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Steven W. Feldman

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Article

RESCISSION, RESTITUTION, AND THE PRINCIPLE OF FAIR REDRESS: A RESPONSE TO PROFESSORS BROOKS AND STREMITZER

Steven W. Feldman*

I. INTRODUCTION

Analyzing a remedy that the reporter for the *Restatement (Third) of Restitution and Unjust Enrichment* describes as having “[e]normous practical importance and theoretical interest,”¹ scholars in recent years have produced a flood of articles covering contract rescission and restitution.² In their 2011 Article in the *Yale Law Journal, Remedies on and off Contract*, Professors Richard Brooks and Alexander Stremitzer weigh in on the discussion.³ Relying on microeconomic theory, which reflects the perspective of rational buyers and sellers, the authors’ thesis is that current legal doctrine is too restrictive in allowing buyers’ rescission and too liberal in granting them restitution.⁴ Although other commentators

* Attorney-Advisor, U.S. Army Corps of Engineers, Huntsville, Alabama. The author expresses deep appreciation to Dr. Gayla Feldman for her love and support, including our springtime walks discussing law and economics. Thanks to Meredith Miller and Doug Rendleman for their input and especially to Andrew Kull and Jeremy Telman for their extensive and challenging critiques. This Article is written in honor of Joseph Perillo and Stewart Macaulay, two giants in contract scholarship who also graciously provided helpful comments in its preparation. All opinions are solely those of the author.

¹ Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465, 1491 (1994).

² See Symposium, *A Conference on Restitution and Unjust Enrichment*, 92 B.U. L. REV. 763 (2012); Symposium, *Restitution Rollout: The Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 865 (2011); Symposium, *The Restitution Roundtable*, 65 WASH. & LEE L. REV. 889 (2008); Symposium, *Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763 (2001). These symposia issues are four prominent examples of the spate of articles covering contract rescission and restitution that have been produced in recent years.

³ Richard R.W. Brooks & Alexander Stremitzer, *Remedies on and off Contract*, 120 YALE L.J. 690 (2011) [hereinafter Brooks & Stremitzer, *Remedies on and off Contract*]. Richard R.W. Brooks is Leighton Homer Surbeck Professor of Law at Yale Law School, and Alexander Stremitzer is Acting Professor of Law at UCLA Law School. Both authors hold doctorates in economics in addition to their law degrees. The authors have reprised their views from their *Yale Law Journal* article in a contribution to the Washington and Lee Law School’s symposium, *Restitution Rollout: The Restatement (Third) of Restitution and Unjust Enrichment*. See Richard R.W. Brooks & Alexander Stremitzer, *Beyond Ex Post Expediency – An Ex Ante View of Rescission and Restitution*, 68 WASH. & LEE L. REV. 1171 (2011).

⁴ See Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 693.

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in prominent journals have cited this Article with approval,⁵ I respectfully suggest that it has some fundamental flaws on both legal and economic grounds. In my Article, I summarize the authors' argument, identify my concerns, and propose an alternative formulation.

Brooks and Stremitzer write that a limited rescission model is "excessive" and based on a "misunderstanding" of the economic effects of these remedies.⁶ Their key premise is that legal authorities have exaggerated the threat to contract stability and other normative values posed by liberal access to rescission.⁷ Therefore, the authors posit that rational parties from an ex ante perspective would often bargain for broad rights of rescission even if damages for breach "were fully compensatory and costless to enforce."⁸

While they oppose rescission where the promisee acts opportunistically to avoid unfavorable bargains, Brooks and Stremitzer contend that the existence of a buyer's expanded ability to rescind after a breach, even if not implemented, influences contracting behavior in several ways.⁹ First, the seller will reduce the likelihood of promisee rescission by investing to enhance the quality of performance.¹⁰ Second, the seller will minimize the buyer's possible use of rescission by reducing prices.¹¹ In this regard, the authors say that allowing the buyer greater rights of rescission would actually benefit the contracting system by allowing rational parties to create efficient incentives to avoid breach.¹²

The authors further argue that, with regard to monetary redress, the law is trending inappropriately from "'rescission and restitution' toward 'rescission and expectation' [damages]."¹³ Brooks and Stremitzer's major concern is that the Uniform Commercial Code ("U.C.C.") allows buyers

⁵ See Daniel Friedmann, *Does the Dead Contract Rule Restitution from Its Grave?*, 92 B.U. L. REV. 811, 817 n.30 & n.32 (2012); Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243, 252 n.26 (2011); Note, *(In)Efficient Breach of International Trade Law: The State of the "Free Pass" After China's Rare Earths Export Embargo*, 125 HARV. L. REV. 602, 605 n.17 (2011). But see generally Michael Aikins, *Off-Contract Harms: The Real Effect of Liberal Rescission Rights on Contract Price*, 121 YALE L.J. ONLINE 69, 69-70 (2011) (criticizing Brooks and Stremitzer's *Yale Law Journal* article solely on economic grounds and concluding that they present an incomplete analysis of the effects of rescission on the marketplace); see also *infra* Part III.E (discussing an additional economic critique).

⁶ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 693.

⁷ *Id.*

⁸ *Id.* at 699.

⁹ *Id.* at 693.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 702.

returning defective goods to revoke their acceptance and to obtain expectation damages, including lost profits.¹⁴ The authors deem these cumulative remedies as especially harmful because they give the rational buyer an improper incentive to rescind as a dominant strategy.¹⁵ Yet another critique is that the disaffirming buyer receives a windfall of expectation damages if he gets to both exit the contract and obtain the same payoff (except with a losing contract) as though the bargain had been fully performed.¹⁶ This legal trend, Brooks and Stremitzer contend, ironically “poses the real threat to contractual stability.”¹⁷ Therefore, the authors suggest the law should be changed so the buyer must elect between rescission and damages.¹⁸

As another part of their proposal and to promote more efficient contracting, Brooks and Stremitzer argue that restitution after rescission should only “come at a price.”¹⁹ This concept means the relief should be limited to restoration of the purchase price or the other benefits that the buyer has conferred upon the seller.²⁰ Therefore, the authors do not support redress for the buyer’s damages in reliance on the contract.²¹ They also do not endorse a remedy for disgorgement of the seller’s ill-gotten gain from the breach, such as where the defaulting seller has taken the buyer’s payment, invested it, and earned additional profits.²² Brooks and Stremitzer contend that the latter remedies conflict with sound economic theory because they disincentivize the above seller’s investments and price reductions.²³ The authors also advocate that these recoveries contradict the fundamental objective of restitution as restoring the status quo ante, because these remedies can leave the seller worse off or the buyer better off than if the contract never existed initially.²⁴

In their critique, Brooks and Stremitzer focus almost exclusively on economic issues and sources. Even though they strongly contend that current contract law undermines sound economic theory, they do not

¹⁴ *Id.* at 701-02 n.28.

¹⁵ *Id.* at 701-02.

¹⁶ *Id.* at 698.

¹⁷ *Id.* at 694.

¹⁸ *See id.* at 693 (“Hence, the final point of our argument: the remedy in restitution following rescission should be limited to restoration of price or other conferred benefits to the promisor under the contract.”).

¹⁹ *Id.* at 719.

²⁰ *Id.*

²¹ *Id.* at 692-93. While in several passages the authors favor only restoration of the purchase price and other benefits conferred upon the seller, they do hedge on the buyer’s entitlement to reliance damages. *See infra* notes 299-312 and accompanying text.

²² *Id.* at 719.

²³ *Id.* at 704-11, 719.

²⁴ *Id.* at 718 n.81 and accompanying text.

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adequately analyze whether the restricted rescission and excessive restitution model actually exists in statutory and case law. Their legal analysis consists mainly of isolated references to the U.C.C., the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), the *Restatement (Third) of Restitution and Unjust Enrichment*, the *Restatement (Second) of Contracts*, and seven decisions (none of which were published later than 1988).²⁵ The authors' chief point of doctrinal discussion is their emphasis on the element of material breach, which they describe as an important restraint upon the buyer's ability to obtain rescission and a deterrent to promisee opportunism.²⁶

In contrast, I will perform an intensive case law and statutory analysis showing that the law appropriately follows a principle of "fair redress," which follows a liberal rescission/fair restitution approach. Indeed, the authors' opposition to reliance and disgorgement is particularly counterproductive because their stance undermines the core policy of rescission and restitution, which is to afford the injured party an equitable remedy. Brooks and Stremitzer do not mention that when courts act in equity, judges must avoid rigid formulas that automatically disqualify a particular mode of relief. To this end, courts are free to fashion flexible remedies for the injured party to meet the needs of justice on a case-by-case basis.²⁷

Brooks and Stremitzer's economic analysis is also faulty. The authors' undue reliance on hypothetical buyers and sellers largely ignores the unique situational factors and relational issues that frequently contribute to whether a particular buyer will rescind for breach. By consistently emphasizing the supposed choices of rational parties, the authors necessarily subscribe to a strong version of rational choice theory, which many commentators have discredited as an all-encompassing conception of economic and contracting behavior.²⁸

²⁵ See generally sources cited *id.* at 692-727.

²⁶ *Id.* at 717. "Much of the mischief here is regulated by the materiality condition that triggers the election to rescind." *Id.* See also 23 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 63:3, at 438-39 (Richard A. Lord ed., 4th ed. 2002) (explaining that a "material breach," as a pre-requisite for the buyer's rescission, "must 'go to the root' or 'essence' of the agreement between the parties, or be 'one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract'" (footnotes omitted).

²⁷ See *Umphres v. J.R. Mayer Enters., Inc.*, 889 S.W.2d 86, 91 (Mo. Ct. App. 1994) ("Courts in equity must remain free to consider all equitable considerations and to fashion flexible remedies to meet the needs of justice on a case by case basis."); see also *infra* notes 33, 40, 76, 151, 248-49, 268 and accompanying text (highlighting additional cases that recognize the "equitable" nature of these remedies).

²⁸ See *infra* Part III.E (providing a thorough discussion of rational choice theory and its implications for contract principles).

Besides their speculations, the authors have not offered any data that liberal rights of rescission, followed by restricted restitution, would enhance contractual stability by strongly encouraging seller investments and price reductions. Because the authors' economic premises are unsupported, their proposals for legal reform lack a sound foundation.

Little danger exists that any court would overturn the decades of precedent, as described below in my Article, and adopt the authors' proposed remaking of rescission and restitution. Nevertheless, a detailed rebuttal of Brooks and Stremitzer's highly-placed Article is important, because my counter-analysis should benefit other academics writing on these topics. My basic proposition is that no major reforms are necessary (except for the vague material breach doctrine) because existing law satisfactorily protects both buyer and seller.

Part II of this Article describes the right of withdrawal that exists in contract law in both legal and non-legal settings. I first address the nature of rescission and the validity of the authors' description of this remedy. The authorities are far more liberal in granting this remedy than Brooks and Stremitzer describe in their Article. Second, I review rescission and the U.C.C., with emphasis on the buyer's right of rejection under U.C.C. section 2-601 and the buyer's right to revoke acceptance under U.C.C. section 2-608. Here, the case law shows a decidedly pro-buyer perspective. Third, I analyze a sampling of special domestic statutes and regulations, most notably the Federal Truth in Lending Act, the Federal Trade Commission's Door-to-Door Sales Cooling Off Rule, and the laws of New York and California. Fourth, I examine common mercantile practice on rescission in the United States and overseas. Fifth, I examine whether the authors are correct that the material breach doctrine is a strong barrier to rescission. Sixth, I explain why the law actually favors liberal rights of rescission in what I call the principle of "fair redress." On a deeper level, besides being the first full-length legal analysis of Brooks and Stremitzer's Article, I show the consistent thread in diverse areas of U.S. commercial law and practice liberally granting rescission, so that the injured party can protect his or her reasonable expectations.

Part III of my Article analyzes the parameters of restitution after rescission. First, I consider the election of remedies doctrine as between rescission and monetary recovery under the common law and the U.C.C. Both regimes, in their own way, properly follow the basic policy of avoiding duplicate recovery for the promisee. Second, I analyze the merits of permitting both rescission and damages (including profits) under the U.C.C. These combined remedies are not a windfall as argued by Brooks and Stremitzer but are consistent with the fundamental rule of

making the injured party whole. Third, I analyze whether the contract price should limit restitution in quantum meruit, focusing on the authors' approach to the well-known California Court of Appeals case of *Boomer v. Muir*.²⁹ The analysis will show that the authors have misconstrued the case, and I will further prove that the majority rule allowing redress in excess of the contract price has a sound legal, normative, and economic basis. Fourth, I critique Brooks and Stremitzer's inflexible rejection of the buyer's reliance and disgorgement interests in restitution. Fifth, I contest both the authors' adoption of what amounts to rational choice theory and their failure to incorporate relational contracting principles in their view of rescission and restitution. As with Part II of this Article, the analysis in Part III demonstrates the common thread of achieving fair redress for the buyer, which supports making the injured party whole but no further than complete redress, through the sound exercise of equitable discretion.

II. THE RIGHT OF BUYER WITHDRAWAL: LEGAL AND NON-LEGAL RELIEF

A. *The Nature of Rescission*

Rescission of a contract is awardable to the injured party with the other side's material breach, fraud, or with other grounds for avoidance, such as mutual mistake, impossibility of performance, failure of consideration, or mutual agreement.³⁰ Both Brooks and Stremitzer and this Article largely focus on rescission as a predicate for the buyer to obtain restitution for the seller's breach of contract.³¹

²⁹ 24 P.2d 570 (Cal. Dist. Ct. App. 1933).

³⁰ See *Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. Dist. Ct. App. 1965) (identifying the fundamental requirements necessary to state a cause of action for rescission or cancellation of a contract); *Newton v. Aitken*, 633 N.E.2d 213, 216 (Ill. App. Ct. 1994) (noting the circumstances when a court may award rescission); *Callanan v. Powers*, 92 N.E. 747, 752 (N.Y. 1910) (describing specific occurrences when rescission is generally permitted).

³¹ Following Brooks and Stremitzer's analysis, this Article focuses on the buyer's right of rescission and restitution for the seller's breach and not the seller's right of rescission and restitution for the buyer's breach. The latter remedy is disallowed at common law, as well as the U.C.C., in the usual case of a buyer on credit that fails to pay the price. Further, modern statutes have eliminated most of the usual fraud claims, as well as the contention that the buyer received goods while insolvent. See 11 U.S.C. § 546(c)(1) (2006); U.C.C. § 2-702 (2009); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37(2) & cmt. c (2011). This Article also does not address where the party in default seeks restitution for the value of its part performance. See 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 5.1, at 568 (1978 & Supp. 2012) (discussing recovery at the contract rate for part performance). See generally Richard H. Lee, *The Plaintiff in Default*, 19 VAND. L. REV. 1023 (1966) (discussing generally the issue of whether a defaulting party can recover for part performance). This

Unquestionably, certain aspects of the authors' legal analysis are valid. Generally, the authors are correct that an aggrieved buyer encountering a seller's breach may elect between (1) affirming the contract and seeking money damages or specific performance or (2) disaffirming the contract and pursuing rescission followed by restitution.³² Brooks and Stremitzer properly define "rescission" as undoing the contract and "eliminating all obligations under the contract from the time of breach."³³ They are also correct that "restitution" after disaffirmance means the parties return the money, property, or other benefits that restores their pre-contract position.³⁴

Article does, however, explore rescission in favor of the seller. *See infra* Part III.C (examining in more depth the decision in *Boomer v. Muir*).

³² Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 692.

³³ *Id.* at 692 n.2. Compare *PWS, Inc. v. Ban*, 285 Cal. Rptr. 598, 600 (Cal. Ct. App. 1991) ("The effect of rescission is to void the contract *ab initio*."), *McEnroe v. Morgan*, 678 P.2d 595, 598 (Idaho Ct. App. 1984) ("Rescission is an equitable remedy that totally abrogates the contract and restores the parties to their original positions."), *Busch v. Model Corp.*, 708 N.W.2d 546, 551 (Minn. Ct. App. 2006) ("Rescission is an equitable remedy that seeks to put the parties in the same position they would have been had the contract never existed.") (internal quotation marks omitted), and *Bossie v. Boone Cnty. Bd. of Educ.*, 568 S.E.2d 1, 5 (W. Va. 2002) ("Generally speaking, the effect of a rescission is to extinguish the contract and to annihilate it so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken.") (quoting 17 AM. JUR. 2D *Contracts* § 600 (1991)), with *infra* notes 39–46 and accompanying text (explaining that this all-encompassing language is itself not always correct, because some cases and authorities say that rescission is an "on contract" remedy).

³⁴ *See* *Head & Seemann, Inc. v. Gregg*, 311 N.W.2d 667, 669 (Wis. Ct. App. 1981), *aff'd*, 318 N.W.2d 381 (Wis. 1982) ("Rescission is always coupled with restitution[.]"); *see also* *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001) ("The idea behind restitution is to restore—that is, to restore the non-breaching party to the position he would have been in had there never been a contract to breach.").

"It is an accepted part of American contract law that there are remedies for breach called 'restitution,' but the multiple connotations of the word 'restitution' are such that 'restitution for breach of contract' can refer to a number of different things entirely." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 4, topic 2, at 606 (2011). The confusion comes about primarily because restitution is not limited to rescission cases. The injured party may select restitution as an alternative to protecting its expectation or reliance interests. *See* *Harris v. Metro. Mall*, 334 N.W.2d 519, 524 (Wis. 1983) (explaining that restitution is not limited to rescission cases and noting other situations when it is used). Commentators also have pointed out the confusion surrounding restitution. *See, e.g.,* Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973, 977 (2011) (noting that restitution is "subject to professional misunderstanding on every level").

Brooks and Stremitzer correctly point out that some controversy also exists on whether the primary purpose of restitution is to restore the status quo ante or to prevent the breaching party's unjust enrichment. Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 719 n.82. As one court has observed, however, there is no necessary inconsistency between these positions. *See* *First Annapolis Bancorp, Inc. v. United States*, 89 Fed. Cl. 765, 799 (2009) ("[T]he task is . . . to return nonbreaching parties to their pre-

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Brooks and Stremitzer further point out that there is criticism that rescission should not be available for promisees who abuse the remedy as a pretext to avoid an unfavorable contract.³⁵ Some decisions do rely on this consideration.³⁶ Along similar lines, the authors are correct that some cases emphasize the instability that results from inappropriately undoing contracts, because the “public has an interest in the sanctity of contract which forms the foundation for economic development and the free flow of goods and services.”³⁷ This “sanctity of contract” also reflects a moral judgment that contracts should be upheld whenever

contract position and not quibble about the analytical construct.”). Other authorities employ both rationales. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 cmt. e (“[T]he justification of rescission as an alternative remedy for breach is not the avoidance of unjust enrichment, but a concern with fairness to the injured party combined with remedial economy.”); see also *S.S. Silberblatt, Inc. v. East Harlem Pilot Block-Bldg. 1 Hous. Dev. Fund Co.*, 608 F.2d 28, 41 (2d Cir. 1979) (“[R]estitution . . . is not designed to put the aggrieved party in the position where he would have been if the contract had been performed but to restore him to the *status quo ante*, regardless of the contract price or rate.”).

³⁵ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 714–15.

³⁶ See, e.g., *Phez Co. v. Salem Fruit Union*, 201 P. 222, 231 (Or. 1921) (“This pretext of rescission seems to us to have been an afterthought, conjured up to escape the consequences of what war conditions had rendered an unprofitable, if not a losing, contract.”).

The authors assert that the undue availability of rescission “has been a source of great anxiety among legal authorities.” Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 693. However, they fail to cite any case law for this proposition. *Id.* My reading of the cases is that courts approach this issue much more matter-of-factly. See, e.g., *Janusz v. Gilliam*, 947 A.2d 560, 566 (Md. 2008) (“No party has a right to rescind or modify a contract merely because he [or she] finds, in the light of changed conditions, that he [or she] has made a bad deal.” (quoting *Harford Cnty. v. Town of Bel Air*, 704 A.2d 421, 431 (Md. 1998))).

³⁷ *Dillon Real Estate Co. v. Am. Nat’l Ins. Co.*, No. CV 08 1508 PHX FJM, 2010 WL 1688806, at *2 (D. Ariz. Apr. 26, 2010); see, e.g., *N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 117 F. Supp. 2d 211, 253 (N.D.N.Y. 2000) (“Sanctity of contract constitutes the most fundamental underpinning of commerce.” (quoting *In re Schenck Tours, Inc.*, 69 B.R. 906, 910 (Bankr. E.D.N.Y. 1986), *aff’d*, 75 B.R. 249 (E.D.N.Y. 1987))); *McMullen v. Kutz*, 985 A.2d 769, 778 (Pa. 2009) (“[J]udicial non-interference in contractual affairs fosters certainty and stability in economic relations.”) (footnote omitted).

Most of these cases, however, pertain to where the plaintiff alleges a lack of valid consent at formation, such as mistake or fraud, and where the promisor could manufacture evidence of his original intent. See, e.g., *Hedging Concepts, Inc. v. First Alliance Mortg. Co.*, 49 Cal. Rptr. 2d 191, 198 (Cal. Ct. App. 1996) (discussing mistake as a grounds for rescission); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1061–62 (Del. Ch. 2006) (explaining that courts should be cautious of allowing parties to escape freely negotiated contractual obligations); *Kruzich v. Old Republic Ins. Co.*, 188 P.3d 983, 988 (Mont. 2008) (discussing mutual mistake as a grounds for rescission); *Robinson v. Brooks*, 577 S.W.2d 207, 208 (Tenn. Ct. App. 1978) (explaining that rescission of contract is only available “under the most demanding circumstances”).

possible to preserve the parties' autonomy and freedom of contract.³⁸ Undoubtedly, these policies do caution against the overly lenient allowance of rescission for breach of contract.

Beyond the above observations, however, Brooks and Stremitzer's legal analysis regarding the essential nature of rescission and restitution is insufficient because they have failed to capture the nuances in the decisions. The authors call restitution both a contract remedy and a substantive basis for liability.³⁹ To the contrary, courts are unanimous that "[r]estitution . . . is not a cause of action; it is a remedy for various causes of action."⁴⁰ More importantly, the authors greatly overstate the case that it is "unquestioned by observers" and "doctrinal orthodoxy" that rescission and restitution is an "off-contract remedy" as compared with damages or specific performance being an "on-contract remedy."⁴¹ While a number of decisions do indeed support their view, other judicial opinions observe that "a party seeking rescission and restitution in a breach of contract action does not seek to undo the contract from its beginning."⁴² Courts have observed, "It has long been recognized that the right to damages or restitution are both remedial rights *based on the contract*."⁴³ To the same effect, the *Restatement (Third) of Restitution and*

³⁸ See *Morta v. Kor. Ins. Corp.*, 840 F.2d 1452, 1460 (9th Cir. 1988) (noting that courts respect the notion of freedom of contract); *N.Y. State Elec. & Gas Corp.*, 117 F. Supp. 2d at 253 (citing *In re Schenck Tours, Inc.*, 69 B.R. at 910) (noting the strong public policy in favor of upholding freely negotiated contracts); *Abry Partners*, 891 A.2d at 1059-61 ("[T]here is a strong American tradition of freedom of contract . . ."). *But see infra* notes 150-60 (noting that rescission is compatible with freedom of contract).

³⁹ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 697 ("Restitution steps in as the new legal basis for the promisor's obligation to provide relief as soon as the prior contractual obligation is disaffirmed."). "We emphasize that we are referring to restitution as a source of obligation, not as a measure of damages as it is sometimes understood." *Id.* at 718 n.77.

⁴⁰ *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1143 n.17 (Alaska 1996) (citing *Alaska Sales & Serv., Inc. v. Millet*, 735 P.2d 743, 746 n.6 (Alaska 1987)); *see also* *Pilar Servs., Inc. v. NCI Info. Sys., Inc.*, 569 F. Supp. 2d 563, 569 (E.D. Va. 2008) (defining restitution as an equitable remedy); *Ram Energy, Inc. v. United States*, 94 Fed. Cl. 406, 410 (2010) ("[T]he court is unaware of any legal doctrine or precedent under which restitution itself can be deemed a cause of action. Rather, in a contract context, it is a potential remedy in the event a breach is found."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. a (2011) ("This section describes an alternative remedy for breach of contract that is sometimes called 'restitution' but is more easily recognized under the name 'rescission.'").

⁴¹ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 692.

⁴² *CBS, Inc. v. Merrick*, 716 F.2d 1292, 1297 (9th Cir. 1983) (Nelson, J., concurring). *But see* Eric G. Andersen, *The Restoration Interest and Damages for Breach of Contract*, 53 MD. L. REV. 1, 15 n.51 (1994) (citing cases using the "on contract/off contract" terminology).

⁴³ *Amber Res. Co. v. United States*, 73 Fed. Cl. 738, 749 n.11 (2006) (quoting JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 601 (4th ed. 1998)) (emphasis added). Notably, Brooks and Stremitzer contend that restitution is unquestionably an off contract remedy, even as they also acknowledge Joseph Perillo's observation that restitution can be

Unjust Enrichment states that rescission and restitution as a remedy for breach are equally a remedy “on contract.”⁴⁴ Along these same lines, perhaps the most influential commentators on restitution, Lon Fuller and William Perdue, Jr., concluded it was “remarkable that . . . restitution as a remedy [for breach should have come to be seen as] entirely distinct from the usual suit on a contract.”⁴⁵ Because the “on/off” test is not very helpful, the result is that most courts do not use this paradigm, but more precisely recognize that the rescinded contract no longer has a legal existence to cap the plaintiff’s recovery at the defunct contract’s price.⁴⁶

The most telling objection against the authors’ assertion that the on/off contract construct is a part of the legal orthodoxy is that the U.C.C. does not follow this model for rescission and revocation. The reason is that the U.C.C. deems all remedies by definition to be contract terms. Thus, under U.C.C. sections 1-201(b)(3), 1-201(b)(11), and 1-205, a “contract” incorporates all applicable U.C.C. provisions, which means that all such contracts for the sale of goods ordinarily include those Article 2 terms covering rejection and revocation.⁴⁷ As a commentator correctly observes, “For all intents and purposes, the availability of rescission and suit off the contract is a non-issue for the buyer in any

an “on contract” remedy. See Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 700 n.26 (noting Perillo’s view that restitution is a remedy “that often operates in an explicitly contractual setting”) (citing Joseph M. Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1209 (1973)); see also John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1232 (2008) (explaining that breach of contract actions were lumped together with tort actions and that the freestanding body of contract law only ripened at the turn of the nineteenth century).

⁴⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. a. The Reporter’s Note to the *Restatement* also calls the distinction “obscure” in the selection of a remedy. *Id.* ch. 4, topic 2, at 638.

⁴⁵ L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 72 (1936). “The conception (or perhaps we should say ‘visualization’) of restitution as something entirely different from a suit ‘on the contract’ has had a number of unfortunate consequences.” *Id.*

⁴⁶ See, e.g., *Blanton v. Friedberg*, 819 F.2d 489, 492 (4th Cir. 1987) (“One who has rendered a service or supplied work . . . but who has been wrongfully discharged . . . may regard the contract as terminated and get judgment for the reasonable value of all that the defendant has received in performance of the contract . . .” (quoting *W.F. Magnum Corp. v. Diamond Mfg. Co.*, 775 F.2d 1202, 1208 (4th Cir. 1985))); *Baldwin v. Panetta*, 4 So. 3d 555, 561–62 (Ala. Civ. App. 2008) (explaining that one who has performed services under a contract may rescind the contract and sue for the value of work performed).

⁴⁷ U.C.C. §§ 1-201(b)(3), 1-201(b)(11), 1-205 (2006). Generally, the parties may vary a U.C.C. requirement by agreement, subject to the exception that “[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.” U.C.C. § 2-719(2) (2006); see also U.C.C. § 1-302(a) (2006).

kind of contract governed by the U.C.C.”⁴⁸ Brooks and Stremitzer do not seize on this important aspect of a contract under the U.C.C.

