POLICYHOLDER MISREPRESENTATION IN INSURANCE CLAIMS

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Intentional misrepresentation by a policyholder in a proof of claim or a related claim document can provide an insurer with a defense against coverage under the policy—the "false swearing" rule.[1] This article summarizes the rule and situates it within the broader landscape of both the claims process and the range of responses to insurance fraud. It then suggests the proper contours of the rule and the applicable standard of proof: the false swearing rule should require reliance by the insurer and proof by clear and convincing evidence. This article also addresses the broader problem of agency and opportunism in insurance claims by both the insured and insurer,

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[1] There is a related problem of the negligent, but not intentional, provision of erroneous information by the insured that is not within the scope of this paper. On the broader issue, see George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941 (1992).

arguing that the insurer's conduct in asserting fraud should be evaluated by a reasonableness standard.

I. THE FALSE SWEARING RULE

Many insurance policies include an express provision declaring that fraud or other false statements permit the insurer to void the policy.[2] The first paragraph of the 1943 New York Standard Fire Insurance Policy—the "165 Lines" that became the basis for many standard, legislatively adopted policies—states such a provision:

> Concealment, Fraud
>
> This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.[3]

More modern examples expand on the concept:

> Conditions
>
> R. Concealment Or Fraud
>
> We provide coverage to no "insureds" under this policy if, whether before or after a loss, an "insured" has:
>
> 1. Intentionally concealed or misrepresented any material fact or circumstance;
> 2. Engaged in fraudulent conduct; or
> 3. Made false statements;
>   a. relating to this insurance.[4]

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[2] 13A COUCH ON INSURANCE § 197:1 (3d ed. 2022).

[3] N.Y. INSURANCE LAW § 3404(e) (McKinney 2015).

[4] INS. SERVS. OFF., HOMEOWNERS 3 — SPECIAL FORM, HO 00 03 05 11, at 17 (2010) [hereinafter HO3].

Or, more simply:

> Concealment or Fraud: We do not provide coverage for any *insured* who has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance.[5]

The doctrine that applies to these provisions is the "false swearing rule," often called the "false swearing defense" because it provides a defense to coverage.[6] An intentional misrepresentation by an insured in a proof of loss or other statement during the claim process violates the terms of the policy and enables the insurer to avoid paying a claim.[7] Indeed, in most jurisdictions a misrepresentation as to part of a loss enables the insurer to avoid paying for any of the loss, even portions that it otherwise would owe.[8] Despite the doctrine's name, the misrepresentation does not need to be sworn to defeat coverage.[9]

This simple statement of the doctrine conceals much complexity, of course. Courts vary in their approaches to the doctrine, and legislation in many states defines the rule. The Appleman treatise notes:

> The rules thus far set forth are generally accepted. A few cases apply them far more stringently than do the great majority of decisions. . . . The delineation line between the tests used by the various courts is narrow and wavering.[10]

Thus, a violation of the misrepresentation provision in the policy generally requires that the insured make a false statement regarding a material fact with an intent to deceive the insurer.[11] A broad, insurer-favorable version of the false swearing rule has generous standards for materiality and intent and no reliance or prejudice requirement,[12] but narrower versions of the rule require that the insurer relied on the

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[5] Longobardi v. Chubb Ins. Co., 582 A.2d 1257, 1259 (N.J. 1990).

[6] JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL AND KNUTSEN ON INSURANCE COVERAGE § 908[C] at 9-221 (4th ed. 2015).

[7] *Id. See also* ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 83 (5th ed. 2012).

[8] STEMPEL & KNUTSEN, *supra* note 6, at 9-221, 9-222.

[9] JERRY & RICHMOND, *supra* note 7, at 587.

[10] 5af-157f APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 3587 (2d ed. 2011).

[11] 13A COUCH ON INSURANCE § 197:11 (3d ed. 2022).

[12] *Id.*

misrepresentation.[13] Innocent or innocuous misstatements are not sufficient to invoke the defense,[14] but where the insured asserts a valuation far in excess of the actual value of the loss, an inference of false swearing may be raised.[15] Generally, false swearing has the effect of avoiding the insurer's obligations under the policy altogether even if the misrepresentation related to only a portion of the loss; however, some courts hold that false swearing enables an insurer to avoid coverage only as to the portion of the claim that was misrepresented.[16]

II. THE BASIS FOR THE FALSE SWEARING RULE

The false swearing rule rests on four bases that span legal doctrine, morality, and public policy.

