RECENT DEVELOPMENTS IN MEDICINE AND THE LAW

Phyra McCandless, Eliot Tracz, James A. Wells, Kim Kocher, Marc L. Penchansky, and Mark T. Smith

I. Liability of Generic Drug Manufacturers Post-*Bartlett* 326
A. *Mutual Pharmaceutical Co. v. Bartlett* 326
B. Cases Applying *Bartlett* 327
1. *Schrock v. Wyeth, Inc.* 328
2. *In re Fosamax Products Liability Litigation* 328
C. Cases Distinguishing *Bartlett* 329
1. *Fullington v. Pfizer, Inc.* 330
2. *Dopson-Troutt v. Novartis Pharmaceutical Corp.* 331
D. Narrow Readings of *Bartlett*'s Applicability 331
1. *Hassett v. Dafoe* 331
2. *Teva Pharmaceuticals USA, Inc. v. Superior Court* 332
E. Conclusion 333
II. Legal Challenges to Nursing Home Arbitration Agreements on Grounds of Unconscionability 333
A. Arbitration Agreement Found Conscionable 334
B. Arbitration Agreement Found Unconscionable 337
C. Further Evidentiary Consideration Necessary to Determine Unconscionability 337
III. Negligent Infliction of Emotional Distress 338

Phyra McCandless is an associate with Girard Gibbs LLP in San Francisco. Eliot Tracz is a second-year student at DePaul University College of Law in Chicago. James A. Wells is an attorney with Meyerson & O'Neill in Philadelphia. Kim Kocher is a partner and Marc L. Penchansky is an associate in the Philadelphia office of White and Williams LLP. Mark T. Smith is a partner at Sherrard & Roe, PLC, in Nashville, Tennessee. Mr. Wells is chair and Ms. McCandless and Messrs. Smith and Tracz are vice chairs of the TIPS Medicine and Law Committee.

A. The Plaintiff as the Primary Victim of Negligence 339
1. Special Relationships 339
2. Special Circumstances 342
3. Independent Tort 343
4. Physical Impact 346
B. The Plaintiff as a Bystander to Negligence 346
C. Physical Manifestations of Emotional Distress 348

This article examines three important topics bearing on the intersection of law and medicine. The first is the June 2013 ruling by the U.S. Supreme Court in *Mutual Pharmaceutical Co., Inc. v. Bartlett*,[1] in which the Court ruled five-to-four that a New Hampshire law creating a design defect cause of action against manufacturers of generic drugs was preempted by federal law. Both *Bartlett* and subsequent cases construing it are examined in detail. The second topic reviews recent developments in the enforceability of arbitration agreements by nursing homes with a specific focus on cases finding such agreements to be conscionable or unconscionable. The third section explores the poorly understood principles of negligent infliction of emotional distress (NIED), discussing recent cases either reaffirming the traditional limitations on recovery for emotional distress or expanding NIED theories of liability.

I. LIABILITY OF GENERIC DRUG MANUFACTURERS POST-*BARTLETT*

The following is a survey of representative prescription drug cases following *Bartlett*. Part A is a brief review of the *Bartlett* facts and reasoning. Part B is a discussion of cases in which *Bartlett* was directly applied. Part C analyzes cases that distinguished *Bartlett*. Finally, Part D evaluates cases applying *Bartlett* narrowly such that some products liability claims against generic drug manufacturers are not preempted by federal law.

A. *Mutual Pharmaceutical Co. v. Bartlett*

Karen Bartlett obtained a generic form of the drug Clinoril in December 2004 to treat her shoulder pain.[2] Clinoril is a brand name for a nonsteroidal anti-inflammatory drug (NSAID) called sulindac.[3] Ms. Bartlett's sulindac was manufactured by Mutual Pharmaceutical Co.[4] Shortly after taking the NSAID, Bartlett developed an acute case of toxic epidermal necrolysis.[5] Sixty to sixty-five percent of the surface of Bartlett's body dete-

1. 133 S. Ct. 2466 (2013).
2. *Id.* at 2472.
3. *Id.* at 2471.
4. *Id.* at 2472.
5. *Id.*

riorated, was burned off, or turned into an open wound.[6] She was placed into a medically induced coma for several months, required a feeding tube for a year, and underwent twelve eye surgeries.[7] Bartlett was left severely disfigured, physically disabled, and nearly blind.[8]

Bartlett sued Mutual in New Hampshire, alleging failure to warn and design defect claims.[9] The failure to warn claim was dismissed, but after a two-week jury trial, Mutual was found liable for design defect and Bartlett was awarded $21 million.[10] The First Circuit upheld the judgment.[11]

The central issue in *Bartlett* was whether the New Hampshire cause of action for design defect was preempted by federal law.[12] New Hampshire state law imposes a duty on drug manufacturers to ensure that the products they market are not unreasonably unsafe.[13] Safety is evaluated by taking into account both chemistry and adequacy of warning about adverse risks.[14] The conflict arises when New Hampshire law is compared to the federal Food, Drug, and Cosmetic Act.[15] Because federal law prevented Mutual from changing the formula of sulindac, New Hampshire's design defect cause of action required Mutual to change the label on its product to include stronger warnings.[16] Relying on its opinion in *PLIVA, Inc. v. Mensing*,[17] the Court found that federal law prohibits generic drug manufacturers from independently changing the labels on their drugs.[18] This meant, according to the Court, that the New Hampshire law required Mutual not to comply with federal law.[19] The Court found that under the Supremacy Clause, "state laws requiring a private party to violate federal laws are pre-empted."[20] In reversing the First Circuit, the Supreme Court held that "state-law design-defect claims that turn on the adequacy of a drug's warnings are pre-empted by federal law."[21]

B. *Cases Applying* Bartlett

Several courts have applied the ruling in *Bartlett* to explain the preemption and dismissal of design defect and failure to warn causes of action.

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 2470.
13. *Id.*
14. *Id.*
15. 21 U.S.C. §§ 301–310.
16. *Bartlett*, 133 S. Ct. at 2470.
17. 131 S. Ct. 2567 (2011).
18. *Bartlett*, 133 S. Ct. at 2470.
19. *Id.*
20. *Id.*
21. *Id.*

This part will focus on representative cases that followed closely on the heels of the Supreme Court opinion. Certiorari has not yet been granted in these cases.