Lastly, the authors have overlooked the sea change in the case law giving greater importance to rescission as a response to breach. A U.S. district court decision properly stated that the law “clearly allows and even encourages rescission as a remedy for complaint that sounds in ‘breach of contract.’”⁴⁹ Furthermore, the current edition of *Williston on Contracts* observes, “Since at least the Second World War, the courts have shown a marked increase in their willingness to grant rescission and, most especially, restitution by means of quasi-contract.”⁵⁰ Indeed, that same treatise comments that “[w]hat was certainly a ground-shift in the middle of the last century became a virtual landslide during its final twenty-five years.”⁵¹ These case law trends contradict the authors’ contention that the law inappropriately restricts rescission for deserving plaintiffs.

B. *The U.C.C. and Rescission*

In their centerpiece legal criticism, Brooks and Stremitzer analyze rescission under the U.C.C., and therefore this Article gives this area the greatest emphasis as well.⁵² The authors’ argument can be summarized

⁴⁸ Elizabeth Hayes Patterson, *U.C.C. Section 2-612(3): Breach of an Installment Contract and a Hobson’s Choice for the Aggrieved Party*, 48 OHIO ST. L.J. 177, 192 n.83 (1987).

⁴⁹ *Petrucelli v. Palmer*, 596 F. Supp. 2d 347, 367 (D. Conn. 2009). Ironically, Professors Brooks and Stremitzer have missed the doctrine most favorable to their position: where damages are an adequate remedy at law, some courts will not invoke their equitable powers to rescind the contract. *See, e.g., Kakaes v. George Washington Univ.*, 790 A.2d 581, 583 (D.C. 2002) (“[E]quitable relief will not be granted where the plaintiff has a complete and adequate remedy at law.”); *Collier v. Boney*, 525 So. 2d 971, 972 (Fla. Dist. Ct. App. 1988) (“[A] fundamental requirement necessary for rescission of a contract is that the moving party has no adequate remedy at law.”); *C3 Media & Mktg. Grp., LLC v. Firstgate Internet, Inc.*, 419 F. Supp. 2d 419, 435 (S.D.N.Y. 2005) (construing New York law). *Contra Ganaway v. Henderson*, 103 So. 2d 693, 695 (Fla. Dist. Ct. App. 1958) (granting rescission without considering the issue of whether damages were an adequate remedy); *Lanners v. Whitney*, 428 P.2d 398, 404 (Or. 1967) (allowing rescission irrespective of whether damages were an adequate remedy); *Chastain v. Billings*, 570 S.W.2d 866, 868 (Tenn. Ct. App. 1978) (“[I]f an adequate remedy of law exists, such as an award of damages, rescission will not be granted.”). *See generally* Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027 (2011) (criticizing courts’ use of this equitable doctrine).

⁵⁰ 26 WILLISTON, *supra* note 26, at vii.

⁵¹ *Id.*

⁵² Brooks and Stremitzer also argue that the CISG suffers from the same defects as the U.C.C. in unduly restricting rescission & generously providing restitution. Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 701 nn.27-28. The CISG, a product of the United Nations Commission on International Trade, is a self-executing treaty between member nations, which includes the United States as a signatory, and has the force and effect of law in the United States. U.N. Convention on Contracts for the

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as follows. They claim that parties have restricted rights to avoid a contract under the U.C.C.⁵³ Relying upon U.C.C. section 2-608, which deals with the buyer's revocation of acceptance,⁵⁴ Brooks and Stremitzer assert that this section "makes it clear that the term 'rescission' was avoided in the Code because of concern that the term was 'capable of ambiguous application . . . and susceptible also of confusion with cancellation.'"⁵⁵ In posing this argument, the authors rely heavily on U.C.C. section 2-608, comment 1, which states, "The section no longer

International Sale of Goods, opened for signature Apr. 11, 1980, S. Treaty Doc. No. 98-9, 19 I.L.M. 671 (codified at 15 U.S.C. § 5528 (1992)). The treaty "applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States." CISG art. 1(1)(a), 19 I.L.M. 672.

The CISG is the "international analogue" to Article 2 of the U.C.C., although the latter's case law is not per se applicable. See *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005) ("The CISG does not state expressly whether the seller or buyer bears the burden of proof as to the product's conformity with the contract. Because there is little case law under the CISG, we interpret its provisions by looking to its language and to 'the general principles' upon which it is based."); see also Michael Kabik, *Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TAX & BUS. LAW. 408, 428-29 (1992) ("[T]he C.I.S.G. is, for the most part, truly a mirror image of the U.C.C. . . ."); Robert S. Rendell, *The New U.N. Convention on International Sales Contracts: An Overview*, 15 BROOK. J. INT'L L. 23, 42 (1989) ("[O]ne may view the Convention as a triumph of the Uniform Commercial Code's approach to contract law.").

⁵³ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 693 ("[The] authorities have limited the ease with which rescission may be elected.").

⁵⁴ For the elements of this remedy, see *Conte v. Dwan Lincoln-Mercury, Inc.*, 374 A.2d 144, 148 (Conn. 1976).

⁵⁵ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 692, n.2 (quoting U.S.C. § 2-608 cmt. 1 (2003)). The U.C.C. contrasts "rescission," which refers to a mutual agreement to discharge contractual duties, "cancellation," which occurs when either party puts an end to the contract for breach by the other party, and "termination," which is the same "cancellation" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance. U.C.C. §§ 2-106(3)-(4), 2-209 cmt. 3 (2006); see JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 21.2 (4th ed. 1998) (noting the difference in the U.C.C. definitions of the terms rescission, cancellation, and termination).

Courts in a number of U.C.C. § 2-608 cases, however, have not always obeyed this distinction. *E.g.*, *Smith v. Monaco Coach Corp.*, 334 F. Supp. 2d 1065, 1070 (N.D. Ill. 2004) (noting that the purpose of U.C.C. § 2-608 is to "cancel the sale and return the parties to *status quo ante*"); *Lenkay Sani Prods. Corp. v. Benitez*, 362 N.Y.S.2d 572, 573 (N.Y. App. Div. 1975) (stating that the plaintiff "rescinds" under U.C.C. § 2-608). Outside the U.C.C., many authorities use "rescission," "termination," and "cancellation" interchangeably. See *United States v. Scruggs*, 356 F.3d 539, 545 (4th Cir. 2004) (mentioning the confusion of vocabulary inherent in the term "rescission"); 12A C.J.S. *Cancellation of Instruments* § 2 (2012) ("The terms 'cancellation' and 'rescission' are frequently regarded as being interchangeable or synonymous.") (footnotes omitted); E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 8.15, at 509-10 n.2 (3d ed. 2004).

speaks of ‘rescission.’”⁵⁶ The authors immediately back away from their claim, however, when they state that the U.C.C. “remains confused” on this point.⁵⁷ Thus, Brooks and Stremitzer comment that “the Code itself sometimes [uses] the term ‘rescission’ and nowhere [defines] what it means by that usage or explaining if it differs in application from ‘revocation of acceptance.’”⁵⁸ They further observe that the U.C.C. section 2-608 has also “contributed to the concealment of rescission through the murky label ‘revocation of acceptance,’” but they make no efforts to explain the elements of this revocation remedy.⁵⁹

I disagree with Brooks and Stremitzer’s argument that the U.C.C. is opposed to rescission for various reasons, as explained below.

The first flaw in the authors’ contention is they fail to mention that the U.C.C. co-exists with a common law remedy for rescission in contracts for the sale of goods. Relying on U.C.C. section 1-103, which states that the U.C.C. is supplemented by the prevailing rules of law and equity, the Kansas Court of Appeals ruled that “a party’s right to seek the equitable remedy of rescission has not been affected by any provision of the UCC.”⁶⁰ The existence in many jurisdictions of this parallel statutory and common law power in contracts for the sale of goods and the concomitant expanded remedial choices available to the plaintiff undercuts Brooks and Stremitzer’s contention that the U.C.C. is restrictive on rescission.⁶¹

The authors also have misconstrued the U.C.C.’s references to rescission in various Code sections and commentaries. Although U.C.C. section 2-608, comment 1, does indeed say the section no longer speaks of “rescission,” the authors are wrong in claiming “that the term ‘rescission’ was avoided in the Code.”⁶² Technically, the quoted statement appears in a comment that pertains to only one section, U.C.C. section 2-608, but such comments are not part of the U.C.C. itself; therefore, they can have only persuasive weight.⁶³

Otherwise, the Code repeatedly embraces rescission without reservation. U.C.C. section 2-720 explicitly says that parties may use the

⁵⁶ U.C.C. § 2-608 cmt. 1 (2003).

⁵⁷ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 692 n.2.

⁵⁸ *Id.* at 692-93 n.2.

⁵⁹ *Id.* at 697 n.13.

⁶⁰ *Perry v. Goff Motors, Inc.*, 736 P.2d 949, 954 (Kan. Ct. App. 1987).

⁶¹ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 715 (stating how the law uses various techniques to “restrict rescission rights”).

⁶² *Id.* at 692 n. 2.

⁶³ *Gen. Motors Acceptance Corp. v. Anaya*, 703 P.2d 169, 172 (N.M. 1985) (also stating that U.C.C. comments are not binding on the courts).

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word “rescission” to reserve a right of action for breach of contract.⁶⁴ U.C.C. section 2-721 unqualifiedly uses the word “rescission” when it states, “Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.”⁶⁵ U.C.C. section 2-209 (not mentioned by the authors) further embraces rescission as a remedy when it states that “[a] signed agreement which excludes modification or rescission except by a signed writing [generally] cannot be otherwise modified or rescinded[.]”⁶⁶ Therefore, I concur with the current edition of *Corbin on Contracts* when it opines, “The present author does not agree that U.C.C. Article 2 was intended to abolish the concept of rescission.”⁶⁷

Another important gap in Brooks and Stremitzer’s analysis is that they do not address the case law upholding the right of rescission under the U.C.C. My analysis below concentrates on the two most important U.C.C. sections in this area, section 2-601 (never mentioned by the authors) on the buyer’s right to reject improper delivery and section 2-608 on buyer revocation of his earlier acceptance.

Contrary to the impression left by Brooks and Stremitzer, the decisions commonly use the rescission terminology in describing the U.C.C.’s approach on the buyer’s right to reject the tender or delivery of the goods. Thus, U.C.C. section 2-601 provides that the buyer, upon receipt of goods in a single delivery contract which “fail in any respect to conform to the contract,” may reject them, accept them, or accept only some of a number of commercial units.⁶⁸ With every court considering the matter indicating that rejection under U.C.C. section 2-601 is a

⁶⁴ U.C.C. § 2-720, official cmt. (2003).

⁶⁵ *Id.* § 2-721.

⁶⁶ *Id.* § 2-209(2).

⁶⁷ ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1102, at 4 (John E. Murray, Jr. & Timothy Murray, Supp. 2012).

⁶⁸ U.C.C. § 2-601 (2004). The rules on rescission of installment contracts are provided in another section of the U.C.C. See *id.* § 2-612(2)–(3). The CISG follows a U.C.C. Article 2 type policy in Chapter II, Section II. See CISG-AC Opinion no. 5, *The Buyer’s Right to Avoid the Contract in Case of Non-Conforming Goods or Documents*, May 7, 2005, para. 3.3, 7 [hereinafter CISG-AC Opinion no. 5]. As one commentator observes, “Where the buyer has not accepted the goods (*i.e.*, the seller has not delivered or the buyer refuses to retain the goods) avoidance under the Convention yields results very similar to those under U.C.C. Article 2.” Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 62 n.36 (1988). Some relatively minor differences exist, such as the CISG does not follow a strict version of the perfect tender rule. See CISG-AC Opinion no. 5, *supra*, at para. 2.2, 3.3 (mentioning that CISG through Article 52 follows a limited perfect tender rule). Thus, Brooks and Stremitzer’s contention is unsupported that the CISG represents a demand to restrict the availability of rescission. Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 701 n.28.

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remedy similar to (and providing the same relief as) common law equitable rescission, the U.C.C. allows a buyer to reject whenever the tender of delivery or the goods so delivered were not perfectly in conformity with the contract.⁶⁹ Often called the “perfect tender rule,” this principle strongly favors the buyer; many cases have stated that the right to reject even applies to insubstantial, trivial, or minor nonconformities.⁷⁰

The perfect tender rule is based on the proposition that the seller’s complete performance is a warranty and a condition precedent to the buyer’s obligation to pay, provided the buyer rejects in good faith.⁷¹ Where the buyer rejects non-conforming items, it is the seller who carries

⁶⁹ See *IMA N. Am., Inc. v. Maryln Nutraceuticals, Inc.*, No. CV-06-344-PHX-LOA, 2008 WL 4737888, at *1 (D. Ariz. Oct. 28, 2008) (explaining how several states treat the revocation of acceptance provision in U.C.C. § 2-608). See generally *Maas v. Scoboda*, 195 N.W.2d 491 (Neb. 1972) (repeatedly using the term “rescission” in describing the U.C.C. § 2-601 remedy).

⁷⁰ See, e.g., *Intermeat, Inc. v. Am. Poultry Inc.*, 575 F.2d 1017, 1024 (2d Cir. 1978) (“[T]here is no doubt that the perfect tender rule applies to measure the buyer’s right of initial rejection of goods under U.C.C. § 2-601.”); *Moulton Cavity & Mold, Inc. v. Lyn-Flex Indus., Inc.*, 396 A.2d 1024, 1027 (Me. 1979) (explaining the perfect tender holds that the buyer has the right to reject the seller’s tender “if in any way it fails to conform to the specifications of the contract”); see also *Extrusion Painting, Inc. v. Awnings Unlimited, Inc.*, 37 F. Supp. 2d 985, 995 (E.D. Mich. 1999) (“[T]he perfect tender rule . . . requires a very high level of conformity . . . [whereby] the buyer may reject” the goods for any trivial defect) (internal quotation marks omitted); *Moulton Cavity & Mold, Inc.*, 396 A.2d at 1027 (noting that a buyer is able to avoid an unfavorable contract based on an insubstantial defect); *Ramirez v. Autosport*, 440 A.2d 1345, 1351 (N.J. 1982) (stating that the Code permits cancellation of a contract for minor defects). See generally JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 8-3, at 312 (5th ed. 2001) (laying out the three choices under U.C.C. 2-601 that a buyer has if the goods fail to conform).

⁷¹ See *GE Packaged Power, Inc. v. Readiness Mgmt. Support, L.C.*, 510 F. Supp. 2d 1124, 1133 (N.D. Ga. 2007) (“Buyers are in good faith entitled to reject goods ‘for any nonconformity, even one that is trivial’); *Annecca Inc. v. Lexent, Inc.*, 307 F. Supp. 2d 999, 1004 (N.D. Ill. 2004) (noting that each side’s performance of a contract is often “subject to the satisfaction of several conditions precedent by the other [party]”); *Moulton Cavity & Mold, Inc.*, 396 A.2d at 1027–28 (expressing that the doctrine of substantial performance “has no application to a contract for the sale of goods”); U.C.C. § 2-507(1) (stating that “[t]ender of delivery is a condition to the buyer’s duty to accept” and pay for the goods); U.C.C. § 2-106 cmt. 2 (explaining that there is a “policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance”); see also *D.P. Tech. Corp. v. Sherwood Tool, Inc.*, 751 F. Supp. 1038, 1043 (D. Conn. 1990) (stating that a rejection of goods must be made in good faith); *Neumiller Farms, Inc. v. Cornett*, 368 So. 2d 272, 275 (Ala. 1979) (explaining the good faith requirement for the rejection of goods); Shelley Smith, *A New Approach to the Identification and Enforcement of Open Quantity Contracts: Reforming the Law of Exclusivity and Good Faith*, 43 VAL. U. L. REV. 871, 883 (2009) (explaining the good faith requirements in output and requirement contracts). See generally William H. Lawrence, *The Prematurely Reported Demise of the Perfect Tender Rule*, 35 U. KAN. L. REV. 557 (1987) (rebutting an argument questioning whether any life remains in the perfect tender rule).

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the burden of proving that the nonconformity was corrected.⁷² This perfect tender rule also is subject to limited exceptions, such as the seller's right to cure the defects under U.C.C. section 2-508, which allows the seller to repair the items or to provide substitute or missing items.⁷³ Nevertheless, consistent with the injunction of U.C.C. sections 1-102(1) and 1-106(1), stating that remedies shall be liberally construed, the decisions say that U.C.C. section 2-601 displays a pro-buyer perspective in that "courts must give 'all reasonable leeway' to the 'rightfully rejecting . . . buyer.'"⁷⁴

Next, in denying the existence of rescission under the U.C.C. and by giving so much weight to U.C.C. section 2-608, comment 1, the authors do not cite the numerous cases equating common law rescission and revocation of acceptance under U.C.C. section 2-608. Most decisions have found that the U.C.C. section 2-608 "is intended to provide a buyer with the same relief as the common law remedy of equitable rescission."⁷⁵ Thus, as with common law rescission, "[t]he remedies associated with revocation of acceptance are intended to return the buyer and seller to their presale positions."⁷⁶ Further, U.C.C. section 2-608(3) grants that "[a] buyer who so revokes [his acceptance] has the same rights and

⁷² See *Ramirez*, 440 A.2d at 1351 (citing *Miron v. Yonkers Raceway, Inc.* 400 F.2d 112, 119 (2d. Cir. 1968)).

⁷³ See Lawrence, *supra* note 71, at 590-91 ("Despite an overall consensus to the contrary by most commentators who have addressed the buyer's right to reject under the Uniform Commercial Code, the perfect tender rule codified in Article 2 is not so undercut by other Code provisions that it is a mere shadow of its former self."); see also Jeffrey M. Dressler, Note, *Good Faith Rejection of Goods in a Falling Market*, 42 CONN. L. REV. 611, 617-18 (2009) ("Courts . . . have shown a willingness to enforce the perfect tender rule . . . and allow buyers to reject even for minor or trivial defects.").

⁷⁴ *Novacore Techs., Inc. v. GST Commc'ns Corp.*, 20 F. Supp. 2d 169, 184 (D. Mass. 1998) (quoting *Bevel-Fold, Inc. v. Bose Corp.*, 402 N.E.2d 1104, 1109 (Mass. App. Ct. 1980)).

⁷⁵ *IMA N. Am., Inc. v. Maryln Nutraceuticals, Inc.*, No. CV-06-344-PHX-LOA, 2008 WL 4737888, at *1 (D. Ariz. Oct. 28, 2008); see also *Jones v. Fleetwood Motor Homes*, 127 F. Supp. 2d 958, 967 (N.D. Ill. 2000) (referencing equitable relief of rescission under the Illinois Commercial Code); *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 587 P.2d 816, 818 (Idaho 1978) ("[I]t has been held, and the commentators agree, that rescission and revocation of acceptance amount to the same thing under the Uniform Commercial Code . . ."); *Ramirez*, 440 A.2d at 1351 ("[I]n brief, revocation is tantamount to rescission."); *Aubrey's R.V. Ctr., Inc. v. Tandy Corp.*, 731 P.2d 1124, 1127 (Wash. Ct. App. 1987) (explaining that U.C.C. § 2-608 is the Code's version of the common law remedy of rescission). But see *McGinnis v. Wentworth Chevrolet Co.*, 668 P.2d 365, 367 n.4 (Or. 1983) ("Some of the participants in this case have used the word 'rescission' as a synonym for 'revocation of acceptance'. This is an incorrect usage.").

⁷⁶ *Chaurasia v. Gen. Motors Corp.*, 126 P.3d 165, 172 (Ariz. Ct. App. 2006); *IMA N. Am., Inc.*, 2008 WL 4737888, at *2; see also *Beer v. Bennett*, 993 A.2d 765, 771 (N.H. 2010) ("Rescission is an equitable remedy, . . . which restores the injured party to the position occupied before the transaction." (quoting *Mooney v. Nationwide Mut. Ins. Co.*, 822 A.2d 567, 569 (N.H. 2003); *Patch v. Arsenaault*, 653 A.2d 1079, 1082 (N.H. 1995))).

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duties with regard to the goods involved as if he had rejected them.”⁷⁷ For all these reasons, most courts either give lip service to the brief aside in comment 1 to U.C.C. section 2-608 so heavily stressed by Brooks and Stremitzer or omit the comment altogether.⁷⁸ Indeed, at least one court contends that comment 1 to U.C.C. section 2-608 *supports*, rather than abolishes, rescission under the Code.⁷⁹

The authors further overlook that U.C.C. section 2-608 is a “liberalization” of this relief as compared with the common law.⁸⁰ One example of this expansion is that under the U.C.C., unlike the common law, no requirement exists for the buyer to tender the goods to the seller.⁸¹ Also, the test for revocation under U.C.C. section 2-608(1) is whether the value of the goods was “substantially impaired,” with buyer subjectivity being an important element for this remedy.⁸² Accordingly, if the defect “shakes the buyer’s faith or undermines his confidence in the reliability and integrity of the purchased item,” even where the defect is curable, that circumstance can support revocation.⁸³ Thus, the

⁷⁷ U.C.C. § 2-608(3) (2003).

⁷⁸ See, e.g., *Peckham*, 587 P.2d at 818 (providing a citation to comment 1 and observing that “rescission and revocation . . . amount to the same thing”); *Ramirez*, 440 A.2d at 1351 (citing comment 1 and stating that “revocation is tantamount to rescission”).

⁷⁹ *Aubrey’s*, 731 P.2d at 1127 (“That [U.C.C. 2-608] encompasses the concept of rescission is supported by Official Comment 1 to [U.C.C. 2-608] as well as past Washington decisions.”) (footnote omitted).

⁸⁰ *Id.* at 1128; see also *Peppler v. Kasual Kreations, Inc.*, 416 So. 2d 864, 865 (Fla. Dist. Ct. App. 1982) (“[U.C.C. § 2-608] has merely codified the remedy formerly available in equity.”); *Gasque v. Mooers Motor Car Co.*, 313 S.E.2d 384, 389 (Va. 1984) (“The Uniform Commercial Code has substituted a standard of commercial reasonableness for the stricter standards which formerly prevailed . . .”); Francis A. Minitier, *Buyer’s Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments*, 13 GA. L. REV. 805, 810 (1979) (explaining that U.C.C. section 2-608 is an expanded right of rescission).

“The buyer’s power under the [CISG] to avoid after the goods have been delivered is strikingly similar to the buyer’s power to reject or revoke acceptance under Article 2 of the U.C.C.” Flechtner, *supra* note 68, at 63. See generally THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS ch. 1, art. 26, at 87, 115 (Reed R. Kathrein & Daniel Barstow Magraw eds., 2d ed. 1990) (explaining that CISG takes a very similar approach to U.C.C. 2-608 but in a much more direct fashion).

⁸¹ See, e.g., *Snow v. C.I.T. Corp. of the S., Inc.*, 647 S.W.2d 465, 467 (Ark. 1983) (“A tender of goods purchased was a condition to the right of rescission under our earlier law, but the Uniform Commercial Code dropped that requirement.”).

⁸² See *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*, 449 N.E.2d 1289, 1294 (Ohio 1983) (stating that substantial impairment is a factor that should be determined by the court); see also *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 353 (Minn. 1977) (“[T]he nonconformity must substantially impair the value of the goods to the buyer.”).

⁸³ *McCullough*, 449 N.E.2d at 1294. See *Inniss v. Methot Buick-Opel, Inc.*, 506 A.2d 212, 219 (Me. 1986) (quoting *McCullough*, 449 N.E.2d at 1294); see also *Lathrop v. Tyrrell*, 471 N.E.2d 1049, 1051 (Ill. App. Ct. 1984) (“Once a person’s faith is shaken in a major investment, the item not only loses its real value in the buyer’s eyes, but also becomes an

U.C.C. test for substantial impairment is not the reduced value of the goods on the open market or their value to the average buyer, but rather the detriment to the “particular buyer involved.”⁸⁴

Perhaps the leading case illustrating the leniency of the U.C.C.’s substantial impairment standard in favor of the buyer is *Colonial Dodge, Inc. v. Miller*.⁸⁵ In this decision, the Michigan Supreme Court upheld a very safety-conscious buyer’s decision to revoke acceptance of a new car the day after its delivery, because the car was missing a spare tire, the absence of which was not sufficiently detectable at the time of sale and not readily available from the seller.⁸⁶ The authors fail to discuss any of these liberal elements of U.C.C. section 2-608.⁸⁷

The above analysis has shown that numerous principles mark clear boundaries for this generous remedy, contrary to Brooks and Stremitzer’s characterization of U.C.C. section 2-608 as “conceal[ing] rescission” and being “murky.”⁸⁸ In all respects, consistent with the injunction of U.C.C. sections 1-102(1) and 1-106(1) that remedies shall be liberally construed, the U.C.C. displays a pro-buyer revocation policy in

article whose integrity has been substantially impaired and whose operation is fraught with apprehension.” (citing *Overland Bond & Inv. Corp. v. Howard*, 292 N.E.2d 168 (Ill. App. Ct. 1972)); *Mercury Marine v. Clear River Constr. Co.*, 839 So. 2d 508, 524 (Miss. 2003) (explaining generally the doctrine of “shaken faith”); *Haverlah v. Memphis Aviation, Inc.*, 674 S.W.2d 297, 304 (Tenn. Ct. App. 1984) (“Cases in other jurisdictions have held that substantial impairment of value within the meaning of UCC § 2-608(1) exists when the nonconformities in the goods are such that they shake the buyer’s faith in the ability of the goods to perform the function for which they were purchased.”).

⁸⁴ *Gasque*, 313 S.E.2d at 388 (citing *Champion Ford Sales, Inc. v. Levine*, 433 A.2d 1218, 1226 (Md. Ct. Spec. App. 1981)); see also *Jorgensen v. Pressnall*, 545 P.2d 1382, 1384–85 (Or. 1976) (explaining that the substantial impairment test is subjective regarding the plaintiff’s needs, circumstances, and objective regarding the need for evidence beyond plaintiff’s assertions of non-conformity).

⁸⁵ 362 N.W.2d 704, 707 (Mich. 1984).

⁸⁶ *Id.* at 705–07.

⁸⁷ In a sharp contrast to rejection under U.C.C. section 2-601, another important pro-buyer principle exists under U.C.C. section 2-608. Except where a buyer knew about the nonconformity before acceptance and reasonably assumed that the nonconformity would be cured, most courts have concluded that, unlike where the buyer rejects a nonconforming tender, “a seller has no right to cure [such defects] after a buyer revokes his acceptance.” *Head v. Phillips Camper Sales & Rental, Inc.*, 593 N.W.2d 595, 600 (Mich. Ct. App. 1999); see also *Car Transp. Brokerage Co. v. Blue Bird Body Co.*, 322 F. App’x 891, 895 (11th Cir. 2009) (“[W]here a buyer’s acceptance is as described in UCC § 2-608(1)(b), the majority rule is that he may revoke the acceptance without waiting for a cure, seasonable or otherwise, by the seller.”). This pro-buyer principle is so strong that revocation of acceptance is available “even where the seller has attempted to limit its warranties.” *Esquire Mobile Homes, Inc. v. Arrendale*, 356 S.E.2d 250, 252 (Ga. Ct. App. 1987) (quoting *Hub Motor Co. v. Zurawski*, 278 S.E.2d 689 (Ga. Ct. App. 1981)).

⁸⁸ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 697 n.13.

that “courts must give ‘all reasonable leeway’ to the ‘rightfully rejecting or revoking buyer.’”⁸⁹

C. *Special Domestic Statutes and Regulations*

Brooks and Stremitzer further fail to mention that, besides the U.C.C., a number of federal statutes and regulations in the United States generally aimed at consumers support a broad right of rescission. These rights comprise a significant part of the U.S. economy. In the federal system, examples of these tools are the Truth in Lending Act (“TILA”) and the Federal Trade Commission (“FTC”) Door-to-Door Sales Cooling Off Rule. In addition, state statutes provide rights of avoidance in multitudinous contracts for services. A flavor of these broad rights may be shown by consulting the laws of California and New York, two bellwether states for commercial transactions in the United States.

