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Protecting Victims from Liability Insurance Companies that Add Gratuitous Insult to Grievous Injury

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Protecting Victims from Liability Insurance Companies that Add Gratuitous Insult to Grievous Injury

Francis J. Mootz III*

1. INTRODUCTION

It is an honor to participate in this important symposium with such an impressive array of scholars. The symposium grew out of an Association of American Law Schools (AALS) Annual Meeting program that charged the speakers to develop innovative litigation strategies to advance gender justice by holding institutional actors responsible for various forms of sex and gender discrimination. Too frequently, the law takes an atomized approach to tort and discrimination law—singling out the “bad actor,” thereby losing sight of the institutional and structural features that prevent gender equality. The symposium contributors have advanced theories of liability that redress inequalities by targeting their institutional source. This Article takes a different tack by addressing the responsibility of an institutional player that becomes involved only after the principal wrongdoing has occurred. The Article argues that tort law should impose a duty in the form of litigation norms that apply when a liability insurance carrier conducts the defense on behalf of the actor being sued for wrongful conduct.1

The Article begins by describing the universal black-letter common law rule that insurance companies owe no duties to tort victims when they control the litigation on behalf of their insured, the alleged tortfeasor. This Article demonstrates the injustice of this rule by considering a scenario—more typical than commentators are willing to acknowledge—that illustrates

* Dean and Professor of Law, University of the Pacific, McGeorge School of Law. This article was originally presented at the 2013 AALS Annual Meeting as part of a program sponsored by the Section on Women in Legal Education, entitled “Institutional Responsibility for Sex and Gender Exploitation.” I would like to thank Nancy Levit for inviting me to participate on this panel, my colleague Anne Bloom for her helpful suggestions and comments, and Chris Blau (Pacific McGeorge Law, 2013) for his research assistance.

how the role of insurance may interfere with those who seek to advance the cause of gender justice. In Part Two, the Article reviews several strategies for holding insurance companies liable when their litigation tactics cause additional injury to the tort victim, and then explains why these strategies (even when taken together) are insufficient to address the institutional structures giving rise to the injustice. The Article concludes that the institutional problems associated with insurance defense litigation can be addressed only by fashioning a new cause of action that sounds in tort.

II. THE INJUSTICE OF THE COMMON LAW RULE THAT LIABILITY INSURERS OWE NO DUTIES TO THIRD PARTY CLAIMANTS

A long-standing common law rule provides that a liability insurer owes no duties in tort or contract to a third-party claimant who has been injured by its insured.2 This stands in sharp contrast to the heightened duty of good faith owed to its insured, a duty grounded in their contractual relationship, but which gives rise to tort liability in some states.3 The logic of distinguishing between the insured and the third-party claimant appears unassailable: the insurer has contracted only with the insured, and the primary purpose of the contract is to defend and indemnify the insured rather than to confer a benefit on a person suing the insured.4 Imposing a tort duty on the insurer to act in good faith toward the third-party claimant would create an insoluble conflict by ignoring the fact that the insurer steps into the shoes of the tortfeasor as the tort victim’s litigation adversary.5 Thus, courts treat the liability insurer and the third-party claimant as opposed parties who may each seek to maximize their own welfare in the litigation without regard to the interests of the other party.

This principle is exemplified in a case involving a third-party claimant’s suit against a carrier for stonewalling payments in a case of clear liability and documented damages. The carrier delayed payment solely to take

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4. See, e.g., Francis v. Newton, 43 S.E.2d 282, 284 (Ga. Ct. App. 1947) (“[T]he duty of the insurance company to use ordinary care and good faith in the handling of a claim against its insured arises out of the relationship between the insurer and the insured created by the contract or policy of insurance, and there is no fiduciary relationship or privity of contract existing between the insurer and a person injured by one of its policyholders.”).

5. In the words of one court, “[a]n insurer could hardly have a fiduciary relationship both with the insured and a claimant because the interests of the two are often conflicting.” O.K. Lumber Co. v. Providence Wash. Ins. Co., 759 P.2d 523, 528 (Alaska 1988). More directly stated, “[t]he insurer has a fiduciary duty to the insured but an adversary relationship with the victim.” Long v. McAllister, 319 N.W.2d 256, 262 (Iowa 1992).
advantage of the practical obstacles and inconveniences caused by the fact that the claimant resided in Maine and the accident occurred in the insured’s home state of North Carolina. Without a hint of regret or a pang of conscience, the Maine Supreme Court concluded:

That [the] defendant [insurer] may have acted in a manner which may have brought into play plaintiff's economic circumstances as pressure upon plaintiff to settle for an amount less than plaintiff believed his case was really worth does not constitute duress in legal contemplation, either to vitiate the settlement which was made or create an independent cause of action for damages. 6

The law is not wholly callous to the interests of the claimant. Once a final judgment triggers the liability carrier's duty to indemnify the insured, most states provide the third-party plaintiff with the right to file a direct action against the insurer to recover the proceeds. 7 However, during the defense of the underlying tort action the liability insurer may aggressively avoid judgment no less than its insured. This Article contends that the common law rule violates clearly articulated public policy, with particularly grave results for those who have been victimized on the basis of subordinated characteristics such as gender.

