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Private Enforcement of the Affordable Care Act: Toward an “Implied Warranty of Legality” in Health Insurance

ABSTRACT. For decades, the individual health insurance market failed to provide consumers adequate or affordable health coverage. The Affordable Care Act (ACA) sought to change this state of affairs, establishing a new Patient’s Bill of Rights and instituting other protections that require insurers to make comprehensive coverage readily accessible. However, recent reports have begun to document health plans’ violations of the ACA, such as their failure to pay consumers their required refunds or the illegal imposition of waiting periods for transplant services. Although the ACA preserves a role for states in implementing and enforcing the law, state remedies are often lacking. For instance, many state consumer protection laws do not apply to insurance, while traditional breach of contract claims only provide for recourse when a health insurance policy expressly incorporates ACA provisions. As a result, a critical gap in the law has come to light: the absence of a private right of action. This Note proposes that state courts can address this gap by finding that the sale of individual health insurance comes with an implicit and legally enforceable promise that the policy and insurer administering it are in full compliance with the ACA. In other words, this Note urges courts to establish an “implied warranty of legality” in the context of individual health insurance. Modeled on the implied warranty of habitability, this approach would correct for power imbalances within this market. It would also promote individual rights by empowering consumers to sue when they have been wronged and foster civic engagement by enabling consumers to play an active role in the enforcement of public law. The implied warranty of legality would also have redistributive effects, allowing for the costs of noncompliance to be shared more evenly across the market. Looking beyond the ACA, the implied warranty of legality should also be applied in other regulated markets with similar dynamics, or, if the ACA is scaled back or repealed, to enforce state health insurance rules that seek to protect consumers from unlawful insurer practices.

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INTRODUCTION

The individual health insurance market plays an important residual function in the U.S. health care system, serving individuals and families who cannot access or afford employer-sponsored insurance but who earn too much to qualify for Medicaid.¹ Until recently, however, this market frequently failed to provide these consumers adequate or affordable health coverage. Premiums were often prohibitively expensive for consumers,² especially women, older adults, and less healthy people whom insurers could charge higher rates.³ Insurers also considered some consumers—from pregnant women and expectant fathers to individuals who had suffered from acne, allergies, or bunions—“uninsurable” and would deny them any coverage.⁴ In addition, some insurers would strategically rescind coverage when consumers became sick, denying consumers the benefits for which they had contracted and paid.⁵ To the extent that individual consumers could obtain and retain individual health insurance coverage, their policies typically provided limited protection against out-of-

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1. See Melinda Beeuwkes Buntin et al., *The Role of the Individual Health Insurance Market and Prospects for Change*, 23 HEALTH AFF. 79, 80 (2004).
 2. See Michelle M. Doty et al., *Failure To Protect: Why the Individual Insurance Market Is Not a Viable Option for Most U.S. Families*, COMMONWEALTH FUND 2 (July 2009), http://www.commonwealthfund.org/~media/files/publications/issue-brief/2009/jul/failure-to-protect/1300_doty_failure_to_protect_individual_ins_market_ib_v2.pdf [<http://perma.cc/7RFC-7UJ5>] (“Nearly three-quarters (73%) of respondents said they never bought a plan, with 61 percent of those who did not buy a plan in the individual market citing expensive premiums as the main reason.”).
 3. See *id.* (“People who buy coverage in the individual market must pay the full premium and, in most states, are rated on the basis of their health or age . . .”); *Nowhere To Turn: How the Individual Health Insurance Market Fails Women*, NAT’L WOMEN’S L. CTR., 8-10, 13 (2008), <http://nwlc.org/wp-content/uploads/2015/08/NWLCReport-NowhereToTurn-81309w.pdf> [<http://perma.cc/QUV6-AGD4>].
 4. See David S. Hilzenrath, *Papers Show Insurers Limited Coverage for Acne, Pregnancy*, WASH. POST (Sept. 19, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/18/AR2009091803501.html> [<http://perma.cc/M4JH-7C8H>].
 5. See Memorandum from the H. Comm. on Energy & Commerce Staff to Members & Staff of the Subcomm. on Oversight & Investigations 10-13 (June 16, 2009), http://www.ct.gov/oha/lib/oha/documents/pdfftestimony/us_house_comm_on_energy_and_commerce_memo_6_16_09_on_rescission_of_health_insurance_policies.pdf [<http://perma.cc/7WCR-337R>] (describing how insurance companies would rescind coverage because consumers had failed to report conditions that were unknown at the time they were applying for coverage or because of other unrelated discrepancies in their applications); *Cancer Patient Tells of Rips in Health Insurance Safety Net*, CNN (June 16, 2009, 3:19 PM), <http://www.cnn.com/2009/POLITICS/06/16/health.care.hearing> [<http://perma.cc/3KRW-SZSB>].

pocket medical costs, covered fewer benefits, and imposed greater restrictions than did employer-sponsored plans.⁶

These practices played a central role in Congress's decision to enact the Patient Protection and Affordable Care Act, commonly known as the ACA.⁷ The first set of ACA reforms, collectively referred to as the Patient's Bill of Rights, became effective on September 23, 2010, six months after the law was enacted.⁸ Among other things, the Patient's Bill of Rights prohibits insurers from imposing annual and lifetime dollar limits on coverage,⁹ discriminating against children with pre-existing conditions,¹⁰ and rescinding coverage absent fraud or intentional misrepresentation by the consumer.¹¹ These rules also require insurers to cover preventive care without cost-sharing¹² and to allow children to stay on their parent's health plan until they reach the age of twenty-six.¹³ Even more robust patient protections became effective in 2014. For example, in 2014, the ACA extended the rules against pre-existing condition denials to adults¹⁴ and imposed community rating requirements that limit insurers' ability to vary rates based on individual characteristics, such as age, gender, and health status.¹⁵ The ACA also required insurers to cover a broad range of "essential health services," including prescription drugs, maternity care, and rehabilitative and habilitative services.¹⁶ Plans sold through the newly launched health insur-

6. See Doty, *supra* note 2, at 4-7.

7. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585 (2012) ("In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues."); David Simas, *Why We Passed the Affordable Care Act in the First Place*, WHITE HOUSE (Oct. 30, 2013, 6:39 PM), <http://www.whitehouse.gov/blog/2013/10/30/why-we-passed-affordable-care-act-first-place> [<http://perma.cc/H4ZN-YF5M>].

8. See Ctr. for Consumer Info. & Ins. Oversight, *Patient's Bill of Rights*, CTRS. FOR MEDICAID & MEDICARE, <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/Patients-Bill-of-Rights.html> [<http://perma.cc/2FGZ-Y9YU>]; see also *A New Patient's Bill of Rights*, WHITE HOUSE, <http://www.whitehouse.gov/files/documents/healthcare-fact-sheets/patients-bill-rights.pdf> [<http://perma.cc/44AF-UJZ9>].

9. See 42 U.S.C. § 300gg-11(a)(1) (2012).

10. See *id.* § 300gg-3(d).

11. See *id.* § 300gg-12.

12. See *id.* § 300gg-13(a).

13. See *id.* § 300gg-14(a).

14. See *id.* §§ 300gg-3, -4.

15. See *id.* § 300gg(a).

16. See *id.* § 300gg-6(a).

ance marketplaces must meet additional requirements, such as network adequacy and marketing rules.¹⁷

Despite these new rules, consumers still face obstacles to adequate and affordable health coverage. Multiple insurers, for instance, have continued to charge consumers copays for preventive services, such as birth control, that the law requires insurers to make available without cost-sharing.¹⁸ Other insurers have issued policies excluding coverage of transplant services for new enrollees, contravening the law's prohibitions on benefit-specific waiting periods.¹⁹ And one insurer has been accused of cheating individual market enrollees out of \$35 million in rebates under the ACA's medical loss ratio rules, which require insurers to pay refunds if they do not spend eighty percent or more of premium dollars on health care expenditures or quality improvement.²⁰

Consumers injured by these insurer violations and others are presented with limited options for recourse. Consumers may appeal certain adverse benefit denials using their health plans' internal procedures and hope that their insurers self-correct or, if that fails, ask an external reviewer to reconsider their claims.²¹ If the appeals process does not address consumers' problems, consumers may take their complaints to state and federal regulators, and hope—

17. See *id.* § 18031(c)(1).

18. See *State of Women's Coverage: Health Plan Violations of the Affordable Care Act*, NAT'L WOMEN'S L. CTR., 8 (2015), <http://www.nwlc.org/sites/default/files/pdfs/stateofcoverage2015final.pdf> [<http://perma.cc/67QX-52KS>].

19. See *id.* at 17-18.

20. See Bob Herman, *Blue Shield of California Faces Class-Action Lawsuit over Incorrect Rebates*, MOD. HEALTHCARE (July 14, 2016), <http://www.modernhealthcare.com/article/20160714/NEWS/160719940> [<http://perma.cc/4U7N-6GEL>].

21. See 42 U.S.C. §§ 300gg-19(a)-(b); 45 C.F.R. § 147.136(b)(2)(ii)(C) (2014). This is an important procedural protection for consumers who are denied treatments covered by their health policy if, for example, the insurer contends that it is not medically necessary. However, this protection does not provide recourse when a consumer's argument is based not on the terms of his or her policy, but on the legal protections in the ACA itself. Moreover, even when a consumer's complaint falls within the scope of the appeals process, the process may prove inadequate if the consumer has multiple claims that he or she wants resolved at once, if the consumer wants to conduct discovery or present testimonial evidence in support of his or her claims, or if the consumer seeks damages for injuries caused by illegal benefit denials or coverage terminations. See Brendan S. Maher, *The Affordable Care Act, Remedy, and Litigation Reform*, 63 AM. U. L. REV. 649, 671-72 (2014); Wade S. Hauser, Note, *Does Iowa's Health Care External Review Process Replace Common-Law Rights?*, 99 IOWA L. REV. 1401, 1428-29 (2014); see also John V. Jacobi et al., *Health Insurer Market Behavior After the Affordable Care Act: Assessing the Need for Monitoring, Targeted Enforcement, and Regulatory Reform*, 120 PA. ST. L. REV. 109, 134 (2015) (noting that appeals processes can come with shorter filing deadlines than civil actions).

perhaps in vain—that these regulators intervene.²² But what consumers cannot do, at least under federal law, is sue. Despite the myriad ways in which the ACA transformed the substantive laws governing individual health insurance, the ACA did not create a private right of action that could empower consumers to require insurers to comply with these rules and pay damages if consumers are injured when they do not.²³

The law's reluctance to provide a private right of action under federal law may stem, in part, from the law's deference to the historic role of states when it comes to insurance regulation.²⁴ States have long been the primary regulators of insurance, a fact that Congress recognized and enshrined in the McCarran-Ferguson Act of 1945.²⁵ The Act officially declared that federal law shall not be construed to limit or override state laws regulating insurance unless Congress's intent to do so is clear.²⁶ While the ACA was an unprecedented federal intervention into state authority, it did not disrupt the general framework established by the McCarran-Ferguson Act: federal law serves as a floor upon which state law can build.²⁷ Thus, consumers may turn to state law where the ACA is

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22. See *infra* Section I.A (discussing the shortcomings of public enforcement in insurance). For a helpful description of the ACA's public enforcement scheme, see Sara Rosenbaum et al., *Implementing Health Reform in an Era of Semi-Cooperative Federalism: Lessons from the Age 26 Expansion*, 10 J. HEALTH & BIOMEDICAL L. 327, 340-46 (2015).
23. Maher, *supra* note 21, at 672. One important exception is section 1557, which prohibits discrimination on the basis of race, color, national origin, sex, age, or disability under health programs or activities receiving federal financial assistance, administered by an executive agency, or established under Title I of the ACA. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified at 42 U.S.C. § 18116(a) (2012)). Unlike the ACA's private insurance market reforms, section 1557 has been interpreted to create a private right of action, at least with respect to claims of disparate treatment. See *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376, 31,440 (May 18, 2016) (codified at 45 C.F.R. pt. 92) (“[The Office of Civil Rights] interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation.”).
24. See Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 118 (2001) (“Modern federal legislation often regulates matters that traditionally were left to the states. Congress does not usually preempt state law, but instead legislates against the backdrop of state law. Reading federal statutes liberally to maximize the creation of rights, rights of action, and remedies may invade state prerogatives in ways that Congress did not intend. In many instances state remedies are available to cure wrongdoing and federal remedies are unnecessary.” (footnote omitted)).
25. See McCarran-Ferguson Act of 1945, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified at 15 U.S.C. § 1011 et seq. (2012)).
26. 15 U.S.C. §§ 1011-12 (2012).
27. See *infra* Section I.A.

lacking.²⁸ As this Note will show, however, relying on already established state laws to enforce the ACA is much like trying to fit a square peg into a round hole. You might squeeze it in sometimes, but the hole is not the best fit and often will not work at all. For example, consumers may be able to bring a breach of contract claim under state law when the policy terms of their insurance plans are ambiguous and the ACA favors one interpretation, but consumers may be without a remedy for violations of provisions that are not expressly incorporated in their contracts.²⁹

In response to the inadequacy of existing options, this Note proposes that state courts recognize an “implied warranty of legality,” a single, comprehensive state cause of action that allows consumers to privately enforce the ACA.³⁰ Under the implied warranty of legality, the sale of an individual health insurance policy would carry with it an implied, enforceable promise that the policy and the insurer administering it are and will remain in full compliance with the ACA for the policy’s term.³¹ Failure to comply with the ACA would constitute a

28. See, e.g., Joseph Friedman et al., *A Crystal Ball: Managed Care Litigation in Light of the Patient Protection and Affordable Care Act*, 27 HEALTH L. 1, 3 (2014) (“[ACA] claims may be raised through other statutes that do contain a private right of action (e.g., ERISA or state insurance or other law) by applying [the ACA’s] relevant provision as the legal standard against which the claim is measured.”); Maher, *supra* note 21, at 672 (“[A] claimant has the right to bring suit under whatever law, pre-ACA, governed the insurance policy his claim arises under.”); Wendy K. Mariner, *Health Insurance Is Dead; Long Live Health Insurance*, 40 AM. J.L. & MED. 195, 211 (2014) (“In theory, patients can sue a private insurer under state law for claims denials and other causes of action.”).

29. See *infra* Section I.B.

30. This Note borrows this term from section 41 of the Marine Insurance Act of 1906, an Act of the Parliament of the United Kingdom, which provides that “[t]here is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.” Marine Insurance Act 1906, 6 Edw. 7 c. 41, § 41 (Gr. Brit.). According to one description of the warranty, “If the managers [of a ship] are negligent in taking the necessary steps to prevent an illegality during the performance of the adventure, the assured will be in breach of the implied warranty of legality.” BARIS SOYER, *WARRANTIES IN MARINE INSURANCE* 127 (2d ed. 2006); see also Guy Manchuk, *Armed Guards, Marine Insurance, and the Implied Warranty of Legality*, 24 U.S.F. MAR. L.J. 309, 341, 349-50 (2011-12) (discussing how the warranty may cover situations where illegality is clear on the face of the policy as well as situations where illegality only arises during the course of an adventure). The implied warranty of legality, as used here, would operate similarly, protecting consumers from unlawful policy terms and from unlawful insurance practices that occur over the term of the policy.

31. This Note focuses exclusively on the individual insurance market. While many of the ACA’s private insurance reforms also apply to employer-sponsored insurance, the question of whether the implied warranty of legality would be preempted under the Employee Retirement Income Security Act of 1974 (ERISA) adds a layer of complication that this Note will

breach of the implied warranty and be actionable in court for either prospective (i.e., injunctive) or compensatory relief, with the goal of placing the consumer in the position he or she would have been in had no violation occurred.

The implied warranty of legality has a robust lineage. This Note draws inspiration from the original judicial opinions that created the implied warranty of habitability, which revolutionized the relationship between landlords and tenants using a theory based on the classic doctrines of implied warranties of merchantability and fitness.³² The implied warranty of legality also may be viewed as an expansion of and improvement upon the reasonable expectations doctrine—a half-century old approach to interpreting insurance contracts that is meant to favor consumers, who are often relatively powerless and information-poor market actors.³³

Like other implied warranties, the implied warranty of legality is attractive for its intuitive simplicity. Just as the implied warranty of merchantability promises consumers that the goods they purchase “are fit for the ordinary purposes for which such goods are used”³⁴—for example, that a refrigerator keeps its contents cold—the implied warranty of legality promises consumers who purchase individual health insurance that the policy does what the law says it must. Unlike the reasonable expectations doctrine, however, the implied warranty of legality imposes no new, unexpected obligations on insurers. Rather, it holds insurers accountable for promises implicit in the private health insurance market in a post-ACA world.

More broadly, the instinct behind this proposal—to provide a remedy for individuals who have suffered an injury due to others’ legal violations—is centuries old.³⁵ Civil recourse theorists, such as John Goldberg, draw on social contract theory to argue that the state should provide opportunities for redress via private law in order to compensate for the law’s restrictions on individuals’ ability to seek private retribution.³⁶ Others, like Nathan Oman, frame the im-

not discuss. See, e.g., Maher, *supra* note 21, at 673-74 (discussing ERISA preemption of state law claims).

32. See *infra* Section II.A.

33. See *infra* Section I.B.3.

34. U.C.C. § 2-314(2)(c) (AM. LAW INST. & UNIF. LAW COMM’N 2002).

35. See, e.g., Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1319-22 (2003) (tracing the idea of the right to a remedy back to Blackstone and Coke).

36. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541 (2005); see also, e.g., Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 86 (1998) (“The idea of civil recourse is a desirable solution to the social contractor. Consenting to comply with all the rules, even after one’s rights are violated, does not entail giving up all

pulse for recourse as a question of honor.³⁷ Oman points to John Grisham's novel *The Rainmaker*, where a mother sues an insurance company for denying medical treatment to her dying son, to help illustrate this point: "By suing the company, by standing up to it, the mother transformed herself from a passive victim into an agent, an equal who could demand and receive respect."³⁸ The implied warranty of legality seeks to give real consumers that same opportunity.

The remainder of this Note proceeds in three major parts. Part I begins by explaining the important role of state law in this area. Critically, the ACA preserves states' traditional role in health insurance regulation and does not preempt state causes of action that enable consumers to sue to enforce the law. Yet existing state causes of action that consumers may try to use for this purpose fail to provide a comprehensive private enforcement regime. Most importantly, no single cause of action would enable enforcement of the full array of the ACA's various consumer rights and protections.

To fill this gap, Part II proposes that states adopt an implied warranty of legality. This approach is modeled on the implied warranty of habitability, and the reasons given by courts for adopting it apply equally to the individual health insurance market under the ACA. Additionally, the implied warranty of legality, like the implied warranty of habitability, is based in the common law, thus negating any need for state legislative action. Part II also describes how the implied warranty of legality would operate in practice. This discussion includes consideration of how courts would construct the warranty—including the basis on which courts could hold insurers liable, whether insurers should be allowed to disclaim the warranty, and the remedies that would be available, as well as potential barriers to adoption. As proposed, the implied warranty of legality would run the risk of increasing premiums, but these increases are justifiable on redistributive grounds. Additionally, while insurers are likely to raise the primary jurisdiction and filed rate doctrines as bars to litigation, these doctrines should have minimal impact on consumers' ability to seek recourse under the implied warranty of legality.

possibility of redress should others invade one's own rights. Conversely, consenting to be subject to a wide variety of duties to others does not entail being vulnerable to a similarly wide range of possible criminal sanctions. While the state takes away the liberty of private retribution, it offers a right to civil redress in its place. While it creates in each a vulnerability to action under the law, it provides in return protection from the threat of private retribution.").