The first rationale for the false swearing rule is doctrinal. Part of the insured's contractual obligation with the insurer is to refrain from misrepresentation in the claim process. The obligation is clear and specific where the insurance policy contains a provision relating to misrepresentation after a loss, as in the ISO HO-3.[17] Even if the provision is less clear as to the conduct to which it applies, it reasonably is interpreted to apply to post-loss conduct as well as to misrepresentations in the course of applying for the insurance.[18] This element of the analysis is an instance of a fundamental principle of insurance law that the relation between insurer and insured is created and substantially defined by their agreement.[19] Indeed, even if an express provision was not included, the obligation to avoid misrepresentation would attach because of the general obligation of good faith, which is inherent in every contract.[20]

The second rationale provides an economic justification for the false swearing doctrine. An insured has an incentive to misrepresent or conceal information from its insurer during the claim process in order to maximize its recovery. This behavior runs a spectrum from the wrong, but not

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[13] *Id.* at § 197:18, 197:19.

[14] JERRY & RICHMOND, *supra* note 7, at 587.

[15] STEMPEL & KNUTSEN, *supra* note 6, at 9-221.

[16] STEMPEL & KNUTSEN, *supra* note 6, at § 908[C] at 9-221,222; 13 COUCH ON INSURANCE § 197:11 (3d ed. 2022).

[17] HO3, *supra* note 4.

[18] *Longobardi*, 582 A.2d at 1261.

[19] *See* Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 658 (2013).

[20] *See* Jay M. Feinman, *The Law of Insurance Claim Practices: Beyond Bad Faith*, 47 TORT TRIAL & INS. PRAC. L.J. 693, 705–06 (2012).

depraved, in which the insured pads a claim to make up for an inadequacy of record-keeping or a careless decision to under-insure, to the callously deceitful, as the functional equivalent of stealing. As the New Jersey Supreme Court stated, "such misrepresentations strike at the heart of the insurer's ability to acquire the information necessary to determine its obligations and to protect itself from false claims."[21] Insurers, being aware of the potential for misrepresentation must invest resources to monitor insureds' behavior and to ferret out their fraud. The false swearing doctrine deters wrongful behavior by insureds and reduces the need for inefficient monitoring behavior by insurers.

The third rationale is moral: *fraus omnia corrumpit*—"fraud vitiates everything it touches" or "fraud corrupts and destroys the whole."[22] Davey and Richards describe this principle as "a broadly moral purpose consistent with judicial refusal to engage with those who commit fraud."[23] In the context of other types of contracts, the principle allows for the avoidance of a contract for fraud,[24] even in the presence of a merger clause that seems to require a contrary result.[25] The same result attaches in insurance claims where the court will not countenance or reward fraud of any type.[26]

The first three rationales focus on the two-party relation between insurer and insured. The fourth rationale treats the two-party relation as one among many similar relations. Baker colorfully expresses this as the merger of the story of the "immoral insured" with the story of the "depravity of those who threaten the public interest."[27]

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[21] *Longobardi*, 582 A.2d at 1261. *See also* James Davey & Katie Richards, *Deterrence, Human Rights and Illegality: The Forfeiture Rule in Insurance Contract Law*, LLOYD'S MAR. & COM. L.Q. 314, 318 (2015).

[22] Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1059 (Del. Ch. 2006) (see e.g., CORBIN ON CONTRACTS § 28.21); *Custom Data Solutions, Inc. v. Preferred Capital,* Inc., 733 N.W.2d 102, 105 (Mich. Ct. App. 2006) (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9.21 340–41 (4th ed. 1998)).

[23] Davey & Richards, *supra* note 21, at 318.

[24] 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28.22 (rev. ed. 2002).

[25] *Custom Data Solutions, Inc.,* 733 N.W.2d at 105 (observing that "[d]espite the existence of a merger clause, parol evidence is admissible for purposes of demonstrating that the agreement is void or voidable or for proving an action for deceit.") (citations omitted).