1. Truth in Lending Act

TILA and its implementing regulations assure the meaningful disclosure in relation to credit so that consumers can readily compare various terms and avoid the uninformed use of credit.⁹⁰ To accomplish this purpose, TILA generally requires disclosure of credit terms in an understandable manner for the consumer.⁹¹

⁸⁹ *Novacore Techs., Inc. v. GST Commc’ns Corp.*, 20 F. Supp. 2d 169, 184 (D. Mass. 1998) (quoting *Bevel-Fold, Inc. v. Bose Corp.*, 402 N.E.2d 1104, 1108 (Mass. Ct. App. 1980)). “Commentators who have looked closely at the cases have found that courts are very protective of buyers’ rights in applying this seemingly seller-friendly standard, so long as a buyer revokes promptly upon discovering a defect.” Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397, 1413–14 (2009) (footnote omitted); see also Donald W. Garland, *Determining Whether a Nonconformity Substantially Impairs the Value of Goods: Some Guidelines*, 26 U.C.C. L.J. 129, 143 (1993) (explaining that if a seller does not cure all minor nonconformities on a “timely basis, a buyer will be able to successfully revoke its acceptance of the good”); John A. Sebert, Jr., *Rejection, Revocation, and Cure Under Article 2 of the Uniform Commercial Code: Some Modest Proposals*, 84 NW. U. L. REV. 375, 394–95 (1990) (noting that the seller merely repairing every defect promptly and effectively does not necessarily constitute an effective cure to the buyer).

⁹⁰ 15 U.S.C. § 1601(a) (2006) (explaining the purpose of the Consumer Credit Cost Disclosure subchapter is to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices”); see also 12 C.F.R. § 226.1(b) (2012) (“The purpose of this regulation is to promote the informed use of consumer credit by requiring disclosures about its terms and cost.”).

⁹¹ 15 U.S.C. § 1635(a) (2006) (“The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section.”).

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When the transaction, other than for the purchase of a home, involves the taking of the consumer's principal dwelling as collateral, TILA grants consumers the right to rescind the transaction.⁹² The consumer has this unimpaired right for three days, but it may last for up to three years if the homeowner does not sell the home and if the seller fails to provide important TILA disclosures at the time of the original credit transaction.⁹³ Two types of trigger events will extend the period for rescission: (1) a failure to provide the consumer having an interest in the property with one copy of the TILA disclosure form that has all the material information correctly disclosed; and (2) failure to give the consumer two copies of the notification of the consumer's right to cancel, one copy to keep, and one to use if the consumer exercises the option to rescind.⁹⁴

TILA is a remedial statute with a strong pro-buyer perspective liberally construed in favor of the rescinding consumer and strictly enforced against the creditor.⁹⁵ "[L]enders are generally strictly liable under TILA for inaccuracies, even absent a showing that the inaccuracies are misleading"⁹⁶ Accordingly, a court has no discretion to decline TILA rescission, notwithstanding any equities in favor of the seller.⁹⁷

2. Federal Trade Commission's Rule Concerning Door-to-Door Sales Cooling Off Period

The FTC Rule, 16 Code of Federal Regulations ("CFR") Part 429, provides that in connection with door-to-door sales, it constitutes an unfair and deceptive act or practice for any seller to fail to furnish the buyer with a fully completed copy of the contract, which must contain a statement in substantially the following form in ten point, bold face type:

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date

⁹² *Id.*

⁹³ See 15 U.S.C. § 1635(f) (laying out the time limit for an obligor's right of rescission under TILA).

⁹⁴ *Id.* § 1635(a); 12 C.F.R. §§ 226.5(b), 226.15(b), 226.23(b)(1) (2012) (cited in *In re Regan*, 439 B.R. 522, 527 (Bankr. D. Kan. 2010)).

⁹⁵ 17 AM. JUR. 2D *Consumer Protection* § 3 (2012). "Congress passed the Truth in Lending Act (TILA) to promote consumers' informed use of credit by requiring meaningful disclosure of credit terms." *Id.* (citing *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 874 (2011)).

⁹⁶ *Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 328 (7th Cir. 1999).

⁹⁷ See *In re Regan*, 439 B.R. at 527 (explaining that when a lender has violated TILA provisions, courts impose strict liability and have "no discretion to decline rescission because of the equities of the case").

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of this transaction. See the attached notice of cancellation form for an explanation of this right.⁹⁸

In broad pro-buyer coverage, the rule defines a “door-to-door sale” as “[a] sale, lease, or rental of consumer goods or services with a purchase price of \$25 or more, whether under single or multiple contracts.”⁹⁹ For the consumer to invoke the rule, he must show that “the seller or his representative personally solicit[ed] the sale, including those [sales] in response to or following an invitation by the buyer.”¹⁰⁰ Lastly, the regulation applies where “the buyer’s agreement or offer to purchase is made at a place other than” the seller’s place of business.¹⁰¹ The regulation has limited exemptions, such as “for sellers of arts or crafts sold at fairs or similar places.”¹⁰²

The above form must contain all pertinent details of the right to cancel, and the seller must further explain this right to the purchaser, except in emergencies.¹⁰³ Subject to giving the seller written notice, the buyer may cancel for any reason within three business days of the agreement.¹⁰⁴ The pro-buyer policy is that consumers are entitled to protection from unscrupulous or high pressure sales practices. Therefore, the law allows an extended time for buyers to contemplate the possible consequences of the transaction and to reverse their commitment without penalty.¹⁰⁵

3. State Policies

Every state has a cooling-off statute similar to the FTC rule, and some jurisdictions have even broader coverage, such as for telemarketing transactions.¹⁰⁶ Further, almost all states have adopted many other consumer protection statutes that allow rescission as a corrective remedy. This section focuses on two jurisdictions: California and New York.

⁹⁸ 16 C.F.R. § 429.1(a) (2012).

⁹⁹ *Id.* § 429.0(a).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* § 429.3(b).

¹⁰³ *Id.* §§ 429.0(a)(3), 429.1(e).

¹⁰⁴ *Id.* § 429.1(b).

¹⁰⁵ See Byron D. Sher, *The “Cooling Off” Period in Door-to-Door Sales*, 15 UCLA L. REV. 717, 718-19 (1968) (explaining the extended time period that a buyer receives in this type of situation).

¹⁰⁶ See DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 14:8, Appendix 14A (2011) (explaining how every state has a cooling off statute); see also, e.g., ALA. CODE § 8-19A-14(e) (1975) (describing a fourteen-day cancellation period).

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California permits purchaser avoidance for the following contracts: credit repair services, dance studio services, dating services, dental services, discount buying services, door-to-door sales, electric services, employment counseling services, endless chain scheme, franchise sales, funeral agreements (pre-need), health studio services, home equity sale during foreclosure, home improvement agreements, home loans, home repair or restoration agreements following a disaster, home-secured transactions, home solicitation sales, immigration consultant services, life insurance under \$10,000, insurance (disability, seniors, and life), property insurance, unfulfilled internet sales, job listing services, legal document assistance, manufactured or mobile home transfers, unfulfilled mail and telephone sales, membership camping agreements, mortgage foreclosure consultant services, personal emergency response unit agreements, private child support collectors, real estate transfers (delayed or materially amended transfer disclosure statement), retail installment agreements, seller assisted marketing plans, seminar sales, short-term time shares, undivided interest subdivisions, unlawful detainer assistants, water treatment devices, weight-loss services, and service contracts for: (a) used cars, home appliances, and home electronic products; (b) new motor vehicles; (c) any type of goods, pro-rata refund less cancellation fee; and (d) unfulfilled telephone sales.¹⁰⁷

New York similarly authorizes purchaser avoidance of numerous transactions: automobile broker business contracts, charitable organization contracts with a professional fund-raiser, credit services business contracts, door-to-door sales contracts, health club contracts, home food service plan sales, home improvement contracts, campground memberships, personal emergency service response agreements, prize award schemes, sale of urea-formaldehyde foam insulation, sale or lease contracts for subdivided lands, social referral (dating) services, and telephone sales contracts.¹⁰⁸

These federal and state statutory schemes have the same objective—to protect the gullible individual from wily sellers so that consumers have a window to cancel contracts they may have signed while under pressure or when they lacked adequate information. These statutes do not undermine the stability of contracting, but accomplish the opposite effect by encouraging higher standards of good faith and fair dealing in

¹⁰⁷ See *Consumer Transactions with Statutory Contract Cancellation Rights*, CAL. DEP'T OF CONSUMER AFFAIRS (Jan. 2010), http://www.dca.ca.gov/publications/legal_guides/k-6.shtml (listing the types of contracts California permits purchaser avoidance and their respective time limitations).

¹⁰⁸ See *Contracts*, ORANGECOUNTYGOV.COM, 118-20, http://www.orangecountygov.com/filestorage/124/826/1278/Consumer_Law_Help_Manual_-_Contracts.pdf (last visited Jan. 12, 2013).

the marketplace. Once again, Brooks and Stremitzer have overlooked key federal and state laws and regulations, which follow sound public policy in recognizing the buyer's broad rights of rescission in targeted transactions.

D. The Material Breach Doctrine: A Porous Barrier to Rescission

Courts often mention the material breach doctrine as an element for common law rescission and Brooks and Stremitzer do so as well. In defining "material breach," the authors cite the *Restatement (Second) of Contracts*, section 344, "[A] breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation."¹⁰⁹ Thus, they say that "when [the] breach is not material [i.e., partial], the right to rescind is not triggered" and the promisee must resort to damages, but "when breach is material, rescission rights are triggered."¹¹⁰ They also praise the material breach element as a device that regulates "[m]uch of the mischief" caused by "strategic and opportunistic parties."¹¹¹

The authors err with their uncritical acceptance of this pre-requisite and their confidence in its ability to cabin undue rescission and to deter promisee opportunism. As the following analysis will show, Brooks and Stremitzer's treatment is deficient, because the material breach pre-requisite has always been a porous barrier against the buyer's right of relief.

Many courts have recited the black letter principles of the material breach doctrine.¹¹² Generally, unless the contract states a different standard (which is a rarity), these cases commonly indicate that "[r]escission is not generally permitted for casual, technical, or unimportant breaches, or where the breach is incidental or subordinate to the main purpose of the contract."¹¹³ With such a partial breach, courts will confine the promisee to its damages remedy.¹¹⁴ By contrast, with a material breach, the default "must be of a relatively high degree of

¹⁰⁹ RESTATEMENT (SECOND) OF CONTRACTS § 373(1) (1981).

¹¹⁰ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 696.

¹¹¹ *Id.* at 717.

¹¹² *See, e.g.,* McGee Constr. Co. v. Neshobe Dev., Inc., 594 A.2d 415, 417 (Vt. 1991) ("Contracting parties can define what will constitute a material breach of their contract.").

¹¹³ 26 WILLISTON, *supra* note 26, § 68:2, at 40-41 (footnotes omitted).

¹¹⁴ *See* Vidalia Outdoor Prods., Inc. v. Higgins, 701 S.E.2d 217, 219 (Ga. Ct. App. 2010) ("If the breach is not material, the party is limited to a claim for damages and cannot rescind the contract."); RW Power Partners, L.P. v. Va. Elec. & Power Co., 899 F. Supp. 1490, 1496 (E.D. Va. 1995) (explaining that a party's only remedy for a partial breach is damages).

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importance.”¹¹⁵ Whether a breach of contract is material is an issue of fact.¹¹⁶

While these black letter principles seem reasonable on their surface, other commentators properly recognize the problems with the case law notions of material breach. It can be argued in the defense of the doctrine that the law commonly adopts a flexible, multi-factor test in the administration of remedies, but the material breach test is a different type of multi-factor doctrine because it is deeply flawed. The difficulty is that it provides little substantive guidance and leaves fact-finders adrift to decide material breach on vague notions of equity. Accordingly, the following discussion establishes that the cases are all over the map, which further destabilizes the vitality of the material breach prerequisite.

First, the material breach doctrine is confused, because courts use numerous formulations of the test with different shadings on the requisite magnitude of the breach.¹¹⁷ For example, some decisions say that the breach must be “so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform.”¹¹⁸ Other versions are the more malleable standards that the breach must go to the root, the heart, or the essence of the contract.¹¹⁹ A number of jurisdictions, such as Oklahoma and Iowa, employ a misleading formulation, “failure of consideration,” to describe the requirement.¹²⁰ Still other courts say a

¹¹⁵ Hansen Bancorp, Inc. v. United States, 367 F.3d 1297, 1312 (Fed. Cir. 2004) (quoting PALMER, *supra* note 31, § 4.5); First Annapolis Bancorp, Inc. v. United States, 89 Fed. Cl. 765, 800 (2009) (quoting PALMER, *supra* note 31, § 4.5).

¹¹⁶ See Malik Corp. v. Tenacity Grp., LLC, 961 A.2d 1057, 1061 (D.C. 2008) (acknowledging that the materiality of a breach of contract is an issue of fact); Borah v. McCandless, 205 P.3d 1209, 1215 (Idaho 2009) (“Generally, unless the facts presented are undisputed, whether there was a breach of the terms of a contract is a question of fact.”).

¹¹⁷ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. a (2011) (explaining that rules governing rescission and restitution were not subject to any uniform test in the development of their case law); 26 WILLISTON, *supra* note 26, §§ 63.3, 68:2, 68:21.

¹¹⁸ E.g., Marion Family YMCA v. Hensel, 897 N.E.2d 184, 186 (Ohio Ct. App. 2008).

¹¹⁹ See Falls v. State Farm Ins. Mut. Auto. Ins. Co., 774 F. Supp. 2d 705, 711 (M.D. Pa. 2011) (noting that the Pennsylvania Supreme Court recently decided that a breach is material if it goes to the “heart and essence of the contract”); 23 WILLISTON, *supra* note 26, § 63:3 (stating that for a breach to be material, it “must ‘go to the root’ or ‘essence’ of the agreement”).

¹²⁰ See, e.g., Maytag Co. v. Alward, 112 N.W.2d 654, 659 (Iowa 1962) (describing how the failure of consideration formulation is used in Iowa); Bonner v. Okla. Rock Corp., 863 P.2d 1176, 1186 (Okla. 1993) (providing an example and describing the failure of consideration formulation used in Oklahoma); see also Andersen, *supra* note 42, at 16–17 n.56 (noting that the phrase failure of consideration can be troublesome and misleading). A more accurate definition of failure of consideration is the absence of consideration as a defense to contract

breach is material if the promisee receives something “substantially less or different” from that for which he or she bargained.¹²¹ Compounding these varying standards, “[c]ourts frequently use ‘material breach’ in a conclusory fashion without indicating how or why they reached the conclusion.”¹²² In fact, “[c]ontracting parties can define what will constitute a material breach of their contract.”¹²³

In other facets of these competing perspectives, courts give varying emphasis to the elements of the doctrine. Thus, a significant number of decisions emphasize causation and that the test examines whether “the matter, in respect to which the failure of performance occurs, is of such a nature and of such importance that the contract would not have been made without it.”¹²⁴ Other courts emphasize relational issues as between the parties, requiring proof of an irreparable loss of trust.¹²⁵ Under many cases, the amount of money damages will prove materiality, but other courts hold that proof of damages is not essential on this point where the breach was central to the parties’ agreement.¹²⁶ Conversely, where a breach causes no damage or prejudice to the other party, it may be deemed not to be material.¹²⁷ Last, some cases equate a material breach with a “total breach,” but this usage is easily misconstrued, because it incorrectly implies that the promisor must have failed to provide any performance under the contract.¹²⁸ The above proliferation of

enforcement. See *Farrell v. Third Nat’l Bank*, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936) (“Failure of consideration is in fact simply a want of consideration . . .”).

¹²¹ E.g., *Fowler v. A & A Co.*, 262 A.2d 344, 347 (D.C. 1970); *Schnepf v. Thomas L. McNamara, Inc.*, 93 N.W.2d 230, 232 (Mich. 1958); 17 AM. JUR. 2D *Contracts* § 447 (1964)).

¹²² RESTATEMENT (SECOND) OF CONTRACTS, § 241, Reporter’s Note, cmt. a.

¹²³ *McGee Constr. Co. v. Neshobe Dev., Inc.*, 594 A.2d 415, 417 (Vt. 1991) (citing *Carter v. Sherburne Corp.*, 315 A.2d 870, 873–74 (Vt. 1974)).

¹²⁴ *Arrow Master, Inc. v. Unique Forming Ltd.*, 12 F.3d 709, 715 (7th Cir. 1993) (citation omitted).

¹²⁵ See *LJL Transp., Inc. v. Pilot Air Freight Corp.*, 962 A.2d 639, 652 (Pa. 2009) (explaining that when there is a breach of contract that causes irreparable damage to the trust between the contracting parties, the non-breaching party may terminate the contract without notice).

¹²⁶ See *Horton v. Horton*, 487 S.E.2d 200, 204 (Va. 1997) (“However, proof of a specific amount of monetary damages is not required when the evidence establishes that the breach was so central to the parties’ agreement that it defeated an essential purpose of the contract.”).

¹²⁷ *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 64 F.3d 1202, 1212 n.8 (8th Cir. 1995) (holding that the breach was not material and caused no damage to the non-breaching party).

¹²⁸ See *Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1344–45 (Fed. Cir. 2004) (“A ‘total breach’ is a breach that ‘so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.” (quoting *Mobile Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 608 (2000))); *Hyman v. Cohen*, 73 So. 2d 393, 397 (Fla. 1954) (stating that many courts have equated material and

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substantive standards, sometimes contained in the same case,¹²⁹ only complicates the courts' task in determining this element for rescission.

As just indicated, a basic flaw in the materiality standard in the case law is the speculative "but for" causation element. The problem here is that when courts require the failure of performance to have been "of such a nature and of such importance that the contract would not have been made without it," fact-finders must make an ex post analysis of the parties' intentions when they originally entered the contract.¹³⁰ In this respect, the materiality of the breach will depend on "the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties."¹³¹ The upshot is that the parties in the heat of litigation will often battle with self-serving evidence of the prior original intent and over the extent of materiality the parties would have assigned to a future, hypothetical breach. This speculation is inherently unreliable for fact-finders as a means to divine the parties' initial understandings. As one commentator notes:

Although fact-specific judgments have been made for centuries by judges and jurors in adjudicating the propriety of contract termination decisions, the risk is obvious that those termination decisions will be challenged subjectively in "20/20 hindsight," even though the finders of fact were instructed to view the

total breaches to mean the same thing); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. c (2011) (explaining that the terminology of "total breach" is often "easily misconstrued").

¹²⁹ *See, e.g.,* Estate of Luster v. Allstate Ins. Co., 598 F.3d 903, 908 (7th Cir. 2010) ("The Indiana cases limit rescission to breaches that go 'to the heart of the contract, or that result in a 'complete failure of consideration.'" (citations omitted); *see also* Gilbert v. Dep't of Justice, 334 F.3d 1065, 1071 (Fed. Cir. 2003) ("[A] breach is material when it relates to a matter of vital importance, or goes to the essence of the contract." (quoting Thomas v. Dep't of Hous. & Urb. Dev., 124 F.3d 1439, 1442 (Fed. Cir. 1997))); RW Power Partners, L.P. v. Va. Elec. & Power Co., 899 F. Supp. 1490, 1496 (E.D. Va. 1995) ("Rescission should be permitted only when the complaining party has suffered a breach so material and substantial in nature that it affects the very essence of the contract and serves to defeat the object of the parties.") (citation omitted).

¹³⁰ Ahern v. Knecht, 563 N.E.2d 787, 792 (Ill. App. Ct. 1990).

¹³¹ Stone Forest Indus., Inc. v. United States, 973 F.2d 1548, 1551 (Fed. Cir. 1992) (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 cmts. a-b (1981)); *see also* Creative Waste Mgmt., Inc. v. Capitol Env'tl. Servs., Inc., 429 F. Supp. 2d 582, 606 (S.D.N.Y. 2006) ("Under New York Law, '[t]here is no hard and fast rule on the subject of rescission, for the right usually depends on the circumstances of the particular case.'" (quoting Callanan v. Powers, 92 N.E. 747, 752 (N.Y. 1910))).

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decision to terminate as of the time and in the factual context in which it was made.¹³²

Perhaps the best effort to correlate these disparate strands of the common law material breach doctrine appears in the *Restatement (Second) of Contracts*, section 241.¹³³ Many courts cite with approval section 241's five factors, which will assist in this determination:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.¹³⁴

Several commentators persuasively argue that the *Restatement* test "fails in its essential purpose."¹³⁵ As one writer analyzing numerous

¹³² 5 BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 18:4 (2011); see also John Honnold, *Buyer's Right of Rejection: A Study in the Impact of Codification upon a Commercial Problem*, 97 U. PA. L. REV. 457, 462 (1949) ("[T]he court has neither the means, nor the right" to determine why the parties to a contract inserted a certain provision into the contract. (quoting *Filley v. Pope*, 115 U.S. 213, 220 (1885))).

¹³³ See RESTATEMENT (SECOND) OF CONTRACTS § 241 (providing five factors to help clarify the common law material breach doctrine).

¹³⁴ *Id.*; see *In re Old Carco LLC*, 452 B.R. 100, 127-28 (Bankr. S.D.N.Y. 2011); see also *Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1312 (Fed. Cir. 2004); *Kersh v. Montgomery Developmental Ctr.*, 519 N.E.2d 665, 668 (Ohio Ct. App. 1987); *Adams TV of Memphis, Inc. v. ComCorp of Tenn., Inc.*, 969 S.W.2d 917, 921 (Tenn. Ct. App. 1997). These are just examples of cases that cite section 241 with approval.

¹³⁵ 5 BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 18:4 (citing the amorphous standard of material breach); see also Eric G. Andersen, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073, 1084 (1988) ("When the *Restatement* factors are considered individually, their contribution to a workable materiality standard is marginal

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decisions has observed, “Despite their distinguished pedigree, the *Restatement* factors fall seriously short of providing a workable definition of materiality. Their most obvious failing is the absence of any guidance on their relative priorities or on how to combine them.”¹³⁶ A second writer analyzing the cases approving the *Restatement* has concluded, “Determining whether a material breach has occurred under current law involves a weighing of several factors, a determination that often seems either completely without logic or precision, or self-evident and conclusory. Thus, parties are left not knowing what to do and what risks they may be assuming.”¹³⁷ A third writer asserts that “trial courts merely pay ‘lip service’ to the restatement and then slide the factual issue of ‘material breach’ to the jury with little analysis.”¹³⁸ Thus, under the *Restatement* test, the standard inevitably devolves to vague notions of fairness and justice in the eyes of the fact-finder.¹³⁹ Even the *Restatement* concedes that its test is “necessarily imprecise.”¹⁴⁰ Until it is reformed to meet all the above objections, the common law material breach doctrine remains an uncertain bulwark against excessive rescission, contrary to Brooks and Stremitzer’s unqualified endorsement of this concept.

E. *Common Commercial Practices and Rescission*

Common mercantile practices further support the widespread availability of rescission to consumers. Brooks and Stremitzer neglect to mention that many merchants in prescribed circumstances demur from enforcing their rights against customers seeking rescission, because they are more interested in maintaining good customer relations for future purchases. This omission is important because the law on the books

at best.”); Amy B. Cohen, *Reviving Jacob and Youngs, Inc. v. Kent: Material Breach Doctrine Reconsidered*, 42 VILL. L. REV. 65, 90 (1997) (explaining that the material breach doctrine leaves parties without “predictable guidelines”).

¹³⁶ Andersen, *supra* note 135, at 1076, 1083 (“A close look at the relevant *Restatement* provisions makes it difficult to blame the courts for falling into confusion or completely bypassing them.”).

¹³⁷ Cohen, *supra* note 135, at 67.

¹³⁸ 5 BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 18:4 n.13.10 (citing Mustang Pipeline Co. v. Driver Pipeline Co., 134 S.W.3d 195, 199 (Tex. 2004)).

¹³⁹ See Cohen, *supra* note 135, at 83 (explaining that the *Second Restatement* provides no unifying principle other than fairness or justice in determining how to balance the factors); see also Kel-Keef Enters. v. Quality Components Corp., 738 N.E.2d 524, 537 (Ill. App. Ct. 2000) (“The issue of whether or not a breach of contract is ‘material,’ thereby discharging the other’s duty to perform, is a question to be decided on the inherent justice of the matter.” (quoting *Susman v. Cypress Venture*, 543 N.E.2d 184, 187 (Ill. 1989))); *Rogers v. Balsley*, 608 N.E.2d 1288, 1292 (Ill. App. Ct. 1993) (explaining that the determination of a material breach will be based on the “inherent justice of the matter” (citing *Hickox v. Bell*, 552 N.E.2d 1133 (Ill. App. Ct. 1990))); Andersen, *supra* note 135, at 1083–84.

¹⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 241 cmt. a (1981).

does not match many contracts in action. As several commentators have noted, while the details can differ, many retailers in the United States and Europe allow purchasers a “core right to withdraw” from the transaction.¹⁴¹

Regarding the United States, Omri Ben-Shahar and Eric A. Posner have noted the “nearly universal” practice in retail stores accepting a “core right to withdraw” from sales of new merchandise.¹⁴² These two commentators have examined in detail the return policies of two major retailers, Wal-Mart and Target, for both in-store and on-line sales.¹⁴³ In these establishments, the customer can return without question and without receipts almost all items for cash or store credit.¹⁴⁴ Some qualifications exist; for example, apparel must be returned unworn with tickets attached and books must be unused and unmarked.¹⁴⁵ Another restriction is that the purchaser must return the item within a prescribed period, ordinarily 90 days.¹⁴⁶ Apart from these qualifications, these merchants expect and even invite these returns as part of good customer relations if the buyer is dissatisfied with the product for any reason.¹⁴⁷ Notably, Ben-Shahar and Posner did not report that many merchants in the United States stand upon their U.C.C. rights in resisting rescission.

Other researchers have reached the same conclusion about common commercial practice in the United States and overseas. Performing a survey of the general conditions of thirty-two shops in the United States and various European nations that consumers visit regularly, Jan M. Smits writes:

Many retail shops throughout the world have adopted the policy that customers can [withdraw] at will and receive back the contract price or at least a credit note with which they can buy a different product in the same shop. This return policy is often laid down in the general conditions of the retailer. These contractual rights are even so common that the general public in

¹⁴¹ See Omri Ben-Shahar & Eric A. Posner, *The Right to Withdraw in Contract Law*, 40 J. LEGAL STUD. 115, 120 (2011).

¹⁴² *Id.*

¹⁴³ *Id.* at 120–21.

¹⁴⁴ *Id.* at 120.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 121.

¹⁴⁷ See *id.* at 142–43 (explaining that some jurisdictions hold that buyers can escape contracts that involve “fancy, taste, sensibility, or judgment” simply because they are dissatisfied with the product).

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some countries seems to think that there is a “general right to return goods.”¹⁴⁸

It can be argued that these common mercantile practices are irrelevant to Brooks and Stremitzer’s argument because they are discussing rescission in the adversarial legal setting, whereas these common practices occur non-adversarially. The answer is that no fine line exists between adversarial and non-adversarial rescission, and these settings are further related because merchants liberally allow rescission for the very purpose of avoiding adversarial relations with customers in the hope of gaining future business. Aside from their incomplete legal analysis, Brooks and Stremitzer’s thesis that sellers naturally seek to reduce the possibility of rescission overlooks that many sellers willingly embrace liberal rescissionary practices at the ground level in the American and European marketplace.¹⁴⁹

F. *Rescission and the Principle of “Fair Redress”*

As demonstrated above, Brooks and Stremitzer are incorrect that buyers have restricted statutory and common law rights to rescind for breach of contract or that a trend exists for further retrenchment. Indeed, the law addressing broad powers of rescission is so pervasive that several commentators have noted a right to withdraw in the general law of contracts.¹⁵⁰

¹⁴⁸ Jan M. Smits, *Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?*, 29 PENN. ST. INT’L L. REV. 671, 677 (2011). Smits also comments,

Even in areas where mandatory withdrawal rights exist, retailers usually allow their customers to withdraw from the contract for a longer period than necessary. The most plausible reason why they do so is to attract customers, and the only way to do this is to *go further* than the statutory rule prescribes.