37. See Nathan B. Oman, *The Honor of Private Law*, 80 *FORDHAM L. REV.* 31, 32-34 (2011).

38. *Id.* at 62.

Part III concludes by considering if and when the implied warranty of legality could be applied to regulatory regimes beyond the ACA. The ACA's narrow approach to preemption means that preemption should not pose a barrier to the adoption of the proposed implied warranty of legality. Although this result is not assured under other federal statutes, Supreme Court precedent generally preserves state causes of action—like the implied warranty of legality—that parallel but do not expand federal requirements. Moreover, the implied warranty could be applied to enforce state health insurance rules in the event that the ACA's federal protections are scaled back. Assuming preemption is not an obstacle, the implied warranty could also be extended beyond the individual health insurance context and would be most justified in markets that resemble insurance and housing—for instance, markets where participation is involuntary and goods carry high societal importance.

I. THE CONTINUING VITALITY OF STATE LAW UNDER THE ACA

The ACA transformed health insurance regulation in the United States by setting comprehensive new federal standards intended to improve the affordability, adequacy, and accessibility of individual health insurance.³⁹ Yet contrary to conventional wisdom, the ACA is far from a “federal takeover of health insurance.”⁴⁰ Rather, the ACA maintains states' historical responsibility to both establish and enforce the law governing health insurance. Indeed, the law self-avowedly left in place the “federalism framework” under which states serve as the primary regulators of insurance.⁴¹ This Part describes this framework and argues that it allows states to provide for private enforcement of the ACA even in the absence of a federal private right of action. An analysis of existing state causes of action illustrates the extent to which consumers can rely on current law to enforce the ACA and seek relief from injuries arising from violations thereof. This analysis reveals that these causes of action provide only a piece-

39. See Katie Keith et al., *Implementing the Affordable Care Act: State Action on the 2014 Market Reforms*, COMMONWEALTH FUND 2-3 (Feb. 2013), http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2013/1662_Keith_implementing_ACA_state_action_2014_reform_brief_v2.pdf [<http://perma.cc/L9K7-FXD6>].

40. Brendan S. Maher & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Health Insurance Under the ACA*, 31 YALE L. & POL'Y REV. 275, 277 (2013).

41. Sara Rosenbaum, *Can This Marriage Be Saved? Federalism and the Future of U.S. Health Policy Under the Affordable Care Act*, 15 MINN. J.L. SCI. & TECH. 167, 173 (2014); see also *id.* at 178 (describing the “conceptual approach to insurance reform” as “preserving state primacy over health insurance regulation while introducing transformational federal standards designed to fundamentally remake the market at its core”).

meal remedy and that a more comprehensive solution is necessary to ensure consumers benefit from the full array of rights and protections provided them by the ACA.

A. State Regulatory and Enforcement Powers Under the ACA

States have long served as the default regulators of insurance. In fact, up until 1944, when the Supreme Court recognized that interstate insurance transactions fell within Congress's Commerce Clause power, state regulatory power was exclusive.⁴² The Supreme Court's decision reversing precedent prompted a swift reaction from Congress, but rather than exercise its newfound authority, Congress disclaimed it.⁴³ Specifically, in the McCarran-Ferguson Act of 1945, Congress declared that continued state regulation of insurance was "in the public interest"⁴⁴ and provided that congressional action should not be interpreted to "invalidate, impair, or supersede" state regulation absent a clear intent to do so.⁴⁵ While Congress since has intervened significantly in the context of employer-sponsored benefit plans, until the ACA, Congress largely left regulation and enforcement of individual insurance to the states, only setting certain minimum standards.⁴⁶

The ACA greatly expanded the breadth and scope of federal regulations governing the individual insurance market but preserved the state-centric approach to individual insurance regulation along two dimensions. First, states may continue to strengthen health insurance regulation.⁴⁷ For example, while

42. See *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944). Prior to this ruling, the Supreme Court repeatedly had held that the business of insurance was not commerce and thus not subject to federal regulation. See, e.g., *N.Y. Life Ins. Co. v. Deer Lodge Cty.*, 231 U.S. 495, 502-12 (1913); *Hooper v. California*, 155 U.S. 648, 653-56 (1895); *Paul v. Virginia*, 75 U.S. 168, 182-85 (1868).

43. See Timothy S. Jost & Mark A. Hall, *The Role of State Regulation in Consumer-Driven Health Care*, 31 AM. J.L. & MED. 395, 398 (2005).

44. 15 U.S.C. § 1011 (2012).

45. *Id.* § 1012(b).

46. See, e.g., Jost & Hall, *supra* note 43, at 397-99 (comparing ERISA with the Health Insurance Portability and Accountability Act of 1996); Rosenbaum, *supra* note 41, at 173-74 (same).

47. See 42 U.S.C. § 300gg-62(a) (2012); see also Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 15,808, 15,862 (proposed Mar. 21, 2014) (to be codified in scattered sections of 45 C.F.R.) ("States have significant latitude to impose requirements with respect to health insurance coverage that are more restrictive than the Federal law requirements."); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 596 (2011) ("In making clear that states can impose additional requirements, both measures [the ACA and the Dodd-Frank Wall Street Reform

the ACA allows health insurers to charge older adults rates up to three times more than what they charge younger adults, states may demand that health insurers apply the same rates to all customers, regardless of age.⁴⁸ Second, states remain the primary enforcers of both federal and state health insurance regulations in the individual market.⁴⁹

and Consumer Protection Act] thus come down firmly on the side of federal law serving as a regulatory floor, rather than as a regulatory ceiling.” (footnote omitted)).

48. See Justin Giovannelli et al., *Implementing the Affordable Care Act: State Approaches to Premium Rate Reforms in the Individual Health Insurance Market*, COMMONWEALTH FUND 2-3 (Dec. 2014), http://www.commonwealthfund.org/~media/files/publications/issue_brief/2014/dec/1795_giovannelli_implementing_aca_state_premium_rate_reforms_rb_v2.pdf [<http://perma.cc/B7TS-CVCK>].
49. See 42 U.S.C. § 300gg-22(a)(1) (2012). The federal government may take over responsibility for enforcement only if it determines that the state has failed to “substantially enforce” the law. See *id.* § 300gg-22(a)(2). This process has been described as “almost painfully deferential to state powers.” Rosenbaum, *supra* note 41, at 181; see also Katherine T. Vukadin, *Obamacare Interrupted: Obstructive Federalism and the Consumer Information Blockade*, 63 BUFF. L. REV. 421, 462 (2015) (“The federal fallback remains an option, but can it really be effective? Its role is limited by logistical issues as well as state primacy in such matters—the measured approach to enforcement reflected in HHS’s statements reflects these limitations. The federal government’s approach to enforcement is incremental and careful out of fear of being labelled unconstitutional commandeering.” (footnotes omitted)). With respect to the ACA’s insurance market reforms, federal regulators have asked that states provide notice if they do not have statutory authority to enforce the market reforms or otherwise choose not to do so. See Ctr. for Consumer Info. & Ins. Oversight, *Compliance and Enforcement, CTRS. FOR MEDICARE & MEDICAID SERVS.*, <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/compliance.html> [<http://perma.cc/7Z33-JHRN>]. As an alternative to fully taking over enforcement, CMS also announced that it was willing to work in collaboration with states that are “willing and able to perform regulatory functions but lack[] enforcement authority.” *Id.* As of January 1, 2014, five states had asked the federal government to assume enforcement authority and three had entered collaborative enforcement arrangements. See Katie Keith & Kevin W. Lucia, *Implementing the Affordable Care Act: The State of the States*, COMMONWEALTH FUND 13 (Jan. 2014), http://www.commonwealthfund.org/~media/Files/Publications/Fund%20Report/2014/Jan/1727_Keith_implementing_ACA_state_of_states.pdf [<http://perma.cc/9GNK-6ZY5>]. Experience to date suggests that federal intervention in enforcement will be rare absent invitation. Studies by the General Accountability Office have found that the federal government failed to intervene to enforce provisions of HIPAA in the face of state inaction. Rosenbaum et al., *supra* note 22, at 358 n.182 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-98-217R, PRIVATE HEALTH INSURANCE: HCFA CAUTIOUS IN ENFORCING FEDERAL HIPAA STANDARDS IN STATES LACKING CONFORMING LAWS (1998); and U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-00-85, IMPLEMENTATION OF HIPAA: PROGRESS SLOW IN ENFORCING FEDERAL STANDARDS IN NON-CONFORMING STATES (2000)). Recent experience suggests that the federal government will be no more proactive: even though Arizona enacted a statute in April 2015 prohibiting the state “from using any personnel or financial resources to enforce, administer or cooperate with the [A]ffordable [C]are [A]ct,” see ARIZ. REV. STAT. ANN. § 1-271(A) (2015), eighteen months later, it is still not listed among the states where the federal

Unfortunately, state public enforcement mechanisms are unlikely to provide consumers complete protection from violations of the law. These typically include review and approval of policy forms, review and approval of premium rates, complaint processing, oversight of claims payment practices and advertising, and periodic market conduct reviews.⁵⁰ Violations may be met with the imposition of corrective action plans, fines, and orders to refund money to consumers, among other measures.⁵¹ Because states are responsible for licensing health insurers, they may also take action on the license in response to severe violations.⁵² Yet prior work examining state insurance regulation has found that insurance departments tend to “underperform in their efforts to protect and support consumers’ interests.”⁵³ Regulatory capture⁵⁴ and limited re-

government had taken over enforcement authority, *see* Ctr. for Consumer Info. & Ins. Oversight, *supra*.

50. *See* Elizabeth Abbott et al., *Strengthening the Value and Performance of Health Insurance Market Conduct Examination Programs: Consumer Recommendations for Regulators and Lawmakers*, HEALTH MGMT. ASS’N 15 (Nov. 2013), http://www.naic.org/documents/committees_conliaison_related_health_mce.pdf [<http://perma.cc/F25X-L6HJ>]; *How Private Coverage Works: A Primer, 2008 Update*, HENRY J. KAISER FAM. FOUND. 8-10 (Apr. 2008), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7766.pdf> [<http://perma.cc/6RJ-55GW>].
51. *See* Abbott et al., *supra* note 50, at 16.
52. *See* *How Private Coverage Works: A Primer, 2008 Update*, *supra* note 50, at 2-3, 9.
53. Cassandra B. Roeder, *Reforming Consumer-Insurer Dispute Resolution in the Auto Insurance Industry*, 14 J. BUS. & SEC. L. 151, 159 (2014); *see also, e.g.*, Deborah F. Sanders, *Unfair Settlement Practice Acts: Should Legislators Expressly Create or Should Courts Imply a Private Cause of Action for Third Parties?*, 4 OHIO ST. J. DISP. RESOL. 295, 298-300 (1989) (“Moreover, when statutes have sufficient enforcement power, agencies have been criticized for failing to use their enforcement power against violators. Very few state insurance commissioners who have the power to enforce [unfair settlement practice] statutes have exercised that power to protect claimants from unfair settlement practices.” (footnotes omitted)).
54. *See* Roeder, *supra* note 53, at 159 (“Many state insurance commissioners are former industry executives, and thus some believe the regulatory environment is stacked against consumer interests due to industry capture. It has also been argued that the nature of the company-consumer relationship causes an inherent power imbalance; a small group of organized, highly motivated companies is better-equipped to lobby effectively than a large group of consumers, each of whom has only a small stake in a given financial service contract.” (footnotes omitted)); *see also* Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1644 (2011) (arguing that regulatory capture will have a particularly negative effect “in the context of consumer protection, where regulated entities have quite strong interests in deregulation, and consumers, the beneficiaries of regulation, are a large, dispersed group of individuals, each with a limited stake in regulatory outcomes”); Harvey Rosenfield, *Auto Insurance: Crisis and Reform*, 29 U. MEM. L. REV. 69, 113 (1998) (“‘Capture’ of the regulators by the regulated industry is common in state-based insurance systems . . .”).

sources⁵⁵ have frequently been proffered as explanations for this shortcoming. Studies tracking state implementation of the ACA similarly suggest that many states lack the ability or willingness to closely monitor insurer compliance and bring enforcement actions when violations are uncovered. In some cases, this is driven by a lack of capacity or institutional knowledge of how to enforce provisions of the ACA that are novel to the state.⁵⁶ In other instances of inaction, state regulators lack the legal authority to directly enforce some or all of the ACA's market reforms.⁵⁷ Effective administrative enforcement also depends on

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55. See Roeder, *supra* note 53, at 160 (“State insurance departments frequently lack adequate financial resources and as a result are often understaffed.”). Roeder goes on to highlight reports showing that consumer complaint resolution, in particular, gets short shrift. *See id.* For more detail on the examples that Roeder uses, see Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 661-63 (1999). *See also* Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 663 (2013) (“Ideally, the insurance commissioner stands in the shoes of potential policyholders, disapproving policy terms that would be unacceptable to purchasers if they were in a position to understand, bargain about, or reject them. In practice, however, authority to regulate policy forms and premium rates is only lightly exercised, except for occasional forays into the high-volume consumer auto and homeowners lines of insurance. One reason is that regulatory resources are extremely limited, given the sheer volume of policy form and rate filings. Realistically, regulators can scrutinize only a small percentage of filings.” (footnote omitted)); Max Huffman, *Competition Policy in Health Care in an Era of Reform*, 7 IND. HEALTH L. REV. 225, 232 (2010) (“States lack the resources to enforce either antitrust or consumer protection prohibitions against the insurance industry . . .”).
56. *See, e.g.*, Jacobi et al., *supra* note 21, at 157 (“[I]n practice, many states ‘do little to assess their network adequacy. To the extent state regulators provide oversight, it is most commonly in response to consumer complaints.’” (quoting Quynh Chi Nguyen, *Network Adequacy: What Advocates Need To Know*, COMMUNITY CATALYST 2 (Jan. 2014), http://www.communitycatalyst.org/resources/publications/document/Network-Adequacy_what-advocates-need-to-know_FINAL-01-28-14.pdf [<http://perma.cc/F2QW-66BP>])); Katie Keith et al., *Nondiscrimination Under the Affordable Care Act*, GEO. U. HEALTH POL’Y INST. 11 (July 2013), <http://georgetown.box.com/shared/static/c4wvixauvz30xh1r82.pdf> [<http://perma.cc/MN37-69S8>] (“Regulators reported difficulty in conducting a meaningful review of the adequacy of drug formularies to ensure that plans do not discriminate based on, for example, expected length of life or disability. Some noted that this type of in-depth review would be an expansion of their traditional regulatory role because it requires an understanding of the latest drug treatments, patient needs, and evidence-based treatments. This type of review is made even more difficult by the fact that insurers change their formularies frequently.”); *id.* at 15 (noting that regulators “raised concerns that states may not have sufficient resources to devote to a more in-depth review”).
57. *See* Katie Keith et al., *supra* note 39, at 2-3. While some officials may attempt to encourage voluntary compliance as part of their policy and rate review processes, regulators have shared that they may be unable to “respond to consumer complaints, require an insurer to change its practices, or impose sanctions without express authority to enforce federal law.” *Id.* at 11. Instead, regulators have “sought ways to characterize their oversight in terms that

robust market conduct examinations that allow for ongoing monitoring of insurers after rates and policies are approved,⁵⁸ but it appears unlikely that these examinations will be conducted with sufficient regularity or thoroughness to provide meaningful protection to consumers, since they can be costly and time-consuming.⁵⁹ And, even if regulators do eventually intervene, it may only come after consumers have experienced injury.⁶⁰

These drawbacks have led others to conclude that private enforcement is necessary to complement public enforcement.⁶¹ Of course, leaving in place state *public* enforcement power does not necessarily mean that federal law allows private causes of action arising under state law. But Congress was clear in the ACA that state law is not preempted unless it “prevent[s] the application” of the ACA’s insurance reforms.⁶² In the only appellate decision interpreting this preemption language to date, the Eighth Circuit described the set of cases in which preemption applies as “narrow” and held that “only those state laws that ‘hinder or impede’ the implementation of the ACA run afoul of the Supremacy Clause.”⁶³ The same clause has elsewhere been termed an “anti-preemption provision,” amid speculation that it may even preserve state laws that frustrate but do not directly block or contradict federal law, in contrast to general principles of obstacle preemption.⁶⁴

Nothing in the text of the ACA suggests that this anti-preemption provision is limited to the substantive requirements that a state may set for insur-

effectively soft-peddled their regulatory powers in favor of a partnering or technical support role with the health insurance industry.” Rosenbaum et al., *supra* note 22, at 351.

58. See Abbott et al., *supra* note 50, at 7. When used in the past, these examinations have uncovered serious violations of insurance laws, including the use of unapproved policy forms and premium rates, improper claims handlings, and noncompliance with rules pertaining to consumer appeals and grievance processes. *Id.* at 17; see also Jacobi et al., *supra* note 21, at 177 (“Close attention to the effects of formulary design and other market behavior of insurers will be crucial to uncover potentially problematic conduct that could constitute unlawful discrimination. It is likely that most of such conduct, if it occurs, will be relatively subtle, and will only be revealed through attentive review of the marketplace by advocates, researchers, and regulators.”).
59. See Abbott et al., *supra* note 50, at 20.
60. Cf. Rosenbaum et al., *supra* note 22, at 345.
61. See, e.g., *id.* at 359 (concluding that the “pathway to accountability of insurers and health plans for the quality and scope of promised coverage necessarily must entail private enforcement rights as well as government oversight”).
62. 42 U.S.C. § 18041(d) (2012) (“Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title.”).
63. *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022 (8th Cir. 2015) (citation omitted).
64. Maher, *supra* note 21, at 703.

ance companies—that is, the first of the two dimensions discussed above. Rather, the text expressly preserves “any State law” and thus plainly extends protection from preemption to state causes of action so long as they do not hinder the ACA.⁶⁵ The question thus becomes whether existing state causes of action can provide relief for consumers injured due to violations of the law, or if a new cause of action is needed.⁶⁶

B. Existing State Causes of Action

States have long been important battlegrounds in the fight to advance consumer rights, and, over time, states have adopted a latticework of statutes and common law claims to protect consumers.⁶⁷ Faced with unlawful conduct by insurers, consumers could attempt to vindicate their rights under the ACA by availing themselves of any of three categories of existing laws: contract law, state consumer protection statutes, and insurance bad faith laws. However, while these laws might support consumers in certain circumstances, they ultimately fall short of providing consumers a coherent and comprehensive remedy for violations. Specifically, each approach only provides a means to enforce some, but not all, of the rights and protections afforded consumers under the ACA, and, even then often limits the types of relief available.

65. 42 U.S.C. § 18041(d).