1. *Schrock v. Wyeth, Inc.*[22]

In an Oklahoma case, the plaintiff, Susan Schrock, had been prescribed metoclopramide (Reglan) on three separate occasions between March 2000 and March 2005.[23] In early May 2005, she visited a neurologist with complaints of "neck drawing and arm weakness."[24] Her symptoms worsened in 2006, and in October 2007 she was diagnosed with tardive dyskinesia.[25] The plaintiff and her husband filed suit against several brand and generic manufacturers of metoclopramide, alleging, among other claims, breach of warranty.[26]

On appeal, the Tenth Circuit held that the Schrocks' breach of warranty claims were preempted by federal law.[27] In reviewing the complaint and the Oklahoma law, the court found that the claim referred to the manner in which the product was labeled.[28] Thus, the court ruled, the warranty claims were based on a theory of improper warnings or descriptions on the labeling.[29] Relying heavily on *Bartlett*, the Tenth Circuit court found that the breach of warranty claims were preempted because the generic manufacturer could not have altered the chemical formula or the label without violating federal law.[30]

Furthermore, the court rejected the plaintiff's reliance on *Fullington v. Pfizer, Inc.*[31] and found that the claims were reasonably characterized as design defect or failure to warn cases.[32] The court also indicated that the viability of the design defect cases was brought into doubt by *Bartlett*.[33]

2. *In re Fosamax Products Liability Litigation*[34]

At least one federal court has allowed a *Bartlett* defense to defeat design defect claims against manufacturers of generic drugs. In *In re Fosamax Products Liability Litigation*, the U.S. District Court for the Southern Dis-

22. 727 F.3d 1273 (10th Cir. 2013).
23. *Id.* at 1277.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1276.
28. *Id.* at 1287.
29. *Id.*
30. *Id.* at 1288.
31. 720 F.3d 739 (8th Cir. 2013), discussed *infra* at Part I.C.1.
32. *Schrock*, 727 F.3d at 1289 n.6.
33. *Id.*
34. No. 06 MD 1789, 2013 U.S. Dist. LEXIS 115667 (S.D.N.Y. Aug. 15, 2013).

trict of New York allowed a defendant to prevail on a motion to dismiss in part due to the preemption of the design defect claims under *Bartlett*.[35]

In re Fosamax deals with multidistrict litigation cases in which plaintiffs were prescribed Fosamax (alendronate sodium).[36] After ingesting alendronate sodium over a period of time, the plaintiffs developed osteonecrosis of the jaw.[37] The plaintiffs filed suit, alleging failure to warn, negligence, design defect, breach of warranty, and fraud.[38]

In responding to the motion to dismiss, the plaintiffs argued that *Bartlett* did not "provide a basis for wholesale dismissal of plaintiffs' design defect claims."[39] The district court, however, rejected this claim, stating that the generic manufacturers could not have changed the chemical composition of their product without being subjected to FDA procedures for new drugs.[40] The plaintiffs further argued that *Bartlett* did not apply because they did not seek a label change but instead claimed that the risks of Fosamax outweighed the benefits.[41] The court found this argument to be explicitly preempted by *Bartlett*.[42] Moreover, the plaintiffs did not offer any alternative actions that the generic manufacturers could have taken. Therefore, left to speculate, the court found that conceivable courses of action (at least in the mind of the judge) were preempted by *Bartlett*.[43] The court granted the alendronate sodium generic manufacturers' motion to dismiss the design defect claims.[44] The failure to warn claims were dismissed "except to the extent that plaintiffs may claim that the Generic Defendants failed to timely update their labels,"[45] similar to the action of the California Court of Appeal in *Teva Pharmaceuticals USA, Inc. v. Superior Court*.[46]

C. *Cases Distinguishing* Bartlett

At the time of this writing only two opinions have been published that distinguish the ruling in *Bartlett*. *Fullington v. Pfizer, Inc.*,[47] which is an Eighth Circuit case that helped to create a circuit split on the application of *Bartlett*, is of particular interest because of the newness of *Bartlett* and

35. *Id.* at *17.
36. *Id.* at *1.
37. *Id.*
38. *Id.*
39. *Id.* at *14–15.
40. *Id.* at *15.
41. *Id.* at *16.
42. *Id.*
43. *Id.* at *16–17.
44. *Id.* at *17.
45. *Id.*
46. 217 Cal. App. 4th 96, 107, 114 (2013) (denying the generic manufacturer's petition to reverse a trial court's overruling a demurrer), *review denied* (Sept. 25, 2013), discussed *infra* at Part I.D.2.
47. 720 F.3d 739, 741 (8th Cir. 2013).

the potential that it poses for the Supreme Court to reinforce, clarify, or amend the *Bartlett* ruling.

1. *Fullington v. Pfizer, Inc.*

Joyce Fullington was prescribed metoclopramide from April 2008 until April 2009.[48] After a year of taking the drug, she developed the neurological disorder tardive dyskinesia.[49] She filed suit against the makers of the brand name drug Reglan and the makers of the generic drug metoclopramide.[50] The district court found that all of her claims were either not viable under Arkansas law or preempted by federal law.[51]

In discussing the design defect cause of action, the Eighth Circuit conceded that *Bartlett* "casts doubt on the viability of Fullington's design defect claim."[52] The court pointed out that in *Bartlett* the state of New Hampshire used a risk-utility approach that required a court to weigh (1) the product's value to the public, (2) whether the product's supplier could reduce the product's risk without major expense or a reduction in efficacy, and (3) whether an alternate warning could mitigate unreasonable risk of harm to determine if a drug is unreasonably dangerous.[53] The appeals court explained that it was this test that required generic drug makers to remake their products in violation of federal law, ultimately leading to the ruling in *Bartlett*.[54]

The court then went on to distinguish *Bartlett* by pointing out that Arkansas uses a different test to determine if a drug is unreasonably dangerous.[55] Arkansas prefers to base its determinations on consumer expectations rather than risk utility.[56] The court determined that, because of this difference, it was not yet clear whether Arkansas offered generic manufacturers a chance to alter their unreasonably dangerous products.[57] The Eighth Circuit therefore reversed the dismissal of *Fullington*'s nonwarning design defect and breach of implied warranty claims and remanded for further consideration under *Bartlett*.[58]

Fullington was the first federal appellate court opinion to come down after *Bartlett* was decided and it espoused a narrow reading of the Supreme Court's opinion. The Eighth Circuit found that *Bartlett* applied

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 746.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 746–47.

only to a risk-utility test, like the one used in New Hampshire, which effectively required generic drug manufacturers to remake their products. Shortly afterwards, the Tenth Circuit handed down its opinion in *Schrock*, which adopted a much broader reading of the *Bartlett* decision. The two circuits are now split as to whether *Bartlett* ought to be interpreted narrowly, only applying to circumstances in which the test used by the state mandated a change in the label or design of a product, or whether *Bartlett* barred a wider range of breach of warranty and failure to warn claims.