Consider an all-too-typical litigation scenario. 8 Assume that a fifteen-year-old girl participating on a swim team is repeatedly sexually assaulted by her swim team coach. When the abuse comes to light, the girl sues the sponsoring organization, which is insured under a Commercial General Liability (“CGL”) policy. 9 Given the nature of the allegations in the suit, and the wording of the CGL policy, there is no legitimate basis for the carrier to deny coverage. 10 Given the evidence adduced by the plaintiff and

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8. For another scenario emphasizing the injustice of the common law rule, see Mootz, Sounds of Silence, supra note 1, at 444–48.


Most CGL policies are based on forms drafted by the Insurance Services Office, an industry association, though insurers are free to modify ISO forms. Under those policies, most litigation concerns Coverage A (for “bodily injury” or “property damage”—physical injuries) or Coverage B (for “personal injury” and “advertising injury”—economical or intangible injuries). Coverage A requires an accidental event, while Coverage B does not.

10. Generally, injury suffered through intentional actions is not deemed to be within the scope of coverage for an occurrence, but it is possible for an organization to protect itself against the intentional acts of its agents. Many CGL policies will exclude sexual misconduct, but the wording of the exclusion may not apply to all parties insured under the policy. See, e.g., Final Judgment &
 pleaded in her complaint, there is no legitimate basis to contest liability and the existence of damages. Nevertheless, the litigation is contentious and lasts for more than seven years. The insurer delays the proceedings at every opportunity and conducts extended depositions of the victim that seek to exploit her emotional state by delving deeply into her personal life. The carrier instructs its lawyers—members of a large, national law firm with substantial resources at their disposal—to refuse document requests at every turn, suffering some sanctions as the price of wearing down the plaintiff and her family. The litigation extends and compounds the original injury, solely to enable the insurance carrier to minimize its payment to the victim. Ultimately, the twenty-two-year-old woman settles the case, desperate to bring the constant reliving of her abuse to an end. The settlement is much lower than might be expected, but ending the litigation in itself has become very valuable to her.

If justice delayed is justice denied, how do we characterize the claimant's protracted and painful experience in this case? One might question whether this scenario is common in modern tort litigation, asking "do liability insurers really act in such a craven manner on anything approaching a regular basis?" Unfortunately these scenarios are all too familiar. Professor Feinman suggests that the problem of

Order Granting Attorney’s Fees, Doe v. Johnson Cnty. Park & Recreation Dist. v. Lexington Ins. Co. (Cir. Ct. Jackson Co. Mo. Nov. 2, 2011), Nos. 0516-CV-23636, 07-EXEC-39290, 0716-CV-24114-01, available at http://muchnick.net/omaha/missourijudge.pdf (in an order granting attorney’s fees the court concluded that one party was an “Additional Named Insured,” and therefore was not within the scope of a sexual misconduct exclusion that applied only to “Additional Insureds,” which is a different category of insureds).

11. The scenario is an amalgam but is primarily based on litigation across the country against United States Swimming affiliates. See id. The description of the litigation in Doe, unfortunately, is not unheard of. Lexington Insurance denied coverage and refused to tender a defense for the defendants, who suffered a $5 million verdict. Id. The plaintiff then sought to recover the judgment from Lexington, as well as attorney’s fees pursuant to a Kansas statute that mandates an award when an insurer refuses to pay without just cause. Id. After five years of litigation, the court awarded the verdict, less setoffs, and attorneys’ fees with a 1.2 multiplier. Id. The Court found that Lexington denied coverage, even while paying claims under the exact same policy on behalf of similarly situated insureds. Final Judgment & Order Granting Attorney’s Fees, ¶¶ 16–18, Doe v. Johnson Cnty. Park & Recreation Dist. v. Lexington Ins. Co. (Cir. Ct. Jackson Co. Mo. Nov. 2, 2011), Nos. 0516-CV-23636, 07-EXEC-39290, 0716-CV-24114-01, available at http://muchnick.net/omaha/missourijudge.pdf. “The Court also notes that this has been a vigorous and contentious litigation, and has at times crossed the line or [sic] propriety, resulting in sanctions against Lexington. In that instance Lexington had given false representations regarding discovery matters, including payments made.” Id. at ¶ 25. “In the defense of this matter, Lexington has repeatedly misstated the terms of its policies to the Court, including the very language of the sexual misconduct exclusion that Lexington relied on to deny coverage in the underlying proceeding.” Id. at ¶ 26. “Moreover, Special Master Fred Wilkins describes some of Lexington’s tactics in this coverage litigation as having been ‘dishonest as the extreme,’ and has made ‘arguments that no competent counsel could justify,’ and these view were adopted by the Court . . . . In the process, the Court has determined that Lexington deliberately concealed evidence of the payments it made from its COL Policies: ‘The history of the Lexington’s obstructionism with respect to documentation of payments it made from the wasting policies at issue in these proceedings leads inevitably to the conclusion that Lexington has been attempting to hide the existence of these payments from the Judgment Creditors.’” Id. at ¶
"intransigence" by liability carriers is a growing problem in cases with significant exposure:

There are a very significant number of large cases, probably an increasing number in the last few years, in which liability is relatively clear and it is also clear that the victim's damages are substantial, yet the insurance company refuses to make an offer to settle the case, makes a disproportionately low offer that it refuses to raise, or makes an offer only very late in the process. 12

This phenomenon extends beyond cases with severe exposure, also affecting high volume lines of business such as automobile liability insurance, because in this setting a single insurer can save significant sums of money in the aggregate by stonewalling or denying numerous legitimate claims. 13 It is important to understand that insurers are motivated by more than the simple goal of reducing the amount of the verdict. As Professor Feinman relates, tort reform legislation has served to limit exposure and therefore reduced the risk of intransigence. Insurance carriers employ hardball tactics to discourage the plaintiff's bar from even taking cases, demonstrating by intransigence that they will risk taking a big hit in a few cases that make it to trial in order to suppress the volume of litigation. 14 Further, insurers make money not just on underwriting but also investment, with the result that the "float" of delaying payment on claims can be a central part of their business strategy because it permits them to earn more investment income with little risk of increasing overall claims payouts. 15

The allegations in a recent case brought against Allstate underscore the degree to which insurance carriers will advance these multiple motives through stonewalling tactics in individual cases. In Young v. Allstate Ins. Co., the Supreme Court of Hawaii reversed the dismissal of the complaint, construing all well pleaded facts as true. 16 The plaintiff, an eighty-five-year-old man, alleged that the defendant insurance company refused to settle his claim for injuries sustained in a car accident. The court concluded that Allstate's refusal to settle the claim was intransigent and therefore actionable. 17

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13. I have analyzed the Campbell case discussed by Professor Jay Feinman (note 12) in terms of the incentives for auto insurers to adopt intransigent policies across a broad spectrum of cases that leave third party claimants without an effective remedy. See Holding Liability Insurers Accountable, supra note 1, at 475-79.
15. Id. at 197-202.
old woman named Priscilla Young, alleged that she was rear-ended by a
driver who fell asleep at the wheel. Young's car was destroyed, and her
injuries were severe enough to induce depression. 17 Although Young's
medical expenses alone exceeded $6,000, she was offered only $5,000 to
settle, and this offer was increased by a mere $300 before trial. 18 The
understated allegation—"Allstate was aware that Young was permanently
injured, then eighty-five years of age, and in a very vulnerable position" 19—
emphasizes the motives to suppress payment on this particular claim, but the
allegations brought to light a much broader course of conduct.

Allstate allegedly acted pursuant to a plan "to increase profits by over
$200,000,000.00 annually by underpaying claims and denying claimants just
and reasonable compensation" that was premised on keeping injured parties
away from attorneys and compensating them based on a computer model
rather than actual losses. 20 The seemingly irrational approach to Young's
claim was merely one manifestation of a much larger scheme to increase
profits:

If a settlement offer were not accepted or the claimant hired an
attorney, Allstate would fully litigate virtually every claim, irrespective of its insured's liability or the real physical harm and
value of the injuries suffered by the claimant. Allstate thereby
sought to subject claimants to unnecessary and oppressive
litigation and expenses, or, in other words, "scorched-earth
litigation tactics." Allstate intended to force claimants and their
attorneys through arbitration and trial unnecessarily. For example,
if a non-binding arbitration award were anything more than
nominal, Allstate's practice was to Appeal the award. The insurer
employed these tactics to discourage claimants from pursuing
injury claims. Allstate also sought to discourage attorneys from
representing claimants by creating so much work and expense that
they could not afford to advocate for a client with minor, moderate,
or sometimes even serious injuries . . . . The manual illustrated that
a five percent reduction in the amount paid on bodily injury claims
would yield profits of $201,000,000.00 per year. 21

In this light, the treatment of Young makes perfect—albeit perverse—sense.
Young's lawyer persevered and was able to obtain a jury verdict of

17. Id. at 671.
18. Id. at 672.
19. Id.
20. Id. at 669-70.
21. Id. at 670.
$198,971 for the injuries she suffered in the automobile accident. Allstate offered to pay $260,000 if Young would also release them of any claims relating to Allstate's litigation tactics, but she “rejected that offer because she wanted to ‘expos[e] Allstate’s misconduct on her claim and case to other members of her community.’” Her zeal to hold Allstate accountable ran headlong into the common law baseline rule that Allstate owed no duties to her in the litigation against its insured. Young was unable to recover on theories of abuse of process, malicious defense, and breach of good faith and fair dealing. Young's intentional infliction of emotional distress claim, dismissed at the appellate level, was remanded for further proceedings. The Article now examines these strategies that aggrieved parties like Young can pursue.