Id. at 682.

¹⁴⁹ See *supra* notes 9–12 and accompanying text. An excellent recent example of a major manufacturer adopting a liberal rescissionary policy to obtain new business is Chevrolet’s “Love It or Return It” guarantee. The policy states that if an eligible retail customer purchases an eligible 2012 or 2013 Chevrolet model between July 10, 2012, and September 4, 2012, the customer may return his/her vehicle to the original selling/participating dealer after thirty days, but no longer than sixty days after the delivery date. See Jerry Hirsch, *General Motors’ Chevrolet Brand Offers Refund to New-Car Buyers*, L.A. TIMES, July, 11, 2012, <http://articles.latimes.com/2012/jul/11/business/la-fi-autos-chevy-buyback-20120711> (explaining Chevrolet’s return policy generally and comparing it to a recent policy of Hyundai’s).

¹⁵⁰ See, e.g., Ben-Shahar & Posner, *supra* note 141, at 116 (“European law in this way recognizes the consumer’s ‘right to withdraw.’ There is no such generic right in the common law of contract or in the Uniform Commercial Code in the United States.”); see also

On a more fundamental level, Brooks and Stremitzer have missed that, with few exceptions, the law welcomes rescission for breach when doing so enables the legal system to promote a fair redress and the parties' good faith. Courts have observed, "[R]escission is an equitable remedy."¹⁵¹ Thus, as stated by the *Restatement (Third) of Restitution and Unjust Enrichment*, "[T]he justification of rescission as an alternative remedy for breach is . . . a concern with fairness to the injured party combined with remedial economy."¹⁵² The *Restatement* further observes, "The effect of rescission in shifting losses can be tolerated as an incidental consequence of a remedy whose principal function is to release the claimant from an involuntary exchange . . ."¹⁵³

These policies are longstanding. In discussing rescission, Williston observed in 1903:

The remedy of rescission, if allowed at all, is allowed on broad principles of justice. The basis of the remedy is that the buyer has not bought what he bargained for. . . . [W]hen a buyer buys a horse, warranted sound, the real thing he is after is a sound horse. It is the performance of the warranty, not damages for the breach of it, which is in his mind. He does not want an unsound horse, worth half the money, and the difference in damages. . . . [I]f the one transferred to him is not sound, he is as truly forced to perform a bargain which he never intended to make, as is any defendant, if compelled to perform his part of a contract when the plaintiff is materially in default.¹⁵⁴

Williston's reasoning remains valid to this day and is rooted in the nature of contract. As modern authorities have concluded, unless mandated by law, a contract is a private "ordering" where the parties freely select their partners, trust the other's willingness to honor his

Smits, *supra* note 148, at 679 (noting that there are concerns for the effectiveness of withdrawal rights).

¹⁵¹ *Atkins v. Beasley*, 544 S.W.2d 505, 507 (Tex. Civ. App. 1976); *see also* *Newton v. Aitken*, 633 N.E.2d 213, 215 (Ill. App. Ct. 1994) (explaining that the application of rescission as an equitable remedy is left up to the discretion of the trial court); *Busch v. Model Corp.*, 708 N.W.2d 546, 551 (Minn. Ct. App. 2006) (noting that rescission is an equitable remedy which tries to put the parties in the position as if the contract had never existed).

¹⁵² RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 cmt. e (2011); *see also id.* § 37 cmt. a ("The justification for the rescission remedy combines remedial economy and elementary fairness to the plaintiff.").

¹⁵³ *Id.* § 54 cmt. k.

¹⁵⁴ Samuel Williston, *Rescission for Breach of Warranty*, 16 HARV. L. REV. 465, 472 (1903).

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commitments, and define their respective obligations, rewards, and risks.¹⁵⁵ The remedy of rescission, therefore, furthers the general policy of permitting the parties to a contractual relationship to determine the allocation of risk.¹⁵⁶ Rescission is also part of freedom of contract, a fundamental constitutional and statutory right.¹⁵⁷ Freedom of contract is “no right at all if it is not accompanied by freedom not to contract.”¹⁵⁸ The policy here would be that “courts have hesitated to compel persons to work together or to enforce other ongoing human relationships, including partnerships.”¹⁵⁹ “Accordingly, parties today can agree to rescind for any reason and are essentially afforded the same freedom of contract to rescind an agreement as they have to enter into an agreement.”¹⁶⁰ With respect to rescission, Brooks and Stremitzer have ignored the principle of fair redress established in the cases.

¹⁵⁵ Joseph Martin, Jr., *Delicatessen, Inc. v. Schumacher*, 417 N.E.2d 541, 543 (N.Y. 1981) (“[A] contract is a private ‘ordering’ in which a party binds himself to do, or not to do, a particular thing.”) (citation omitted); see also *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 275 (Cal. 2004) (explaining that the parties to a contract create a “mini-universe” for themselves in which they voluntarily assume certain responsibilities).

¹⁵⁶ See *Harley-Davidson Motor Co. v. Powersports, Inc.*, 319 F.3d 973, 986 (7th Cir. 2003) (“[R]escission . . . is not incompatible with the general policy of permitting the parties to a contractual relationship to determine allocation of risk.”).

¹⁵⁷ See *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (explaining that the freedom of contract is protected by the Fourteenth Amendment to the U.S. Constitution); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that the freedom of contract is a right protected as a “liberty” under the Fourteenth Amendment); see also *Grabill Cabinet Co. v. Sullivan*, 919 N.E.2d 1162, 1168 (Ind. Ct. App. 2010) (“In Indiana, the freedom of parties to contract is favored to the extent that it has been held to be among those freedoms protected by Article 1, section 1, of the Indiana Constitution.”). Freedom of contract is also recognized in the Uniform Commercial Code. See U.C.C. § 1-102 cmt. 2 (2003) (“[F]reedom of contract is a principle of the [Uniform Commercial] Code.”); see also Caroline Edwards, *Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment*, 78 ST. JOHN’S L. REV. 663, 691 (2004) (“Freedom of contract provides the fundamental component of Article 2’s structure.”) (footnote omitted).

¹⁵⁸ *Joseph Martin, Jr., Delicatessen, Inc.*, 417 N.E.2d at 543; see also *Elda Arnhold & Byzantio, L.L.C. v. Ocean Atl. Woodland Corp.*, 284 F.3d 693, 705 (7th Cir. 2002) (“Freedom not to contract should be protected as stringently as freedom to contract.” (quoting *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 281 (7th Cir. 1996) (Cudahy, J., concurring))).

¹⁵⁹ Cf. *Hopkins v. Price Waterhouse*, 920 F.2d 967, 980 (D.C. Cir. 1990).

¹⁶⁰ John Prebble & Chye-Ching Huang, *The Fabricated Unwind Doctrine: The True Meaning of Penn v. Robertson*, 7 HASTINGS BUS. L.J. 117, 143 (2011) (quoting David H. Schnabel, *Revisionist History: Retroactive Federal Tax Planning*, 60 TAX LAW. 685, 699 (2007)); see also *Ganaway v. Henderson*, 103 So. 2d 693, 695 (Fla. Dist. Ct. App. 1958) (“[P]arties themselves can rescind a contract by mutual consent when such rescission violates no established rule of law.”) (footnote omitted).

III. THE RIGHT OF FAIR REDRESS: THE PARAMETERS OF RESTITUTION AFTER RESCISSION

Brooks and Stremitzer argue that the existing law of restitution after rescission is too generous. They posit that “a number of jurisdictions are moving toward combining [rescission] with expectation damages.”¹⁶¹ Citing various sections of the U.C.C., as well as several books and articles, the authors claim that U.S. statutory law allows for combined remedies with no requirement for the plaintiff to elect remedies as between revocation of acceptance and a suit for breach.¹⁶²

The authors also reject current case law on the scope of restitution. The authors express concern with the established view that the rescinding buyer can be entitled to reliance damages, for example, the buyer’s expenses in transporting defective goods back to the seller or for repairing the buyer’s other property injured by the seller’s defective goods.¹⁶³ Brooks and Stremitzer further disagree with allowing the buyer’s disgorgement of the seller’s ill-gotten gain, such as where the seller has taken the buyer’s payment, invested it, and earned additional profits.¹⁶⁴ To counter the courts’ asserted tendency to grant excessive restitutionary recovery, Brooks and Stremitzer propose that restitution after rescission should be limited to restoration of the price, or the promisee’s other conferred benefits, to the promisor.¹⁶⁵

A. *Election of Remedies: The Common Law and U.C.C. Compared*

Brooks and Stremitzer appear to argue that U.S. law completely abolishes the election of remedies doctrine when they state that “[t]he United States allows for combined remedies.”¹⁶⁶ Their support for this statement is comment 1 to U.C.C. section 2-608, which states, “[T]he buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him.”¹⁶⁷ Comparing the U.C.C. practice to the U.C.C.’s predecessor, the Uniform Sales Act, the authors conclude, “It is one of many ironies in this area

¹⁶¹ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 701. Brooks and Stremitzer here rely upon the *Restatement (Second) of Contracts*, section 344, formulation of expectation damages, which they describe as the value that would have been received had the breach not occurred. *Id.* at 698 n.16.

¹⁶² *Id.* at 701 n.28.

¹⁶³ *Id.* at 720, 726; *see also* PALMER, *supra* note 31, § 3.9, at 276 (explaining the theory behind allowing the injured party to recover reliance damages).

¹⁶⁴ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 693, 719.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 701-02 n.28.

¹⁶⁷ *Id.* (quoting U.C.C. § 2-608 cmt. 1 (2003)).

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that the UCC would so expressly abandon the mutual exclusivity of these remedies."¹⁶⁸

In making the above claims about rescission and breach damages and putting to the side for the moment their discussion of the U.C.C., Brooks and Stremitzer leave out that the common law election of remedies doctrine is alive and well in contracts, other than those in goods, which means that, in part, the law does disallow rescission combined with breach damages.¹⁶⁹ This omission severely undermines the authors' unqualified claim that "[t]he United States allows for combined remedies."¹⁷⁰ In particular, as will be shown, this common law rule blocks any attempt by a plaintiff to obtain a windfall by recovering, on the same set of facts, a judgment using two or more theories based simultaneously on contract rescission and contract enforcement.¹⁷¹ Indeed, as also will be shown, the U.C.C. itself follows a nuanced view on election of remedies.¹⁷²

1. Common Law Election of Remedies

As a form of estoppel, and sensitive to equitable principles, the common law doctrine of election of remedies requires a party to select "one of two or more coexisting and inconsistent remedies which the law affords the same set of facts."¹⁷³ According to most courts, although the

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* (noting that there is a risk of cumulative liability in cases because people can obtain expectation and breach damages). Because the American economy is increasingly oriented to services and not the manufacture of goods, common law rescission is far more important than U.C.C. rescission. Reihan Salam, *U.S. Economy Weakened Years Before the Crash*, CNN OPINION (July 23, 2012, 7:38 AM), <http://www.cnn.com/2012/07/23/opinion/salam-economy-woe/index.html>.

¹⁷⁰ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 702 n.28.

¹⁷¹ *See Wynfield Inns v. Edward LeRoux Grp., Inc.*, 896 F.2d 483, 488 (11th Cir. 1990) (indicating that elections of remedies can be made before judgment but after a verdict has been returned); *Andover Air Ltd. P'ship v. Piper Aircraft Corp.*, 7 U.C.C. Rep. Serv. 2d 1497, 1498 (D. Mass. 1989) (noting that a party can pursue inconsistent theories but cannot use inconsistent theories to support a damages judgment); *Genetti v. Caterpillar, Inc.*, 621 N.W.2d 529, 545-46 (Neb. 2001) (stating that when a party pursues alternate theories of recovery, the party will have to elect between them); *Hayes v. Civil Serv. Comm'n of Nashville & Davidson Cnty., Tenn.*, 907 S.W.2d 826, 828 (Tenn. Ct. App. 1995) (holding that the plaintiff could not pursue inconsistent remedies through to final judgment).

¹⁷² *See infra* notes 186-213 and accompanying text (describing the U.C.C. approach).

¹⁷³ *Christensen v. Eggen*, 577 N.W.2d 221, 224 (Minn. 1998); *see also Estate Counseling Serv., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527, 530 (10th Cir. 1962) ("The whole doctrine of election of remedies is equitable and in applying the doctrine the court should be sensitive to equitable principles."). The election of remedies doctrine also has roots in the law of waiver. *See* 25 AM. JUR. 2D *Election of Remedies* § 4 (2004) (explaining that the doctrine of election of remedies has historically been viewed as a part of the law of waiver); *see also Duksa v. Middletown*, 472 A.2d 1, 4 (Conn. 1984) (determining that to seek

party may plead in the alternative and pursue all remedies, regardless of consistency, the plaintiff generally must decide between inconsistent remedies before receiving a final judgment.¹⁷⁴ The election principle can apply in the same case or in successive actions.¹⁷⁵

In one application of this election theory, a party claiming breach of contract under the common law must decide whether to obtain expectation damages or rescission.¹⁷⁶ As a 2006 California Court of Appeals case stated, “An action for rescission and an action for breach of contract are alternative remedies. The election of one bars recovery under the other.”¹⁷⁷ Another important point is the aggrieved party has the choice of rescission versus damages just for a material breach; a lesser partial breach can support only a damages remedy.¹⁷⁸ Accordingly, the election doctrine is based on the logical notion that “prevents a plaintiff from ‘both repudiating [a] contract and then suing

rescission is to waive “any claim for damages for any breach of the contract”). *But see* *ESPN, Inc. v. Office of Comm’r of Baseball*, 76 F. Supp. 2d 383, 390 (S.D.N.Y. 1999) (“[W]aiver and election are distinct principles that do not overlap but rather control different phases of the contractual relationship.”).

¹⁷⁴ See *Wynfield Inns*, 896 F.2d at 488 (“Generally, an election between inconsistent remedies is made after a verdict is entered but prior to the entry of judgment.”); *Andover*, 7 U.C.C. Rep. Serv. 2d at 1498 (noting that a party can pursue inconsistent theories but cannot use inconsistent theories to support the judgment); *Genetti*, 621 N.W.2d at 545–46 (indicating that when a party pursues alternate theories of recovery, the party will have to elect between them); *Hayes*, 907 S.W.2d at 828 (ruling that a plaintiff may not pursue inconsistent remedies to final judgment); see also *Kline Hotel Partners v. Aircoa Equity Interests, Inc.*, 729 F. Supp. 740, 743 (D. Colo. 1990) (noting that several jurisdictions leave the time of choice between inconsistent theories to the trial court’s discretion).

¹⁷⁵ See *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1371–72 (7th Cir. 1990) (explaining that election of remedies allows plaintiff to proceed under different theories because following the verdict on one theory precludes the other theory); *Raw v. Lehnert*, 357 A.2d 574, 576 (Pa. Super. Ct. 1976) (holding that multiple theories for damages under the same contract can be pursued in successive actions so long as the damage types are different).

¹⁷⁶ See DAN B. DOBBS, *LAW OF REMEDIES* § 9.4, at 713 (2d ed. 1993) (“[T]he plaintiff who has sued for damages cannot change his mind and ask for replevin instead . . .”) (footnote omitted); see also *Seekings v. Jimmy GMC of Tucson, Inc.*, 638 P.2d 210, 215 n.2 (Ariz. 1981) (“We observe that a plaintiff suing outside the U.C.C. for common law rescission and damages for breach of contract or warranty can be forced to choose either rescission or damages as a remedy.”).

¹⁷⁷ *Akin v. Certain Underwriters at Lloyd’s London*, 44 Cal. Rptr. 3d 284, 296 (Cal. Ct. App. 2006) (citations omitted).

¹⁷⁸ See *Old Stone Corp. v. United States*, 450 F.3d 1360, 1371 (Fed. Cir. 2006) (“Restitution is ‘available only if the breach gives rise to a claim for damages for total breach and not merely to a claim for damages for partial breach.’” (quoting *Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1309 (Fed. Cir. 2004))); 13 WILLISTON, *supra* note 26, § 39:32, at 645 (explaining that a party can bring an action either for total breach or a partial breach when pursuing damages).

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on it to gain the benefit of the [same] bargain.”¹⁷⁹ Another policy for the election of remedies rule is to preserve fairness to defendants, because the plaintiff is entitled only to complete relief to make it whole, and not double recovery, for a single wrong.¹⁸⁰ *Corbin on Contracts* provides a hypothetical to help illustrate this principle:

Suppose that a buyer pays \$100 in advance for goods that when delivered are so defective that he rightly rejects or returns them. His restitutionary remedy is a judgment for the return of the price (\$100) paid; his remedy in damages is a judgment for the full market value of the goods that the seller promised to deliver with incidental outlays and consequential injuries that the seller had reason to foresee. But he should not be given judgment for both of these amounts at once. He would then both eat his cake and still have it; he would have the benefits of full performance at no cost.¹⁸¹

Accordingly, courts in non-U.C.C. transactions have said that lost profits damages, as distinguished from restitutionary recovery,¹⁸² “are

¹⁷⁹ *Landin v. Ford*, 727 P.2d 331, 332 (Ariz. 1986) (quoting *Jennings v. Lee*, 461 P.2d 161, 167 (Ariz. 1969)); *accord* *Far West Fed. Bank v. Office of Thrift Supervision Dir.*, 119 F.3d 1358, 1365 (9th Cir. 1997) (ruling that a party cannot pursue a remedy that affirms the contract while also bringing one based on disaffirmance); *Genetti*, 621 N.W.2d at 545–46 (determining that a party cannot pursue a claim on a theory of recovery premised on existence of a contract while at the same time proceeding on a theory premised upon the lack of a contract); *James v. Hogan*, 47 N.W.2d 847, 851 (Neb. 1951) (explaining that damages and restitution as remedies are inconsistent as one affirms the contract and the other disaffirms it).

¹⁸⁰ *See Walraven v. Martin*, 333 N.W.2d 569, 572, 574 (Mich. Ct. App. 1983) (explaining that a plaintiff may pursue multiple remedies against a seller as long as he is not awarded double recovery); *Vowers & Sons, Inc. v. Strasheim*, 576 N.W.2d 817, 825 (Neb. 1998) (holding that the plaintiff could not recover for the same injury twice through a different form of remedy); *Adams v. Grant*, 358 S.E.2d 142, 144 (S.C. Ct. App. 1986) (“The basic purpose of election of remedies is to prevent double recovery for a single wrong.”) (citation omitted); *Purcell Enters., Inc. v. Tennessee*, 631 S.W.2d 401, 409 (Tenn. Ct. App. 1981) (noting that the reason for having the election of remedies doctrine is to ensure against double recovery).

¹⁸¹ CORBIN, *supra* note 67, § 1223, at 515–17.

¹⁸² *Compare* *Harley-Davidson Motor Co. v. PowerSports, Inc.*, 319 F.3d 973, 988 (7th Cir. 2003) (“[R]escission and restorative damages [are] entirely consistent with each other and therefore not subject to election.” (quoting *Head & Seemann, Inc. v. Gregg*, 311 N.W.2d 667, 667, 672 (Wis. Ct. App. 1981))), *and* *Boyle v. Odell*, 605 A.2d 1260, 1265 (Pa. Super. Ct. 1992) (“Restitution, unlike damages, is a remedy not inconsistent with rescission.”) (citations omitted), *with Landin*, 727 P.2d at 332 (explaining that the election of remedies doctrine only prevents a party from receiving damages that presuppose a valid contract, but does not preclude other types of damages combined with rescission).

contractual, not consequential, and are therefore not recoverable in rescission.”¹⁸³ Furthermore, as many courts observe, “Because a rescinded contract is void *ab initio*, following a lawful rescission the ‘injured’ party is precluded from recovering damages for breach just as though the contract had never been entered into by the parties.”¹⁸⁴ These holdings exemplify the courts’ strong reliance on the logic of the common law election of remedies doctrine to preclude the buyer’s overcompensation with expectation damages when it pursues an action for rescission based on breach of contract.¹⁸⁵

2. U.C.C. Election of Remedies

Undoubtedly, as Brooks and Stremitzer indicate, when it comes to the buyer’s remedy for a defective tender of goods, some decisions do rely upon U.C.C. section 2-608, comment 1, for the proposition that the U.C.C. rejects altogether the election of remedies doctrine.¹⁸⁶ For example, the California Court of Appeals, relying on U.C.C. section 2-608, comment 1, observed that the award of lost profits and the restitution of sums the plaintiff paid “are not per se inconsistent.”¹⁸⁷

¹⁸³ *Flagship West, LLC v. Excel Realty Partners L.P.*, No. 1:02-CV-05200 OWW DLB, 2006 WL 3300395, at *2 (E.D. Cal. Nov. 14, 2006), *vacated on other grounds*, 337 F. App’x 679 (9th Cir. 2009); *accord James v. Hogan*, 47 N.W.2d 847, 852 (Neb. 1951) (noting that a party cannot recover lost profits when pursuing rescission of a contract), *cited with approval in Olson v. Pedersen*, 231 N.W.2d 310, 316 (Neb. 1975) (holding that a party cannot get both rescission and damages); *Rennie v. Pierce Cards, Ltd.*, 409 N.Y.S.2d 395, 396 (N.Y. App. Div. 1978) (“[The] plaintiff, having elected to rescind, cannot recover lost profits.”).

¹⁸⁴ *Bergstrom v. Estate of DeVoe*, 854 P.2d 860, 862 (Nev. 1993) (citations omitted); *see also Sharp Structural, Inc. v. Franklin Mfg., Inc.*, 283 F. App’x 585, 589 (9th Cir. 2008) (stating it would be “clear error” for a jury to award both rescission and breach of contract damages); *Hassan v. Yusuf*, 944 N.E.2d 895, 920 (Ill. App. Ct. 2011) (“[I]t is well established that a remedy based on rescission is inconsistent with a remedy of damages . . .”).

¹⁸⁵ *See Sharp Structural, Inc.*, 283 F. App’x at 589 (holding that allowing a jury to grant both damages and rescission was an error); *Landin*, 727 P.2d at 332 (noting that the rescission doctrine prevents a party from requesting rescission damages only when they presuppose a valid contract); *Hassan*, 944 N.E.2d at 920 (noting that a remedy based on damages is inconsistent with that of rescission); *James*, 47 N.W.2d at 852 (noting that a party rescinding a contract cannot recover damages beyond restitution); *Olson*, 231 N.W.2d at 316 (indicating that remedies of rescission and damages are inconsistent with each other); *Boyle*, 605 A.2d at 1265 (holding that restitution is consistent with rescission, but damages are not).

¹⁸⁶ U.C.C. § 2-608 cmt. 1 (2003); Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 692 n.2; *see also Berge v. Int’l Harvester Co.*, 190 Cal. Rptr. 815, 823 (Cal. Ct. App. 1983) (explaining that, in California, the Uniform Commercial Code has not adopted an election of remedies doctrine).

¹⁸⁷ *Berge*, 190 Cal. Rptr. at 823; *see also Barry & Sewall Indus. Supply Co. v. Metal-Prep of Hous., Inc.*, 912 F.2d 252, 257 (8th Cir. 1990) (“Pursuant to the U.C.C., revocation and a suit for damages are distinct remedies, and a buyer may pursue either or both options.” (citing

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Other courts adopt similar language.¹⁸⁸ On the other hand, the status of the U.C.C. and the election of remedies doctrine is more nuanced than Brooks and Stremitzer have described. Four points about the U.C.C. and the decisions support this argument.

First, read in context, comment 1 to U.C.C. section 2-608 does not totally abolish the election of remedies doctrine.¹⁸⁹ As the Utah Supreme Court has commented, “The Uniform Commercial Code makes damages available in an action for rescission, but it does not otherwise change the traditional theory of election of remedies.”¹⁹⁰ What the Utah court was referencing is the basic purpose of the election of remedies doctrine (i.e., avoiding excessive compensation to the plaintiff), which remains in force in the U.C.C.¹⁹¹ However, Brooks and Stremitzer never mention this line of authority.¹⁹² Moreover, the authors leave out a key portion of the same U.C.C. section 2-608 comment regarding the election of remedies, which notes, “[T]he prior basic policy is continued”¹⁹³ Additionally,

Solar Kinetics v. Joseph T. Ryerson & Son, Inc., 488 F. Supp. 1237, 1242 (D. Conn. 1980)); *Seekings v. Jimmy GMC of Tucson, Inc.*, 638 P.2d 210, 215 n.2 (Ariz. 1981) (indicating that U.C.C. § 2-608 “involves no suggestion of ‘election’ of any sort”); *Robertson Cos. v. Kenner*, 311 N.W.2d 194, 196 (N.D. 1981) (“[R]escission and damages are not mutually exclusive remedies under the Uniform Commercial Code.”).

¹⁸⁸ See, e.g., *Barry & Sewall Indus. Supply Co.*, 912 F.2d at 257 n.2 (“Pursuant to the U.C.C., revocation and a suit for damages are distinct remedies, and a buyer may pursue either or both options.”); *Seekings*, 638 P.2d at 215 (indicating that the U.C.C. § 2-608 “[i]nvolves no suggestion of ‘election’ of any sort”); *Robertson Cos. Inc.*, 311 N.W.2d at 199 (“[R]escission and damages are not mutually exclusive remedies under the Uniform Commercial Code.”).

¹⁸⁹ U.C.C. § 2-608 cmt. 1.

¹⁹⁰ *Mecham v. Benson*, 590 P.2d 304, 308 (Utah 1979) (footnotes omitted) (citations omitted).

¹⁹¹ See U.C.C. § 1-103 (“Unless displaced by the particular provisions of this Act [the Uniform Commercial Code], the [usual] principles of law and equity” are applicable).

¹⁹² Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 701 n.28 (providing only a partial quote from U.C.C. section 2-608, comment 1, which leaves out the main purpose of the election of remedies doctrine). Some courts also leave out this key language in their analysis. See *Lightcap v. Steenberg Homes, Inc.*, 466 N.W.2d 904, 906 n.4 (Wis. 1991) (noting that the U.C.C. rejects the election of remedies doctrine when involving damages for breach and revocation, as found in U.C.C. section 2-608, comment 1); see also *Adams v. Grant*, 358 S.E.2d 142, 144 (S.C. Ct. App. 1986) (noting that the buyer does not have to elect between damages anymore and using an incomplete summary of U.C.C. section 2-608, comment 1).