2. *Dopson-Troutt v. Novartis Pharmaceuticals Corp.*[59]

In *Dopson-Troutt*, the plaintiff was diagnosed with breast cancer, which metastasized to her hip and pelvic bone.[60] Her oncologist prescribed Aredia and Zometa, which are bisphosphonate drugs produced by Novartis.[61] She was infused with Aredia and then Zometa from 1999 until May 2005.[62] After having a tooth pulled, she began experiencing pain caused by osteonecrosis of the jaw.[63] She and her husband filed suit, alleging in part that the manufacturer's labeling was responsible for her injuries.[64]

The district court addressed *Bartlett* in its order on Novartis's motion in limine.[65] Novartis argued that if the FDA prohibits manufacturers from making label changes without FDA approval, the plaintiffs' arguments are preempted.[66] In distinguishing *Bartlett*, the district court noted that the *Bartlett* decision does not apply to the changes-being-effected (CBE) regulation in question.[67] In reaching this conclusion, the court determined that Novartis had focused its argument on *Bartlett*'s statements about a statute that fell outside of the CBE.[68] The Novartis motion in limine was therefore partially denied.[69]

D. *Narrow Readings of* Bartlett*'s Applicability*

1. *Hassett v. Dafoe*[70]

Hassett v. Dafoe is another case arising out of injuries associated with metoclopramide.[71] Hassett's injuries were representative of over 2,000 other

59. No. 8:06-CV-1708-T-24-EAJ, 2013 U.S. Dist. LEXIS 135834 (M.D. Fla. Sept. 23, 2013).
60. *Id.* at *1–2.
61. *Id.* at *2.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at *13.
67. *Id.* at *18–19.
68. *Id.* at *18.
69. *Id.* at *22.
70. 74 A.3d 202, 208 (Pa. Super. Ct. 2013), *reh'g denied* (Oct. 2, 2013).
71. *Id.* at 205.

plaintiffs.[72] Hassett filed suit against the generic manufacturers of metoclopramide.[73] The defendants appealed an order overruling their objections in a demurrer to the complaint.[74] The Pennsylvania Superior Court rendered its opinion on the interlocutory appeal.[75]

The generic defendants attempted to characterize all of the plaintiff's claims as failure to warn claims, which would require a change in the label.[76] The plaintiff argued that the complaint did not frame every issue as a failure to warn issue.[77] Instead, he argued that the counts I, II, and III of the complaint alleged strict liability claims and negligence claims on the theory that the defendant knew it was selling and marketing a drug that was known to be unreasonably dangerous or defective.[78] Under such reasoning, the court found that the ability or duty to redesign a product is not an element of the cause of action and therefore that the generic defendants could comply with both federal and state law.[79] The court distinguished *Bartlett*, finding that it did not address whether strict products liability claims would be preempted.[80]

2. *Teva Pharmaceuticals USA, Inc. v. Superior Court*[81]

The *Teva* case in California arose out of another Fosamax case in which Olga Pikerie suffered injuries related to alendronate sodium.[82] Fosamax and alendronate sodium are used in the treatment and prevention of osteoporosis.[83] Pikerie was prescribed and first took the drug in 2006 and continued through 2011.[84] In April 2011, Pikerie suffered a fractured femur and filed suit against the manufacturers of Fosamax and alendronate sodium, alleging that the drug might cause fracture of the femur due to the suppression of bone turnover.[85] Upon motion for demurrer, all parties agreed that there was one issue to be resolved: did the complaint allege sufficient facts to state a cause of action that was not preempted by federal law?[86]

Among the allegations stated by Pikerie was a claim that the defendants failed to update the labels of their alendronate sodium products to be con-

72. *Id.* at 205 n.1.
73. *Id.* at 205.
74. *Id.*
75. *Id.* at 206.
76. *Id.* at 211.
77. *Id.* at 212.
78. *Id.*
79. *Id.*
80. *Id.* at 213.
81. 217 Cal. App. 4th 96 (2013), *review denied* (Sept. 25, 2013).
82. *Id.* at 101.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 104–05.

sistent with the updated label of the reference label drug (the original drug, Fosamax).[87] The court found these allegations sufficient to sustain a cause of action based on the failure to update the warning labels.[88] Furthermore, the court found that this claim was not preempted by federal law.[89] The court noted that had Pikerie alleged that the generic defendants had failed to update their labels beyond the scope of the updates made to the Fosamax label, then the claims would be preempted.[90] The court further noted that the doctrine of impossibility preemption did not apply, as the generic manufacturers were able to comply with their federal duty to match the label of alendronate sodium to the label of Fosamax, as well as comply with their state law duty to prevent harm to the consumers of their product.[91]

Although *Teva* was decided by the California Court of Appeal just before *Bartlett* and does not explicitly refer to *Bartlett*, review was denied even after the *Bartlett* ruling.[92] State claims for failure to update a label and failure to adequately communicate were not preempted under federal law.[93]

E. *Conclusion*

The cases post-*Bartlett* show that courts have not been hesitant to apply *Bartlett* to dismiss design defect claims against generic manufacturers; however, in several instances, courts have challenged the scope of the *Bartlett* ruling. The creation of a circuit split within the first two months following the release of the *Bartlett* decision raises legitimate questions as to how broadly *Bartlett* will apply going forward. At the time of writing, certiorari has not been granted in these cases, yet it seems likely that certiorari will be granted given the reaction to *Bartlett* in narrowing claims against generic drug manufacturers. Whether the Supreme Court will side with the Eighth Circuit in *Fullington* and adopt a narrow interpretation or uphold the broader interpretation espoused by the Tenth Circuit in *Schrock* remains up for debate.

II. LEGAL CHALLENGES TO NURSING HOME ARBITRATION AGREEMENTS ON GROUNDS OF UNCONSCIONABILITY

When a resident is admitted to a nursing home, as part of the admission process the resident or a family member is invariably asked to sign forms

87. *Id.* at 107.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 108.
92. Teva Pharm. USA, Inc. v. Super. Ct., No. S212258, 2013 Cal. LEXIS 7909 (Sept. 25, 2013).
93. *Teva*, 217 Cal. App. 4th at 101.

that often include a provision that any subsequent disputes between the resident and the nursing home be resolved through binding arbitration. Nursing home arbitration agreements are contested on a variety of legal grounds. Whether an agreement is unenforceable typically involves an analysis of procedural and substantive unconscionability. Procedural unconscionability involves the fairness of the bargaining process; substantive unconscionability considers the fairness of the terms of the contract itself.[94] Whether procedural or substantive, the unconscionability analysis is dependent on the specific factual issues of each case, as is highlighted below.

As described below, an examination of cases from the survey period suggests that nursing home residents seeking to void arbitration agreements as unconscionable generally have an uphill battle. The factual inquiries typically involve whether claims are exempted from arbitration in an unreasonably one-sided manner; the circumstances surrounding the execution of the agreement to include the resident's mental awareness; the availability of other nursing home options; whether the agreement was presented as take-it-or-leave-it; and whether arbitration will be prohibitively expensive.