66. Maher, *supra* note 21, at 694-95 (rejecting the argument that the ACA extinguishes state law causes of action).

67. See, e.g., Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 664 (2008) (“There is great variation among consumer protection laws, however, because each law deals with a specific matter, and deals with it in its own somewhat unique way There is no uniformity and no consistency among the various consumer protection laws and how they are enforced because there is no national consensus on what laws are necessary to protect consumers and who should enforce those laws.”); see also Edward M. Crane et al., *U.S. Consumer Protection Law: A Federalist Patchwork*, 78 DEF. COUNS. J. 305, 326 (2011) (“Most states have . . . amended their consumer protection acts many times, resulting in great variation from state to state, even among states that initially adopted the same ‘model’ statute. States have also enacted additional consumer protection statutes targeting specific industries, products, or practices.” (footnotes omitted)).

1. *Breach of Contract*

Private insurance is defined as a “contract where one undertakes to indemnify another or pay a specified amount upon determinable contingencies.”⁶⁸ Failure to follow through on a contractual promise gives rise to a breach of contract claim.⁶⁹ Because a health insurance contract or policy may not expressly incorporate all of an insurer’s obligations under the ACA, traditional breach of contract claims offer only limited recourse to consumers seeking redress for violations of the ACA.

Consider a health insurance contract that expressly lists items and services that are included within the ACA-mandated essential health benefit package.⁷⁰ If the insurer then denies coverage for one of the listed services, a consumer can bring a breach of contract claim and effectively force the plan to comply with the law. But if the policy is ambiguous or does not specifically reference the ACA, the consumer may face difficulties in seeking to require the insurer to comply with the ACA or to compensate for harm caused by the insurer’s violation of the law. For example, even though health insurers must cover four different types of addiction treatment medication as part of the essential health benefit package, an insurer may not list all four types in its policy.⁷¹ If the insurer then denies coverage for an unlisted addiction treatment medication, the insurer will have violated the ACA, but not necessarily the terms of its policy.

To strengthen their claim in situations where their policies are ambiguous, plaintiffs may turn to one of two contract interpretation doctrines that place a thumb on the scale in favor of consumers. The first doctrine, *contra proferentem*, provides that “ambiguities must be construed against the drafter.”⁷² Typically, this rule is invoked to resolve ambiguities as a matter of last resort, after the court has first attempted to shed light on the provision by reviewing extrinsic

68. Constance A. Anastopoulo, *Bad Faith: Building A House of Straw, Sticks, or Bricks*, 42 U. MEM. L. REV. 687, 691 (2012) (quoting S.C. CODE ANN. § 38-1-20(25) (Supp. 2011)).

69. See 23 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 63:1 (4th ed. 2016) (“As a contract consists of a binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract.” (footnotes omitted)).

70. See 45 C.F.R. §§ 156.110, 156.115.

71. See Steven Ross Johnson, *Nearly All ACA Benchmark Plans Violate Rules on Addiction Treatment Coverage*, MOD. HEALTHCARE (June 7, 2016), <http://www.modernhealthcare.com/article/20160607/NEWS/160609927> [<http://perma.cc/ZBR4-GPYG>].

72. Arthur J. Park, *What To Reasonably Expect in the Coming Years from the Reasonable Expectations of the Insured Doctrine*, 49 WILLAMETTE L. REV. 165, 167 n.9 (2012).

or parole evidence.⁷³ To protect consumers from exploitation by insurers, however, this rule traditionally has taken on a stronger role in insurance contract disputes⁷⁴: “Once the court finds an ambiguity, the interpretation favoring the policyholder prevails, without reference to the parties’ intent and without examination of extrinsic evidence.”⁷⁵

The second approach, the reasonable expectations doctrine, goes even further. In 1970, driven by concerns about the adhesive nature of insurance contracts and a growing consensus that consumers were not closely reviewing insurance contracts, Robert Keeton proposed that insurance contracts should be read such that “[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.”⁷⁶ This is now known as the reasonable expectations doctrine.

How this doctrine should be applied in practice has led to considerable debate. Some argue that its use should be limited to situations in which contract language is ambiguous. This, of course, raises the question of whether the reasonable expectations doctrine is distinct from *contra proferentem*.⁷⁷ Others interpret the reasonable expectations doctrine to mean that the expectations of an objective, reasonable consumer should trump clear contract language when the two conflict.⁷⁸ However, this approach presents questions as to what an objective, reasonable consumer would expect her health insurance to cover.⁷⁹ Finally, some argue for a middle ground that takes into consideration how conspicuous the contested provision was to the consumer when the policy was purchased.⁸⁰

These disagreements reflect a central tension faced by courts seeking resolution to insurance disputes: insurers need predictability when setting rates so

73. See Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 120 (2008).

74. See *id.* at 109.

75. *Id.*

76. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part One*, 83 HARV. L. REV. 961, 967 (1970). While Keeton arguably offered the first clear enunciation of the reasonable expectations doctrine in insurance, Friedrich Kessler, Alan Schwartz, Karl Llewellyn, and Spencer Kimball previously made similar arguments. See Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 42-48 (1998).

77. See Park, *supra* note 72, at 170.

78. See, e.g., *id.* at 169.

79. See, e.g., Wendy K. Mariner, *The Picture Begins To Assert Itself: Rules of Construction for Essential Health Benefits in Health Insurance Plans Subject to the Affordable Care Act*, 24 ANNALS HEALTH L. 437, 459 (2015).

80. See, e.g., Park, *supra* note 72, at 169.

that they can cover all the claims without risking insolvency, while consumers are poorly equipped to understand the scope of protection provided by their insurance policy at the time of purchase.⁸¹ Given the complex and technical nature of insurance, there are likely to be significant gaps between what an insurer intends its policy to cover and what consumers think their policy covers.⁸² Adopting a robust form of the reasonable expectations doctrine may force insurers to cover items and services they did not account for in advance.⁸³ Not doing so, however, may leave consumers in a lurch when they discover their insurance is narrower than they anticipated.⁸⁴

The Second Restatement of Contracts adopted language reflecting a more robust version of the reasonable expectations doctrine with respect to standard form contracts in 1979: “Where the other party has reason to believe that the

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81. See Kenneth S. Abraham, *The Expectations Principle as a Regulative Ideal*, 5 CONN. INS. L.J. 59, 60 (1998); Anastopoulo, *supra* note 68, at 697-98 (“[I]nsurance companies have a vested interest in being able to accurately predict their obligations and make appropriate business decisions that will foster economic success. Accurate claim forecasting enables insurance companies to pay obligations to policyholders when unavoidable losses arise. However, the unequal bargaining power leaves the [policyholders] vulnerable to unfair practices that the insurance companies may use to achieve their goals.”); see also Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders’ Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 342-45, 352-53 (1998) (explaining the relationship between the reasonable expectations doctrine and the purpose of insurance contracts); Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729, 767-69 (2000) (observing that the controversy over the reasonable expectations doctrine maps on to traditional divisions between the Williston School and the Corbin School, “formalists and functionalists,” “legal economists and consumer protectionists,” and other sets of observers (quoting Mark C. Rahdert, *Reasonable Expectations Revisited*, 5 CONN. INS. L.J. 107 (1998))).
82. See, e.g., Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 330 (1998) (“Most insureds make purchasing decisions with informal and situational information that is unlikely to give them specific expectations for particular claims. To the extent that insureds consider coverage information, it is likely too general in nature.”)
83. Cf. Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 273-74 (1998) (“[E]xpectations analysis . . . leads to results at odds with the insurers’ understanding of the words chosen for the policy and makes outcomes turn too much on the self-interested averments of the policyholder.”).
84. Cf. Swisher, *supra* note 81, at 744 (“[I]nsurance coverage today is sold by a multitude of insurance agents who often emphasize the insured’s ‘peace of mind’ and reasonable expectation of coverage, even though an insured seldom reads his or her policy, and even though there may be a number of contractual conditions, limitations, and exclusions within the insurance policy that the insurer subsequently may cite in order to void the policy and defeat coverage.”).

party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”⁸⁵ Since the 1990s, however, courts’ use of the doctrine—particularly in its stronger forms—has significantly declined in response to the reinvigoration of contractual formalism and the related ascendancy of textualism and the law and economics movement.⁸⁶ One estimate from 1998 found that only six states still used a “‘pure’ version of the Keeton doctrine,” while an additional five states had walked back prior endorsements.⁸⁷ By 2007, the number of strictly adherent states was down to two.⁸⁸

While rare today, a robust version of the reasonable expectations doctrine—where courts are willing to trump express contractual language—could enable consumers to enforce ACA provisions that may only be implicit in their insurance policies. Along these lines, Wendy Mariner has argued that courts should combine the reasonable expectations doctrine with traditional rules of statutory interpretation to resolve disputes over what insurers must cover under the ACA’s essential health benefit rules.⁸⁹ For example, an insurance policy may state broadly that it covers maternity care, as mandated by the ACA, without identifying every item and service that falls within that general category.⁹⁰ Under this version of the reasonable expectations doctrine, a consumer denied a particular service should be able to sue for breach of contract and successfully argue that the court should look to the ACA and its implementing regulations to establish the consumer’s reasonable expectations and thereby define the scope of maternity care required by the contract.⁹¹

85. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1979).

86. See Stempel, *supra* note 83, at 272-77; Swisher, *supra* note 81, at 773-77. As Swisher explains, legal formalists believe that “an insurance policy must be construed and enforced according to general principles of contract law, and courts therefore are not at liberty to reinterpret or modify the terms of a clearly written and unambiguous insurance policy, but must look at the ‘plain meaning’ of the insurance contract.” *Id.* at 749 (footnote omitted). Stempel similarly argues that “the growth of reasonable expectations analysis has been pared to a large degree by the prevailing view that judges must generally be restrained strict constructionists who do as little as possible to interfere with textual instruments and markets.” Stempel, *supra* note 83, at 265.

87. Stempel, *supra* note 83, at 193-95.

88. See Randall, *supra* note 73, at 111-12.

89. See Mariner, *supra* note 79, at 467-69.

90. See, e.g., *id.* at 454 (“ACA plans present the . . . problem that the plan itself cannot fully disclose everything that will (or will not) be covered [T]he description of EHB categories is so broad and vague that, apart from a few dental and vision services, the policy itself cannot make explicit all covered benefits or exclusions.”).

91. See *id.* at 460-61.

Relying on the ACA to establish a baseline for reasonable expectations in this manner may make the doctrine more appealing in jurisdictions where it is currently disfavored. Using the ACA as a basis would cabin judicial discretion and limit insurers' concerns about facing unpredictable obligations.⁹² But even if there were a resurgence in the reasonable expectations doctrine, breach of contract claims still would not reach violations of ACA provisions that are not reflected in the terms of the health insurance policy. Health insurance policies generally describe what benefits are covered and under what conditions, but may not specify how rates are calculated and applied, the terms of the ACA's medical loss ratio rules, or other crucial features of health plan administration.⁹³ Accordingly, breach of contract claims provide only a partial solution for consumers when their health insurers violate the ACA.

2. State Consumer Protection Statutes

Every state and the District of Columbia has adopted laws to combat fraudulent and deceptive practices in consumer marketplaces.⁹⁴ These statutes, commonly known as Unfair and Deceptive Acts and Practices laws (UDAPs), are important in enabling consumers to prevent harm and recover damages for injuries caused by unscrupulous business practices.⁹⁵

In their strongest form, UDAPs allow consumers to bring claims expressly alleging that insurers violated the ACA and thus serve as an important tool for privately enforcing the ACA. Take California's consumer protection laws as an example. They are labeled "strong" on fifteen out of nineteen criteria by the National Consumer Law Center, including on the criterion for insurance.⁹⁶

92. Cf. Swisher, *supra* note 81, at 772-73 (explaining that the lack of parameters for what constitutes "reasonably predictable reasonable expectations . . ." helps explain the widespread judicial reluctance to embrace Professor Keeton's 'strong' 'rights at variance' doctrine of reasonable expectations" (footnotes omitted)).

93. See, e.g., *Sample Individual Major Medical Policy*, HUMANA INS. COMPANY (2016), <http://apps.humana.com/marketing/documents.asp?file=2803190> [<http://perma.cc/B4LC-S55H>].

94. See Crane et al., *supra* note 67, at 326 ("By 1981, every state had enacted some form of consumer protection act that addressed deceptive (and often unfair) trade practices.").

95. See Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT'L CONSUMER L. CTR. 5-6 (Feb. 2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf [<http://perma.cc/W3R2-XGL7>].

96. *Consumer Protection in the States: Appendix B*, NAT'L CONSUMER L. CTR. 14-16 (Jan. 10, 2009), <http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf> [<http://perma.cc/V3W6-4F5D>]; see also Kevin J. Dunne et al., *What Insurers and Their Counsel Need To Know About California's Unfair Competition Law*, 68 DEF. COUNS. J. 180, 180 (2001) ("Na-

Like many state UDAPs, California's Unfair Competition Law (UCL) prohibits businesses from engaging in "any unlawful, unfair or fraudulent business act or practice."⁹⁷ More uniquely, however, the California Supreme Court has observed that, "[b]y proscribing 'any unlawful' business practice, 'section 17200 borrows violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable."⁹⁸ Courts have since found that the statute covers violations of both state and federal law, meaning that a violation of the ACA is a per se violation of the UCL.⁹⁹ Under this broad definition of unlawful acts or practices, plaintiffs have brought a class action lawsuit against a California insurer for alleged violations of the ACA's medical loss ratio rules.¹⁰⁰

Yet despite its broad scope, the UCL has its own flaws, including both substantive and procedural limits that make recovery more difficult, if not impossible, for certain consumers. For example, consumers do not have standing to seek relief unless they have "suffered injury in fact and ha[ve] lost money or property as a result of unfair competition."¹⁰¹ Additionally, when consumers have standing, their remedies are generally limited to injunctive relief and restitution.¹⁰² Imagine a new enrollee in one of the insurance plans found to have illegally imposed waiting periods for transplant services.¹⁰³ Under the UCL, the consumer could neither bring suit asking a court to order their insurer to comply with the law without first suffering financial injury, nor seek compensation for expenses (such as physician or pharmacy bills) or physical injury (if, for example, the consumer develops complications during the waiting period) incurred as a result of a violation. Thus, while the UCL authorizes suits against insurance companies for violations of federal law, it fails to provide complete recourse for all consumers.

tional insurance companies must presume that if they are to be sued anywhere under an unfair competition law (UCL), the most likely location is California.").

97. CAL. BUS. & PROF. CODE § 17200 (West 2016).

98. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539-40 (Cal. 1999) (quoting *State Farm Fire & Cas. Co. v. Superior Court*, 53 Cal. Rptr. 2d 229, 234 (1996)).

99. *See, e.g., Fortaleza v. PNC Fin. Servs. Grp.*, 642 F. Supp. 2d 1012, 1019 (N.D. Cal. 2009).

100. *See* Complaint at 12, *Morris v. Blue Shield of Cal.*, No. BC625804 (Cal. Super. Ct. July 1, 2016).

101. CAL. BUS. & PROF. CODE § 17204 (West 2016).

102. *See, e.g., Flannery v. VW Credit, Inc.*, 181 Cal. Rptr. 3d 589, 597 (2014), *review denied* (Apr. 22, 2015).

103. *See State of Women's Coverage: Health Plan Violations of the Affordable Care Act*, *supra* note 18, at 17-18.

By and large, the utility of other states' UDAPs is even more circumscribed. Unlike California's UCL, for instance, under most state UDAPs, it is insufficient to allege that a company violated a law. In other words, there are no per se violations. Instead, a plaintiff must show that the defendant engaged in certain unfair, deceptive, or unconscionable trade practices that may be more or less strictly defined and thus more difficult to meet.¹⁰⁴ For example, Oregon's UDAP lists a number of specific unlawful practices, from making false or misleading representations about price reductions to organizing pyramid schemes.¹⁰⁵ While it also includes a catchall category,¹⁰⁶ the Attorney General must first declare an unfair or deceptive practice as such before anyone can bring suit under this catchall.¹⁰⁷ Among the handful of states other than California in which violations of state or federal statutes regulating businesses constitute per se violations of their UDAPs, additional rules can limit a consumer's ability to bring a claim to privately enforce the ACA. For example, Illinois courts have ruled that a violation of federal law only constitutes a per se violation of the state's UDAP if the action "offends public policy."¹⁰⁸ Yet to "offend public policy," the federal law must, among other things, provide a private right of action itself, thereby making the UDAP at least somewhat redundant.¹⁰⁹ In addition, some UDAPs demand that the consumer show that the defendant's conduct had a negative public impact,¹¹⁰ while others require proof of intent.¹¹¹ These requirements create stringent hurdles for consumers who have suffered individualized injuries and seek to vindicate the rights and protections guaranteed them under the ACA.

Even more problematically for consumers seeking redress for violations of the ACA, nearly half of the states exempt insurance transactions from the scope of their UDAPs, either in the express language of the statute or as interpreted

104. See generally Carter, *supra* note 95; *Consumer Protection in the States: Appendix B*, *supra* note 96.

105. See OR. REV. STAT. §§ 646.608(1)(j), (r) (West 2016).

106. See *id.* § 646.608(1)(u).

107. See *id.* § 646.608(4).

108. *Carroll v. Butterfield Health Care, Inc.*, No. 02-C-4903, 2003 U.S. Dist. LEXIS 19287, at *8 (N.D. Ill. Oct. 28, 2003).

109. *Id.* at *9.

110. See Carter, *supra* note 95, at 19-20; see also Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 17-22, 32 (2005) (discussing the variance among states in the elements necessary to bring private claims under a consumer protection act).

111. See Carter, *supra* note 95, at 17.

by courts.¹¹² Opponents of including insurance transactions under UDAPs sometimes argue that state administrative enforcement mechanisms sufficiently protect consumers,¹¹³ despite evidence to the contrary.¹¹⁴ Often, however, the exception is at least partially justified by a determination that “selling an insurance policy is not an ordinary consumer contract for ‘goods or services’” and thus falls outside the scope of UDAPs, which are focused on consumer transactions.¹¹⁵ Indeed, it has been argued that “the distinctive features of the insurance relationship” – including the fact that the relationship between the parties is based on a desire for protection against calamity rather than commercial advantage, as well as the unequal relationship between insured and insurer – “remove it from the model of contract.”¹¹⁶ But the “tortious” nature of the harm that insurers can impose through their actions should not be a reason to deny consumers recourse,¹¹⁷ although it may suggest the need for a different solution that accounts for the complex nature of insurance relationships.

3. *Insurer Bad Faith Laws*

Insurer bad faith laws are one attempt to reconcile the dual contractual and tortious nature of insurer misconduct.¹¹⁸ Like all contracts, insurance policies come with an implied duty of good faith and fair dealing under which insurers are expected not to interfere with a policyholder’s right to receive contracted-for benefits.¹¹⁹ Under contract law, when the duty is breached, a consumer may

112. *See id.* at 15.

113. *See, e.g.,* Victor E. Schwartz et al., “That’s Unfair!” Says Who—The Government or the Litigant?: *Consumer Protection Claims Involving Regulated Conduct*, 47 WASHBURN L.J. 93, 109-13 (2007).