¹⁹³ U.C.C. § 2-608 cmt. 1. The section notes, in pertinent part, “Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in the present section.” *Id.*

Brooks and Stremitzer have overlooked another U.C.C. reference that could have supported more strongly their position on the U.C.C. and the election of remedies. See generally Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3. Regarding the seller’s remedies in general for the buyer’s breach, U.C.C. section 2-703, comment 1 broadly

comment 1 to U.C.C. section 2-608 must be read in the context of the commentary to U.C.C. section 2-721, entitled *Remedies for Fraud*.¹⁹⁴ The latter comment states explicitly that (1) the “remedies for fraud are extended by this section to coincide in scope with those for non-fraudulent breach[,]” and (2) rescission for breach of contract can bar other remedies when “the circumstances of the case makes the remedies incompatible.”¹⁹⁵ For these reasons, case law properly identifies the “Uniform Commercial Code approach” to election of remedies as turning on the “facts of the individual case.”¹⁹⁶ Therefore, notwithstanding any possible confusion in the comment to U.C.C. section 2-608, both U.C.C. sections 2-608 and 2-721 show that the U.C.C. captures the basic policy of the election of remedies doctrine in breach of contract cases to avoid excessive recovery for the plaintiff.¹⁹⁷

Second, a number of cases have given little, if any, weight to this comment of U.C.C. section 2-608, recalling that comments are not part of the official U.C.C. and have only persuasive weight.¹⁹⁸ For example, in *Parsons v. Motor Homes of America, Inc.*, the Florida District Court of Appeals referenced the U.C.C. comment but still required a U.C.C. plaintiff to elect between revocation of acceptance and breach of contract damages before entry of judgment.¹⁹⁹ In *Fablok Mills, Inc. v. Cocker Machine & Foundry Co.*, a New Jersey appellate decision evaluating a U.C.C. case, the court employed a traditional election of remedies methodology without mentioning the U.C.C. comment.²⁰⁰ Specifically,

states, “This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.” U.C.C. § 2-703 cmt. 1. Although U.C.C. section 2-703, strictly speaking, governs only the seller’s remedies for breach, comment 1 covers the entire Article 2 in stating, “This Article rejects any doctrine of election remedy” *Id.* This U.C.C. comment about the relationship between the U.C.C. and the election of remedies, however, is confusing. *Id.* The first sentence rejects the doctrine as a fundamental policy and states that remedies are always cumulative. *Id.* The second sentence reverses course and states that a remedy can be barred as inconsistent based on the facts of the case. *Id.* Ironically, this second sentence in comment 1 endorses the fundamental policy of the election doctrine that the first sentence purports to reject. *Id.* See also *supra* notes 173–75 and accompanying text (explaining generally the election of remedies doctrine).

¹⁹⁴ U.C.C. § 2-721.

¹⁹⁵ *Id.* cmt.

¹⁹⁶ *Coast-to-Coast Fin. Corp. v. United States*, 52 Fed. Cl. 352, 363 (2002).

¹⁹⁷ U.C.C. § 2-721 cmt.; U.C.C. § 2-608 cmt. 1.

¹⁹⁸ See *Rutherford v. Darwin*, 622 P.2d 245, 248 (N.M. Ct. App. 1980) (stating that U.C.C. comments are “not binding on this Court”).

¹⁹⁹ 465 So. 2d 1285, 1289 (Fla. Dist. Ct. App. 1985) (“[A]n election between inconsistent remedies need only occur *before judgment is entered*.” (quoting *Monoco of Orlando, Inc. v. ITT Indus. Credit Corp.*, 458 So. 2d 332 (Fla. Dist. Ct. App. 1984))).

²⁰⁰ 310 A.2d 491, 496 (N.J. Super. Ct. App. Div. 1973).

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the *Fablok Mills* court noted that “once recovery is permitted either through rescission or by way of damages, the alternative remedy must be dropped.”²⁰¹ In *General Motors Acceptance Corp. v. Anaya*, the Supreme Court of New Mexico acknowledged comment 1 to U.C.C. section 2-608, but also observed that “the nonalternative nature of the remedies does not entitle the buyer to inconsistent or double recoveries.”²⁰² These cases all conflict with other decisions relying on U.C.C. section 2-608, comment 1, for the interpretation that the U.C.C. categorically rejects the election of remedies principle.²⁰³

Third, the U.C.C. does indeed apply the usual election of remedies doctrine in distinct factual settings. First, several courts have ruled that the promisee may not obtain monetary redress on the same facts for both breach of warranty, which affirms the contract, and revocation of acceptance, which disaffirms the contract.²⁰⁴ Another election doctrine is found in U.C.C. section 2-608 itself.²⁰⁵ As Professor Allan Farnsworth indicates, a “binding” election occurs under U.C.C. section 2-608(a) when “a buyer . . . has chosen to treat a breach as partial and has accepted the goods with knowledge of their nonconformity.”²⁰⁶ Consistent with that concept, courts have admonished, “[A]cceptance damages are not applicable where acceptance has been revoked.”²⁰⁷ However, in the

²⁰¹ *Id.*

²⁰² 703 P.2d 169, 171 (N.M. 1985).

²⁰³ See *Parsons*, 465 So. 2d at 1289 (requiring that a party had to elect between revocation of acceptance and breach of contract damages before entering a judgment); *Fablok Mills, Inc.*, 310 A.2d at 496 (noting that any alternative remedies must be dropped once recovery is allowed under either rescission or by damages); *Gen. Motors Acceptance Corp.*, 703 P.2d at 172 (noting that the U.C.C. comment is only persuasive; thus, the court required that the plaintiff choose either to proceed under rescission or damages). *But see* *Seekings v. Jimmy GMC of Tucson, Inc.*, 638 P.2d 210, 215 n.2 (Ariz. 1981) (noting that plaintiffs bringing actions under the U.C.C. no longer have to choose between rescission or damages as remedies).

²⁰⁴ See, e.g., *Genetti v. Caterpillar, Inc.*, 621 N.W.2d 529, 545-46 (Neb. 2001) (disallowing proceeding under a theory of recovery premised on existence of the contract and under a theory based on the lack of a contract (citing *Vowers and Sons, Inc. v. Strasheim*, 576 N.W.2d 817 (Neb. 1998))); *Kelly v. Olinger Travel Homes, Inc.*, 117 P.3d 282, 287-88 (Or. Ct. App. 2005) (noting that a party cannot revoke acceptance of the product and still recover damages for breach of warranty); see also *Herring v. Home Depot, Inc.*, 565 S.E.2d 773, 776 (S.C. Ct. App. 2002) (“Breach of warranty is an action affirming the contract. In an action for breach of warranty, the buyer retains the goods. Revocation of acceptance, on the other hand, requires the return of the goods and cancellation of the terms of a contract.”) (footnotes omitted). *But see* *Page v. Dobbs Mobile Bay, Inc.*, 599 So. 2d 38, 42 (Ala. Civ. App. 1992) (allowing revocation even with a disclaimer of all warranties).

²⁰⁵ U.C.C. § 2-608 cmt. 1 (2003).

²⁰⁶ FARNSWORTH ON CONTRACTS § 8.19, at 536 n.9 (3d ed. 2004).

²⁰⁷ *Costa v. Volkswagen of Am.*, 551 A.2d 1196, 1201 (Vt. 1988), *overruled on other grounds* by *Gochey v. Bombardier, Inc.*, 572 A.2d 921 (Vt. 1990).

general sense, the election of remedies under the Code still exists;²⁰⁸ namely, the buyer's alternative remedies under U.C.C. section 2-712, "Cover"; "Buyer's Procurement of Substitute Goods"; U.C.C. section 2-713, "Buyer's Damages for Non-Delivery or Repudiation"; and U.C.C. section 2-714, "Buyer's Damages for Breach in Regard to Accepted Goods." Brooks and Stremitzer do not mention any of these contrary authorities in their discussion of U.C.C. election of remedies.

For the purpose of the election of remedies doctrine, it should be conceded that the U.C.C. is more generous than the common law on its idea of what makes the injured party whole. As will be discussed in subsection III.B below, the U.C.C., in delineating the revoking buyer's remedies for breach, allows recovery for damages based on the buyer's covering on the market along with consequential and incidental damages.²⁰⁹ To this extent, election of remedies is less of a bar to damages than when combined with rescission. The U.C.C. is also necessarily more generous in granting both rescission and damages, because all U.C.C. remedies are remedies "on the contract" unless disclaimed.²¹⁰ Nevertheless, the fundamental principle of the election of remedies doctrine—to preclude double recovery for a single wrong—is still "basic policy" under the U.C.C.²¹¹

Further, the U.C.C. approach closely aligns with the overall objective of the U.C.C.'s remedial system. As stated in U.C.C. section 1-106(1), remedies are to be "liberally administered," but only so that "the aggrieved party may be put in as good a position as if the other party had fully performed."²¹² Therefore, awarding the revoking plaintiff relief for his actual losses to make him whole, consistent with U.C.C. section 1-106(1), comports with both the election of remedies doctrine and the U.C.C. system of relief.²¹³

²⁰⁸ See Patterson, *supra* note 48, at 191 n.70 ("There is still, in the general sense, some election of remedy under the Code."); see also *Gawlick v. Am. Builders Supply, Inc.*, 519 P.2d 313, 314-15 (N.M. Ct. App. 1974) (noting that U.C.C. section 2-714 is not available to a buyer who has effectively revoked acceptance).

²⁰⁹ See U.C.C. § 2-608 cmt. 1 (providing that a buyer's remedy is not limited to electing between revocation and damages).

²¹⁰ See *supra* notes 49-51 and accompanying text (discussing the equitable reasoning behind courts awarding rescission in a contract dispute).

²¹¹ U.C.C. § 2-608 cmt. 1; see also *Head & Seemann, Inc. v. Gregg*, 311 N.W.2d 667, 669 (Wis. Ct. App. 1981), *aff'd*, 318 N.W.2d 381 (Wis. 1982) (indicating that the main purpose of the election of remedies doctrine is to prevent double recovery for the same wrong (citing *Bank of Commerce v. Paine, Weber, Jackson & Curtis*, 158 N.W.2d 350, 352-53 (Wis. 1968))).

²¹² U.C.C. § 1-106(1); U.C.C. § 1-305(a).

²¹³ U.C.C. § 1-106(1); see also *supra* Part III.A (explaining generally the common law election of remedies doctrine). Commentators have noted that the CISG also has a place for election of remedies, because the plaintiff "has the option to choose either avoidance or

B. *The U.C.C., Revocation of Acceptance, and Expectation Damages*

In discussing the U.C.C.'s treatment of revocation of acceptance and monetary redress, the authors strongly object to the combined allowance of expectation damages.²¹⁴ Brooks and Stremitzer rely on U.C.C. section 2-711(2), which deals with the buyer's remedies where the seller either fails to deliver or repudiates the contract.²¹⁵ Next, they point to a casebook commentary, which observes that U.C.C. section 2-721 allows both damages and lost profits when the buyer revokes.²¹⁶ The authors further cite several treatises and law review articles that they believe confirm the U.C.C.'s allowance for revocation of acceptance, as well as full expectation damages.²¹⁷

This section shows that the authors' treatment of the U.C.C. on revocation and damages is incomplete. It further establishes that the U.C.C.'s approach with regard to these combined remedies under its salutary policy in section 1-106 provides a remedy to make the buyer whole, but not to compensate him any further, even when the seller's breach is unjustified.

1. The "Cover" Requirement

The U.C.C. in section 2-711(1) addresses the rejecting or revoking buyer's remedies for money damages.²¹⁸ U.C.C. section 2-711(1) provides that a buyer may cancel the contract and recover the portion of the purchase price already paid.²¹⁹ Additionally, the buyer, under U.C.C. section 2-711(1)(a), may either "cover" and obtain damages pursuant to U.C.C. section 2-712 or recover damages for non-delivery as provided in U.C.C. section 2-713.²²⁰ Either combination of remedies

nonavoidance and thus the power to elect between the two distinct remedial schemes available under the Convention." Flechtner, *supra* note 68, at 68. Brooks and Stremitzer do not mention this observation. See Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 701 n.28 ("The trend *may* be observed internationally in the CISG.") (emphasis added) (citation omitted).

²¹⁴ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 701-02.

²¹⁵ *Id.* at 701-02 n.28.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See also U.C.C. § 2-711(1) cmt. 1 (explaining the purpose of this code provision).

²¹⁹ U.C.C. § 2-711(1). In a related section, under U.C.C. section 2-720, unless a contrary intention appears, an action for rescission may not be construed as a renunciation of any claim for damages. See U.C.C. § 2-720 (providing the effect of cancellation or rescission on claims for antecedent breach under the U.C.C.).

²²⁰ See *Kashi v. Gratsos*, 790 F.2d 1050, 1056 (2d Cir. 1986) (ruling that allowing damages from cover and for non-delivery are cumulative); *Martella v. Woods*, 715 F.2d 410, 414 (8th Cir. 1983) (noting that a breach of contract only entitles the party to the difference between the higher market price and the lower contract price); see also JAMES J. WHITE & ROBERT S.

entitles the buyer to both restitution and damages.²²¹ By contrast, the buyer's alternative under U.C.C. sections 2-714 and 2-715 is to accept the goods despite the non-conformity and to recover damages therefor, including for breach of warranty (U.C.C. section 2-714) and for incidental and consequential damages (U.C.C. section 2-715).²²²

Accordingly, case law is clear that "[a]cceptance damages are not applicable where acceptance has been revoked," which means that a revoking buyer *will not* be entitled to the difference in value between what the buyer received and what had been warranted.²²³ Similarly, U.C.C. section 2-712 does not follow the benefit of the bargain compensation standard of U.C.C. section 2-713, which allows the buyer to recover the difference between the market price at the time when the buyer learned of the breach and the contract price.²²⁴ U.C.C. section 2-713 also provides incidental and consequential damages minus the expenses the buyer saved as a result of the seller's breach.²²⁵ Put another way, the remedies of U.C.C. sections 2-711 and 2-712 prevent the revoking buyer from being overcompensated for his loss.²²⁶ This policy

SUMMERS, UNIFORM COMMERCIAL CODE § 7-3, at 284 (6th ed. 2010) (noting that cover is not a mandatory remedy for the buyer). If the buyer fails to meet the pre-requisites for cover under U.C.C. section 2-712, he is not barred from recovery from any other remedy. *Id.*

²²¹ CORBIN, *supra* note 67, § 55.6.

²²² See *Selectouch Corp. v. Perfect Starch, Inc.*, 111 S.W.3d 830, 834 (Tex. Ct. App. 2003) (explaining a buyer's options when he or she receives non-conforming goods).

²²³ *Costa v. Volkswagen of Am.*, 551 A.2d 1196, 1201 (Vt. 1988), *overruled on other grounds* by *Gohey v. Bombardier, Inc.*, 572 A.2d 921 (Vt. 1990); see also *Felde v. Chrysler Credit Corp.*, 580 N.E.2d 191, 198 (Ill. App. Ct. 1991) ("[U.C.C.] section 2-714 contains no language precluding buyers from seeking the remedy of rescission in appropriate instances due to breaches of warranty . . ."); *Jaramillo v. Gonzales*, 50 P.3d 554, 559 (N.M. Ct. App. 2002) (indicating that a buyer revoking acceptance may not receive damages for breach of warranty). See generally Timothy Davis, *UCC Breach of Warranty and Contract Claims: Clarifying the Distinction*, 61 BAYLOR L. REV. 783 (2009) (discussing the circumstances supporting a buyer's breach of contract action under U.C.C. section 2-711 and the buyer's breach of warranty under U.C.C. section 2-714).

²²⁴ U.C.C. § 2-712.

²²⁵ U.C.C. § 2-713(1); see also *Cetkovic v. Boch, Inc.*, No. 1472, 2003 WL 139779, at *1 (Mass. Dist. Ct. Jan. 13, 2003) ("Perhaps to avoid a windfall, the buyer's damage recovery is to be reduced by the expenses the buyer avoids by not having to perform."); *Watson v. Tom Growney Equip., Inc.*, 721 P.2d 1302, 1305 (N.M. 1986) (holding that the measure of damages is the fair market value of the good minus the contract price).

²²⁶ See *Aubrey's R.V. Ctr., Inc. v. Tandy Corp.*, 731 P.2d 1124, 1131 (Wash. Ct. App. 1987) (noting that a buyer obtaining revocation of acceptance is entitled to return of purchase price and "any expenses incurred by the buyer in reasonable reliance upon the contract, plus incidental and consequential damages arising from the breach"). Additionally, finance charges less any amount saved if buyer is released from future finance charges will also be included. *Id.* The court in *Aubrey's* stated:

The objective behind awarding damages to a buyer who justifiably revokes acceptance is different [from breach of warranty]. [With

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partially resolves Brooks and Stremitzer's concern that the U.C.C. is too generous with expectation damages for the revoking buyer.

In other principles regarding cover, case law recognizes that it is a mechanism that allows the buyer to avoid lost profits where the seller has failed to perform.²²⁷ In responding to the seller's breach, the buyer under U.C.C. section 2-712(1) may cover "by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller."²²⁸ This remedy accords with commercial reality, "because the buyer usually needs the goods he has bargained for, and he covers to realize one of the objects of the initial contract, namely to exchange money for goods."²²⁹ The amount of cover damages, as against the seller, under U.C.C. section 2-712(2) will be based on the difference between the cost of cover and the contract price together, including incidental or consequential damages as defined in U.C.C. section 2-715, but minus the expenses the buyer has saved as a result of the breach.²³⁰ Therefore, in a codification of the rule that a buyer must mitigate damages, the U.C.C. limits the recovery of consequential damages to those amounts that the buyer could not have "obviated by cover."²³¹ Once again, the U.C.C. guards against overcompensation to the buyer.

revocation], the buyer is not merely seeking the benefit of his or her bargain. Rather, the buyer seeks to be restored to the position he or she would have been in if the contract had never been entered into.

Thus, the objective of this remedy is primarily restitution.

Id. (footnote omitted); *see also* U.C.C. § 2-720 (noting that, without clear intentions to the contrary, an action for rescission does not waive the right to seek damages).

²²⁷ *See* Bishop v. Hyundai Motor Am., 52 Cal. Rptr. 2d 134, 138 (Cal. Ct. App. 1996) (interpreting "cover" as a way for parties in commercial transactions to avoid lost profits where they failed to perform).

²²⁸ U.C.C. § 2-712(1).

²²⁹ HAWKLAND UNIFORM COMMERCIAL CODE SERIES § 2-713:1 (2002).

²³⁰ *Compare* Allied Semi-Conductors Int'l, Ltd. v. Pulsar Components Int'l, Inc., 907 F. Supp. 618, 631 (E.D.N.Y. 1995) (noting that damages from cover are the difference between the higher cover cost and the contract price, plus incidental or consequential damages), *with* Export Dev. Can. v. Elec. Apparatus & Power, L.L.C., No. 03 Civ.2063(HBP), 2008 WL 4900557, at *18 (S.D.N.Y. Nov. 14, 2008) (disallowing cover damages when cost of cover is less than contract price).

²³¹ U.C.C. § 2-712 cmt. 3; *see also* Sun-Maid Raisin Growers of Cal. v. Victor Packing Co., 194 Cal. Rptr. 612, 614 (Cal. Ct. App. 1983) (allowing consequential damages only to the extent that they could not be avoided by cover); Panhandle Agri-Service, Inc. v. Becker, 644 P.2d 413, 419 (Kan. 1982) (noting that a buyer's failure to use the remedy of cover when reasonably available will preclude recovery of consequential damages, such as lost profits).

2. Consequential and Incidental Losses

Still other U.C.C. policies limit the revoking buyer's monetary recovery.²³² U.C.C. section 2-715 addresses consequential damages, even when they overlap to an extent with incidental damages. Consequential losses resulting from the seller's breach include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."²³³ The "reason to know" language concerning the buyer's requirements comes from the English decision of *Hadley v. Baxendale*.²³⁴ *Hadley* remains a leading case in the United States on consequential damages, setting out that such damages include lost operating profits of a business.²³⁵

Another important point comes from comment 6 to U.C.C. section 2-715. This comment provides that if the seller knows that the buyer is in the business of reselling the goods, the seller is charged with knowing that the buyer will be selling the goods in anticipation of a profit.²³⁶ Because U.C.C. section 2-715 imposes an objective rather than a subjective standard in determining whether the seller should have anticipated the buyer's needs, the seller's actual knowledge of the

²³² See U.C.C. § 2-715 (defining what should be included as incidental and consequential damages under the U.C.C.).

²³³ *Id.* § 2-715(2)(a). As the court observed in *Petroleo Brasileiro, S.A. v. Ameropan Oil Corp.*,

While the distinction between the two is not an obvious one, the Code makes plain that incidental damages are normally incurred when a buyer (or seller) repudiates the contract or wrongfully rejects the goods, causing the other to incur such expenses as transporting, storing, or reselling the goods. On the other hand, consequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.

372 F. Supp. 503, 508 (E.D.N.Y. 1974) (citation omitted).

²³⁴ 156 Eng. Rep. 145 (1854), cited in WHITE & SUMMERS, *supra* note 70, § 6-5, at 224 & DOBBS, *supra* note 176, § 12.16(4), at 378.

²³⁵ See *Schonfeld v. Hilliard*, 218 F.3d 164, 176 (2d Cir. 2000) (describing lost profits as the most common form of consequential damages). The U.C.C. approach differs from common law lost profits in the sense of the contract market differential. See DOBBS, *supra* note 176, § 12.16(4), at 377 n.1 ("Profits does not refer to a market gain of the kind represented in the contract-market differential but to income from an ongoing set of operations.").

²³⁶ U.C.C. § 2-715 cmt. 6; see also *Canusa Corp. v. A & R Lobosco, Inc.*, 986 F. Supp. 723, 731 (E.D.N.Y. 1997) ("When the aggrieved buyer is in the business of reselling the breaching seller's goods, the buyer may recover the lost profits as consequential damages."); *Larsen v. A.C. Carpenter, Inc.*, 620 F. Supp. 1084, 1131 (E.D.N.Y. 1985) (noting that a buyer may recover lost profits if they were contemplated by the parties).

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buyer's requirements is not required.²³⁷ Instead, "[t]o recover loss of profits plaintiff has the burden to show that he could not have covered."²³⁸ These standards avoid the overcompensation problem posed by Brooks and Stremitzer, because the U.C.C. here goes no further than making the buyer whole as a consequence of the seller's breach.

U.C.C. section 2-715(1) contains another compensation policy as it describes "incidental damages" from the seller's breach to include, but not limited to:

[E]xpenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.²³⁹

Examples of other compensable losses in this category would be interest, finance charges, extra overhead, labor, and expenses.²⁴⁰ This redress to the buyer is eminently fair and avoids the overcompensation feared by Brooks and Stremitzer, because "[t]here is no justice in such a case in compelling [the buyer] to relinquish his actual damages as a condition of getting rid of an obnoxious and useless chattel."²⁴¹

3. Overall U.C.C. Policy

U.C.C. section 1-106 states the overarching policy that all remedies should be liberally construed so that the aggrieved party shall be put in as good a position as if the breaching party had performed, which means that damages are proper where consistent with actual losses.²⁴² A related policy is that "the very essence of a sales contract" is for the existence of

²³⁷ See *Sun-Maid Raisin Growers of Cal. v. Victor Packing Co.*, 194 Cal. Rptr. 612, 615 (Cal. Ct. App. 1983) (explaining the standard that the U.C.C. uses in determining whether the seller should have anticipated the buyer's needs).

²³⁸ *Kanzmeier v. McCoppin*, 398 N.W.2d 826, 833 (Iowa 1987).

²³⁹ U.C.C. § 2-715(1). "The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damage." *Id.* § 2-715 cmt. 1.

²⁴⁰ See *City Nat'l Bank of Charleston v. Wells*, 384 S.E.2d 374, 382-83 (W. Va. 1989) (allowing recovery of these losses combined with revocation under U.C.C. section 2-608).

²⁴¹ *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 310, 326 (1877).

²⁴² See *Allied Cannery & Packers, Inc. v. Victor Packing Co.*, 209 Cal. Rptr. 60, 64 (Cal. Ct. App. 1984) (noting that damages are permitted to put the aggrieved party in as good a position as if the breach had never happened); *Delano Growers' Coop. Winery v. Supreme Wine Co., Inc.*, 473 N.E.2d 1066, 1075 (Mass. 1985) (explaining that remedies under the U.C.C. should be liberally construed and stating that damages should not overcompensate the buyer).

minimum adequate remedies.²⁴³ These doctrines apply equally to the revocation of acceptance remedy. Accordingly, a revoking buyer is permitted not only to avoid the obligation to pay the purchase price, but also to seek those damages that would be available to a non-accepting buyer, including reliance damages stemming from his incidental expenses and his consequential damages that were within the reasonable contemplation of the seller.²⁴⁴ As stated in *Williston on Contracts*, “This is a sensible result since, following the revocation, the buyer is in essentially the same position as if he or she had rejected initially.”²⁴⁵ These recoveries therefore are different from a windfall to the buyer, which is never permissible;²⁴⁶ nonetheless, Brooks and Stremitzer do not mention any of these policies in their critique of the U.C.C.²⁴⁷

On a more fundamental level, the U.C.C. rules on revocation and monetary redress are fair to both buyers and sellers. The U.C.C. in section 1-103 adopts the principles of law and equity when consistent with the Code; this standard is important because “[a] plaintiff electing rescission is entitled to those damages that are necessary to make him whole.”²⁴⁸ To this same end courts have said, “In equity, the court makes the calculated adjustments necessary to do complete justice. If complete justice requires that damages be awarded with the rescission, the court will award them.”²⁴⁹ Where the law has a choice, it should always impose the loss upon the wrongdoer whose conduct has caused the harm rather than upon the innocent party.²⁵⁰ The U.C.C. makes this same choice in fully protecting the revoking buyer’s losses.²⁵¹

²⁴³ *Conte v. Dwan Lincoln-Mercury, Inc.*, 374 A.2d 144, 149 (Conn. 1976) (citing U.C.C. section 2-719 comment 1).

²⁴⁴ See 14 WILLISTON, *supra* note 26, § 40:23, at 89-90 (explaining generally the damages available to a revoking buyer).

²⁴⁵ *Id.*

²⁴⁶ See *Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1345 (Fed. Cir. 2004) (noting that it is never permissible to use restitution to bestow a windfall).

²⁴⁷ See generally Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3.

²⁴⁸ *Landin v. Ford*, 727 P.2d 331, 332 (Ariz. 1986).

²⁴⁹ *Head & Seemann, Inc. v. Gregg*, 311 N.W.2d 667, 672 (Wis. Ct. App. 1981), *aff’d*, 318 N.W.2d 381 (Wis. 1982); see also *Atkins v. Beasley*, 544 S.W.2d 505, 507 (Tex. Civ. App. 1976) (noting that rescission is an equitable remedy and will be allowed if it is necessary to restore full justice).

²⁵⁰ Compare *Amber Res. Co. v. United States*, 73 Fed. Cl. 738, 747 (2006) (suggesting that, when given a choice on which of two parties should receive a windfall, “there is no reason” for a court to confer it upon the party in breach), and *Mayer v. Town of Hampton*, 497 A.2d 1206, 1210 (N.H. 1985) (“[I]t is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim.”), with *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113, 117 (Colo. 1995) (“It is a principle of the law of restitution that one should not gain by one’s own wrong.”) (citation omitted).

²⁵¹ See U.C.C. § 2-719 (2003) (providing the protections available for the revoking buyer).

By contrast, Brooks and Stremitzer never cite the precedents discussed above, which provide that “[t]he only real reason to deny both rescission and damages is the danger of allowing recovery more than once for a single item of loss.”²⁵² The authors further leave out the mandatory nature of U.C.C. section 1-106 and its command to award the revoking buyer his restitution interest, his reliance damages, and his consequential losses, including lost profits where they are attributable to the seller’s wrongful conduct.²⁵³ While the common law in denying profits for rescission places more emphasis on the logical inconsistency between affirming and disaffirming the same contract, the U.C.C. is not subject to this objection because revocation is always an “on-contract” U.C.C. remedy.²⁵⁴ As stated above, the contract contains this remedy as a matter of law unless properly disclaimed.²⁵⁵ The U.C.C. also exemplifies the forward-thinking policy that “[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.”²⁵⁶ Accordingly, Brooks and Stremitzer have not shown that the U.C.C.’s approach to rescission and damages is illogical, overly generous, or a threat to contractual stability.

C. *Should the Contract Price Limit Restitution?: The Case of Boomer v. Muir*

As part of their critique that the restitution after rescission is too generous under current legal doctrine, Brooks and Stremitzer contend

²⁵² Fousel v. Ted Walker Mobile Homes, Inc., 602 P.2d 507, 510 (Ariz. Ct. App. 1979) (quoting DAN B. DOBBS, DOBBS ON REMEDIES 634 (1973)); see also Brandeis Mach. & Supply Co. v. Capitol Crane Rental, Inc., 765 N.E.2d 173, 177 (Ind. Ct. App. 2002) (“[O]ne of the broad remedial goals of the U.C.C. is that the aggrieved party be put in as good a position as if the other party had fully performed, but not in a better position.”).