[26] STEMPEL & KNUTSEN, *supra* note 6; JERRY & RICHMOND, *supra* note 7.

[27] Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1411–12 (1994).

> The normally decent, law-abiding American . . . if left to his own devices, has a little larceny in his soul. . . . And really, people can't see it as anybody's money. The insurance company and the federal government—people like that—they are fair game where the public is concerned.[28]

Insurance fraud by false swearing cheats not only the individual insurer but also the pool of insureds that the insurer embodies. The same logic extends to the deterrence and efficiency rationales. The false swearing rule deters behavior and minimizes investigative costs, both of which ultimately are borne by all insureds—"substantial and unnecessary costs to the general public in the form of increased rates."[29]

III. AGENCY AND OPPORTUNISM

Much of the four-part rationale for the false swearing rule rests on the recognition of a potential problem in the insurance relation: the problem of agency and opportunism by the insured in filing a claim. In an agency relationship, one party has freedom to act in a way that affects the other party and has different incentives and access to different information that may shape its performance. This creates monitoring problems in which the party subject to the other's action either needs to incur costs in monitoring the performance or takes the risk of a disadvantageous performance. Agency is a particular problem in contractual relationships where one party may have the ability to control its performance in ways that defeat the other party's reasonable expectations. Opportunism—"self-interest seeking with guile"[30]—is an extreme form of agency in which the party with freedom to act exploits circumstances for selfish advantage without regard for a prior commitment such as a commitment to contractual performance. From this

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[28] *Id.* at 1411–12.

[29] Merin v. Maglaki, 599 A.2d 1256, 1259 (N.J. 1992) (referring to the purpose of the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-2). *See also* Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG [2016] UKSC 45, [10] ("Fraudulent insurance claims are a serious problem, the cost of which ultimately falls on the general body of policy-holders in the form of increased premiums."). *Id.* at [55] ("if claims have to be investigated in detail and routinely verified by insurers, the cost of the systems necessary to do this will fall on policyholders generally through increased premiums, and good claims will be delayed alongside the bad.").

[30] Oliver E. Williamson, *Opportunism and Its Critics*, 14 MANAGERIAL & DECISION ECON. 97, 97 (1993). *See* Cohen, *supra* note 1, at 953–61.

perspective, the risk that an insured will conceal or misrepresent information in the claim process is an agency problem in which the insured may act opportunistically.

A. AGENCY AND OPPORTUNISM BY THE INSURED

The doctrinal rationale for false swearing recognizes that a fraud or concealment term in the policy is designed to check agency and opportunism by the insured and that the insurer's ability to avoid coverage is the necessary remedy. The rationale is based on "the asymmetrical positions of the parties to an insurance contract—the insurer being vulnerable on account of his dependence on the insured for information both at the formation of the contract and in the processing of claims."[31] The insured's agency in providing information about the cause of the loss and the amount of the loss enables it to act opportunistically by fabricating or exaggerating when filing a claim. In the absence of the false swearing doctrine, the insurer would need to respond by investing considerable costs in investigation; even then, in some cases, it will be unable to discover the presence or the full extent of the fraud and would therefore have to pay even in the absence of coverage.[32]

The moral and economic rationales for the false swearing rule similarly respond to potential agency and opportunism. The false swearing doctrine deters fraudulent breaches by the insured and reduces investigation costs by the insurer, both of which reduce their joint costs.[33] The rule's application to insurance is simply an example of the many settings in which fraud is the product of agency and opportunism, leading to the general principle that fraud corrupts all. The fourth rationale extends the economic logic to the pool of insureds. The efficient allocation of the risk of fraud and

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[31] *Versloot Dredging BV* [2016] UKSC 45 [9].

[32] Even in the absence of a policy term, the general obligation of good faith would prohibit fraud by the insured for the same reason. At least in the American context, the obligation of good faith is not an expression of the insurance law doctrine of *uberrima fides*, with its grand translation of "utmost good faith." *See* R. A. Hasson, *The Doctrine of* Uberrima Fides *in Insurance Law—A Critical Evaluation*, 32 MOD. L. REV. 615 (1969). *See also* Mkt. St. Assocs. v. Frey, 941 F.2d 588, 595 (7th Cir. 1991) (Judge Posner describing good faith as an "injection of moral principles into contract[,] . . . some newfangled bit of welfare-state paternalism[,] . . . [or] the sediment of an altruistic strain in contract law."); Jay M. Feinman, *Good Faith and Reasonable Expectations*, 67 ARK. L. REV. 525 (2014).