A. *Arbitration Agreement Found Conscionable*

In *Estate of Eleanor Hodges v. Green Meadows*,[95] the resident's daughter signed an arbitration agreement on her mother's behalf pursuant to a power of attorney.[96] Applying Pennsylvania law, the court stated that unconscionability can be found if the party seeking to invalidate the contract proves "an absence of meaningful choice together with contract terms which are unreasonably favorable to the other party."[97] Moreover, Pennsylvania law provides that both procedural and substantive unconscionability must be shown to invalidate an arbitration agreement.[98] The standard for procedural unconscionability required the daughter to show that she lacked a meaningful choice when she signed the agreement, as is often found in a contract of adhesion.[99] The factors considered include whether a take-it-or-leave-it standard form was involved, the parties' relative bargaining positions, and the degree of economic compulsion.[100]

After analyzing the daughter's deposition testimony and affidavit, the court determined that the agreement was procedurally conscionable because the daughter had a meaningful choice when she signed the

94. Clark v. Renaissance W., LLC, 307 P.3d 77, 79 (Ariz. Ct. App. 2013).
95. No. 12-CV-01698, 2013 U.S. Dist. LEXIS 46878 (E.D. Pa. Mar. 29, 2013).
96. *Id.* at *11.
97. *Id.* at *20 (quoting Witmer v. Exxon Corp., 434 A.2d 1222, 1228 (Pa. 1981); Hopkins v. New Day Fin., 643 F. Supp. 2d 704, 714 (E.D. Pa. 2009)).
98. *Id.* at *20–21.
99. *Id.* at *21.
100. *Id.* at *22.

agreement.[101] In reaching this finding, the court noted that (1) the daughter indicated she read and understood the agreement and had the opportunity to ask questions, (2) the agreement had a one-week revocation period and the daughter indicated she did review it again, (3) the facility was one of two that met the resident's needs and the daughter chose the one that was more convenient, and (4) although the daughter asserted in her affidavit that she was told she must sign the documents for her mother to be admitted, her deposition testimony did not support this contention.[102] Because the agreement was procedurally conscionable, the court did not evaluate substantive unconscionability.[103]

In *THI of New Mexico at Vida Encantada, LLC v. Archuleta*,[104] the resident was mentally competent and sharp when admitted to the nursing home.[105] Although she had not signed a power of attorney, her daughter signed the arbitration agreement on the resident's behalf without her mother's express permission.[106] Nevertheless, the court determined that the daughter had implied authority to agree to arbitration.[107] Thus, one of the challenges to the agreement that the court addressed was whether the agreement was unconscionable.

Under New Mexico law, substantive and procedural unconscionability have an inverse relationship in that "the more substantively oppressive a contact term, the less procedural unconscionability may be required for a court to conclude that the offending term is unenforceable."[108] Substantive unconscionability inquires whether the contract terms unreasonably benefitted one party over another.[109] The personal representative of the resident's estate argued that the agreement was substantively unconscionable because (1) the arbitral body identified in the agreement purportedly imposed unreasonable costs, (2) the pool of arbitrators was purportedly unfair and not neutral, and (3) the agreement required punitive damages to be proven by clear and convincing evidence in contravention of New Mexico law's preponderance of the evidence standard.[110] The court rejected these arguments because the nursing home agreed to pay all administrative costs and adhere to a preponderance of evidence standard for punitive damages. No evidence in the record supported the asser-

101. *Id.* at *23.
102. *Id.* at *23–27.
103. *Id.* at *27–28.
104. No. Civ. 11-399 LH/ACT, 2013 U.S. Dist. LEXIS 80584 (D.N.M. Apr. 30, 2013).
105. *Id.* at *4.
106. *Id.* at *4–5.
107. *Id.* at *23–26.
108. *Id.* at *45 (quoting Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 908 (N.M. 2009)).
109. *Id.*
110. *Id.* at *45–49.

tion that the potential arbitrators would not be neutral and fair.[111] The court likewise rejected the argument that the agreement was procedurally unconscionable, focusing on the fact that there was no evidence to show that other facilities were not available, the arbitration clause was labeled in bold directly above the signature lines, and there was no evidence of high-pressure tactics or other improper conduct by the nursing home.[112]

Harrison v. Winchester Place Nursing & Rehabilitation Center[113] involved a substantive unconscionability challenge to a nursing home arbitration agreement.[114] Although it was stipulated that the agreement was procedurally unconscionable, Ohio law requires the party asserting unconscionability to prove both procedural and substantive unconscionability.[115] The resident first argued that because there were other defendants in the case that were not bound by the arbitration agreement, enforcement of the arbitration agreement would improperly require separate proceedings that would negatively impact judicial economy and create the possibility of inconsistent verdicts.[116] The court rejected this argument because several courts had previously enforced arbitration, even though some parties were not subject to arbitration.[117]

The resident's other challenges to the fairness of the terms of the agreement were also largely predicated on the *Wascovich* case. The agreement at issue in *Wascovich* was deemed substantively unconscionable based on a lack of procedural protections, the potential for an increase in the number of depositions and hearings, duplicate discovery, and expert testimony and expenses in two forums.[118] The *Harrison* court also declined to follow *Wascovich* with respect to these arguments, choosing instead to follow other Ohio cases holding that arbitration agreements with similar terms were found to be substantively conscionable.[119] Finally, the *Harrison* court rejected the resident's argument that the arbitration agreement was not commercially reasonable for the following reasons: the arbitration agreement was not buried in the admission agreement but was instead a separate four-page document, the resident had the right to seek counsel and the agreement was optional, the agreement was not a precondition for admission, the resident had the right to cancel within thirty days,

111. *Id.*
112. *Id.* at *49–52.
113. 996 N.E.2d 1001 (Ohio Ct. App. 2013).
114. *Id.* 1003.
115. *Id.* at 1006.
116. *Id.* at 1007–08.
117. *Id.* at 1008. The court declined to follow *Wascovich v. Personacare of Ohio Inc.*, 943 N.E.2d 1030 (Ohio Ct. App. 2010), with respect to this argument because *Wascovich* was factually distinguishable and not controlling authority. *Harrison*, 996 N.E.2d at 1008–10.
118. *Harrison*, 996 N.E.2d at 1009.
119. *Id.* at 1011–13.

the bulk of the expense of arbitration was to be paid by the nursing home, and the waiver of a right to a jury trial was in boldface type.[120]

B. *Arbitration Agreement Found Unconscionable*

Courts did find some nursing home arbitration agreements to be unconscionable during the survey period. In *Clark v. Renaissance West, LLC*,[121] the court held that the agreement was substantively unconscionable because the resident would be unable to afford to arbitrate his claims.[122] The court noted that substantive unconscionability can be found if the expense of arbitration is so excessive as to deny residents the opportunity to vindicate their rights.[123] The resident presented expert testimony at an evidentiary hearing to establish that the case would take days to arbitrate at considerable expense and further demonstrated that he lacked the financial resources to pay the expense.[124] This evidence, together with the fact that the arbitration agreement did not provide for a reduction or waiver of the resident's fees based on financial hardship, led the court to affirm the trial court's determination that the agreement was unconscionable.[125]

