

The Restoration Interest and Damages for Breach of Contract

Eric G. Andersen

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MARYLAND LAW REVIEW

VOLUME 53

1994

NUMBER 1

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Articles

THE RESTORATION INTEREST AND DAMAGES FOR BREACH OF CONTRACT

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INTRODUCTION

Over the course of half a century, the expectation, reliance, and restitution "interests" have come to determine the way we think about contract remedies. Their vitality is due in large part to the brilliant and influential article by Fuller and Perdue,¹ "often acclaimed [as] the best, or the most influential, or the most important, contracts article ever written."² It has been said of the article that "[n]o scholarly work during the period between the first and second Restatement of Contracts had more impact on the law of contracts"³ Moreover, from a practical point of view, "[t]he interest analysis has . . . become standard fare in law school classrooms and in legal writing about contract remedies. Although explicit judicial recognition has been less widespread, the few decisions that have employed the analysis enjoy a 'leading case' prominence that give it the feel of established doctrine."⁴

This Article critically re-examines Fuller's tripartite regime of remedial interests. It accepts that the tripartite regime serves an essential role as a foundation for contract remedies, but argues that such an

1. Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages:1*, 46 YALE L.J. 52 (1936) [hereinafter Fuller & Perdue, *The Reliance Interest Part 1*]; Lon L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages:2*, 46 YALE L.J. 373 (1937) [hereinafter Fuller & Perdue, *The Reliance Interest Part 2*].

2. Todd D. Rakoff, *Fuller and Perdue's The Reliance Interest as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203, 204 (1991).

3. Robert E. Hudec, *Restating the "Reliance Interest,"* 67 CORNELL L. REV. 704, 704 (1982).

4. *Id.* at 705.

analytic device falls short of completing contract law's remedial structure. In particular, the tripartite regime fails to produce an adequate system of damages to remedy a material breach of contract. That problem is better resolved by a bipartite model of damages. In the bipartite model, the *expectation interest* stands at one pole. It represents, for the injured party, the economic consequences of full contractual performance. At the opposite pole is the *restoration interest*, which returns the breach victim to the economic position he occupied before the contract was made. The expectation and restoration interests pull logically and intuitively in opposite directions, one looking forward to the fulfillment of the duties created by the contract and the other looking backward to the *status quo ante*. This bipartite model, rather than Fuller's tripartite model, defines the basic remedial alternatives for measuring damages for a material breach of contract.

The best way to investigate the expectation-restoration model is to examine cases in which a breach victim claims damages that exceed the expectation interest. Part I of this Article reviews the ways in which conventional contract law and scholarship have dealt with such claims. Although some useful rules apply to particular factual settings, at a more general level the decisions of the courts, and the theories used to justify them, become deeply incongruous.

Part II of this Article introduces the restoration interest. Notwithstanding the nominal judicial acceptance of the Fullerian tripartite regime, courts have intuitively recognized, as the alternative to expectation damages, a remedy fully based on neither restitution nor reliance, as these interests are conventionally understood. When courts find that expectation damages are inadequate, they often grant relief that restores the injured party to the legal and economic circumstances that existed prior to contract formation. The basis for that remedy is the restoration interest. Although related in important ways to reliance and restitution, it is distinct from each of them, as discussed in more detail in Part II of this Article. The restoration interest consists of three remedial elements: *restitution* to the injured party of the net benefit conferred upon the breacher under the contract; *compensation for other losses* the breach victim has suffered, within the constraints applicable to contract damages generally; and *discharge of executory obligations* of the victim under the contract.

Part III of this Article addresses the relationship between the expectation and restoration interests. A general rule, strongly respected in practice, is that one injured by a breach of contract is entitled to damages that protect, at a minimum, the expectation interest. Because expectation damages usually exceed those based on the restora-

tion interest, courts are not often required to decide whether restoration damages are available. But restoration inevitably exceeds expectation from time to time; when it does, courts must decide whether to protect this important interest.

Part III proposes two principles that govern claims for restoration in excess of expectation. The first is the *certainty principle*, which places on the breaching party the burden of proving that damages based on the injured party's restoration interest would exceed expectation damages. If that burden is not met, then the case is treated as if the minimum entitlement of expectation damages has not been exceeded.

When it is clear that restoration is greater than expectation, the *extent-of-benefit principle* applies. The premise of this principle is that, as the performance of the contract unfolds, the parties become committed not only to the benefits, but also to the risks, of their bargain. When a contract is still a set of executory promises, one injured by a material breach is entitled to recapture the precontractual position through restoration damages. Stated otherwise, the advantages of a favorable contract are assured to the nonbreaching party by making expectation damages the floor, but escape from a disadvantageous bargain nevertheless is allowed by making the restoration interest the ceiling on recovery if restoration exceeds expectation. As a contract moves from executory agreement to executed exchange, the ceiling on damages approaches the expectation-interest floor. When that movement is complete, damages are fully fixed by the expectation interest: the injured party still enjoys the benefits of a good deal, but is now stuck with the burdens of a bad one.

Recognizing that the restoration interest is the fundamental counterpart to the expectation interest, and understanding how the two interests accommodate each other, clarifies the conclusions that many courts have reached instinctively. It brings order to two important legal doctrines beset by stubborn incongruities: restitution as a remedy for breach and restitution for a plaintiff in default. Moreover, it produces an integrated system of contract damages and sets the stage for further examination and trenchant criticism of the law.

I. RESTITUTION VERSUS EXPECTATION AS MEASURES OF RELIEF FOR MATERIAL BREACH OF CONTRACT

A. *Illustrating the Problem*

The clearest view of the issues surrounding the restoration interest is offered by cases in which one injured by a breach of contract demands restitution rather than expectation damages. The manner in which the current law treats competing claims of restitution and

expectation may be illustrated by some simple, hypothetical cases. The analysis of these and other cases in this Article is aided by Professor Farnsworth's convention for describing and categorizing cases involving restitution-based recoveries for breach in excess of the expectation interest.⁵ He notes that

[u]nder most agreements, one party, which will be referred to as the "supplier," is to furnish something characteristic of the type of contract, such as goods, land, or services, for which the other party, which will be referred to as the "recipient," is to pay a price in money. Typical pairs of suppliers and recipients include the seller and the buyer under a contract for the sale of goods, the vendor and the purchaser under a contract for the sale of land, the employee and the employer under an employment contract, and the builder and the owner under a construction contract.⁶

The "supplier" and "recipient" designations, as defined by Professor Farnsworth, are adopted here. In this Article, suppliers will be referred to in the masculine and recipients in the feminine.

Hypothetical Case 1:

During the winter, Builder enters a contract with Owner to install a deck on the latter's house during the coming summer. The contract price of \$3000, which on the date of contract formation is the fair market value of the work to be performed, is payable upon completion. When summer arrives, the market value of the work Builder has undertaken to do has risen to \$4000 because of increases in the price of lumber. Complete performance would cost the Builder \$3500. Before Builder begins the work, Owner wrongfully repudiates her obligations, saying she will not pay the price.

If Builder is held to his expectation interest, he will owe the breaching Owner \$500, for he would have suffered a loss of that magnitude had the contract been performed as agreed. Intuitively, that result is absurd. It seems that Builder should be entitled simply to walk away from the deal. Consider a similar case, however, with the facts changed in one important respect.

Hypothetical Case 2:

During the winter, Builder enters a contract with Owner to install a deck on the latter's house during the coming sum-

5. See generally E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.9 (2d ed. 1990).

6. *Id.* § 12.9, at 883-84.

mer. The contract price of \$3000, which on the date of contract formation is the fair market value of the work to be performed, is payable upon completion. When summer arrives, the market value of the work Builder has undertaken to do has risen to \$4000 because of increases in the price of lumber. Builder completes the work, as promised, at a cost to himself of \$3500. Owner then wrongfully refuses to pay any part of the purchase price.

Should Builder be entitled to escape the unfavorable expectation interest on these facts? He would prefer, of course, to recover in restitution the value of the \$4000 benefit conferred on Owner. But the law is clear that he is limited to his expectation interest⁷—on these facts, the contract price of \$3000. By entering a fixed price contract, Builder generally is thought to have accepted a risk that the price of lumber might increase. But wasn't that same risk accepted upon formation of the identical contract in the first case? What accounts for our sense that expectation should limit recovery in the second, but not the first example?

The same phenomenon occurs when the recipient is injured by the supplier's breach. Consider the following pair of cases.

Hypothetical Case 3:

Buyer pays \$100,000 in advance for industrial machinery to be manufactured by Seller and delivered in six months. When the time for delivery arrives, the market price of the machinery has declined to \$60,000. Seller, having encountered difficulty in manufacturing the goods to contract specifications,⁸ fails to tender delivery and repudiates the obligation to do so.

If Buyer were held to her expectation interest, she could recover only \$60,000 from Seller, the amount that would enable her to purchase the machinery from someone else. Again, that result is both intuitively incorrect and inconsistent with the law, which entitles Buyer to restitution of the full purchase price.⁹ Now consider how the matter appears under an identical contract, but with a change in the status of performance.

7. RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1979); *see also infra* note 61 and accompanying text.

8. For purposes of this hypothetical, we assume that Seller's breach is not excused under the impracticability doctrine.

9. U.C.C. § 2-711(1) (1993).

Hypothetical Case 4:

Buyer pays \$100,000 in advance for industrial machinery to be manufactured by Seller and delivered in six months. When the time for delivery arrives, the market value of the machinery required by the contract has declined to \$60,000. The goods are delivered as promised and Buyer accepts them. She then discovers that the goods fail to perform as promised, in breach of an express warranty given by Seller. As a result, they are worth only \$50,000.

Should Buyer be entitled to avoid the risk of the declining market through restitution of the purchase price (\$100,000), offset by the value of the machinery delivered (\$50,000), for a total of \$50,000? The Uniform Commercial Code says no.¹⁰ The Code limits Buyer to her expectation interest, determined by the difference in the value of the goods as delivered and their value as warranted.¹¹ Thus, she is entitled to only \$10,000.¹²

In both pairs of cases, something about the fact of the Seller's performance makes an obvious difference to one's sense of the appropriate measure of relief. It seems clear that neither expectation nor restitution should trump the other in every case. But neither the courts nor the commentators have been able to work out the relationship between these two measures of relief in a way that avoids inconsistencies and jarring anomalies. This Article takes a fresh look at the conceptual framework used to resolve these simplified cases, as well as the more complex situations that arise in real life.

B. The Conventional Approach to Contract Damages: The Three Contractual "Interests"

Conventional contract theory sets out three alternative remedial interests on which a court may base damages¹³ for breach: the expectation, reliance, and restitution interests.¹⁴ This framework is based largely on the work of Fuller and Perdue.¹⁵ The standard, though

10. The Code's answer assumes that revocation of acceptance under § 2-608 of the U.C.C. is not possible.

11. U.C.C. § 2-714(2) (1993).

12. This conclusion assumes the absence of "special circumstances show[ing] proximate damages of a different amount." U.C.C. § 2-714(2) (1993).

13. The focus of this Article is on damages rather than specific performance. The latter is a method of protecting the expectation interest; it is a remedy that raises prudential and policy concerns not present when the remedy is substitutional.

14. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1979).

15. See generally Fuller & Perdue, *The Reliance Interest Part 1*, *supra* note 1; Fuller & Perdue, *The Reliance Interest Part 2*, *supra* note 11.

elliptic, definition of the *expectation interest* is that it puts the injured party in the same position as if the contract had been properly performed.¹⁶ Thus, the expectation interest measures and defines a person's rights and duties in terms of the bargain that was struck.

That bargain allocates certain risks and benefits to each party. For example, in a simple contract for the sale of goods for a fixed price at a specified time in the future, the buyer runs the risk that the market price will decline by the time for performance; the seller bears the risk that the market price will rise. In a fixed-price contract for the construction of a building, the contractor runs the risk that his costs will exceed his internal estimates (whether due to market forces or errors in judgment), while the owner bears the risk that the builder's actual costs will be so low that she could have found another builder to do the job for less. An expectation-based remedy for breach takes account of these risk allocations, leaving them where the parties put them by agreement.

The *reliance interest* takes its bearings from the "sunk costs" of the aggrieved party. When protected, it compensates a party for losses or harms that were incurred or suffered based on the assumption that the promise of the breaching party would be kept. The modern understanding of the reliance interest derives from the article by Fuller and Perdue, which generalized that it puts the injured party in the position he would have occupied had the contract not been formed,¹⁷ provided that the reliance damages do not exceed the expectation interest.¹⁸

Damages based on either the expectation or reliance interests are qualified in important ways. Perhaps the most significant qualification is that the victim's recovery is limited by his reasonable opportunities to avoid injury to himself. The avoidability principle is best illustrated by the rule on mitigation of damages, which reduces the monetary recovery otherwise due the victim of a breach by the losses

16. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 14-4, at 591 (3d ed. 1987); FARNSWORTH, *supra* note 5, § 12.1, at 840; RESTATEMENT (SECOND) OF CONTRACTS § 347 (1979).

17. Fuller & Perdue, *The Reliance Interest Part 1*, *supra* note 1, at 54; FARNSWORTH, *supra* note 5, § 12.1, at 842. Depending upon how broadly the reliance interest is defined, it may tend to merge with the expectation interest. This is particularly true when the parties are assumed to be operating within a free and properly functioning economic market. The making of one contract necessarily entails forgoing the opportunity to enter another and enjoy the profits or benefits that the latter would have generated. If those lost benefits or profits—and avoided losses and harms—are treated as elements of the reliance interest, then reliance damages approach expectation. Fuller & Perdue, *The Reliance Interest Part 1*, *supra* note 1, at 73-75; Fuller & Perdue, *The Reliance Interest Part 2*, *supra* note 1, at 417-18.

18. RESTATEMENT (SECOND) OF CONTRACTS § 349 (1979); *see also infra* Part I.C.1.

he reasonably could have avoided.¹⁹ Expectation and reliance damages are also limited by the foreseeability of the injury caused by the breach²⁰ and by the certainty with which the extent of that injury can be proven.²¹ Taken together, these limitations demonstrate that the enforceable expectation interest is not simply the aggregate of all benefits that would have been enjoyed and losses that would have been avoided had the contract been properly performed. Likewise, the enforceable reliance interest is not simply the sum of all loss or harm that would not have been suffered had the contract not been formed.²² Rather, these interests are defined in terms of the intentions and expectations of the parties themselves at the time when the contract was formed. The guidance provided by the parties' expectations is relevant not only to the proper calculation of damages for breach, but also to a variety of other important problems of contract performance and enforcement.²³

Restitution represents a major element of our jurisprudence, one that antedates and is at least partially independent of contract law. The *restitution interest* in contracts cannot be understood without at least a brief reference to the history of restitution generally.

Restitution is of ancient lineage. Throughout much of western legal history, it has been tied to the notion of unjust enrichment.²⁴ Nevertheless, restitution has never become firmly established as a coherent body of doctrine or concepts in Anglo-American jurisprudence. That phenomenon is partially explained by the nature of the English common law writ system, which was organized by causes of action rather than by abstract doctrinal categories. The law of restitution, together with what we now call contract and tort, was embedded in various causes of action, particularly the *indebitatus assumpsit* counts

19. The avoidability principle is reflected in other contexts as well. See Eric G. Andersen, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299, 335-38 (1988) [hereinafter Andersen, *Good Faith Enforcement*]; Eric G. Andersen, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073, 1109 (1988) [hereinafter Andersen, *Material Breach*].

20. RESTATEMENT (SECOND) OF CONTRACTS § 351 (1979).

21. *Id.* § 352.

22. Another important limitation on the expectation and reliance interests is that they disregard the transaction costs of obtaining and enforcing a judgment for breach, particularly attorney fees. Contract law's refusal to recognize such costs as a component of the expectation interest is a serious issue, but is beyond the scope of this Article.

23. See Steven J. Burton & Eric G. Andersen, *The World of a Contract*, 75 IOWA L. REV. 861, 861 (1990) (focusing on an approach to contracts "rooted in respect for the intention of the parties and their reasonable expectations").

24. For a discussion of restitution in relation to unjust enrichment in ancient Roman law, later European law, and English common law, see REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 834-901 (1990).

for "money had and received," "money paid," "*quantum meruit*," and "*quantum valebat*."²⁵

After the writ system ended, contract and tort emerged as the principal conceptual elements of private law. Restitution was largely represented by the anomalous category of "quasi-contract" or "contracts implied in law,"²⁶ and thus was classified nominally and uncomfortably as an appendage to contract law. Nevertheless, restitutionary elements also could be identified clearly in the law of tort, and restitution was part of the remedial inventory of both law and equity.²⁷

English law has struggled with the concept of restitution. The characterization of restitution as somehow contractual "resulted in strained and artificial analysis"²⁸ because courts were forced to find implied or tacit agreements as bases for restitutionary awards. One commentator has written that "[b]edevelled by historical accident and legalistic fiction, the law of restitution has remained something of a backward child of the legal family."²⁹ Serious arguments have been advanced that the law should recognize "a generali[zed] right to restitution,"³⁰ and impressive efforts have been made to provide the necessary conceptual framework.³¹ Yet even one of the most ardent advocates of unifying and rationalizing the law of restitution characterizes its current position in English law as "lack[ing] any agreed framework and [therefore] standing in danger of being unintelligible."³²

In the United States, the unity of restitution as a body of law has been promoted by the publication of a separate Restatement³³ and by Professor Palmer's invaluable four volume treatise on the subject.³⁴ Nevertheless, a review of the Restatement and of Professor Palmer's

25. Brice Dickinson, *The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law*, 36 INT'L & COMP. L.Q. 751, 753 (1987). See also ZIMMERMANN, *supra* note 24, at 891-95, 892-93 n.363.

26. Joseph M. Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1210-12 (1973).

27. See generally LORD GOFF OF CHIEVELEY & GARETH JONES, *THE LAW OF RESTITUTION* 4-5 (3d ed. 1986) (discussing claims in equity analogous to quasi-contractual claims).

28. Perillo, *supra* note 26, at 1211.

29. ZIMMERMANN, *supra* note 24, at 892-93.

30. GOFF & JONES, *supra* note 27, at 15.

31. See PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 6-8 (1985) (identifying five "strategic" points that would clarify the law of restitution).

32. *Id.* at 1. Similarly, Lord Diplock said in 1977 that "there is no general doctrine of unjust enrichment recognised in English law [but only] specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law." *Orakpo v. Manson Inv. Ltd.*, [1977] 3 All E.R. 1, 7, 95 App. Cas. 104 (H.L.).

33. RESTATEMENT OF RESTITUTION (1937).

34. GEORGE E. PALMER, *LAW OF RESTITUTION* (1978).

treatise reveals that the subject is organized more around the disparate factual settings in which restitutionary claims are made than on the basis of common doctrine or theory. It thus has been said that the attempt to unify restitution in American law "disintegrat[es] . . . into a new typology of enrichment claims."³⁵

When applied in a contractual context, restitution is "chiefly employed for the unwinding of contracts."³⁶ Restitutionary awards perform that function in a number of settings. For example, restitution may provide relief when a contract is or has become unenforceable because it runs afoul of legal restrictions such as the Statute of Frauds.³⁷ Restitution also may be used to adjust the parties' relationship following the failure of a contract at formation or a discharge of executory duties for reasons other than breach.³⁸ A third example, which is of interest here, is the use of restitution as a remedy for breach of contract.

Unlike reliance, which focuses on the costs incurred by the non-breaching party, or expectation, which is concerned with the gains and losses that full performance of the contract would have produced, restitution as a remedy for breach looks to the benefits conferred by one party on the other. Restitution's concept of "benefit," however, is elusive. It may be understood as requiring an increase in the wealth of the receiving party. In that event, one of the primary purposes of restitution is to avoid unjustly enriching one person at the expense of another. Alternatively, a "benefit" may be understood as the commitment of labor, material, money or other resources on behalf or at the request of the receiving party. If so, then restitution is measured by what it would cost on the market to procure the goods or services of the supplying party, whether or not the recipient actually was enriched thereby.³⁹

The restitution remedy is based on the *net* benefit conferred upon the breaching party by the victim. Thus, it is a routine element of restitutionary remedies for breach that the *victim* also must restore

35. ZIMMERMANN, *supra* note 24, at 895.

36. JOHN P. DAWSON, UNJUST ENRICHMENT 112 (1951).

37. See RESTATEMENT (SECOND) OF CONTRACTS § 376 (1979); CALAMARI & PERILLO, *supra* note 16, § 19-40, at 834; FARNSWORTH, *supra* note 5, § 6.11; Perillo, *supra* note 26, at 1215-19.

38. For example, restitution becomes important when a contract is deemed avoidable by one of the parties because of problems affecting its formation, such as mistake, duress, misrepresentation, or the youth or mental incapacity of one of the parties. See RESTATEMENT (SECOND) OF CONTRACTS § 376 (1979). Likewise, restitution is important when the contract is discharged due to impracticability or frustration of purpose. *Id.* § 377.

39. *Id.* § 371; Fuller & Perdue, *The Reliance Interest Part 1*, *supra* note 1, at 71-72; PALMER, *supra* note 34, § 4.2. See also *infra* note 147 and accompanying text.

the value of any benefits received from the *party in breach*.⁴⁰ Such mutual restoration might suggest that the goal of the restitution remedy for breach of contract is to return the breach victim to the *status quo ante*. Strictly construed, however, that is not the effect of the remedy, as demonstrated by its disregard for the sunk costs that do not translate into benefits to the other party. Nevertheless, the idea that the purpose of the restitution interest is to return the parties to their precontractual positions persists. It is expressed in a number of the cases⁴¹ and is suggested in the official commentary to the original Restatement of Contracts.⁴² As this Article will explain, this idea characterizes the restoration interest, of which restitution is a key component.

C. *The Relationships Between Expectation, Reliance, and Restitution as Remedies for Breach*

1. *Expectation Versus Reliance*.—In conventional contract law, the relationship of reliance to expectation is that of a lesser included remedy—that is, expectation includes the reliance interest, and adds to it the profit or gain a party would have realized from the transaction. Significantly, if that profit or gain would have been negative because the contract would have been a losing one for the nonbreaching party, then the reliance interest is reduced by the amount of the loss. Expectation, therefore, may exceed reliance, but not vice versa; the expectation interest is a ceiling on reliance damages. Fuller and Perdue made this point emphatically,⁴³ and it has been accepted in the

40. CALAMARI & PERILLO, *supra* note 16, § 15-4, at 651; FARNSWORTH, *supra* note 5, § 12.19, at 947-48; PALMER, *supra* note 34, § 4.14; *see also* Duksa v. City of Middletown, 472 A.2d 1, 7 (Conn. 1984) (holding that the “rescission” of agreement under which a land owner granted a sewer line easement to the city required the land-owner to return to the city the value of a free tie-in to the sewer).

A procedural issue that has concerned both courts and litigants in this regard arises from the availability of restitutionary remedies in both law and equity. The law courts traditionally required the plaintiff to have made or tendered any necessary restoration of benefits to the defendant before commencing the action. Equity courts simply required restoration of benefits by the plaintiff as a condition of any decree ordering restitution. PALMER, *supra* note 34, § 4.14, at 482-84. Modern courts, which frequently encounter difficulty with the concept of “rescission,” have grappled with this issue. *See* Binkholder v. Carpenter, 152 N.W.2d 593, 596-97 (Iowa 1967) (noting the distinction between equitable rescission and rescission of the contract by one of the parties); Liebsch v. Abbott, 122 N.W.2d 578, 582 (Minn. 1963) (contrasting statutory from equitable “rescission” and restitution). The better view would be to disregard the law-equity distinction in this context and to follow the equitable rule, permitting the court to make reciprocal restitution a part of its judgment.

41. *See infra* note 144 and cases cited therein.

42. RESTATEMENT OF CONTRACTS § 347 cmt. b (1932).

43. Fuller & Perdue, *The Reliance Interest Part 1*, *supra* note 1, at 75-80.

First⁴⁴ and Second Restatements⁴⁵ and in the courts.⁴⁶ The breach victim might seek or be limited to his reliance damages, which are less than his expectation damages, because his profits cannot be proven with sufficient certainty.⁴⁷ Similarly, a court might impose this lesser recovery over the breach victim's objections.⁴⁸ But in a contest be-

44. RESTATEMENT OF CONTRACTS § 333(d) (1932).

45. RESTATEMENT (SECOND) OF CONTRACTS § 349 (1979).

46. *E.g.*, *Bausch & Lomb, Inc. v. Bressler*, 977 F.2d 720, 729 (2d Cir. 1992) (holding that the trial court's award to distributor of ophthalmic diagnostic equipment injured by manufacturer's material breach could not be justified as reliance damages since it apparently exceeded the expectation interest); *Dade County v. Palmer & Baker Eng'rs, Inc.*, 339 F.2d 208 (5th Cir. 1964) (holding that an engineering firm injured by county's breach was entitled to protection of reliance interest where county was unable to satisfy burden of proof that full performance would have resulted in a net loss); *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182, 189 (2d Cir. 1949) ("[T]he promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed."); *Michael Del Balso, Inc. v. Carozza*, 136 F.2d 280, 281-82 (D.C. Cir. 1943) (holding that the recovery of supplier who is wrongfully prevented from completing performance "must be regulated by the contract price," thus reducing damages by losses recipient can prove supplier would have suffered); *Gruber v. S-M News Co.*, 126 F. Supp. 442, 446 (S.D.N.Y. 1954) (holding that damages of manufacturer of Christmas cards against breaching distributor consist of costs of reliance, reduced by losses manufacturer would have suffered from full performance); *Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637, 638-39 (Tex. Ct. App. 1988) (holding that reliance damages of a freight company whose contract was wrongfully cancelled should be reduced by losses the breaching party can prove the freight company would have suffered); *Wartzman v. Hightower Prods., Ltd.*, 53 Md. App. 656, 662-63, 456 A.2d 82, 86 (1983) (holding that a corporation could recover reliance damages from law firm that breached a contract to create a firm authorized to raise capital and noting that such damages would not include losses the law firm could prove that the company would have incurred); *Dialist Co. v. Pulford*, 42 Md. App. 173, 178, 399 A.2d 1374, 1380-81 (1979) (holding that a distributor whose supplier breached an exclusivity arrangement "should not be permitted to escape the consequences of a bad bargain by falling back on his reliance interest").

47. *E.g.*, *Brennan v. Carvel Corp.*, 929 F.2d 801, 811 (1st Cir. 1991) (holding that the trial court correctly awarded reliance damages to ice cream franchisees who did not offer proof of lost profits); *Re/Max of Georgia, Inc. v. Real Estate Group on Peachtree, Inc.*, 412 S.E.2d 543, 546 (Ga. Ct. App. 1991) (holding that the proper measure of damages for breach of territorial covenant in franchise agreement was real estate franchisee's net expenses in attempting to comply with franchise agreement and not lost profits, where franchisee was a new business and therefore lost profits were too speculative); *Herbert W. Jaeger & Assocs. v. Slovak Am. Charitable Ass'n*, 507 N.E.2d 863, 868 (Ill. App. Ct. 1987) (awarding injured owner reliance damages due to lack of reliable information to support standard expectation damages); *Wartzman*, 53 Md. App. at 666, 456 A.2d at 88 ("The very nature of reliance damages is that future gain cannot be measured with any reasonable degree of reliability."). See also RESTATEMENT (SECOND) OF CONTRACTS § 349 (1979).

48. Fuller and Perdue proposed that, in a number of circumstances, courts either have limited or should limit recovery to reliance below the expectation level, rather than either awarding full expectation damages or no recovery at all. Fuller & Perdue, *The Reliance Interest Part 2*, *supra* note 1, at 373-401. Despite their article's considerable influence on our understanding of remedial concepts, the courts have not widely adopted the reliance interest as a ready, mandatory alternative to expectation. A case in which a court favorably

tween the two interests, the choice is between the more generous expectation interest and the equally or less generous reliance interest.⁴⁹ Reliance as a remedy for breach is capped by expectation.