²⁵³ Compare U.C.C. § 1-106 (explaining the mandatory nature of the damages to be awarded for buyer revocation of a contract), with Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 716 n.70 (noting that the magnitude of a payout allowed under restitution *can* be an incentive to rescind) (emphasis added).

²⁵⁴ See *supra* notes 43–45 and accompanying text.

²⁵⁵ See *supra* notes 43–45 and accompanying text.

²⁵⁶ Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946). The CISG and U.C.C. rules on the measure of damages are very similar. See 1 RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS § 1:32, at 76 (3d ed. 2008) (citing Flechtner, *supra* note 68); see also Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT’L & COMP. L. REV. 279, 303 (1997) (noting that the aggrieved seller can recover the price and incidental costs of replacing the damaged or nonconforming goods). Indeed, courts have held that the U.C.C. principles can be useful analogues in the interpretation of CISG damage requirements when they are similar. See *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995) (explaining that case law interpreting article 2 of the U.C.C. can be helpful in the interpretation of certain CISG provisions when the language of the two are similar).

that restitution can provoke “ex post inefficiency.”²⁵⁷ By this concept, they mean that after the parties make their investments and the value of the exchange is known, a payoff in restitution exceeding the contract price incentivizes the injured party “to search for, or even induce, a cause of rescission.”²⁵⁸ As support, they reference what they deem the “most infamous example” of this scenario, the well-known case of *Boomer v. Muir*, where a subcontractor obtained a judgment in restitution for its incurred costs resulting from the prime contractor’s prevention of the subcontractor’s performance on a hydroelectric dam project.²⁵⁹

Brooks and Stremitzer’s main objection to *Boomer* is that the contract price was \$300,000, and the prime contractor had already paid the subcontractor \$280,000, but the California Court of Appeals nevertheless awarded the plaintiff subcontractor another \$258,000. Brooks and Stremitzer opine, “Hence, Boomer’s expectation damages were \$20,000, which the court disregarded when it ordered Muir to pay him \$258,000 in restitution.”²⁶⁰ The authors further argue that only after the subcontractor realized that it was in a losing contract did it bring the action of rescission and restitution instead of enforcing the contract. Thus, they are particularly critical of the *Boomer* court’s ruling that restitution following rescission should not be limited by the contract price.²⁶¹

As will be shown, Brooks and Stremitzer have misconstrued the facts of this prominent case, because no evidence existed that the subcontractor in *Boomer* acted opportunistically in searching for an excuse to exit the contract or that it had any inkling at the time of the events that a quasi-contractual recovery could exceed a contractual recovery. Instead, Boomer’s enforcement of quantum meruit with recovery above the contract price has a sound legal, normative, and economic grounding.

1. *Boomer v. Muir*: The Court’s Opinion

In *Boomer*, R.C. Storrie & Co. (“Storrie”), a partnership of Robert B. Muir and Robert C. Storrie, had a general contract with the Feather River Power Company to build a hydroelectric dam in California. In a subcontract with H.H. Boomer, with a completion date of December 1, 1927, defendant Storrie’s obligation was to deliver to the dam site all the cement, gravel, sand, steel, and other metal work, which was to become

²⁵⁷ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 716.

²⁵⁸ *Id.* n.70.

²⁵⁹ *Boomer v. Muir*, 24 P.2d 570, 580 (Cal. Dist. Ct. App. 1933).

²⁶⁰ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 716 n.70.

²⁶¹ *Id.* at 716 n.70, 719 & n.83.

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a permanent part of the dam. Boomer's obligation was to furnish all other materials, labor, and equipment. The contract's firm fixed price was \$300,000.

Soon after contract execution, the parties experienced continuing performance disputes regarding the defendant Storrie's failure to furnish compressed air, deliver materials, maintain roads, and conveniently locate a quarry. Boomer continually sought to make the arrangement succeed as the parties renegotiated important contract terms.²⁶² After eighteen months on the job, Boomer finally left the site even though the dam was 95% complete. Boomer quit the contract in frustration because Storrie had persistently prevented Boomer's performance, which caused Boomer to incur significant delays and increased costs. The evidence specifically showed that as late as approximately two weeks before Boomer left the site, Boomer reaffirmed to Storrie his willingness to complete performance, but to no avail.²⁶³

The contract entitled Boomer to receive monthly progress payments for satisfactory work based on a schedule of unit prices. The agreement also entitled Storrie to withhold ten percent of the progress payments for those months where Boomer failed to place a minimum amount of material in the dam. When Boomer finally felt compelled to cease performance after the year and a half of trying to work with the prime contractor, Storrie had paid Boomer all but \$20,000 of the \$300,000 contract price.²⁶⁴

Boomer then filed an action in a California court for rescission and restitution for the value of its partial performance.²⁶⁵ The court found that Storrie had committed an unexcused material breach by failing to provide the requisite materials and the other items and that Boomer justifiably had ceased performance. The evidence also showed that the prime contractor's defaults delayed Boomer's operations and had made performance more expensive. The court made no finding that Boomer had worked inefficiently or had underbid the job so that it would

²⁶² *Boomer*, 24 P.2d at 571-73. Storrie increased the subcontractor's price and the amounts retained, and Boomer agreed to meet new periodic targets for pouring cement. *Id.* at 572.

²⁶³ *Id.* at 572-73. Shortly before terminating performance, Boomer sent Storrie the following telegram on November 27, 1927: "I am prepared to complete my contract on time. Ran out of material last night. Do you want me to hold crew here to put through the three unfinished slabs of the third section? This extra cost must be paid by you. I await your answer today." *Id.* at 573. After waiting unsuccessfully on Storrie's response from December 3-15, 1927, Boomer left the site. *Id.*

²⁶⁴ *Id.* at 572.

²⁶⁵ *Id.* Boomer originally pled two theories in his complaint, rescission and restitution and enforcement of a mechanic's lien upon the dam. *Id.* Upon the defendant's motion, which the court granted, Boomer elected his remedy in rescission and restitution and dropped the count for the mechanic's lien. *Id.* at 572, 579.

inevitably be in a loss status. The court also made no finding that the contract contained what is commonly called a “no damages for delay” clause, which typically provides that no claim shall be made or allowed to the contractor for any damages that may arise out of any delay caused by the owner of a construction project.²⁶⁶ Lastly, the court made no finding that Boomer had breached any of his obligations.²⁶⁷

Ultimately, the trial court granted Boomer a judgment in rescission and restitution for an additional \$258,000 for the market value of his extra labor and materials, which was the difference between Boomer’s costs attributable to Storrie’s delays and other interferences and what Storrie had already paid this subcontractor. Storrie then appealed.

Citing numerous cases throughout its opinion, the California Court of Appeals began by citing the well-settled rule that a contractor in Boomer’s position has a choice of three remedies: (1) action in rescission and quantum meruit, which is a judicially implied-in-law contract that takes the place of the formal contract; (2) an action for enforcement of the contract and a remedy in damages for the delays and expenses; or (3) an action for repudiation that puts the contract to an end and allows a remedy for the unrealized profits.²⁶⁸ Therefore, Boomer’s choice of rescission and quantum meruit was proper.

The *Boomer* court explained that where the plaintiff rescinds the contract as a remedy for breach, such as where the defendant has prevented the plaintiff’s performance, the plaintiff may file an action in quantum meruit to recover the reasonable value of what it had provided in performing under the contract.²⁶⁹ The court observed that the quantum meruit remedy is of “equitable origin” and subject to considerations of “natural justice.”²⁷⁰ Next, the *Boomer* court relied on the nature of rescission as extinguishing ab initio all contract obligations,

²⁶⁶ *Id.* at 573, 579. See generally Maurice T. Brunner, *Validity and Construction of “No-Damage” Clause with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3D 187 (1976) (explaining no damage for delay clauses).

²⁶⁷ *Boomer*, 24 P.2d at 573, 579.

²⁶⁸ See *Lumbermens Mut. Cas. Co. v. United States*, 654 F.3d 1305, 1317 n.9 (Fed. Cir. 2011) (“A recovery in quantum meruit is based on an implied-in-law contract.”); *Newbery Corp. v. Fireman’s Fund Ins. Co.*, 95 F.3d 1392, 1404 (9th Cir. 1996) (noting that quantum meruit “rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice”) (citation omitted); *Campbell v. Nw. Nat’l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex. 1978) (stating that the right to recover under quantum meruit is “based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted”). Similarly, the U.C.C. has not precluded application of quantum meruit. See *J.L. Teel Co. v. Hous. United Sales, Inc.*, 491 So. 2d 851, 861 (Miss. 1986) (applying the quantum meruit theory even in light of the U.C.C.).

²⁶⁹ *Boomer*, 24 P.2d at 573.

²⁷⁰ *Id.* at 575.

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including the price. The court also noted that the contract price is set “on condition that the entire contract be performed,” and, therefore, the contract price should not control in partial performance cases involving restitution.²⁷¹

Along the same lines, in answer to Storrie’s claim that Boomer’s recovery would exceed the \$300,000 contract price (\$280,000 + \$258,000), the court drew upon the equitable nature of quantum meruit. The *Boomer* court observed that the subcontractor deserved this relief because it had acted in good faith and had incurred the extra expenses. Accordingly, the court commented, “Where the defendant undertakes to limit the plaintiff’s recovery by treating the contract price as a limitation upon such recovery, he [by his wrong] is asserting a right under the very contract which he himself has discharged.”²⁷² Given that the contract and its price limitation no longer existed in the eyes of the law, Boomer, under the particular facts, could properly enforce his equitable claim (which was adequately documented) and against which Storrie lacked a meritorious defense.

2. *Boomer v. Muir*: Analysis

Boomer is consistent with established doctrine that a general construction contractor has an implied obligation not to hinder or delay a subcontractor’s performance.²⁷³ As the *Boomer* court correctly indicated, redress above the contract price is proper where the partially performing party, faced with the obstructions of the breaching party, never agreed to exchange his partial performance and extra costs in return for a cap on the original contract price.²⁷⁴ The plaintiff’s right to

²⁷¹ *Id.* at 577.

²⁷² *Id.* (quoting *City of Philadelphia v. Tripple*, 79 A. 703, 706 (Pa. 1911)).

²⁷³ See *Cont’l Masonry Co. v. Verdel Constr. Co.*, 369 A.2d 566, 567 n.1 (Md. 1977) (explaining that generally a contractor has an implied duty not to delay work performed by a subcontractor); *R.C. Tolman Constr. Co. v. Myton Water Ass’n*, 563 P.2d 780, 782 (Utah 1977) (“It is true that there is an implied obligation arising out of a construction contract that the person hiring the work to be done will cooperate with the contractor and will not hinder or delay him in his performance.”) (footnote omitted).

²⁷⁴ *Boomer*, 24 P.2d at 579. Where the injured party has fully performed the contract, however, the contract expectancy is the limit on recovery. See *DOBBS*, *supra* note 176, § 12.7(5), at 802 (“The full performance/liquidated sum rule in effect makes expectancy a ceiling in the cases to which it applies.”); see also *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 37(2), at 613 (2011) (“Rescission as a remedy for breach of contract is not available against a defendant whose defaulted obligation is exclusively an obligation to pay money.”); *RESTATEMENT (SECOND) OF CONTRACTS* § 373(2) (1981) (“The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.”).

quantum meruit exists not because of the contract the parties once had, but because there is no longer a contract.²⁷⁵ Thus, the theory behind quantum meruit is that “[t]he law implies a promise by the party to pay for what has been thus received, and allows him to recover any damage he has sustained by reason of the breach, for this is exact justice.”²⁷⁶

Regarding the remedy, what must always be kept in mind is that “[i]n its very nature rescission implies the extinction of the contract, and, once accomplished, neither party can base any right of recovery upon it.”²⁷⁷ Accordingly, *Boomer* exemplifies the “overwhelming weight of authority” that allows a partially performing plaintiff’s restitutionary

The rationale here is that the price of the contract is a liquidated debt, and the injured party may not claim that the services are worth more than the original agreement. See Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 430 (1992) (“A further limitation on the breaching party’s recovery is that she will not ‘be allowed to recover more than a ratable portion of the total contract price where such a portion can be determined.’”) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 374 cmt. b). But see Andersen, *supra* note 42, at 26–29 (criticizing the full performance rule because the partial/total breach situations are “economically equivalent”).

²⁷⁵ See *James v. Hogan*, 47 N.W.2d 847, 852 (Neb. 1951) (explaining that a seller’s right to return or redelivery extends from the non-existence of a contract); see also *Murdock-Bryant Constr., Inc. v. Pearson*, 703 P.2d 1197, 1202 (Ariz. 1985) (“[R]estitution through an implied-in-law contract . . . [is] imposed for the purpose of bringing about justice without reference to the intentions of the parties.” (quoting *Artukovich & Sons v. Reliance Truck Co.*, 614 P.2d 327, 329 (Ariz. 1980))); *Sneed v. State ex rel. Dep’t of Transp.*, 683 P.2d 525, 528 (Okla. 1983) (“The law requires that every right acquired under a contract be absolutely surrendered as a condition precedent to its avoidance.”).

²⁷⁶ *Hayman v. Davis*, 109 S.E. 554, 556 (N.C. 1921) (citation omitted).

²⁷⁷ *James*, 47 N.W.2d at 852 (citation omitted).

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recovery to exceed the contract rate or price,²⁷⁸ even as the contract price can be evidence of the reasonable value.²⁷⁹

Further analysis proves the logic of the court's approach. This remedy combines elements of preventing both the defendant's unjust enrichment and the plaintiff's unjust impoverishment.²⁸⁰ Boomer also satisfied the requirement that the plaintiff has conferred a benefit upon the defendant, because the benefit here was the value of Boomer's services that Storrie solicited by the contract.²⁸¹ Brooks and Stremitzer

²⁷⁸ Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 44 (1981) (quoting 1 PALMER, *supra* note 31, § 4.4). Cases are numerous in this regard. *E.g.*, *United States v. W. States Mech. Contractors, Inc.*, 834 F.2d 1533, 1539 (10th Cir. 1987); *United States v. W. Cas. & Sur. Co.*, 498 F.2d 335, 338 (9th Cir. 1974); *United States v. Algernon Blair, Inc.*, 479 F.2d 638, 641 (4th Cir. 1973); *United States v. Zara Contracting Co.*, 146 F.2d 606, 610 (2d Cir. 1944); *Johnston v. Star Bucket Pump Co.*, 202 S.W. 1143, 1152 (Mo. 1918); *Smith v. Brocton Preserving Co.*, 296 N.Y.S. 281, 282 (N.Y. App. Div. 1937); *see also Lindquist Ford, Inc. v. Middleton Motors, Inc.*, 557 F.3d 469, 477 (7th Cir. 2009) ("Under quantum meruit, damages are 'measured by the reasonable value of the plaintiff's services' . . . and calculated at 'the customary rate of pay for such work in the community at the time the work was performed.'" (quoting *Mead v. Ringling*, 64 N.W.2d 222, 225 (1954))); *Fairbanks N. Star Borough v. Tundra Tours, Inc.*, 719 P.2d 1020, 1029 n.15 (Alaska 1986) ("[T]he measure of recovery on quantum meruit is the reasonable value of the service rendered to the benefited defendant, and 'not the value of the actual benefit realized and retained by the recipient.'" (quoting *Peavey v. Pellandini*, 551 P.2d 610, 616 (Idaho 1976))).

For a rare decision ruling that the contract price is a cap on restitution, see, *e.g.*, *Johnson v. Bovee*, 574 P.2d 513, 514 (Colo. App. 1978) ("We believe using the contract price as a ceiling on restitution is the better-reasoned resolution of this question.").

²⁷⁹ *See City of Damascus v. Bivens*, 726 S.W.2d 677, 679 (Ark. 1987) ("The contract price is some evidence of the value of the benefit conferred."); *Busch v. Model Corp.*, 708 N.W.2d 546, 552 (Minn. Ct. App. 2006) (explaining that, for the purposes of quantum meruit, "[d]etermination of the 'reasonable value' can be based on the contract price, even though recovery is sought in equity" (quoting *Confer Bros. v. Currier*, 204 N.W. 929, 931 (Minn. 1925))); *Mills Realty, Inc. v. Wolff*, 910 S.W.2d 320, 322 (Mo. Ct. App. 1995) ("[Plaintiff] may rely on the contract as *prima facie* evidence of the reasonable value of services provided."). Further, courts have observed, "As the best means of restoring the *status quo ante*, cost of performance is often used as the basis for determining the amount of *quantum meruit* recovery, in the absence of 'any challenging evidence.'" *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 530 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966).

²⁸⁰ *See Algernon Blair*, 479 F.2d at 641 (explaining that restitution provides a strong case for relief because it involves a combination of unjust impoverishment and gain); *see also W.F. Magann Corp. v. Diamond Mfg. Co.*, 775 F.2d 1202, 1208 (4th Cir. 1985) (indicating that the underlying purposes of quantum meruit are to prevent the breaching party from being unjustly enriched and restore the aggrieved party to the position it occupied before entering the contract). *But see supra* note 36 (noting the debate on this issue).

²⁸¹ *See W.F. Magann Corp.*, 775 F.2d at 1208 ("[A] threshold requirement for recovering *quantum meruit* damages is that the defendant receive the benefit of the plaintiff's performance."); RESTATEMENT (SECOND) OF CONTRACTS § 370 (1981) ("A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance."). *But see Lindquist Ford, Inc.*, 557 F.3d at 477 ("[A] plaintiff can recover under quantum meruit even if he confers no benefit on the defendant."); *Ramsey v. Ellis*, 484 N.W.2d 331, 333 (Wis. 1992)

devote no analysis to the *Boomer* court's use of the above well-settled legal doctrines, especially regarding the nature of quantum meruit. The authors also overlook the line of authority implicitly adverted to in *Boomer* endorsing the use of equitable estoppel against the wrongdoer's attempt to limit the valuation of the injured party's loss.²⁸²

("[R]ecovery in quantum meruit is based upon an implied contract to pay reasonable compensation for services rendered."). Indeed, the law is so protective of the victim's interests that the plaintiff can recover for the value of the services "even if the plaintiff would have lost money on the contract if it had been fully performed." *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720, 730 (2d Cir. 1992); see also *Lindquist Ford, Inc.*, 557 F.3d at 478 ("[T]o recover under quantum meruit, the plaintiff must prove that 'the defendant requested the [plaintiff's] services' and 'the plaintiff expected reasonable compensation for the services.'" (quoting *Ramsey*, 484 N.W.2d at 333)); *United States for Use of Wallace v. Flintco Inc.*, 143 F.3d 955, 965 n.9 (5th Cir. 1998) ("When a general contractor actively interferes with its subcontractor's performance, the subcontractor may treat the contract as rescinded and recover under quantum meruit the full value of work done."); *Murdock-Bryant Constr., Inc. v. Pearson*, 703 P.2d 1197, 1203 (Ariz. 1985) ("What is important is that it be shown that it was not intended or expected that the services be rendered or the benefit conferred gratuitously, and that the benefit was not 'conferred officiously.'" (quoting *Pyeatte v. Pyeatte*, 661 P.2d 196, 203 (Ariz. Ct. App. 1982)); *City of Philadelphia v. Tripple*, 79 A. 703, 706 (Pa. 1911) (explaining that sufficient benefit existed where the promisor "expended the money in good faith and in the course of attempted performance. This is sufficient to give him an equitable claim for reimbursement"); 1 PALMER, *supra* note 31, §§ 1.8, 4.2, at 45-46, 370 (making the specific characterization noted in the text).

The authorities have posed several other tests for this element. In one version, regarding this benefit to the defendant, the award "may as justice requires be measured by either (a) the reasonable value to the other party of what he received . . . or (b) the extent to which the other party's property has been increased in value or his other interests advanced." RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981), *quoted in* *Bernstein v. Nemeyer*, 570 A.2d 164, 169 (Conn. 1990). Another popular standard for measuring the value of the supplier's services is the amount for which the services and materials supplied could have been purchased from one in the supplier's position at the time and place the services were rendered. *W. Cas. & Sur. Co.*, 498 F.2d at 338 (explaining the standard); see also *City of Portland ex rel. Donohue & Fleskes Corp. v. Hoffman Constr. Co.*, 596 P.2d 1305, 1313-14 (Or. 1979) (indicating that the standard is not the value of the benefit conferred upon defendant, but the reasonable value of the contractor's work itself which is a market value measure and not a reimbursement for actual costs). Any of these tests support the result in *Boomer*.

²⁸¹ *United States v. Algernon Blair, Inc.*, 479 F.2d 638, 641 (4th Cir. 1973); see also *W.F. Magann Corp.*, 775 F.2d at 1208 (underlying purposes of quantum meruit are "to prevent the breaching party from being unjustly enriched and to restore the aggrieved party to the position it occupied before entering the contract").

²⁸² See *McLaughlin v. Shamaly*, 26 N.W.2d 733, 734 (Mich. 1947) (explaining a situation where "the defendant was estopped to deny the benefit" (quoting *Hemminger v. W. Assurance Co.*, 54 N.W. 949, 950 (1983))). In *United States v. Behan*, the U.S. Supreme Court expressly adopted the estoppel principle in this circumstance. 110 U.S. 338, 346-47 (1884). The Court further commented:

It does not lie . . . in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced

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Perhaps the authors' most serious error is that they have greatly confused matters by implying that Boomer received a windfall because Boomer's expectation damages would have been the remaining \$20,000 on the contract price of \$300,000 had Boomer brought an action in damages to enforce the contract.²⁸³ Under established principles, the contract price is never a cap on breach damages, because the plaintiff always has the right to recover for those losses fairly anticipated under the contract and the losses that might naturally flow from the breach, such as delay costs and excess labor.²⁸⁴ As another commentator observes:

The error, often committed in cases involving an injured supplier, is asking whether restitution may be awarded in excess of the *contract price*. This question seems to assume, uncritically, that the unpaid portion of the contract price is synonymous with the expectation interest of the injured supplier—an assumption that often is incorrect.

....

The material breach leading to [contract] cancellation very often consists, at least in part, of the owner's (or general contractor's) breach of these obligations. When that occurs, the contractor (or subcontractor) may be palpably injured by delays in the job, having to work around other contractors, or other difficulties. Under

fairly and in good faith to lay out and expend, (including his own services,) after making allowance for the value of materials on hand . . . unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.

Id. at 345–46.

²⁸³ See Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 716 n.70 (noting the authors' views on *Boomer*).

²⁸⁴ See *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F. Supp. 187, 191 n.5 (W.D. Va. 1997) (explaining generally a plaintiff's rights during a breach of contract claim); see also *S. Leo Harmonay, Inc. v. Binks Mfg. Co.*, 597 F. Supp. 1014, 1036–37 (S.D.N.Y. 1984) (noting that a subcontractor is entitled to damages for delay, including extra material costs, excess equipment costs, and additional labor costs); *Moore Constr. Co. v. Clarksville Dep't of Elec.*, 707 S.W.2d 1, 14–17 (Tenn. Ct. App. 1985) (stating that a contractor is also entitled to damages for delay, including extra supervisory costs and loss of the use of equipment).

Yet another way of looking at the prime contractor's hindrance and delays of the subcontractor in *Boomer* is that the prime's interference with the subcontractor was a constructive change to the contract entitling the subcontractor to an equitable price adjustment. See *Metric Constr. Co. v. United States*, 81 Fed. Cl. 804, 817–18 (2008) (stating that the subcontractor is entitled to a price adjustment in equity when the conduct of the prime contractor can be considered a constructive change in the contract).

standard principles of contract damages, the owner or general contractor owes compensatory damages to the subcontractors for those injuries, separate and apart from the unpaid contract price. Whether those damages are characterized as “consequential” or “incidental damages,” or as a loss in value of the primary performance owed by the party in breach, they demonstrate that the unpaid contract price is but one component of the victim’s expectation interest.²⁸⁵

Accordingly, Brooks and Stremitzer have failed to consider that it is only when the supplier’s entire loss consists of the unpaid portion of the purchase price will restitution equal the supplier’s expectation interest.²⁸⁶

The above analysis shows that the *Boomer* court’s allowance of quantum meruit recovery above the contract price stands on firm legal grounding. It also has persuasive normative force. As one commentary on *Boomer* observes:

The proposition, announced and followed in the cases considered, that a defendant who interferes with and prevents good faith performance by the plaintiff cannot use the contract to limit plaintiff’s recovery is sound. When the rule is otherwise, the defendant is allowed to preserve the terms of a hard bargain which he himself failed to keep and to use them to prevent a plaintiff who made a good faith effort to perform from being restored to the position he occupied before entering performance. Such a rule rewards the defendant who did not observe the contract by giving the benefit of the effort and expenditures above the contract price at the expense of a plaintiff who made a bona fide attempt to perform. *A rule which rewards the party who breached the contract at the expense of the party who made a bona fide attempt to perform a bad bargain is unfair and contrary to concepts of justice.*²⁸⁷

²⁸⁵ Andersen, *supra* note 42, at 22–23 (footnotes omitted).

²⁸⁶ See generally Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3.

²⁸⁷ Austin C. Wilson, Comment, *The Contract Price as a Limit on a Quantum Meruit Recovery*, 27 TEX. L. REV. 44, 52 (1948) (emphasis added); see also 1 PALMER, *supra* note 31, § 4.4, at 392 (“[I]t would be a gross miscarriage of justice to award this same prospective gain to the defendant, through deduction from the plaintiff’s recovery, when the defendant is the party guilty of a breach of contract.”). The breaching party of the contract is the wrongdoer and must accept the consequences of his actions. See *id.* at 269–73 (explaining

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Lastly, regarding the economic aspects of the remedy, some authors have argued that granting the injured party restitution above the contract price creates three related incentives for both parties.²⁸⁸ First, the buyer understands that the seller strongly desires contract completion, and, therefore, the buyer could be tempted to hold up performance by seeking unjustified price or performance concessions from the seller.²⁸⁹ The possibility that the seller could obtain a remedy above the contract price tends to discourage such opportunistic behavior, which would otherwise result in an unfair advantage to the buyer.²⁹⁰ Second, the possibility of a restitutionary remedy discourages inefficient breaches, i.e., where a breaching party causes harm to the injured party without being forced to pay a properly-calibrated amount of damages and where the external, social harm outweighs the breaching party's private benefits.²⁹¹ This specter of a restitutionary remedy above the contract price is both an expensive negative sanction that deters breach and a positive enticement for the seller to enforce any benefits it negotiated with the original contract.²⁹² Third, the restitutionary remedy encourages efficient contracting that might otherwise occur by allowing the parties to take advantage of asymmetries of information.²⁹³ More specifically, the seller usually knows the quality of the goods or services better than the buyer, and, therefore, the seller is better able to calculate the odds that it will do good enough work that would increase its business reputation or the incidence of buyer reciprocity.²⁹⁴ Other commentators agree that a "fault-based economic theory offers a

that the basis for awarding damages to the plaintiff is that the breaching party pay for his conduct); see also Bernard E. Gegan, *In Defense of Restitution: A Comment on Mather, Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 57 S. CAL. L. REV. 723, 728 (1984) (noting that the breaching party should be precluded from seeking the protection of the contract). Case law sounds these same themes. *E.g.*, *Schwasnick v. Blandin*, 65 F.2d 354, 359 (2d Cir. 1933) ("Justice demands no more than that the promisor shall not profit at the promisee's expense."); *Johnston v. Star Bucket Pump Co.*, 202 S.W. 1143, 1153 (Mo. 1918) ("To permit him to use his breached contract to limit a recovery against him would be to pay to him a premium for his own wrong. The law does not contemplate such."); *City of Philadelphia v. Tripple*, 79 A. 703, 706 (Pa. 1911) ("The owner, on the other hand, has deprived himself of the legal right which would have sufficed to defeat the equity. He accordingly stands defenseless in the presence of the builder's claim.").