III. STRATEGIES FOR HOLDING LIABILITY INSURERS ACCOUNTABLE FOR BAD FAITH LITIGATION TACTICS

There are several established causes of action that can be employed by third-party claimants against liability insurers, but each poses distinctive problems and does not fully address the institutional reality of insurance company intransigence. The first strategy is to hold insurance defense counsel responsible for the litigation tactics, but this is yet another example of going after a single bad actor rather than attacking the institutional structure that promotes the bad behavior. Additionally, this strategy will

23. Id. at 673.
24. Id. at 675–79 (discussing abuse of process); Id. at 679–89 (discussing malicious defense); 690–93 (discussing good faith).
25. Id. at 687–89.
26. At least one court has recognized the need to look beyond the professional obligations of insurance defense counsel. In Givens v. Mulliken, the Tennessee Supreme Court held that a third party claimant states a cause of action against a liability insurer for the abuses of process committed by defense counsel “if the attorney’s tortious actions were directed, commanded, or knowingly authorized by the insurer.” 75 S.W.3d 383, 390 (Tenn. 2002). The court rejected a formulaic professional ideal in which defense counsel independently provides counsel to the insured, and accepted the institutional reality at work in such cases:

Consequently, although an insurer clearly lacks the right to control an attorney retained to defend an insured, we simply cannot ignore the practical reality that the insurer may seek to exercise actual control over its retained attorneys in this context. . . . To be clear, our recognition of the control exercised by insurers in this context does not condone this practice, especially when it works to favor the interests of the insurer over that of the insured; rather, we acknowledge this aspect of the relationship only because it would be imprudent for this Court to hold that attorneys are independent contractors vis-a-vis insurers, but then to ignore the practical realities of that relationship when it causes injury.

Id. at 395.
police only the most egregious outer bounds of behavior. Litigation is a full contact sport, and if we regard insurance carriers as just another party engaged in litigation, the awarding of sanctions against attorneys for their excessive behavior will be too infrequent and insubstantial to deter abuse directed by the insurance carrier. Even more important, if insurance carriers reward attorneys for employing "mad dog defense tactics," as was alleged in Young, discovery sanctions may in fact serve as a perverse badge of honor for the defense attorneys striving to ensure a continuing relationship with the insurance carrier that hires them and pays their fees.

Claimants have attempted to use several doctrinal strategies directly against the insurance carrier, but narrow interpretations of these causes of action leave third-party claimants without an effective remedy when insurance carriers attempt to prey on their vulnerability. First, some claimants have argued that they are third-party beneficiaries of the insuring agreement with the insured, permitting them to enforce the terms of the insurance policy directly. In some narrow situations, this strategy provides an effective vehicle for relief. For example, when the claimant qualifies as an unnamed insured under the policy, the claimant is able to assert bad faith by virtue of his or her insured status. Additionally, when coverage under

In a companion case, the Tennessee Supreme Court held that an insurer can be vicariously liable under the same standard of liability when defense counsel tortiously interferes with the prospective business relationships between tort victims and a third-party medical center. See Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W. 3d 691 (Tenn. 2002).

27. This is one of the frightening details of a systemic approach to underpaying claims that was revealed in the trial of Crockett v. Allstate Ins. Co. See Rebecca Porter, Jury Punishes Allstate for "Scorched-Earth" Tactics, 37 TRIAL 70 (Dec. 2001); David Hechler, Allstate Found Liable for Abuse of Process, NAT'L LAW J., Oct. 22, 2001, at A15. This same corporate strategy was employed by State Farm and came to light in the famous Campbell case that was decided by the Supreme Court because of the constitutionally "excessive" punitive damages awarded by the jury. Details of the reprehensible behavior by State Farm is described in the opinion of the Utah Supreme Court. See State Farm Mutual Auto. Ins. Co. v. Campbell, 65 P. 3d 1134, 1148 (Utah 2001), rev'd, 538 U.S. 408 (2003), on remand 98 P. 3d 409 (Utah 2004).

28. Young alleged that Allstate attorneys were paid incentive bonuses to try cases rather than settle them, and their performance reviews focused on whether the attorney achieved results that were at or below the computer model of expected payout. Young v. Allstate Ins. Co., 198 P.3d 666, 671 (Haw. 2008).

29. See Mootz, Sounds of Silence, supra note 1, at 450-51.


In Goodson v. Am. Standard Ins. Co. of Wis., 89 P.3d 409 (Colo. 2004), the court held that
the policy is on an automatic, no fault basis, some jurisdictions permit the third party claimant to enforce the policy directly. Thus, in Meleski v. Schbohm LLC, the court found that a claimant was an intended beneficiary of the no-fault medical payments provision of the policy, recognizing that the plaintiff's right to immediate payment did not give rise to the typical tort scenario in which insurance carriers owe no duties to third-party claimants.