2. *Expectation Versus Restitution*.⁵⁰—In conventional contract law, the relationship between restitution and expectation is problematic. Although restitution has long been available as a remedy for breach of contract, it retains much of its character as a basis of recovery independent of the contract. Accordingly, courts sometimes speak of a restitutionary recovery as “off the contract,” as opposed to expectation damages “on the contract,”⁵¹ and otherwise frame their opinions in terms suggesting that the contract ceases to govern the rights of the parties when a restitutionary remedy is properly invoked.⁵² On this reasoning, expectation cannot limit a restitutionary recovery as it does a reliance-based award. When restitution exceeds expectation, the victim of the breach has every incentive to stress the independence of

considered restricting a breach victim to her reliance interest is *Sullivan v. O'Connor*, 296 N.E.2d 183, 186-89 (Mass. 1973) (plastic surgeon breached a contract to achieve a specific result). The *Sullivan* court declined to decide the issue, however, concluding that the patient had waived her right to claim a difference between the reliance and expectation damages. *Id.* at 189-90. Notwithstanding occasional instances of reliance damages below the expectation being awarded over the objections of the injured party, expectation remains the “basic principle for the measurement of . . . damages.” FARNSWORTH, *supra* note 5, § 12.8, at 871. *Cf.* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (demonstrating that courts usually protect the expectation, rather than the reliance, interest when enforcing promises on the basis of promissory estoppel).

49. Situations in which damages have been measured by the reliance interest have characteristically been those in which damages measured by the full expectation are for some reason regarded as inappropriate and the court turns to the reliance interest as a lesser included component that will give a measure of relief.

FARNSWORTH, *supra* note 5, § 12.1, at 843.

50. The discussion here focuses on expectation versus restitution with the understanding that reliance is encompassed in and limited by expectation, as discussed above. As a remedy for breach, however, restitution often may be viewed as a component of the reliance interest in that it includes any reliance loss to one party that also entails a benefit to the other.

51. *E.g.*, *United States ex rel. Coastal Steel Erectors v. Algernon Blair, Inc.*, 479 F.2d 638, 641 (4th Cir. 1973) (distinguishing a claim in *quantum meruit* from recovery “on the contract”); *Paul Hardeman, Inc. v. Arkansas Power & Light Co.*, 380 F. Supp. 298, 338 (E.D. Ark. 1974) (contrasting restitution with recovery “on the contract”); *Service Publications, Inc. v. Goverman*, 487 N.E.2d 520, 524 (Mass. 1986) (referring to recovery in *quantum meruit* as “off the contract”); *Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Auth.*, 387 N.E.2d 206, 210 (Mass. Ct. App. 1979) (limiting fully performing breach victim to damages “on” the contract as opposed to *quantum meruit* “off” the contract); *Kirkland v. Archbold*, 113 N.E.2d 496, 499 (Ohio Ct. App. 1953) (contrasting action “founded on the broken contract” with one based on quasi-contract); *Plante v. Jacobs*, 103 N.W.2d 296, 298 (Wis. 1960) (distinguishing a claim in *quantum meruit* from recovery “on the contract”).

52. See *infra* text accompanying notes 70-80.

the restitutionary recovery from "contractual" damages to receive the more generous measure of relief.⁵³

Why should that more generous remedy be available? As the authors of one analysis on the subject put it: "Where precisely the same facts are operative and precisely the same interests are said to have been abused, there is no sense in allowing the 'aggrieved' party to select restitutionary language and render the contract limitations on damages irrelevant."⁵⁴ Yet it is clear that in some instances restitution in excess of expectation is permitted, and sometimes not. A brief review of what courts actually do when confronted with this issue is best begun by noting three points on which there is general agreement: (i) the breach must be a material one; (ii) according to the so-called "full performance rule," restitution in excess of expectation is not available if the supplier has fully performed and the only breach consists of the recipient's failure to pay the contract price in money; and (iii) a recipient of services, goods, or other property who has paid in advance is entitled to restitution, even in excess of expectation, if the supplier wrongfully fails to render any performance.⁵⁵ Beyond these three points of agreement, however, the state of the law becomes conflicting and confused.

a. *The Significance of Material Breach.*—Courts and commentators often state that the availability of restitution as a remedy turns on whether the breach was material.⁵⁶ That proposition is true only in

53. Where expectation exceeds restitution, theoretical difficulties do not arise from damages based on the latter unless the court *requires* the injured party to forego the more generous expectation-based recovery in favor of restitution—a phenomenon that seems not to have occurred in the context of remedies for breach. If, for some reason, the victim prefers restitution to expectation in that setting, then giving the requested relief poses no threat to the primacy of the expectation interest.

54. Robert Childres & Jack Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 NW. U. L. REV. 433, 441 (1969).

55. See *infra* Part I.C.2.c.

56. *E.g.*, *United States ex rel. Building Rentals Corp. v. Western Casualty & Sur. Co.*, 498 F.2d 335, 339 (9th Cir. 1974) ("Restitution is an available remedy for breach of contract only when the breach is of such vital importance and so material that it is held to go to the 'essence' of the contract."); *Bishop Trust Co. v. Kamokila Dev. Corp.*, 555 P.2d 1193, 1196 (Haw. 1976) ("The right to rescind and bring an action for restitution is well recognized as an alternative to an action for damages where there has been repudiation or a material breach of a contract."); *Maytag Co. v. Alward*, 112 N.W.2d 654, 659 (Iowa 1962) (holding that an employee's wrongful termination of employment "was such a repudiation and breach of the option contracts and amounted to such failure of consideration for the sales of stock as entitled plaintiff to restitution of the stock upon repayment of the purchase price"). See also FARNSWORTH, *supra* note 5, § 12.19, at 947.

The English counterpart of the material breach requirement is that there must have been a "failure of consideration." GOFF & JONES, *supra* note 27, at 449-51. That trouble-

the sense that a material breach makes *possible* the setting in which restitution can occur: the “stopping [of] performance and [the granting of] a judicial remedy as a substitute for all of [the victim’s] contractual rights.”⁵⁷ But a material breach does not *require* that restitution damages be made available to the injured party.

The essence of restitution—the return by each party of the value of benefits received—is inconsistent with the continuing performance of the contract. Restitution therefore requires some basis for halting performance. A material breach provides that basis.⁵⁸ It entitles the victim to cancel the contract and claim damages in lieu of the performance the breaching party would have rendered.⁵⁹ Typically, of course, the damages sought will be based on the expectation interest. But if restitution exceeds expectation, the injured party will prefer the former remedy. Nothing in the fact of cancellation on account of a material breach requires that the victim have access to restitution rather than expectation damages, however. Strictly speaking, a material breach means only that the victim is entitled to bring contract performance to an end and receive damages, based on *an appropriate measure*. That measure could be either expectation or restitution. Nothing in the notion of contract cancellation itself suggests that one measure should be preferred over the other.⁶⁰ The conclusion that a breach is material therefore raises, but does not resolve, the question whether restitution in excess of expectation should be permitted.

b. The Full Performance Rule.—When the supplier is the victim of a breach, at least a part of the recipient’s nonperformance generally will consist of the failure to pay some or all of the contract price. If the value of the supplier’s performance exceeds expectation damages

some phrase, which occasionally appears in the American case law, can be misleading if not understood. See BIRKS, *supra* note 31, at 219-42 (discussing the difficulties inherent in the use of the phrase “failure of consideration”). The discharge of a contract under the English ground of “failure of consideration” and under the American ground of “material breach” may differ in important respects.

57. 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1113, at 606 (1964).

58. Contract performance may cease even if the breach in question is not material. The materiality analysis usually becomes inapplicable when the breach occurs or is acted upon when the party committing it has no remaining executory duties to perform. Andersen, *Material Breach*, *supra* note 19, at 1135-39. Restitution-based damages are possible in that setting.

59. Andersen, *Material Breach*, *supra* note 19, at 1101-05; FARNSWORTH, *supra* note 5, § 8.15, at 632-34.

60. This statement is not wholly consistent with Andersen, *Material Breach*, *supra* note 19, which was written on the assumption that cancellation due to material breach implies protection of the expectation interest. The views expressed in this Article modify and supersede what was said there.

for the breach, then the supplier will prefer restitution. Perhaps the most confidently repeated generalization about restitution in excess of expectation is that the damages of the fully performing supplier whose recipient's only breach is a wrongful refusal to pay are limited to the contract price.⁶¹ As noted below, that statement is incorrect in some cases.⁶² Nevertheless, the full performance rule is a standard feature of the traditional law of restitution as a remedy for contractual breach.

c. Restitution in Response to the Supplier's Failure to Perform.—If a recipient pays some or all of the contract price in advance, and the supplier wrongfully fails to deliver or tender the required goods or services, then the recipient is entitled to full restitution of the contract price, even if the market value of the supplier's performance has fallen. Such cases are rare because, when restitution does exceed expectation, it is usually because the deal is favorable to the supplier, who therefore is unlikely to breach.

The most obvious and common manifestation of this principle is found in contracts for the sale of goods. Section 2-711(1) of the U.C.C. provides the statutory basis for this remedy by ensuring that the recipient may "recover[] so much of the price as has been paid."⁶³ Contracts for the sale of real property provide another example. If a purchaser (recipient) pays some or all of the purchase price before closing and the vendor (supplier) fails to tender marketable title by the required date, then the purchaser is entitled to the return of her

61. RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1979); RESTATEMENT OF CONTRACTS § 351(a-b) (1932); DAN B. DOBBS, REMEDIES § 12.20, at 893-94, § 12.24, at 918 (1973); PALMER, *supra* note 34, § 4.3, at 378-81. *E.g.*, Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 516 N.E.2d 190, 193 (N.Y. 1987) (holding that where contractor ignored owner's breach of contract and chose instead to complete the contract, the lower court correctly limited the contractor to a recovery on the contract, instead of under quasi-contract). The cases sometimes stretch the full performance rule, applying it to cases in which performance is *almost* complete. *E.g.*, United States *ex rel.* Harkol, Inc. v. Americo Constr. Co., 168 F. Supp. 760, 761-62 (D. Mass. 1958) (preventing a subcontractor who "substantially completed" the contract, despite contractor's failure to make progress payments, from recovering in *quantum meruit*); John T. Brady & Co. v. City of Stamford, 599 A.2d 370, 377-78 (Conn. 1991) (holding that where a contractor sought recovery in *quantum meruit* after he had completed 99% of the job, the lower court correctly restricted recovery to the contract price based on the full performance rule).

62. See *infra* notes 106-109 and accompanying text. See also *infra* Part I.D.2.

63. U.C.C. § 2-711(1) (1993). The pre-Code law is consistent, as demonstrated by the venerable case of *Bush v. Canfield*, 2 Conn. 485 (1818) (holding that a buyer of flour who paid in advance was entitled to full restitution of the purchase price upon seller's failure to deliver, notwithstanding the fact that the market value of the flour had fallen below the contract price).

payment, notwithstanding that the value of the property now may be less than she agreed to pay for it.⁶⁴

d. Cases of Conflict and Confusion in Expectation Versus Restitution.—The results in cases not falling within the two fact patterns just described are conflicting and confused. Cases in which the injured recipient seeks restitution and the supplier has performed partially or fully (but defectively) are relatively rare in the case law. This is so because recipients usually pay for goods or services only upon or after delivery, and a supplier is unlikely to breach when the contract is favorable to him and unfavorable to the recipient.⁶⁵

The bulk of the case law concerns the aggrieved, partially performing supplier—such as an employee or building contractor—who is fired wrongfully after doing only part of the work for which he contracted. Typically, such suppliers do initiate performance in advance of receiving payment, which creates a net restitution interest in their favor. Furthermore, it is not uncommon for a dispute over delays in performance, contract interpretation, or the quality of the supplier's work to lead the recipient to the erroneous conclusion that she is entitled to dismiss the supplier. If the contract would have been advantageous for the recipient and disadvantageous for the supplier, the latter will have an incentive to seek restitutionary, rather than expectation-based, relief. There are a great many cases suggesting that the supplier is freed from the constraints of the expectation interest in such circumstances, and some holding that he is not.⁶⁶

D. Attempts to Settle the Contest Between Expectation and Restitution

The issue of restitution in excess of expectation has attracted considerable attention. Fuller and Perdue found it "remarkable that . . . restitution as a remedy [for breach should have come to be seen as] entirely distinct from the usual suit on a contract."⁶⁷ Although they noted the anomaly of permitting restitution in excess of expectation,⁶⁸ they did not seek to resolve that difficulty. Courts and scholars have offered justifications or proposed solutions to the problem at varying levels of generality. Each justification, however, is subject to serious criticism.

64. DOBBS, *supra* note 61, § 12.9, at 843-44; PALMER, *supra* note 34, § 4.18, at 518-22.

65. See *infra* Part III.C.4.b for a discussion of such cases.

66. See *infra* Part III.C.4.a for a discussion of such cases.

67. Fuller & Perdue, *The Reliance Interest Part 1*, *supra* note 1, at 72.

68. *Id.* at 76-77.

1. *Resort to the Notion of "Rescission" of the Contract.*—Probably the most common justification for permitting an injured party to obtain restitution in excess of expectation is that the contract has been "rescinded" and therefore may be ignored as a source of damages measurement. This argument treats rescission and restitution as a linked pair, suggesting that the invocation of the latter as a measure of damages necessarily brings the former into play. It is widely recognized, however, that in the context of remedies for breach of contract, references to "rescission" are unnecessary and confusing.⁶⁹ A true rescission may occur, of course, when the parties mutually agree to put an end to their contract.⁷⁰ Something like rescission, but more accurately described as "avoidance," occurs when mistake, lack of capacity, misrepresentation, or duress infects the contract formation process.⁷¹ When a contract comes to an end on account of impracticability or frustration of purpose, one might loosely describe the event as a "rescission," although the basic term "discharge"⁷² is more appropriate. But when one party seeks relief on account of the other's breach, the word "rescission" is misleading.⁷³ Bringing the contract to an end on account of breach is more precisely referred to as a "cancellation."⁷⁴ At stake is the proper form and quantum of relief that should be available on account of the breach. When, as in this Article, the focus is on monetary, rather than specific, relief, the issue becomes one of measurement. Using the word "rescission" in place of "cancellation"

69. See *infra* note 72 and accompanying text.

70. *E.g.*, *Billings v. Gardner*, 745 P.2d 792, 793 (Or. Ct. App. 1987) (stating that buyer and seller had mutually rescinded an oral contract for the sale of a business); *Kirk v. Brentwood Manor Homes, Inc.*, 159 A.2d 48, 50 (Pa. Super. Ct. 1960) (involving a mutually agreed rescission of a contract to purchase realty); *St. Norbert College Found., Inc. v. McCormick*, 260 N.W.2d 776, 782 (Wis. 1978) (holding that a donor to a tax-exempt trust was unable to demonstrate mutual rescission of a contract by express agreement or by inference from the acts of the parties).

71. CALAMARI & PERILLO, *supra* note 16, § 9-27, at 386-87, § 8-4, at 310, § 8-12, at 328, § 9-23, at 373; FARNSWORTH, *supra* note 5, §§ 9.3-9.4, at 683-700, § 4.3, at 228-30, § 4.15, at 269-72, § 4.19, at 282-83.

72. RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 265 (1979).

73. See *CBS, Inc. v. Merrick*, 716 F.2d 1292, 1297 (9th Cir. 1983) (Nelson, J., concurring) (describing the legal ambiguities involved in using the terms "rescission and restitution"). See also DOBBS, *supra* note 61, § 12.1, at 792-93, § 12.9, at 844 (discussing the interrelationship of rescission and restitution); FARNSWORTH, *supra* note 5, § 8.15, at 632 n.2, § 12.19, at 948-49 (explaining that a court's use of the term "rescission" can be inaccurate); PALMER, *supra* note 34, § 4.6, at 421 (discussing the concept of rescission).

74. The U.C.C. distinguishes "cancellation," or the bringing of a contract to an end on account of breach, from "termination," in which no breach occurs. U.C.C. § 2-106(3)-(4) (1993). The terms commonly are used interchangeably, however. FARNSWORTH, *supra* note 5, § 8.15, at 632 n.2.

to identify the event triggering the measurement process⁷⁵ is more likely to confuse than to clarify.

The notion of rescission is significant when courts think of it as accomplishing something very different from cancellation. Cancellation, of course, typically is the prelude to an expectation-based recovery.⁷⁶ Some courts conclude that rescission, by contrast, eliminates the contract as a basis for measuring relief. As a consequence, the injured party's remedy is defined solely in terms of the value of the benefit conferred on the breacher, without any reference to contract values. Perhaps the strongest statement of such reasoning is found in *Boomer v. Muir*.⁷⁷

A rescinded contract ceases to exist for all purposes. How then can it be looked to for one purpose, the purpose of fixing the amount of recovery? . . . The contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken.⁷⁸

Such reasoning exalts form over substance; it permits one to dispense with the contract as a source of remedial rights and obligations merely by using the word "rescission" to describe the act of cancellation. There is no apparent reason why simply invoking a restitutionary remedy should free the aggrieved party from the same contractual constraints that apply when expectation damages are sought.⁷⁹ As

75. Cf. *Dialist Co. v. Pulford*, 42 Md. App. 173, 176-77 & n.3, 399 A.2d 1374, 1377-78 & n.3 (1978) (discussing the trial court's use of the term "rescission" where cancellation and damages were the relevant remedies).

76. Andersen, *Material Breach*, *supra* note 19, at 1092-1105. Cancellation need not necessarily lead to expectation damages, however. See *supra* text accompanying notes 56-60.

77. 24 P.2d 570 (Cal. Dist. Ct. App. 1933).

78. *Id.* at 577. The plaintiff contractor in *Boomer* was permitted to recover restitution far in excess of its expectation interest. *Id.* at 578-80.

79. See DOBBS, *supra* note 61, § 12.24, at 916 ("The choice between the rule limiting the contractor to the contract rate and the rule allowing him the full 'value' of his work without limit is a difficult one."); George E. Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264, 273 (1959) ("The word rescission has been a source of many difficulties in the law of restitution. Some of them . . . seem to stem from the notion that a business transaction entered into by the parties has a physical reality that must be destroyed in order for the plaintiff to obtain restitution."). For a view of English law that treats restitution as detached from contract values, see A.S. BURROWS, *REMEDIES FOR TORTS AND BREACH OF CONTRACT* 270-75 (1987). This approach to restitution may be explained in part by the apparently different event that triggers the restitutionary remedy in English, as opposed to American, law. English law requires a "total failure of consideration," *id.* at 270, which may be substantially more severe than a "material breach" under American law. See *supra* Part I.C.2.a. A total failure of consideration "deprives the 'party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the

Professor Palmer has noted in reference to a specific contractual context,

[The injured party's] discharge simply put[s] an end to the contract, and there is no need to give any more extensive effect to it than this. The contract ha[s] in fact been made, and this remains as a relevant fact in the case after discharge. If it is good policy to limit the [injured party's] recovery by reference to the price term of the contract . . . nothing in the concept of either cancellation or rescission stands in the way of doing so.⁸⁰

2. *Framing the Issue as Restitution Versus the Contract Price.*—One reason that courts and scholars may conclude that restitutionary relief should not be confined by the expectation interest is that they frame the issue incorrectly. The error, often committed in cases involving an injured supplier, is asking whether restitution may be awarded in excess of the *contract price*.⁸¹ 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.

To be sure, the primary benefit the supplier expects is the payment of the contract price. In a great many contracts, however, that payment is by no means the only thing of value the recipient owes. In construction contracts, for example, the general contractor typically is responsible, either by express promise or by implication, for providing the subcontractor with a suitable site on which to perform the work,⁸²

consideration for performing those undertakings.” Goff & Jones, *supra* note 27, at 454 (quoting Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., 2 Q.B. 26, 66 (1962)).

80. PALMER, *supra* note 34, § 4.4(f), at 407. Professor Palmer refers to a client's breach of a contract with an attorney. As discussed *infra* note 127, Professor Palmer believes that policy considerations unique to the attorney-client relationship justify a different result than applies to commercial agreements generally.

81. Professor Palmer, for example, addresses the issue solely in terms of whether the contract price should limit a recovery in restitution for breach of contract. PALMER, *supra* note 34, § 4.4. See also FARNSWORTH, *supra* note 5, § 12.20, at 952-53 (discussing restitutionary recovery in excess of contract rate); DOBBS, *supra* note 61, § 12.24, at 915-18 (discussing restitution in losing contracts); Childres & Garamella, *supra* note 54, at 445-46 (referring to the injured supplier's expectancy in terms of the “contract price” and the “contract rate”).

82. *E.g.*, Guerini Stone Co. v. P.J. Carlin Constr. Co., 248 U.S. 334, 340 (1919) (“It is sufficiently obvious that a contract for the construction of a building, even in the absence of an express stipulation upon the subject, implies as an essential condition that a site shall be furnished upon which the structure may be erected.”); R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc., 244 S.E.2d 774, 778 (Va. 1978) (holding that a prime contractor materially breached a construction subcontract by failing to make a work site available to the subcontractor by the agreed date).

for scheduling the work to be done on the total project so that various subcontractors do not impede each other's efforts,⁸³ and for not interfering with each subcontractor's performance.⁸⁴ The material breach leading to 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 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.⁸⁵ 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,⁸⁶ they demonstrate that the unpaid contract price is but one component of the victim's expectation interest.

When the contract price is less than the expectation interest, courts are correct in stating that the contract price does not limit a restitutionary recovery. Such a limit would leave the victim *undercompensated*, as measured from the baseline of expectation. Only when expectation equals the unpaid contract price—that is, the entire loss suffered by the supplier consists of the money not paid by the recipient—does limiting a restitutionary recovery to the contract price honor the expectation principle.

The lack of identity between the contract price and the expectation interest explains the willingness of some courts to disregard the contract price in favor of the injured supplier's right to restitution. For example, in *United States ex rel. Citizens National Bank v. Stringfel-*

83. *E.g.*, *United States ex rel. Heller Elec. Co. v. William F. Klingensmith, Inc.*, 670 F.2d 1227, 1230-31 (D.C. Cir. 1982) (stating that a general contractor wrongfully delayed a subcontractor's work on a parking garage through its failure to coordinate adequately the work of its subcontractors and its failure to provide sufficient supervisory personnel); *Lamb Plumbing & Heating Co. v. Kraus-Anderson of Minneapolis, Inc.*, 296 N.W.2d 859, 864 (Minn. 1980) ("[O]ne aspect of a prime contractor's duties is to coordinate the work of its subcontractors and eliminate gaps and overlaps in their work.")

84. *E.g.*, *Continental Masonry Co. v. Verdel Constr. Co.*, 279 Md. 476, 478 n.1, 369 A.2d 566, 567 n.1 (1977) (noting that a general contractor is "under an implied obligation not to delay or hinder, by his own actions, performance by a subcontractor"); *R.C. Tolman Constr. Co. v. Myton Water Ass'n*, 563 P.2d 780, 782 (Utah 1977) ("[T]here 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.").

85. *See* FARNSWORTH, *supra* note 5, § 12.9, at 879-81 (discussing "consequential" and "incidental" damages).

86. *See id.*

low,⁸⁷ a subcontractor sought to recover in *quantum meruit* after being wrongfully discharged from a contract to perform earth moving.⁸⁸ The contract price provided for payment at a rate of \$0.45 per cubic yard.⁸⁹ The court affirmed a trial court award based on a value of \$1.15 per cubic yard.⁹⁰ The opinion emphasized that the subcontractor's "labors were increased by the delays of [the general contractor] in removing spoil for which it had responsibility and by other conduct of [the general contractor]."⁹¹ As a result, the contract price would have been the reasonable value of the services performed by the subcontractor "only if [the subcontractor] had been able to work unhampered by the numerous obstacles and interferences occasioned by [the general contractor's] failure to properly co-ordinate the project."⁹² The court further noted that "[the subcontractor's] costs had increased significantly by the excess dirt and other obstacles scattered over the jobsite, by the necessity of reworking some sections as many as four times, and by delays caused by [the general contractor's] interference."⁹³ Therefore, the court concluded that

forty-five cents may have been a reasonable price for moving a cubic yard of dirt once. If, however, that cubic yard were required to be moved two or three times before it came to rest with finality at its proper destination, the costs incurred would obviously be significantly higher, and the reasonable value of the work would be similarly greater.⁹⁴

On facts like these, limiting the injured party's recovery to the contract price obviously would fall far short of protecting the expectation interest. The comparison between contract price and the value of the benefit conferred thus is not an important one.⁹⁵ In other

87. 414 F.2d 696 (5th Cir. 1969), cited with approval in PALMER, *supra* note 34, § 4.4(a), at 109 n.7a (Supp. 1990).

88. *Stringfellow*, 414 F.2d at 698.

89. *Id.*

90. *Id.* at 699.

91. *Id.* at 698 (quoting *Citizens Nat'l Bank v. Vitt*, 367 F.2d 541, 543 (5th Cir. 1966)).

92. *Id.* (quoting the Dist. Ct. judge).

93. *Id.*

94. *Id.* at 700.

95. The fact that the expectation interest may exceed the contract price is apparent in other cases cited to demonstrate that the price does not limit restitution. This is true, for example, of the following cases, cited in PALMER, *supra* note 34, § 4.4(a), at 389 n.1: *United States ex rel. Susi Contracting Co. v. Zara Contracting Co.*, 146 F.2d 606, 607-08, 611-12 (2d Cir. 1944) (calculating the injured subcontractor's recovery to include amounts for use of its equipment by the general contractor, even though that use was beyond the scope of the parties' agreement); *United States ex rel. Wander v. Brotherton*, 106 F. Supp. 353, 354 (S.D.N.Y. 1952) (holding that the subcontractor's *quantum meruit* claim included the value of "increased and additional expenses for wages and materials not contemplated by the

cases, however, the contract price will define the maximum extent of expectation. An example of this principle is found in *Dickson v. Emerson*,⁹⁶ in which the supplier promised to haul logs from a given location to a river and to construct a length of roadway in return for an agreed price of \$2.50 per thousand feet of logs.⁹⁷ After the supplier had built the roadway and hauled a portion of the logs, the recipient, who had paid only a portion of the contract price, wrongfully discharged the supplier.⁹⁸ The supplier sued in *quantum meruit* to recover the value of the services performed.⁹⁹ The Oregon Supreme Court held that the supplier was "entitled to recover the reasonable value of the work done which inured to the benefit of [the recipient], within the limits of the . . . total contract."¹⁰⁰ The facts of the case do not indicate that the supplier suffered any harm other than the recipient's failure to pay money as promised. The unpaid contract price (less the cost of any performance avoided by the supplier) therefore was synonymous with the expectation interest.¹⁰¹ The comparison of unpaid contract price to the value of the benefit conferred was clearly relevant to the relationship between expectation and restitution.¹⁰²

contract solely by reason of unwarranted delays on the part of defendants"). The same also may be true of many other cases in which the necessary facts are not developed at trial or on appeal because the focus of the courts and the litigants is misdirected toward the contract price—that is, toward the relationship of contract price to restitution—rather than a comparison of restitution with expectation.

96. 61 P.2d 439 (Or. 1936).

97. *Id.*

98. *Id.* at 440.

99. *Id.* at 439.

100. *Id.* at 441 (emphasis added).

101. The court went on to quote *Williston on Contracts* for the proposition that the contract price is merely evidence of, but does not conclusively establish, the value of the benefit conferred in such a case. *Id.* The purpose of this discussion apparently was not to justify a restitutionary recovery possibly in excess of the total contract price, but to explain why the contract rate of \$2.50 per thousand feet should not be applied to measure the plaintiff's recovery. The court correctly noted that the plaintiff had already constructed the roadway, which was to be used for the entire job, and that the \$2.50 rate for hauling only a portion of the logs would not protect the plaintiff's expectation of recovering the costs of that construction. *Id.* at 440-41. The court's analysis on this point is consistent with its conclusion that the total contract price formed an upper limit on the plaintiff's recovery.

102. In *City of Portland ex rel. Donohue & Fleskes Corp. v. Hoffman Constr. Co.*, 596 P.2d 1305, 1313 & n.7, 1313-14 n.9 (Or. 1979), the Oregon Supreme Court correctly declined to follow *Dickson* in limiting a *quantum meruit* recovery by the contract price. In *Hoffman Constr. Co.*, a general contractor (the recipient) materially breached a subcontract by failing to have the work site adequately prepared for the subcontractor (the supplier), failing to coordinate the work of various subcontractors, and interfering with the subcontractor's work. *Id.* at 1308. The effect of the breach was to delay the subcontractor's work and increase its costs substantially. *See id.* The subcontractor sued in *quantum meruit* for the value of the work performed. *Id.* The court briefly considered whether, on the strength of *Dickson*, the recovery should be limited by the contract price. *Id.* at 1313-14 n.9.

