be better to wait for a comprehensive approach to drug price regulation through legislation?

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253. Hogberg, *supra* note 34.

254. BARNES & BURKE, *supra* note 33, at 17-20.

255. *Id.*

256. *Id.*

It is true that the courts will have difficult in deciding which drugs are classified as lifesaving drugs. Drugs used to treat Cancer (including those to reduce tumors), to control debilitating pain, or to treat ailments of vital organs appear easy targets for price gouging without any tort effect. But what about drugs that treat diabetes, high blood pressure, high cholesterol, depression, pneumonia, malaria, or various tropic diseases? Will tort lawsuits end up pitting patients with various disease against one another in the process of their lobbying Congress to qualify as a lifesaving drug? In addition, what about companies that come to the market with an exorbitant price, or those that have prices that increase more gradually over time?<sup>257</sup> As has been shown, claims that qualify under IIED or NIED consist of facts where defendants take over existing drugs that have already established markets and pricing. As such, these cases will not impact drug pricing needed for the development of *new* drugs. Additionally, while drug companies may deal creatively with ways to hide exorbitant prices, their activities will create a paper trail that will eventually be noticed by individual patients. Just as in the case of bad faith insurance, lawyers will be on the lookout for evidence of extreme and outrageous price increases, without justification, and respond with ways to uncover these practices.

Finally, as discussed above, if a court only certifies as to Medicare or Medicaid patients, there is an additional individualization issue that may pit some insurers against others. On the other hand, if the court certifies the class for all patients taking the drug, then such an individualization issue will disappear. Class certification, therefore, provides a mechanism to overcome the problems associated with individualization that are typically associated with adversarial litigation.

It is true that, in the area of SSDI, legislation that treats all disabilities develops more efficient and effective protections than if each disability had to make its own individual case in the legislature or in court.<sup>258</sup> And, for example, giving the power to the Veterans Administration to negotiate the price of drugs to treat veterans can effectively work to regulate prices for veterans. On the other hand, legislation that does not cover all patients using a particular drug, but only those in particular government

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257. There is much evidence in the market that such practices are already being employed. See Editorial Board, *No Justification for High Drug Prices*, N.Y. TIMES (Dec. 19, 2015), <http://www.nytimes.com/2015/12/20/opinion/sunday/no-justification-for-high-drug-prices.html>.

258. BARNES & BURKE, *supra* note 33, at 52.

programs, can end up pushing on to private insurers the high prices of the drugs. However, where the class allows negotiation for drug pricing regardless of the special characteristics of patients, price moderation cannot be passed on to other consumers. As a result, unlike the initial politics of providing Disability Insurance, which pitted businesses against those with disabilities, the high price of drugs affects the size of government expenditures paid for by public dollars. The dollars paid are not a zero-sum game between different classes of patients, but are funded by moderating the profits of an already enormously profitable industry. Barnes and Burke show that this very problem was overcome in the case of SSDI through the actions of individual states, arguing the unfair effects on state Medicare funds, if the federal government did not address the problem uniformly.<sup>259</sup> Class action certifications can remedy the state-by-state unfairness of different pricing under different plans in different states, and still be a result of direct negotiations between patients and drug companies in light of the prices originally charged, and those charged after the takeover.

In addition, the effect of a class action price moderation will send signals to the market for similar drugs to voluntarily moderate their prices. The moderated effect of the tort system on business behavior will operate like it did in the case of bad faith insurance practices. We turn, in Part V, to the case of the law of bad faith insurance to see how an integrated approach might lead to a moderation of all drug prices in the U.S. market.

Finally, this Essay argues that the lessons learned from bad faith insurance law are predictors of the effect of adversarial litigation in the case of exorbitant drug prices and not the problem of individualism.

## V. THE DEVELOPMENT OF BAD FAITH LAW

There are a number of reasons to consider the history of the development of bad faith insurance law as a bellwether for developing policy in relation to exorbitant pricing of lifesaving drugs. First, its history demonstrates the public need for protection against the emotional harm caused by shady business practices designed to take advantage of individuals during a crisis, whether because they are injured, disabled, suffered a loss from theft or fire, or the death of a spouse or parent.<sup>260</sup> Second, it

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259. *Id.*

260. Mark J. Browne, Ellen S. Pryor & Bob Puelz, *The Effect of Bad-Faith Laws*

shows how early bad faith regulatory legislation failed because it lacked the teeth that litigation can provide to change behavior.<sup>261</sup> Third, it shows the continued shortcoming that a state-by-state approach takes, absent some nationally coordinated legislation designed to guard against the most egregious practices.<sup>262</sup>