[33] Mkt. St. Assocs., 941 F.2d at 595.

the cost of preventing it in an individual transaction becomes the sum of all such individual transactions in considering the interests of the pool.[34]

B. AGENCY AND OPPORTUNISM BY THE INSURER

The four-part rationale for the false swearing rule embodies a certain vision of the relationship between insurer and insured, one in which the insured's freedom to act in an opportunistic way in the claim process must be checked by the rule. That vision is, at best, incomplete, and its incompleteness leads astray the formulation and application of the rule.

It is true that the insured and insurer are in an agency relationship in the claim process and that opportunism is a risk, but agency and opportunism run in both directions. The insurer, as well as the insured, possesses agency and has incentives to act opportunistically.

When a loss occurs, insurer agency arises because policy terms and the surrounding law that measure the company's performance are vague and difficult to enforce. Also, the insured usually is poorly situated to effectively monitor the company's performance in handling the claim. The insurance policy does not specify in much detail the insurer's duties in processing a claim. A typical HO-3 homeowners' policy, for example, only requires the company to pay claims within sixty days of agreement or adjudication and to participate in appraisal; otherwise, it delineates no duties concerning the processing of a claim.[35] Indeed, it is difficult to specify the insurer's duties because they necessarily rest on vague concepts such as promptness and reasonableness. As expressed in the Model Unfair Claims Settlement Practices Act, for example, a company must "adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies."[36] The vagueness of the company's defined responsibility, the substantial advantage in information, and the expertise that the insurer possesses create an inherent difficulty in monitoring the performance. Even if the insured can detect insurer opportunism, its ordinary

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[34] The moral rationale may speak more broadly about external norms of morality, but it seems to be at most a minor theme in the case law.

[35] HO3, *supra* note 4, at 15.

[36] Model Unfair Claims Settlement Practices Act § 4.C (Nat'l Ass'n of Ins. Comm'rs 1997). Even when a statute appears to narrowly specify a duty, the specification is usually qualified by a vague term. In Tennessee, for example, an insurer is subject to a statutory penalty if it fails to pay a claim within sixty days of a demand by the policyholder, but only if "the refusal to pay the loss was not in good faith." TENN. CODE ANN. § 56-7-105 (West 2008); *see also* GA. CODE ANN. § 33-4-6 (West 2016); LA. STAT. ANN. § 22:1892 (2021).

remedy is only to receive the benefits it already was entitled to under the policy; in most jurisdictions, broader remedies are available only if the insured can prove intentional or reckless misconduct.[37]

Moreover, the company has some incentive to act opportunistically and not pay a claim or pay less than it actually owes. The company that denies payment of a claim in whole or in part increases its profits. The company that only delays payment of a claim increases its investment income and thereby increases its profits. Market competition, reputational effects, and administrative regulation arguably fail to provide effective checks on opportunistic behavior.[38] A company that delays paying claims or denies valid claims in whole or in part conceivably could suffer a negative reputational effect, and reputation is an important element in consumer purchases of insurance. But claim practices are not a major determinant of satisfaction or purchasing behavior, particularly relative to price.[39]

The form of insurer opportunism in the claim process that is particularly relevant to the false swearing rule is the assertion of fraud by the insured as a reason for not paying a claim. The false swearing rule gives power to that assertion, and therefore, the rule itself potentially becomes a tool for opportunism. In many jurisdictions, the severe consequences of a finding of false swearing—denial of an entire claim for any nontrivial incidence of fraud—raise the stakes considerably. Therefore, with respect to false swearing in the claim process, agency and opportunism are present on both sides.