C. *Further Evidentiary Consideration Necessary to Determine Unconscionability*

Some courts did not decide whether the arbitration agreement was unconscionable, but instead remanded for further evidentiary consideration. These cases nevertheless illustrate factual considerations that commonly bear on the issue of unconscionability. For example, in *Bargman v. Skilled Healthcare Group, Inc.*,[126] the resident contended that the agreement was unreasonably one-sided because the nursing home's claims would be excluded from the arbitration provision.[127] Arbitration agreements can be found substantively unconscionable where the drafter unreasonably reserves the vast majority of its claims for the courts while the weaker party is limited to arbitration.[128] In this case, the agreement provided that issues related to resident discharge and collection claims would be exempted from arbitration.[129] The court found that exempting discharge-related claims from arbitration was proper because these issues were required to be handled in administra-

120. *Id.* at 1013–14.
121. 307 P.3d 77 (Ariz. Ct. App. 2013).
122. *Id.* at 82.
123. *Id.* at 79.
124. *Id.* at 80–81.
125. *Id.* at 82.
126. 292 P.3d 1 (N.M. Ct. App. 2012).
127. *Id.* at 3.
128. *Id.* at 4.
129. *Id.* at 2.

tive proceedings pursuant to statute.[130] With respect to the exemption for collection claims, the court rejected the nursing home's argument that this exemption applied equally to the parties because as a practical matter only the nursing home would pursue a collection action.[131] Instead, the court remanded the case for an evidentiary hearing on the nursing home's claim that excluding collection claims was not unreasonable or unfair.[132]

In *Strausberg v. Laurel Healthcare Providers, LLC*, the Supreme Court of New Mexico also remanded a nursing home arbitration agreement case.[133] The *Strausberg* court emphasized that because the Federal Arbitration Act requires that agreements to arbitrate must be treated like any other contract, the burden of proving unconscionability rests with the party seeking to invalidate the contract.[134] At the trial court level, the resident demonstrated the following: (1) she was confused when she signed the agreement, (2) the paperwork was not explained to her, (3) she was given ten minutes to sign the paperwork, (4) she did not have her reading glasses with her, and (5) she felt disoriented at the time.[135] The nursing home, on the other hand, presented a witness with no recollection of the resident or her signing of the agreement, and it was established that the form arbitration agreement was offered to the resident as a precondition of admission on a take-it-or-leave-it basis.[136]

Nevertheless, the trial court determined that the resident knew she was significantly limiting her right to seek recourse in the court system. Holding that her understanding of the arbitration agreement was a controlling factor, the court found the agreement substantively conscionable.[137] The supreme court's charge to the New Mexico Court of Appeals on remand was to determine, in light of the resident's burden of proof, whether the trial court erred by compelling arbitration.[138]

III. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The tort of negligent infliction of emotional distress (NIED) is a well-recognized exception to the prohibition on recovery for emotional injury resulting from ordinary negligence. From its initial limitation to emotional distress caused by physical injury, NIED has been extended to the plaintiff in the "zone of danger," the bystander who witnesses trau-

130. *Id.* at 4.
131. *Id.* at 5.
132. *Id.*
133. 304 P.3d 409 (N.M. 2013).
134. *Id.* at 419.
135. *Id.* at 413.
136. *Id.* at 413–14.
137. *Id.* at 414.
138. *Id.* at 423.

matic injury, and, most recently, those with special relationships or circumstances. In fact, some courts have recently created an independent tort circumscribed only by general negligence principles. Still, NIED does not provide a remedy for all compensable emotional trauma.

A. *The Plaintiff as the Primary Victim of Negligence*

The first generally recognized NIED theory, the physical impact rule, limits recovery to emotional distress flowing from a physical injury. The plaintiff's mental suffering is recoverable if it is directly traceable to physical injury caused by the defendant's negligence. The historical rule, precluding emotional distress damages without physical impact, has recently been reaffirmed in some jurisdictions. But, in others, the physical impact rule has given way to exceptions involving special circumstances and relationships or even completely abandoned.

1. Special Relationships

The viability of NIED claims without physical impact has been addressed in recent cases involving special relationships, with divergent results.

In *Miranda v. Said*,[139] the Supreme Court of Iowa allowed former clients to pursue damages for emotional distress in a legal malpractice action for faulty immigration advice. In *Miranda*, the parents came with their son to the United States without documentation.[140] Although the father received authorization to work, his status was later revoked.[141] Facing deportation, the father retained counsel.[142] The attorney advised them to return to Ecuador, await their son's imminent award of citizenship, and gain readmittance upon application asserting "extreme hardship."[143] The attorney erroneously advised that this "plan . . . had a ninety-nine percent chance of success."[144] The application for reentry was denied and the parents were subject to a ten-year bar to readmission because they had left the United States voluntarily.[145] The attorney's advice led to the separation of the family, who sued for NIED.[146]

The Iowa Supreme Court noted that a party has "a duty to exercise ordinary care to avoid causing emotional harm"[147] when its actions are "so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed," that a breach will likely result

139. 836 N.W.2d 8 (Iowa 2013).
140. *Id.* at 11.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 12 (citing 8 U.S.C. § 1182(a)(9)(B)(i)).
146. *Id.* at 13.
147. *Id.* at 14 (citing Oswald v. LeGrand, 453 N.W.2d 634, 639 (Iowa 1990)).

in mental suffering or anguish and the parties should know that suffering will result from the breach.[148] The court acknowledged that it had never specifically held that emotional distress damages are recoverable in a legal malpractice action.[149] The court held that, in order to determine whether emotional distress damages are available, Iowa courts should "consider the policy considerations surrounding a particular class of cases and whether negligent conduct is very likely to cause severe emotional distress."[150] To aid in identification of those attorney-client relationships that are likely to cause emotional distress, the court identified the primary consideration as the remote degree of connection between the negligent conduct and the harm to the plaintiff.[151] Applying these considerations, the court held that the attorney's representation in this immigration matter was charged with emotions.[152] Therefore, it was foreseeable that emotional distress would accompany the prolonged separation of parents and child.[153] Thus, the court permitted the plaintiffs to seek emotional-distress damages from their counsel.