Having (sometimes correctly) concluded that the *contract price* does not limit restitution, courts and scholars have failed to consider adequately the more pertinent question: should the *expectation interest* limit the injured supplier's restitutionary recovery? Were it decided that expectation should limit restitution, other questions would require attention. For example, in some cases the extent to which the victim's expectation interest exceeds the unpaid contract price will be unclear or difficult to determine. The principles governing the relationship between restitution and expectation need to take that problem into account.¹⁰³ Unfortunately, neither the case law nor contract scholarship consistently has framed the issue as a contest between restitution and expectation. Instead, the focus on—and rejection of—the contract price as a limit on recovery has contributed to the conclusion that restitution damages are not subject to any limitation at all.¹⁰⁴

3. *The Problem of the Full Performance Rule.*—Assuming the correctness of the argument that, at the victim's option, the materially breached contract may be treated as rescinded and therefore non-existent, a serious difficulty arises. As noted above,¹⁰⁵ the "full performance rule" categorically precludes restitutionary relief in excess of expectation when the injured supplier has fully performed, but the recipient wrongfully refuses to pay. Why should the victim not be entitled to restitution in such a case, as he would be, in the view of many courts, had he only partially performed?

The explanation generally given for the rule is that, by having his damages limited to the contract price, the supplier receives precisely what he bargained for.¹⁰⁶ The argument proves too much, however. The partially performing supplier also receives what he bargained for when he receives a damage award based on his expectation interest. There may be a difference in the amount of the award, of course, because the fully performing supplier is entitled to the entire unpaid

It concluded, however, that the contract price should not be a limit because, in contrast to the facts in *Dickson*, the plaintiff here had incurred increased costs on account of the defendant's breach. *Id.* Because those increased costs would form part of the plaintiff's expectation damages, it would be incorrect to treat the unpaid contract price alone as a limit on the plaintiff's restitutionary recovery. *Id.* at 1313 & 1313-14 n.9. Although the court correctly sensed that the subcontractor would be undercompensated if the contract price formed the upper limit on restitution, it, like so many others who have commented on this issue, failed to ask whether there was another, *appropriate* ceiling on restitution.

103. See *infra* Part III.A.

104. See *supra* Part I.C.2.

105. See *supra* text accompanying notes 61-62.

106. See RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. b. (1979); PALMER, *supra* note 34, § 4.3, at 383.

contract price, while the partially performing supplier's award will be reduced by the savings realized from not having to complete his performance. The two situations, however, are economically equivalent. In each case, the supplier gets the full value of the recipient's promised performance; in each, interest is available for delays in payment;¹⁰⁷ in each, recovery may be had for consequential or incidental¹⁰⁸ losses.¹⁰⁹

The full performance rule probably can be explained in part on historical grounds. The common law writ of *assumpsit*, which was the main vehicle for the development of contract, originally was unavailable to enforce the payment of a liquidated sum of money owed by the

107. Awards of interest are often governed by statutes or rules of court that do not distinguish between fully and partially performing suppliers, but rather tend to focus on the degree to which the amount of damages was liquidated or readily ascertainable. *See, e.g.*, CAL. CIV. CODE § 3287(b) (West 1970); N.Y. CIV. PRAC. L. & R. 5001(a)-(b) (McKinney 1992). Nor do the courts take the extent of the injured supplier's performance into account in awarding interest. *See, e.g.*, Paul Hardeman, Inc. v. Arkansas Power & Light Co., 380 F. Supp. 298, 342 (E.D. Ark. 1974) (requiring payment of interest on a *quantum meruit* award for a partially performing supplier); Coleman Eng'r Co. v. North Am. Aviation, Inc., 420 P.2d 713, 722 (Cal. 1966) (granting interest to a partially performing supplier); Nor'Easter Group, Inc. v. Colossale Concrete, Inc., 542 A.2d 692, 699-700 (Conn. 1988) (upholding a statutory award of interest for a substantially performing supplier); Walter Kiddie Contractors, Inc. v. State, 434 A.2d 962, 978-79 (Conn. Super. Ct. 1981) (holding that a substantially performing contractor was entitled to prejudgment interest).

108. Examples of cases in which an injured, fully or substantially performing supplier was awarded damages for consequential losses include: S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014, 1028-36 (S.D.N.Y. 1984) (holding that a subcontractor whose performance was delayed by the contractor was entitled to damages caused by the delay, including rises in material costs, excess field costs for equipment, and extra wages to supervisors and additional workers), *aff'd*, 762 F.2d 990 (2d Cir. 1985); Moore Constr. Co. v. Clarksville Dep't. of Elec., 707 S.W.2d 1, 14-17 (Tenn. Ct. App. 1985) (holding that a contractor was entitled to damages caused by the owner's and co-prime contractor's delay, including extra supervisory costs and loss of use of equipment); *Walter Kiddie Constructors, Inc.*, 434 A.2d at 978 (finding that a contractor was entitled to damages for the owner's delay, including additional home office and field costs, inefficiencies, and loss of productivity). Injured partially performing suppliers were awarded such damages in *Steeltech Bldg. Prods. v. Edward Sutt Assocs., Inc.*, 559 A.2d 228, 230-31 (Conn. App. Ct. 1989) (awarding damages for idle labor costs) and in *Rome Hous. Auth. v. Allied Bldg. Materials, Inc.*, 355 S.E.2d 747, 752 (Ga. Ct. App. 1987) (allowing recovery of damages for extra equipment expenses stemming from the government's delay).

109. The authorities showing that an injured, fully performing supplier may recover damages for delay and for consequential and incidental losses do not focus on whether restitution exceeded expectation. It would be absurd, however, to suppose that such damages would be available only to the supplier whose expectation interest exceeds restitution, but not to one for whom restitution exceeds expectation. Because of the full performance rule, the expectation measure would be used in either case. The availability of such damages further illustrates the point made above that the contract price does not necessarily equal the expectation interest. To the extent that the full performance rule is stated as a prohibition of recovery above the *contract price*, it is in error. Rather, the point is that the supplier is limited to his *expectation interest*.

defendant, even if based upon an express promise.¹¹⁰ For that purpose, the action of "debt" was required.¹¹¹ Ames attributed that anomaly to the reluctance of the English courts to accept that "two legal relationships, fundamentally distinct, might be produced by one and the same set of words."¹¹²

Over time, however, assumpsit did become available to enforce a promise to pay money. The first step in the writ's extension came when assumpsit was made available to a plaintiff who could prove that an express promise to pay had been made subsequent to the creation of the debt.¹¹³ The extension of assumpsit was completed in *Slade's Case*,¹¹⁴ in which the subsequent promise was "implied" by the court.

Assumpsit took on various forms, including "special assumpsit," in which the particulars of the contract had to be pleaded, and general or "*indebitatus assumpsit*," which encompassed a variety of "common counts."¹¹⁵ The common counts "are merely abbreviated and stereotyped statements that the defendant is indebted to the plaintiff for a variety of commonly recurring reasons."¹¹⁶ The common counts came to include *quantum meruit* and *quantum valebat*, both of which applied an essentially restitutionary measure of relief, basing the amount of the plaintiff's recovery on the value of the performance rendered.¹¹⁷

Notwithstanding the inclusion of the injured supplier's claim for breach of contract under the umbrella of assumpsit and the presence of the restitution-based *quantum meruit* and *quantum valebat* counts within that writ, courts continued to treat the fully performing supplier's claim against a recipient in breach as essentially one for a liquidated debt, enforceable only in the amount of the promised payment.¹¹⁸ Consequently, the action of debt, though nominally brought within the domain of assumpsit, effectively has operated as a distinct basis for recovery, exclusively applicable when the claim is for a liquidated sum of money expressly promised by the defendant. Yet the fully performing supplier is no less the victim of a material breach

110. FARNSWORTH, *supra* note 5, § 1.6, at 19; PALMER, *supra* note 34, § 1.2, at 6.

111. 1 CORBIN, *supra* note 57, § 20; FARNSWORTH, *supra* note 5, § 1.6, at 19; PALMER, *supra* note 34, § 1.2, at 6.

112. James Barr Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53, 55 (1888), *reprinted in* JAMES BARR AMES, *LECTURES ON LEGAL HISTORY* 149 (1913).

113. PALMER, *supra* note 34, § 1.2, at 7.

114. 4 Co. Rep. 92b, 76 Eng. Rep. 1074 (1602).

115. FARNSWORTH, *supra* note 5, § 1.6, at 19.

116. 1 CORBIN, *supra* note 57, § 20, at 51.

117. *See supra* text accompanying notes 24-25.

118. 5 CORBIN, *supra* note 57, § 1110.

than is the supplier who has performed only partially. The latter's recovery could be limited to expectation damages just as readily as the former's, but usually is not. The course of tradition carved by the common law forms of action is not a sufficient reason why expectation damages should be a ceiling on recovery in one case but not the other.

The full performance rule stands in sharp contrast to other circumstances in which restitution usually or invariably is permitted as a remedy for breach. Under the reasoning typically used to justify restitution as a remedy for breach, the remedial rights of an injured, fully performing supplier whose recipient fails to pay are inconsistent with those of an injured, fully performing recipient whose supplier fails to perform. The latter routinely is permitted to choose between the expectation and restitution interests and to select the more generous source of relief,¹¹⁹ while the former is not.¹²⁰ The remedy available to a fully performing supplier also seems inconsistent with those available to partially performing suppliers, who are entitled to restitution in excess of the contract price, and perhaps in excess of the expectation interest as well.¹²¹

4. *Scholarly Solutions for the Problem of Expectation Versus Restitution.*—The anomalies in the relationship between expectation and restitution as remedies for breach of contract have been addressed at various times by the scholarly community. Writers from a previous era argued for the abolition of the full performance rule, seeking consistency by fully liberating restitution from expectation.¹²² As noted above,¹²³ however, that position has been rejected in the case law. Childres and Garamella pressed for consistency in the opposite direction. Focusing primarily on the injured supplier, they argued that expectation-based remedies should not be undermined by the ready availability of a larger, restitutionary recovery.¹²⁴ A number of other scholars have noted the problem and the lack of an adequate explanation, but have made no serious attempt to provide a conceptual or

119. See *supra* text accompanying notes 63-64 and Hypothetical Case 3 (*supra* text accompanying note 8).

120. See *supra* text accompanying note 61.

121. See *supra* text accompanying notes 87-104.

122. WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 298-302 (1893); FREDERICK C. WOODWARD, THE LAW OF QUASI-CONTRACTS § 262 (1913).

123. See *supra* notes 61-62 and accompanying text.

124. Childres & Garamella, *supra* note 54, at 437-41, 457-58.

theoretical solution.¹²⁵ In his treatise on restitution,¹²⁶ Professor Palmer apparently accepts the correctness of the full performance rule, without coming to grips with its basic inconsistency with the broader universe of cases on restitution as a remedy for breach.¹²⁷ Professor Dobbs proposes a number of pragmatic solutions to minimize the conflict between restitution and expectation, without attempting a general resolution of the issue.¹²⁸

Professor Farnsworth has proposed a general theory to explain the existing case law. He suggests that "restitution is available as an alternative remedy unless measuring the amount of recovery would involve the court in problems that could be avoided by awarding damages based on expectation."¹²⁹ The "problems" to which he refers re-

125. See 5 CORBIN, *supra* note 57, § 1110; J. MURRAY, MURRAY ON CONTRACTS § 126, at 720-21 (3d ed. 1990); CALAMARI & PERILLO, *supra* note 16, § 15-4, at 652. Williston's treatise acknowledges the full performance rule, but provides virtually no discussion of its relationship to the general rule permitting restitution in excess of expectation. 12 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS §§ 1459, 1485 (3d ed. 1970).

126. PALMER, *supra* note 34, § 4.3. In an earlier article, Professor Palmer suggested that the contest between expectation and restitution should be resolved in terms of "considerations of fairness and convenience." Palmer, *supra* note 79, at 281. Professor Palmer's resolution of the issue is reminiscent of the "essence of the contract" approach to material breach. See Andersen, *Material Breach*, *supra* note 19, at 1091-92.

127. Professor Palmer states that giving the injured, fully performing supplier "the very thing he bargained for in return for his performance, that is, a sum of money, . . . provide[s] a rational explanation of the full performance doctrine" PALMER, *supra* note 34, § 4.3, at 383. By contrast, he objects to reducing the restitutionary award of an injured, partially performing supplier by the losses he would have suffered had the contract been fully performed. *Id.* That reduction would permit the breaching recipient to enjoy the benefits of a contract favorable to her, which would be "a gross miscarriage of justice . . . [because] the defendant is the party guilty of a breach of contract." *Id.* § 4.4(a), at 392. Professor Palmer does not attempt to explain why the fact that the supplier happens to have fully performed makes it any less gross a "miscarriage of justice" to grant the breaching recipient the benefits of a favorable contract.

It is noteworthy that in the context of a recipient client's breach of contract with a supplier attorney, where the agreement is favorable to the former, Professor Palmer argues that the partially performing attorney should be limited to expectation relief precisely to the extent proposed *infra* in Part III.C. *Id.* § 4.4(f), at 406-09. The proffered justification for the different treatment appears to be that "a client should be free to terminate the relationship when he has lost trust or confidence in his lawyer, whether justly so or not," *id.* § 4.4(f), at 408, and that not permitting the client to retain the benefits of the contract she breached would unduly inhibit that freedom. One cannot help but conclude that Professor Palmer justifies restitution in excess of expectation as a means of punishing one who materially breaches and that he excepts the breaching client from that policy on the assumption that she is more entitled to breach the retainer agreement than is a party to an ordinary commercial contract. He also uncritically excepts the recipient in an ordinary commercial contract where the supplier has fully performed on the unpersuasive, though oft-repeated, ground that the supplier got exactly what he bargained for.

128. DOBBS, *supra* note 61, §§ 12.20, 12.24.

129. FARNSWORTH, *supra* note 5, § 12.20, at 949.

late to difficulties in measuring damages. Thus, restitution should be available to an injured recipient, in many cases, because measuring her restitution interest usually will require no more than determining the amount of money she has paid.¹³⁰ The easiest cases are those in which the supplier has failed to perform entirely or the recipient justifiably rejects the supplier's entire performance, because there will be no difficulty in measuring the offsetting benefit received by the injured recipient.¹³¹ By contrast, measuring the restitution interest might be difficult when an injured supplier has fully performed, but expectation simply will be the unpaid contract price.¹³² Thus, the full performance rule reflects the relative ease of determining expectation rather than restitution damages.¹³³ The hardest cases will be those in which an injured supplier has partially performed, because measuring either restitution or expectation is likely to be challenging.¹³⁴

The difficulty-of-measurement principle comes under strain, as Professor Farnsworth acknowledges, when the injured supplier already has conferred a benefit greater in value than the contract price before the contract is ended prematurely. In this situation, Professor Farnsworth notes that

[u]sing the contract price as a ceiling on recovery in such a case will not entirely avoid problems of measurement of the benefit conferred on the party in breach, since that benefit must, at least in principle, be measured before it can be known whether the ceiling has been reached. On the other hand, not using the contract price as a ceiling on recovery may result in a more generous recovery for part performance than would have been allowed for full performance.¹³⁵

Giving an injured, partially performing supplier restitution in excess of the total contract price is but one illustration of the general

130. *Id.* § 12.20, at 950.

131. *Id.*

132. Note the possibility of damages in addition to the unpaid price, however. *See supra* Part I.D.2; *see also infra* Part II.B.

133. FARNSWORTH, *supra* note 5, § 12.20, at 953-54.

134. *Id.* § 12.20, at 950-53. Measuring restitution may be difficult because, even more than in the case of the fully performing supplier, determining the market value of the performance rendered can be problematic. How does one determine, for example, the value of a partially completed construction job? *Cf. Andersen, Material Breach, supra* note 19, at 1117-18 (suggesting a means of determining the value of the benefit conferred in such cases). Expectation also may be difficult to measure because the measurement will require at least a finding of how much more the supplier would have spent on full performance or, alternatively, what profit or loss would have resulted from full performance. *See FARNSWORTH, supra* note 5, § 12.10.

135. FARNSWORTH, *supra* note 5, § 12.20, at 954.

problem of restitution in excess of expectation.¹³⁶ It demonstrates why Professor Farnsworth's theory, for which he makes only modest claims,¹³⁷ is ultimately incapable of fully accommodating the competing claims of restitution and expectation in damages for breach of contract. There will be cases, including some falling under the full performance rule, in which measuring both restitution and expectation will not be particularly difficult.¹³⁸ In any event, modern courts have become increasingly willing to tolerate difficulties in measuring the proper amount of damages awardable for breach of contract.¹³⁹ A rule based on ease of measurement should not drive so fundamental an issue as the proper basis for determining damages for breach.

To be sure, relative ease of measurement is not an insignificant factor in the relationship between expectation and restitution. As will be seen,¹⁴⁰ ease of measurement sometimes will play a major, even a determinative, role in the analysis. But a sturdier conceptual foundation is needed for deciding whether the remedial rights of a breach victim should look forward, protecting the expectation interest, or backward, guarding the restitution interest. Indeed, the first question is whether "restitution" itself adequately encompasses the proper alternative to expectation as a remedy for breach of contract.

II. THE RESTORATION INTEREST

The thesis of this Part of the Article is that the conventional, tripartite model of contractual interests should be superseded by a bi-

136. Professor Farnsworth's analysis apparently assumes that the contract price is equivalent to the expectation interest, which may not be so, as pointed out above. *See supra* Part I.D.2.

137. Professor Farnsworth describes his theory only as "a general principle serving to rationalize many of the decisions." FARNSWORTH, *supra* note 5, § 12.20, at 949.

138. *See, e.g., id.* § 12.15, at 923-24.

139. Early cases often interpreted the certainty limitation on contract damages rather strictly. *E.g., Griffin v. Colver*, 16 N.Y. 489, 491 (1858) (holding that "damages to be recovered for a breach of contract must be shown with certainty" and that speculative profits are not recoverable). In recent years, the certainty requirement has been relaxed. *See, e.g., Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 261 (8th Cir. 1969) (holding that the injured party need prove damages with "only reasonable certainty, not absolute certainty" and that doubts will be resolved against the party in breach); *Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl. 1960) ("If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery."). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 352 (1979) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."); 5 CORBIN, *supra* note 57, § 1020, at 124 (concluding that a basis for "a reasonable estimate" of value of harm suffered is required for recovery of damages); FARNSWORTH, *supra* note 5, § 12.15, at 881.

140. *See infra* Part III.A.

partite regime. Within the bipartite regime are two alternative and competing measures of damages for breach of contract. Expectation is one of them.¹⁴¹ But neither restitution nor reliance alone, as conventionally defined, adequately describes the other. This Part of the Article defines and describes the second interest, which is referred to as the *restoration interest*. Part III of the Article then discusses the principles governing the relationship between expectation and restoration.

Restoration is the logical and intuitive counterpart to expectation. The expectation interest seeks the economic replication of full performance. Subject to well-established qualifications,¹⁴² it looks forward to the circumstances that would have existed had the agreement been performed as the parties originally anticipated. Restoration looks backward to the economic circumstances of the breach victim at contract formation. Subject to the same qualifications, it seeks to restore the injured party to the precontractual position. Although the restoration interest is not unambiguously recognized as an element of conventional contract doctrine, its protection is a stated remedial goal of many judicial opinions and is reflected in the results of numerous cases.¹⁴³ As governed by the principles discussed in Part III, the restoration interest eliminates the anomalies in the law of contract damages previously discussed. The restoration interest also simplifies the law of damages, making it more elegant and intuitive. For these reasons, the bipartite restoration-expectation model is superior to the tripartite expectation-reliance-restitution regime.

The restoration interest consists of three components: restitution, compensation for other loss, and a discharge of executory obligations. An understanding of the restoration interest begins with an examination of the goals and effects of restitution as a remedy for breach.

A. *Restitution*

1. *Restitution and the Goal of Restoring the Status Quo Ante.*—The choice between restitution and expectation frequently is cast in terms of whether the remedy for breach should enable the victim to back out of the contract or to move forward through it. Restitution, with the notion of rescission sometimes added to stress the “undoing of the contract,” is seen as the way backward. It is often said that the pur-

141. This analysis treats as belonging to the expectation rubric those cases in which reliance is used as a subset of expectation in measuring damages. See *supra* Part I.C.1.

142. See *supra* notes 19-22 and accompanying text.

143. See *infra* Part II.B.2.

pose of restitution as a remedy for breach is to restore the victim to the *status quo ante*.¹⁴⁴

The restitution interest as conventionally understood, however, does not return the injured party to the *status quo ante*. When restitution is used as a remedy for breach of contract, both the First and Second Restatements require the breaching party to have received a "benefit" from the injured party's performance.¹⁴⁵ To be sure, the concept of benefit is defined generously. The breaching party need not have been enriched in order to have "benefitted." It is sufficient that the victim's full or part performance has been received by the breacher or rendered at his request.¹⁴⁶ Scholarly authority and the case law are solidly in accord with the proposition that restitution does not require the defendant to have become or remained wealthier as a result of the plaintiff's performance.¹⁴⁷

Even if the restitution interest is generously defined, however, protecting it alone is insufficient to restore the breach victim to the status quo. Restitution excludes a number of potentially significant costs—such as amounts expended in preparation for performance and consequential losses arising from the breach—that do not confer a benefit on the other party under even the most liberal concept of

144. See, e.g., RESTATEMENT OF CONTRACTS, § 347 cmt. b (1932) ("In granting restitution as a remedy for breach, . . . the purpose to be attained is the restoration of the injured party to as good a position as that occupied by him before the contract was made."); 5 CORBIN, *supra* note 57, § 1107, at 573 ("[I]n enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend to put the injured party in as good a position as that occupied by him before the contract was made."); *Riess v. Murchison*, 503 F.2d 999, 1008 (9th Cir. 1974) (holding that the victim of a material breach "may seek restitution in which both he and the wrongdoer will be restored to the position they occupied at the time the contract was formed"), *cert. denied*, 420 U.S. 993 (1975); *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."); *Potter v. Oster*, 426 N.W.2d 148, 152 (Iowa 1988) ("Restoring the status quo is the goal of the restitutionary remedy of rescission."); *United Engine Co. v. Junis*, 195 N.W. 606, 607 (Iowa 1923) ("A rescission contemplates and requires the restoration of the status quo."); *Shoreham Developers, Inc. v. Randolph Hills, Inc.*, 269 Md. 291, 300, 305 A.2d 465, 471 (1973) ("The purpose of restitution [as a remedy for breach of contract] is to put the injured party in as good a position as that occupied before the contract was made."); *Calliari v. Sugar*, 435 A.2d 139, 142 (N.J. Super Ct. Ch. Div. 1980) (explaining restitution in kind).

145. RESTATEMENT OF CONTRACTS, § 348 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 370 (1979).

146. RESTATEMENT OF CONTRACTS § 348 cmt. a (1932); RESTATEMENT (SECOND) OF CONTRACTS § 370 cmt. a (1979).

147. See, e.g., PALMER, *supra* note 34, §§ 1.2, 4.2, and cases cited therein (tracing the beginnings of quasi-contract and discussing "The Legal Conception of Benefit"). See generally John P. Dawson, *Restitution without Enrichment*, 61 B.U. L. REV. 563 (1981).

"benefit."¹⁴⁸ As Fuller and Perdue observed, a definition of the restitution interest based on a return to the victim's precontractual position is more descriptive of the reliance interest than of the restitution interest.¹⁴⁹ Yet, as demonstrated above,¹⁵⁰ when used as a measure of damages for breach, the reliance interest routinely is treated as a lesser included element of expectation. As so understood, the reliance interest is reduced by losses that would have been incurred by the victim from full performance. Reliance therefore also falls short of fully describing what is at stake when the victim seeks a backward-looking remedy for breach.

A puzzle of sorts thus arises. If the remedial goal of looking backward is truly to restore the victim's precontractual position, then the tool for accomplishing that goal is not restitution, but rather a more robust reliance interest—one fully emancipated from the limits of expectation. Indeed, the relevant backward-looking interest has been referred to as the "status quo interest,"¹⁵¹ which describes the precontractual position more accurately than does "reliance."¹⁵² But despite statements to the effect that their goal is to restore the status quo, the courts, with stubborn consistency, use restitution instead of reliance as the alternative to expectation.¹⁵³ When the purpose is not to replicate the victim's rights to performance but to free him from its constraints, restitution is the remedial measure of choice. This phenomenon

148. In other circumstances, of course, restitution does fully restore the status quo, as when the only change in an injured recipient's position is the payment of the purchase price, which she seeks to have refunded, or when an injured supplier has incurred no cost or detriment that has not been realized as a benefit realized by the breaching recipient.

149. Fuller & Perdue, *The Reliance Interest Part 1*, *supra* note 1, at 89.

150. See *supra* Part I.C.1.

151. A.S. Burrows, *Contract, Tort and Restitution—A Satisfactory Division or Not?*, 99 LAW Q. REV. 217, 221 (1983).

152. Although reliance is nominally defined in terms of the position the party in question would have enjoyed had the contract not been made, RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1979), A.S. Burrows argues that the connotation of "status quo" more accurately represents the precontractual position for several reasons. Burrows, *supra* note 151, at 218-21. The term "status quo" encompasses more clearly than does "reliance" consequential losses resulting from the breach that were not caused by the victim's reliance on the breaching party carrying out the promise. *Id.* Furthermore, the term "status quo" necessarily excludes reliance that benefits, rather than disadvantages, the party in question, and it illustrates the conceptual unity of the interest being protected in breach of contract cases with the interest for which remedies in tort exist: the interest in compensation for a harm inflicted. *Id.* See *infra* text accompanying notes 201-222 regarding the relationship of the restoration interest to tort remedies. In this Article, the term "restoration interest" is preferred over "status quo interest" because the latter may connote a recovery freed from the constraints of the avoidability, foreseeability, and certainty limitations applicable to all contract damages. See *infra* note 220 and accompanying text.

153. See cases cited *infra* Part II.B.2.

might be explained in any of at least three ways: (i) courts might be blind to the shortcomings of restitution to achieve their stated remedial goal; (ii) the courts' true remedial goal might be something less than the professed one of restoring the breach victim to the *status quo ante*; or (iii) the remedy the courts have applied, and referred to as "restitution," might extend beyond restitution, toward the full replication of the precontractual position.

The third position mentioned above seems particularly descriptive of a good many opinions. Although courts refer to the remedy they grant as "restitution," they commonly grant additional relief necessary to return the breach victim to the *status quo ante*.¹⁵⁴ If that is so, then why does the concept of restitution enjoy such staying power? Why has the alternative to expectation not come to be referred to generally as the reliance or status quo interest?

2. *Restitution as the Principal Element of the Restoration Interest.*—Despite the lack of complete conceptual fit between the restitution interest and the goal of returning the victim to the *status quo ante*, there are at least two important reasons, in addition to historical momentum, for the law's deeply rooted attachment to restitution as the central component of the backward-looking remedy for breach of contract. The first is that a restitutionary claim, at least insofar as it is based on actual accretions to the wealth of the other party, carries with it a strong moral justification. As Fuller and Perdue pointed out, when costs incurred by A translate into added wealth for B, the resulting discrepancy from the status quo is double what would occur if A's loss resulted in no gain to B.¹⁵⁵ It is unsurprising, then, that a court would justify a return of wealth to A not simply on the ground that A has suffered a loss, which is relevant to the reliance interest as well, but on the ground that B has enjoyed a corresponding gain. This is the essence of restitution granted to prevent unjust enrichment. The policy against unjust enrichment is ancient, finding expression in the philosophy of Aristotle¹⁵⁶ and in Roman law.¹⁵⁷ It continues to exert a powerful influence on modern jurisprudence, including the law of contracts.

154. See *infra* Part II.B.2.

155. See Fuller & Perdue, *The Reliance Interest Part 1*, *supra* note 1, at 56.

156. ARISTOTLE, *NICOMACHEAN ETHICS* 120-23 (Martin Ostwald trans., 1962) (pages 1132a-1132b in I. Bekker trans., Berlin, Prussian Academy, 1831, the first modern edition, to which most others cross-reference).

157. 1 THE DIGEST OF JUSTINIAN 380 (Mommsen, et al., eds. and trans. 1985) (Book XII, citing Pomponius); see also ZIMMERMANN, *supra* note 24, at 851-57 (explaining the development of Roman law regarding unjustified enrichment).