Each of the rationales for the false swearing doctrine also relates to insurer opportunism. Opportunism by insurers constitutes an egregious form of breach of the insurance contract not only of its express terms requiring payment of what is owed but also of the obligation of good faith. The risk of insurer opportunism imposes inefficient monitoring costs on insureds, costs that many insureds cannot bear at all. It violates moral and legal strictures, and insurer fraud imposes costs on members of the pool whose claims are not paid, just as the prevention of that kind of fraud benefits the entire pool by ensuring that the claim process works better for all claimants.

In a broader perspective, the false swearing doctrine is only a small part of a large-scale, public/private system designed to detect, punish, and deter fraud by insureds in the claim process.[40] The evils of insurance fraud

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[37] Feinman, *supra* note 20, at 704.

[38] Jay M. Feinman, *The Regulation of Insurance Claim Practices*, 5 U.C. IRVINE L. REV. 1319 (2015).

[39] Feinman, *supra* note 20, at 711 n.90.

[40] JAY M. FEINMAN, DELAY, DENY, DEFEND 167–88 (2010).

and the consequences for fraudsters are marketed to the public through social media, television advertisements, and promoted news reports.[41] Sophisticated predictive analytics trigger the identification of potentially fraudulent claims.[42] Insurance companies contain Special Investigation Units to which fraud claims are referred for a more aggressive investigation. Insurance regulators and prosecutors in most states have established distinct units to seek civil and criminal penalties for fraud, and legislation often requires insurers to report suspected cases of fraud to the authorities.[43] All states now recognize insurance fraud as a crime, with two-thirds of the states treating it as a felony.[44] This system embodies the potential for insurer opportunism.[45]

The essential point here is not that insurer-side fraud is commonplace or as great as insured-side fraud, but that the potential for insurer opportunism in the claim process and its manifestation in excessive claims of fraud is at least significant enough to enter into consideration of false swearing cases. The insurer's and the pool's interest in preventing fraudulent claims are legitimate but so are the insured's and the pool's interest in preventing fraudulent claims of fraud. Reconciling the possibility and effects of opportunism by the insured and by the insurer in formulating the boundaries of the false swearing rule requires consideration of the relative risk and severity of each form of opportunism. How likely are insureds to control relevant information and at what expense could insurers discover it? How likely are insurers to deny claims opportunistically? If an insurer asserts fraud, how likely will an insured effectively contest the insurer's position?

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[41] *Id. See e.g.*, *Video & Infographics*, COAL. AGAINST INS. FRAUD https://insurancefraud.org/videos-infographics/ (featuring a series of videos and infographics).

[42] FEINMAN, *supra* note 40, at 182–83.

[43] *See* Aviva Abramovsky, *An Unholy Alliance: Perceptions of Influence in Insurance Fraud Prosecutions and the Need for Real Safeguards*, 98 J. CRIM. L. & CRIMINOLOGY 363 (2008).

[44] *Id.*

[45] There is no doubt that insurance fraud is a problem, but it may not be as great of a problem as the system proclaims it to be. The most authoritative, quantitative study of insurance fraud concluded that the ratio of fraud alleged and reported by insurance companies to actual, provable fraud, was about 25 to 1. Richard A. Derrig, *Insurance Fraud*, 69 J. RISK & INS. 271, 275 (2002). *See also* James Davey, *A Smart(er) Approach to Insurance Fraud*, 27 CONN. INS. L.J. 34 (2020).

IV. RESPONSES TO OPPORTUNISM

The false swearing rule focuses on agency and opportunism by the insured. The presence, or at least the possibility, of insurer opportunism requires more balanced responses than the all-or-nothing consequences of a strict rule in at least three ways. The first response addresses the false swearing doctrine itself: to invoke the false swearing defense, an insurer should be required to establish both that the misrepresentation was material and that it relied on the misrepresentation. The second response is about the process of litigating cases: allegations of misrepresentation by the insured should require proof by clear and convincing evidence. In each of these first two responses there is a split among the states, and the suggested rule is better suited to achieving the objectives of the false swearing rule and to addressing the presence of opportunism on both sides of the insurance relation. The third response is collateral to the false swearing rule and addresses the issue of balancing insurer and insured opportunism: an insurer should be required to act reasonably in the claim process, and an insured who is injured by unreasonable claims processing should have an effective remedy.