114. *See supra* notes 53-60 and accompanying text.

115. *See* Carter, *supra* note 95, at 3; Schwartz et al., *supra* note 113, at 111 (quoting *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981)); *see also* Devon Green, *Examining the Applicability of the Vermont Consumer Fraud Act to the Insurance Industry*, 36-Winter VT. B.J. 28-29 (2011); *cf.* Mariner, *supra* note 79, at 439 (“The history of health insurance includes examples of courts struggling with whether to classify health plans as service contracts or as insurance for purposes of state insurance regulation.”).

116. Jay M. Feinman, *Implied Warranty, Products Liability, and the Boundary Between Contract and Tort*, 75 WASH. U. L.Q. 469, 486 (1997).

117. *Id.*

118. *See* Anastopoulos, *supra* note 68, at 704; Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 77-79 (1994).

119. *See* Anastopoulos, *supra* note 68, at 695; Richmond, *supra* note 118, at 75-77; Douglas R. Richmond, *Bad Insurance Bad Faith Law*, 39 TORT TRIAL & INS. PRAC. L.J. 1, 3-6 (2003).

only recover up to their policy limits.¹²⁰ This remedy, however, has been found inadequate to fully compensate consumer injuries that arise due to an insurer's breach, such as emotional distress and lost income, or to deter insurers from unscrupulous conduct.¹²¹ Approximately half of the states have imposed a correlative tort duty not to engage in bad faith that provides consequential and punitive damages to fill this gap.¹²²

Because of their relation to the duty of good faith, claims for bad faith typically arise out of an insurer's performance of its contractual duties.¹²³ Most commonly, bad faith claims allege the wrongful denial of coverage or unreasonable delays in claims processing.¹²⁴ Beyond the remedy, the primary difference between a bad faith claim and a breach of contract claim is that the former requires a showing that the insurer's conduct was unreasonable.¹²⁵ While there is no uniform standard for bad faith causes of action, courts typically require

120. See Richmond, *supra* note 118, at 79 ("Were an insurer's duty of good faith purely contractual, an insured's recovery generally would be limited to those damages necessary to restore him to the position he would have occupied had the promise been performed, i.e., the 'benefit of the bargain.' Such limited damages would do nothing to deter predatory or unscrupulous insurers, inasmuch as their liability would always be tied to policy limits.")

121. See Anastopoulo, *supra* note 68, at 699-700; Richmond, *supra* note 118. For additional discussion of the differences between tort and contractual remedies and their relevance in the context of insurance, see *infra* Section II.C.3.

122. See Jeffrey E. Thomas, *Insurance Law Between Business Law and Consumer Law*, 58 AM. J. COMP. L. 353, 366 (2010) (citing ROBERT H. JERRY II & DOUGLAS S. RICHMOND, UNDERSTANDING INSURANCE LAW § 25G (4th ed. 2007); see also Richmond, *supra* note 119, at 4 ("Bad faith is actionable as a tort only in the realm of insurance."); Richmond, *supra* note 118, at 108 ("In *Braesch v. Union Insurance Co.*, the Nebraska Supreme Court identified three factors justifying the application of tort principles to the decidedly contractual first-party relationship. First, the insurance industry is affected with a public interest, as 'plainly evidenced' by extensive state regulation. The public character of risk and loss distribution requires that all those having to do with it be driven by good faith. Second, the non-commercial character of insurance distinguishes insurance policies from other kinds of contracts for which breaches do not sound in tort. The public purchases insurance to protect against calamity, and for security and peace of mind. Third, the disparity of bargaining power between insurers and insureds differentiates insurance policies from 'run-of-the mill' contracts. In *McCullough v. Golden Rule Insurance Co.*, a 1990 decision, the Wyoming Supreme Court reasoned that acknowledging first-party bad faith as a tort would offer insurers 'additional impetus for good faith.'" (footnotes omitted)).

123. See Robert H. Jerry II, *Bad Faith at Middle Age: Comments on "The Principle Without a Name (Yet)," Insurance Law, Contract Law, Specialness, Distinctiveness, and Difference*, 19 CONN. INS. L.J. 13, 15 (2012).

124. See Richmond, *supra* note 119, at 5; see also Richmond, *supra* note 118, at 111-12.

125. See Anastopoulo, *supra* note 68, at 697; Richmond, *supra* note 118, at 109 ("The unreasonableness of the insurer's conduct is the essence of this tort."); Richmond, *supra* note 119, at 7, 17.

consumers to show both that their insurer acted unreasonably and that their insurer was aware (or should have been aware) of the unreasonableness of its conduct.¹²⁶ Because of this overlap between bad faith and breach of contract claims, bad faith claims are unlikely to capture different violations of the ACA than breach of contract claims. Bad faith claims may take a slightly altered tone, however: over time there has been a growing recognition of “systemic” or “institutional” bad faith whereby a consumer argues that rather than erring once, an insurer intentionally structured its claims processing so as to deny certain benefits to all policyholders.¹²⁷ This likely presents the greatest opportunity to use bad faith litigation to enforce the ACA. For example, if a consumer has reason to believe that his or her insurance company is routinely denying coverage of certain items and services in violation of both the contract and the essential health benefit or preventive service rules, the consumer can bring a bad faith claim in addition to or in lieu of any breach of contract claim.

Unfair insurance practice acts and unfair claim settlement statutes are statutory analogues to insurer bad faith law, prohibiting vexatious refusals to pay claims.¹²⁸ Like common law bad faith claims, these statutes often only attach liability to claim denials if the insurer’s denial is deemed unreasonable.¹²⁹ Because of their similarity, some states have held that unfair insurance practice acts and unfair claim settlement statutes preempt bad faith causes of action.¹³⁰ Problematically, while some of these statutes authorize consumers to bring claims under them,¹³¹ many rely solely on public enforcement mechanisms, meaning that consumers in some states have no way to recover for bad faith conduct and are limited to breach of contract remedies.¹³²

126. See Richmond, *supra* note 118; see also Richmond, *supra* note 119, at 5-6 (noting that states vary as to whether these elements are measured by objective or subjective standards).

127. Kenneth S. Abraham, *Liability for Bad Faith and the Principle Without a Name (Yet)*, 19 CONN. INS. L.J. 1, 3-4 (2012); Jerry, *supra* note 123, at 16.

128. See Richmond, *supra* note 118, at 115-16.

129. See *id.* at 116.

130. See *id.* at 116-17; see also Anastopoulo, *supra* note 68, at 692-93 (noting that some states prohibit private actions against insurers “either through statutory language or case law”).

131. See Richmond, *supra* note 118, at 117 (citing STEPHEN S. ASHLEY, *BAD FAITH ACTIONS: LIABILITY AND DAMAGES* § 9.02 (1997)); Thomas, *supra* note 122, at 366 (“Some states also provide a statutory remedy that is similar to the tort remedy for bad faith.”).

132. See Anastopoulo, *supra* note 68, at 692-93 (explaining that many states’ statutory schemes implicitly or explicitly prohibit private causes of action); Schwartz et al., *supra* note 113, at 110 (“In most cases, the insurance code does not provide a private right of action . . .”); see also Sanders, *supra* note 53, at 298 (explaining that most state statutory provisions were modeled on a model act that omitted a private cause of action, and observing that if this

In sum, where states provide bad faith causes of action that sound in tort, they may provide an important mechanism for expanding the remedies available to consumers harmed by certain violations of the ACA. Nonetheless, like breach of contract and UDAP-based claims, bad faith actions do not constitute a comprehensive mechanism for challenging violations of all the ACA's insurance reforms. Given the limited focus of the cause of action on wrongful denials or delays of coverage, bad faith claims are unlikely to reach violations of the ACA that do not implicate the provision of benefits, such as the law's rating reforms, eligibility rules, and transparency requirements.

II. AN "IMPLIED WARRANTY OF LEGALITY" IN HEALTH INSURANCE

This Note advocates for a more comprehensive and targeted approach to ACA enforcement than any of the three causes of action discussed above can provide. Specifically, I propose introducing an implied warranty of legality that individual health insurance policies and the companies offering them are in full compliance with the ACA. This Part first describes the primary source of inspiration for this approach—the implied warranty of habitability—and demonstrates how the motivations justifying the adoption of the implied warranty of habitability apply equally to an implied warranty of legality. It then discusses how common law courts can adopt an implied warranty of legality without waiting for state legislative action, as they did decades ago with the implied warranty of habitability, and describes three key issues early courts will confront in structuring the warranty. This Part concludes by addressing two potential barriers to adoption: the threat of increased costs and the primary jurisdiction and filed rate doctrines.

A. *The Implied Warranty of Habitability*

Starting in 1961, state courts across the country began adopting an implied warranty of habitability for residential leases.¹³³ The Supreme Court of Wisconsin was the first state high court to do so, with its opinion in *Pines v. Persson*.¹³⁴ The best known decision came a decade later, when Judge J. Skelly Wright issued the majority opinion for the D.C. Circuit in *Javins v. First Na-*

omission was intentional, the omission could either have served as a flexibility mechanism for states or as an indication that the model act contemplated administrative enforcement).

133. See C. Stephen Lawrence, Note, *George Washington University v. Weintraub: Implied Warranty of Habitability as a (Ceremonial?) Sword*, 33 CATH. U. L. REV. 1137, 1139-43 (1984).

134. 111 N.W.2d 409 (Wis. 1961).

*tional Realty Corp.*¹³⁵ Following *Pines*, the *Javins* Court held that “a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations.”¹³⁶ In so ruling, the court provided common law remedies to tenants whose living conditions did not meet municipal housing regulations.¹³⁷

These decisions marked a revolution in property law, which for centuries had stood by the rules of *caveat emptor* and no-repair: tenants were to take the land and any improvements as they found them and were barred from escaping their lease obligations even when they faced breaches by their landlords.¹³⁸ While the concept of an implied warranty was new to property, it was standard fare in contract law.¹³⁹ For example, by the 1960s implied warranties based on the assumed expectations of buyers – such as implied warranties of fitness and merchantability – were well established for the sale of goods.¹⁴⁰ The implied warranty of merchantability served as an implicit promise that the goods being sold were suitable for ordinary use and of average quality.¹⁴¹ The implied warranty of fitness offered a guarantee to buyers who informed sellers that they sought goods for a particular use that the good then sold was in fact fit for that purpose.¹⁴² Additionally, as the Illinois Supreme Court observed, it was also common practice to read the law in effect at the time a contract was adopted into the terms of the contract itself, “as though expressly referred to or incorporated in it.”¹⁴³ Thus, while the implied warranty of habitability was novel in

135. 428 F.2d 1071 (D.C. Cir. 1970).

136. *Id.* at 1072-73.

137. *See id.* at 1072-73, 1082-83.

138. *See generally* Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 795-97 (2013).

139. *See id.* at 799-805.

140. *See Javins*, 428 F.2d at 1075-76; *see also* Lemle v. Breeden, 462 P.2d 470, 474 (Haw. 1969) (“[The implied warranty of habitability] is a doctrine which has its counterparts in the law of sales and torts . . .” (footnotes omitted)); Campbell, *supra* note 138, at 804 (“Courts were persuaded that creating a warranty or promise that the residential leasehold would be in a habitable condition was consistent with the obligation of warranty in other areas of the law such as products liability.”).

141. *See Javins*, 428 F.2d at 1075.

142. *See id.*

143. *Schiro v. W.E. Gould & Co.*, 165 N.E.2d 286, 290-91 (Ill. 1960) (“It is settled law that all contracts for the purchase and sale of realty are presumed to have been executed in the light of existing law, and with reference to the applicable legal principles . . . Thus, the law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it.” (citations omitted)); *see also* Econ. Fuse

adopting an implied warranty based on the housing code, the premises behind it were well established.

The *Javins* court offered a multi-faceted explanation for its landmark decision. As the court explained, the legislature had adopted a regulatory scheme, the housing code, which reflected “a well known package of goods and services” that modern tenants expected of any “shelter.”¹⁴⁴ The court observed that in so doing, “[t]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner.”¹⁴⁵ Yet the court found that public efforts to enforce the housing code were “far from uniformly effective”¹⁴⁶ and that tenants were poorly equipped to bring their homes up to code, both because of their relative inability to identify and deal with housing defects compared to landlords,¹⁴⁷ and because of their lack of bargaining power contra landlords.¹⁴⁸ Accordingly, to remedy this situation, the court borrowed a well-known concept from contract law—the implied warranty—and applied it to property.¹⁴⁹

& Mfg. Co. v. Raymond Concrete Pile Co., 111 F.2d 875, 878-79 (7th Cir. 1940) (“And the courts must read into every written contract the law governing the parties at the time the contract is made; that, too, necessarily enters into and forms a part of every contract as if fully and expressly incorporated therein.”).

144. *Javins*, 428 F.2d at 1074.

145. *Id.* at 1082 (quoting *Pines v. Persson*, 111 N.W.2d 409, 412-13 (Wis. 1961)).

146. *Id.* Courts in many jurisdictions were motivated by perceived failures in the housing code. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 414 (2011) (“More broadly, appellate courts and legislatures imposed the implied warranty of habitability largely to make up for the failure of housing code enforcement. That failure resulted in significant part from a lack of adjudicatory resources for code enforcement.”); see also Campbell, *supra* note 138, at 800-03 (describing how advocates who had fought for adoption of the codes turned their attention to the implied warranty of habitability in an attempt to improve compliance).

147. See *Javins*, 428 F.2d at 1079 (“In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant’s position corresponds precisely with ‘the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose.’” (quoting *Henningens v. Bloomfield Motors, Inc.*, 161 A.2d 69, 78 (N.J. 1960))).

148. See *id.* (“The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord’s bargaining power and escalates the need for maintaining and improving the existing stock.” (footnotes omitted)).

149. See *supra* note 140 and accompanying text.

The present-day individual health insurance market reflects similar dynamics to those outlined by the *Javins* court: Congress has adopted a robust set of consumer protections that all individual health plans must meet, but administrative enforcement is insufficient to prevent violations or recompense the injured,¹⁵⁰ and consumers are poorly positioned to protect themselves before the fact. As Keeton explained when he was advocating for the reasonable expectations doctrine, an insurance contract is a form of adhesion contract.¹⁵¹ Consumers cannot bargain over the terms of the contract,¹⁵² and, in fact, they often cannot even access the full policy before they purchase the plan.¹⁵³ This allows insurers to draft the terms to maximize their own interests against the consumer's interests.¹⁵⁴ Moreover, even if consumers could negotiate or know the specific terms of their policies, they are unlikely to be able to make sense of the policy language and cannot necessarily predict what items and services they will need.¹⁵⁵ Consumers also are not free to switch insurance policies mid-year if they encounter violations but do not qualify for a special enrollment period.¹⁵⁶ Implied warranty theory provides a cause of action that can take these structural features of the health insurance context into account in providing a remedy to consumers.

Scholars have occasionally made passing references to the potential of applying implied warranty theory to insurance,¹⁵⁷ yet it has gained little traction

150. See *supra* notes 53-60 and accompanying text.

151. See Keeton, *supra* note 76, at 966.

152. See *id.*; see also Feinman, *supra* note 116, at 486 (“The relationship is an inherently unequal one, in which the insured typically has no ability to bargain for terms and is at the insurer’s mercy in case a claim is made.”); Mariner, *supra* note 79, at 453 (describing the limited choice set that health insurance purchasers have on insurance marketplace exchanges).

153. See Mariner, *supra* note 79, at 454.

154. See Swisher, *supra* note 81, at 759.

155. See Mariner, *supra* note 79, at 445-46, 453-55.

156. See 45 C.F.R. § 155.410 (describing annual open enrollment periods); *id.* § 155.420 (describing special limited circumstances when individuals can enroll in a plan mid-year).

157. See, e.g., Anderson & Fournier, *supra* note 81, at 379 n.130; W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 546-47 (1971); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 818-19 nn.14-17 and accompanying text (2009); William Mark Lashner, Note, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175, 1182-83 (1982); Joseph E. Minnock, Comment, *Protecting the Insured from an Adhesion Insurance Policy: The Doctrine of Reasonable Expectations in Utah*, 1991 UTAH L. REV. 837, 849-50. The only work that appears to squarely address the idea is a 1925 comment published by the *Yale Law Journal*. See Comment, *The Application to Insurance Contracts of the Implied Warranty of Sales Law*, 35 YALE L.J. 203 (1925). More tangentially, William S. Brewbaker III has argued that managed care plans be subject to an “implied warranty of

to date.¹⁵⁸ This has been attributed at least in part to the fact that implied warranties traditionally attach to the sale of tangible products.¹⁵⁹ This formal distinction is not especially compelling, however: consumers are just as ill-equipped to tell if an insurance policy offered to them “works’ for its intended purpose” as they are with a physical good like a television or car.¹⁶⁰ Perhaps more importantly, implied warranty theory appears to have been overshadowed by Keeton’s reasonable expectations doctrine.¹⁶¹ And, indeed, application of the implied warranty of merchantability or fitness to insurance would likely operate in much the same way as the reasonable expectations doctrine, as both look to what a reasonable consumer expects an insurance policy to cover.¹⁶²

In a post-ACA world, however, implied warranty theory can do far more than these approaches. Because the ACA sets a comprehensive regulatory scheme against which insurance policies and insurer conduct can be judged, courts need not speculate about what a reasonable consumer would or would not expect. Consequently, this approach is less radical than the traditional reasonable expectations doctrine in an important way: an implied warranty of legality merely enforces requirements that the ACA has already set into law ra-

quality.” William S. Brewbaker III, *Medical Malpractice and Managed Care Organizations: The Implied Warranty of Quality*, 60 LAW & CONTEMP. PROBS. 117, 118 (1997). Adam Candeub has also advocated for the use of medical warranties to promote health care quality. See Adam Candeub, *Contract, Warranty, and the Patient Protection and Affordable Care Act*, 46 WAKE FOREST L. REV. 45, 47-48 (2011).

158. See, e.g., Jerry, *supra* note 123, at 14 n.2; Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1402 n.42 (2007); Jeffrey W. Stempel, *Enhancing the Socially Instrumental Role of Insurance: The Opportunity and Challenge Presented by the ALI Restatement Position on Breach of the Duty To Defend*, 5 U.C. IRVINE L. REV. 587, 589 n.5 (2015).

159. See Slawson, *supra* note 157, at 546.

160. *Id.* at 546-47.

161. See Stempel, *supra* note 157, at 818 n.14 (“Prior to Keeton’s article and scholarly recognition of the reasonable expectations doctrine, courts had on occasion found the product/warranty analogy helpful in resolving insurance disputes.”); see also *id.* at 818 n.15 (“The tide against a strong form of the reasonable expectations doctrine, one that would even trump clear but problematic policy language, tended to also pull back the possible use of a breach-of-warranty or product-defect approach to construction. Nearly thirty-five years after it was rendered, *C & J Fertilizer* remains the insurance coverage case that most directly addresses the insurance policy as a product and the insurer’s promise as akin to a manufacturer’s warranty, although there have been cases alluding to this aspect of *C & J Fertilizer*.”).