The second reason that resort initially is made to restitution rather than to reliance is a practical one, which applies not only to cases of unjust enrichment but also to the many instances in which restitution is granted in the absence of any corresponding gain to the other party.¹⁵⁸ The restitution interest often lends itself to more accurate measurement of what is necessary to restore the parties' precontractual position than does direct resort to the concept of reliance or the status quo. Indeed, in some cases the precontractual position may be virtually impossible to calculate except in restitutionary terms.

Suppose, for example, that a contractor provides labor and materials to construct a building. Strictly speaking, the reliance interest is measured by the costs to the supplier of preparing and performing under the contract. Some of those costs may be readily ascertainable, such as the costs of materials purchased from third parties for use on the job or the amount of wages paid to workers. Other costs are likely to be inherently elusive, unless defined in terms of market values. Consider the builder's own time or the use of tools and equipment he already owns. Measuring the actual costs incurred by the builder in the use of those resources would be a process riddled with uncertainties. How much of the useful life of the equipment was consumed on the job? What were the costs of transporting the equipment to the job site? How does one determine or quantify the detriment the builder suffered in expending his own labor?

For costs such as these, the price that others would be willing to pay for the use of the equipment or for the builder's time provides the most accurate, and often the only practicable, gauge of reliance.¹⁵⁹ It is perhaps for this reason that restitution as a remedy for breach commonly is measured by the market value of the claimant's performance, whether or not the other party actually has been enriched.¹⁶⁰ The point is not only that something is being taken back from the person who received it, but also that something of value is being restored to

158. See *supra* text accompanying note 147.

159. There will be cases, of course, in which measuring the change from the breach victim's status quo will be no more difficult than determining the breaching party's enrichment. In that event, a court might well look directly to the former in calculating damages. An example of a court doing so appears in *McCray v. Murray*, 423 So. 2d 559 (Fla. Dist. Ct. App. 1982), in which a contractor engaged to construct a fish pond materially breached the contract by abandoning the job prior to completion. The court decided that the land owner was entitled to choose between expectation relief and "damages which will put him in the same position as he was immediately prior to making the agreement." *Id.* at 561. The court affirmed an award of \$20,000 as the cost of restoring the property to its previous condition, even though the data for calculating the extent of the builder's enrichment, in the form of soil excavated and sold to third parties, was readily available. *Id.* at 560.

160. RESTATEMENT (SECOND) OF CONTRACTS § 371 cmt. 9 (1979).

the one who lost it. If the breaching party has been measurably enriched, then that defendant's increase in wealth is an available measure of restitution. But if, as often is the case, the victim's costs of performance do not fully translate into enrichment of the breaching party, then restitution measured by the market value of the performance in question becomes the most, and sometimes the only, feasible way to restore the *status quo ante*.¹⁶¹ As so measured, restitution is anchored not in the policy against unjust enrichment, but in the policy of restoring the breach victim to the precontractual position. Both its moral claims (when unjust enrichment exists) and its practical advantages (whether or not unjust enrichment exists) make restitution the principal element of the restoration interest.

B. Other Loss

Although a generous approach to restitution moves toward restoration of the status quo, full restoration requires more. Some of the injured party's costs, such as preparations to perform, cannot be considered "beneficial" to the breaching party under any reasonable definition. As long as restitution remains the starting point for restoration, compensation for such losses is essential to the full protection of the restoration interest. In this Article, the general term "other loss" is used to describe such costs. The "other loss" category is at least roughly analogous to the "incidental" and "consequential" losses that are a familiar part of expectation damages.¹⁶² As is true of other elements of contract damages, these losses are subject to the limitations of avoidability, certainty, and foreseeability.¹⁶³ A detailed examination of the "other loss" category is beyond the scope of this Article. It is enough for present purposes to define it generally as the difference between what is covered by the restitution interest and the net worsening of the injured party's position on account of the breach.¹⁶⁴

161. This view is consistent with the RESTATEMENT (SECOND) OF CONTRACTS § 371 (1979), which authorizes using either the market value of the performance rendered or the actual benefit to the other party as the measure of a restitutionary award.

162. See U.C.C. § 2-715 (1993). The various categories of "other loss" are discussed, though not by these labels, in RESTATEMENT (SECOND) OF CONTRACTS §§ 351, 354 (1979).

163. See *supra* text accompanying notes 19-22; see also *infra* notes 220-222 and accompanying text.

164. "Other loss" overlaps with what Fuller and Perdue referred to as "incidental reliance," to be distinguished from "essential reliance." Fuller & Perdue, *The Reliance Interest Part I*, *supra* note 1, at 78. For an insightful discussion of the possible elements of reliance as conceived by Fuller and Perdue, much of which would be relevant to a full analysis of the "other loss" component of the restoration interest, see Hudec, *supra* note 3, at 718-33.

The limitations perceived to be inherent in the notion of restitution have prevented some courts from awarding compensation for other loss. Moreover, the election of remedies doctrine has caused needless confusion about appropriate restitutionary recoveries. The manner in which courts have struggled with these obstacles is examined briefly next, followed by a survey of court opinions that have surmounted them successfully.

1. *Obstacles to Compensation for "Other Loss."*—Courts often sense, instinctively and correctly, that compensation for "other loss" ought to be awarded to the injured party. The remedy they apply, however, is not labeled "restoration," but rather "restitution," which suggests that only those costs or losses that translate into a benefit to the breaching party are recoverable. As Professor Perillo perceptively observed:

The harmful effect and, therefore, the failure of the unjust enrichment theory as the basis of the entire law of quasi-contract [i.e., restitution] is that it has inhibited, but not killed, efforts by courts to restore the *status quo ante* to the extent appropriate by requiring, where just, defendants to compensate plaintiffs for expenditures under the contract which have not been received by the defendant. . . . In short, it tended to obscure the need to protect a party from unjust impoverishment.¹⁶⁵

Some courts have responded to this problem by awarding as much "other loss" as possible under the rubric of restitution. Their efforts, however, do not succeed completely. An example is *Caffey v. Alabama Machinery & Supply Co.*,¹⁶⁶ in which the buyer of a machine that failed to operate properly sued not only for restitution of the amounts paid, but also for the costs of freight and transportation of the machine, installation, efforts to make it work, and deterioration of the sorghum crop that the machine should have processed.¹⁶⁷ Under counts pleaded for "money had and received," the court allowed restitution of the amount paid.¹⁶⁸ It also awarded damages for the trans-

165. Perillo, *supra* note 26, at 1220. Professor Perillo also notes that the focus on unjust enrichment as the basis of restitutionary remedies in contract tends to make the defendant's enrichment the measure of the benefit conferred, rather than the fair value of the plaintiff's performance. *Id.* As mentioned *supra* in the text accompanying note 147, courts and commentators generally do recognize the latter as a legitimate measure of the restitution interest.

166. 96 So. 454 (Ala. Ct. App. 1922), *cert. denied*, 96 So. 459 (Ala. 1923).

167. *Id.* at 456.

168. *Id.*

portation, installation, and testing costs.¹⁶⁹ All of the latter costs were clearly "other losses" that neither enriched, nor were incurred for the benefit of, the seller. The court nevertheless treated them as "restitutionary" by characterizing them as "in the nature of a part of the purchase price."¹⁷⁰

Notwithstanding its generosity as to some items of "other loss," the *Caffey* court denied contractual recovery for others, namely the deterioration of the crop and the installation of new equipment.¹⁷¹ The court's rationale for refusing compensation of these losses was that they "cannot in any sense be said to be a part of the purchase money of the tractor, and, not being such, cannot be recovered in these [restitutionary] counts [for money had and received]."¹⁷²

In fact, the costs of transporting, installing, and testing the machine—the losses that *were* compensated—were no more "beneficial" to the seller than those that *were not* compensated—the losses due to crop damage and the installation of new equipment. All of these items clearly fell within the "other loss" component of the restoration interest, in that compensation for them was necessary to restore the plaintiff to the position he enjoyed prior to contract formation. The concept of restitution alone is simply too inelastic to include important items of "other loss."

Another obstacle to compensation for "other loss" as part of the restoration interest is the "election of remedies" doctrine. As applied to remedies for breach of contract, the doctrine sometimes is stated as a categorical prohibition against combining restitution with contract damages. The theory is that restitutionary relief is an element of the remedy of "rescission,"¹⁷³ while contract damages normally are associated with the expectation interest.¹⁷⁴ Therefore, according to this

169. *Id.*

170. *Id.*

171. *Id.* The plaintiff also sought and was denied damages for replacement equipment. *Id.* Such a claim was part of the expectation interest, rather than the restoration interest.

172. *Id.* Although the court concluded that it was unable to compensate for the plaintiff's crop loss as a remedy for breach of contract, it held that it was able to compensate the victim for the crop loss under a tort claim for misrepresentation. *Id.* at 458. As discussed *infra* in the text accompanying notes 201-222, to the extent the buyer's tort and contract remedies sought to restore the *status quo ante*, they should have been essentially identical.

173. See *supra* Part I.D.1.

174. For example, in *Kavarco v. T.J.E., Inc.*, 478 A.2d 257, 261 (Conn. 1984), the court stated that "[t]o seek rescission is to waive any claim for damages arising from breach of a contract." A North Carolina case took the election of remedies concept even farther: In *Industrial & Textile Piping, Inc. v. Industrial Rigging Servs., Inc.*, 317 S.E.2d 47 (N.C. Ct. App. 1984), *review denied*, 321 S.E.2d 895 (N.C. 1984), the court confused restitution as a measurement of damages for breach of contract with restitution (under the heading of *quantum meruit*) as a basis for liability. The court treated *quantum meruit* as a remedy avail-

theory, the plaintiff is entitled to elect a restitutionary or an expectation-based remedy, but cannot combine elements of both. Such statements occasionally lead a court to exclude from contract damages compensation for "other loss" that clearly is part of the restoration interest.¹⁷⁵ Most courts, however, notwithstanding broad dicta about the inconsistency of rescission and damages on the contract, correctly understand that the purpose of the election doctrine is simply to avoid allowing the injured party a double recovery.¹⁷⁶ Thus, although inconsistent theories may be pleaded and proved,¹⁷⁷ the judgment finally entered must not permit double recovery of the elements within the expectation and the restoration interests.¹⁷⁸ But choosing to protect the restoration interest rather than expectation does not preclude

able only for breach of an implied contract. *Id.* at 50. Therefore, the court reasoned that once an express contract is formed, no implied contract covering the same subject matter can exist, and thus recovery in *quantum meruit* is impermissible. *Id.* Cf. *Campbell v. Blount*, 210 S.E.2d 513 (N.C. Ct. App. 1975), in which an aggrieved building contractor was permitted to recover in *quantum meruit* because the parties had abandoned the relevant portions of their express contract in favor of an implied one. *Id.* at 516. The court noted, however, that in general "[t]here cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise." *Id.* at 515 (quoting *Concrete Co. v. Lumber Co.*, 124 S.E.2d 905, 908 (N.C. Ct. App. 1962)). The same reasoning was used in *Siebler Heating & Air Conditioning, Inc. v. Jensen*, 326 N.W.2d 182, 184 (Neb. 1982), in which the court denied recovery in *quantum meruit* to an injured, fully performing contractor. The result in this case is explainable under the full performance rule.

175. An example occurs in *Duksa v. City of Middletown*, 472 A.2d 1 (Conn. 1984), in which the court said that "[a] definite election to rescind a contract is final and operates as a waiver of the right to sue in damages." *Id.* at 7-8 (citation omitted) (quoting *Haaser v. A.C. Lehmann Co.*, 33 A.2d 135 (Conn. 1943)). The contract in that case granted the city a sewer line easement over private property. *Id.* at 2. The court ruled that the "rescission" of a contract on account of the city's breach eliminated the land owner's right to consequential damages. *Id.* at 8-9. The focus of the *Duksa* court's analysis was on whether a promise to pay such damages was discharged when the contract was cancelled or could stand on its own as a separate agreement. *Id.* at 4-6. The court rejected, at least implicitly, the idea that those damages were recoverable even in the absence of an enforceable promise to pay them. See *id.* ("[I]f the plaintiff could have proceeded on rescission, he could not on this record also have had an award based in part on a rescission theory and in part on a 'separate agreement' consequential damage theory."). See also *Hepperly v. Bosch*, 527 N.E.2d 533, 536-37 (Ill. App. Ct. 1988) (asserting that sellers of a house under an installment contract, who were granted restitution of the property from a defaulting buyer, were entitled to additional damages for injury to the property only if pleaded and proved as an independent tort).

176. See, e.g., *Head & Seaman v. Gregg*, 311 N.W.2d 667 (Wis. Ct. App. 1981), *aff'd*, 318 N.W.2d 381 (Wis. 1982); see also *infra* notes 208-219 and accompanying text.

177. See *Walraven v. Martin*, 333 N.W.2d 569 (Mich. Ct. App. 1983) (concluding that the trial court erred in forcing the purchaser of a cafe, who discovered that sewer construction on the street would disrupt pedestrian and vehicular traffic and impede parking, to elect, prior to trial, either expectation damages or rescission).

178. See *id.* at 574 ("We reiterate that, while plaintiff is entitled to complete relief, he is not entitled to double recovery.").

the recovery of damages for "other loss" in addition to straightforward restitution.¹⁷⁹

Although the election of remedies doctrine has worked its full share of mischief in cases involving the restoration interest, it does raise a valid point. In determining the "other loss" component of the restoration interest, one must avoid either double counting or omitting an appropriate claim for relief. Suppose, for example, that an accountant justifiably cancels a contract to provide accounting services because of the wrongful interference of the client, who has not yet paid for the services rendered. In calculating the accountant's restoration interest, the restitutionary component—the market value of the services rendered—probably would include the normal overhead and other expenditures the accountant incurred during the period of contractual performance. The accountant might have an additional claim for costs arising from the client's interference, however, such as costs for preparations to perform under the contract. If those costs are not reflected in the value of the performance rendered prior to cancellation, then they fall within the "other loss" category of the restoration interest.¹⁸⁰ An accurate calculation of the restoration interest requires a determination of whether an incurred cost or loss is within the scope of the restitution component of restoration or should be added as an element of "other loss."¹⁸¹

2. *Cases Correctly Perceiving the Role of Compensation for "Other Loss."*—Many courts compensate for "other loss," readily going beyond restitution in order to reach the goal of returning the breach victim to the status quo. An example is *Sundie v. Lindsay*,¹⁸² in which the seller of a business sued for the return of \$10,000, which had been placed in escrow and identified as liquidated damages, when the buyer wrongfully failed to close the transaction.¹⁸³ The court affirmed

179. *See id.* at 572 (declaring that the purchaser is entitled to consequential damages in addition to restitution, as long as double recovery is not awarded).

180. This statement is true assuming that these costs satisfy the normal limitations on contract damages. *See supra* text accompanying notes 19-22; *see also infra* text accompanying notes 220-222.

181. It also is important to distinguish between losses that belong to some element of the restoration interest and those that do not. Suppose the accountant claimed damages based on the lost opportunity to work for someone else. The inclusion of lost opportunities in the restoration interest tends to merge it into the expectation interest, particularly where a functioning market exists. *See supra* note 17. Lost opportunities therefore generally are considered an element of expectation, not restoration. Courts generally recognize and respect this distinction, particularly when the claim is for lost profits. *See PALMER, supra* note 34, § 4.8, at 434-36.

182. 166 So. 2d 152 (Fla. Dist. Ct. App. 1964).

183. *Id.* at 153.

a lower court ruling that the agreed sum constituted a "penalty" and therefore could not be claimed by the seller.¹⁸⁴ The court went on to say, however, that the seller was entitled to choose "damages that will put him in the same position as he was immediately prior to making the agreement"¹⁸⁵ as an alternative to expectation-based relief. Those damages included the expenses of preparing to perform, such as fees paid to an attorney to arrange the transaction prior to the buyer's breach.¹⁸⁶ Those fees obviously were not part of the seller's restitution interest.¹⁸⁷

In *CBS, Inc. v. Merrick*,¹⁸⁸ a television network sued a producer who breached a contract for the production of a television series.¹⁸⁹ The network sought the protection of its restoration interest by claiming restitution of the sum paid to the producer himself as well as compensation for "other losses," consisting of payments to third parties—a director and a screenwriter.¹⁹⁰ The court reversed the trial court's denial of "reliance damages" for the latter payments.¹⁹¹ The *Merrick* court noted that, although recovery may be limited to restitution when a contract "is illegal or void from its inception,"¹⁹² a party injured by a material breach of contract is entitled to recover the additional amounts the injured party spent in reliance on the contract.¹⁹³

Similarly, in *Miller-Piehl Equipment Co. v. Gibson Commission Co.*,¹⁹⁴ the seller of a grain storage bin promised the buyer that a government "Storage Guarantee Agreement" would be awarded to him.¹⁹⁵ When the government guarantee was not forthcoming, the buyer cancelled the agreement.¹⁹⁶ The seller sued for the contract price and the

184. *Id.* at 154.

185. *Id.* at 153. The court obviously was well aware that the election of remedies doctrine precluded only simultaneous protection of both the restoration and expectation interests. *Id.*

186. *Id.*

187. The decision in *Sundie* was followed by *Plantation Key Developers v. Colonial Mortgage Co.*, 589 F.2d 164, 169-70 (5th Cir. 1979) (permitting a developer to recover from a lender both a fee and a commission it had paid to a broker who had located the lender, in response to the lender's breach of its commitment to make loans available to the purchasers of a condominium).

188. 716 F.2d 1292 (9th Cir. 1983).

189. *Id.* at 1294.

190. *Id.* at 1295-96.

191. *Id.* at 1296.

192. *Id.*

193. *Id.* ("A party injured by a breach of contract may recover both restitution and reliance damages.").

194. 56 N.W.2d 25 (Iowa 1952).

195. *Id.* at 26.

196. *Id.*

buyer counterclaimed for the expenses incurred in installing a concrete slab for the bin.¹⁹⁷ The court held that the seller's failure to procure the guarantee entitled the buyer to "rescind."¹⁹⁸ The court then ruled that the buyer's counterclaim should have been allowed because "[a] purchaser who has rightfully rescinded such a contract may demand the complete restoration of the status quo which includes the return of any expenditure made by him which was contemplated by the contract."¹⁹⁹

The goal of restoring the victim to the *status quo ante*, so clearly reflected in *Miller-Piehl*, is also a part of the standard damages remedy for tort actions, which aim to compensate the victim for harm caused by the defendant.²⁰⁰ The baseline against which harm is measured in tort is the plaintiff's position prior to the defendant's wrongful act or omission. The baseline in contract is the breach victim's position prior to contract formation. Given this similarity of remedial purpose, it is not surprising that useful illustrations of the restoration interest arise from an important intersection of contract and tort: cases in

197. *Id.* at 27.

198. *Id.*

199. *Id.* at 29. Several other courts have awarded "other loss" in connection with restitution or rescission as a remedy for breach. See *Potter v. Oster*, 426 N.W.2d 148, 150 (Iowa 1988) (allowing an injured purchaser of real property to recover miscellaneous expenses for closing the transaction and relocating, in addition to restitution of installment payments, taxes, and improvements); *United Engine Co. v. Junis*, 195 N.W. 606, 608 (Iowa 1923) (permitting the buyer of an engine and generators, on a breach of warranty, to rescind the contract and still demand payment for installment costs); *Harris v. Metropolitan Mall*, 334 N.W.2d 519, 526 (Wis. 1983) (permitting the plaintiff in a case involving the sale and leaseback of a shopping mall to recover out-of-pocket expenses in addition to amounts paid to defendants).

In *Dialist Co. v. Pulford*, 42 Md. App. 173, 399 A.2d 1374 (1979), a manufacturer broke its promise to give a distributor exclusive access to a certain territory. *Id.* at 177, 399 A.2d at 1379. The court held that this breach gave the distributor justification for cancelling the contract and seeking damages. *Id.* The plaintiff sought to recover the \$2500 he had paid to the manufacturer for the distributorship. *Id.* at 175, 399 A.2d at 1377. He also sought compensation for the salary he would have earned from the employment he had given up in order to take the new position. *Id.* at 184, 399 A.2d at 1382. The court conceived of the remedy in terms of the plaintiff's traditional reliance interest and struggled with the question whether the lost salary constituted an element of reliance. *Id.* Although conceding that "[t]he forfeiture of an occupation in which one earns steady compensation does not fit neatly within" the reliance category, the court awarded compensation. *Id.* If the plaintiff's recovery were considered under the rubric of restoration, which more accurately describes it, then compensation for lost wages would be a routine instance of "other loss," which accompanies the restitution of the fee paid to the manufacturer and the discharge of the plaintiff's executory obligations to perform under the contract.

200. See W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20 (5th ed. 1984) ("A recognized need for compensation is . . . a powerful factor influencing tort law.").

which the defendant makes a fraudulent misrepresentation during the formation of the contract.

The law governing remedies for such misrepresentation tends to be confused and conflicting because of the concurrent application of tort and contract bases of liability.²⁰¹ The cases indicate, however, that the remedial alternatives for tortious misrepresentation are essentially the same as for material breach of contract.²⁰² Damages may be based on the benefit of the bargain—in essence, forward-looking, expectation damages.²⁰³ Alternatively, the victim may claim the net value of what has been lost in the transaction, which is essentially the restoration interest.²⁰⁴ A number of opinions suggest that in cases of misrepresentation in contract formation, either the victim of the fraud or the court may choose one of these measures.²⁰⁵ When the

201. *Id.* § 105, at 727-29 (discussing both the tort and the contract-warranty causes of action for misrepresentation).

202. *See, e.g., Kincaid Enters., Inc. v. Porter*, 812 S.W.2d 892, 900 (Mo. Ct. App. 1991) ("It is well to understand that a claim for breach of contract and a claim for fraudulent inducement to make that contract are not inconsistent remedies."). Note that this comparison leaves aside the additional possibility of punitive damages when the action sounds in tort. *See, e.g., Four "S" Alliance, Inc. v. American Nat'l Bank & Trust Co.*, 432 N.E.2d 1213, 1217 (Ill. App. Ct. 1982) (upholding the trial court's award of punitive damages for fraudulent misrepresentations in a gasoline service station lease).

203. *See, e.g., Four "S" Alliance, Inc.*, 432 N.E.2d at 1216 ("A benefit-of-the-bargain formula for damages is proper in an action for fraud."); *Porter*, 812 S.W.2d at 900 (measuring damages both for fraud and for breach of contract as "the benefits and gain [the victim] would have made under the contract had its terms been performed, and indeed had it been intended to be performed"); *Radford v. J.J.B. Enters., Ltd.*, 472 N.W.2d 790, 795 (Wis. Ct. App. 1991) (awarding defrauded boat buyers both the "benefit of the bargain" and their consequential damages); *Naranjo v. Paull*, 803 P.2d 254, 263 (N.M. Ct. App. 1990) (concluding that "benefit of the bargain" damages, if properly computed, are available for fraud).

204. *See CAL. CIV. CODE* § 3343(a) (West 1991) ("One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction."); *Hughes v. Consolidated-Pennsylvania Coal Co.*, 945 F.2d 594, 615 (3d Cir. 1991) (noting that under Pennsylvania law, the proper measure of damages for fraud is the fair market value of the property when sold minus the fraudulently paid price), *cert. denied*, 112 S. Ct. 2300 (1992); *Fidelity Mortgage Co. v. Cook*, 821 S.W.2d 39, 43 (Ark. 1991) (affirming trial court's judgment awarding out-of-pocket expenses for fraud damages); *Miles Homes Div., Insilco Corp. v. Smith*, 790 S.W.2d 382, 384 (Tex. Ct. App. 1990) ("The proper measure of damages for fraud at common law is the difference between the value of that which he has parted with and received."); *Tuchalski v. Moczynski*, 449 N.W.2d 292, 294 (Wis. 1989) (indicating that defrauded parties may recover their amount of actual loss).

205. *See United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 203-04 (D.N.J. 1955) (selecting *sua sponte* in a federal False Claims Act case "what measure of damages would most clearly do justice between the parties"); *Turnbull v. LaRose*, 702 P.2d 1331, 1336 (Alaska 1985) ("A plaintiff should have the opportunity to use either measure . . ."); *Rice v. Price*, 164 N.E.2d 891, 895-96 (Mass. 1960) (noting that a fraud victim may choose

restoration measure is chosen, damages include a return of the value conferred upon the defendant, in addition to such "other losses" as can be proved.²⁰⁶ The remedial goal of the backward-looking remedy thus is the same whether the harm was caused by a falsehood at formation or by a failure to perform as promised.²⁰⁷ Therefore, it is appropriate to look to misrepresentation cases for examples of courts protecting the restoration interest.

The fraud case of *Head & Seemann, Inc. v. Gregg*,²⁰⁸ provides a clear illustration. In *Gregg*, the plaintiff sold its house under an installment contract and later sought to repossess the house when the defendant buyer defaulted. The defendant had falsely represented to the plaintiff that she had equity in another house that she was planning to sell and that she would pay over the net proceeds of that sale to the plaintiff.²⁰⁹ The plaintiff sought not only recovery of the property, but also damages to compensate for the property's rental value while in defendant's possession and for out-of-pocket expenditures made to repair damage done by the defendant.²¹⁰ The trial court had granted rescission of the contract, but had denied all other damages. The trial court reached that result by concluding that the election of remedies doctrine renders disaffirmance of the contract and rescission inconsistent with affirmance and damages.²¹¹ The court of appeals agreed with the trial court that the purpose of the election doctrine was to avoid inconsistent remedies.²¹² The appellate court disagreed with the trial court that disaffirmance and rescission neces-

the measure of damages, subject to adequate proof of damages); *Zeliff v. Sabatino*, 104 A.2d 54, 56-57 (N.J. 1954) (holding that the court may choose the measure of damages as justice requires); *Selman v. Shirley*, 85 P.2d 384, 393-94 (Or. 1938) (concluding that, unless "content with recovery" of actual loss, the defrauded party may elect recovery under the benefit-of-the-bargain rule); *Martin v. Brown*, 566 So. 2d 890, 891-92 (Fla. Dist. Ct. App. 1990) (holding that either of the two measures of recovery for fraud "may be used to do justice as the circumstances demand"); *KEETON ET AL.*, *supra* note 200, § 110, at 767-70 (debating the merits of various court decisions applying either the benefit-of-the-bargain or out-of-pocket measures in misrepresentation tort actions).

206. *KEETON ET AL.*, *supra* note 200, § 110, at 769.

207. *See CBS, Inc. v. Merrick*, 716 F.2d 1292, 1296 (9th Cir. 1983) ("A party may rescind a contract if there was fraud in the inception or if there was a substantial breach.").

208. 311 N.W.2d 667 (Wis. Ct. App. 1981), *aff'd*, 318 N.W.2d 381 (Wis. 1982).

209. *Id.* at 668.

210. *Id.* The defendant had made no payments to the plaintiff, and so had no restitutionary claim of her own.

211. *Id.*

212. *Id.* The court declined to abolish the election of remedies doctrine altogether, choosing instead to limit it to its proper role of preventing inconsistent recoveries. In *Gregg*, the effect of the election doctrine was "to prevent a defrauded party from both repudiating the contract and then suing on it only to *gain the benefit of the bargain*." *Id.* at 672 (quoting *Jennings v. Lee*, 461 P.2d 161, 167 (Ariz. 1969)). In other words, the court of

sarily are inconsistent with affirmance and damages, however.²¹³ Instead, the court of appeals considered the purpose of the remedy being granted to the plaintiff, concluding that the ultimate goal was the restoration of the *status quo ante*.²¹⁴ Accordingly, the court held that the remedy must include "restorative damages,"²¹⁵ consisting of fair rental value and other expenses, because such damages "work together [with restitution]²¹⁶ to restore the injured party to his precontract position."²¹⁷ In its brief affirming opinion, the Wisconsin Supreme Court held that the plaintiff was entitled to recover "out-of-pocket expenses . . . even if the expenses do not directly benefit the purchaser, as long as they do not constitute a double recovery."²¹⁸ In other words, the plaintiff's full restoration interest was protected.²¹⁹

appeals found that the seller was not entitled to simultaneous protection of the restoration and expectation interests.

213. *Id.* at 673 ("[R]escission and restorative damages are consistent remedies which work together to restore the injured party to his precontractual position.").

214. *Id.*

215. *Id.*

216. Although the court refers to the restitutionary remedy as "rescission," *id.*, it is clear from the context that to the court "rescission" meant the restitution or restoring of the property to the sellers. *See id.* at 669 ("Rescission is always coupled with restitution: the parties return the money, property or other benefits so as to restore each other to the position they were in prior to the transaction.").

217. *Id.* at 673.