The first wave of change against extreme insurance practices came, not from the courts, but from state legislatures.<sup>263</sup> Still, states were not all quick to adopt protections. As of 1951, only one quarter of the states enacted legislation that provided for attorney's fees and penalties in those cases where insurance companies "engaged in denying insured's claims in bad faith."<sup>264</sup> Such legislation was enacted to provide recovery in instances where insurers defaulted on their obligations to pay benefits.<sup>265</sup> Then, in the 1970s, the National Association of Insurance Commissioners (NAIC) created legislation that was meant to address claim settlements. Mary Cryar, in her article, *If We Knew Then What We Know Now – The Evolution of Insurance Bad Faith*, provides that the legislation:

1. Only prohibited certain acts when the insurer acts flagrantly and in conscious disregard or if it commits such acts so often as render it a general business practice.
2. Silent as to any remedies for individual claimants.

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on *First-Party Insurance Claims Decisions*, 33 J. LEGAL STUD. 355, 355-56 (2004); Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L. REV. 1317, 1317-18 (1994). For a general introduction to the debate over the fairness or efficiency benefits of bad faith laws, see Ellen Smith Pryor & Charles Silver, *Symposium on the Law of Bad Faith in Contract and Insurance*, 72 TEX. L. REV. 1203, 1203-07 (1994). For analyses of the various costs and benefits of a tort-based cause of action for bad faith denials of first-party claims, see KENNETH S. ABRAHAM, *DISTRIBUTING RISK* 183-88 (1986); Mark Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 125, 125-36 (1994); Robert H. Jerry, II, *Remedying Insurers' Contract Performance: A Reassessment*, 18 CONN. L. REV. 271, 272 (1986); Alan O. Sykes, "Bad Faith" Breach of Contract By First-Party Insurers, 25 J. LEG. STUD. 405, 406-08 (1996).

261. See Kenneth S. Abraham, *The Natural History of the Insurer's Liability for Bad Faith*, 72 TEX. L. REV. 1295, 1298-1300 (1994).

262. *Id.*

263. Michael E. DeBow, *The Intersection of Insurance Bad Faith Litigation and State Insurance Regulation: A Reconsideration*, GEORGE MASON SCHOOL OF LAW, LAW & ECONOMICS CENTER 1, 1 (2015), available at [http://www.masonlec.org/site/rte/uploads/files/DEBOW\\_Bad-Faith-paper-1-1-1.pdf](http://www.masonlec.org/site/rte/uploads/files/DEBOW_Bad-Faith-paper-1-1-1.pdf).

264. Mary K. Cryar, *If We Knew Then What We Know Now—The Evolution of Insurance Bad Faith*, Insurance Bad Faith and Extra-Contractual Liability (June 2013) 1, 4, available at [www.dri.org/DRI/course-materials/2013-BadFaith/pdfs/01\\_Cryar.pdf](http://www.dri.org/DRI/course-materials/2013-BadFaith/pdfs/01_Cryar.pdf).

265. *Id.*

3. Only enables state insurance regulators to seek injunctive relief or penalties as a way to enforce the regulations.<sup>266</sup>

Additionally, Cryar provides that “[t]he majority of courts have held this legislation does not create a private right of action for insureds,”<sup>267</sup> and that it was unsuccessful in assisting insureds.<sup>268</sup>

As a result of the failures of legislation, courts started to develop ways in which insureds would receive remedies in their actions.

Social pressure pushed for relief from unjustified delays in processing and arbitrary refusals to pay claims, and insureds began utilizing private attorneys to advance their interests. This forced the courts to finally take a serious look at the claims process and eventually gave rise to the common-law tort or bad faith that we have today.<sup>269</sup>

The “first development in bad faith” came from:

[T]he third-party insurance arena. Originally, liability policies as we know them today did not exist. Rather, third party insurance was via indemnity policies . . . [that] only obligated the insurer to pay monies to a third party if two requirements were met. One, the insured had to have been held liable and two, the insured actually had to have paid the judgment to the third party. If the insured was insolvent, or for some other reason, did not pay the third party, the insurer had no obligation to pay any amount. The tort victim similarly had no remedy against the insurer. Liability policies, on the other hand, obligate the insurer to pay the third party once the liability has been established, without any requirement that insured first pay the victim.<sup>270</sup>

Indemnity policies eventually:

[V]anished from the third party arena, and were replaced with liability policies. Why? The public was not satisfied with indemnity policies. It offended

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266. *Id.* at 6.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

common sense for the insurer to avoid liability solely because the insured could not pay the judgment first. Sometimes, insurers even colluded with insureds to secure and adjudication of bankruptcy for the latter so the insurer could avoid its obligations under an indemnity policy. This pressure gave rise to court and legislative action. State legislatures began enacting “direct action” statutes. Courts began construing indemnity policies like liability policies, absent clear policy language that limited the insurer’s obligation to paying what the insurer paid the tort victim. Courts also began holding insurers to be estopped from denying any obligation to pay third party claimants once the insurer assumed control of the defense.<sup>271</sup>