162. See James M. Fischer, *The Doctrine of Reasonable Expectations Is Indispensable, If We Only Knew What for?*, 5 CONN. INS. L.J. 151, 170-71 (1998) (“Indeed, [the reasonable expectations doctrine] as an equity-based concept, is somewhat analogous to warranty as a tort-contract hybrid, particularly when warranties are implied for public policy reasons.”).

ther than imposing new, unexpected obligations on insurers.¹⁶³ The implied warranty of legality can thus better resolve the aforementioned tension between insurers' need for predictability and consumers' need for protection that constrained adoption of the reasonable expectations doctrine.¹⁶⁴

B. *The Power of Common Law Courts*

State adoption of an implied warranty of legality may, but need not, be the product of legislative action. Rather, as this Note proposes, it can be judicially enacted. To appreciate why, it is important to first draw out the distinction between finding an implied private right of action under the ACA and establishing an implied warranty under state common law. While the ACA's text forecloses the first option, the latter remains within the power of state courts.

The past half-century has seen a retrenchment from finding implied causes of action under federal statutes.¹⁶⁵ This trend, instigated by Justice Powell's dissent in the 1979 Supreme Court case *Cannon v. University of Chicago*,¹⁶⁶ is premised on the "separation-of-powers principle of limited jurisdiction" of federal courts.¹⁶⁷ Because Congress determines the jurisdiction of federal courts, if

163. Cf. Wendy K. Mariner, *Can Consumer-Choice Plans Satisfy Patients? Problems with Theory and Practice in Health Insurance Contracts*, 69 BROOK. L. REV. 485, 536 (2004) ("Applied to insurance contracts, which allocate risk by definition, there is little room for forcing an insurer to provide a service that it did not contemplate.").

164. See *supra* notes 81-84 and accompanying text.

165. See, e.g., Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 12 (2014) ("Under current law, implied private rights of action are, in a word, 'disfavored.'"); Bradford C. Mank, *Using § 1983 To Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321, 353-54 (2001) ("The Supreme Court has increasingly emphasized that it will not recognize an implied private right of action unless there is significant evidence that Congress intended to allow such a suit.").

166. 441 U.S. 677, 731 (1979) (Powell, J., dissenting); see also Davis, *supra* note 165, at 11 ("[T]he Court began in the late 1970s to backtrack from the common wisdom that federal courts were competent to imply private remedial rights. The turning point was Justice Powell's manifesto against implied private rights of action in his dissenting opinion in *Cannon*.").

167. *Cannon*, 441 U.S. at 731 (Powell, J., dissenting); see also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability."); Mank, *supra* note 165, at 354 ("The fundamental principle of separation of powers prohibits the judiciary from assuming the legislative task of defining statutory remedies without evidence that Congress intended to authorize a private right of action."). Separation-of-powers theory has also undergirded the Supreme Court's case law governing implied constitutional causes of action. See, e.g., Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U. L. REV. 1473, 1481-84 (2013) (arguing

Congress forgoes creating a private cause of action to enforce federal law, “federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.”¹⁶⁸ The movement away from implied causes of action has also been justified by concerns for democratic accountability.¹⁶⁹ Today, the general rule is that courts may not imply private causes of action under federal statutes absent affirmative evidence of congressional intent.¹⁷⁰ Applied here, it follows that because Congress did not intend to create a federal cause of action to enforce the ACA, the courts may not imply one. A plaintiff who comes to court relying on a theory of an implied statutory cause of action will lose.

The analysis changes, however, if the plaintiff’s claim derives from state common law.¹⁷¹ As a preliminary matter, the underlying reasons for precluding implied causes of action under federal statutes—separation of powers and democratic accountability—do not apply with the same force at the state level. States are not bound by the same separation-of-powers principles that the Constitution imposes on the federal government.¹⁷² Instead, state power is “diffused horizontally across the branches, as well as vertically between the state and myriad local units.”¹⁷³ Free from the legal constraints facing federal courts, state courts may issue advisory opinions, appoint executive branch officials, and initiate investigations.¹⁷⁴ Moreover, state courts may also be thought

that separation-of-powers concerns are responsible for the Court’s decision to recognize a right of action against a federal authority who has violated a constitutional right).

168. *Cannon*, 441 U.S. at 730-31 (Powell, J., dissenting).

169. See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1128 (2006) (“Each of the Justices appears committed to the notion that—all things being even remotely equal—it is more democratically sound and, therefore, normatively superior for legislatures to specify the available remedies for violations of rights and duties rather than to rely on the ad hoc equitable judgments of the judiciary.”).

170. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (rejecting a private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964).

171. Cf. Henry H. Drummonds, *The Dance of Statutes and the Common Law: Employment, Alcohol, and Other Torts*, 36 WILLAMETTE L. REV. 939, 947-51 (2000) (drawing a distinction between implying a cause of action in a statute and exercising common law power to provide a cause of action based on the violation of a statute).

172. See Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1881-97 (2001).

173. *Id.* at 1904.

174. See *id.* at 1836-37; see also Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 WM. & MARY L. REV. 1273, 1276-79 (2005) (noting several differences between state and federal courts).

of as more democratic than federal courts.¹⁷⁵ Many state court judges are elected, giving them a greater level of accountability and political knowledge than is typically assumed of federal judges.¹⁷⁶ In addition, state judges “are likely to feel closer links to their local communities than federal judges, thereby enjoying a greater aura of democratic accountability.”¹⁷⁷ And just as state courts have more democratic bona fides than their federal counterparts, many state legislatures arguably have fewer, suggesting less reason to defer to traditional political processes at the state level.¹⁷⁸

Even more importantly, however, constitutional limits to federal power necessarily restrain the modern implied right of action jurisprudence described above, while state power “is plenary and inherent.”¹⁷⁹ Because federal courts lack the power to make common law absent exceptional circumstances, “they must restrict themselves to statutory interpretation in deciding whether to imply a cause of action from a statute.”¹⁸⁰ State courts, in contrast, have historically retained broad common law powers, and their analysis of whether a cause of

175. See Hershkoff, *supra* note 172, at 1885–86.

176. See, e.g., Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1244–45 (2012). *But see* Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 79 (2000) (“[J]udicial election cannot possibly provide any more than the most formalistic and marginal basis for asserting the democratic legitimacy of judicial rulemaking.”).

177. Hershkoff, *supra* note 172, at 1886 (quoting Donald W. Brodie & Hans A. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 542); *see also* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 5 (1995) (noting that state courts are “both literally and figuratively closest to the people”).

178. See Hershkoff, *supra* note 172, at 1938 (“[S]tate lawmaking devices . . . do not resemble Congress in any meaningful structural sense: they are not majoritarian; they are not bicameral; they lack a committee structure; and they do not encourage or require coalition-building. The local and populist decisionmaking devices that characterize nonfederal lawmaking increase the opportunities for factions to seize control of political power, necessitating oversight that might include judicial review.”); Stephan Landsman, *Introduction*, 49 DEPAUL L. REV. 275, 278 (1999) (“Professor [Richard] Abel . . . finds that legislatures are often the captives of special interests and that legislative deliberations are frequently ‘secretive, hasty’ and unreasonable. By contrast, it is the courts that are ‘populist and deliberative.’ Based on these observations he argues that courts should recognize the propriety of their developing the common law and should carefully scrutinize legislative interference with it.” (quoting Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533 (1999))).

179. Hershkoff, *supra* note 172, at 1887.

180. Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 580 (1982).

action exists is not limited to that which is specified in a statute.¹⁸¹ Even ardent opponents of judicial lawmaking, such as Justice Scalia, have acknowledged this distinction between the power and role of state and federal courts.¹⁸² According to the conventional view, “while [judges] may disagree strongly with particular decisions, [they] rarely question the authority of common-law courts, even in pivotal cases.”¹⁸³ The common lawmaking power of state courts thus far exceeds the power of federal courts in constructing a private right of action.

Properly understood, the implied warranty of legality would be a product of the state common law, rather than of the ACA itself. Common lawmaking reasons by analogy,¹⁸⁴ comparing the facts of one case to those of the past such that the law evolves over time “to bring about better, fairer, and generally more

181. See *id.* at 577 (“At the state level, the question of courts’ general power to make common law is not at issue; . . . Federal courts’ lawmaking powers, by contrast, are constitutionally circumscribed, and therefore different issues may be present when a litigant seeks an implied right of action under a federal statute in federal court.” (footnote omitted)); see also Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781, 786 (1990) (“Because our system of government allows state courts to make law, state court judges are not compelled to attribute the law they make to the legislature.” (footnote omitted)); *id.* at 816-17 (“[T]he Erie doctrine and other judicially imposed limitations on making federal common law . . . led [Justice] Frankfurter and others to attempt to attribute the source of private rights of action to Congress, even though Congress had not expressly provided for them State courts do not need to resort to such fictions. They have the power to make common law.” (footnotes omitted)); Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1702 (2014) (“Federal courts, unlike state courts, do not claim the general common law powers of state courts to elaborate private law.”); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 487 (2013) (“The touchstone of [Chief Judge Judith Kaye’s] argument for state court divergence is the fact that state courts ‘are the keepers of the common law.’ Even in an age of statutes, state courts, unlike federal courts of limited jurisdiction, retain general common law powers. Because of this, Judge Kaye argues, state law is a complex tapestry of common law and statute, making the court an interlocutor with the legislature, not just a passive interpreter of statutory commands.” (footnotes omitted)).

182. See *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (acknowledging that “state-court judges possess the power to ‘make’ common law”); see also Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 238 (2003) (“Justice Scalia’s concern about a democratic deficit for judge-made law would seem to include all judges, although in some cases, he has appeared to draw distinctions between federal and state judges. If the argument is that federal judges ought to do little (and possibly less than their counterparts in other jurisdictions), it would be based either on some reading of the Constitution, or on historical practices, or on a view that conditions now require situating federal judges as specially limited.” (footnotes omitted)).

183. Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 486 (1982).

184. See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 360 (1997); Vincent A. Wellman, *A Common Mistake About the Common Law*, 92 MICH. B.J. 39, 42 (2013).

desirable results.”¹⁸⁵ As a part of this process, common law courts “perceive the impact of major legislative innovations and . . . interweave the new legislative policies with the inherited body of common-law principles.”¹⁸⁶ To establish an implied warranty of legality, a court need only look to the state’s existing body of law and reason that the circumstances surrounding the sale of an individual health insurance policy in the age of the ACA are conceptually similar to the circumstances in which courts adopted the implied warranty of habitability in the housing context. If a court does so, it is within the court’s power to conclude that the implied warranty of legality should apply.

C. Constructing an Implied Warranty of Legality

As a product of the analogical approach to state common lawmaking, an implied warranty of legality would likely look and operate differently across the country. States may, for instance, adopt different burdens of proof, statutes of limitations, and other standards based on whatever their existing implied warranty doctrines provide. Yet it is worth briefly sketching out certain key contours of the implied warranty of legality that have a particularly significant impact on consumers’ ability to successfully seek relief. As an example, begin with the class of plaintiffs in California alleging that their insurer unlawfully denied them rebates under the ACA’s medical loss ratio rules. If they sought to add an implied warranty claim to their complaint, they would have to show (1) that they purchased individual health insurance through a plan subject to the ACA; (2) that at the time of purchase they assumed the plan complied with the ACA and its implementing regulations; (3) that the insurer violated the ACA’s medical loss ratio rules by failing to provide refunds; and (4) that the violation caused them injury.¹⁸⁷ The insurer may then attempt to negate any of these elements in its defense or raise other affirmative defenses.¹⁸⁸

185. James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1742 (2003); see also Drummonds, *supra* note 171, at 994 (“Common law courts create new torts, as well as apply and modify existing torts, in the exercise of their common law powers. It has always been so. General common law negligence, for example, evolved from relationship-specific duties in the 19th century.”).

186. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970).

187. *Cf. Mary Hope, Cause of Action for Breach of Implied Warranty of Habitability of Residence*, in 3 CAUSES OF ACTION 379, § 5 (West 2016) (describing the elements of “[a] cause of action for breach of an implied warranty of habitability” in the context of newly built residences).

188. *Cf. id.* § 25 (listing the negating elements of a prima facie case in a suit for breach of an implied warranty of habitability).

The following subsections lay out factors that the court should take into account in determining liability under the implied warranty of legality, as well as the remedies that should be available to successful plaintiffs. In particular, these subsections will focus on issues that courts and academics have highlighted as important in the context of the implied warranty of habitability and that are likely to arise as courts consider adopting an implied warranty of legality: first, the kind of insurer conduct that constitutes a breach of the implied warranty; second, whether insurers may raise waiver as a defense; and third, the remedies that would be available to consumers. In some instances, I recommend that courts follow a path similar to that which courts have followed in implied warranty of habitability cases; in other instances, I suggest that departure is warranted.

1. *Basis for Finding Violations*

The threshold task for courts will be to define what conduct constitutes a breach of the implied warranty of legality. I propose that courts adopt two boundaries to keep the implied warranty of legality from becoming a general-purpose cause of action against insurers, rather than a tool for allowing consumers to vindicate their rights and protections under the ACA.

First, courts should limit the warranty to violations of the ACA so that insurers will not be open to claims based on consumer expectations that are not grounded in the statute. This, notably, would be a departure from how some jurisdictions have approached the implied warranty of habitability. The Supreme Court of Hawaii, for example, “based its holding on a common sense notion that certain conditions make housing unsuitable for human occupancy, rather than on a statutory notion of an implied minimum quality of housing as in *Javins*.”¹⁸⁹ California, likewise, chose not to limit the implied warranty of habitability to the housing code, despite acknowledging that compliance with housing code standards would suffice in most cases.¹⁹⁰ One of the strengths of the implied warranty of legality over the reasonable expectations doctrine, however, is that courts can rely on a set of relatively well-established standards of conduct governing insurers to guide their decisions. By limiting consumer claims to violations of these standards, insurers retain a greater measure of predictability regarding when courts may hold them liable. Absent reasonably clear parameters for determining insurer liability, the implied warranty of le-

189. Joshua S. Wyner, *Toward a Common Law Theory of Minimal Adequacy in Public Education*, 1992/1993 ANN. SURV. AM. L. 389, 413 (1994) (footnotes omitted).

190. See *Green v. Superior Court*, 517 P.2d 1168, 1182-83 (Cal. 1974).

gality would likely suffer the same resistance as the reasonable expectations doctrine.¹⁹¹

Of course, there will be areas in the law that remain ambiguous and that courts adjudicating an implied warranty claim would have to interpret.¹⁹² Nothing is unique about this situation, however, and courts should fill in the gaps just as they would in any other circumstance. The fact that this could produce some variation in how the law is interpreted and applied across states should not bar adoption of the warranty; “[i]ndeed, the very reason that Congress delegates to the states in many circumstances is to produce policy *disuniformity*—that is, to produce federal law that may mean different things in different states.”¹⁹³ The idea that state courts will be interpreting ambiguities in the ACA should not be jarring, but seen as a natural extension of the law’s structure. While this could produce some uncertainty for insurers, it is more circumscribed than what they face under the reasonable expectations doctrine. The potential for variation in the law across states would also be nothing new for insurers, given the primacy of state regulation both before and after the ACA.¹⁹⁴

Second, courts should limit the warranty to provisions that are intended to benefit consumers. For example, consumers should not be allowed to sue merely because an insurer violated one of the ACA’s agency reporting or administrative simplification rules.¹⁹⁵ This limitation is regularly used in negligence per se cases, a theory of tort liability that similarly relies on statute to define the standard of care that individuals must observe. In these cases, courts will typically only hold that a violation of a statute constitutes negligence if the plaintiff is among the class of persons the statute is intended to protect, and the harm the plaintiff has suffered is the type of injury the statute sought to pre-

191. See Swisher, *supra* note 81, at 772-73.

192. For example, a group of scholars has observed that “[n]either the federal statute nor regulations define key terms, like ‘unreasonable delay,’ instead ‘leaving the implementation of specific standards either to insurers or to the states.’” Jacobi et al., *supra* note 21, at 142.

193. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 604 (2011). Alternatively, such concerns may be “considerably mitigated by the fact that . . . [the Supreme] Court retains power to review the decision of a federal issue in a state cause of action.” *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 816 (1986).

194. See *supra* Section I.A.

195. See, e.g., 42 U.S.C. §§ 1320d-1, 1320d-2, 1320d-3, 1320d-4 (2012) (calling on the agency to adopt standards and operating rules for financial and administrative transactions).

vent.¹⁹⁶ A similar approach makes sense under contract law, which traditionally bars incidental beneficiaries from enforcing a contract to which they are not a party, but which benefits them.¹⁹⁷

This limit also may be necessary to avoid a preemption challenge. As discussed in greater depth in Section IV.A, the Supreme Court generally will not find that a state cause of action is preempted when it merely provides damages for an injury caused by conduct prohibited by a federal statute.¹⁹⁸ The Court, however, has preempted claims brought under a fraud-on-the-agency theory, whereby the plaintiffs were effectively seeking to enforce a duty that the defendant owed a federal agency, rather than a duty directly owed to the plaintiffs themselves.¹⁹⁹ In the Court's view, the agency should be able to specify what it needs from a regulated entity without interference from third parties that could disrupt its review processes and thus obstruct implementation of federal law.²⁰⁰ Presumably a court could come to a similar conclusion if consumers attempt to use the implied warranty of legality to enforce duties owed by an insurer to a state or federal agency.

2. *The Defense of Waiver*

Insurers are likely to try to avoid liability under the implied warranty of legality by disclaiming the warranty in their policies. That is, insurers may claim that they make no promises as to whether their policies comply with the ACA

196. See Drummonds, *supra* note 171, at 980 (“Of course, to consider a statutory duty for negligence *per se* analysis, the statute must protect a class of persons, including the plaintiff against a class of risks that includes the kind of harm the plaintiff suffered.”); Michael Traynor, *Public Sanctions, Private Liability, and Judicial Responsibility*, 36 WILLAMETTE L. REV. 787, 799 (2000) (“The court ordinarily does not apply the statute as the standard of conduct if the statute’s purpose is found to protect the interest of the state or other persons or against other harms or hazards.”). As the D.C. Circuit found in *Javins*, it also may be appropriate to disregard *de minimis* violations. See *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1082 n.63 (D.C. Cir. 1970) (“The jury should be instructed that one or two minor violations standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent.”).

197. See Gary L. Monserud, *Blending the Law of Sales with the Common Law of Third Party Beneficiaries*, 39 DUQ. L. REV. 111, 120-25 (2000) (discussing the treatment of third-party beneficiaries under the First and Second Restatements of Contracts).

198. See Jarett Sena, *The Contours of the Parallel Claim Exception: The Supreme Court’s Opportunity To Define the Ill-Defined*, 42 FORDHAM URB. L.J. 291, 305 (2014) (noting the Supreme Court’s recent willingness to accept parallel claims).

199. See *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 352 (2001) (discussing how plaintiffs’ claims were based on a fraud-on-the-agency theory).