218. *Head & Seemann, Inc. v. Gregg*, 318 N.W.2d 381, 382 (Wis. 1982).

219. For additional fraud cases illustrating the role of "other loss" damages in the restoration interest, see *Mock v. Duke*, 174 N.W.2d 161 (Mich. Ct. App. 1969) (allowing both restitution of the purchase price of property sold on the basis of a false representation that a water well drilled on the property would produce sufficient water for domestic use and reimbursement of drilling costs expended by the defrauded purchaser); *Garbark v. Newman*, 51 N.W.2d 315, 325 (Neb. 1952) (permitting a defrauded buyer of a used automobile to recover as damages the costs of attempted repairs in addition to restitution of the purchase price); *Maurice v. Chaffin*, 241 S.W.2d 257, 259 (Ark. 1951) (allowing a buyer of a truck to recover from a seller, who misrepresented the truck's condition, costs expended for repair in addition to the restitution of the purchase price).

The *Garbark* case was criticized in *Authorized Supply Co. v. Swift & Co.*, 271 F.2d 242, 246-47 (9th Cir. 1959), but only on the basis of the now-discredited interpretation of the election of remedies doctrine, the same interpretation that the court in *Gregg* rejected. It is possible that an undercurrent of punishment for wrongdoing, and not merely of compensation for harm, is implicit in the tort cases even when punitive damages are not formally at issue. For an example of a case awarding restoration damages upon concurrent findings of fraud and breach of contract, in which a punitive tone is clearly evident, see *DeRosa v. Boston Bakery & Italian Food Specialty, Inc. (In re DeRosa)*, 98 B.R. 644, 648-49 (Bankr. D.R.I. 1989) (ordering rescission of a franchise agreement on the basis of substantial breach of contract); *DeRosa v. Boston Bakery & Italian Food Specialty, Inc. (In re DeRosa)*, 103 B.R. 382, 384-86, 388 (Bankr. D.R.I. 1989) (again ordering rescission of the franchise agreement and awarding damages on the basis of negligent and intentional misrepresentation).

Compensation for "other loss," whether arising in the context of a claim for breach of contract or a claim for fraud, is subject to the important limitations applicable to contract damages generally. When the claim is characterized as contractual, these limitations are stated in terms of the familiar trio of avoidability, foreseeability, and certainty.²²⁰ When the tort rubric is used, foreseeability and proximate cause limit recovery.²²¹ It is unlikely, however, that the differences in the terms used often will lead to differences in the quantum of damages. Indeed, it is frequently unclear from the cases whether the wrongdoer's conduct is necessarily or properly characterized as tortious fraud rather than as contractual breach of warranty.²²² In any event, potential differences between tort and contract in this context do not belie the essential unity of the restoration interest protected.

C. Discharge as a Means of Protecting the Restoration Interest

The restoration interest frequently is protected in a form that tends to be invisible. Assume a contract for the provision of consulting services. The services are to begin in two months, with payments to be made at thirty-day intervals thereafter. Before performance begins, the supplier wrongfully repudiates the contract. If the cost of replacing the supplier's services exceeds the contract price, then the recipient probably will seek expectation damages. But suppose the supplier's services can be replaced on the market for less than the recipient had agreed to pay. In that event, she simply will cancel the contract, and the parties' relationship will end.

220. See *supra* text accompanying notes 19-22. For a case applying these limitations to restoration damages, see *CBS, Inc. v. Merrick*, 716 F.2d 1292 (9th Cir. 1983), discussed *supra* text accompanying notes 188-193, in which the court noted that on remand the trial court would be required to apply the avoidability ("mitigation") and foreseeability limitations to the amount of "other losses" recoverable by CBS. *Id.* at 1296. Likewise, in *Plantation Key Developers v. Colonial Mortgage Co.*, 589 F.2d 164, 169 (5th Cir. 1979), the court cited the venerable case of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854), to support the proposition that damages for "other loss" are recoverable only if the injury was reasonably foreseeable. On the application of the avoidability limitation to restitutionary recoveries, see RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. e (1979) (explaining that the restitution interest does not include "performances that a party has rendered following a repudiation by the other party").

221. See *KEETON ET AL.*, *supra* note 200, § 110, at 767 (reiterating that damages for fraudulent misrepresentation are limited to those proximately caused by the fraudulent conduct and reasonably foreseeable).

222. See *Garbark v. Newman*, 51 N.W.2d 315 (Neb. 1952) (discussing misrepresentation regarding a used automobile in terms of both fraud and breach of warranty); cf. *Mock v. Duke*, 174 N.W.2d 161 (Mich. Ct. App. 1969) (holding that it was error for the trial court to grant rescission of a contract for the sale of land without also considering the plaintiff's allegations of fraudulent misrepresentation and damages arising therefrom).

The restoration interest is protected in such a case of cancellation. Under the facts presented, the recipient is no worse off economically than before she entered the contract. She therefore has no restitution interest, nor has she suffered any "other loss." To return her to the legal *status quo ante*, however, requires a discharge of her obligation to pay the contract price. Under the material breach doctrine, she is empowered to obtain that discharge unilaterally and without judicial action simply by declaring the contract at an end.²²³ Had she paid some of the price in advance or had the breach caused her some "other loss" she might have needed the court's help to get compensation for those harms. But even in that event, the discharge of her duty to pay would be part of her restoration interest.

As a general matter, the discharge of executory obligations to perform under the contract is an element of the restoration interest. The formation of a contract necessarily involves the conferring of benefits between the parties. Those benefits consist of consensual, executory rights and duties—the obligations of which contracts are made. Even if conditional, those obligations represent a departure from the legal status quo. They are a form of "legal cost" incurred by the parties concerned. If all goes well, at some point executory obligations will be replaced by executed performance, meaning that legal costs will have been converted to economic ones. The discussion in Parts II.A and II.B has shown that restitution and compensation for "other losses" must be combined with general restitution to restore the economic status quo. But the restoration remedy is not complete until the legal status quo also is restored. That is the function of discharge.

Under the common law material breach doctrine, discharge occurs through the action of the injured party alone when that party cancels the contract.²²⁴ Sometimes, however, the injured party will seek or require judicial action in the discharge of executory duties as a part of the court's protection of the restoration interest. *Maurice v. Chaffin*²²⁵ provides an example. In *Maurice*, the buyer of a truck sued the seller for fraudulently misrepresenting its condition.²²⁶ The court affirmed a trial court judgment that had protected the buyer's restora-

223. See FARNSWORTH, *supra* note 5, § 8.15, at 634 (discussing the material breach doctrine and the power to terminate the contract). Discharge of executory obligations also is central to expectation damages. The purpose of expectation damages is to give the injured party the economic equivalent of full performance. A discharge eliminates all remaining executory duties, replacing them with an immediate claim for their equivalent in money. Andersen, *Material Breach*, *supra* note 19, at 1102-03.

224. See *supra* note 223 and accompanying text.

225. 241 S.W.2d 257 (Ark. 1951).

226. *Id.*

tion interest in three ways: by ordering the seller to return the buyer's vehicle, which had been taken in trade for the truck (restitution); by ordering the seller to pay damages to reimburse the buyer's expenses in trying to repair the truck ("other loss"); and—of interest here—by cancelling the promissory note and mortgage given by the buyer to secure payment of the remainder of the purchase price (discharge).²²⁷ The cancellation of the buyer's executory obligation was essential to protecting his restoration interest.

A discharge of the breach victim's executory duties does not affect the dollar amount of restoration damages. But recognizing discharge as an element of restoration is nonetheless important. As will be illustrated by some of the hypothetical cases discussed in Part III, focusing on the discharge element helps one recognize cases in which the restoration interest is being protected, especially those in which a party is permitted simply to walk away from a contract. Absent an understanding of the role of discharge, it may appear that no remedy at all has been given.

D. Conclusion

Restitution, compensation for "other loss," and discharge of executory duties combine to constitute the restoration interest. The purpose of protecting that interest is to return the injured party to the precontractual position by compensating for detrimental changes in that position—both economic and legal—occurring on account of the contract, subject to the limitations of avoidability, foreseeability, and certainty. The restoration interest stands as the alternative to expectation, which seeks to replicate the economic equivalent of full performance—subject to those same limitations. The explicit recognition of the restoration interest brings into focus the available remedial choices when a contract has been breached. With the alternatives made clear, the next problem is to understand how the expectation and restoration interests operate together as part of an integrated regime of contract damages.

227. *Id.* at 257. See also *Caffey v. Alabama Mach. & Supply Co.*, 96 So. 454, 455-56 (Ala. Ct. App. 1922) (holding that a buyer was entitled to rescind a contract entered on the basis of fraudulent misrepresentation or following breach of warranty and that executory promissory notes made to seller also could be cancelled), *cert. denied*, 96 So. 459 (Ala. 1923).

III. PRINCIPLES GOVERNING AVAILABILITY OF THE RESTORATION INTEREST

With few exceptions, a breach victim is always entitled to at least expectation damages.²²⁸ A demand for restoration damages in excess of expectation requires justification. Although the problem does not arise often, restoration in excess of expectation is claimed with sufficient frequency to require a stable set of principles to govern its use. More importantly, the cases in which restoration exceeds expectation provide an opportunity to analyze the relationship between these two interests as constituent elements of the larger regime of contract remedies. That analysis sheds light on issues broader than the proper resolution of claims for restoration greater than expectation. In particular, it clarifies the theoretical underpinnings for the commonly applied doctrine of restitution for a party in breach.

This Part of the Article argues that two principles should govern the competing demands of expectation and restoration, each arising from a different set of contract law concerns.²²⁹ The first is referred to as the *certainty principle*. It is rooted in the same policy that sustains the certainty limitation on a breach victim's expectation damages.²³⁰ The certainty principle places upon the breaching party the burden of proving with reasonable certainty that the victim's restoration interest exceeds his expectation interest. If the breacher is unable to make that showing, then the injured party will be entitled to restoration damages because that measure of relief is deemed to comply with the general rule that at least expectation damages are recoverable.

The second principle governing the expectation-restoration relationship is the *extent-of-benefit* principle. It is based on the idea that as the performance of the contract unfolds, the parties become committed not only to the benefits, but also to the risks, of the bargain they struck. In particular, as the contract moves from executory to executed, the injured party no longer is permitted to escape the losses that full performance would have caused. Commitment to the risks of

228. As noted *supra* in note 48, occasionally there may be cases in which the courts conclude that only a lesser measure of damages is allowed. When some element of the victim's expectation interest fails the test of avoidability, foreseeability, or certainty, one might argue that the full expectation interest is not protected. The better view, however, is that those tests help *define* that interest so that an award limited by them does not violate the expectation principle.

229. In addition to the two principles discussed here, it remains a requirement that no further performance will be rendered under the contract. See *supra* text accompanying notes 56-60. The granting of restitution and the discharge entailed by the protection of the restoration interest obviously are inconsistent with further performance.

230. See generally FARNSWORTH, *supra* note 5, § 12.15 (discussing this principle).

the contract is represented by the expectation interest. Escape from those risks is represented by restoration. Thus, as performance unfolds, the injured party becomes increasingly limited by the expectation interest, and access to restoration decreases correspondingly.

For purposes of this analysis, the unfolding of contract performance is measured by the extent to which the benefits of the supplier's performance are available to the recipient. The extent of the recipient's performance, which generally consists of the payment of money, is not controlling. No matter which party is in breach, therefore, the injured party will be limited to expectation damages to the degree that the recipient can enjoy the benefits of the supplier's performance. To the degree that that is not so, the breach victim will be entitled to "back out" of the contract economically through an award of restoration damages. Applying the extent-of-benefit principle in practice requires resort to the venerable tool of contract divisibility, which must be applied with sensitivity to the goals it serves in this context.

In analyzing a given case, resort to the certainty principle should precede application of the extent-of-benefit principle. A conclusion in favor of restoration under the certainty principle means that the matter may be treated as if expectation damages equal or exceed restoration damages. Because a breach victim always is free to seek damages at or below the level of expectation, that treatment in principle avoids the issue of damages in excess of the expectation interest. When it becomes clear that the restoration recovery exceeds expectation damages, however, that issue must be confronted. The extent-of-benefit principle resolves it.

A. *The Certainty Principle*

A standard element of the law governing expectation damages for breach is that the injured party's loss must be proved with reasonable certainty.²³¹ Normally, the burden of making that showing rests with the injured party.²³² An instructive example involves a supplier, such as a building contractor, who is wrongfully fired after partially performing under the contract. The builder normally seeks expectation damages, which consist of the cost of his part performance until

231. See RESTATEMENT (SECOND) OF CONTRACTS § 352 (1979) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."); see also U.C.C. § 1-106 cmt. 1 (1993) ("Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more.").

232. See FARNSWORTH, *supra* note 5, § 12.15, at 921 (discussing the imposition of the "onerous burden" on the injured party).

the time of the breach, plus the profits he would have earned had the job been completed.²³³ The partially performing builder usually will have no difficulty proving the reliance element of his claim with adequate certainty because it consists of expenditures and costs already incurred.²³⁴ He may, however, have difficulty proving with sufficient certainty that he would have earned a profit.²³⁵ As a result, the builder may fail to recover damages for the profits he would have earned under the contract. If his proof of profit is sufficiently weak, he might even choose to ignore that element of his expectation damages claim, putting forward only the reliance claim. His expectation-based recovery thus would consist of the costs of his performance up to the time of the owner's breach.

In some cases, the law shifts the certainty burden to the party in breach.²³⁶ Suppose that the owner argues that the builder would have *lost* money had he been permitted to finish the job and that the cost-of-performance element of his expectation damages should be reduced by the extent of that loss. If such a loss is proved, then the builder's damages will be reduced accordingly.²³⁷ According to the Second Restatement²³⁸ and the case law,²³⁹ it will be the owner who

233. Assuming the builder suffered no losses other than the unpaid portion of the contract price and could not salvage any of the costs expended in part performance, the cost of partial performance plus expected profit would be an accurate measure of his expectation interest. FARNSWORTH, *supra* note 5, § 12.10, at 884-86.

234. Strictly speaking, some of the builder's reliance costs may be measured in restitutionary terms, such as the costs of his time and use of his own equipment. See *supra* text accompanying notes 157-161.

235. The certainty limitation on damages has become relatively relaxed in recent years. See FARNSWORTH, *supra* note 5, § 12.15, at 921-23. In addition, the drafters of the Second Restatement argued that doubts should be resolved against the breaching party. RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1979). Nevertheless, to the extent that the victim is unable to satisfy the certainty test, as when a claim for lost profits is considered too speculative, recovery may be denied.

236. See, e.g., *Gruber v. S-M News Co.*, 126 F. Supp. 442, 446 (S.D.N.Y. 1954) ("The burden of proving loss in event of performance properly rests on the defendant who by its wrong has made the question relevant to the rights of the plaintiffs."). See also *infra* note 239, citing cases.

237. RESTATEMENT (SECOND) OF CONTRACTS § 349 (1979).

238. See *id.* (entitling breach victim to reliance damages "less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed") (emphasis added). See also FARNSWORTH, *supra* note 5, § 12.20, at 950-52 (discussing the shift in burden to the breaching owner to prove, with reasonable certainty, a negative "profit" term).

239. See, e.g., *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182, 189 (2d Cir. 1949) (maintaining that a breaching seller bears the burden of proving that the enterprise in which buyer was to use the goods would have incurred a loss); *In re Yeager Co.*, 227 F. Supp. 92, 98-100 (N.D. Ohio 1963) (holding that a defendant department store whose bankruptcy caused a breach of contract bore the burden of proving that a partnership selling goods through the store would have suffered losses had the contract been per-

bears the burden of proving that loss with reasonable certainty. Should she fail to do so, the contractor will be entitled to recover his costs of performance just as if the expectation interest—the presumptive limit on recovery—would not be exceeded thereby.

Placing the burden of certainty on the breaching party in such cases serves as authority for, and indeed sometimes can be characterized as an illustration of, the proposition that if the party in breach cannot prove with reasonable certainty that restoration exceeds expectation, then the former remedy should be allowed. As discussed above,²⁴⁰ the reliance interest is understood conventionally as being capped by the expectation interest. Absent that cap the reliance interest, if defined broadly to include “other loss” and combined with the discharge of executory obligations, becomes the restoration interest—that is, within the normal limitations on contract damages, it restores the victim of the breach to the *status quo ante*.

Perhaps the best known statement of the rationale for placing on the breaching party the burden of proving that restoration damages would exceed expectation relief is given in *L. Albert & Son v. Armstrong Rubber Co.*²⁴¹ In *Armstrong Rubber Co.*, the buyer of machinery sued to recover the cost of construction necessary to prepare for equipment to be delivered by the seller.²⁴² The seller’s delivery was unjustifiably tardy.²⁴³ Meanwhile, the market for the goods the machinery was to produce—“refined” or recycled rubber—collapsed due to the end of World War II.²⁴⁴ Expectation damages for the buyer in such a case

formed); *Gruber*, 126 F. Supp. at 446 (concluding that a distributor of Christmas cards bore the burden of proving that the manufacturer would have incurred losses had distributor not breached its duty to perform with due diligence); *Blake Constr. Co. v. C.J. Coakley Co.*, 431 A.2d 569, 579 (D.C. 1981) (requiring a general contractor that materially breached to prove that a subcontractor would have suffered losses if permitted to complete performance); *Wartzman v. Hightower Prods., Ltd.*, 53 Md. App. 656, 662-63, 456 A.2d 82, 86-87 (1983) (maintaining that a law firm that breached its contract to incorporate a company so that it would be legally authorized to sell shares of stock to the public bore the burden of proving that the company would have incurred losses on such a venture); *Dialist Co. v. Pulford*, 42 Md. App. 173, 182, 399 A.2d 1374, 1380-81 (1979) (asserting that although a distributor whose supplier breached an exclusivity arrangement “should not be permitted to escape the consequences of a bad bargain by falling back on his reliance interest, . . . the burden of proving that performance would have resulted in a loss . . . should be on the party breaching the contract”); *Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637, 638-39 (Tex. Ct. App. 1988) (finding that the breaching service company failed to support its burden of proving both the fact and the extent of losses that would have been suffered by the freight company).

240. See *supra* Part I.C.1.

241. 178 F.2d 182, 189 (2d Cir. 1949).

242. *Id.* at 184, 188.

243. *Id.* at 186.

244. *Id.*

ordinarily would include the costs of preparatory construction plus the lost profits that the buyer could prove with reasonable certainty.²⁴⁵ It was doubtful, however, that there would have been any profits at all.²⁴⁶ Indeed, the seller claimed that the buyer would have suffered a loss and argued that the amount of the loss should be deducted from the preparation-costs component of the buyer's damages.²⁴⁷ The court, speaking through Judge Learned Hand, responded as follows:

In cases where the venture would have proved profitable to the promisee, there is no reason why he should not recover his expenses. On the other hand, on those occasions in which the performance would not have covered the promisee's outlay, such a result [i.e., permitting the recovery of reliance damages] imposes the risk of the promisee's contract upon the promisor. We cannot agree that the promisor's default in performance should under this guise make him an insurer of the promisee's venture; yet it does not follow that the breach should not throw upon him the duty of showing that the value of the performance would have been less than the promisee's outlay. It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other. On principle therefore the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed.²⁴⁸

The buyer in *Armstrong Rubber Co.* had not yet paid the purchase price.²⁴⁹ Thus, the restoration interest consisted solely of the "other loss" incurred in preparing to receive the promised machinery, and of the discharge of the buyer's executory obligation to pay the price.²⁵⁰ Given the seller's present inability to prove that the remedy sought

245. *Id.* at 189.

246. *Id.* at 188.

247. *Id.* at 189.

248. *Id.*

249. *See id.* at 184 (stating that the seller first had brought an action against the buyer for nonpayment of the contract price).

250. *Id.* at 188. The court expressly discharged the buyer's duty to pay by ruling that the buyer effectively and rightfully had rejected the portion of the goods that were delivered and cancelled the contract, thus giving the buyer a defense against the seller's action for the price. *Id.* at 185-88.

would exceed the expectation interest, the court granted restoration damages.²⁵¹

The *Armstrong Rubber Co.* court's argument for placing on the breaching party the burden of proving that restoration would exceed expectation invites scrutiny. The court emphasized that the need to measure damages had arisen because of the seller's breach, so the seller ought to bear the burden of proof that the damages claimed were excessive.²⁵² A close reading of the quoted language, however, shows that the injured buyer already had satisfied the normal burden of proof as to the damages claimed. The buyer had established the amount of its "outlay," which on these facts equalled the dollar amount of the restoration interest. The court's rationale, stated in terms of the certainty principle, might be generalized as follows.

The breach victim normally bears the burden of proving the fact of breach and the extent of damages. As far as damages are concerned, that burden includes convincing the judge or jury of all facts necessary to satisfy the standards of avoidability, foreseeability, and certainty.²⁵³ The victim is entitled to prove damages measured by either the expectation or the restoration interest. The inquiry ends if the victim chooses the former and succeeds in making the proof, because a breach victim always is entitled to the protection of the expectation interest. If the victim claims and proves restoration, however, the breaching party still has a possible defense: that restoration damages exceed the expectation interest. The law places on the defaulting party the burden of establishing that fact with reasonable certainty.²⁵⁴ If the breaching party fails to meet the burden, then it is presumed that restoration damages do not exceed the expectation

251. *Id.* at 191 (awarding the buyer restoration damages subject to the seller's ability to prove in a future hearing the amount that the buyer would have lost if the contract had been performed).

252. *Id.* at 189.

253. See *supra* text accompanying notes 19-22 and 220-222.

254. The breaching party's burden of proving with certainty that the victim's expectation interest is less than his restoration interest may be higher than the victim's certainty burden in establishing the restoration interest initially. As to the victim, the certainty barrier has been relatively relaxed in recent years. See FARNSWORTH, *supra* note 5, § 12.15, at 921-23. This relaxation perhaps has occurred in part because, as recommended by the drafters of the Second Restatement, doubts should be resolved against the breaching party. RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1979). Resolving doubts against the breaching party may have the effect of increasing the showing that party must make when it bears the substantive burden of proving certainty.

cap, and the injured party's proved restoration damages are allowed.²⁵⁵

A number of cases have expressly accepted the analysis of the certainty principle applied in *Armstrong Rubber Co.*²⁵⁶ Others do so implicitly, but unmistakably. For example, in *Blake Construction Co. v. C.J. Coakley Co.*,²⁵⁷ a general contractor materially breached the contract by interfering with a subcontractor's performance and by failing to reassure the subcontractor that compensation would be given for such problems in the future.²⁵⁸ The court noted that the breach victim's costs of performance clearly would have exceeded the price payable under the original subcontract.²⁵⁹ The subcontract had been "significantly amended,"²⁶⁰ however, by change orders and by the breaching party's "mode of performance";²⁶¹ consequently, the precise amount that would have been payable to the victim under the subcontract was unclear.²⁶² The court considered whether the subcontractor's recovery of its expenses should be reduced by losses it might have suffered

255. Even if the breaching party can prove that restoration damages exceed the expectation cap, the matter is not necessarily concluded in that party's favor; rather, it proceeds to the analysis under the extent-of-benefit principle, as discussed in Part III.C.

256. *E.g.*, *In re Yeager*, 227 F. Supp. 92, 98-100 (N.D. Ohio 1963) (concluding that a department store whose bankruptcy caused a breach of contract bears the burden of proving that a partnership selling goods through the store would have suffered losses had the contract been performed); *Gruber v. S-M News Co.*, 126 F. Supp. 442, 446 (S.D.N.Y. 1954) (holding that a distributor of Christmas cards bears the burden of proof that a manufacturer would have incurred losses had the distributor not breached its duty to perform with due diligence); *Michael Del Balso, Inc. v. Carozza*, 136 F.2d 280, 282 (D.C. Cir. 1943) ("It does not lie, however, in the mouth of the party, who has . . . 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 fairly and in good faith to lay out and expend (including his own services) . . .") (quoting *United States v. Behan*, 110 U.S. 338, 340 (1884)); *Dialist Co. v. Pulford*, 42 Md. App. 173, 182, 399 A.2d 1374, 1381 (1979) ("[W]here the breach has prevented an anticipated gain and, at the same time, made proof of the consequential loss difficult, the burden of proving that performance would have resulted in a loss . . . should be on the party breaching the contract."); *Wartzman v. Hightower Productions, Ltd.*, 53 Md. App. 656, 662-63, 456 A.2d 82, 86-87 (1983) (holding that a law firm that breached a contract to complete the incorporation of a company so that the company would be legally authorized to sell shares to the public bears burden of proving that the company would have incurred losses on its venture); *Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637, 638-39 (Tex. Ct. App. 1988) (holding that the reliance damages of a freight company whose contract was cancelled wrongfully should be reduced by the amount of any losses that the breaching party can prove that the plaintiff would have suffered if the contract had been performed).

257. 431 A.2d 569 (D.C. 1981).

258. *Id.* at 573-77.

259. *Id.* at 579.

260. *Id.*

261. *Id.*

262. *Id.*

under the "amended" amount due.²⁶³ Ultimately, the court awarded the subcontractor its full costs of performance, thereby protecting the restoration interest and placing on the general contractor the burden of showing that the expectation interest had been exceeded.²⁶⁴ The court explained that "[a] court will not salvage a contracting party from the consequences of a losing contract."²⁶⁵ But where the amended subcontract "gave no means of calculating an ascertainable profit margin, and in fact seemed to indicate that there was none, the formula for the measure of damages was the cost of work actually performed, less any progress payments [the victim] received."²⁶⁶ Although the court did not frame the issue in terms of the general contractor bearing the burden of proving with reasonable certainty that restoration damages exceeded expectation, such a showing by that party evidently would have led to a reduction in the subcontractor's recovery.²⁶⁷

The certainty principle is less clearly at work, yet probably operating in the background, in many cases that appear to protect the restoration interest without inquiring whether the expectation cap was exceeded. Those decisions are based on facts under which proving the expectation interest obviously would raise serious problems of uncertainty.²⁶⁸ Courts grant restoration relief in such cases, often under the heading of "rescission,"²⁶⁹ without focusing on the expectation interest at all. An example of such an award appears in the bankruptcy case of *De Rosa v. Boston Bakery & Italian Food Specialty, Inc.*,²⁷⁰ in which the franchisees/debtors successfully sought restoration based on the franchisor's breach of a franchise agreement.²⁷¹ The court, upon

263. *Id.*

264. *See id.*

265. *Id.*

266. *Id.*

267. *See id.* at 579-80.

268. *See, e.g., Brown v. United Ins. Co.*, 113 S.E.2d 26 (S.C. 1960). In *Brown*, an insurance company wrongfully cancelled a policy providing health and death benefits. *Id.* at 28-30. The court recognized that the insured party's expectation interest was "necessarily dependent upon many factors, varying with the facts of each case, and thus rendering impossible reduction of that value to an exact number of dollars and cents." *Id.* at 32. On the facts of *Brown*, those factors included "the non-cancellability of the policy; its provisions for weekly benefits in case of temporarily disabling illness; the insured's age and the state of his health; and the unavailability of similar insurance." *Id.* Given the difficulty of calculating the expectation interest with any accuracy, the court ruled that a jury award of damages amounting to the total premiums paid under the policy—clearly a restoration-based measure—was supported by the evidence. *See id.*

269. *See supra* Part I.D.1.

270. 98 B.R. 644 (Bankr. D.R.I. 1989).

271. *Id.*

finding that the franchisor had materially breached the agreement, granted "rescission" of the contract.²⁷² The franchisees were awarded restitution damages for all amounts paid to the franchisor and damages for other loss, such as the money spent in operating the business.²⁷³ The court did not discuss what expectation damages might have been. But that measure of relief would have required estimating the future profits of a new business, a classic example of a contract in which the expectation measure is considered too uncertain to provide a basis for relief.²⁷⁴

The courts' willingness to grant restoration damages in such cases may be partly attributable to a general, but unarticulated, awareness that the expectation interest is simply incapable of adequate proof based on the facts. It may not occur to the court or to the parties to consider whether or how expectation ought to be taken into account.

A significant number of cases in which restoration relief is granted for material breach of contract can be based on the certainty principle. There are many others, however, in which proof that restoration exceeds expectation is plentiful. If the victim is to have the relief sought, the award must be justified on some basis other than the certainty principle. That problem is considered in Parts III.B and C.