Aside from these specific exceptions, courts uniformly find that the insured and carrier do not intend to benefit the typical third-party tort claimant, at least until the point that a final judgment has been entered in favor of the claimant. Consequently, third-party tort claimants are treated as strangers to the insurance contract, with courts regularly concluding that third-party claimants "are not intended beneficiaries of liability policies and are owed no direct contractual obligation by insurers." This reasoning follows from the nature of insurance as an indemnity agreement, under which the insurer has no obligation to make payments to the claimant until such time as liability is established in the underlying tort action or a settlement is reached.

an unnamed insured is accorded the same rights as a first-party claimant under a policy, and therefore can recover for emotional distress caused by insurer refusal to pay under the policy, even absent a showing of substantial property or economic loss. See Gillette v. Estate of Gillette, 837 N.E.2d 1283, 1289 (Ohio Ct. App. 2005) ("in sum, we conclude that although appellant [passenger] is an insured under the Nationwide policy, where she seeks liability coverage for the negligence of the named insured -- her husband -- she stands in the shoes of a third-party claimant who is not owed any contractual duty by the insurer.").

31. See, e.g., Ennen v. Integon Indemn. Corp., 268 P.3d 277, 286-87 (Alaska 2012) (insurer owed duty of good faith to injured passenger with regard to the UIM claim, but not with respect to a tort claim against the insured); Cain v. Griffin, 849 N.E.2d 507 (Ind. 2006) (ship and fall claimant could assert third-party beneficiary status to enforce the no-fault medical payments provision under the restaurant's liability policy, but could not assert a tort claim for bad faith); Gillette v. Estate of Gillette, 837 N.E.2d 1283, 1289 (Ohio Ct. App. 2005) (holding that passenger was a third-party claimant as to the negligence action, but not with respect to claims under the "Medical Payments" and "Family Compensation" provisions).


35. See, e.g., Zahn v. Canadian Indemn. Co., 129 Cal. Rptr. 286, 288 (Ct. App. 1976). However, some courts have taken the baseline common law position that insurers owe no contractual duties to third party claimants to extremes. In Aircraft Network LLC v. Cessna Aircraft Co., the corporate owner of an airplane sued Cessna after it damaged the plane during routine servicing, 2004
Several tort theories would also plausibly apply to protect the claimant from stonewalling and harsh litigation tactics designed to avoid or minimize payments on valid claims. Some claimants have argued that a claim for intentional infliction of emotional distress is appropriate when the insurer harasses the claimant into abandoning the litigation. Clearly, an insurer that commits intentional torts against the third-party claimant should not be shielded from liability under the general rule that the carrier owes no special duties to the claimant. For example, in *Dussault v. American Int'. Group, Inc.*, the court permitted the claimant to sue for intentional infliction of emotional distress when the carrier agreed to settle the case but then refused to pay the settlement amount until a motion to enforce the agreement was filed, emphasizing that this narrow remedy would not interfere with the insurance carrier’s heightened relationship with its insured.

However, the tort of intentional infliction of emotional distress requires...
the plaintiff claimant to prove "outrageous conduct" by the insurance carrier, a high standard that courts generally find cannot be met solely by pleading that an insurer refused to pay a valid claim. In response to the egregious facts alleged in Young v. Allstate Ins. Co., the Supreme Court of Hawaii held that a claim of intentional infliction of emotional distress was properly pleaded, suggesting that this tort might play an important role in policing the conduct of insurance carriers:

A plaintiff may, however, state a claim for IIED because of his or her relationship with the defendant. "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other or power to affect his interests." "In this sense extreme 'bullying tactics' and other 'high pressure' methods of insurance adjusters seeking to force compromises or settlements" may satisfy the conduct element. ("Insurer's bad faith refusal to make payment on the policy, coupled with its deliberate use of 'economic coercion' (i.e., by delaying and refusing payment it increased plaintiff's financial distress thereby coercing her to compromise and settle) to force a settlement, clearly rises to the level of 'outrageous conduct' to a person of 'ordinary sensibilities'.") (noting that plaintiffs may assert an IIED claim to hold parties liable for engaging in "outrageous bullying tactics" intending "to force a settlement"); In fact, cases involving parties inappropriately resolving their liability disputes actually helped define and develop IIED....

Thus, there may be some momentum toward utilizing the tort of intentional infliction of emotional distress to hold liability insurers liable for outrageous litigation conduct.

The tort of negligent infliction of emotional distress is even less likely to apply to insurance carriers refusing to settle claims in good faith. Courts regularly assume that litigation is inherently prone to result in emotional distress, and so they generally limit liability to situations in which a pre-existing duty of some kind exists between the parties. Working from the

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38. Lee v. Travelers Cos., 252 Cal. Rptr. 468, 470 (Ct. App. 1988) (holding that the claimant failed to allege with specificity acts beyond failing to pay the claim in good faith, and so the claim for intentional infliction of emotional distress must fail because there is no allegation of behavior that is "so extreme as to exceed all bounds of [what is] usually tolerated in a civilized community"). In Doctors' Co. Ins. Services v. Superior Ct., 275 Cal. Rptr. 674, 683–84 (Ct. App. 1990), the court found that suborning perjury might establish requisite tort liability for the carrier on a theory of intentional infliction of emotional distress, but then held that the absolute statutory litigation privilege insulated the carrier from liability. See generally Moore, Sounds of Silence, supra note 1, at 465; Feinman, Insurance Company Intransigence, supra note 12, at 213–19.