A. DOCTRINE

A doctrinal response that balances the two forms of opportunism relates to the elements of materiality and reliance in the false swearing rule. The basic elements of false swearing are a false statement regarding a material fact and the intent to deceive the insurer. *Couch on Insurance* summarizes the materiality requirement which practically all cases use as follows:

> The requirement that a misrepresentation be material is satisfied, in the context of an insurer's post-loss investigation, if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding. Accordingly, false answers are material if they might have affected the attitude and action of insurer, and they are equally material if they may be said to have been calculated either to discourage, mislead, or deflect company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate.[46]

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[46] 13A COUCH ON INSURANCE § 197:18 (3d ed. 2022).

The materiality requirement is an objective element; a misrepresentation is material if it "concerns a subject relevant and germane to the insurer's investigation"[47] so that it might have deceived the insurer or impeded its investigation of the claim.

The states are divided on the related question, a subjective element of whether an element of false swearing is actual reliance by the insurer.[48] Some jurisdictions hold that materiality is sufficient, so reliance is not required; others conclude that the insurer must further prove that it relied on, and actually was misled or deceived, by the insured's misrepresentations.[49] The latter position is correct for two reasons.

First, the requirement of reliance is consistent with the way fraud is treated elsewhere in the law. Actual and justifiable reliance[50] are required where fraud in the inducement is used as a basis for avoidance of a contract[51] or as the basis for a tort cause of action independent of a contract.[52]

Second, the potential for insurer opportunism dictates the need for a reliance requirement. The more extreme rule that materiality is enough without reliance by the insurer purports to be based on the rationales for the false swearing doctrine generally. Courts may emphasize the presence of a concealment or fraud provision in the policy without a specific reliance requirement or the immorality of the fraudulent insured.[53] Most importantly, however, is the need to prevent insured opportunism.

> Moreover, if the law, out of some misgivings about forfeitures, were to require that the insurer demonstrate that it has been misled to its prejudice by the fraud, the policy provision would be virtually worthless and put a premium on dishonest dealings by the assured. . . . The mendacious assured, surveying the possibilities and contemplating

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[47] Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179, 183 (2d Cir. 1984), *cert. denied*, 474 U.S. 826 (1985).

[48] 13A COUCH ON INSURANCE § 197:19 (3d ed. 2022).

[49] *Id.*

[50] Justifiable reliance in the law of fraud generally is the equivalent of the materiality requirement in the false swearing rule and is often stated in terms of materiality. DAN B. DOBBS, THE LAW OF TORTS 1359 (2000).

[51] E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.13 (1990).

[52] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 9 (AM. L. INST. 2020).

[53] Am. Diver's Supply & Mfg. Corp. v. Boltz, 482 F.2d 795, 797 (10th Cir. 1973).

> prospective tactics and strategy in the handling of his claim, would sense immediately that vis-a-vis himself and the underwriter, there would be no risk at all in his deceit. If it worked, he would have his money and, at worst, could be compelled to disgorge only by affirmative suit by the insurer if the fraud were discovered in time to be legally or practicably effective. If it didn't work–if, before consummation, fraud was detected–he would suffer no disadvantage whatsoever. *It would be an everything-to-win, nothing-to-lose proposition.*[54]

What this approach fails to recognize, of course, is the possibility of insurer opportunism, in either of two forms. An insurer has an incentive to use allegations of fraud as part of a broader scheme to deny payment of valid claims. Insurers could also make use of the non-reliance false swearing rule in a strategy that parallels post-claim underwriting. If an insurer discovers a misrepresentation during its investigation of a claim, it can use the misrepresentation as a basis for denying the claim, even if the misrepresentation played no part in its investigation, just as an insurer in past times could use a misrepresentation on the application, even if the misrepresentation played no role in its underwriting decision.[55]

Accordingly, a false swearing rule that includes a requirement of actual reliance better addresses the twin problems of opportunism by the insurer and the insured. Oregon law provides an example of the way in which the requirement of reliance works. Oregon originally enacted the fraud and concealment provision of the New York Standard Fire Policy and in 1985 added a requirement of reliance: "In order to use any representation by or on behalf of the insured in defense of a claim under the policy, the insurer must show that the representations are material and that the insurer relied on them."[56] The requirement in the statute "means ordinary reliance, which requires some evidence of a detrimental action or change in position."[57]

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[54] *Id.* (emphasis in original). *See also* Longobardi v. Chubb Ins. Co., 582 A.2d 1257, 1262 (N.J. 1990) ("[T]he better rule is one that induces insureds to answer truthfully questions about their losses.").