B. Background to the Extent-of-Benefit Principle: A New Perspective on the Doctrine of Restitution for a Plaintiff in Default

An understanding of the extent-of-benefit principle is facilitated by an awareness of an important, but generally ignored, point about contract damages: not only the victim, but also the breaching party,

272. *Id.* at 648-49.

273. *Id.* at 649.

274. See also *CBS, Inc. v. Merrick*, 716 F.2d 1292 (9th Cir. 1983). In *Merrick*, restoration damages were awarded to a television network as a remedy for breach of a contract to produce a TV series. The court did not consider whether expectation damages would have been appropriate, possibly because those damages would have required a determination of what profits the network would have earned had the series been produced—a highly speculative calculation.

Other cases in which the courts have awarded restoration damages where the expectation interest would have been difficult to determine include: *Plantation Key Developers, Inc. v. Colonial Mortgage Co.*, 589 F.2d 164 (5th Cir. 1979) (involving a lender's breach of a contract with a developer of a condominium project to provide permanent loans to buyers of individual units); *Harris v. Metropolitan Mall*, 334 N.W.2d 519 (Wis. 1983) (awarding restoration damages to a party who purchased a shopping mall, in response to a material breach by sellers); *Ingber v. Ross*, 479 A.2d 1256 (D.C. 1984) (giving restoration damages to a dentist who purchased shares of a professional corporation, in response to the other owner's material breach); *Runyan v. Pacific Air Indus., Inc.*, 466 P.2d 682 (Cal. 1970) (granting restoration damages to a franchisee in response to a franchisor's material breach).

has a remedial entitlement, and the remedial entitlements of the parties are mutually determined. To the extent that the breach victim is awarded expectation damages, the breaching party also enjoys an expectation-based entitlement. Likewise, when the victim's restoration interest is protected, the breaching party also has a restoration-based entitlement under the contract. This statement is obviously relevant to the venerable doctrine of "restitution" for a defaulting plaintiff. Its implications go farther than that, however. A description of the link between the remedial entitlements of the breacher and victim, as well as a brief look at the implications of restitution for a party in breach, provide important background to a discussion of the extent-of-benefit principle.

1. *Illustrating the Link Between the Victim's Remedy and the Breaching Party's Entitlement.*—The link between the remedial rights of victim and breaching party is most easily illustrated by means of simplified, hypothetical cases.

Hypothetical Case 5:

On January 1, Courier contracts with business Owner to provide certain delivery services for a six-month period beginning July 1 for a total price of \$12,000, which on that date is the fair market value of those services. By July 1, the fair market value of Courier's services has fallen to \$9000 and remains constant at that level until after December 31. Courier wrongfully refuses to perform any of the required services. Owner has not yet paid any of the contract price.

Expectation would allocate the burden of the drop in the market value to Owner, where it was put by the contract when the parties agreed to a fixed price for Courier's future performance. Thus, the recipient Owner's damages would be negative; she would owe Courier \$3000. From the money originally committed to the contract, she would retain \$9000—enough to have the work performed by someone else. She then would be as well off as if the contract had been performed properly. Significantly, protecting Owner's expectation interest necessarily would mean that Courier enjoys an expectation-based entitlement as well—that is, he would retain the benefit of the market shift originally allocated to him by the agreement. Of course, no court would, or should,²⁷⁵ make such an award; the point is that, by definition, an expectation-based award for the victim results in an expectation-based entitlement for the breaching party as well.

275. See *infra* Part III.C.2.c.

On the facts of this hypothetical, Owner will prefer protection of her restoration interest, which would result in an award of zero dollars. Owner has not yet paid any of the price, nor has Courier performed any of the promised services. Thus, Owner's net restitution interest is nil. Moreover, she has suffered no "other loss." Restoration on these facts simply means that she will be discharged from her payment obligation by virtue of her cancellation of the agreement. Owner retains the funds that she would have paid to Courier and has shifted back to him the risk of the drop in the market value of his services, where it rested prior to the formation of the contract. Thus, the *status quo ante* has been restored. Courier's entitlement, also nil of course, is restoration-based as well. He loses the benefit of the shift in the market and is restored to his precontractual position.

Hypothetical Case 6:

On January 1, Courier contracts with business Owner to provide certain delivery services for a six-month period beginning July 1 for a total price of \$12,000, which on that date is the fair market value of those services. By July 1, the fair market value of Courier's services has fallen to \$9000 and remains constant at that level until after December 31. Courier works the entire six months. Owner then discovers that, due to Courier's incompetence, he has committed serious malfeasance that will cost \$1000 to correct.

One additional fact is relevant: whether or not Owner has paid Courier. The fact of payment will affect the net payment of damages between the parties, but it does not affect the allocation of contract advantages and risks represented by the expectation and restoration interests. If the expectation interest is protected, the Owner is stuck with the fallen market. Under the restoration interest, she escapes it.

Consider the expectation interest first. If Owner has not paid, she would be entitled to retain \$1000 from the money committed to the contract. With that amount she would be compensated for her loss and would be in the same position as if the contract had been performed properly. Her damages would be negative. She would owe the remaining \$11,000 to Courier. On the other hand, if she has already paid the contract price, then she would be entitled to collect damages of \$1000 from Courier to compensate her for his malfeasance. Either way, Courier's entitlement would be expectation-based as well. He would not receive protection of his entire expectation interest because he would be accountable for the \$1000 needed to compensate Owner for his malfeasance. Nevertheless, he would retain the benefit of the drop in the market. Thus, Courier's expectancy interest

would be the starting point of his claim, and the amount of his award then would be reduced by the costs of making good the imperfections in his performance.

Owner's restoration interest would be more favorable to her. If she has not yet paid any of the purchase price, then she is discharged from the duty to pay and (in the absence of any "other loss") will be required to give restitution to Courier of \$8000 for the value of the services he has rendered (the \$9000 market value of the services, less the \$1000 needed to compensate Owner for Courier's malfeasance). Although Courier's work itself cannot be returned to him, Owner's payment to Courier of the monetary value of his work restores him to the economic equivalent of the *status quo ante*. On the other hand, if Owner has paid the contract price, then she claims \$12,000 in restitution from him, offset by the \$8000 benefit he has conferred upon her, for a net payment to her of \$4000. In either event, Owner has recaptured the benefit of the market drop, which protection of her expectation interest would have denied her, and she has traded \$8000 cash for services of equal value. Courier's entitlement is obviously restoration-based as well. He loses the benefit of the drop in the market that the contract had allocated to him; except for the \$1000 needed to compensate Owner for Courier's malfeasance, however, he is returned to the economic equivalent of the *status quo ante* by receiving payment equal in value to the services he rendered.

2. *Implications for the Breaching Party's Entitlement to Restitution.*—When Owner's damages are negative, Courier's affirmative recovery is recognized under the rubric of "restitution" for a plaintiff in breach. As these hypothetical cases demonstrate, however, whether the breaching Courier's recovery is actually restitutionary rather than expectation-based is inextricably linked to the basis of Owner's damages. Whether the remedy should be based on expectation or restoration is an important question, discussed in Part III.C. The critical point here is that a determination of which interest is protected ought not depend upon whether the recipient happens to have paid in advance. Yet when a court fails to perceive the link between the victim's remedy and the breaching party's entitlement, the choice of the protected interest may turn on precisely that factor. Referring to the breaching party's entitlement as "off the contract," and therefore somehow disconnected from it, obscures the truth that the basis of the breaching party's entitlement necessarily determines the basis of the victim's

remedy and vice versa.²⁷⁶ Recognizing that the victim's remedy and the breaching party's entitlement are two sides of the same coin enables one to avoid that error.

The following analysis of the extent-of-benefit principle approaches the matter in this way. It considers the implications of the principle for both parties, treating their remedial interests as part of an integral whole. Part III.D of the Article revisits the doctrine of restitution for a defaulting plaintiff to show that courts generally apply it consistently with the extent-of-benefit principle.

C. *The Extent-of-Benefit Principle*

The extent-of-benefit principle determines when and to what extent a party injured by a material breach is entitled to protection of a restoration interest that clearly exceeds expectation. Because the remedial entitlements of the parties are mutually determined, the extent-of-benefit principle can be used to state, with equal accuracy, the basis for either the victim's damages or the breaching party's entitlement. It is sometimes helpful to consider the principle from the perspective of the breaching party as well as from that of the victim. As will be seen, most of the decided cases that are not resolved by the certainty principle are consistent with the extent-of-benefit principle. That consistency, together with the capacity of the extent-of-benefit principle to provide a coherent rationale for cases on which the authorities are in conflict, underscores the principle's descriptive power and lends it normative force.

1. *Statement of the Principle and the Issues It Raises.*—The extent-of-benefit principle is based, in a general sense, on the unfolding of contract performance. Performing the contract changes the world from the way it was at contract formation to the way the parties envisioned it would become as a result of performance.²⁷⁷ As that process occurs, the victim of a breach—whether supplier or recipient—no longer may

276. The hypothetical cases in the text present the supplier as the party in breach. It is equally true that the breaching party's and victim's remedial entitlements are mutually determined when the recipient breaches. Hypothetical cases reflecting these facts are presented in the cases on Charts I-A, I-B and I-C, discussed in Part III.C.

277. See Burton & Andersen, *supra* note 23, at 863 ("The most elementary contractual concept is that of a *promise*. A promise is an act by which a person imagines a possible world and signals a commitment to bring that world into being by future action."). For purposes of the analysis in this Article, the transition from the imagined world at contract formation to the world resulting from performance is not disrupted by impediments sufficient to invoke the doctrines of impracticability and frustration of purpose. See *supra* note 8.

avoid the allocation of advantages and burdens that was made at contract formation and embedded in the expectation interest. To the extent that contract performance has not unfolded, however, the injured party is entitled to "back out" of the agreement by recapturing advantages contractually forgone and by avoiding burdens contractually assumed. In other words, the victim of the breach is entitled to protection of the restoration interest to the extent that the contract has not been completely performed. Stated more precisely, the principle is that *the victim is limited to protection of his expectation interest, and the breacher is afforded an expectation-based entitlement, proportionate to the extent the benefit of the supplier's performance has been made available to the recipient.*

This definition raises two issues that should be addressed before considering the application of the principle to both hypothetical and decided cases. First, why does the principle turn on the *supplier's*, but not the *recipient's*, performance? Second, why does the principle refer to the *extent the recipient has benefitted from the supplier's performance*, rather than to the *extent the supplier has performed*?

a. *The Difference Between the Supplier's and the Recipient's Performances.*—Perhaps the most striking characteristic of the extent-of-benefit principle is its asymmetry. The breach victim's access to restoration in excess of expectation is governed by the extent to which the recipient has access to the benefits of the *supplier's* performance, no matter which party is in breach. The extent to which the supplier benefits from the *recipient's* performance is irrelevant.

The explanation for this asymmetry lies in the difference between the nature of the supplier's performance and the nature of the recipient's. The supplier provides services, delivers goods or other property, or otherwise alters the existing state of affairs by his performance. The recipient, by contrast, pays money. The payment of money, while an economically important event, is of a character different from other performances because (i) as a practical matter, money payments are totally reversible and (ii) obligations to pay money are readily—almost infinitely—severable. The capacity to "undo" money payments completely and to divide them minutely makes the degree to which a payment obligation has been performed unsuitable as a basis for "locking in" the expectation interest.

Money payments are entirely reversible in the sense that they can be undone without prejudice to either party. They are reversible because money is assumed to be constant in value and because, in a sense, the payment of money is a purely procedural, rather than substantive, exercise.

When interest is made available to adjust for the “time value” of money, the law of contracts treats the value of money as constant. Money returned, with interest, to a paying recipient is understood to have the same value as it had when paid. By contrast, deterioration in the value of goods or other property that has been delivered might make it impossible to restore the supplier to the precise *status quo ante*. As far as the law is concerned, therefore, the performance of an obligation to pay money can be undone without any loss in value or other prejudice to the party receiving the refund.

Especially in the modern world, money is pure form by definition. A dollar bill or a check has no intrinsic value. Each has worth only because of a social consensus that it is useful to treat money as valuable. Because money itself is pure form, its transfer is pure procedure. Although acquiring money takes effort, paying or transferring it does not. A monetary payment is something that is done and undone in an instant, by the observance of the required ritual—handing over bills, signing a check, or by other methods. By contrast, providing property or services often (though not always) requires the investment of time, effort, or creative energy, and restoring property or services in kind is often impossible.

The second important characteristic of the recipient’s money payment obligation is that money is, by nature, almost infinitely divisible. It is defined in terms of fungible units (e.g., U.S. dollars), which can be divided into subparts of only nominal value (e.g., cents) or aggregated into large sum units (e.g., millions of dollars). Unlike many supplier performances consisting of providing property or services, obligations to pay money are always divisible. The analysis of the extent-of-benefit principle in Part III.C of the Article will show that one must attempt to divide a contract according to the degree the recipient has benefited from the supplier’s performance. Sometimes that division simply is not feasible. When it is possible, however, it is always possible to allocate an amount of money to the divisible portion of the supplier’s performance. The ready divisibility of money means that a payment obligation will never preclude the prorationing of the restoration and expectation interests as required by the extent-of-benefit principle. Values assigned to the supplier’s part performance are, by definition, stated in monetary terms. The very act of dividing the supplier’s performance necessarily divides the recipient’s payment obligation as well.

These observations suggest that, upon cancellation of the contract, it is equally as easy, so far as obligations to pay money are concerned, to go forward (by protecting expectation) as it is to go

backward (by protecting restoration). In a sense, nothing "real" has happened when money has been paid because it can be "unpaid" instantly and without loss in value or transaction costs. And if a payment obligation has not been performed, it can be satisfied later, without loss of value or other prejudice, by an award of money damages. The basis of the extent-of-benefit principle is that, as the changes in the world contemplated by the contract unfold, the breach victim is progressively restricted to protection of his expectation interest. The executed or executory status of payment obligations is a fully transparent and reversible part of that unfolding world, at least for purposes of determining the measure of relief.

In its purest form, the supplier-recipient model does not apply to very many contracts. One who pays money for goods or services frequently has other obligations as well. One paying for construction work or other services, for example, typically is obligated to provide a work site and to refrain from interfering with the supplier's performance.²⁷⁸ Likewise, the buyer of goods may have duties relating to specification, shipping, or acceptance.²⁷⁹ These obligations often are implied or imposed as statutory default rules and exist primarily to make the supplier's performance possible or feasible. They do not themselves alter the existing state of affairs; rather, they make it possible for the supplier to do so. For that reason, such obligations do not undermine the operation of the extent-of-benefit principle. The recipient's primary obligation is to pay money, and that obligation is always open to such divisibility as the supplier's performance lends itself.²⁸⁰

278. See *supra* notes 82-84 and accompanying text.

279. See, e.g., U.C.C. § 2-319(3) (1993) (explaining that the buyer bears the responsibility of informing the supplier of any delivery instructions).

280. There are a few contracts in which both parties' primary obligations are to provide goods or services. The application of the extent-of-benefit principle to these contracts is discussed *infra*, in note 385. Some contracts—primarily those dealing with money loans—appear to have two recipients, in the sense that each party's obligation is to pay money. For present purposes, however, a lender of money is in the same position as one who leases personal or real property (a supplier), rather than one who pays for the use or ownership of property or for the provision of services (a recipient). The money lender may appear to differ from a lessor in that the former, unlike the latter, does not retain title to the thing lent. But the notion of having "title" to money is nonsense. As discussed in the text above, money is not a thing at all, but a form and practice that exists solely as a matter of social consensus. For example, although the debtor is obligated to repay \$100 to the lender, it makes no sense to ask whether the borrower must repay the "same" \$100 that was originally advanced by the lender. In essence, the lender's promise is not to make a payment to the borrower, but merely to give the borrower temporary use of a sum of money. The borrower pays a fee (interest) for that use. In practice, damages for breach of loan agreements usually are governed by express contract terms, rather than left to the rules of common law remedies.

b. *Extent of Benefit Versus Extent of Performance.*—The proposed definition of the extent-of-benefit principle identifies as the crucial element not the degree to which the supplier has performed, but rather the extent to which the benefit of that performance is available to the recipient. The latter standard is the proper basis for determining the measure of damages because it focuses on the transfer or exchange between the supplier and the recipient of what was bargained for. The circumstances surrounding the breach— particularly when the supplier is the one committing it—may mean that although a great deal of work was done, it accomplished little or none of what the contract intended. The appropriate gauge of the breach victim's confinement to the expectation interest, and corresponding relinquishment of restoration to the *status quo ante*, is the degree to which the supplier's performance actually accomplishes the contemplated transfer of benefits to the recipient.

As a practical matter, two issues are relevant when the extent-of-benefit principle is applied. The first is the degree to which the supplier has performed. Within the meaning of the extent-of-benefit principle, the recipient cannot benefit from something that has not been done. Thus, the extent of benefit the recipient has realized cannot exceed the degree to which the supplier has completed contractual performance. In other words, the breach victim (whether supplier or recipient) is assured the protection of the restoration interest at least to the degree that the supplier's performance remains incomplete.

The second relevant issue is the extent to which the recipient actually has benefited, or can benefit, from that portion of the supplier's performance that has been rendered. If the supplier is the party in breach, then it is possible that, due to the nature of the breach, the recipient will enjoy even less of the benefit of the supplier's performance than corresponds to the portion of the finished work. Indeed, the supplier may have completed his performance, but may have done so imperfectly. In some cases of imperfect performance by the supplier, compensatory damages will be adequate, as a practical matter, to give the recipient the benefit of so much of the supplier's performance as has been completed. In other cases that will not be so, and then it will be necessary to gauge the extent of the benefit the recipient actually has received, measured in relation to the benefit she would have realized had the supplier rendered full and proper performance.

These issues are best addressed by observing the operation of the extent-of-benefit principle in a series of factual settings. The analysis

that follows will utilize facts similar to those in Hypothetical Cases 5 and 6 above, involving the Courier and the Business Owner. Where found, decided cases reflecting the factual setting under consideration are discussed or cited. In a number of possible factual settings, however, decided cases are rare or non-existent because the facts themselves are improbable, or the proper outcome of the dispute is so obvious that litigation is unlikely, or both. The outcome of the hypothetical case on those facts nevertheless will be discussed briefly for the purpose of demonstrating the consistency with which the extent-of-benefit principle leads to the proper result.

The results required or permitted by the extent-of-benefit principle will be reflected in a series of charts intended to illustrate how the factual settings discussed relate to one another. The charts will be developed and completed as the analysis progresses. For ease of reference, each chart will be reproduced at various points in the text as its contents expand.

The application of the extent-of-benefit principle is simple when the supplier either has not performed at all or has fully performed and it is obvious that the recipient has fully benefited from that performance. These cases are considered in Part III.C.2. But most cases are not so easy. Part III.C.3 illustrates why the extent-of-benefit principle, applied by means of the divisibility doctrine, is needed in more challenging settings. Part III.C.4 considers cases in which the supplier has only partially performed, but the recipient has fully benefitted from what has been done. Part III.C.5 deals with what may be the most difficult cases of all—those in which the degree to which the supplier's actual performance benefits the recipient is less than co-extensive with the degree to which that performance has been completed.

2. *Cases in Which the Extent of Benefit from the Supplier's Performance is Readily Determined.*—In certain factual settings, it will be a simple matter to determine the degree to which the recipient has benefited from the supplier's performance in relation to the total benefit promised. The cases will be easiest when they involve neither imperfect nor partial performance.

Three fact patterns fit this description: (i) the supplier is the injured party and has rendered complete performance; (ii) the supplier is the injured party and has rendered no performance at all; and (iii) the recipient is the injured party and the supplier has rendered no performance at all. These cases are discussed in turn.

a. *The Injured, Fully Performing Supplier.*—Consider first the cases in which the supplier is the injured party. In the facts common to the cases in Column C on Chart I-A,²⁸¹ the Courier has properly completed performance by the time he acts upon the Owner's breach, which consists of interference with the Courier's work. Due to a change in his costs, the contract has turned out to be a losing one for Courier, so he prefers the protection of restoration to expectation.

In each case, Owner has enjoyed the full benefit of Courier's performance, so the degree to which Courier may claim restoration is nil. Thus, Courier is completely limited to his expectation interest; he can claim only the unpaid portion (if any) of the contract price, in addition to compensation for the \$1000 loss caused by Owner's wrongful interference.²⁸² Although the net amount due Courier will depend on whether none, some, or all of the contract price has been paid, as represented in turn by cases C1, C2, and C3, the extent to which the contract price has been paid does not affect the choice of the interest to be protected. Courier's recovery is wholly expectation-based.

The breaching recipient also enjoys an expectation-based entitlement. In this setting, that entitlement allows the recipient to pay for the supplier's work at the contract price, rather than requiring her to pay the higher restoration damages the supplier might claim.

The results required by the extent-of-benefit principle in this setting are fully consistent with the decided cases. That principle appears here in the form of the full performance rule. As discussed above,²⁸³ in such cases the courts routinely hold that the supplier is restricted entirely to the protection of the expectation interest—the payment of the contract price plus damages for consequential losses such as interference with the supplier's work.

281. The facts of the cases in Chart I and in hypothetical case 8 are suggested by *Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637 (Tex. App. 1988). In *Locke*, a freight company sued an express service company for breaching a contract in which the freight company had agreed to perform pick-up and delivery services. *Id.* at 638. The court awarded the freight company the amount of money it had invested to perform the contract. *Id.* at 638-39. The court did not deduct any losses that the freight company would have suffered, however, because the service company was unable to prove the amount of these losses, if any. *Id.* at 639.

282. In each of these cases, the \$1000 loss caused by Owner's wrongful interference is an item of "other loss" that also appears as a component of Courier's restoration interest. See *supra* Part II.B.

283. See *supra* Part I.C.2.b.

CHART I-A

Breach by Recipient in a Rising Market

Facts common to all cases in this chart:

On January 1, Courier contracts with business Owner to provide certain delivery services for a six-month period beginning July 1 for a total price of \$12,000, which on that date is the fair market value of those services. The quantity and value of the work to Owner are to be evenly spaced over the period, so that \$2000 of the contract price can be fairly allocated to each month's work. By July 1, a collectively bargained wage increase applicable to Courier's employees has gone into effect, with the result that it will cost Courier \$2500 per month to perform, and he will lose \$3000 if he performs the entire contract at the agreed price. The employees of only some of Courier's competitors are unionized, and the wage increase has the effect of raising the fair market value of Courier's services to \$15,000. This value remains constant at that level through December 31.

		A	B	C
				Courier works the entire six months. Interference by Owner imposes extra costs of \$1000 on Courier.
1	Owner has paid nothing when Courier acts upon the breach.			C's exp: \$ 13,000 ^{*(Cpr)} C's p/r: \$ 13,000 ^{*(Cpr)} C's res: \$ 16,000
2	Owner has paid \$6000 when Courier acts upon the breach.			C's exp: \$ 7,000 ^{*(Cpr)} C's p/r: \$ 7,000 ^{*(Cpr)} C's res: \$ 10,000
3	Owner has paid \$12,000 when Courier acts upon the breach.			C's exp: \$ 1000 ^{*(Cpr)} C's p/r: \$ 1000 ^{*(Cpr)} C's res: \$ 4000

bold type: results permitted or required under extent-of-benefit principle
 (): numbers enclosed in parentheses are negative
 exp: expectation interest
 res: restoration interest
 p/r: expectation/restoration interests prorated under extent-of-benefit principle
 fpr: result reflects the full performance rule
 * result consistent with majority rule in case law
 + result consistent with substantial number of decided cases
 # facts unlikely to arise and/or intuitively correct results

b. The Injured, Nonperforming Supplier.—Assume now that the Owner wrongfully prevents the Courier from beginning performance of what would have been a losing contract, as reflected in the cases in column A of Chart I-B.

If the recipient Owner has paid nothing in advance, as in Case A1, expectation damages for the supplier Courier would be negative, requiring him to pay the recipient the loss he would have suffered by performing. That result is intuitively absurd, of course, and is not the kind of argument that results in litigation. The correct result, under both common sense and the extent-of-benefit principle, is to let the supplier walk away. That result—discharging the supplier of any obli-

CHART I-B

Breach by Recipient in a Rising Market

Facts common to all cases in this chart:

On January 1, Courier contracts with business Owner to provide certain delivery services for a six-month period beginning July 1 for a total price of \$12,000, which on that date is the fair market value of those services. The quantity and value of the work to Owner are to be evenly spaced over the period, so that \$2000 of the contract price can be fairly allocated to each month's work. By July 1, a collectively bargained wage increase applicable to Courier's employees has gone into effect, with the result that it will cost Courier \$2500 per month to perform, and he will lose \$3000 if he performs the entire contract at the agreed price. The employees of only some of Courier's competitors are unionized, and the wage increase has the effect of raising the fair market value of Courier's services to \$15,000. The value remains constant at that level through December 31.

		A	B	C
		Courier is wrongfully prevented from beginning work.		Courier works the entire six months. Interference by Owner imposes extra costs of \$1000 on Courier.
1	Owner has paid nothing when Courier acts upon the breach.	C's exp: \$ (3000) C's p/r: \$ 0 [*] C's res: \$ 0 [*]		C's exp: \$ 13,000 ^{†(fpr)} C's p/r: \$ 13,000 ^{†(fpr)} C's res: \$ 16,000
2	Owner has paid \$6000 when Courier acts upon the breach.	C's exp: \$ (9000) C's p/r: \$ (6000) [*] C's res: \$ (6000) [*]		C's exp: \$ 7,000 ^{†(fpr)} C's p/r: \$ 7,000 ^{†(fpr)} C's res: \$ 10,000
3	Owner has paid \$12,000 when Courier acts upon the breach.	C's exp: \$ (15,000) C's p/r: \$ (12,000) [*] C's res: \$ (12,000) [*]		C's exp: \$ 1000 ^{†(fpr)} C's p/r: \$ 1000 ^{†(fpr)} C's res: \$ 4000

bold type: results permitted or required under extent-of-benefit principle
 (): numbers enclosed in parentheses are negative
 exp: expectation interest
 res: restoration interest
 p/r: expectation/restoration interests prorated under extent-of-benefit principle
 fpr: result reflects the full performance rule
 * : result consistent with majority rule in case law
 + : result consistent with substantial number of decided cases
 # : facts unlikely to arise and/or intuitively correct results

gation to perform—protects his restoration interest. Neither party has conferred anything of value on the other, and therefore, the supplier's net restitution interest is nil. Assuming no "other loss" is involved, restoration for *both* parties on these facts simply means discharging the Courier and leaving the parties where they stand. Full restoration is available to the injured supplier, for the extent of the benefit conferred upon the recipient, and thus the degree to which the injured supplier is limited to his expectation interest is nil.

Although the facts might be more complex than simple prevention of performance by a nonpaying recipient, the restoration interest would remain the basis of the remedy in any event. Thus, if the recipi-

ent had paid something in advance, as in Cases A2 and A3, the protection of the restoration interest requires the return of what was received. If (unlike the simplified facts represented on the chart) the supplier has suffered "other loss," such as costs expended in preparation for performance that could not be turned to other uses, then compensation for that loss also will be part of the restoration interest.

Because the supplier's restoration interest is wholly protected, the recipient's entitlement is necessarily restoration-based as well. The recipient Owner receives back any payments she has made in advance, but may not claim from the supplier Courier the benefit of the change in the market, which would have been hers under an expectation-based entitlement.

Current law generally is consistent with this position. Section 2-718(2)-(3) of the U.C.C. requires the injured, nonperforming seller to make restitution of the price the buyer has paid in advance, after deducting any damages owed.²⁸⁴ Deductible damages would include compensation for "other losses" the seller has incurred, which protects his restoration interest. If the contract were a losing one for the seller, there is no suggestion in the Commercial Code that he would have to refund *more* than the price received, as would be the case if he were limited to expectation relief.²⁸⁵ The common law traditionally has been reluctant to award relief to the breaching recipient who has paid in advance.²⁸⁶ Under the influence of the U.C.C., that position appears to have changed so that the defaulting recipient who pays in advance now is entitled to restitution.²⁸⁷ Unsurprisingly, no cases have been found in which the recipient who pays in advance and then wrongfully prevents the supplier from commencing performance has been awarded more than the amount of the advance payment. The

284. U.C.C. § 2-718(2)-(3) (1993).

285. Section 2-718(2) of the U.C.C. does contain one feature apparently inconsistent with the extent-of-benefit principle—that is, the right of the seller to withhold the lesser of \$500 or 20% of the value of the buyer's performance without proof of actual loss. This liquidated sum may be intended to compensate the seller for "other losses" such as inconvenience in arranging substitute transactions or similar difficulties likely to occur, but difficult to prove.