²⁸⁸ See Wendy J. Gordon & Tamar Frankel, Comment, *Enforcing Coasian Bribes for Non-Price Benefits: A New Role for Restitution*, 67 S. CAL. L. REV. 1519, 1541-50 (1994) (explaining the incentives for granting restitution to the non-breaching party).

²⁸⁹ *Id.* at 1541.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 1541-42.

²⁹² *Id.*

²⁹³ *Id.* at 1542.

²⁹⁴ *Id.*

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satisfactory explanation of *Boomer* because of the inequity of forcing the faultless seller to pay for unanticipated costs above the contract's firm fixed price that the buyer has directly caused by its material breach.²⁹⁵

Although commentary is divided on the *Boomer* result and reasoning, the facts in *Boomer* demonstrate the subcontractor's consistent good faith performance and the prime contractor's obstruction of those efforts.²⁹⁶ Contrary to the impression left by Brooks and Stremitzer, no

²⁹⁵ George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1305 (1994).

²⁹⁶ Brooks and Stremitzer fail to mention that not every commentator views *Boomer* as an outlier in the law. There is a split among academics with regard to their support for or opposition to *Boomer*. Compare DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 648-51 (3d ed. 2002), Kull, *supra* note 1, at 1471-83, and Perillo, *supra* note 278, at 44-45, with Cohen, *supra* note 295, at 1304-08, Gordon & Frankel, *supra* note 288, at 1523-24, and Wilson, *supra* note 287, at 52.

The commentators opposing *Boomer* are mainly concerned that (1) rescission is a fiction (there is no mutual restoration), because the case is really about breach of contract, and therefore courts cannot ignore the contract's allocation of risks and benefits for measuring the supplier's recovery, and (2) restitution here was supra-compensatory and therefore punitive. See Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2041 nn. 48-49 (2001) (providing ten reasons against the rule formulated in *Boomer*).

My first response is that the debate misses the point on whether *Boomer* is a proper example of rescission versus breach of contract. Irrespective of the theoretical underpinnings of the remedies, the judicial task is to provide the injured party a fair remedy and "[n]ot quibble about the analytical construct." See *First Annapolis Bancorp, Inc. v. United States*, 89 Fed. Cl. 765, 799 (2009) (citations omitted) (recognizing a similar point about whether restitution focuses on the detriment to the injured party or the gain to the breaching party). The *Boomer* court properly did not get bogged down in this detail. But, even still, the *Boomer* case in the larger sense is indeed about rescission if one applies the overriding concept that "[t]he term rescission refers to the avoidance of the transaction or the calling off of the deal." DOBBS, *supra* note 176, § 4.3(6), at 615. It is also true that restoration to the status quo is not an inexorable command of restitution but is a matter of judicial discretion. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. a (2011); see also *Ennis v. Interstate Distrib., Inc.*, 598 S.W.2d 903, 906 (Tex. Civ. App. 1980) ("[R]estoration is not indispensable."). Moreover, even if the *Boomer* case is sub silentio about breach of contract, the facts show that the *Boomer* court properly awarded *Boomer* its expectation interest. See *supra* notes 283-86 and accompanying text (explaining the mandatory nature of expectation damages for the non-breaching party).

My next response to the opponents is that judicially allocating the contractual risk of non-performance to one party or the other in forging a remedy for rescission and restitution is no longer relevant; quantum meruit to support restitution is not based on the intentions of the parties or their prior agreement. See *supra* notes 273-82 and accompanying text (describing the history and basis behind quantum meruit recovery). The plaintiff experiencing a material breach has an undoubted right to avoid the transaction, and necessarily the rescinded contract which, as courts have repeatedly observed, is annihilated for all purposes. See *supra* note 33 (providing cases supporting the notion that the rescinded contract is no longer in effect). Moreover, in quantum meruit, the plaintiff is simply seeking relief for the market value of the requested services (along with reasonable incidental expenses and minus payments previously received), which were a benefit to the defendant. This rule is fair to both sides in that the seller's extravagances or

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evidence existed of subcontractor opportunism or machinations to escape performance. The *Boomer* decision has been good law in California for eighty years without criticism from any California court or indeed from any other court in the United States. The likely reason is the case's sound legal, normative, and economic foundations, which promote both sides' good faith performance to the ultimate benefit of the contracting system. Accordingly, Brooks and Stremitzer have not proven their argument that the plaintiff's recovery in restitution exceeding the contract price creates a possible windfall for partially performing promisors or inherently tends to incentivize opportunistic rescission.²⁹⁷

D. Restitution, Reliance, and Disgorgement

After considering the various avenues of relief potentially available to the rescinding buyer—reliance, restoration, disgorgement, and specific performance—Brooks and Stremitzer state that “the remedy in restitution following rescission should be limited to restoration of price or other conferred benefits to the promisor under the contract.”²⁹⁸ The most intriguing aspects of their analysis are their equivocal rejection of reliance damages and their failure to address disgorgement in any substantial fashion.

1. Reliance Damages in Restitution

Brooks and Stremitzer acknowledge that accepted legal doctrine reimburses the rescinding buyer's expenditures made in reliance on the

unnecessary services will make it improper for the courts to rely upon the seller's costs as evidence of the work's value to the owner. *United States v. Behan*, 110 U.S. 338, 345–46 (1884) (explaining why recovery in quantum meruit is equitable to both sides). Thus, placing the parties in the status quo ante and transitioning them to quantum meruit is a neutral default position that achieves the corrective justice goal of restitution. See Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 VA. L. REV. 59, 108 (2007) (“The basic idea underlying corrective justice is that people have a duty to remedy wrongful losses they inflict on others.”).

Ironically, Brooks and Stremitzer do not question the remedy of quantum meruit and freely accept the prevailing definition of rescission as “eliminating all obligations under the contract.” Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 692 n.2. This position should have led to the authors' support of *Boomer*.

²⁹⁷ The authors further omit that “[t]he opportunistic use of rescission is barred, within traditional doctrine, by a rule that a claimant seeking to rescind must give notice of the election to do so with reasonable promptness after learning of the grounds for rescission.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 cmt. k.

²⁹⁸ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 693; see also *id.* at 719 (noting that promisees should be prohibited from recovering any sums beyond the purchase price); *id.* at 725 (“Rescission should come at a price.”).

contract.²⁹⁹ Some common instances of reliance costs, as cited by the authors, are the buyer's expenses in transporting defective goods back to the seller or for repairing the buyer's other property injured by the seller's defective goods.³⁰⁰ While they question how the rationale supporting this recovery can be consistent with contract doctrine if the contract has been abrogated, they do not tarry on the legal point. Their rationale for not arguing the point further is that "[r]eliance . . . is available both on and off the contract" and has "long been granted under restitution."³⁰¹ Notably, they also fail to mention the moral aspects of placing the economic burden of reliance expenditures not on the breaching party, but on the injured party.

Instead, Brooks and Stremitzer question the availability of reliance losses on economic grounds.³⁰² They first state that the possibility of the buyer's award of reliance and restoration should deter the seller's breach of contract.³⁰³ On the other hand, Brooks and Stremitzer claim "it is clear" that the buyer has a greater monetary incentive to disaffirm if he rescinds and gets both restoration of the purchase price and his reliance expenses, as opposed to recouping just the purchase price.³⁰⁴ Oftentimes, they note, there will be no reliance expenses where the buyer has not made any investments except for the purchase price, which would lower the buyer's incentive to rescind.³⁰⁵ Therefore, the authors are equivocal on the validity of reliance losses in restitution, stating that this area would be "[a] fruitful avenue of future research."³⁰⁶ They also seem unaware that their ambiguous analysis of reliance losses contradicts their repeated assertion that restoration of the price and any other benefits provided to the seller should be the buyer's sole recourse in restitution.³⁰⁷

Some background on reliance damages is first needed for a response to the authors' critique on this subject. Brooks and Stremitzer correctly indicate that an established principle of the remedy of rescission is to restore the injured party by requiring the breaching party to compensate

²⁹⁹ *Id.* at 719, 726.

³⁰⁰ *Id.* at 718 n.79.

³⁰¹ *Id.* at 719, 726; *see also* *Amber Res. Co. v. United States*, 73 Fed. Cl. 738, 742 (2006) ("[R]estitution in the context of express contracts is merely a subset of reliance damages.").

³⁰² Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 725–26.

³⁰³ *Id.* at 726.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 693. "Hence, the final point of our argument: the remedy in restitution following rescission should be limited to restoration of price or other conferred benefits to the promisor under the contract." *Id.*

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the injured party's reliance damages.³⁰⁸ What they do not mention is that these damages encompass those foreseeable, actual expenditures made in preparation or in performance of the contract with no requirement that the breach itself caused the losses or that they have benefited the breaching party.³⁰⁹ Courts also hold that "rescission and restorative damages are consistent remedies which work together to restore the injured party to his precontract position."³¹⁰ In this way, reliance costs do not represent the plaintiff's loss of the benefit of the bargain in the sense of expectation damages. When a plaintiff does receive a recovery in reliance, a court awards only the net reliance loss, such that if the plaintiff had reaped a benefit from those expenditures, the defendant will receive a credit.³¹¹ In essence, courts award these damages to the plaintiff "for the purpose of undoing the harm which his reliance on the defendant's promise has caused him."³¹²

³⁰⁸ See *CBS, Inc. v. Merrick*, 716 F.2d 1292, 1296 (9th Cir. 1983) (explaining that, in rescission cases, a plaintiff may recover reliance damages); *In Re DeRosa*, 98 B.R. 644, 649 (Bankr. D.R.I. 1989) (noting that when an agreement is deemed to be rescinded, reliance damages are awarded).

³⁰⁹ See *Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1309 (Fed. Cir. 2004) ("As reliance damages, the non-breaching party 'may recover expenses of preparation of part performance, as well as other foreseeable expenses incurred in reliance upon the contract.'" (quoting *CALAMARI & PERILLO*, *supra* note 55, § 14.9)); *RESTATEMENT (SECOND) OF CONTRACTS* § 349 (1981) (explaining that damages based on reliance interest includes "expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed"); see also *1 PALMER*, *supra* note 31, § 4.8, at 434-37 (discussing the recovery of damages in connection with restitution).

One authority asserts that reliance damages are always foreseeable. *DOBBS*, *supra* note 176, § 12.16(4), at 377-82 ("Essential reliance expenses are always within the parties' contemplation."); see also *IT Corp. v. Motco Site Trust Fund*, 903 F. Supp. 1106, 1134 (S.D. Tex. 1994) (explaining that plaintiff's reliance damages were the reasonable value of the expenditures it actually incurred and not the projected profits on the contract); *Amber Res. Co. v. United States*, 73 Fed. Cl. 738, 746 (2006) ("Reliance, in short, attempts to make the injured party whole by reimbursing it for amounts expended, even if they do not benefit the breaching party."). The *Restatement (Third) of Restitution and Unjust Enrichment* supports the award of reliance or incidental damages in rescission cases. See *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 37(2) & cmt. c (2011) ("Damages measured by the claimant's expenditure can be included in the accounting that accompanies rescission, in order to do complete justice in a single proceeding.").

³¹⁰ *Head & Seemann, Inc. v. Gregg*, 311 N.W.2d 667, 673 (Wis. Ct. App. 1981), *aff'd*, 318 N.W.2d 381 (Wis. 1982); see also *First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 386 S.E.2d 245, 248 (S.C. 1989) ("Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore him to the position occupied prior to the making of the contract.").

³¹¹ See *DOBBS*, *supra* note 176, § 12.3(1), at 51-52 ("[T]he reliance damages recovery is a recovery for net reliance loss, so that the defendant is credited with any benefit the plaintiff receives from the expenditures in reliance.") (footnote omitted).

³¹² *Amber Res. Co.*, 73 Fed. Cl. at 744 (quoting *Fuller & Perdue*, *supra* note 45, at 53-54).

While they criticize the doctrinal basis for reliance damages, Brooks and Stremitzer do not consider any of its precepts that show the consistency with notions of restitution. The award of reliance damages is fully in sync with rescission, because “[a] buyer is not returned to the ‘precontract’ position if he or she is not allowed, in a proper case, to claim any additional amount he or she has incurred in reliance on the contract.”³¹³ Brooks and Stremitzer overlook that reliance expenses are also awardable in rescission cases as a matter of equitable jurisdiction. Courts have stated that “[c]omplete and full justice is a fundamental doctrine of equity jurisprudence, and if damages, as well as rescission, are essential to accomplish full justice, they will both be allowed.”³¹⁴ In this manner, the law allows trial courts broad discretion to fashion flexible equitable remedies on a case-by-case basis to make the injured party whole.³¹⁵ This principle has particular resonance with rescission and restitution being a “flexible, equitable remedy,” where the defendant “is obliged by the ties of natural justice and equity to make compensation for benefits received.”³¹⁶

More fundamentally, conspicuously absent from Brooks and Stremitzer’s analysis is any mention of the moral imperative for reimbursing reliance damages. The moral problem arises because “[r]eliance losses . . . may be valueless to the promisee.”³¹⁷ With these reliance losses, “the promisee is now in a worse position than he would have been had only his expectations been thwarted. Not only has he lost these hoped-for gains but also he has suffered a decrease in assets.”³¹⁸

³¹³ *Aubrey’s R.V. Ctr., Inc. v. Tandy Corp.*, 731 P.2d 1124, 1131 (Wash. Ct. App. 1987); *see also CBS, Inc.*, 716 F.2d at 1296 (“When a breach occurs after the execution of the contract, the injured party in a contract action is entitled to both restitution and reliance damages.”).

³¹⁴ *Holland v. W. Bank & Trust Co.*, 118 S.W. 218, 218 (Tex. Civ. App. 1909); *see also Maruca v. Phillips*, 90 A.2d 159, 161 (Conn. 1952) (“The governing motive of equity in the administration of its remedial system is to grant full relief.” (quoting *Nichols v. Nichols*, 66 A. 161, 164 (Conn. 1907))); *Sidney Stevens Implement Co. v. Hintze*, 67 P.2d 632, 638 (Utah 1937) (“Where necessary to effect complete justice, equity will award to the party not in default his expenses necessarily incident to contract.”); *Head & Seemann, Inc.*, 311 N.W.2d at 672 (“If complete justice requires that damages be awarded with the rescission, the court will award them.”).

³¹⁵ *See Umphres v. J.R. Mayer Enters., Inc.*, 889 S.W.2d 86, 91 (Mo. Ct. App. 1994) (“Courts in equity must remain free to consider all equitable considerations and to fashion flexible remedies to meet the needs of justice on a case by case basis.”); *see also Cal. Fed. Bank v. United States*, 395 F.3d 1263, 1267 (Fed. Cir. 2005) (“Contract remedies are designed to make the nonbreaching party whole.”).

³¹⁶ *Murdock-Bryant Constr., Inc. v. Pearson*, 703 P.2d 1197, 1202 (Ariz. 1985) (internal quotation marks omitted) (citation omitted).

³¹⁷ Robert J. Nordstrom, *Restitution on Default and Article Two of the Uniform Commercial Code*, 19 VAND. L. REV. 1143, 1145 (1966).

³¹⁸ *Id.*

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Accordingly, by restoring this equilibrium, the reliance remedy helps to achieve corrective justice between the parties, which is the very aim of rescission and restitution.³¹⁹ In diverse areas, moreover, given the choice, the law places liability for loss upon the wrongdoer and not his innocent victim.³²⁰ The concept has equal relevance in contract disputes, including recovery in restitution following a rescission for breach. The reason is that many jurisdictions in the United States have called the contract breaker a “wrongdoer” and the other party the “victim.”³²¹ Forcing the innocent buyer to bear the expense inflicted by a seller’s unexcused breach of contract undermines this general tenet of American jurisprudence regarding liability for wrongdoing.

2. Disgorgement in Restitution

Brooks and Stremitzer mention several times that disgorgement of the wrongdoer’s profits made as a consequence of the breach is one possible remedy in restitution. For example, the authors recognize that “if the promisor exploited to great gain the monies briefly held as a consequence of the contract, restitution may call for disgorgement as a means of returning that party to the status quo ante.”³²² Despite this recognition, however, they do not explain why they would ultimately

³¹⁹ See Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 55 (2003) (explaining that “corrective justice” remedies correct the wrong that the plaintiff has suffered at the hands of the defendant); see also *In re DeRosa*, 98 B.R. 644, 648 (Bankr. D.R.I. 1989) (noting that the purpose of rescission is to “restore both parties to their former position as far as possible and to bring about substantial justice by adjusting the equities between the parties” (quoting *Runyan v. Pac. Air Indust.*, 466 P.2d 682, 691 (Cal. 1970))) (internal quotations omitted); *Bernstein v. Nemeyer*, 570 A.2d 164, 169 (Conn. 1990) (“The award of a restitutionary remedy for breach of contract depends upon a showing of what justice requires in the particular circumstances.”).

³²⁰ Cf. *Wild W. Radio, Inc. v. Indus. Claim Appeals Office of Colo.*, 886 P.2d 304, 306 (Colo. App. 1994) (“In every legal loss-distribution mechanism, there are two things to be accomplished: first, to make the victim whole, and second, to see to it as far as possible that the ultimate loss falls on the actual wrongdoer, as a matter of simple ethics and as a deterrent to harmful conduct.”) (citation omitted); *Vertentes v. Barletta Co.*, 466 N.E.2d 500, 506–07 (Mass. 1984) (Abrams, J., concurring) (“[T]he moral idea [is] that the ultimate loss from wrongdoing should fall upon the wrongdoer.”) (citation omitted).

³²¹ See Steven W. Feldman, *Autonomy and Accountability in the Law of Contracts: A Response to Professor Shiffrin*, 58 DRAKE L. REV. 177, 184 nn.27–28 (2009) (citing results of a Westlaw search showing that forty-six states, ten federal circuits, and the U.S. Supreme Court have used the term “wrongdoer” to describe the breaching party and that twenty states, seven federal circuits, and the U.S. Supreme Court have used the term “victim” to describe the injured party).

³²² Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 718 (footnote omitted).

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reject disgorgement as a form of restitutionary relief.³²³ This oversight is especially puzzling because disgorgement has recently attracted significant discussion in the restitution literature. Indeed, the authors have cited several of the most prominent pieces, and Professor Brooks himself has written a full length article endorsing disgorgement.³²⁴

The first response to Brooks and Stremitzer's position on disgorgement is that by rejecting this remedy in rescission cases and by endorsing only restoration of the purchase price and other benefits conferred upon the defendant, the authors fall into the error of establishing a one-size-fits-all restitution formula. Courts have specifically rejected this type of thinking in rescission actions based on its quintessentially "equitable" nature.³²⁵ In a basic principle of equitable authority, "the decision to award a remedy for rescission for breach of contract always depends upon a showing of what justice requires in the particular circumstances, and thus necessarily rests in the discretion of the trial court."³²⁶

The second response is that emerging case law unmentioned by Brooks and Stremitzer supports disgorgement in rescission and restitution actions. While the general rule is that a mere breach of contract will not make a defendant liable for return of the profits it achieves as a consequence of the breach,³²⁷ except where the parties have a confidential or fiduciary relationship,³²⁸ it is also true that in certain

³²³ See *id.* at 692, 718 (eliminating disgorgement as a proposed remedy and suggesting that restoration of price is the best form of restitutionary relief without providing reasons for the rejection of disgorgement).

³²⁴ See *id.* at 700 n.26 (citing E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985)); Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 TEX. L. REV. 1879 (2001)); see also Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 573 (2006) (arguing that a promisee should be given the choice between requiring the promisor to perform or disgorging the promisor of his benefit from the breach).

³²⁵ See, e.g., *Anderson v. Doms*, 75 P.3d 925, 929 (Utah. Ct. App. 2003) (rejecting the notion that any "one precise formula . . . applies to all rescission cases").

³²⁶ *Petrucelli v. Palmer*, 596 F. Supp. 2d 347, 374 (D. Conn. 2009) (quoting *Diamond v. Marcinek*, 632 A.2d 46, 47 (Conn. App. Ct. 1993)); see also *Far W. Fed. Bank, S.B. v. Office of Thrift Supervision-Dir.*, 119 F.3d 1358, 1367 (9th Cir. 1997) ("The proper measure of restitution depends on the particular circumstances of a given case. It is within the trial court's discretion to determine the measure of restitution that justice requires.").

³²⁷ See *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1194 (Colo. App. 2011) ("[G]enerally a mere breach of contract will not make a defendant liable for return of the profits . . ."); see also *Burger King Corp. v. Mason*, 710 F.2d 1480, 1494 (11th Cir. 1983) ("[D]isgorgement of profits earned is not the remedy for breach of contract.").

³²⁸ See *UDV N. Am., Inc. v. Tequila Cuervo La Rojena, S.A.*, No. 00-50609, 2001 WL 1223638, at *10 (5th Cir. Sept. 26, 2001) ("[D]isgorgement is not available as a remedy for breach of contract unless the contracting parties have a confidential or fiduciary relationship.").

circumstances an injured party in a rescission action may recover profits obtained by the breaching party under a remedy of disgorgement.³²⁹ While the body of law is limited on this subject, the leading case is the Colorado Supreme Court's decision in *EarthInfo, Inc. v. Hydrosphere Resource Consultants, Inc.*³³⁰

In *EarthInfo*, the parties had a contract to exploit information collected by governmental agencies.³³¹ The payment terms were for fixed fees and royalties.³³² The trial court found that EarthInfo had breached the contract by wrongfully withholding royalty payments on derivative products.³³³ Further, the breach was substantial, damages would be inadequate, and rescission was appropriate.³³⁴ The trial court therefore required EarthInfo to pay the net profits it had realized from the date it stopped making royalty payments until the rescission date.³³⁵

The Colorado Supreme Court upheld the disgorgement of profits and stated the applicable standard:

[T]he [trial] court must resort to general considerations of fairness, taking into account the nature of the defendant's wrong, the relative extent of his or her contribution, and the feasibility of separating this from the contribution traceable to the plaintiff's interest. . . . Thus, the more culpable the defendant's behavior, and the more direct the connection between the profits and the wrongdoing, the more likely that the plaintiff can recover all defendant's profits. . . . The trial court must ultimately decide whether the whole circumstances of a case point to the conclusion that the defendant's retention of any profit is unjust.³³⁶

³²⁹ See *Watson*, 254 P.3d at 1195 (“[L]iability in restitution with disgorgement of profits is an alternative to liability for contract damages measured by injury to the promisee.”).

³³⁰ 900 P.2d 113 (Colo. 1995).

³³¹ *Id.* at 115–16.

³³² *Id.* at 116.

³³³ *Id.*

³³⁴ *Id.* at 116–17.

³³⁵ *Id.*

³³⁶ *Id.* at 119 (citations omitted); see *Dastgheib v. Genentech, Inc.*, 438 F. Supp. 2d 546, 552 (E.D. Pa. 2006) (stating that disgorging the profits, which would be inequitable for defendant to retain, is appropriate in certain circumstances); *Univ. of Colo. Found., Inc. v. Am. Cyanamid Co.*, 153 F. Supp. 2d 1231, 1233 (D. Colo. 2001) (holding that disgorgement was within the court's discretion to provide the plaintiffs with a complete remedy); see also *Gassner v. Lockett*, 101 So. 2d 33, 34 (Fla. 1958) (holding for disgorgement in the sale of land context); *Foss v. Heineman*, 128 N.W. 881, 885 (Wis. 1910) (upholding disgorgement relief in a breach of contract context).

The result in *EarthInfo* is supportable on several grounds. Consistent with the view that restitution is not punitive,³³⁷ disgorgement—an equitable remedy—does not punish the defendant.³³⁸ Instead, it requires him to “yield up gains that it cannot justly retain” and to restore the wrongdoer to the position he should have occupied but for the breach.³³⁹ Indeed, disgorgement in a broad sense is always the objective of restitution, because the latter remedy takes from the defendant and gives to the plaintiff.³⁴⁰ Disgorgement also serves a deterrent function of

In a famous example of disgorgement and breach of contract, a former CIA agent published a book about his work for the agency but breached his CIA contract without obtaining pre-clearance. *Snapp v. United States*, 444 U.S. 507, 507–08 (1980). Because the former agent’s breach of contract was also a breach of his fiduciary duty, the Court held him liable in restitution for all profits he realized on the book. *Id.* at 508–09. The law further recognizes the legitimacy of disgorgement in that courts generally use the promisor’s profits as the measure of relief when those profits tend to define the plaintiff’s losses. As stated in *Seymour v. McCormick*,

[T]he general rule is that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement; and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendants had not interfered with his rights.

57 U.S. 480, 483 (1853); see also *Cincinnati Siemens-Lungren Gas Illuminating Co. v. W. Siemens-Lungren Co.*, 152 U.S. 200, 204–07 (1894) (quoting *Seymour*, 57 U.S. 483).

³³⁷ See *Glick v. Campagna*, 613 F.2d 31, 38 n.6 (3d Cir. 1979) (“Actions of restitution are not punitive.” (quoting *Brooks v. Conston*, 72 A.2d 75, 79 (Pa. 1950))).

³³⁸ See *Tull v. United States*, 481 U.S. 412, 424 (1987) (noting that the disgorgement of improper profits is traditionally considered an equitable remedy); see also *S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (“Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws.”).

³³⁹ Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 S.M.U. L. REV. 1577, 1625 (2002); see also *Laurin v. DeCarolus Constr. Co.*, 363 N.E.2d 675, 679 (Mass. 1977) (stating that disgorgement is not punitive, “it merely deprives the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make”); Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 561 n.3 (2006) (“[P]erfect disgorgement’ is ‘a sanction that restores the wrongdoer to the same position that she would have been in but for the wrong’ and thus ‘strips the agent of her gain from misappropriation and leaves her no better or worse than if she had done no wrong.’”) (quoting ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 234 (3d ed. 2000)); Scott L. Watson, Note, *Winstar Damages: Restitution Where Benefit Conferred on the Defendant Is Greater than Plaintiff’s Out-Of-Pocket Cost*, 94 NW. U. L. REV. 305, 330 (1999) (“Basic equitable principles necessitate that where one party must profit from a breach, it should be the non-breaching party.”).

³⁴⁰ See *Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846, 852 (Okla. 1987) (“Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to ‘disgorge’ his gains.”) (footnote omitted). “Where a wrongdoer is shown to have been a conscious, deliberate misappropriator of another’s commercial values, gross profits are recoverable through a restitutionary remedy.” *Id.* (footnote omitted). See also *Old Stone Corp. v. United States*, 63 Fed. Cl. 65, 75 (2004), *rev’d in part on other grounds*, 450 F.3d 1360 (Fed. Cir. 2006) (explaining that restitution is primarily a demand for disgorgement). In their seminal

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discouraging opportunistic breach,³⁴¹ because disgorgement “gives teeth to the long-standing case law principle” of *pacta sunt servanda*, i.e., that promises are to be kept.³⁴² Otherwise, to reject disgorgement on a wholesale basis undermines the contracting system, because “the anomalous result would be to legitimate a kind of private eminent domain (in favor of a wrongdoer) and to subject the claimant to a forced exchange.”³⁴³

The utilitarian version of this observation is that “a promisor who wishes not to perform owes a moral duty of respect to the promisee to seek a mutual accommodation, rather than to unilaterally breach and thereby convert the promisee from a voluntary actor to an involuntary litigant.”³⁴⁴ As the *Restatement (Third) Of Restitution and Unjust Enrichment* also points out, “The broader function of disgorgement . . . is not merely to frustrate conscious wrongdoers but to reinforce the stability of the contract itself, enhancing the ability of the parties to negotiate for a contractual performance that may not be easily valued in money.”³⁴⁵ In all these respects, the promisee bringing the lawsuit is ideally situated as society’s representative, similar to a private attorney general, to deprive the promisor of his ill-gotten gain and to uphold the legal and moral objective that promises are meant to be kept and not broken.³⁴⁶

articles on restitution, Fuller and Perdue repeatedly use the term “disgorge” in defining the restitution interest. See Fuller & Perdue, *supra* note 45, at 54–55 n.2; L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 2, 46 YALE L.J. 373, 393–94 (1937).