200. See *id.* at 350-52.

so that the warranty does not apply to them. Insurers could then argue as an affirmative defense that consumers who purchase policies with disclaimers have waived their right to bring implied warranty claims. In order for the implied warranty of legality to remain viable, however, courts must treat any such disclaimers as void and enforce the legal norm against such disclaimers by imposing punitive damages if and when insurers adopt them.

Whether or not parties can disclaim implied warranties varies under existing law. Under the Uniform Commercial Code, parties can disclaim many of the warranties that would otherwise apply to a sales contract.²⁰¹ This approach is based on general freedom of contract principles.²⁰² In contrast, disclaimers have largely been prohibited with respect to the implied warranty of habitability.²⁰³ To the extent they are allowed, they are typically regarded “with intense suspicion when the purchaser is an ordinary consumer” rather than a commercial investor or other sophisticated party.²⁰⁴ Supporters of the implied warranty of habitability justified banning disclaimers by pointing to the power imbalances between tenants and landlords and the importance of the policies protected by the warranty.²⁰⁵ As the *Javins* court noted, allowing landlords to disclaim the implied warranty of habitability would effectively “nullify the object of the statute.”²⁰⁶ The housing code prescribes mandatory standards that landlords *must* meet, not suggestions subject to negotiation between landlords and tenants.

These policy concerns apply with equal force to the implied warranty of legality, which like the implied warranty of habitability is premised on compliance with a statutory code. They are also buttressed by a further consideration: the threat of risk selection that could occur if insurers were allowed to opt out. Willingness to purchase an insurance policy that disclaims the warranty could

201. See U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM’N 2002).

202. See, e.g., Frona M. Powell, *Disclaimers of Implied Warranty in the Sale of New Homes*, 34 VILL. L. REV. 1123, 1153-54 (1989).

203. See Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 424-25 (2010).

204. Frona M. Powell & Jane P. Mallor, *The Case for an Implied Warranty of Quality in Sales of Commercial Real Estate*, 68 WASH. U. L.Q. 305, 316 (1990).

205. See Lonegrass, *supra* note 203, at 425.

206. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1082 n.58 (D.C. Cir. 1970) (quoting *Narramore v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 96 F. 298, 302 (6th Cir. 1899)); see also Olin L. Browder, *The Taming of a Duty: The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 112 (1982) (“Most of the courts that have declared the warranty of habitability, as in *Javins*, have said that the compelling policy reasons supporting the new law would be subverted if the parties to a lease could, by contract or otherwise, disclaim, waive, or modify the warranty.”).

be used as a proxy for an individual's relative risk in two ways. First, by purchasing such a policy, the consumer would be waiving her right to bring a lawsuit under the implied warranty of legality even if the policy were non-compliant with the law. Thus, waiving parties represent a lower litigation risk than consumers who retained the right to sue for breach of the warranty. Second, insurers may presume that consumers who are willing to waive the warranty expect to have lesser health care expenses than someone who wants to retain the full protections available to them under the law. A woman facing a high-risk pregnancy, for instance, will want assurance that her health insurer is not skirting the ACA's maternity coverage and out-of-pocket cost requirements. It is in her interest to find a plan that is subject to the implied warranty of legality. The implied warranty of legality is, in effect, insurance that her insurance complies with the ACA or at least, that she is placed in the position she would have been in as if the insurer had complied if a violation occurs.²⁰⁷ In contrast, someone who only expects to go to the doctor for an annual physical will neither value nor seek out that additional level of protection.²⁰⁸

Thus, an insurer that insists on disclaiming the warranty is effectively offering less comprehensive insurance and could attract a lower-risk population than an insurer that does not disclaim. Over time, this risk segmentation could drive up the average costs of those insurers who are subject to the warranty compared to those that have opted out.²⁰⁹ Non-disclaiming insurers will have

207. Cf. Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law*, 90 B.U. L. REV. 2323, 2378 (2010) ("Compensation . . . spreads risk among all consumers of the relevant good or service, rather than forcing the unlucky few who are injured to bear the full cost of that risk . . .").

208. Cf. Allison K. Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J.L. & MED. 7, 28 (2010) ("[I]nsurers charge a higher premium based upon a rational presumption that higher-risk individuals will more often choose to purchase insurance than lower-risk individuals.").

209. See, e.g., Tom Baker, *Containing the Promise of Insurance: Adverse Selection and Risk Classification*, 9 CONN. INS. L.J. 371, 378-79 (2003) (describing how risk classification can lead to adverse selection). The ACA enacted three programs intended to stabilize the individual insurance market. These could, in theory, also limit the negative effects of risk segmentation from disclaiming the implied warranty of habitability. Yet two of these programs are set to expire at the end of 2016, and the effectiveness of all three programs has been questioned. For a general description of these programs, see Cynthia Cox et al., *Explaining Health Care Reform: Risk Adjustment, Reinsurance, and Risk Corridors*, KAISER FAM. FOUND. (Aug. 17, 2016), <http://kff.org/health-reform/issue-brief/explaining-health-care-reform-risk-adjustment-reinsurance-and-risk-corridors> [<http://perma.cc/35HX-FPFF>]. For criticisms and concerns that these programs are inadequate to protect against adverse selection, see Jonathan Halvorson, *Risk Adjustment Gone Wrong*, HEALTH CARE BLOG (Aug. 7, 2016), <http://thehealthcareblog.com/blog/2016/08/07/risk-adjustment-gone-wrong> [<http://perma.cc/9MEM-2D93>].

to begin disclaiming the warranty themselves to avoid this outcome and stay competitive. Sooner or later, all insurers in the market will have disclaimed the warranty, and consumers will be back to square one, unable to seek redress for violations.

To prevent this outcome, state courts can declare that the implied warranty of legality is mandatory and treat any waivers that insurers may put into their policies as void, as courts have done with the implied warranty of habitability.²¹⁰ If an insurer nonetheless includes waiver clauses in its policies to try to deter less sophisticated consumers from invoking their rights, the court could levy punitive damages in addition to any other applicable remedies.²¹¹ In so doing, the court can ensure that the implied warranty of legality is available to all consumers and is not subverted into a tool for segmenting risk.

3. Remedies

The ACA benefits consumers in a wide variety of ways: from requiring insurers to provide coverage of certain benefits to certain populations,²¹² to limiting premiums and out-of-pocket costs,²¹³ to increasing transparency and disclosure rules, including requirements to provide language access services to consumers with limited English proficiency.²¹⁴ The types of remedies consumers may seek in response to violations of these and other rules will necessarily vary as well. Which remedies will be available in practice will turn on whether courts conceive of the implied warranty of legality as arising under contract or tort law. In keeping with how some courts have treated the implied warranty of habitability as well as insurance claims more generally, I recommend a hybrid approach under which both contract and tort remedies are available.

210. See, e.g., *George Washington Univ. v. Weintraub*, 458 A.2d 43, 47 (D.C. 1983).

211. See *id.* at 46. In an analysis of *Weintraub*, C. Stephen Lawrence explained that while punitive damages are not typically available in contract cases, the inclusion of a disclaimer could be considered “conduct performed with fraudulent intent and in willful disregard of another’s legal rights,” and thus “viewed as tortious and . . . sufficient to justify an award of punitive damages.” Lawrence, *supra* note 133, at 1163. Accordingly, even in states that find that the implied warranty of legality sounds solely in contract, a separate action in tort may enable a court to award punitive damages for unlawful disclaimers.

212. See, e.g., 42 U.S.C. § 300gg-1 (2012) (providing for guaranteed availability of coverage); *id.* § 300gg-14 (extending dependent coverage to children up to the age of twenty-six); *id.* § 18022(a) (requiring coverage of essential health benefits).

213. See, e.g., *id.* § 300gg-13 (requiring coverage of certain preventive services without cost-sharing); *id.* § 18022(c) (imposing limits on annual out-of-pocket spending).

214. See, e.g., *id.* § 300gg-15 (requiring insurers to provide a summary of benefits and coverage rules for plan enrollees).

Either contract or tort law may provide an adequate remedy if a consumer only wants a court to declare what the law requires and order insurers to comply. Equitable remedies under contract law include specific performance, whereby the court orders the breaching party to fulfill its promises if money damages cannot fully compensate the non-breaching party for her losses.²¹⁵ While courts consider specific performance an extraordinary remedy out of concern “that requiring performance interferes with the promisor’s liberty,”²¹⁶ specific performance is uniquely appropriate in the context of implied warranties that are based on the breaching party’s pre-existing statutory or regulatory obligations. The court is not imposing on the promisor’s liberty, but enforcing a congressionally enacted requirement. Tort law similarly allows for injunctive relief when monetary damages are inadequate to remedy an injury.²¹⁷ Specific performance or tort-based injunctive relief will be adequate in cases where consumers face future or ongoing injury from a violation, such as if an insurer unlawfully denies coverage for a non-urgent medical service or refuses to extend coverage to dependent children under the age of twenty-six.²¹⁸ Therefore, to the extent consumers seek prospective relief, it may make no difference whether the implied warranty of legality sounds in contract or tort.

Contract and tort law part ways, however, when it comes to providing financial compensation to injured parties. Under contract law, remedies are primarily focused on compensating the non-breaching party for foreseeable economic harms.²¹⁹ Often this means giving the non-breaching party the “benefit of the bargain” — that is, putting them in the position they would have been in absent breach.²²⁰ This would be appropriate if, for instance, an insurer failed to provide a full refund under the medical loss ratio rules (as has been alleged in California),²²¹ or if an insurer required a consumer to pay greater out-of-pocket

215. See RESTATEMENT (SECOND) OF CONTRACTS §§ 351, 357 cmt. a (AM. LAW INST. 1981); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1149-50, 1153-55 (1970).

216. Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 296-97 (1979).

217. See, e.g., RESTATEMENT (SECOND) OF TORTS § 933 cmt. a (AM. LAW INST. 1979).

218. See 42 U.S.C. § 300gg-6(a) (requiring coverage of essential health benefits); *id.* § 300gg-14 (requiring coverage of dependent children).

219. See RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (AM. LAW INST. 1981); Farnsworth, *supra* note 215, at 1147 (“Our system, then, is not directed at *compulsion* of promisors to prevent breach; rather, it is aimed at *relief* to promisees to redress breach.”).

220. Farnsworth, *supra* note 215, at 1147-48.

221. 42 U.S.C. § 300gg-18; Complaint, *supra* note 100, at 12-13.

costs than the law allows.²²² Tort law, in contrast, generally bars recovery for purely economic injuries,²²³ but allows courts to award damages for personal injury.²²⁴ This will be important if, for example, an individual is impermissibly denied coverage for a transplant and suffers injury or death due to the resulting delay in treatment.²²⁵

The two areas of law also diverge when it comes to punitive damages. Tort law generally allows for punitive damages, for the purposes of both punishment and deterrence.²²⁶ Contract law, in contrast, bars punitive damages unless the conduct at issue is independently tortious.²²⁷ This distinction is often justified by the theory of “efficient breach.” Courts should not seek to deter breaches through punitive damages because the breaching party will only breach if it is economical to do so after taking into account compensation for the non-breaching party.²²⁸ Courts should be less hesitant to order punitive damages in the context of the implied warranty of legality, however, given that an insurer’s obligations are not merely private promises they entered into voluntarily and now regret, but are mandatory rules imposed by Congress. Punitive damages would also be important if consequential damages are unavailable. Absent either punitive or consequential damages, insurers have “a strong financial incentive to delay providing medical treatment,”²²⁹ because some consumers may never challenge the denial in the first place. The remedy for those that do will otherwise only be an order that the insurer pay for the previously denied bene-

222. See, e.g., 42 U.S.C. § 300gg-13 (prohibiting cost-sharing requirements for coverage of preventive services); *id.* § 18022(c) (imposing limits on annual out-of-pocket spending).

223. See, e.g., Ralph C. Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss from Non-Economic Loss*, 91 MARQ. L. REV. 1081, 1095 (2008); Catherine Paskoff Chang, Note, *Two Wrongs Can Make Two Rights: Why Courts Should Allow Tortious Recovery for Intentional Concealment of Contract Breach*, 39 COLUM. J.L. & SOC. PROBS. 47, 58 (2005).

224. See RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. LAW INST. 1979); Feinman, *supra* note 116, at 481-82.

225. See *State of Women’s Coverage: Health Plan Violations of the Affordable Care Act*, *supra* note 18, at 17-18.

226. See RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (AM. LAW INST. 1979).

227. See RESTATEMENT (SECOND) OF CONTRACTS § 355 (AM. LAW INST. 1981).

228. See William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 630-32 (1999).

229. Katherine T. Vukadin, *Hope or Hype?: Why the Affordable Care Act’s New External Review Rules for Denied ERISA Healthcare Claims Need More Reform*, 60 BUFF. L. REV. 1201, 1232 (2012) (quoting *Healthcare Quality: Grievance Procedures: Hearing Before the S. Comm. on Labor and Human Res.*, 105th Cong. 12 (1998) (statement of Olena Berg, Assistant Secretary, U.S. Department of Labor)).

fits, thus allowing the insurer to accumulate interest in the interim.²³⁰ While this may be a small amount at the individual level, insurers cover tens if not hundreds of thousands of lives in any given state, suggesting that the aggregate can be significant.²³¹

Despite these traditional distinctions between tort and contract law, the line between remedies under the two regimes is not always so clear for implied warranties. While the *Javins* court held that a breach of the implied warranty of habitability “gives rise to the usual remedies for breach of contract,”²³² other jurisdictions have described the implied warranty of habitability as “a multifaceted legal concept that encompasses contract and tort principles.”²³³ These courts capitalized on this hybrid status to allow for consumers to recover under both theories, including contract-based consequential damages and tort-based personal injury damages.²³⁴ Additionally, even when operating under a contract theory of liability, some courts have pushed the boundaries of what is compensable and allowed renters to recover personal injury damages on the grounds that the harm was reasonably foreseeable when the parties entered into the contract.²³⁵

As discussed earlier, insurance also does not fit neatly within the bounds of traditional contract law.²³⁶ As the California Supreme Court has observed, “[w]hereas contract actions are created to enforce the intentions of the parties

230. See *id.*; see also *Green v. State Farm Fire & Cas. Co.*, 667 F.2d 22, 25 (9th Cir. 1982) (“If an insurance company can act with impunity and be liable in any event only for the money it originally owed the policyholder, it will have a financial incentive to resist payment in as outrageous a manner as possible.”).

231. Cf. *Market Share and Enrollment of Largest Three Insurers-Individual Market*, KAISER FAM. FOUND., <http://kff.org/other/state-indicator/market-share-and-enrollment-of-largest-three-insurers-individual-market> [<http://perma.cc/L9QG-A3Z4>].

232. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1073 (D.C. Cir. 1970).

233. *Scott v. Garfield*, 912 N.E.2d 1000, 1005 (Mass. 2009).

234. See, e.g., *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744, 774 (Ind. Ct. App. 1976) (“Liability is based upon a breach of the warranty of habitability at which time the tenant may recover (1) for all damages available under traditional remedies for breach of contract . . . including any consequential damages within *Hadley v. Baxendale* guidelines; and (2) for personal injury and personal property damage in tort under traditional negligence principles.”); *Sample v. Haga*, 824 So. 2d 627, 631 (Miss. Ct. App. 2001); see also Steven W. Feldman, *Expanded Merchant Tort Liability, Democratic Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part II)*, 63 CLEV. ST. L. REV. 163, 181 (2014) (“It turns out . . . that there are indeed two schools of thought on whether this implied warranty of habitability sounds in contract or in tort.”).

235. See Lonegrass, *supra* note 203, at 427.

236. See *supra* notes 116-117 and accompanying text.

to the agreement, tort law is primarily designed to vindicate ‘social policy.’”²³⁷ Thus, while the relationship between the consumer and insurer is based on a contract, the inherent inequities between the parties and the “quasi-public service” nature of insurance implicate tort duties.²³⁸ As with claims brought against landlords under the implied warranty of habitability, courts have begun to expand the types of damages that are available when contract claims are brought against insurance companies. Specifically, although courts traditionally limited contract damages to the terms of the insurance policy, states have begun to allow insurance policyholders to recover for consequential damages on the theory that they were also foreseeable.²³⁹ As the New York Court of Appeals explained, consequential damages are “designed to compensate a party for reasonably foreseeable damages,”²⁴⁰ and an insurer would certainly know “that failure to perform would (a) undercut the very purpose of the agreement and (b) cause additional damages that the policy was purchased to protect against in the first place.”²⁴¹ Thus, consumers who suffer additional injury under such circumstances should be able to recover for those damages as a part of their bargained-for benefit.²⁴² The Second Restatement of Contracts likewise acknowledges that some states have enacted statutes allowing punitive damages in insurance disputes.²⁴³

The blurriness between contract and tort with respect to both implied warranty and insurance suggests that the implied warranty of legality may likewise occupy a hybrid status. Courts thus may provide a blend of remedies that vary based on case-specific circumstances. Since consumers will seek different relief depending on what provisions of the ACA their insurers violate, courts should remain flexible by providing remedies that correspond to the harms incurred. This sort of flexibility is necessary because of the broad array of violations possible under the ACA, given the diversity of requirements imposed on insurers.²⁴⁴ Alternatively, even if a state court treats the implied warranty of legality as falling within the scope of contract law, consumers should remain able to re-

²³⁷. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389 (Cal. 1988).

²³⁸. *Feinman*, *supra* note 116, at 486.

²³⁹. See Jay M. Levin & Lisa A. Szymanski, *Consequential Damages Resulting from an Insurer’s Breach of Contract*, BRIEF, Summer 2012, at 46, 47.

²⁴⁰. *Bi-Econ. Mkt., Inc. v. Harleystville Ins. Co. of N.Y.*, 886 N.E.2d 127, 131 (N.Y. 2008).

²⁴¹. *Id.* at 132.

²⁴². See *id.*

²⁴³. See RESTATEMENT (SECOND) OF CONTRACTS § 355 cmt. a (AM. LAW INST. 1981).

²⁴⁴. See *supra* notes 8-17 and accompanying text.

ceive consequential damages for foreseeable physical injuries that result from an insurer's breach.

D. Addressing Potential Barriers to Adoption

Having described how courts can adopt and structure the implied warranty of legality, this Section seeks to defend the implied warranty against two potential barriers to adoption. First, this Section acknowledges that achieving greater compliance with the ACA through the implied warranty of legality may result in premium increases. I contend, however, that this is a result of redistributing the costs of noncompliance and is wholly consistent with and justified under the ACA's egalitarian principles. Accordingly, cost considerations should not dissuade courts from adopting the implied warranty of legality. Second, this Section considers the primary jurisdiction and filed-rate doctrines, which insurers often invoke to limit litigation. I argue that these doctrines would have only a narrow impact, if any, on claims brought under the implied warranty of legality. Thus, like concerns about costs, these considerations should not prevent the adoption of the proposed warranty.