general common law rule that the carrier and claimant owe each other no duties, courts find that there is no viable claim for negligent infliction of emotional distress when the claimant alleges litigation abuse.\(^{40}\)

Finally, one might assume that the tort of abuse of process would most closely fit the scenario of insurance company intransigence. However, courts traditionally have limited the tort by requiring an act additional to the process itself, and even modern courts that jettison this requirement erect a strong barrier to liability for using valid process to defend a civil action vigorously.\(^{41}\) Courts have refused to create an analogue to malicious prosecution, holding that an alleged “malicious defense” of an action generally remains outside the scope of abuse of process.\(^{42}\) In Young, the court carefully examined the merits of the proposed tort of malicious defense and concluded that it would result in a chilling effect on legitimate defenses and would add nothing to the remedies available to claimants under rules and statutes governing litigation and the tort of intentional infliction of emotional distress.\(^{43}\) Two judges dissented, arguing against the notion that the tort of intentional infliction of emotional distress obviated the need to recognize a tort of malicious defense, given the heightened elements of the former:

The majority seems to suggest that, because Young has stated a claim of IIED for which relief can be granted, we should not recognize the tort of malicious defense, in light of the fact that the tort of IIED offers the same remedies for her injuries as the tort of malicious defense. Although it is clear that Young has successfully \textit{stated} claims of both IIED and malicious defense and that both claims afford tort remedies... there is no way of knowing in this appeal from a HRCP Rule 12(b)(6) dismissal whether Young will be able to \textit{prove} both claims at trial. Her chances of establishing liability are better with respect to her malicious defense claim than


\(^{42}\) See, e.g., Berton v. Nat'l. Gen. Corp., 118 Cal. Rptr. 184, 190-92 (1975) (en banc). There may be some movement away from this traditional rule. In Gieves v. Mulliken, 75 S.W.3d 383 (Tenn. 2002), the Tennessee Supreme Court held that a claimant may sue a liability insurer for abuses of process committed by defense counsel “if the attorney’s tortious actions were directed, commanded, or knowingly authorized by the insurer.” Id. at 390. See generally Mootz, \textit{Holding Liability Insurers Accountable}, supra note 1, at 488-518; Feinman, \textit{Insurance Company Intransigence}, supra note 12, at 219-30.

\(^{43}\) Young, 198 P.3d at 679.
with respect to her IIED claim, because, as previously stated, the malicious defense claim would require proof of fewer facts than the IIED claim. Nevertheless, the majority refused to acknowledge the broader tort of malicious defense, finding it "unnecessary."

Returning to the previous hypothetical scenario can sharpen the preceding doctrinal discussion. The scenario demonstrates why the traditional common law rule that insurers owe no duties to third-party claimants results in injustices. The young woman who has endured years of aggressive litigation tactics designed to prey on her vulnerability would have little recourse under current law. As a true third-party to the insuring agreement, she cannot assert contract rights under the policy until such time as the verdict is final and the liability of the tortfeasor has been fixed. Although certain inappropriate filings or discovery abuses might trigger sanctions during the course of the litigation, it is highly unlikely that a court would recognize a vigorous defense as a form of intentional infliction of emotional distress. Courts would likely conclude that by seeking a large tort verdict, the third-party claimant has voluntarily subjected herself to the harshness of litigation. Courts are even more hesitant to articulate a new tort of "malicious defense" for fear that it will result in endless litigation and a chilling effect on those haled into court to provide a vigorous defense against the suit. In short, the dreadful experience of litigation in this matter will be chalked up to the cost of seeking compensation by filing suit, and any harms suffered by the third-party claimant will be deemed *damnum sine injuria.* This result constitutes a major structural impediment to the goal of achieving gender justice.

IV. **Effectuating the Public Policy in Favor of Prompt and Fair Settlement by Insurance Carriers and Against the Exploitation of Gender Inequities**

The problem of insurance carrier abuse of third-party claimants can be addressed properly and fully only by fashioning a new theory of tort liability premised on the nature of the wrong. This proposal is not as radical as it might appear, given that there is a clearly articulated public policy that liability insurers deal fairly with claimants. Nearly every state has adopted a variation of the Model Unfair Claims Settlement Practices Act ("UCSPA"),

44. Id. at 697 (Levinson, J., concurring and dissenting) (citations omitted).
45. Id. at 686.
46. This maxim literally means "loss without injury," but essentially means that there may be an actual injury that will not be recognized in law as a compensable (legal) injury. *DAMNUN SINE INJURIA,* BLACK'S LAW DICTIONARY (9th ed. 2009).
which prohibits carriers from using a pretext to dispute claims, or forcing
claimants to litigate valid claims to coerce a low settlement.\(^47\) Insurance
carriers are heavily regulated businesses, and courts regularly acknowledge
their vital role in the functioning of the tort system.\(^48\) There is no
conceivable public interest in having insurers consciously underpay
legitimate claims in order to lower the costs of insurance, and certainly not
for the purpose of benefitting equity holders in the company.