286. See FARNSWORTH, *supra* note 5, § 8.14, at 628 ("[A] court would deny restitution to a buyer of goods who defaulted after making a down payment or part payment . . .").

287. See CALAMARI & PERILLO, *supra* note 16, § 11-22, at 476-77 (describing movement of the law toward allowing restitution for all defaulting parties, including those whose contractual obligation is to pay money); FARNSWORTH, *supra* note 5, § 8.14, at 628-30 ("The Code rule on contracts for the sale of goods has encouraged courts to extend the rule of *Britton v. Turner* [allowing restitution for the breaching supplier] to [the breaching recipient buyer in] contracts for the sale of land.").

injured supplier therefore enjoys the protection of his restoration interest.

c. The Injured Recipient Whose Supplier Renders No Performance.—Consider now the injured recipient. In the cases in Column A of Chart II-A, Courier breaches by failing to begin his promised performance.

Because the contract has turned out to be a losing one for the recipient, she will prefer restoration to expectation damages, and because she has received no benefit from the supplier's performance, the extent-of-benefit principle entitles her to the full protection of her restoration interest. If she has paid nothing toward the contract price, as in Case A1, her restoration interest is protected by a simple discharge. If, as in Cases A2 and A3, she has paid some or all of the price, then she is entitled to a refund. Although the quantum of damages that she receives is affected by the amount of her advance payment, the choice of restoration over expectation is not affected.

The decided cases are consistent with this result, which is intuitively correct.²⁸⁸ A typical case is that of the buyer who pays in advance for goods, only to see the market price decline and the seller (through bad luck or poor judgment) wrongfully fails to deliver. In the seminal case of *Bush v. Canfield*,²⁸⁹ the buyer sought restitution of \$5000 paid in advance (out of a total \$14,000 contract price) for flour.²⁹⁰ By the time for delivery, which the seller wrongfully withheld, the market price had dropped to \$11,000.²⁹¹ The seller, seeking to limit the buyer to expectation damages, claimed that only \$2000 needed to be returned to the buyer, because a \$3000 loss would have resulted from full performance.²⁹² The court disagreed, however, and protected the buyer's restoration interest by awarding damages equal to the full \$5000 paid.²⁹³ If a recipient has suffered "other loss" on

288. If the recipient were limited to her expectation interest, then she would be required to pay part of the contract price to the breaching supplier, even though she had received nothing from him.

289. 2 Conn. 485 (1818).

290. *Id.* at 485-86. The *Bush* case thus is like Case A2 on Chart II-A because the buyer paid only part of the contract price in advance.

291. *Id.* at 490.

292. *Id.* at 486.

293. *Id.* at 488. See also *Nash v. Towne*, 72 U.S. 689 (1866) (holding that a buyer could recover the full advance payment for flour that was wrongfully withheld by a seller, rather than basing damages on the value of the flour at the time of delivery).

CHART II-A

Breach by Supplier in a Falling Market

Facts common to all cases in this chart:

On January 1, Courier contracts with business Owner to provide certain delivery services for a six-month period beginning July 1 for a total price of \$12,000, which on that date is the fair market value of those services. The quantity and value of the work to Owner are to be evenly spaced over the period, so that \$2000 of the contract price can be fairly allocated to each month's work. By July 1, the fair market value of Courier's services has fallen to \$9000, and remains constant at that level until after December 31.

		A	B	C
		Courier wrongfully fails to begin work.		
1	Owner has paid nothing when Courier acts upon the breach.	O's exp: \$ (3000) O's p/r: \$ 0 O's res: \$ 0		
2	Owner has paid \$6000 when Courier acts upon the breach.	O's exp: \$ 3000 O's p/r: \$ 6000 O's res: \$ 6000		
3	Owner has paid \$12,000 when Courier acts upon the breach.	O's exp: \$ 9,000 O's p/r: \$ 12,000 O's res: \$ 12,000		

bold type:	results permitted or required under extent-of-benefit principle
()	numbers enclosed in parentheses are negative
exp:	expectation interest
res:	restoration interest
p/r:	expectation/restoration interest prorated under extent-of-benefit principle
fpr:	result reflects the full performance rule
*	result consistent with majority rule in case law
+	result consistent with substantial number of decided cases
#	facts unlikely to arise and/or intuitively correct results

account of the supplier's breach, then compensation for that loss also is reflected in the restoration interest.²⁹⁴

The breaching supplier's entitlement is also necessarily restoration-based. On these facts, it is nil at best and is negative to the extent that any portion of the price paid in advance must be returned and damages for any other loss paid. The supplier loses the advantages of

294. See U.C.C. §§ 2-711, 2-713, 2-715 (1993) (permitting a buyer (recipient) who has not yet received the goods to recover "other loss" under the headings of incidental and consequential damages). See also *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182, 189 (2d Cir. 1949) (illustrating the recovery of "other loss" as part of the restoration interest, the buyer's rightful rejection of the seller's partial performance being equivalent to the supplier's failure to perform at all).

the change in the market that the expectation interest would have given him.

3. *Reasons Why Application of the Extent-of-Benefit Principle May Be Challenging: The Need for the Divisibility Doctrine.*—The operation of the extent-of-benefit principle is simple when the supplier performs either fully or not at all, as in the cases just discussed. In other circumstances, the principle may be more difficult to apply for either or both of two reasons. First, the supplier's performance may be incomplete. Because the recipient cannot benefit from performance that has not been rendered, applying the extent-of-benefit principle in such a case requires determining the degree to which the supplier's performance has occurred. Second, regardless of whether the supplier's performance is complete, if he is the breaching party, then the benefit that the recipient realizes may not be fully proportionate to the performance that the seller renders. Application of the extent-of-benefit principle in either case requires deployment of the venerable doctrine of divisibility. Before focusing on specific fact patterns, a brief look at the divisibility doctrine is warranted.

A good way to stress the importance of the divisibility doctrine to the extent-of-benefit principle is to consider what would happen if the doctrine were *not* employed. Without it, the victim's access to restoration damages would be binary: either expectation would apply in its entirety or restoration would. Jarring results could occur under such a system. In the case of *Oliver v. Campbell*,²⁹⁵ for example, a lawyer contracted to handle a client's divorce for \$750.²⁹⁶ Events did not unfold as the lawyer had expected, and he ended up expending time worth \$5000 on the matter.²⁹⁷ Just prior to the divorce becoming final, the client fired the lawyer and refused to pay more than the \$450 he had already remitted for the services rendered.²⁹⁸ The lawyer sued, seeking not his expectation interest of the remaining \$300, but his restoration interest of nearly \$5000.²⁹⁹ The court assumed that a partially performing, injured supplier is entitled to full restoration damages, without regard to the contract price.³⁰⁰ The court found, however, that the lawyer in this case already had "performed practi-

295. 273 P.2d 15 (Cal. 1954).

296. *Id.* at 16-17.

297. *Id.* at 17.

298. *Id.* at 16.

299. *Id.* at 17.

300. *Id.* at 18-19. Note that in *Oliver* the lawyer claimed his restoration damages solely under the restitutionary rubric of *quantum meruit*, because there apparently was no "other loss." *Id.*

cally all of the services he was employed to perform when he was discharged"³⁰¹ and therefore that he could recover only an additional \$300 under the full performance rule.³⁰² The clear implication in *Oliver* is that, had the client wrongfully fired the lawyer a little sooner, the lawyer would have been entitled to recover almost \$5000, instead of only \$750. He would have received much greater pay for having done less work.

Although the road from restoration to expectation occasionally will be rough or uncertain even under the best of circumstances, the divisibility doctrine eliminates the precipitous drop in damages implicit in the reasoning of *Oliver v. Campbell*. As Professor Corbin pointed out, the divisibility doctrine is applied in response to a wide variety of problems.³⁰³ It is invoked, for example, when an obviously material breach justifies the victim in cancelling only part of the agreement; when a plaintiff is permitted to commence consecutive actions for breach of a contract although the doctrine of *res judicata* otherwise would prohibit all but the first action; when an illegal term is severed from the remainder of the agreement; and when the statute of limitations bars enforcement of only part of a contract.³⁰⁴ That a contract may be indivisible for one purpose does not necessarily mean that it cannot be divisible for others.³⁰⁵ There is no "simple and uniform test of 'divisibility.'"³⁰⁶ Nor can any distinguishing rules be drawn from "'the intention of the parties.'" Too often they actually had none and appeal to 'intention' involves mere fiction. . . . [Instead,] the court is forced to turn to considerations of policy and precedent and should be clearly conscious of the fact."³⁰⁷

The underlying goal of the divisibility doctrine in the context of the extent-of-benefit principle is to determine the degree to which the injured party will be limited to expectation relief, rather than awarded more generous restoration damages. Divisibility in this setting is not based on the express agreement of the parties, who usually contract on the assumption of full performance. Rather, it is a policy choice embedded within the legal regime that governs the parties' agree-

301. *Id.* at 20.

302. *Id.*

303. 3A CORBIN, *supra* note 57, § 688, at 248 (explaining the difficulty inherent in formulating an authoritative rule about contract divisibility because the concept applies to various situations).

304. *Id.* § 695 (1964 & Supp. 1993).

305. *Id.*

306. *Id.*

307. *Id.*

ment.³⁰⁸ Just as using the expectation and restoration interests as the basic alternatives for measuring damages is a part of that regime, so too is applying the divisibility of contracts principle for purposes of applying those measures of relief.³⁰⁹

The basic task of the divisibility concept, as applied to the extent-of-benefit principle, is to quantify the benefit received by or available to the recipient from the supplier's incomplete or imperfect performance. Divisibility on this basis might be affected by the degree of completeness of the supplier's performance, the degree of benefit the recipient realizes from so much of the supplier's performance as has been rendered, or both. Determining the extent to which the supplier's partial or complete performance produces a benefit to the recipient may be easy or difficult. If it is so difficult as to be impracticable, then the injured party has full claim to the restoration interest.

4. *Cases in Which the Recipient's Benefit is Commensurate with the Degree of the Supplier's Performance.*—If the supplier's work is incomplete, but the portion the supplier has completed conforms to the contract, then the recipient often will benefit from that performance to the full extent to which it is rendered. The most common cases in which this situation occurs are those in which the supplier is the victim of the breach and continues to perform properly until prevented by the recipient. The same analytical issue arises when, although the partially performing supplier is in breach, the recipient enjoys the full benefit of what the supplier has done. These fact patterns are considered in turn.

a. *Damages for the Injured, Partially Performing Supplier.*—A substantial number of decided cases, most of them concerning construction contracts, present the fact pattern of the injured, partially performing seller.³¹⁰ Consider a hypothetical case with simplified, but not atypical, facts.

308. The position taken here thus rejects Professor Palmer's view that proration between expectation and restoration is inappropriate because the injured party "did not agree to accept a proportionate part of the price or a unit rate for the part performance." PALMER, *supra* note 34, § 4.4(c), at 401.

309. It may be possible for the parties to "contract around" the divisibility principle as part of their general power to reach agreements about remedies. The power to modify remedies, however, is not limitless. See generally, Andersen, *Good Faith Enforcement*, *supra* note 19.

310. In the case discussed here, the Builder has committed no breach prior to Owner's material breach. The same analysis applies if Builder first commits an immaterial breach.

Hypothetical Case 7:

In January, Builder contracts to construct a new home for Owner on Owner's property. The contract price is \$100,000, with work to commence in June. Builder estimates his total costs of performance at \$90,000, based in part on the current prices of lumber. Because of an intervening increase in the price of lumber, by the time performance is to begin Builder's costs have risen to \$110,000. At that time, it would cost Owner \$120,000 to make the same contract with an equally competent contractor.

Builder commences work on schedule. After the foundation has been laid, the walls and roof framed up, and other parts of the work done, Builder and Owner disagree on the interpretation of the contract. Owner claims that it requires Builder, at his expense, to use a premium grade material on the roof and exterior walls. Builder claims that the marginal costs of using the premium grade material are an "extra" to be paid for by Owner on top of the stated contract price. When negotiations fail, Owner orders Builder off the site. Builder has spent \$55,000 on labor and materials. Owner has paid Builder none of the \$100,000 contract price.³¹¹ Owner engages another contractor to finish the job for \$60,000. Builder's interpretation of the contract is correct.

Due to the change in the lumber market, Builder would have lost \$10,000 from complete performance under the contract, and that performance would have been worth \$20,000 more than the contract price. Builder's restoration interest therefore exceeds expectation, and consequently he will prefer the protection of the former.³¹² Consider first what Builder would recover under either full restoration or full expectation.

Builder's restoration interest consists of restitution based on the value of the benefit conferred on the Owner, compensation for any "other loss" (such as for preparations to perform), and discharge of the obligation to complete the work. On the facts given, Builder will be relieved of the duty to continue the work, and there is no "other

The results would differ only in that Owner's compensatory damages for Builder's initial breach would be taken into account in calculating the final damage award.

311. Typically, owners make progress payments during the course of construction. The absence of advance payments is posited here in order to simplify the analysis. Fact situations in which progress payments are made during the course of the supplier's performance are discussed *infra* in Part III.D.

312. In this situation, such claims by Builder usually are pursued through a claim in *quantum meruit*.

loss." The benefit conferred upon Owner might be calculated in various ways, such as by subtracting the costs of completing the project (\$60,000) from the value Builder's completed performance would have had (\$120,000). Thus, Builder would be entitled to \$60,000 in damages if his restoration interest were fully protected. That result leaves Builder with \$5000 more than his costs, an amount that includes some of the profit he originally had anticipated and also that allows him to escape entirely the increase in the price of lumber. Owner must pay a total of \$120,000—\$60,000 to Builder, and \$60,000 to the second contractor—in order to get the completed house. Therefore, Owner pays full value for the house and loses the advantage of the rising lumber market. Her entitlement is restoration-based as well.

On the other hand, Builder's expectation interest will consist of the contract price (\$100,000), less the amount he saved by not having to complete the job (\$55,000), for a total of \$45,000. Builder thus would be saddled with the entire loss resulting from the changes in the lumber market. The benefit of that change will have been shared by Owner and the new contractor. Owner has a new house worth \$120,000 after paying \$45,000 to Builder and \$60,000 to his replacement, for a total cost of \$105,000.

Consider now the application of the extent-of-benefit principle, which requires division of the contract. Because Builder's work, although incomplete, conformed to the contract and could be taken over and completed by another contractor, Owner probably benefited to the full extent of the work that Builder completed. On these oversimplified facts, it is clear that Builder has completed half the work. Thus, he would be entitled to half the contract price—or \$50,000—and would suffer a loss of \$5000.

If one is troubled by the notion that Builder should lose money when Owner was the party in breach, it is helpful to recall that Builder assumed the risk that the costs of lumber would rise. As it is, he and Owner will share the effect of the change in the market. She will pay a total of \$110,000 for a house that Builder initially was to construct for \$100,000, but that turned out to be worth \$120,000. Builder escapes with a loss of \$5000 rather than the \$10,000 loss he would have suffered from full performance.

The facts in real cases undoubtedly will be more complex, making it more difficult, though not impossible, to determine and compare Builder's remedial interests. As a practical matter, the degree of completion could be based on such factors as money or time expended. Alternatively, the costs of completion (to the new contrac-

tor) might be compared with the total cost (to both contractors) of full performance in order to quantify the portion of the work done by Builder. Once Builder has made a *prima facie* case as to the degree of completion, the burden would shift to the breaching Owner to refute Builder's assessment of damages, with doubts being resolved against Owner as the party in breach. However the degree of Owner's benefit is determined, Builder will be limited to expectation damages to that extent. He will be entitled to the protection of his restoration interest for the remainder.

In a real case, Owner is likely to have caused Builder to incur other expenses, by delaying or interfering with the work or by demanding work beyond that required under the contract. Recovering damages for these items is necessary to put Builder in the same position as if he had performed, and is a part of the expectation interest.³¹³ Those same expenses generally will constitute "other losses" within the scope of the restoration interest, as well. They will be recoverable in full, regardless of the appropriate proration between expectation and restoration damages. The important practical effect of the proration will be to apportion the economic risks and benefits of contract performance between the parties according to the degree to which performance has unfolded.

313. Work performed or value given that is genuinely beyond the scope of the contract is compensable on a *quantum meruit* basis. Such a use of *quantum meruit*, which is restitutionary in nature, is not inconsistent with the protection of the supplier's expectation interest, for it applies only to work done beyond what was originally promised and not to the work for which the parties contracted. Consider *United States ex rel. Susi Contracting Co. v. Zara Contracting Co.*, 146 F.2d 606 (2d Cir. 1944), a case often cited for the proposition that the injured, partially performing supplier is entitled to restitution without reference to the contract price. In that case, Zara Contracting (a general contractor) wrongfully terminated a soil excavation and grading agreement with Susi Contracting (a subcontractor). *Id.* at 609. Susi Contracting had encountered large quantities of clay during excavation, which made performance much more difficult and expensive than anticipated. *Id.* at 607. A term of the agreement, however, precluded Susi Contracting from claiming extra compensation on that account. *Id.* at 608. After ending the contract, Zara Contracting proceeded to complete the work using the equipment of Susi Contracting. *Id.* at 607. Proceeding on the theory that a restitutionary recovery independent of the expectation interest was available to Susi Contracting, the court granted a recovery substantially in excess of the contract price. *Id.* at 610-11. With respect to the award for excavation and grading work done by Susi Contracting, that result is inconsistent with the extent-of-benefit principle. A substantial element of the recovery of Susi Contracting, however, was based on Zara Contracting's use of its equipment after the contract had been terminated. *Id.* at 611-12. That use of equipment appears to have been entirely outside the scope of performance promised by Susi Contracting in the contract and therefore would be recoverable under a *quantum meruit* claim even if Susi Contracting had been restricted to expectation damages as to the work performed.

Hypothetical Case 7 is identical in principle to the cases dealing with an injured supplier that are necessary to complete Chart I. In the cases in column B of this chart, the Courier (supplier) is limited to his expectation interest to the degree that his performance was completed, in accordance with the extent-of-benefit principle; otherwise, he is entitled to restoration. He also has incurred an "other loss" of \$1000, which is included in both the restoration and expectation interests. Affording Courier (or Builder, in Hypothetical Case 7) full protection of the restoration interest does not produce the intuitive sense of dissonance that arises if restoration is allowed after his full performance. Yet the error is the same in principle in both cases. The prorating required by the extent-of-benefit principle is necessary to make a reasonable and sensible transition from the cases in column A, in which full restoration obviously is warranted, to those in column C, in which the expectation limit has been accepted almost universally.

Nevertheless, a majority of the decided cases do not prorate between restoration and expectation as proposed above. Instead, courts have held³¹⁴ or assumed³¹⁵ that the injured, partially performing sup-

314. A notorious example appears in *United States v. Algernon Blair, Inc.*, 479 F.2d 638 (4th Cir. 1973). As in Hypothetical Case 7, a subcontractor (supplier) and a general contractor (recipient) disagreed about the proper interpretation of the contract during the course of performance. *Id.* at 640. The dispute concerned payment for the use of certain equipment. *Id.* The court found that the subcontractor's interpretation was correct and that the general contractor's refusal to pay the amount in dispute was a material breach that entitled the subcontractor to cancel the contract. *Id.* The subcontractor sued in *quantum meruit*, seeking a restitutionary recovery equal to the value of the work performed. *Id.* The trial court found that the subcontractor would have lost money had the contract been fully performed and therefore denied all recovery. *Id.* The Court of Appeals for the Fourth Circuit reversed, holding that the subcontractor's restitutionary recovery in *quantum meruit* was not limited by the contract price. *Id.* at 641. Because there is no indication in the opinion that the subcontractor suffered any injury other than nonpayment of a portion of the contract price, the subcontractor's expectation interest presumably was based entirely on the contract price. The opinion clearly stands for the proposition that restitution is available in excess of expectation. *Accord* *Salo Landscape & Constr. Co. v. Liberty Elec. Co.*, 376 A.2d 1379, 1382 (R.I. 1977) (holding that an injured, partially performing subcontractor was entitled to recovery in *quantum meruit* substantially in excess of the modified contract price). See also PALMER, *supra* note 34, § 4.4(a), at 389 n.1 (providing several examples of cases in which restitution was not limited to the contract price).

315. A number of opinions assume the correctness of the rule that *quantum meruit* recovery for the injured, partially performing supplier is unlimited, although that issue is not before the court. See *S.S. Silberblatt, Inc. v. East Harlem Pilot Block-Building 1 Housing Dev. Fund Co.*, 608 F.2d 28, 41 (2d Cir. 1979) (explaining that a general contractor could recover in *quantum meruit* from a party who was not the party in breach, but rather one who had been enriched unjustly by the contractor's work); *United States ex rel. Aucoin Elec. Supply Co. v. Safeco Ins. Co.*, 555 F.2d 535, 542 (5th Cir. 1977) (providing an explanation of the relationship between *quantum meruit* recovery and damages based on the contract price for the benefit of the trial court on remand).

CHART I-C

Breach by Recipient in a Rising Market

Facts common to all cases in this chart:

On January 1, Courier contracts with business Owner to provide certain delivery services for a six-month period beginning July 1 for a total price of \$12,000, which on that date is the fair market value of those services. The quantity and value of the work to Owner are to be evenly spaced over the period, so that \$2000 of the contract price can be fairly allocated to each month's work. By July 1, a collectively bargained wage increase applicable to Courier's employees has gone into effect, with the result that it will cost Courier \$2500 per month to perform, and he will lose \$3000 if he performs the entire contract at the agreed price. The employees of only some of Courier's competitors are unionized, and the wage increase has the effect of raising the fair market value of Courier's services to \$15,000. This value remains constant at that level through December 31.

		A	B	C
		Courier is wrongfully prevented from beginning work.	Courier is wrongfully fired after four months. Interference by Owner imposes extra costs of \$1000 on Courier.	Courier works the entire six months. Interference by Owner imposes extra costs of \$1000 on Courier.
1	Owner has paid nothing when Courier acts upon the breach.	C's exp: \$ (3000) C's p/r: \$ 0 [†] C's res: \$ 0 [†]	C's exp: \$ 8,000 C's p/r: \$ 9,000 C's res: \$ 11,000 [*]	C's exp: \$ 13,000 ^{†(p/r)} C's p/r: \$ 13,000 ^{†(p/r)} C's res: \$ 16,000
2	Owner has paid \$6000 when Courier acts upon the breach.	C's exp: \$ (9000) C's p/r: \$ (6000) [*] C's res: \$ (6000) [*]	C's exp: \$ 2000 C's p/r: \$ 3000 C's res: \$ 5000 [*]	C's exp: \$ 7,000 ^{†(p/r)} C's p/r: \$ 7,000 ^{†(p/r)} C's res: \$ 10,000
3	Owner has paid \$12,000 when Courier acts upon the breach.	C's exp: \$ (15,000) C's p/r: \$ (12,000) [*] C's res: \$ (12,000) [*]	C's exp: \$ (4000) C's p/r: \$ (3000) C's res: \$ (1000) [*]	C's exp: \$ 1000 ^{†(p/r)} C's p/r: \$ 1000 ^{†(p/r)} C's res: \$ 4000

bold type: results permitted or required under extent-of-benefit principle
 (): numbers enclosed in parentheses are negative
 exp: expectation interest
 res: restoration interest
 p/r: expectation/restoration interests prorated under extent-of-benefit principle
 fpr: result reflects the full performance rule
 * : result consistent with majority rule in case law
 + : result consistent with substantial number of decided cases
 # : facts unlikely to arise and/or intuitively correct results

plier is entitled to a restitutionary recovery in *quantum meruit* completely detached from—and unaffected by—the contract price. These courts do not perceive that the restoration interest is no less “contractual” than is the expectation interest.

A number of forces probably have contributed to this detachment of restoration damages from the contract whose breach they are intended to remedy. One important contributing cause is the “remarkably successful”³¹⁶ efforts of scholars late in the nineteenth century to conceptualize restitutionary recoveries as entirely separate

316. Perillo, *supra* note 16, at 1213.

from contract. They argued that quasi-contract was completely non-contractual, thereby constructing a conceptual barrier between contract and restitution.³¹⁷ As Professor Perillo observed, those who characterized virtually all restitution-based actions as quasi-contractual

erred analytically and thereby distorted the comprehension and development of some aspects of the law. They failed to note that while implied contract [the concept to which they objected] was an inadequate conceptual framework, true contract was an adequate basis for the explanation and development of rules for restitution in a contractual context.³¹⁸

Nevertheless, the notion that recovery in restitution, particularly recovery based on *quantum meruit*, is somehow disconnected from the risks and benefits accepted in the contract has become a common part of conventional contract doctrine.³¹⁹

Another explanation, as noted previously, is the uncritical and often erroneous equation of the expectation interest with the contract price.³²⁰ A court's correct, though improperly explained, refusal to limit an injured supplier to the contract price when substantial "other losses" exist may lead other courts to assume that the contract price is irrelevant to the breach victim's access to restoration damages.

A further likely cause of the majority rule is the courts' understandable failure to perceive that restoration may exceed expectation in the substantial number of cases in which the relative magnitudes of the two remedies are unclear.³²¹ If it cannot be readily determined whether the contract's allocation of risks and benefits is upset by a restoration-based remedy, then the anomalies that result are unlikely to hit home.³²²

317. *Id.*

318. *Id.*

319. See *supra* notes 314-315 and accompanying text.

320. See *supra* Part I.D.2.

321. See *supra* Part III.A and cases cited therein.

322. In *Marine Dev. Corp. v. Rodak*, 300 S.E.2d 763, 766 (Va. 1983), for example, the court accepted the general rule that *quantum meruit* for the partially performing supplier (in this case, a wrongfully discharged employee) may exceed the contract price. On the facts of the case, however, it would have been difficult to measure expectation damages at all. The parties had agreed that a substantial part of the employee's remuneration would be a part ownership of a new company that was taking on certain portions of the employer's business. *Id.* at 765. The new company took on less of the employer's business than had been agreed, and the employee was offered a smaller share of ownership than had been promised. *Id.* On these facts, it is not at all apparent how to determine the value of the employee's expectation interest.

Some courts would limit Builder's restoration relief by making the total contract price a ceiling on damages.³²³ These courts correctly sense that restoration should not be entirely unrestricted, but they restrict it unduly by failing to apply the extent-of-benefit principle.

A few courts, however, have prorated restoration and expectation consistent with the extent-of-benefit principle. For example, in *Dibol & Plank v. W. & E.H. Minnott*,³²⁴ a contractor agreed to paint ten houses "for \$70 each—\$700."³²⁵ The owner wrongfully repudiated after the contractor had painted four houses.³²⁶ The contractor claimed that the market value of the work performed exceeded the

323. An example of a court taking this approach appears in *Johnson v. Bovee*, 574 P.2d 513 (Colo. Ct. App. 1978). In *Johnson*, a building contractor who had been wrongfully fired from a job that, apparently, would have produced only a small profit sought to recover in *quantum meruit* for the work performed. *Id.* at 513-14. The court limited the builder's recovery to the contract price, concluding that it would be "illogical to allow him to recover the full cost of his services when, if he completed the house, he would be limited to the contract price plus the agreed upon extras." *Id.* at 514. See also *Wuchter v. Fitzgerald*, 163 P. 819, 820 (Or. 1917) (holding that the *quantum meruit* recovery of one who was wrongfully prevented from completing a contract to clear land was limited by the contract price); *Dickson v. Emmerson*, 61 P.2d 439, 441 (Or. 1936) (concluding that a wrongfully fired contractor was entitled to recover in *quantum meruit* "within the limits of the price of the total contract").