[55] *See* Thomas C. Cady & Georgia Lee Gates, *Post Claim Underwriting*, 102 W. VA. L. REV. 809 (2000).

[56] OR. REV. STAT. § 742.208(3) (West 2022).

[57] Eslamizar v. Am. States Ins. Co., 894 P.2d 1195 (Or. Ct. App. 1995). *See also* NEB. REV. STAT. § 44-358 (West 2022), applied to misrepresentations in the claim process in McCullough v. State Farm Fire & Cas. Co., 80 F.3d 269 (8th Cir. 1996);

Sufficient detrimental reliance arises if an insurer loses the opportunity to adequately investigate the cause of a loss or incurs time and expense in added investigation of a claim, such as being required to conduct a second Examination Under Oath;[58] processing the claim independently of the alleged misrepresentations does not itself constitute sufficient detrimental reliance.[59]

B. PROCESS

Most states use a preponderance of the evidence standard of proof for the elements of false swearing, while other states require that the elements be proven by clear and convincing evidence.[60] The former is the standard ordinarily applied in cases in which fraud is the basis for avoidance of a contract, and the latter is applied in cases involving the tort of fraud.[61] At a crude doctrinal level, one way of choosing the appropriate burden of proof is to decide whether false swearing is essentially a breach of a term of the contract, a failure of condition under the contract, or whether it is more akin to tortious misrepresentation. One line of authority, for example, distinguishes cases in which the insurer asserts that the insured has attempted to defraud the insurer from those in which the insurer asserts breach of a concealment clause as the basis for voiding the contract—but this makes no sense.[62] The typical policy provision bars both concealment and fraud, and in both cases, the gravamen of the insurer's claim and the consequences for the insured are the same.

Therefore, assigning a burden of proof requires further analysis. A canonical exposition of the differences among burdens of proof and the

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Bryant v. Nationwide Mut. Fire Ins. Co., 313 S.E.2d 803, 808 (N.C. Ct. App. 1984), *aff'd in part*, *rev'd in part*, 329 S.E.2d 333 (N.C. 1985).

[58] Allstate Ins. Co. v. Breeden, 410 Fed. Appx. 6, 8 (9th Cir. 2010); Leander Land & Livestock, Inc. v. Am. Econ. Ins. Co., No. 6:11-CV-06426-AA, 2013 WL 5940027, at *6 (D. Or., Nov. 1, 2013).

[59] Leavenworth v. State Farm Fire & Cas. Co., 297 Fed. Appx. 602 (9th Cir. 2008).

[60] 13A COUCH ON INSURANCE § 197:6 (3d ed. 2022); JERRY & RICHMOND, *supra* note 7, at 587.

[61] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 9 (AM. L. INST. 2020).

[62] Hall v. State Farm Fir & Cas. Co., 937 F.2d 210, 214 (5th Cir. 1991) (citing McGory v. Allstate Ins. Co., 527 So.2d 632, 637–38 (Miss. 1988)). *See also* McCord v. Gulf Guar. Life Ins. Co., 698 So.2d 89, 92 (Miss. 1997).

reasons for them are found in the United States Supreme Court's opinion in *Addington v. Texas*:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. [63]

As the Court further noted, the lower preponderance of evidence standard is appropriate for "the typical civil case involving a monetary dispute between private parties."[64] Because "society has a minimal concern with the outcome of such private suits . . . the litigants thus share the risk of error in roughly equal fashion."[65] In criminal cases, "the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment"—that is, proof beyond a reasonable doubt.[66] In between lies the standard of clear and convincing evidence, in which "the interests at stake . . . are deemed to be more substantial than mere loss of money" such as "the risk to the defendant of having his reputation tarnished erroneously" through allegations of fraud or the like.[67] Other uses of the intermediate standard are those in which some public interest is at stake or the effect on the defendant is more severe than a money judgment. In public law, these uses include commitment to a mental institution and the termination of parental rights,[68] and in private law, suits on oral contracts to make a will and actions to reform written transactions.[69]

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[63] Addington v. Tex., 441 U.S. 418, 423 (1979) (citation omitted).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 424.