In *Vincent v. Devries*,[154] the Supreme Court of Vermont also signaled that emotional distress damages could be recoverable in legal malpractice actions.[155] The plaintiff was sued by the buyers of his home after he refused to complete the sale.[156] The plaintiff's attorney who defended the suit allegedly failed to file a timely answer, affirmative defenses, or a counterclaim and the plaintiff nearly lost his home as a result.[157] In the malpractice suit, the trial court rejected the attorney's claim that emotional distress damages are not available in a legal malpractice action,[158] and a jury awarded the plaintiff $80,000 in emotional distress damages.[159]

Like the Supreme Court of Iowa in *Miranda*, the Supreme Court of Vermont had never decided whether emotional distress damages were available in legal malpractice actions.[160] Although the court did not identify the claim as NIED, it acknowledged the general rule that "absent

148. *Id.* (citing Lawrence v. Grinde, 534 N.W.2d 414, 420–21 (Iowa 1995)).
149. *Id.* at 24.
150. *Id.* at 29–30.
151. *Id.* at 30.
152. *Id.* at 33.
153. *Id.* at 32 (citing McEvoy v. Helikson, 562 P.2d 540, 542, 544 (Or. 1977) (holding emotional distress damages were available to plaintiff when attorney's negligent representation resulted in ex-wife fleeing with their child to Switzerland), *superseded by rule on other grounds as stated in* Moore v. Willis, 767 P.2d 62, 64 (Or. 1988)).
154. 72 A.3d 886 (Vt. 2013).
155. *Id.* at 897.
156. *Id.* at 888.
157. *Id.* at 889.
158. *Id.* at 890.
159. *Id.*
160. *Id.*

physical impact emotional distress damages are only recoverable in cases of ordinary negligence when the distress is accompanied by substantial bodily injury or sickness."[161] The court then stated that the general rule precluding emotional distress damages in ordinary negligence claims without physical impact is well-established; however, the reasoning for this distinction is unclear.[162] Specifically, the case law failed to "explain why a claim of emotional distress by one who has experienced a physical impact of some sort is significantly more reliable."[163] The court surmised that because a per se ban on emotional distress damages in cases not involving a physical impact is "broader than its rationales would support," courts have been more willing to carve out exceptions to this rule.[164] With this background, the court conceded that the majority of jurisdictions still do not allow recovery for emotional distress damages in legal malpractice actions absent some intentional act, physical injury, or particularly egregious conduct.[165]

Although there is a growing trend to permit emotional distress damages when counsel performs services "involving deeply emotional responses in the event of a breach,[166] the Vermont court found that this representation did not involve a deeply emotional response.[167] Characterizing the loss as "economic" rather than personal, the court concluded that the threatened loss of one's home is not as profound a loss as loss of liberty or one's child and, therefore, cannot support emotional distress damages.[168] Because the plaintiff could never meet the standards of an NIED claim, the court concluded that it did not need to explicitly hold that NIED damages were available in legal malpractice claims.[169]

In *Kodsi v. Gee*,[170] a New York appellate court dismissed an emotional distress claim in a legal malpractice action,[171] relying on *Dombrowski v. Bulson*,[172] in which the New York Court of Appeals announced a wholesale rejection of emotional distress damages as a remedy for legal malpractice.[173] In *Dombrowski*, the plaintiff alleged that his counsel's malpractice

161. *Id.* at 891 (citing Fitzgerald v. Congleton, 583 A.2d 595, 600 n.7 (Vt. 1990)).
162. *Id.*
163. *Id.* at 892.
164. *Id.*
165. *Id.* at 894.
166. *Id.* at 894–95 (quoting Miranda v. Said, 836 N.W.2d 8, 8 (Iowa 2013)).
167. *Id.* at 897.
168. *Id.*
169. *Id.* ("[a]ssuming without deciding that Vermont law follows the modern trend of allowing damages under certain circumstances for serious emotional distress in legal malpractice claims and that the evidence in this case could support a finding of sufficiently serious emotional anguish to support such a claim").
170. 954 N.Y.S.2d 16 (App. Div. 2012).
171. *Id.* at 17.
172. 19 N.Y.3d 347 (2012).
173. *Kodsi*, 954 N.Y.S.2d at 18.

led to his improper incarceration. The plaintiff served over five years in prison after he was convicted of sex crimes against a child.[174] Upon petition for habeas relief, the reviewing court found the "errors by defense counsel made it difficult for the jury to make a reliable assessment of the 'critical issue' of the victim's credibility" and overturned his conviction.[175] The Court of Appeals recognized that New York courts generally have rejected claims for emotional distress in legal malpractice actions stemming from representation in civil cases.[176] But the court noted that the intermediate appellate courts were split over whether such damages should be available in criminal cases that lead to an improper loss of liberty.[177] Ultimately, the court found "no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages."[178]

In *Snow v. Chartway Federal Credit Union*,[179] the Utah Court of Appeals considered whether the relationship between borrower and lender could lend itself to an NIED claim. The plaintiff sought emotional distress damages from his credit union because the credit union did not allow another buyer to assume his loan, delayed approval of the short sale, and then foreclosed on his home.[180] The court reviewed the note and found that the credit union was not in fact required to approve an assumption of the loan or a short sale of the property.[181] In rejecting the NIED claim, the court reasoned that, while foreclosure of a home is traumatic, it is not so traumatic that it causes a "reasonable person to suffer severe injury rendering him unable to cope in his daily life."[182] In the end, the court found that the credit union was merely collecting the collateral the borrower agreed to pledge as security for the loan. Therefore, emotional distress damages were not warranted.[183]

2. Special Circumstances

In *Lester v. Exxon Mobil Corp.*,[184] the Court of Appeals of Louisiana addressed a "special circumstances" exception to the physical impact requirement in a fear of cancer claim.[185] The court explained that a "special

174. *Dombrowski*, 19 N.Y.3d at 349–50.
175. *Id.* at 350.
176. *Id.* at 351 (internal citations omitted).
177. *Id. Compare* Wilson v. City of New York, 294 A.D.2d 290, 292 (N.Y. App. Div. 2002) (NIED damages were not available in criminal legal malpractice actions), *with* Dombrowski v. Bulson, 79 A.D.3d 1587, 1589–90 (N.Y. App. Div. 2010).
178. *Dombrowski*, 19 N.Y.3d at 352.
179. 306 P.3d 868 (Utah. Ct. App. 2013).
180. *Id.* at 872.
181. *Id.*
182. *Id.* at 873.
183. *Id.*
184. 120 So. 3d 767 (La. Ct. App. 2013).
185. *Id.* at 774.

circumstances" exception, recognized under Louisiana law, allows recovery where there is an "especial likelihood of genuine and serious emotional distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious."[186] In *Lester*, pipe yard workers allegedly suffered a fear of contracting cancer as a result of occupational exposure to naturally occurring radioactive material.[187] The evidence showed that the workers sustained lifetime exposure to various radioactive isotopes in excess of safe limits, increasing the risk of developing cancer.[188] After learning of their increased cancer risk, the workers had daily concerns and worries about the future of their health.[189] The workers did not, however, allege any actionable physical injury. Based on the unique facts and circumstances of the case, the court affirmed the award of emotional distress damages for fear of developing cancer.[190]