47. The Model Unfair Claims Settlement Practices Act provides, in part:

\(§4.\) Unfair Claims Practices Defined:

Any of the following acts by an insurer, if committed in violation of Section 3,
constitutes an unfair claims practice:

A. Knowing misrepresenting to claimants and insureds of relevant facts of policy
provisions relating to coverages at issue;

C. Failing to adopt and implement reasonable standards for the prompt investigation
and settlement of claims arising under its policies;

D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of
claims submitted in which liability has become reasonably clear;

E. Compelling insureds or beneficiaries to institute suits to recover amounts due under
its policies by offering substantially less than the amounts ultimately recovered in suits
brought by them;

F. Refusing to pay claims without conducting a reasonable investigation; [and]

L. Failing in the case of claims denials or offers of compromise settlement to promptly
provide a reasonable and accurate explanation of the basis for such actions[.]

All but four of the states have adopted a version of this Model Act. See Mootz, Holding Liability
Insurers Accountable, supra note 1, at 481.

48. Dissenting from an opinion denying relief to a claimant for negligent infliction of
emotional distress, a justice of the California Court of Appeals succinctly articulated the public
policy considerations relating to liability insurance:

It is clear, under our mandatory financial liability laws, as well as under California’s
Insurance Code, that insurers exist and are allowed to do business in California not
only to provide their insureds with financial peace of mind, but to provide persons
injured by their insureds with financial recompense for their injuries in a reasonable
and good-faith manner.

[Public policy mandates that insurance companies undertake the burden of fairly and
timely settling those claims as alleged here, when the insured’s liability is reasonably
clear and the claimant’s damages are reasonably ascertainable and which they have
contracted to cover, for a price, rather than allowing such costs and expenses
encompassed by the claimed damages to fall on the shoulders of the injured claimants,
and, in some cases, on the doctors and hospitals whose bills will go unpaid, the welfare
systems to whom the injured parties may be forced to turn, and ultimately on the
taxpaying public.

dissenting).
Protecting Victims from Liability Insurance Companies

For a decade, California courts solved the problem of insurer abuse of third-party claimants by inferring a private cause of action under the UCSPA. However, just ten years later the court reversed itself, after a confusing and complex body of case law attempted to reconcile the cause of action with ordinary principles of statutory interpretation. Royal Globe was generally rejected by other jurisdictions, although some states continue to grant rights to third-party claimants under their UCSPA.

49. In Royal Globe, the Supreme Court acknowledged the common law rule against third-party rights, but held that third-party claimants could bring a private cause of action under UCSPA because the statutory scheme was designed to protect them as well as insureds. Royal Globe Ins. Co. v. Superior Court of Butte Cnty., 592 P.2d 329, 332-34 (Cal. 1979).


Two states embraced the Royal Globe approach, but in both states the courts held that a third-party claimant must meet the statutory requirement of proving more than a single violation in order to recover. See Klaudt v. Flink, 658 P.2d 1065, 1068 (Mont. 1983), superseded by statute, MONT. CODE ANN. § 33-18-242 (1987) (granting third-party claimants a private cause of action but...
The Royal Globe experience teaches that an effective check on liability insurance carriers requires a direct challenge to the baseline common law rule that serves to shield them from third-party claimants. Rather than attempting to shoehorn a cause of action into the UCSPA as a matter of statutory interpretation, courts should draw from the UCSPA and many other statutory and judicial pronouncements to articulate the public policy basis for creating an exception to the general common law rule. Rather than using an amalgam of existing tort and contract theories to protect against abusive insurer intransigence, it makes most sense to address the public policy issue expressly. The most direct manner for addressing the problem is to recognize a new tort of bad faith insurance claim settlement practices in violation of public policy. Recognizing this new tort would not expand the scope of duties, but rather would only provide a mechanism to enforce existing duties.

This new tort is analogous to the development of the tort of wrongful discharge in violation of public policy. Employers are free to exercise wide freedom in running their businesses, but they may not use their economic power to undermine important public policies, as would be the case if an employer terminated an employee for refusing to commit perjury. Similarly, insurers should be permitted to litigate vigorously when liability or damages are unclear, but clearly articulated public policy requires them to promptly and fairly settle cases when there is no legitimate dispute.


Finally, Kentucky permits a cause of action by third-party claimants for violations of the unfair claims practices act, but it finds the source of the cause of action in another statute that provides for a remedy for violations of any state statute that does not foreclose a civil remedy or provide its own civil remedy. See State Farm Mut. Auto. Ins. Co. v. Reeder, 763 S.W.2d 116, 117-18 (Ky. 1988).

I have developed this theory in general terms. See Mootz, Sounds of Silence, supra note 1, at 476-79. The following paragraphs leading to the end of this Article summarize my more general thesis in the context of seeking gender equity.

The watershed case for the development of the tort of wrongful discharge in violation of public policy is Petermann v. Local 396, Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (The public policy of this state as reflected in the penal code . . . would be seriously impaired if it were to be held that one could be discharged [from employment] by reason of his refusal to commit perjury.