1. The Costs of (Non-)Compliance

The goal of the implied warranty of legality is to increase compliance with the ACA. This will entail added costs for health insurers, stemming from at least two sources: (1) obligations that insurers would otherwise avoid, including the cost of covering certain benefits and individuals, and (2) consequential damages that insurers are required to pay for injuries that result from violations of the ACA.²⁴⁵ The insurers will then either take those costs as a loss or, more likely, redistribute them across all their policy holders in the same risk pool through future premium increases.²⁴⁶ Critics of the implied warranty of

²⁴⁵ This is not to say that increasing compliance with the law will always result in higher costs to an insurer. For example, covering birth control without cost-sharing may be cost-neutral or decrease health insurance costs in the long-term. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763 (2014) (citing *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 39,870, 39,877 (July 2, 2013)).

²⁴⁶ These costs could include both expenses directly tied to coming into compliance with the law (either voluntarily or upon court order) and administrative costs associated with litigation. The bulk of the former category would likely be in the nature of actual health care expenses that an insurer would otherwise have avoided paying. Because health insurance premiums are tied to utilization, insurers could pass on the cost of any increases in health care expenditures to consumers in the form of higher premiums. *See generally Drivers of 2016 Health Insurance Premium Changes*, AM. ACAD. ACTUARIES 1-2 (Aug. 2015), <http://www>

legality may argue that these added costs are reason alone not to adopt it.²⁴⁷ While rising health care costs are a real concern for consumers,²⁴⁸ any added costs from the implied warranty of legality, like the costs generated by the ACA's insurance reforms, are justifiable on redistributive grounds.

The ACA's insurance reforms are inherently egalitarian, pooling risk "equally and broadly among healthy and sick insureds."²⁴⁹ Insurers must offer coverage to all, healthy or sick, at the same rate.²⁵⁰ Moreover, this insurance must comply with certain minimum standards so that it actually provides consumers meaningful protection against risk.²⁵¹ As critics of the ACA point out, providing more comprehensive coverage to higher-risk consumers also increases the cost of health insurance, particularly for those who were benefitting under the prior system.²⁵² These costs do not appear out of thin air, however. Prior to

.actuary.org/files/Drivers_2016_Premiums_o80515.pdf [http://perma.cc/D49Q-PD6A] (describing how actuaries develop premiums). Insurers have less ability to shift administrative cost increases (whether due to compliance or litigation) on to consumers due to the ACA's medical loss ratio rules, under which individual market insurers must expend at least eighty percent of premium earnings on medical expenditures and quality improvement investments. 42 U.S.C. § 300gg-18(b)(1)(A)(ii) (2012). If an insurer is at or near this level, it must either reduce other administrative costs or pay for litigation through other revenue sources, such as investment income. If an insurer is above eighty percent, it may incorporate the litigation costs into its premiums until its administrative costs reach twenty percent.

247. Cf. Michael A. Brower, Comment, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 865-66 (2011) (summarizing arguments from Charles Meyers and Richard Posner opposing the implied warranty of habitability on cost-related grounds).
248. See, e.g., Barry Ritholtz, *Health-Care Costs Ate Your Pay Raises*, BLOOMBERG (Sept. 28, 2016, 12:46 PM), <http://www.bloomberg.com/view/articles/2016-09-28/health-care-costs-ate-your-pay-raises> [http://perma.cc/UHD8-Z8RH]. But see Beth Pinsker, *For Most Americans, Healthcare Costs Aren't Skyrocketing*, REUTERS (Oct. 11, 2016, 12:43 PM), <http://www.reuters.com/article/us-datadive-healthcare-idUSKCN12B24H> [http://perma.cc/EJ2C-W92X].
249. Allison K. Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1873, 1887 (2011).
250. 42 U.S.C. § 300gg(a) (prohibiting health status rating). The law, however, still allows insurers to vary rates based on age by a 3:1 ratio and tobacco use by a 1.5:1 ratio. *Id.* Prior to the ACA, most states had not adopted any limit on either age or tobacco rating in the individual market. See Giovannelli et al., *supra* note 48, at 3, 5.
251. See, e.g., 42 U.S.C. § 300gg-6 (enumerating the comprehensive health insurance coverage requirements).
252. See, e.g., *Premium Increases for "Young Invincibles" Under the ACA and the Impending Premium Spiral*, AM. ACTION F. (Oct. 2, 2013), <http://www.americanactionforum.org/research/premium-increases-for-young-invincibles-under-the-aca-and-the-impending> [http://perma.cc/C3RH-AHPN]; see also Robert M. Damler & Paul R. Houchens, *ACA Premium Impact-Variability of Individual Market Premium Rate Changes*, MILLIMAN 1-2 (2012),

passage of the ACA, they simply were not shared evenly across the population. Some consumers paid disproportionately more than others for insurance.²⁵³ Other consumers paid for their health care expenses out of pocket without the benefit of adequate insurance, often incurring significant medical debt along the way.²⁵⁴ And some went without care, incurring costs in the form of poorer health outcomes and even death.²⁵⁵ In enacting the ACA, Congress chose to spread these costs more evenly across consumers and address cost growth through other mechanisms, such as delivery and payment system reforms.²⁵⁶

The implied warranty of legality reinforces the ACA's horizontal redistribution scheme. Today, the lack of a private right of action under the ACA puts the costs of noncompliance on consumers. If, for example, an insurer unlawfully denies certain consumers coverage, those consumers alone bear the costs of paying for health care services out of pocket or not receiving the care they need, when they need it. Just as "it is unjust to ask the ill and injured to pay the costs of unavoidable conditions that impair their welfare," it is equally unjust to force

http://www.in.gov/aca/files/Individual_Market_Premium_Rate_Change_Variability_under_the_ACA_Final.pdf [<http://perma.cc/29H6-RZNN>].

253. See, e.g., *Nowhere to Turn: How the Individual Health Insurance Market Fails Women*, *supra* note 3, at 10 ("[A]t 40-years-old, women's monthly premiums ranged between 4% and 48% higher than men's monthly premiums . . .").
254. See, e.g., Sara Collins et al., *Losing Ground: How the Loss of Adequate Health Insurance Is Burdening Working Families*, COMMONWEALTH FUND 10 (Aug. 2008), http://www.commonwealthfund.org/~media/files/publications/fund-report/2008/aug/losing-ground--how-the-loss-of-adequate-health-insurance-is-burdening-working-families--8212-finding/collins_losinggroundbiennialsurvey2007_1163-pdf.pdf [<http://perma.cc/MX26-984Q>] ("Adults with gaps in health insurance coverage or those underinsured were most at risk of having problems with medical bills: three of five reported any one medical bill problem or accrued medical debt, more than double the rate of those who had adequate insurance all year (26%).").
255. See, e.g., David Cecere, *New Study Finds 45,000 Deaths Annually Linked to Lack of Health Coverage*, HARV. GAZETTE (Sept. 17, 2009), <http://news.harvard.edu/gazette/story/2009/09/new-study-finds-45000-deaths-annually-linked-to-lack-of-health-coverage> [<http://perma.cc/PVA4-DCUZ>] (describing a study conducted by the Harvard Medical School and Cambridge Health Alliance finding that nearly 45,000 annual deaths are associated with lack of health insurance and a forty percent increased risk of death among the uninsured); Collins et al., *supra* note 254, at 15 ("People who were uninsured at the time of the survey or who were insured but had spent a time uninsured during the past year experienced the highest rates of cost-related problems getting needed health care. More than 70 percent of adults who were uninsured for any time during the year cited cost-related problems accessing needed health care, up from just over half in 2001.").
256. See generally Peter R. Orszag & Ezekiel J. Emanuel, *Health Care Reform and Cost Control*, 363 NEW ENG. J. MED. 601, 601-03 (2010) (arguing that the ACA "institutes myriad elements that experts have long advocated as the foundation for effective cost control").

these unlucky consumers to pay the costs of ACA violations themselves.²⁵⁷ As the law currently stands, these consumers cannot take any steps to protect themselves from unanticipated violations of the law. By adopting the implied warranty of legality, however, courts can permit the costs of compliance to be distributed more broadly across the population.²⁵⁸

The implied warranty of legality, like the ACA itself, also advances vertical redistribution by asking those who earn more to pay more of any added costs.²⁵⁹ The ACA accomplishes this by providing premium tax credits to individuals and families earning up to 400 percent of the Federal Poverty Level if they purchase their insurance through an ACA-created health insurance marketplace (also known as an exchange).²⁶⁰ These tax credits cap the amount eligible consumers must contribute to premiums to a percentage of income based on a sliding scale.²⁶¹ The federal government predicts that, on average, these tax credits will lower eligible consumers' premiums by seventy-three percent in 2016.²⁶² Because the ACA calculates tax credit levels as a percentage of an indi-

257. Hoffman, *supra* note 249, at 1925.

258. See Moncrieff, *supra* note 207, at 2378 (“The second benefit of state judicial regulation, particularly through tort, is that it provides compensation to injured parties Compensation serves two important goals: First, it spreads risk among all consumers of the relevant good or service, rather than forcing the unlucky few who are injured to bear the full cost of that risk, and second, it serves non-utilitarian values of social justice and morality, requiring an injuring party to make its victims whole [Compensation] forces insurers, manufacturers, and doctors to spread the risk of error among their consumers (through price increases) and to recompense their injured consumers for the harms that they cause.”).

259. Cf. Hoffman, *supra* note 208, at 33 (discussing “vertical equity” and “health redistribution”).

260. See I.R.C. § 36B(b)(3)(A) (2012). As of March 31, 2016, 9.4 million out of 11.1 million consumers enrolling in health insurance through a marketplace received premium tax credits. *March 31, 2016 Effectuated Enrollment Snapshot*, CTRS. FOR MEDICARE & MEDICAID SERVS. (June 30, 2016), <http://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-06-30.html> [<http://perma.cc/NQ6Y-UG8N>].

261. See I.R.C. § 36B(b)(3)(A). As an example, “a premium credit recipient living in Lebanon, KS—the geographic center of the continental United States—with 2016 household income of \$17,655 (150% FPL, according to premium credit regulations) would be required to contribute 4.07% of that income toward the premium for the standard plan in his or her local area. In other words, the maximum amount that this person would pay for the year toward the standard plan is approximately \$719 (that is, \$17,655 × 4.07%), or around \$60 per month.” BERNADETTE FERNANDEZ, CONG. RESEARCH SERV., R44425, ELIGIBILITY AND DETERMINATION OF HEALTH INSURANCE PREMIUM TAX CREDITS AND COST-SHARING SUBSIDIES: IN BRIEF 5 (Mar. 23, 2016).

262. See Office of the Assistant Sec’y for Planning & Evaluation, *ASPE Issue Brief: Health Insurance Marketplace Premiums After Shopping, Switching, and Premium Tax Credits, 2015-2016*, DEP’T HEALTH & HUM. SERVS. 3 (Apr. 12, 2016), <http://aspe.hhs.gov/sites/default/files/pdf/198636/MarketplaceRate.pdf> [<http://perma.cc/X85Z-AUXR>].

vidual's income, rather than as a percentage of premiums, the tax credits would also shield eligible individuals from any year-to-year premium increases that result from the adoption of the implied warranty of legality.²⁶³ This means that the federal government would pay any costs associated with adoption of the implied warranty of legality on behalf of low-income consumers. In contrast, today, the least well-off are no more protected from the costs of insurer non-compliance than the wealthier.

Thus, the implied warranty reinforces the ACA's substantive promises to consumers, but does so in a manner that builds on and even furthers the law's redistributive framework. Costs should not be a reason to oppose the implied warranty of legality. If anything, the fact that costs of noncompliance are otherwise shouldered unevenly is reason to adopt it.

2. *The Filed Rate and Primary Jurisdiction Doctrines*

Insurers frequently turn to two judge-made doctrines to avoid litigation: the primary jurisdiction and filed rate doctrines. Both of these doctrines are premised on the theory that courts should abstain from adjudicating matters where the law has empowered an administrative agency to act. These doctrines recognize that administrative agencies often have specialized knowledge and discretionary authority to which courts should defer.²⁶⁴ These doctrines originated in and still have their greatest salience in the context of third-party challenges to a regulated entity's rates.²⁶⁵ Yet even acknowledging this, their impact on claims brought under the implied warranty of legality will be limited. After all, rates are only one of many areas regulated by the ACA, and consumers would still be able to bring various other claims before a court.

The primary jurisdiction doctrine governs the general allocation of authority between agencies and courts.²⁶⁶ As articulated by the Supreme Court, it "applies where a claim is originally cognizable in the courts, and . . . enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."²⁶⁷

²⁶³. *See id.*

²⁶⁴. *See, e.g.,* Vonda Mallicoat Laughlin, *The Filed Rate Doctrine and the Insurance Arena*, 18 CONN. INS. L.J. 373, 376-77 (2011-12); Aaron J. Lockwood, Note, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 710 (2007).

²⁶⁵. *See* Laughlin, *supra* note 264, at 377-82; Lockwood, *supra* note 264, at 711-17.

²⁶⁶. *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 63 (1956) ("The doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.").

²⁶⁷. *Id.* at 64.

State courts have uniformly adopted the doctrine²⁶⁸ and commonly apply it to cases involving insurance rates, premiums, and policy forms.²⁶⁹

If applied broadly, this doctrine may inappropriately limit consumers' ability to get recourse under the implied warranty of legality.²⁷⁰ Yet multiple safeguards are available to courts seeking to limit the doctrine's negative effects. First, courts have discretion over whether to refer cases to administrative bodies in the first instance, considering whether the interests of uniformity and expertise "will be aided by [the doctrine of primary jurisdiction's] application in the particular litigation."²⁷¹ If a court determines that it can resolve the case without an agency's expertise or if the agency has no authority to act with respect to the consumer's claims, the court can hold on to the case.²⁷² This may occur where, for example, the ACA does not leave room for administrative discretion and the court merely must determine whether the insurer violated it. Second, if primary jurisdiction is found to apply, the judicial process is merely suspended while the administrative body takes action.²⁷³ The plaintiff may revive his or her claim after the administrative body has ruled.²⁷⁴ Third, to avoid excessive administrative delays, courts have occasionally imposed deadlines on

268. See Craig A. Cohen et al., *Using the Primary Jurisdiction Doctrine in Insurance Litigation*, BRIEF, Summer 2007, at 12, 15.

269. See *id.* at 15-16.

270. See Paula K. Knippa, Note, *Primary Jurisdiction Doctrine and the Circumforaneous Litigant*, 85 TEX. L. REV. 1289, 1290-92 (2007).

271. *W. Pac. R.R. Co.*, 352 U.S. at 64.

272. See, e.g., Cohen et al., *supra* note 268, at 15 ("[The Supreme Court of Texas] further recognized that the primary jurisdiction doctrine will not be applied where the issue is one inherently judicial in nature or when the administrative agency is powerless to grant the relief sought and has no authority to make incidental findings that are essential to the granting of relief. In addition, the Texas court held that intervention by the court in administrative proceedings may be permissible when an agency is exercising authority beyond its statutorily conferred powers." (footnote omitted)). While cases appear to exist where referrals were made "on issues that the agency simply was not equipped or authorized to answer" or "where the issue so referred was not necessary to resolve the claim itself," these appear to be avoidable mistakes rather than necessary outcomes of the doctrine itself. Knippa, *supra* note 270, at 1306.

273. See Cohen et al., *supra* note 268, at 14.

274. See *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) ("Referral of the issue to the administrative agency does not deprive the court of jurisdiction . . ."); see also *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 199 n.29 (1978) ("The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue." (citing 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958))).

the agency to make a ruling.²⁷⁵ Accordingly, so long as courts exercise care, the primary jurisdiction doctrine need not be a bar to litigation, including claims brought under the implied warranty of legality. Instead, it may provide a useful mechanism for incorporating agency input while preserving a consumer's right to judicial recourse when insurers violate the ACA.

The filed rate doctrine, in contrast, stands for the proposition that courts will not hear claims implicating rates that have been filed and approved by regulatory agencies.²⁷⁶ Thus, when applicable, it is a total bar to judicial recourse. While jurisdictions vary, however, there are important limits on the scope of the doctrine that will prevent the filed rate doctrine from barring most, if not all, potential claims brought under an implied warranty of legality.

First, the filed rate doctrine typically only applies when consumers directly challenge insurance rates as unlawful. In most states, the filed rate doctrine neither bars litigation challenging whether the policy forms an insurer filed with the state comply with applicable regulations, nor blocks other contract claims seeking to challenge how an insurer has interpreted its policy or to enforce certain terms of a policy.²⁷⁷ This distinction is grounded in justiciability concerns. While courts may be poorly equipped to evaluate and retroactively revise an insurer's rates—which involves making complex predictions about how many people will enroll and how much care they will utilize²⁷⁸—disputes over whether policy forms or others terms of an insurance contract comply with the ACA present more straightforward questions that courts can answer.²⁷⁹ Given this limit, the filed rate doctrine would not affect any claims brought under the implied warranty of legality that do not directly challenge an insurer's rates, such as claims that an insurer is unlawfully denying coverage of certain benefits, requiring consumers to pay copays, or withholding rebates.

Second, many jurisdictions only apply the filed rate doctrine to bar claims for damages, thus allowing claims for injunctive relief to proceed.²⁸⁰ This limit means that individuals may still be able to challenge an insurer's rates so long as they only seek future relief.

275. See, e.g., *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 206 (5th Cir. 1988).

276. See Laughlin, *supra* note 264, at 373.

277. *Id.* at 391, 442. Additionally, this bar only applies if the violation is reflected in the rate that was filed. Courts have allowed claims alleging that insurers charged rates in excess of what was filed. *Id.* at 403-04. Courts have also allowed claims contending that filed rates were improperly applied. *Id.* at 404-05.

278. See *Drivers of 2016 Health Insurance Premium Changes*, *supra* note 246, at 2-5.

279. See Laughlin, *supra* note 264, at 391.

280. See *id.* at 396-99.

Third, some jurisdictions refuse to apply the doctrine in cases where administrative review is considered insufficient.²⁸¹ The Ninth Circuit, for instance, has held that merely filing rates “does not render them immune from challenge” or “legitimize” rates that do not comply with the law.²⁸² This approach is logical: while deference to an administrative agency may justify invoking the filed rate doctrine when regulators have authority to approve or disapprove rates, there is no agency action to defer to in states with review authority alone.²⁸³ Because justiciability concerns remain, however, any challenges to rates brought under the implied warranty of legality may present a circumstance where the court could invoke the primary jurisdiction doctrine to refer any retrospective reallocation of rates to an agency while otherwise maintaining jurisdiction over the case.

Taking these three factors into account, the filed rate doctrine is far narrower than the primary jurisdiction doctrine. Because it wholly removes cases from a court’s jurisdiction, however, it also comes with a bigger bite when it does apply. In part due to its perceived harshness,²⁸⁴ the doctrine remains contentious.²⁸⁵ Some state court judges have even suggested that its days are numbered.²⁸⁶ Indeed, because both the filed rate doctrine and the primary jurisdiction doctrines are judge-made, courts can roll them back just as courts can push forward the implied warranty of legality. Even if they remain in place, however, the main limit they would impose on the implied warranty of legality would be to bar certain challenges to insurer rates. This alone is not reason enough to justify not adopting the warranty.

III. THE IMPLIED WARRANTY OF LEGALITY BEYOND THE ACA

Looking forward, the implied warranty of legality need not be limited to enforcing the ACA. This Part offers preliminary thoughts on the extent to which the implied warranty of legality can and should be invoked in other

281. *See id.* at 387, 410-16.

282. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 394 (9th Cir. 1992); *see also Clark v. Prudential Ins. Co. of Am.*, Civ. No. 08-6197 (DRD), 2011 WL 940729, at *14 (D.N.J. Mar. 15, 2011) (“Whether a state agency has the authority to approve reasonable rates is critical.”).

283. *See Laughlin*, *supra* note 264, at 410.

284. *See Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (“[T]he filed rate doctrine may seem harsh in some circumstances . . .”).

285. *See Richardson v. Standard Guar. Ins. Co.*, 853 A.2d 955, 962 (N.J. Super. Ct. App. Div. 2004).

286. *See id.* at 963.

markets to enforce other regulatory regimes. First, I return to the practical barrier facing almost any state cause of action: federal preemption. As discussed above, the implied warranty of legality is viable as a mechanism for enforcing the ACA at least in part because of the ACA's very narrow approach to preemption. This Part will discuss the rules that are likely to apply when a federal statute is silent or otherwise does not go as far as the ACA to fend off preemption. Then, I turn to the normative question of when else courts should adopt the implied warranty of legality, assuming no preemption. Private rights of action can benefit both individuals and society, but they come with costs. I identify two additional features of the insurance and housing markets that justify creating implied warranties, and I contend that these characteristics should be used to identify other markets where the adoption of the implied warranty of legality would be equally appropriate.

A. Preemption and the Parallel Claims Exception

As explained earlier, the ACA does not preempt “any State law” unless it “prevent[s] the application” of the ACA’s insurance reforms.²⁸⁷ In this context, preemption is not a significant concern as the implied warranty of legality should not block implementation in any way. Yet not all federal statutes include preemption clauses that so clearly preserve state causes of action, and, indeed, some of these statutes expressly bar state causes of action.²⁸⁸ While an implied warranty of legality will be a non-starter in the latter case, Supreme Court precedent regarding the parallel claims exception to preemption suggests that the implied warranty of legality may remain viable when statutes are silent or ambiguous.

Under the parallel claims exception, the Court has regularly exempted from preemption claims based on “state duties [that] . . . ‘parallel,’ rather than add to, federal requirements.”²⁸⁹ Justifying the parallel claims exception, in *Medtronic, Inc. v. Lohr*, the Court explained that “[t]he presence of a damages remedy does not amount to the additional or different ‘requirement’ that is necessary under the statute; rather, it merely provides another reason for manufacturers to comply with identical existing ‘requirements’ under federal

²⁸⁷. 42 U.S.C. § 18041(d) (2012).

²⁸⁸. See, e.g., Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 101, 112 Stat. 3227, 3227-28 (codified as amended in scattered sections of 15 U.S.C.) (preempting class actions for securities fraud arising under state law).

²⁸⁹. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 407, 495 (1996)).

law.”²⁹⁰ Because the implied warranty of legality simply provides a mechanism for consumers to enforce the terms of a federal statute, either through injunctive or compensatory relief, it should generally fall within the bounds of the parallel claims exception. However, there are potential limits.

First, the Court held in *Buckman Co. v. Plaintiffs’ Legal Committee* that the parallel claims exception does not necessarily apply to statutes regulating areas of the law where states have not traditionally played a role, such as food and drug safety, or when there is reason to think Congress sought uniformity in enforcement.²⁹¹ This is not a concern in the health insurance context given states’ historic leadership in this area and the fact that the ACA expressly allows for continued state-level variation,²⁹² but it could impact uptake of the implied warranty of legality in other markets where states traditionally have not played a role.

Second, even if the implied warranty of legality is generally feasible under the parallel claims exception, *Buckman* suggests that preemption could still block certain claims. Specifically, preemption could be a barrier if consumers seek to enforce duties the regulated entity owed an agency rather than duties the entity directly owed them. In *Buckman*, the plaintiff’s claims were based on a fraud-on-the-agency theory: they were injured because a device manufacturer secured approval by making fraudulent representations to the U.S. Food & Drug Administration (FDA).²⁹³ In the Court’s view, these claims “inevitably conflict with the FDA’s responsibility to police fraud consistently with the Administration’s judgment and objectives.”²⁹⁴ For example, were the Court to allow the plaintiffs’ fraud-on-the-agency claims to survive, applicants seeking to fend off future litigation “would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the FDA’s evaluation of an application.”²⁹⁵ One could imagine the implied warranty of legality having a similar disruptive effect if con-

^{290.} *Lohr*, 518 U.S. at 495.

^{291.} See 531 U.S. 341, 347, 350–53 (2001).

^{292.} See *supra* Section I.A; see also Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 *FORDHAM L. REV.* 1749, 1764 (2013) (“Like countless other cooperative federalism programs, the ACA encourages states to experiment with how they choose to implement the new federal statute. In the context of the ACA’s insurance-exchange provisions alone, the statute mentions ‘state flexibility’ six times and explicitly contemplates that the exchanges will look different across the states.” (footnote omitted)).

^{293.} *Buckman Co.*, 531 U.S. at 347, 350–52.

^{294.} *Id.* at 350.

^{295.} *Id.* at 351.

sumers could use it to enforce reporting requirements and other administrative duties.

In sum, consumers will likely have greater success invoking the implied warranty of legality in the context of markets traditionally subject to state regulation than in new, emerging markets or those primarily regulated at the federal level. Additionally, consumers will be more likely to defeat preemption defenses when they bring claims to enforce statutory provisions that directly benefit them rather than duties owed to federal agencies, even if such duties carry indirect benefits.

B. Guiding Principles for Future Applications

Providing people with private rights of action to enforce statutory and constitutional provisions offers benefits at both the individual and societal level.²⁹⁶ For individuals, as this Note has already touched on, a private right of action provides an important mechanism to recoup damages for injuries suffered due to another's violation of the law. This carries with it obvious financial benefits, but the sense of empowerment that comes from standing up for oneself in court can also promote dignity and integrity, and "give people control over their lives."²⁹⁷ For society, providing individually enforceable rights can "promote order and predictability, thus enabling people to act upon reasonable expectations in managing their affairs."²⁹⁸ It can also advance democratic values by enabling individuals to represent themselves.²⁹⁹ In addition, private enforcement of a federal regulatory scheme can specifically benefit overburdened regulators by bringing more resources and attention to an issue and alerting regulators to areas that need more attention.³⁰⁰

At the same time, recognizing private rights of action "may conflict with social utility because recognizing rights is sometimes inefficient."³⁰¹ How then, should courts determine when social utility is sufficiently great to outweigh potential inefficiencies that may result from private enforcement? One answer is that courts should defer to the legislature and simply look to whether state

296. See Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 678 (1987).

297. See *id.*; see also Oman, *supra* note 37, at 32-34, 62 (arguing that individuals vindicated their sense of insulted honor through litigation).

298. Zeigler, *supra* note 296, at 679.

299. See Steven B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 666 (2013).

300. See *id.* at 662-64; Moncrieff, *supra* note 207, at 2376-77.

301. Zeigler, *supra* note 296, at 679.

causes of action are preempted.³⁰² However, simply because Congress has left room for state solutions does not necessarily mean that courts should go out of their way to adopt them. Thus, for courts establishing the implied warranty of legality for the first time and seeking to build in limits to the applicability and availability of the implied warranty across a range of contexts, I identify two features common to housing and insurance that justify providing consumers a private right of action to enforce the rights and protections afforded them by statute. These two characteristics can serve to guide the application of the implied warranty of legality to other contexts in the future.

First, in these markets, redress is dependent upon the presence of compulsion or involuntariness in the transaction. In the housing context, this compulsion is *de facto*: participation in the rental housing market is a practical necessity for millions of Americans who cannot afford to purchase a home. In insurance, it is *de jure*: individuals must maintain minimum essential coverage to avoid tax penalties.³⁰³ For individuals who do not qualify for employer-sponsored insurance or public programs, this means that they must purchase individual health insurance coverage.³⁰⁴ While these consumers may have a choice of plans when they first enroll, they cannot change plans mid-year absent a change in financial or living circumstances.³⁰⁵ They may report their problems to state and federal regulators, but, as Part I shows, their ability to seek recourse is limited in the absence of a general private right of action. Thus, while the ACA affords consumers a vast new array of protections, it does not empower them to take action to respond to violations. This is *adhesion-plus*: not “take it or leave it” but simply “take it.”³⁰⁶

Providing enforceable rights to consumers in a “take it” situation is not merely a matter of market fairness, but civic fairness. Along these lines, Nan Hunter argues that a “right of participation should be viewed as reciprocal to

302. Cf. Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997) (arguing that courts should not preempt state tort remedies absent a clear statement from Congress). *But see* Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1 (1995) (arguing that Congress should leave preemption determinations to the courts).

303. I.R.C. § 5000A (2012).

304. Buntin et al., *supra* note 1, at 80.

305. *Open Enrollment Period*, HEALTHCARE.GOV, <http://www.healthcare.gov/glossary/open-enrollment-period> [<http://perma.cc/9PA7-UXRH>].

306. See Mariner, *supra* note 79, at 452-53 (“Persons obligated to obtain minimum coverage under the ACA do not have that option. They must ‘take’ a policy, because they cannot ‘leave it’ without penalty.” (footnote omitted)).

the individual's obligation to purchase insurance.³⁰⁷ Hunter conceives of this right of participation in the context of individual engagement in ACA-related policymaking,³⁰⁸ but it can also take the form of individual engagement in ACA enforcement efforts.³⁰⁹ Adjudication should be understood as an "avenue[] for political expression" and "an alternative point of entry into political life."³¹⁰ Through the implied warranty of legality, consumers gain a voice in shaping a market where they are otherwise largely held both captive and passive.

Second, the regulated transaction—here, the purchase of individual health insurance—is of great societal importance. In fact, this transaction involves a Rawlsian-type primary good, a good that, behind a veil of ignorance, individuals would choose to distribute equally to ensure fair and just opportunities for advancement in society.³¹¹ While Rawls himself did not identify health care as

307. Nan D. Hunter, *Health Insurance Reform and Intimations of Citizenship*, 159 U. PA. L. REV. 1955, 1967 (2011).

308. See *id.* at 1967-68 (tracing the "consumer-citizen framework embodied in the ACA back to the 1930s where it emerged as a "tactic for melding democratic values with the preservation of capitalism"); *id.* at 1983-85 (highlighting the creation and governance of health insurance exchanges as an opportunity for citizenship engagement under the ACA).

309. Cf. Hershkoff, *supra* note 172, at 1917 (describing how adjudication can serve as an "avenue[] for political expression" and "an alternative point of entry into political life" in the context of arguing for "an enlarged concept of justiciability").

310. *Id.* at 1916; see also Burbank et al., *supra* note 299, at 666 ("Meaningful access to opportunities to defend and advance rights through litigation can amount to a form of active and direct citizen participation in the enterprise of self-government, constituting a valuable and important facet of democratic life. This form of participation may incorporate interests into the governing process that would be rendered impotent by simple majoritarianism. Although majoritarian institutions are often thought emblematic of democracy, such institutions do not exhaust forms of democratic governance. As Malcolm Feeley and Edward Rubin put it, 'perhaps a democracy must respect the rights of individuals or be governed by organic law or provide opportunities for expression and participation or establish conditions for rational discourse,' and courts may be distinctively suited to contributing these elements to a broader democratic regime." (quoting MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 333 (1998))); Peters, *supra* note 184, at 350 ("In the Anglo-American tradition, we restrict the role of the judge to that of making 'a choice between competing views, or a mediation among such views'; to the parties who will be affected by the judgment we leave the definition and articulation of those views. Thus the litigants subject to a court decision are in a very real sense, as Edward Levi observes, 'bound by something they helped to make.' This echoes our general preference for government through participation over government by fiat." (footnotes omitted)).

311. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 62 (1971) (defining health as a natural primary good, essential to all life plans). By referencing a "veil of ignorance," John Rawls discusses the hypothetical situation in which individuals make decisions while unaware of their per-

such a good in his original writings, others have since suggested that it “could readily be added to the list.”³¹² As Norman Daniels has argued, meeting people’s health needs is foundational to their ability to function normally in society and “to choose among life plans they can reasonably pursue, given their talents and skills.”³¹³ Empirical studies confirm a connection between poor health and annual earnings,³¹⁴ as well as the important role that health insurance plays in health outcomes.³¹⁵ Insurance itself is also associated with positive economic effects, both for individuals³¹⁶ and society at large.³¹⁷ As the Wisconsin Supreme Court observed in *Pines* when it adopted the implied warranty of habitability, “[t]he need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.”³¹⁸ So, too, is the need and social desira-

sonal characteristics, such as class and social status, and their natural assets and abilities, such as strength and intelligence. *See id.* at 12.

312. Russell Korobkin, *Determining Health Care Rights from Behind a Veil of Ignorance*, 1998 U. ILL. L. REV. 801, 806; *see also* Allen E. Buchanan, *The Right to a Decent Minimum of Health Care*, 13 PHIL. & PUB. AFF. 55, 61 (1984) (“At least some forms of health care (such as broad services for prevention and health maintenance, including mental health) seem to bear the earmarks of Rawlsian primary goods . . .”).
313. NORMAN DANIELS, *JUST HEALTH: MEETING HEALTH NEEDS FAIRLY* 29, 77 (2008).
314. *See* Jack Hadley, *Sicker and Poorer—The Consequences of Being Uninsured: A Review of the Research on the Relationship Between Health Insurance, Medical Care Use, Health, Work, and Income*, 60 MED. CARE RES. & REV. 3S, 57S (2003).
315. *See id.* at 38S-45S (summarizing research on the connection between health insurance status and health outcomes and mortality).
316. *See, e.g.*, Bhashkar Mazumder & Sarah Miller, *The Effects of the Massachusetts Health Reform on Financial Distress*, FED. RES. BANK CHI. 3 (July 2015), <http://www.chicagofed.org/publications/working-papers/2014/wp-01> [<http://perma.cc/R5ZH-QG3L>] (finding that the “Massachusetts reform improved financial outcomes across many dimensions: it improved credit scores, reduced delinquencies, lowered the fraction of debt past due and reduced the incidence of personal bankruptcy”).
317. James A. Thornton & Jennifer L. Rice, *Does Extending Health Insurance Coverage to the Uninsured Improve Population Health Outcomes?*, 6 APPLIED HEALTH ECON. & HEALTH POL’Y 217, 228 (2008) (finding that “there may be large social economic benefits and net benefits from extending health insurance coverage to the uninsured”).
318. *Pines v. Persson*, 111 N.W.2d 409, 413 (Wis. 1961); *see also* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 771-72 (1983) (distinguishing “judicial or legislative attack” on contracts of adhesion for paintings from those for housing, and concluding that “[i]t is . . . misleading to describe the nondisclaimable warranty of habitability as simply a device for correcting an imbalance in bargaining power” and that “[m]ore accurately, it is an instrument of redistribution that seeks to shift control over housing from one group (landlords) to another (tenants) in a way that furthers the widely shared goal of insuring everyone shelter of at least a minimally decent sort”).

bility of access to adequate health care—which, for all but the very wealthy, means access to adequate health insurance.³¹⁹

This Note is not the first proposal to identify these principles as reasons to justify intervention in a market, but it takes their import further. As Shlomit Azgad-Tromer argued, “[i]f consumers have bounded voluntariness, and the moral values of society support the assignment of the market as serving a basic need, that market should be considered essential and be regulated at a higher degree of paternalism.”³²⁰ While Azgad-Tromer is focused on regulatory interventions, such as price controls and subsidies,³²¹ this Note is motivated by the belief that regulatory paternalism alone is not enough to protect these “essential markets” if regulators cannot consistently ensure that the rules are followed. When these circumstances apply, courts should empower consumers to enforce the protections that they are provided by bringing actions under an implied warranty theory.

CONCLUSION

The implied warranty of legality would allow consumers to enforce the myriad rights and protections granted them under the ACA. Absent this, limitations in the administrative enforcement mechanisms and pre-existing state causes of action leave open the chance that many, if not most, violations of the law will go without remedy. Individuals will continue to face unnecessary charges, excessive premiums, and denials of care from which the law was meant to protect them. This will surely cause financial injury to many and may even result in preventable physical and emotional injury to some.

319. See, e.g., Steven Brill, *Bitter Pill: Why Medical Bills Are Killing Us*, TIME (Feb. 20, 2013) [http://healthland.time.com/2013/02/20/bitter-pill-why-medical-bills-are-killing-us/print/\[2/26/2013](http://healthland.time.com/2013/02/20/bitter-pill-why-medical-bills-are-killing-us/print/[2/26/2013) [<http://perma.cc/4J63-7VWV>] (describing the high prices of hospital services); John Walker, *Patients Struggle with High Drug Prices*, WALL ST. J. (Dec. 31, 2015, 10:38 AM), <http://www.wsj.com/articles/patients-struggle-with-high-drug-prices-1451557981> [<http://perma.cc/ZQR7-K8T4>] (describing the high prices of prescription drugs); see also Catherine Hoffman & Julia Paradise, *Health Insurance and Access to Health Care in the United States*, 1136 ANNALS N.Y. ACAD. SCI. 149 (2008) (showing that health insurance coverage strongly correlates to access to a wide array of health care services, including preventive care and treatment for acute and chronic conditions).

320. Shlomit Azgad-Tromer, *A Hierarchy of Markets: How Basic Needs Induce a Market Failure*, 14 DEPAUL BUS. & COM. L.J. 1, 4 (2015). Joshua Wyner has similarly pointed to compulsory education laws to help justify finding an implied warranty to an adequate education. See Wyner, *supra* note 189, at 412.

321. See Azgad-Tromer, *supra* note 320, at 4.

Like the implied warranty of habitability before it, the implied warranty of legality can help correct the power imbalance between consumers and insurers still left after enactment of the ACA. It can empower consumers to stand up for themselves and seek individualized redress, as well as to engage civically by participating in enforcement of the law. Moreover, the implied warranty of legality will further the ACA's redistributive goals by ensuring that the costs of an insurer's noncompliance with the law are shared more equitably across the market.

In adopting an implied warranty of legality, state courts can also assert a position for themselves in defining how the law will operate within their jurisdiction. While this role has received little attention to date, it is a natural extension of the ACA's federalist structure. Continuing to misconceive of the ACA as a federally and administratively driven statute will deny consumers the benefit of the law's full potential. While the ACA is transformative in the protections it provides to patients and consumers, it did not upend the traditional state-federal dynamic in insurance regulation. States have long built on minimum federal floors to better protect consumers and should do so again here, where the ACA falls short.

And states need not stop there. The concept of an implied warranty of legality should be applied to other federal and state regulatory schemes under which consumers face similar pressures and bargaining dynamics. Indeed, even if the ACA were repealed or amended, the implied warranty of legality could be used to enforce state health insurance rules. The adaptability of the implied warranty of legality is rooted in its simplicity: consumers should be able to trust that when they purchase a heavily regulated product or service, it is in compliance with the applicable rules. If it is not, the provider has broken an implicit promise on which its contracts were based and should be held responsible.