³⁴¹ See Caprice L. Roberts, *Restitutory Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991, 995 (2009) (examining whether disgorgement will actually deter the breaching party’s behavior); see also *Snepp*, 444 U.S. at 515 (stating that disgorgement is a reliable deterrent to breach); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 cmt. c (2011) (supporting disgorgement against a conscious wrongdoer for both moral reasons and for the creation of adequate incentives for lawful behavior); *Id.* § 39(3) (accepting disgorgement as a remedy for opportunistic breach). Caprice L. Roberts has provided thoughtful analyses of restitutory disgorgement under the new *Restatement (Third) of Restitution and Unjust Enrichment*. See generally Caprice L. Roberts, *Restitutory Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131 (2008); Caprice L. Roberts, *A Commonwealth of Perspective on Restitutory Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945 (2008).

³⁴² Weinrib, *supra* note 319, at 73; see also *Panitz v. Panitz*, 799 A.2d 452, 459 (Md. Ct. Spec. App. 2002) (“It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept.”).

³⁴³ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 cmt. c.

³⁴⁴ Eisenberg, *supra* note 339, at 580.

³⁴⁵ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. b.

³⁴⁶ Brooks and Stremitzer acknowledge that plaintiffs that recover the purchase price in restitution are “typically entitled” to interest on the price for the time defendants held this money. Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 718 n.80. The longstanding policy for allowing a plaintiff prejudgment interest—generally a matter of statute—is that the defendant has harmed the plaintiff by depriving him of the opportunity

The nascent development of disgorgement as a restitutionary remedy, recognized by the *Restatement (Third) Of Restitution and Unjust Enrichment*, comports with fundamental rules of damages.³⁴⁷ The law recognizes that courts have flexibility, as dictated by the interest of justice, to apply these rules on damages, which are all merely “useful guides” that are “subject to modification and adjustment, just as were the antecedent rules they have modified and replaced.”³⁴⁸ Allowing disgorgement where justified is backed by established case law that each case is *sui generis*, whereby the law upholds the animating principle that damage awards as a response to breach prevent similar harms in the future.³⁴⁹ This emerging acceptance of disgorgement as a remedy in rescission and restitution is just another example in the common law

to forego the use of these funds. See *Scholz v. S.B. Int'l., Inc.*, 40 S.W.3d 78, 82 (Tenn. Ct. App. 2000) (explaining that the rationale behind allowing prejudgment interest is not to punish the wrongdoer, but to compensate the wronged party for the use of the money that he should have received earlier). Also, the general rule is that if a claim is liquidated, prejudgment interest follows as a matter of right, but if the claim is unliquidated, the allowance of this interest is a matter of the trial court’s discretion. See *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 328 (6th Cir. 2011) (“Under Kentucky law, if the claim is liquidated, interest follows as a matter of right, but if it is unliquidated, the allowance of interest is in the discretion of the trial court.” (quoting *Hale v. Life Ins. Co. of N. Am.*, 795 F.2d 22, 24 (6th Cir. 1986))). This well-established rule on pre-judgment interest is a first cousin of disgorgement, because in both instances courts award the plaintiff a monetary recovery in excess of the purchase price.

³⁴⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39; see also Eisenberg, *supra* note 339, at 559–62 (providing comprehensive arguments that contract law should and does protect a plaintiff’s disgorgement interest). See generally Sidney W. DeLong, *The Efficiency of a Disgorgement as a Remedy for Breach of Contract*, 22 IND. L. REV. 737 (1989) (arguing that a broad disgorgement remedy undermines cost avoidance goals); Steve Thel & Peter Siegelman, *You Do Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies*, 52 WM. & MARY L. REV. 1181 (2011) (explaining generally that disgorgement is a part of standard contract doctrine).

³⁴⁸ CORBIN, *supra* note 67, § 55.6; accord *Kempfer v. Automated Finishing, Inc.*, 564 N.W.2d 692, 704 n.10 (Wis. 1997) (supporting the notion that contract law has flexibility and that courts have discretion in applying the law) (citation omitted); see also *Cassinis v. Union Oil Co. of Cal.*, 18 Cal. Rptr. 2d 574, 583 (Cal. Ct. App. 1993) (stating that equitable remedies will be asserted as the complexities of the changing times increase) (quoting *Bertero v. Nat’l Gen. Corp.*, 62 Cal. Rptr. 714 (Cal. Ct. App. 1967)). The *Cassinis* court also provided:

[E]quity has contrived its remedies “so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,” and “has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirement of every case”

Id.

³⁴⁹ See *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 277 Cal. Rptr. 40, 47–48 (Cal. Ct. App. 1990) (“[E]ven more than in the case of other rules of law, [the damages rules] must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.”).

tradition. With their implicit categorical rule that disgorgement should not be available in rescission cases, Brooks and Stremitzer would hamstring this flexibility in the administration of remedies for breach of contract.

E. Restitution, Rational Choice Theory, and Relational Contracting

While this Article is devoted primarily to Brooks and Stremitzer's treatment of the legal aspects of rescission and restitution, some commentary is appropriate regarding the economic foundations of the authors' reform proposals. In addressing the economic effects of rescission and restitution, Brooks and Stremitzer establish a model of contracting behavior that repeatedly reflects the perspective of "rational" buyers and sellers:

Rational parties, we argue, would often desire a right of rescission followed by restitution even if damages were fully compensatory and costless to enforce. The mere presence of a threat to rescind, even if not carried out, exerts an effect on the behavior of parties. Parties can enlist this effect to increase the value of contracting. To illustrate, consider the situation of a seller of goods who knows that the buyer has a right to rescind the contract if the goods are defective. Since rescission is generally disfavored by the seller, she will try to reduce its incidence. The seller knows that rescission occurs only when the contract price is more than the goods' value, as measured by expectation damages. That is, the buyer will want to rescind only when the contract is a losing one: when the value that the buyer derives from the goods is less than the price that he paid for them. . . . By lowering the price, the seller can reduce the likelihood that the buyer will want to rescind the contract, and by investing in the quality of the goods, the seller can reduce the probability that the buyer will have the legal right to do so.³⁵⁰

³⁵⁰ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 699 (footnotes omitted). For other references to the contracting choices the authors believe that "rational" parties will make, see *id.* ("The effect of rescission on quality investments may often be desired by rational parties as they strive to increase the value of their contracting relationship."); *id.* at 700 n.23 (noting the sequence of decisions "rational" parties make on the equilibrium path); *id.* at 711 (describing the decision by a "rational seller" in making

The authors employ an elaborate array of equations to support these theories.³⁵¹ Because they repeatedly place emphasis on rational actors, they implicitly subscribe to the doctrine sometimes used in economics called “rational choice theory.”³⁵² The basic assumption of this school of thought is that actors are rational maximizers, i.e., persons who try to get the most out of their resources.³⁵³

This form of rational determinism posits that actors always seek wealth/profit maximization and cost minimization.³⁵⁴ The defining features of this approach are that participants (1) maximize their utility (2) from a stable set of preferences and (3) accumulate an optimal amount of information and other inputs in a variety of markets.³⁵⁵ The authors’ heavy reliance on these “intuitions” about the hypothetical rational actor drives Brooks and Stremitzer’s (empirically unsupported) notions that highly liberalized rights of rescission and greatly restricted rights of restitution will motivate the seller to (1) reduce the likelihood of promisee rescission by investing to enhance the quality of performance and (2) minimize the buyer’s possible use of rescission by lowering prices.³⁵⁶

investments as compared with the seller’s payoff); and *id.* (discussing the price levels that “rational parties should set”). Interestingly, Brooks and Stremitzer do not specifically acknowledge their adherence to rational choice theory.

³⁵¹ These theories include the “Seller’s Payoff as a Function of Produced Quality,” “Seller’s Payoffs with Low Warranted Quality,” “Effect of Renegotiation on Buyer’s Payoffs,” and “Seller’s Payoffs Under Cumulative Concurrence and Renegotiation.” *Id.* at 706, 711, 723, 724.

³⁵² Jacob Jacoby, *Is it Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory*, 6 ROGER WILLIAMS U. L. REV. 81, 85 (2000).

³⁵³ *See id.* at 87 (“[R]ational behavior dictates that one seek to maximize utility.”).

³⁵⁴ *See id.* at 99 (“Rational maximization, in turn, may be defined as seeking ‘wealth/profit maximization’ and ‘cost minimization.’”).

³⁵⁵ *See id.* at 100-01 (explaining the key features of the rational choice theory). The Article explains:

Implicit in Rational Choice Theory are a number of key assumptions. Among these are: (1) objective criteria exist that enable one to differentiate rational from irrational; (2) the differences between organizational behavior and individual (consumer) behavior are negligible; (3) consumer behavior is predicated upon consciously considered factors; (4) consumer behavior is predicated solely upon rational considerations; (5) consumers make their choices from among “a stable set of preferences;” (6) consumers always seek to maximize utility[;] (7) in maximizing utility, consumers consider the risks involved; (8) when not presumed, satisfaction can easily be assessed; and (9) information provision will translate into information impact.

Id. But *see id.* at 101-22 (strongly disputing these assumptions).

³⁵⁶ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 693, 715, 724. The authors further claim that “the buyer will want to rescind only when the contract is a losing

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Many commentators have extensively debunked the notion that contracting parties consistently proceed exclusively or even primarily on rational motivations,³⁵⁷ and several writers have gone so far as to say that economic explanations of contract are a “failure.”³⁵⁸ Common observation further tells us that contracts are not strictly formed or performed based on economic formulas or the strict terms of the contract, either explicitly or implicitly. “[P]sychological variables, sociological variables, cultural variables, [and] environmental variables . . . will often override economic considerations.”³⁵⁹ Rather than maximize utility in decision-making, actors typically will settle—“satisfice”—for the best solution among a limited number of choices.³⁶⁰

one: when the value that the buyer derives from the goods is less than the price that he paid for them.” *Id.* at 699. To the contrary, the buyer often can have legitimate reasons for rescission for issues unrelated to the quality of the goods. Thus, courts have approved buyer revocation of acceptance where the seller was unable to furnish a clear certificate of title. See 67 AM. JUR. 2D *Sales* § 1057 & n.5 (2003) (citing numerous cases that have upheld this notion).

³⁵⁷ E.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213–25 (1995) (noting that while rational-actor psychology is the foundation of the standard economic model of choice, the empirical evidence shows that this model often diverges from the actual psychology of choice because of the parties’ bounded rationality, irrational disposition, and defective capabilities); Danielle Kie Hart, *Contract Law Now – Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 47–59 (2011) (persuasively arguing individuals do not necessarily act rationally in the marketplace and contracts are not always the product of informed choice); Jacoby, *supra* note 352, at 126 (“Rational Choice Theory is a simplistic theory having little correspondence with the real world of (individual) consumer behavior.”) (footnote omitted); Alan M. White, *Behavior and Contract*, 27 LAW & INEQ. 135, 135, 171 (2009) (explaining that rational choice theory does not describe the real behavior of consumers and sellers); see also Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67 (2002) (arguing that the alleged greater realism of behavioral law and economics as compared with rational choice theory is more illusion than reality).

³⁵⁸ See Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 832 (2007) (“Economic accounts of the current doctrine governing contract damages have failed, and the nature of that failure places limits on the role of economics in an integrated theory of contract law.”); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 830 (2003) (“[T]he economic approach does not explain the current system of contract law, nor does it provide a solid basis for criticizing and reforming contract law.”).

³⁵⁹ Jacoby, *supra* note 352, at 85.

³⁶⁰ Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 300 n.161 (2011).

The capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world The human mind adapts to these shortcomings by developing unconscious cognitive shortcuts that generally make it easier to make sense of new situations even in the absence of complete information. Thus, rather than maximiz[ing] their choices, humans

Therefore, while rational economic concerns clearly will play a role for most persons most of the time, as will the strict contract terms, parties generally make contracting decisions based on the transaction in context of the parties' relationship and the other surrounding factors and circumstances.

Indeed, parties will sometimes reach their decisions on biased, incorrect, or missing information, and irrational emotional considerations might well rule the day. The dollar value of and the need for the contract, the general state of the parties' business, the need to uphold business reputations, the parties' views of business morality, and the nature and reliability of their prior course of dealings will all commonly enter into the parties' calculation regarding contract performance and the possibility of rescission. Some sellers might give less consideration to rescission where the buyer has demanded a refund in a rude and disrespectful way, but give more consideration to this remedy when the buyer has requested rescission in a polite and considerate manner. Because buyers and sellers commonly consider a particular agreement in the wider context of their general needs and objectives, their decisions on a single contract might not be tied to the advantages or disadvantages of an individual sale or purchase.

Other factors come into play as well. As a motivator of a decision to rescind, the contract price also can be more or less important to the parties depending on their individual business circumstances, just as contract quality can be more or less important to the parties depending on the particular party's definition of the value of the bargain. Another important point is that the person who purchases for the purpose of resale, a category unmentioned by Brooks and Stremitzer, is in a transaction with entirely different motives and goals than the typical buyer because the former actor is both a buyer and a seller.³⁶¹ Brooks and Stremitzer's narrow focus on individual transactions to the exclusion of the full context of the parties' general needs and objectives is the major shortcoming in their economic analysis.³⁶²

consider only a few possible courses of action and satisfice, choosing to settle for a solution that is adequate.

Id. (citations omitted) (internal quotation marks omitted).

³⁶¹ The seller here also has different potential liabilities. See *Harbor Hill Lithographing Corp. v. Dittler Bros., Inc.*, 348 N.Y.S.2d 920, 924 (N.Y. Sup. Ct. 1973) ("[T]he Code and commentary . . . make quite clear that resale circumstances put the seller on notice of potential exposure to liability for lost profits.").

³⁶² The reporter for the *Restatement (Third) of Restitution and Unjust Enrichment* has argued to the contrary of Brooks and Stremitzer's views. See Andrew Kull, *supra* note 1, at 1501-18 ("[C]ontracting parties would not, however, agree *ex ante* to a right of rescission as a remedy for every material breach[.]"). While they reject Kull's analysis, Brooks and Stremitzer do not answer Kull's critique in any meaningful way. See Brooks & Stremitzer,

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Another school of thought has a superior, empirically-supported understanding of contracting behavior that does give proper weight to contracts in context. As Stewart Macaulay has argued in an influential series of articles,³⁶³ contracts are always more than a paper document and its terms and conditions. To business persons, reciting contract clauses to one another in an adversarial setting is seldom viewed as a reasonable way of solving a contract dispute or for deciding whether to stay in the relationship. Indeed, purchasing agents, sales personnel, and

Remedies on and off Contract, *supra* note 3, at 696 n.11, 700 n.24 (rejecting Kull's position on the right to rescission); see also Jacoby, *supra* note 352, at 91 (commenting that the established principle from economics that sellers may have valid reasons not to lower prices so they can avoid a signal of (1) lower quality and prestige or (2) that the item was going to be discontinued and replaced by a more advanced model). Apart from economic considerations, buyers also may reject a transaction for social policy reasons, such as those consumers placing significant emphasis on the seller's environmental program.

³⁶³ E.g., Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000); Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465 (1985); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Stewart Macaulay has reviewed my Article and seriously doubts the premises of Brooks and Stremitzer's proposal:

(1) Many times the buyer really is a collection of people. Why do we assume that the purchasing agent or the production engineers even would learn about whether restitution could be combined with an expectation damages remedy in case [of] breach? They do know that there might be a contract there, and this means that the seller might be able to cause some kind of annoying trouble. But why learn details about something unlikely to happen? If these people don't know about the law, how can it have an incentive effect? Of course, lawyers can tell them, but how much power do lawyers have over the day to day buying and selling in most corporations? Except in unusual situations, lawyers run meaningless rituals. If this is true, details like restitution plus lost profit will have little incentive effects. (2) In most supply chain situations, there is a powerful sanction that is much more important than law—reputation. A firm that doesn't honor its promises, both express and implied, doesn't get too much repeat business. There are norms supported by the sanction of a loss of profit in the future. Sales people often act as the buyer's "agent" within the sales personnel's own corporation. They lobby to treat customers very well. *This means that in many cases the kinds of incentives that the two authors talk about is not very important if important at all.*

E-mail from Stewart Macaulay, Malcolm Pitman Sharp Professor & Theodore W. Brazeau Professor, University of Wisconsin, to author (April 11, 2012) (on file with the author) (emphasis added). In a similar vein, Douglas Laycock observes that dollars and cents do not always drive the decision to rescind, noting that plaintiffs may choose to rescind "[b]ecause of personal preferences not reflected in market values." Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 942 (2012).

other vendor and vendee employees may see the written contract as a formality created only to please the demands of lawyers.

This view of contract ties back to the nature of modern day bargains. Most commercial contracts contain extensive boiler-plate written in dense and technical language that is not meant to be read or well-understood by the buyer (or even the seller in many instances) on such important topics as disclaimers of warranties, limitations of liability, and other seller-friendly exculpatory clauses. Nevertheless, promisees and promisors frequently assume there are exceptions or qualifications to the written terms that are not worth the effort to spell out in advance. Business persons are rarely fully cognizant of key principles of contract law and seldom face contract litigation.³⁶⁴ Indeed, the buyer might not even be aware of any right to rescind a contract based on a breach.³⁶⁵ The reality is that many reasons exist for why the paper deal is often ignored, misunderstood, or discounted and how it fails to capture the actuality of contractual decision-making.³⁶⁶

Except for one brief footnote allusion,³⁶⁷ Brooks and Stremitzer do not refer in any substantive detail to these real world aspects of contracting. Instead, the authors bank on a one-size-fits-all theory, theorizing that every party largely explicitly or implicitly subscribes to rational and even mechanical cost-benefit economic analyses as the moving force in performing or rescinding their agreements. By contrast, courts and commentators have observed that it is “extremely common”³⁶⁸ that contracts will have a “relational” aspect, i.e., they involve parties who are presently performing a long-term contract or have dealt with one another repeatedly in the past and are likely to do so in the future.³⁶⁹ Robert Gordon has aptly explained relational contracting as where:

³⁶⁴ See generally Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, *supra* note 363.

³⁶⁵ See 1 CONSUMER LAW SALES PRACTICE AND CREDIT REGULATION § 259 (2011) (noting that consumers frequently are unaware of their U.C.C. right to revoke acceptance).

³⁶⁶ See DOBBS, *supra* note 176, § 12.1(1).

³⁶⁷ See Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 697–98 n.14 (stating that rescission could be more likely with a plaintiff that has particular personal preferences in market values or where the plaintiff has lost confidence in the defendant and the transaction).

³⁶⁸ Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, *supra* note 363, at 64; see also *infra* notes 369–72 (illustrating the idea that relational principles play a substantial role in contracting).

³⁶⁹ Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, *supra* note 363, at 64. As one commentator has pointed out, all contracts “tend to fall along a relational-discrete continuum,” because some contracts have more relational elements than others. Hart, *supra* note 357, at 53 n.286. Thus, all contracts are relational, because even one-time contracts have relational elements. *Id.*

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parties treat their contracts more like marriages than like one-night stands. Obligations grow out of the commitment that they have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate. In bad times parties are expected to lend one another mutual support, rather than standing on their rights; each will treat the other's insistence on literal performance as willful obstructionism; if unexpected contingencies occur resulting in severe losses, the parties are to search for equitable ways of dividing the losses; and the sanction for egregiously bad behavior, is always, of course, refusal to deal again.³⁷⁰

All these insights point to the empirically-confirmed view that contract performance will frequently rest more on relational norms than upon strict legal or economic considerations.³⁷¹ As several commentators

³⁷⁰ Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569 (1985). As just indicated, the late Professor Ian Macneil was also a highly influential proponent of relational contract doctrine. See IAN R. MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* 9 (David Campbell ed., 2001) (providing one of his many scholarly writings on the subject); see also Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contracting Theory to Domestic Violence*, 2010 BYU L. REV. 515, 538-44, 554-621 (2010) (providing a summary of relational contracting principles). See generally Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823 (2000) (noting various relational contracting approaches).

³⁷¹ See Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 16-24 (1992) (verifying the prevalence of relational contracting in an empirical study); Zamir, *supra* note 296, at 128 n.183 ("Numerous studies have indicated that the fear of legal sanctions is only one incentive to keep contractual promises (along with short- and long-term self-interest motivations, social norms, and moral sentiments), and not necessarily the most powerful one."); *Woolsey v. Funke*, 24 N.E. 191, 192 (N.Y. 1890) ("There is no surer way to find out what parties meant than to see what they have done."); see also *Baldwin Piano, Inc. v. Deutsche Wurlitzer GmbH*, 392 F.3d 881, 885 (7th Cir. 2004) ("Because these long-term relations produce continuing profits for both sides, both have something to lose by taking the exit option without trying to work out differences first."); *Mor-Cor Packaging Prods., Inc. v. Innovative Packaging Corp.*, 328 F.3d 331, 336 (7th Cir. 2003) ("Many, we suspect most, material breaches are forgiven, either in the hope that they will be cured or because self-help (as through termination) or legal remedies would cost the victim of the breach more than they were worth."); *Becho, Inc. v. United States*, 47 Fed. Cl. 595, 604 (2000) ("Commercial reality suggests that, in some circumstances, a contractor may wish to remain silent in the face of what it perceives to be abusive . . . conduct in order to get paid promptly or to maintain a valuable customer relationship."). See generally Cambee's

have pointed out, “There are some empirical data to suggest that U.S. businessmen in some regions will perform their contracts because they value honor and reputation over money no matter how much they might lose.”³⁷² These well-known and accepted principles of relational contracting are missing in Brooks and Stremitzer’s analysis.

Furthermore, Brooks and Stremitzer do not acknowledge that when parties encounter shortcomings in the contract language or problems with performance (even serious deficiencies), parties commonly do not seek to exit the contract or even to modify their contracts formally. It also may occur that the contract states that the terms will be adjusted in light of a potential contract breach or changed circumstances. For example, federal government contracts will include such a clause providing that if a described event occurs, such as a change in the designs, drawings, or specifications, the terms will be equitably adjusted.³⁷³ Even absent such a clause, the likelihood of party flexibility during the course of performance and the frequent uncertainty or ambiguity of the contract itself will be a major buffer against the possibility of rescission. Consistent with Gordon’s view of relational contracting, the critical point missed by Brooks and Stremitzer is that almost all parties when signing a contract honestly commit to performance and rarely think about the possibility of rescission. Each party makes the tacit assumption that even with a serious breach, both sides will proceed in good faith and will cooperate in resolving disputes short of contract cessation and possible litigation. As courts understand through long experience, the parties exhibit a “natural wariness” before entering an agreement, but upon making the contract, the parties expect a “cooperative enterprise” and higher levels of mutual trust.³⁷⁴

The U.C.C. is in line with these practical insights into contract relations. As stated in U.C.C. section 2-609, comment 1, “[T]he essential purpose of a contract . . . is actual performance and [parties] do not bargain merely for a promise, or for a promise plus the right to win a

Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 173 n.10 (8th Cir. 1987) (noting the concept of “relational contracts”). Without using the term “relational,” the above analysis shows that courts have employed several of the underlying principles as early as the nineteenth century.

³⁷² Gordon & Frankel, *supra* note 288, at 1531 & n.47.

³⁷³ See, e.g., 48 C.F.R. § 52.243-1 (2010) (providing an example of this kind of regulation).

³⁷⁴ *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 594–95 (7th Cir. 1991); see also Zamir, *supra* note 296, at 131 n.191 (“[T]ypically the parties’ actual intentions are to treat each other according to the prevailing norms of reasonableness, fairness, and cooperation, rather than according to the written text of the formal agreement, and that, for this reason, application of former norms is also efficient.”).

lawsuit . . .”³⁷⁵ In actuality, contrary to their asserted thesis favoring liberal rights of rescission, the authors actually endorse a more restricted right of rescission in practice—rescission should not be available as the buyer’s “dominant strategy” but should exist primarily to disincentivize the rational seller from breach of contract.³⁷⁶ In other words, the authors offer the conflicted theory that parties should enjoy broad rights of rescission—so long as they are not frequently exercised.

As Nobel Prize winning economist Milton Friedman once observed, “The only relevant test of the validity of a hypothesis is comparison of prediction with experience.”³⁷⁷ Accordingly, by offering the empirically unsupported contentions that many, if not all, parties in a contract dispute: (1) understand and rely heavily on the written contract terms; (2) seek bargaining leverage based on the possibility of avoiding or seeking rescission; (3) strongly base their purchasing or selling strategy on the relation between rescission, price, and quality considerations; (4) place little importance on non-legal norms and informal practices in responding to breach; and (5) disregard the full context of their individual needs and objectives. Brooks and Stremitzer’s theories provide an inaccurate and incomplete portrayal of the relational world of contract.

IV. CONCLUSION

Brooks and Stremitzer’s proposal to restructure the law of rescission and restitution has numerous legal and economic shortcomings.

As reflected in the U.C.C. and other federal and state policies, the authorities are much more liberal in allowing rescission than the authors’ descriptions. Brooks and Stremitzer’s reliance on the material breach doctrine as a regulator of rescission is unpersuasive because this vague doctrine is inherently unreliable for fact-finders as a means to determine the right of withdrawal. Perhaps more importantly, they do not mention that common mercantile practice favors buyer rescission on a no-questions-asked basis under generous circumstances, because many merchants are less interested in strictly enforcing individual contracts and more interested in maintaining good customer relations for future purchases. Brooks and Stremitzer’s thesis suffers seriously from these oversights. All told, the law in this area properly reflects a principle of

³⁷⁵ U.C.C. § 2-609 cmt. n.1 (2011). See generally Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789 (1993) (arguing that the U.C.C. incorporates attributes of relational contract theory).

³⁷⁶ Brooks & Stremitzer, *Remedies on and off Contract*, *supra* note 3, at 702.

³⁷⁷ Christopher P. Guzelian, *Scientific Speech*, 93 IOWA L. REV. 881, 888 n.27 (2008) (quoting economist Milton Friedman).

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fair redress, whereby the consistent thread is a liberal grant of rescission to help parties achieve their reasonable expectations. Except for clarification of the material breach doctrine, no major doctrinal changes are needed to achieve this goal.

Brooks and Stremitzer's analysis of restitution after rescission is similarly problematic. Regarding the election of remedies between rescission and damages, the authors fail to distinguish the election doctrine in the common law and U.C.C. settings. This Article has shown that each version in its own way protects against overcompensation to plaintiffs. As for the authors' objection that the U.C.C. inappropriately allows expectation damages along with rescission, the U.C.C. and its case law support the opposite conclusion that these combined remedies make the injured party whole as against the seller's wrongdoing. The next flaw in their argument is their (equivocal) rejection of reliance damages, because, under Brooks and Stremitzer's analysis, the law should burden the innocent party with the loss created by the breaching party. Next, the authors' failure to explain their opposition to disgorgement is puzzling, especially in view of the strong normative and legal support for this remedy in the proper circumstances. Last, the authors' treatment of the economic issues is unsatisfactory, because Brooks and Stremitzer necessarily rely on the largely discredited rational choice theory to the near-total exclusion of relational contracting principles.

Ultimately, the authors' proposal to limit restitution after rescission to restoration of the contract price and other benefits conferred is faulty because Brooks and Stremitzer's economic and legal premises for their reform lack merit. The authors have overlooked the well-established principle that rescission and restitution are equitable remedies that defy a one-size-fits-all solution. Instead, the law must avoid rigid formulas and remain free to fashion flexible remedies that meet the ends of justice on a case-by-case basis.