[68] 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 301:5 (7th ed. 2015).

[69] 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 340 723–24 (7th ed. 2013).

The use of clear and convincing evidence in a fraud cause of action is well-established.[70] Indeed, the application of the standard is so well established that modern cases seldom specifically explain the court's logic in fraud cases, but it follows from the general rationale. Allegations of fraud are more serious than allegations of ordinary breach of contract, and "more evidence should be required to establish grave charges than to establish trifling or indifferent ones."[71]

Under this rationale, the false swearing defense should require proof by clear and convincing evidence. Indeed, false swearing in the insurance context is potentially a more serious matter than some other types of fraud. Insurance is about security for the insured, and the consequences for the insured in losing the security of its insurance policy are often severe or even catastrophic. Especially where insurer reliance on the misrepresentation is not required, the trier of fact needs to be more certain that the other elements are met, such as that the insured had made the misrepresentation intentionally, before attaching such drastic consequences, and more of the risk of error in fact-finding should be borne by the insurer. Finally, the threat of insurer opportunism in using allegations of fraud as a strategy to avoid paying claims—exploiting false claims of false swearing—suggests that courts ought to be cautious in enabling an insurer to use a claim of false swearing to entirely void its obligation under the policy and should assign the risk of error in fact-finding to the insurer.

C. OTHER RESPONSES

The best way to understand the false swearing doctrine is to situate it in the broader landscape of insurance claim practices. Doing so supports the approach to elements of the doctrine itself and the process by which it is applied in litigation described above—materiality and actual reliance proven by clear and convincing evidence. But it also suggests that the underlying issue should be addressed by other means as well.

From the insurer-side perspective, the fundamental problem addressed by the false swearing rule is the immoral insured seeking to defraud the insurer at the expense of the pool of policyholders. The appropriate response is a broad false swearing doctrine, an elaborate public/private structure for

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[70] 37 GEORGE BLUM ET AL., AMERICAN JURISPRUDENCE 2D FRAUD AND DECEIT § 479 (2022).

[71] Ziegler v. Hustisford Farmers Mut. Ins. Co., 298 N.W. 610, 612 (Wis. 1941) (quoting BURR. W. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES 1036 (2d ed. 1926)).

the investigation and sanctioning of insurance fraud, wide latitude for an insurer in invoking that structure, and insurer immunity from liability for reporting suspected fraud to civil and criminal authorities.[72] In litigation with an insured, an insurer should be subject to liability only for the most grievous errors in challenging a claim as fraudulent, perhaps where it intentionally or recklessly alleges fraud that does not exist. Today, in many states, an insurer is protected by such rules in both of these situations.

From the perspective that insurer-side opportunism also is a problem, however, the landscape looks much different and the responses to it should be different as well. The insurance fraud structure is far too elaborate for the scope of the problem and there is little in the way of a parallel structure for investigating and remedying insurer-side fraud in the wrongful delay or denial of claims.[73] One desirable response is to buttress the law of claim practices by requiring an insurer to observe reasonable standards of claim practices and making the insurer civilly liable to an insured where the insurer does not—that is, defining what is usually referred to as "bad faith" to be a negligence standard rather than intent or recklessness.[74] A negligence standard would provide a more effective deterrent for insurer opportunism, including opportunism through improper assertions of fraud by an insured while still enabling an insurer to deny a claim for false swearing where it is reasonable to do so.

V. CONCLUSION

The false swearing rule was developed to address the problems of agency and opportunism by an insured in the claim process. That problem is best understood within the insurance claim process with broad perspective, a perspective that recognizes the possibility of agency and opportunism by an insurer as well as by an insured. From that perspective, the rule needs to be properly defined, applied, and supplemented by other doctrines to balance the legitimate interests of insureds and insurers.

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[72] FEINMAN, *supra* note 40; Derrig, *supra* note 45; Davey, *supra* note 45.
[73] Feinman, *supra* note 38, at 1333–40.
[74] Feinman, *supra* note 20.