3. Independent Tort

In *Osborne v. Kenney*,[191] the Supreme Court of Kentucky considered whether to reject the continued vitality of the physical impact requirement for NIED claims in its entirety. The *Osborne* plaintiff was sitting alone at home when an airplane crashed through her roof, sliced through her chimney, and set her house afire.[192] No debris from the airplane or the house struck the plaintiff, and she suffered no physical injury as a result of the crash.[193] The plaintiff hired counsel who untimely filed suit against the pilot seeking, among other things, emotional distress damages.[194] The action against the pilot was dismissed because it was barred by the statute of limitations.[195] The plaintiff then filed a legal malpractice action against her counsel.[196]

In Kentucky, when a plaintiff's claim is lost because it is untimely filed, the plaintiff must recreate the untried action in her suit against the allegedly deficient counsel and counsel may present any defenses available to the defendant in the underlying action.[197] In *Osborne*, the attorney asserted that his former client could not have succeeded in a claim for emotional distress damages against the pilot because she did not experience a physical impact.[198]

186. *Id.*
187. *Id.* at 776.
188. *Id.*
189. *Id.* at 776–77.
190. *Id.* at 777.
191. 399 S.W.3d 1 (Ky. 2012).
192. *Id.* at 6.
193. *Id.*
194. *Id.*
195. *Id.* at 7.
196. *Id.*
197. *Id.* at 10.
198. *Id.* at 5.

The Kentucky Supreme Court acknowledged its long-established view that "an action will not lie for fright, shock, or mental anguish which is unaccompanied by physical contact or injury."[199] But the court found that the physical impact rule "has proven difficult in its application and has been repeatedly stretched and diluted."[200] For example, Kentucky courts have previously found an impact caused by a bombardment of the body with x-rays.[201] The trial court in this matter found that if exposure to x-rays were sufficient, then the reverberation of the plaintiff's house and sound waves emitted upon the plane's impact were sufficient to justify recovery.[202]

Rather than mold the definition of physical impact to fit the fact pattern, the Kentucky Supreme Court did away with the impact rule. After determining that most jurisdictions have rejected the impact rule, the court was persuaded that "these cases should be analyzed under general negligence principles."[203] That is, a plaintiff must show that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff sustained injury, and (4) there is legal causation between the defendant's breach and the plaintiff's injury.[204] However, "[d]istress that does not significantly affect the plaintiffs [sic] everyday life or require significant treatment will not suffice."[205] Rather, the Kentucky court borrowed from Tennessee case law and held that the plaintiff must show "severe" or "serious" emotional injury,[206] which is defined as an "emotional injury . . . where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case."[207] Further, the court also required a plaintiff to present expert medical testimony or scientific proof to support its claim of emotional distress.[208] The court was satisfied that these changes balanced the concerns of fraud and frivolous litigation that underlie the need for the impact rule with "societal advancements in mental health treatment and education, in a manner that assures individuals suffering from legitimate emotional injuries will be able to seek recovery."[209]

199. *Id.* at 14 (citing Deutsch v. Shein, 597 S.W.2d 141, 145–46 (Ky. 1980) (internal alterations omitted)).

200. *Id.* at 15.

201. *Id.* (citing *Deutsch*, 597 S.W.2d at 146).

202. *Id.* at 16.

203. *Id.* at 17.

204. *Id.* (citing Restatement (Third) of Torts: Phys. & Emot. Harm § 46 cmt. 1 & § 47 cmt. j).

205. *Id.*

206. *Id.* (citing Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996)).

207. *Id.* (citing Paugh v. Hanks, 451 N.E.2d 759, 765 (Ohio 1983); Restatement (Second) of Torts § 46).

208. *Id.* (citing *Camper*, 915 S.W.2d at 446).

209. *Id.* at 18.

In *Bylsma v. Burger King Corp.*,[210] the Supreme Court of Washington considered a deputy sheriff's claim for emotional distress caused by his discovery of a glob of phlegm on his hamburger.[211] The deputy sheriff alleged that he suffered "ongoing emotional distress, including vomiting, nausea, food aversion, and sleeplessness" that led him to seek treatment from a mental health professional.[212] Although the plaintiff sued for emotional distress damages under the Washington Product Liability Act, the court relied on its analysis of previous NIED claims.[213]

The court held that emotional distress damages would be available to the deputy sheriff even in the absence of physical injury.[214] The court explained that the right to compensation for emotional distress must be balanced with the competing interest of preventing fraudulent claims and ensuring that "tortfeasors are held responsible only insofar as is commensurate with their degree of culpability."[215] In Washington, emotional distress is recoverable in the absence of physical injury only where emotional distress is (1) within the scope of foreseeable harm of the negligent conduct, (2) a reasonable reaction given the circumstances, and (3) manifest by objective symptomatology.[216] "The scope of foreseeable harm of a given type of conduct depends on 'mixed considerations of logic, common sense, justice, policy, and precedent.' "[217] The court then surveyed those cases where emotional distress damages were permitted in the state without an attendant physical injury, e.g., improper burial of an infant child.[218] The court concluded that "food consumption is a personal matter and contaminated food product . . . is well within the scope of foreseeable harmful consequences" that will cause emotional distress.[219]

In *Horne v. Cumberland County Hospital System, Inc.*,[220] the North Carolina Court of Appeals considered whether a former employee could bring an action for NIED against her former employer for being "written-up" and ultimately discharged from her duties.[221] The court set forth the elements of a claim for NIED: (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff to suffer severe emotional distress, and (3) the conduct

210. 293 P.3d 1168 (Wash. 2013) (en banc).
211. *Id.* at 1169.
212. *Id.*
213. *Id.* at 1170–71.
214. *Id.* at 1171.
215. *Id.* at 1170.
216. *Id.* (citing Hunsley v. Giard, 553 P.2d 1096, 1103 (Wash. 1976)).
217. *Id.* at 1171 (citing King v. City of Seattle, 525 P.2d 228, 235 (Wash. 1974) (quoting THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 110 (1906))).
218. *Id.*
219. *Id.*
220. 746 S.E.2d 13 (N.C. Ct. App. 2013).
221. *Id.* at 16.

did in fact cause the plaintiff to suffer severe emotional distress.[222] The court found that the employee failed to establish both the first and third elements of an NIED claim.[223]

The court determined that the employee failed to prove her claims as to the first prong for two reasons. First, the plaintiff failed to show that the employer owed a legal duty to its employee, as required by any negligence action.[224] Further, the alleged incidents were premised on allegations of intentional conduct rather than negligent conduct.[225] The court held that allegations of intentional conduct, even when liberally construed, cannot satisfy the negligence element of an NIED claim.[226]

The third element requires severe emotional distress, defined as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."[227] The employee only cursorily alleged "severe emotional distress" without supporting detail.[228] In the absence of an allegation concerning the type, manner, or degree of severe emotional distress, the court held that the plaintiff's complaint failed to state a valid NIED claim.[229]