53. The watershed case for the development of the tort of wrongful discharge in violation of public policy is Petermann v. Local 396, Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) ("The public policy of this state as reflected in the penal code . . . would be seriously impaired if it were to be held that one could be discharged [from employment] by reason of his refusal to commit perjury.")).
Protecting Victims from Liability Insurance Companies

It is important to emphasize that this does not place insurers in a bind, such that they owe conflicting duties to their insured and the claimant. Rather, liability insurers would owe consistent duties to their insured and the public to fairly investigate, litigate and settle claims in accordance with the insurance policy.

It also bears emphasis that the public interest is not necessarily co-extensive with the personal interests of the third-party claimant, whose primary interest in part may be to recover as much money as quickly as possible. Liability insurers act in bad faith contrary to public policy if they seek to avoid obligations of their insured that cannot be contested honestly and legitimately, with the goal of using superior bargaining power to coerce the third party claimant to accept an inadequate settlement rather than incur the time and expense to litigate to judgment. Put somewhat differently, the public interest is implicated when the insurer uses specious and pretextual arguments to avoid settlement and delay payment. The measurement of harm is found in the pressure on the third-party claimant to accept less than the claimant could reasonably expect to receive for her injuries. The public is injured in this case, in addition to the third-party claimant, which justifies an exception to the standard common law rule that a liability insurer owes no duties to third-party claimants.

Public policy is particularly implicated when the original injury suffered by the third-party claimant occurs in the context of gender subjugation, because the claimant is more likely to be vulnerable to the intransigence of an insurance carrier. In a wide variety of settings courts and legislatures have acknowledged the importance of curtailing the potential for the judicial process to exacerbate the barriers to gender justice. 54

54. See generally FED. R. EVID. 412(a)(1)-(2), (b)(2) (prohibiting "evidence offered to prove that a victim engaged in other sexual behavior; or evidence offered to prove a victim's sexual predisposition" but allowing the court to "admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim" (emphasis added)). This effort to temper litigation excesses was grounded in the goal of achieving gender justice. See Clifford S. Fishman, Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior, 44 CATH. U. L. REV. 709, 721 (1995) (explaining that "FRE 412 is intended to be extremely broad in scope. The exclusion of the complainant’s prior sexual behavior encompasses evidence suggesting her . . . use of contraceptives, the birth of an illegitimate child, venereal disease, and ‘activities of the mind, such as fantasies or dreams.’ It also is intended to exclude evidence which, although not referring directly to sexual activities or thoughts, may have a sexual connotation for the fact-finder such as that relating to the alleged victim’s mode of dress, speech, or life-style." (citations omitted)).

In criminal cases involving sexual assault, courts have protected the victim from additional abuse in the course of the prosecution by relaxing the traditional broad interpretation of the confrontation clause. The Supreme Court has held that "[a] State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court." Maryland v. Craig, 497 U.S. 836, 853 (1990); see also Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty., 457 U.S. 596, 608 (1982) (holding that a "trial court can determine on a case-by-case basis whether [exclusion of the press and general public during testimony] is necessary to protect the welfare of a minor victim").
The young woman who suffered a grievous injury at the hands of a swim team coach should not then be subjected to the strategies of an insurance carrier seeking to maximize its profits by making her claim for justice any more emotionally costly than the inherent travails of the litigation process. My proposal for a new tort action would not be limited to such cases, but these extreme cases should provide the motivation for courts to restore the role of insurers within the modern tort system. At long last, courts should acknowledge the implications that follow from the fact that liability insurance carriers are highly regulated corporations permitted to exist only because they serve the public interest as articulated by their governing legislation. This acknowledgment should lead quickly to the conclusion that the public interest in the smooth functioning of the tort-insurance system should be enforced by adoption of a targeted common law doctrine akin to the tort of wrongful discharge in violation of public policy. Until such time, there will be too many cases where justice is denied through the strategy of harassment and delay.

The public interest is especially implicated in cases in which liability insurer intransigence can exert even more influence, due to the claimant's vulnerability as a result of gender injustice. There is no excuse for subjecting the victims of gender injustice to a second injury at the hands of a liability insurance carrier. By focusing on this particular context, it should be clear

This evidentiary rule is also applied in sex discrimination cases under Title VII. See FED. R. EVID. 412, Advisory Notes (1994) (stating "Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment"); Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000). Cf. Wilson v. City of Des Moines, 442 F.3d 637, 643 (8th Cir. 2006).

It would not be a stretch to conclude that the UCSPA statutory scheme provides an implied exception to the ordinary norms governing civil litigation in the insurance defense context. For example, the Equal Employment Opportunity Commission has long been exempted from the requirements of class certification under F.R.C.P. 23 in the interest of promoting its mission to serve the public interest. Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 324 (1980) (stating that "the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals. Its authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit"); see also Winnie Chau, Something Old, Something New, Something Borrowed, Something Blue and A Silver Sixpence for Her Shoe: Dukes v. Wal-Mart and Sex Discrimination Class Actions, 12 CARDOZO J. L. & GENDER 969, 981 (2006).

that "public policy" is not a generic and empty term. Rather, it is the
lifeblood of justice that must be fully articulated and embraced in the
institutional setting of the tort-insurance system if we are to make good on
the basic premises of the civil litigation system.