Cryar further opined:

As a result of these changes, indemnity policies gradually disappeared, leaving insurers issuing liability policies, which contained language that permitted the development of third party bad faith actions. First party bad faith took over. An insurance relationship was seen as one in which the insured sought security. Like good health insurance, it protected the accumulation of savings from one’s lifetime of labor against the vagaries of accidents and disease. It was not obtained for commercial advantage, but is instead protection against a calamity. The consequences of the breach of an insurance contract by the insurer were broader than merely not receiving payment. Instead, the insured who did not promptly receive payment would suffer financial harm and even more importantly to this discussion, emotional distress. To recover, the insured may have to incur attorney’s fees.<sup>272</sup>

Most jurisdictions adopted a cause of action for bad faith in first party insurance.<sup>273</sup> But each state’s law is marked by unique aspects that require considerable care in determining “the law” in a given state. Cryar divided the jurisdictions into categories:

1. Some jurisdictions refuse to recognize a cause of action for first-party and bad faith and have no or

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271. *Id.*

272. *Id.* at 7.

273. *Id.* at 8.

- limited statutory remedies for violation of claims practice standards.
2. About half, or perhaps fewer than half, uses a variation of the [rule against acting] *unreasonable or without proper cause*.
  3. A larger group, such as in Iowa, use some version of “fairly debatable” rule. . . .
  4. Others, such as Utah, while recognizing bad faith, have tied it to its contract roots, rather than creating a tort action.
  5. Many jurisdictions have enacted statutes which define bad faith or prohibit unfair claim practices, such as in Georgia and Louisiana.<sup>274</sup>

What lessons can be learned from this history of Bad Faith Insurance Law that can map onto our analysis of the exorbitant pricing situation?

- Even where state insurance regulators already were in place, enforcement was uneven.<sup>275</sup>
- Unless specific remedies are provided for in legislation, courts may be uncomfortable with making market decisions about “fair” practices. Still, where the price had been set and a new owner raises that price, the unreasonableness of such pricing is more easily proven.<sup>276</sup>
- As the U.S. shifts to a national health insurance system that seeks to provide universal coverage, court oversight is needed to prevent insurers from taking advantage of insureds in emergency situations.<sup>277</sup> Just as it is bad faith, and a breach of the very reason for health insurance—to protect against catastrophic losses, including emotional distress and anxiety threatened by the loss of life savings for insurance companies to threaten non-payment, impossible notice requirements, penalty clauses, or raising rates or deductibles during a coverage period, it is similarly bad faith for a drug company to effect the same losses—financial and emotional—by raising prices.
- Insurance itself will become too expensive if prices of drugs are raised arbitrarily high in the middle of their coverage

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274. *Id.* (emphasis added).

275. Abraham, *supra* note 261, at 1295.

276. *Id.*

277. *Id.*

cycle.<sup>278</sup>

- Without granting a private cause of action, the regulation is not likely to be effective.<sup>279</sup>
- If state court definitions vary, multistate class actions are not likely to be granted.<sup>280</sup>

Finally, then, state-by-state legislative fixes will present difficulties for all patients seeking a lowering of prices of their drugs. While the U.S. litigation systems provide fixes for these problems, a nationwide regulatory body may be necessary to regulate the drug companies' behavior. For example, multi-district litigation (MDL) procedures provide courts a path to coordinate and consolidate cases involving patients adversely affected by product defects in medical devices.<sup>281</sup> The same can be employed to coordinate pricing problems with drugs; yet coordination problems and conflict of laws and interests problems proliferate in MDLs.

In the event that tort law does not find its way to a remedy, then legislation should be enacted to moderate the pricing of lifesaving drugs in the U.S. The experience of state development of rules against bad faith insurance practices and breaches of covenants of good faith and fair dealing should be instructive in this regard. By providing for attorney's fees and punitive damages, legislation can also provide incentives to the private attorney general provisions of tort law, to effectively discipline the market as a whole.<sup>282</sup> On the other hand, current Supreme Court rulings restrict the awarding of punitive damages by a state court to conduct occurring within that state.<sup>283</sup> It will also provide the incentives to keep an eye out for creative attempts at exacting fees and prices that take advantage of emergency contexts inherent in

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278. *Id.*

279. *Id.*

280. *Id.*

281. See, e.g., *DePuy Orthopedics, Inc., ASR Hip Implant Products Liability Litigation, MDL 2197*, <http://www.ohnd.uscourts.gov/home/clerk-s-office-and-court-records/multidistrict-litigation-cases/mdl-2197/> (last visited Aug. 26, 2016). A full description of Multidistrict Panel Rules and Procedures is available online. Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation (July 6, 2011), [http://www.jpml.uscourts.gov/sites/jpml/files/Panel\\_Rules-Amended-7-6-2011\\_With\\_Index-6-5-2014.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Panel_Rules-Amended-7-6-2011_With_Index-6-5-2014.pdf).

282. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420 (2003). Before *Campbell*, DeBow reports that a database assembled by Helland and Klick contains information on 748 class action suits filed against 130 insurance companies "that were open at least one point during the period of 1992 to 2002." See DeBow, *supra* note 263, at 11.

283. *Id.*

the market for lifesaving drugs. These regulations reveal the same tensions in the law and free market between fundamental beliefs in a liberal society that pricing should be set by the maker of a product, and yet the government needs to regulate where there exists emergencies and where producers lack the morality required to protect against extortionate practices. These regulations and subsequent common law adaptations will provide a road map for similar efforts by the states to develop regulations against exorbitant prices of lifesaving drugs.

## VI. CONCLUSION

As we have seen, tort law principles provide a remedy to moderate exorbitant pricing of lifesaving drugs. On the other hand, requirements of “severity of emotional distress” might make it difficult for courts to certify classes of cases in order to get at the common vulnerability interest that is violated by such behavior. In addition, courts worrying about whether they are legislating may balk at extending legal duties through affirmative duty and negligence doctrines. Perhaps courts will adopt creative approaches to these situations and allow cases to be brought by a class of plaintiffs similarly impacted by the exorbitant pricing. Once certified, an injunction threatening the price increases could generate the necessary leverage to moderate pricing through negotiations between patients and drug makers.

Important policy considerations dictate that the courts should not wait for the legislature to deal with the problem. Adversarial litigation grounds pricing moderation in well-established precedents of common law tort, whether IIED or NIED that should at least warrant the formation of a class action and consideration of injunctions or other equitable remedies. Waiting will not create bad policies, path dependencies, backlash, or problems of individualization because the nature of the pricing problem is not a zero sum game. The pricing of drugs by takeover artists does not relate to costs of development. Vague promises to use of profits for the development of future drugs are too tangential to justify the effect on the price paid by the patient, and by the public generally, as well as their effect on depletion of the life savings of individual patients.<sup>284</sup> It constitutes unjust

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284. TransAmerica’s 16th Annual Retirement Survey gives some evidence for how quickly an upper-middleclass person would go through their savings when they have to pay \$30,000 per year for drugs. The company culled data from over 4,500 online interviews of those interested enough to fill out their survey, in order to determine the

enrichment rather than providing for necessary incentive for the development of the drugs. In addition, the price negotiated is not set by a bureaucracy, and not subject to potential capture by industry, or corruption from payoffs or kickbacks. The price gets negotiated by the patients' representatives, supervised by the courts, and advised by experts on both sides, seeking to make the case for fair pricing.

Absent such innovation, the remedy for exorbitant pricing may lie in legislation that is patterned on Bad Faith Insurance legislation. On the other hand, such legislation will be ineffective unless an administrative agency is authorized with its enforcement. Since it is unlikely that the FDA would be empowered in this regard, perhaps the best regulator may be Medicare. Empowering CMS to regulate pricing for Medicare creates its own individualization problems, potentially causing higher prices to be put off on private insurers provided by employers. This will soon be about the end of private employer-provided plans and the political and economic consequences could signal the end of national health insurance.

In the short run, an adversarial litigation approach is the next best alternative and can be developed under existing doctrines of tort law, existing procedures for class certification, and under existing remedies. For maximum effectiveness, Congress should enact national legislation that explicitly gives patients standing to bring suit, and provides private enforcement actions that include rights to class certification, attorneys' fees, injunctions, and punitive damages. Such legislation can insure that the courts avoid the pitfalls of bad faith insurance legislation. It also avoids the problems of bureaucratic solutions that languish without agency resources to withstand industry capture. It remedies delays and inaction of government regulatory schemes that cause emotional harm to patients, and enriches and rewards those most immoral actors in the market for lifesaving drugs.

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average American's retirement savings by age. The results showed that the savings would be: \$16,000 for people in their 20s, \$45,000 for people in their 30s, \$62,000 for people in their 40s, \$117,000 for people in their 50s, and \$172,000 for people in their 60s. Transamerica Center for Retirement Studies, *16th Annual Transamerica Retirement Survey: A Compendium of Findings About American Workers* (Aug. 2015), [http://www.transamericacenter.org/docs/default-source/resources/center-research/16th-annual/tcrs2015\\_sr\\_16th\\_compendium\\_of\\_workers.pdf](http://www.transamericacenter.org/docs/default-source/resources/center-research/16th-annual/tcrs2015_sr_16th_compendium_of_workers.pdf).