4. Physical Impact

In *Brewer v. HR Policy Association*,[230] the U.S. District Court for the District of Columbia confirmed that the tort of NIED is limited under District of Columbia law to either (1) emotional distress resulting from direct physical injury or (2) if there is no physical impact, emotional distress caused by the plaintiff's presence in the zone of physical danger created by the defendant's negligence.[231] The court, therefore, dismissed an employee's NIED claim based on wrongful termination because it did not involve any allegation of physical harm or fear for her safety.[232]

B. *Plaintiff as a Bystander to Negligence*

In a bystander claim, it is the close relative of the primary victim, not the primary victim, who owns the cause of action for bystander damages. The

222. *Id.* at 19 (citing Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A., 395 S.E.2d 85, 97 (N.C. 1990)).
223. *Id.* at 19–20.
224. *Id.*
225. *Id.*
226. *Id.* at 20 (citing Scheaffer v. County of Chatham, 337 F. Supp. 2d 709, 734 (M.D.N.C 2004)).
227. *Id.* at 19–20 (citing *Johnson*, 395 S.E.2d at 97)).
228. *Id.* at 20.
229. *Id.*
230. 887 F. Supp. 2d 118 (D.D.C. 2012) (applying District of Columbia law).
231. *Id.* at 126.
232. *Id.*

universally recognized standard for bystander liability requires proof that the bystander plaintiff (1) was located near the scene of the accident, (2) contemporaneously observed the injury-producing event, and (3) is closely related to the primary victim. The contemporaneous observance requirement has spawned considerable litigation over the years. Courts, for example, have wrestled with the questions of whether the contemporaneous observance requirement is fulfilled where there is a delay between the negligent act and the harmful result, when the alleged negligent conduct is not an affirmative act but an omission, or when the bystander plaintiff is not aware that the defendant's conduct is negligent at the time of loss.

In *Fortman v. Forvaltningsbolaget Insulan AB*,[233] the California Court of Appeal recently confirmed that a plaintiff meets the contemporaneous observance requirement under California law only where (1) the defendant's negligent conduct is observable, (2) the plaintiff contemporaneously witnesses the injury, and (3) the plaintiff is contemporaneously aware that the defendant's conduct is causing the harm.[234] Absent an understanding perception of the causal connection between the defendant's conduct and the injury, the court held that emotional distress damages are not recoverable.[235] Although the court held that the plaintiff must contemporaneously perceive the causal connection between the defendant's conduct and the resulting injury, the court noted that the plaintiff need not be aware that the defendant's conduct was negligent at the time.[236]

In reaching its decision, the court first reaffirmed that NIED is not an independent tort under California law.[237] To dictate limits on bystander recovery, the court confirmed that the mandatory test for bystander liability requires proof that the plaintiff (1) is closely related to the injured victim, (2) contemporaneously observes the injury-producing event, and (3) suffers severe emotional distress.[238] The court then surveyed California law to determine whether the plaintiff must be contemporaneously aware of the causal connection between the defendant's conduct and the harm.[239]

Beginning with medical malpractice cases, the court noted that unobservable medical negligence, as in a failure to diagnose and treat, does not give rise to a viable NIED claim because the plaintiff cannot meaningfully perceive the defendant's conduct as harmful.[240] Reviewing accident cases, the court stated that, "to the extent there is any flexibility in the [contem-

233. 151 Cal. Rptr. 3d 320 (Ct. App. 2013).
234. *Id.* at 325–27.
235. *Id.* at 327.
236. *Id.* at 325.
237. *Id.* at 323.
238. *Id.* at 324.
239. *Id.* at 325–44.
240. *Id.* at 325–26.

poraneous observance requirement], case law permits recovery based on an event perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative."[241] Turning finally to products liability cases, the court rejected any attempt "to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure."[242]

Applying the contemporaneous observance requirement, the *Fortman* court refused to extend bystander liability to the manufacturer of scuba diving equipment in a claim brought by a diver's sister who witnessed her brother's death during a diving accident.[243] Although the plaintiff witnessed her brother's death, she believed at the time that he had suffered a heart attack.[244] It was only after the accident that the plaintiff learned that her brother's equipment had malfunctioned.[245] Because the plaintiff did not meaningfully comprehend that the defective product caused the injury at the time of the accident, the court held that she did not state a viable NIED claim.[246]

C. *Physical Manifestations of Emotional Distress*

As opposed to a direct physical injury, which gives rise to emotional distress, the element of "physical manifestations of emotional distress" refers to physical harm caused by the mental disturbance. The requirement of physical manifestations of emotional distress is designed to guarantee the genuineness of the emotional distress claim. No clear-cut rule, however, exists regarding the type of NIED claim in which proof of physical manifestations of emotional distress is required. Many jurisdictions substitute the concept of physical manifestations of emotional distress for the direct physical impact requirement. In yet other jurisdictions, proof of physical manifestations of emotional distress remains a distinct element in all types of NIED cases.

The degree of physical harm that a plaintiff must establish to substantiate an emotional distress claim is also not well defined by case law. The majority of courts hold that headaches, dizziness, vomiting, and sleeplessness, if transitory, are insufficient. In contrast, courts generally hold that symptoms of severe depression, stress, and anxiety, amounting to bodily harm, establish the requisite physical manifestations of emotional distress.

241. *Id.* at 329.
242. *Id.* at 331.
243. *Id.* at 333.
244. *Id.* at 324–25.
245. *Id.*
246. *Id.* at 332.

In *In re Lopez*,[247] the U.S. Bankruptcy Court for the District of Massachusetts held that Massachusetts law recognizes NIED in the absence of direct physical impact but requires (1) proof of physical manifestations of emotional distress and (2) that a reasonable person would have suffered emotional distress under the circumstances of the case.[248] In the *Lopez* case, the court dismissed a claim brought by debtors based on the wrongful foreclosure of their home in the absence of any allegation of physical manifestations of emotional distress.[249]

Finally, in *Hysjulien v. Hill Top Home of Comfort, Inc.*,[250] the North Dakota Supreme Court required proof of physical manifestations of emotional distress even in an emotional distress claim based on a sexual assault.[251] An employee in *Hysjulien* alleged that, after a sexual assault by her supervisor, she suffered from anxiety, fear, frequent and severe headaches, short-temperedness, and a diminished sex life.[252] The court found, however, that the employee failed to establish the requisite physical manifestations of her emotional distress because she identified no evidence showing that her symptoms were anything other than transitory phenomena.[253]

247. 486 B.R. 221 (Bankr. D. Mass. 2013) (applying Massachusetts law).
248. *Id.* at 234.
249. *Id.*
250. 827 N.W.2d 533 (N.D. 2013).
251. *Id.* at 549.
252. *Id.* at 550.
253. *Id.*