Some courts have given lip service to the prevailing rule that *quantum meruit* claims are not limited by the contract price, but nonetheless have been reluctant to permit damages in excess of the total contract price. For example, in *Smith v. Brocton Preserving Co.*, 296 N.Y.S. 281, 282 (N.Y. App. Div. 1937), a wrongfully fired, partially performing contractor was awarded \$2500 in *quantum meruit* damages by a jury. Full payment of the contract price would have resulted in an award of only about \$1000. *Id.* The Appellate Division concluded that the trial court had incorrectly justified setting aside the jury's verdict on the ground that *quantum meruit* damages could not exceed the contract price. *Id.* at 283. Nevertheless, the appellate court agreed with the trial court's ruling that the defendant was entitled to a new trial if the plaintiffs did not agree to reduce the award of damages to \$1,008.40, because the jury should have been instructed that the contract price was evidence of the value of the work performed. *Id.*

The North Carolina Court of Appeals has reached this same conclusion by treating *quantum meruit* not only as a measurement of damages for breach, but also as a basis of liability distinct from—and mutually exclusive with—an express contract. See *Beckham v. Klein*, 295 S.E.2d 504, 507-08 (N.C. Ct. App. 1982) (holding that the existence of an express contract, which was not breached by the defendant, covering payment to a real estate broker necessarily precludes recovery in *quantum meruit* for services rendered on an implied contract theory). Thus, when a valid and enforceable express contract is breached, only expectation damages may be awarded; restitution in the form of a recovery in *quantum meruit* is categorically unavailable. *Industrial & Textile Piping, Inc. v. Industrial Rigging Servs., Inc.*, 317 S.E.2d 47, 50 (N.C. Ct. App. 1984), *review denied*, 321 S.E.2d 895 (N.C. 1984).

324. 9 Iowa 403 (1859). Although the result of this case is an example of prorated damages, the court does not frame its analysis in terms of the extent-of-benefit principle.

325. *Id.* at 404.

326. *Id.*

contract price. He therefore sought damages based on his restoration interest (consisting of restitution and, in the absence of any "other loss," a discharge of the duty to complete the job) rather than his expectation interest (consisting here of the contract price less costs avoided).³²⁷ On these facts, it was simple to sever the contract on the basis of the number of houses to be painted.³²⁸ Moreover, it was clear that the recipient enjoyed a benefit from the supplier's part performance that was fully commensurate with the amount of work done. Thus, divisibility required that the contractor be restricted to the expectation interest for the full extent of the work completed and that he be entitled to the protection of his restoration interest as to the remainder of the job. The court granted precisely that remedy.³²⁹ It awarded damages limited to the payment of a portion of the total contract price, based on the four houses painted, but discharged the contractor's obligation as to the unfinished work.³³⁰ Dividing the contract in proportion to the completed work prevented the contractor from escaping the loss of market value that he suffered with respect to the completed portion of the work, which fully benefited the other party, but permitted him to recapture the opportunity to work more profitably elsewhere with respect to the unfinished portion.

In *Kehoe v. Mayor of Rutherford*,³³¹ a municipality materially breached a contract that was clearly favorable to it.³³² The municipality had promised to pay \$0.65 per running foot for the paving of a street 4220 feet long, which put the total contract price at \$2743.³³³ At the time of the municipality's default, the contractor already had spent \$3153 and would have incurred an additional \$1891 in expenses to complete the job, a total cost of \$5044.³³⁴ The court prorated the contractor's recovery between expectation and restoration on the basis of his costs.³³⁵ Thus, the court restricted him to a fraction of the total contract price (\$2743) represented by (i) the costs incurred (\$3153) divided by (ii) the cost of full performance (\$5044).³³⁶ The

327. *Id.*

328. *Id.* at 406.

329. *Id.* at 407.

330. *Id.*

331. 27 A. 912 (N.J. 1893).

332. *Id.* at 913.

333. *Id.*

334. *Id.*

335. *See id.*

336. *Id.*

result was an award of \$1715.³³⁷ The division of the agreement on the basis of the contractor's cost of performance may not have been the only permissible way to prorate the expectancy limit on his recovery, but assuming that it was an acceptable one, the result was proper under the extent-of-benefit principle. The municipality (recipient) benefitted from the contractor's (supplier's) performance to the full extent of the paving that was done. To that extent, the contractor was restricted to his expectation interest, based on the contract price. But the contractor's restoration interest—represented, on these facts, by a simple discharge of his duty to complete the job—was protected as to the remainder of the work.³³⁸

The dissenting opinion in *Paterno & Sons, Inc. v. New Windsor*³³⁹ urged the application of the extent-of-benefit principle. In *New Windsor*, a municipality had materially breached a contract for the construction of a sewerage trunk system by failing to make progress payments to the contractor as required.³⁴⁰ The majority opinion summarily concluded that the contractor was not limited to recovering "the balance due under the contract,"³⁴¹ but was entitled to recover \$813,289 in *quantum meruit* as opposed to approximately \$205,000 in expectation damages.³⁴² The dissenting opinion agreed that recovery in *quantum meruit* was available to the contractor, but argued that the recovery should be based on "a fair apportionment of the work done against the total contract price."³⁴³ To the dissent, freeing *quantum*

337. *Id.* Because the builder already had been paid slightly more than this amount—\$1850—he was given no damages. Apparently, the municipality did not seek to recover the excess payment.

338. The *Kehoe* analysis was accepted in principle in *Harrison v. Clarke*, 73 A. 43 (N.J. 1909), a case in which a portrait artist was wrongfully prevented from completing his work. *Id.* at 43-44. The court reversed a trial court award of the full contract price, noting that the recovery should be prorated according to the method used in *Kehoe* unless, under the certainty principle, expectation damages could not be ascertained. *Id.* at 44. In the latter event, full restoration damages would be proper. *Id.*

339. 351 N.Y.S.2d 445 (N.Y. App. Div. 1974).

340. *Id.* at 447.

341. *Id.* With this statement, the court committed the typical error of neglecting to consider whether the "balance due under the contract" was less than the expectation interest. See *supra* Part I.D.2.

342. The *quantum meruit* award was determined by subtracting \$1,163,686 (the total payments made to the contractor prior to the breach) from \$1,976,975 (the value of the work performed). The figure of \$205,000 was based on progress payments not made and amounts withheld from previous payments. *New Windsor*, 351 N.Y.S.2d at 448-49. The accuracy of this amount as expectation damages may be questionable because, as the dissenting opinion notes, damages on the contract are not to be determined simply on the basis of "stage payments," which do not necessarily reflect the contractor's expectation interest. *Id.* at 451.

343. *Id.*

meruit from the constraints of the contract price would be the equivalent of imposing a penalty of punitive damages on the breaching party.³⁴⁴

Even opinions that have prorated recovery between expectation and restoration have not fully recognized the scope of the restoration interest, often because it consists simply of a discharge of executory duties. The failure to discern the elements and operation of the restoration interest is undoubtedly one significant reason why attempts to reconcile the competing demands of expectation and restitution have been inconclusive. Once the dimensions of the restoration interest are understood, however, the extent-of-benefit principle provides the appropriate analysis for the common problem of the injured supplier whose restoration interest clearly exceeds expectation.³⁴⁵

b. Damages for the Injured Recipient When the Supplier Partially Performs.—When the recipient is the injured party in cases of breach following partial performance by the supplier, the extent-of-benefit principle may become more challenging to apply. It still may be the case, however, that the recipient benefits to the full extent of the supplier's partial performance. Consider first a simple hypothetical case:

Hypothetical Case 8:

On January 1, Courier contracts with business Owner to provide certain delivery services for a six-month period beginning July 1 for a total price of \$12,000, payable in advance. The quantity and value of the work to Owner are to be evenly spaced over the period, so that \$2000 of the contract price can be fairly allocated to each month's work. On January 1, \$12,000 is the fair market value of Courier's services. By July 1, the fair market value of those services has dropped to \$9000, or \$1500 for each month's work, due to changes in the labor market, and the value remains constant at that level until after December 31. Courier works as agreed for four months, until October 31, then quits in breach of contract.

Courier, the supplier, performed properly for part of the contract period, and then he breached the contract by failing to perform at all. The facts of this hypothetical case are devised so that the contract is readily divisible according to the amount of time performance was

344. *Id.*

345. Professor Palmer, who as a general rule does not accept the analysis proposed here, does favor it in the case of a client's breach of an agreement with an attorney. PALMER, *supra* note 34, § 4.4(f), at 407-09.

rendered. Because the recipient Owner has received the full benefit of that part performance—"full" in the sense that the value of the four months' service rendered is not diminished by Courier's failure to work for the last two months—Owner should be accountable on an expectation basis for the four months' work. Owner therefore must pay a *pro rata* portion of the contract price, \$2000 for each month worked. For the remaining two months, Owner is free to claim protection of her restoration interest. Because she paid in advance, protecting that interest requires restitution of the \$4000 allocable to the two months' work not done. Had Owner not paid in advance, she would have been obligated to pay Courier \$8000 for the work that was done, but entitled to restoration as to the remaining contract price—that is, a simple discharge of her executory promise to pay the last \$4000.

This solution apportions between the parties the value of the change in the market between the parties. Because of that change, the market value of Courier's services over six months was worth \$3000 less than Owner had agreed to pay. Courier is allocated \$2000, or two-thirds, of that difference, which is proportional to the amount of work done; Owner is permitted to recapture \$1000, or one-third, of that difference.

Consider now circumstances in which the contract does not so easily lend itself to divisibility.

Hypothetical Case 9:

In January, Builder contracts to construct a new home for Owner on her property. The contract price is \$100,000, with work to commence in June. Builder estimates his total cost of performance at \$90,000, based in part on the current price of lumber. Because of an intervening decrease in the price of lumber, by the time performance is to begin Builder's costs have dropped to \$80,000. At that time it would cost Owner \$90,000 to make the same contract with an equally competent contractor.

Builder commences work on schedule. After the foundation has been laid, the walls and roof framed up, and other parts of the work done, Builder and Owner disagree on the interpretation of the contract. Owner claims that it requires Builder, at his expense, to use a premium grade material on the roof and exterior walls. Builder claims that the marginal costs of using the premium grade material are an "extra" to be paid for by Owner on top of the stated contract price. When negotiations fail, Builder quits. Builder has spent \$40,000 on labor and materials. Owner has paid

Builder the entire \$100,000 contract price in advance.³⁴⁶ Owner engages another contractor to finish the job for \$45,000. Owner's interpretation of the contract is correct.

Owner is the injured party. Because the contract has become unfavorable to her, she will prefer restoration damages over those based on her expectation interest. Consider the quantum of each of those interests.

If Owner's restoration interest were fully protected, she would be entitled to restitution of the \$100,000 paid, less the value of Builder's performance. That value might be set at \$45,000, because the finished job was worth \$90,000 and \$45,000 was required to complete it after Builder left. Assuming Owner suffered no "other loss," restoration damages would give her a \$55,000 claim against Builder.³⁴⁷ After subtracting from that recovery the money she paid to the second contractor, Owner will have recaptured the full \$10,000 drop in the market price. Builder would come out \$5000 ahead of his costs (representing half of the profit he originally expected to earn), but he will have lost the entire benefit of the change in the market.

If Owner were limited to expectation damages, she could claim only the \$45,000 paid to the second contractor. She then would have the finished house for a total outlay of \$100,000. Builder would retain \$55,000 of the contract price, which exceeds his costs by \$15,000. Of that amount, \$5000 represents half of his originally anticipated profit and \$10,000 represents the entire difference between the market value of his performance when the contract was made and its value when performance began.

Suppose the extent-of-benefit principle were applied based on a finding that the job was fifty percent complete when Builder quit. Builder would be entitled to retain \$50,000 of the contract price, and would owe the other \$50,000 to Owner in damages. After subtracting the money paid to complete the work, she would be left with \$5000, representing a recapture of half the quantum of the fall in the market value of Builder's performance. Builder would enjoy the other half of that value, in addition to half of the profit that he expected to earn when he entered the contract.

Although the facts of a real case would not be likely to lend themselves so neatly to the calculation of the remedial interests involved,

346. Payment of the full contract price in advance is atypical. It is posited here to simplify the analysis. Facts in which the supplier's performance precedes the recipient's payment are discussed *infra* in Part III.D.

347. In these facts, Owner has no executory duties to perform, so discharge is not involved in protecting her restoration interest.

the principles used to decide the hypothetical case would still apply. Practical judgment can be used to determine the extent of Builder's performance and thus to prorate the parties' entitlements between restoration and expectation.

Decided cases are rare in which, following a supplier's partial performance, an injured recipient appears as a plaintiff seeking the protection of either her restoration or her expectation interest. Their scarcity is due to the fact that suppliers generally do not breach contracts favorable to themselves and to the relative infrequency with which recipients, like Owner in Hypothetical Case 9, pay for goods or services in advance. More commonly, the recipient's payments lag behind the supplier's performance, so that the supplier appears as a plaintiff seeking to recover on a *quantum meruit* claim. In the familiar line of cases beginning with *Britton v. Turner*,³⁴⁸ the courts routinely award the supplier "restitution," less damages owed on account of the breach.³⁴⁹ As shown above,³⁵⁰ whether the award given the supplier actually is based on restitution—or, more properly, restoration—depends on which of the injured recipient's interests is protected. The problem of recovery by a materially breaching supplier is also relevant to cases discussed later in the analysis, and closer attention to this issue is deferred until Part III.D. Suffice it to say that, unless no reasonable basis for divisibility can be found, analyzing the problem under the extent-of-benefit principle requires measuring the breaching supplier's recovery at least in part by his expectation interest. As will be seen, many courts do precisely that, notwithstanding the entrenched practice of referring to the supplier's recovery as "restitutionary."

In the few cases in which injured recipients have sought protection of the restoration interest as plaintiffs, courts sometimes have applied the extent-of-benefit principle. In *Bollenback v. Continental Casualty Co.*,³⁵¹ the plaintiff-recipient was a purchaser of health insurance and the defendant-supplier was an insurer that wrongfully refused to pay a claim.³⁵² The insurance company incorrectly maintained that the policy had lapsed for nonpayment of premiums.³⁵³ The plaintiff brought an action for breach of the insurance contract, claiming restitution of all premiums previously paid under the policy (\$2166.50), as opposed to the amount of the unpaid

348. 6 N.H. 481 (1834).

349. *Id.*

350. *See supra* Part III.B.

351. 414 P.2d 802 (Or. 1966).

352. *Id.* at 803.

353. *Id.*

claim.³⁵⁴ The latter amount represented the plaintiff's expectation interest.³⁵⁵ The plaintiff claimed in effect that the former amount, given the absence of "other loss," was his restoration interest. The court rejected the defendant's argument that the policy was really a series of separate, six-month contracts based on the times at which premiums were due.³⁵⁶ The court also concluded that the defendant had materially breached, thereby entitling the plaintiff to "rescind."³⁵⁷ The court in *Bollenback* declined, however, to give the plaintiff full restitution of premiums paid,³⁵⁸ although it characterized that result as consistent with "the majority opinion in the United States."³⁵⁹ The court observed that full restitution of the premiums paid would fail to give the insurance company credit for the coverage it had provided prior to its breach,³⁶⁰ a value that must be returned to it pursuant to the rule of mutual restitution.³⁶¹ The *Bollenback* court recognized that restitution required crediting the insurance company with the value it had conferred; therefore, the court granted the plaintiff only restitution of premiums paid after the time at which the insurer claimed that the policy had lapsed—a point that preceded the denial of the claim by several years.³⁶²

354. *Id.* at 804.

355. Expectation also would include any additional sum necessary to purchase comparable coverage from another insurer. The plaintiff did not raise this issue, however, presumably because the total of the expectation interest still would have been less than restoration. For two reasons, cases like *Bollenback*, in which an injured insured's restoration interest exceeds expectation, are unlikely to arise today. First, at least as far as medical insurance is concerned, the value of the unpaid claim is likely to be great due to the inflation of health care costs. Note that the unpaid claim in *Bollenback* of \$107.33 was for a six-day hospital stay. *Id.* at 803. Second, the frequent availability of punitive damages against insurers for wrongful refusal to pay claims tends to overwhelm restoration relief.

356. *Id.* at 808.

357. *Id.* at 807.

358. *Id.* at 809.

359. *Id.*

360. *Id.* at 811-12. As the *Bollenback* court observed, in a number of older cases courts have assumed that, if an insured has made no claim against an insurer, then no benefit was received from the coverage provided. See, e.g., *Van Werden v. Equitable Life Assurance Soc'y*, 68 N.W. 892, 895 (Iowa 1896) (holding that when an insurance "company violates the condition of its contract it is liable to return to the assured as much as he (the assured) would lose because of the breach of contract"); *American Life Ins. Co. v. McAden*, 1 A. 256, 258 (Pa. C.P. 1885) (noting that, although the insureds "may, in some sense, perhaps, be said to have enjoyed the protection which the policy afforded in the event of the husband's death; but as that event did not occur, the policy had as yet been of no appreciable actual advantage to the plaintiff . . . [and] the company has paid nothing and the plaintiffs have received nothing").

361. See *supra* note 40 and accompanying text.

362. *Bollenback*, 414 P.2d at 812.

The court in *Bollenback* characterized its result in restitutionary terms: the plaintiff received restitution of premiums paid, less the value of the insurance protection received.³⁶³ In fact, however, the court made no inquiry about the market value of the coverage provided, which would have been necessary to a restitution-based claim. Instead, it actually applied the extent-of-benefit principle. It did so by uncritically—though correctly, as far as the result is concerned—valuing the coverage provided at the contract price.³⁶⁴ The court thus protected the expectation interest of both parties to the full extent of the supplier's performance, from which the recipient had enjoyed a complete benefit. By allowing the insurer to retain the premiums paid during the period in which it had provided coverage, each of the parties enjoyed the advantages and suffered the burdens of the expectation interest with respect to that period. By awarding restoration of the premiums paid after coverage was wrongfully terminated, the court also protected the restoration interest of both parties with respect to the time thereafter.

If, as in *Bollenback*, the recipient receives the full benefit of the supplier's part performance, notwithstanding that the latter is in breach, then the divisibility described here is straightforward. The purpose of divisibility is simply to identify the portion or percentage of the total performance that has been completed by the supplier. That portion then forms the upper limit on the extent to which the injured party will be limited to expectation relief. Therefore, it is necessary only to identify some ground for quantifying the portion or percentage of the supplier's completed performance. That ground might be based on units of goods delivered, time or money expended, portions of work completed, periods of time during which insurance coverage was provided, or other methods. If the performance rendered conforms to the contract, it may be clear or uncontested that the extent of the benefit realized by the recipient is fully co-extensive with the portion of the supplier's completed performance. If so, then the breakpoint between expectation and restoration has been identified. If not, further analysis, as described in Part III.C.5, will be necessary. Nevertheless, even in the latter case, the initial step of dividing

363. *Id.*

364. *Id.* The court's only comment about the value of the insurance protection received by the plaintiff was cast in terms of "the cost to [the] defendant of carrying the risk of [the] policy." *Id.* The cost to the insurer obviously may be very different from the market value of the coverage provided. Other courts have approached the matter in the same way. *E.g.*, *Mutual Reserve Fund Life Ass'n v. Ferrenbach*, 144 F. 342, 345 (8th Cir. 1906) (noting the potential disparity between the "value in insurance protection to the insured, and [the] cost to the association in carrying the risk").

the contract according to the degree to which the supplier's performance is complete may be useful because it establishes the maximum reach of expectation and the minimum claim of restoration.

5. *Cases in Which the Recipient Does Not Obviously Realize the Full Benefit of the Supplier's Complete or Partial Performance.*—In some cases, dividing the contract solely on the basis of the extent of the supplier's performance will not be satisfactory. Although that division sets the maximum extent to which the victim will be limited to the expectation interest, the supplier's part performance often does not confer a commensurate degree of benefit on the recipient. A recipient who herself is in breach may not benefit to the full extent of the supplier's part performance simply because of the nature of that performance. Suppose that one contracting for the receipt of equipment-maintenance services wrongfully repudiates after the supplier has performed some, but not all, of the required work. If the portion of the work completed produced a benefit to the buyer that was less than commensurate with the degree of completion of the supplier's performance, then the supplier would be limited to expectation damages only to the extent of the buyer's benefit, not to the extent of his own performance.

The more common case, however, will involve the breaching supplier. The nature of the breach may be such that the extent of the benefit enjoyed by the recipient will be less than the degree of the supplier's performance. For example, the delivery of some parts for a machine may have no value without the delivery of the remaining parts, even if a separate price can be established for each part,³⁶⁵ goods delivered at one time during the year may be less valuable than at other times, making an unadjusted price per item or unit unreason-

365. See FARNSWORTH, *supra* note 5, § 8.13, at 625 (stating that "[f]airness requires that a party that has received only a fraction of what that party expected under a contract should not be asked to pay an identical fraction of the contract price unless it appears that the value to that party or what was received is roughly that same fraction of the value to that party or full performance"). Cf. CALAMARI & PERILLO, *supra* note 16, § 15-6, at 656-57 (stating that contract severability is not "mechanically applied" and the mere fact that a unit price has been established by contract is not conclusive of severability if it can be shown that the price is based on an average of the estimated market price for a product that fluctuates in value).

able;³⁶⁶ and a job fifty percent complete may be worth far less to the recipient than half the market value of the completed work.³⁶⁷

Even complete performance by the supplier, if it is imperfect in some way, may fall far short of conferring on the recipient the intended benefit of that performance. Consider, for example, the case of *Escher v. Bender*,³⁶⁸ in which the owner of land that had been used for farming sold it to a buyer who intended to develop a resort.³⁶⁹ The seller represented to the buyer that the southern part of the property bordered on three lakes and 500 to 600 feet of a trout stream.³⁷⁰ After the sale was completed, a survey revealed that the property bordered on only one lake to the extent represented.³⁷¹ The frontage on the second lake and the trout stream were substantially less than the seller had said, and the property failed to touch the third lake at all.³⁷² The court found no evidence that the seller was guilty of

366. *Cf. Wellston Coal Co. v. Franklin Paper Co.*, 48 N.E. 888, 890 (Ohio 1897) (holding that due to the fluctuation of coal prices with the seasons, in an action for breach of contract for the refusal to receive coal, "justice and fair dealing require that the defendant, having repudiated the contract, should pay the market price for the coal at the time it was delivered").

367. *See Pennsylvania Exch. Bank v. United States*, 170 F. Supp. 629, 630-32 (Ct. Cl. 1959) (holding that partial performance of a contract to stand in readiness to manufacture high quantities of goods that might be needed for national defense purposes did not confer a proportionate benefit on the United States).

Note that contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. Although most of the hypothetical and decided cases referred to in this analysis have been outside the scope of Article 2, occasional reference has been made to U.C.C. sales transactions for illustrative purposes. It bears noting that some of the differences between Article 2 and the common law of contracts are relevant to the operation of the extent-of-benefit principle. In particular, U.C.C. § 2-601 employs the so-called "perfect tender rule." Inquiry into how the perfect tender rule bears upon the extent-of-benefit principle warrants more detailed treatment than is appropriate to this Article. Suffice it to say that the perfect tender rule, when applied together with the statutory concepts of "rejection" and "acceptance" defined in U.C.C. §§ 2-602 and 2-606, appears to give the injured buyer (recipient) greater access to restoration before acceptance and lesser access to it afterward than the extent-of-benefit principle would give. The perfect tender rule is subject to a number of important exceptions, and it has been the subject of much attention in the scholarly literature. For recent discussions of the perfect tender rule, see 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, 384-86, 422-25 (1990) (discussing the confusion surrounding the perfect tender rule and proposing that the rule be replaced with the substantial impairment standard); William H. Lawrence, *The Prematurely Reported Demise of the Perfect Tender Rule*, 35 KAN. L. REV. 557, 591 (1987) (arguing that the perfect tender rule is "still alive" under the U.C.C. and that the rule must be read in light of the drafters' intent to be fully understood).

368. 61 N.W.2d 143 (Mich. 1953).

369. *Id.* at 144-45.

370. *Id.* at 145.

371. *Id.*

372. *Id.*

intentional misrepresentation, but nevertheless concluded that he had promised, and failed to deliver, marketable title of record to the entire area as represented.³⁷³ Therefore, the buyer was allowed full protection of her restoration interest.³⁷⁴

Whether the seller's performance in *Escher* is characterized as incomplete, or as complete but imperfect, divisibility for purposes of the extent-of-benefit principle ultimately should turn on the degree to which the seller's performance satisfies the recipient's primary purposes in entering the contract. Thus, if the purchaser in *Escher* had purchased the property for the purpose of growing crops and all of the acreage was equally fertile, the contract might well have been divisible on a per acre basis. The injured buyer's claim to restoration in excess of expectation would be limited to the acres to which title was not delivered.

Although the *Escher* court did not discuss the issue in the terms presented here, its decision can be justified on the ground that the buyer's entire primary purpose for purchasing the property—the development of a recreation area—was undermined by the greatly reduced access to the lakes and stream and that no reasonable basis for divisibility existed.³⁷⁵ Under the extent-of-benefit principle,³⁷⁶ therefore, she was free to claim full restoration.³⁷⁷

373. *Id.* at 147.

374. *Id.* at 148.

375. Another real property case in which the buyers received no benefit from the seller's full performance is *Potter v. Oster*, 426 N.W.2d 148, 150 (Iowa 1988). The seller in *Potter*, who was himself purchasing the land under an installment contract, sold it to the buyers under a similar arrangement. *Id.* at 149. The buyers made all their installments as promised, paid property taxes and insurance, and made improvements to the land, which they used as a residence and for farming. *Id.* at 149-50. The seller, however, defaulted in his own payments to the original owner, who then repossessed the land which, in the meantime, had declined substantially in value. *Id.* The buyers sought, and were awarded, full restoration damages. *Id.* at 150. They received: (i) restitution of all payments made, less the rental value of the land during the time they lived on it; (ii) compensation for such "other losses" as real estate taxes and insurance premiums, closing costs, and relocation expenses; and (iii) implicit discharge of their obligation to pay the remainder of the purchase price. *Id.* Full restoration damages clearly in excess of expectation were appropriate if one concludes that, although the buyers had benefitted from their occupancy of the property prior to the breach, no reasonable basis for divisibility existed.

376. The decision might have also been justified on the certainty principle if, as may well have been the case, the seller was unable to demonstrate that the buyer's expectation damages—probably based on the diminished value of the resort with the reduced water frontage—were less than her restoration interest.

377. In land sale contract cases, courts often reject a purchaser's claim for restoration or "rescission" on the basis of the "merger" doctrine, which holds that executory promises regarding the land to be delivered are merged into and extinguished by the warranty of title given on the closing of a contract to sell real estate. See, e.g., *Jolley v. Idaho Sec., Inc.*, 414 P.2d 879, 884 (Idaho 1966) (applying the merger doctrine). Courts applying this doc-

The fact that the supplier has committed malfeasance, however, does not necessarily mean that the recipient cannot enjoy the intended benefit to the full extent of the supplier's performance, whether it be partial or complete. Compensatory damages may be adequate as a practical matter to repair or make good the malfeasance, up to the extent of the supplier's performance.³⁷⁸ Consider the cases in columns B and C on Chart II-B.

The basic facts are analogous to those in Hypothetical Case 9, except that Courier has committed malfeasance. If the errors in Courier's work can be corrected, awarding Owner compensatory damages sufficient to have the corrections made will give her the full benefit of so much of Courier's performance as has been rendered, whether partial or full. This is different from a case such as *Escher v. Bender*,³⁷⁹ in which compensatory damages may not have enabled the buyer of land to purchase the missing portion of the property.

This issue may arise frequently in the context of construction contracts. Even though the extent-of-benefit principle may be more challenging to apply in this setting, it can provide a practicable solution to the problem of apportioning the victim's remedy between expectation and restoration.

Hypothetical Case 10:

In January, Builder contracts to construct a new home for Owner on her property. The contract price is \$100,000, with work to commence in June. Builder estimates his total costs of performance at \$90,000, based in part on the current price of lumber. Because of an intervening decrease in the price of lumber, by the time performance is to begin Builder's costs have dropped to \$80,000. At that time it would cost Owner \$90,000 to make the same contract with an equally competent contractor.

trine assume, without evident justification, that only expectation damages may be given as a remedy for breach of a warranty contained in a deed. As pointed out by Professor Palmer, there is no reason why restitution—or, as proposed here, restoration—should not be an available remedy for breach of a warranty of title contained in a deed. PALMER, *supra* note 34, § 4.17. The merger doctrine appears to create an unnecessary and unfortunate obstacle to protection of the restoration interest in appropriate cases.

378. Although damages may make it possible for the injured recipient to benefit from the full extent of the supplier's performance, for purposes of the extent-of-benefit principle they do not substitute for nonfeasance. As discussed *supra* in Part III.C.1, the injured party is entitled to claim restoration in excess of expectation at least to the extent that the supplier has not completed performance. The distinction between damages intended to compensate for malfeasance and those remedying nonfeasance is discussed in Andersen, *Material Breach*, *supra* note 19, at 1101-05.

379. 61 N.W.2d 143 (Mich. 1953).

CHART II-B

Breach by Supplier in a Falling Market

Facts common to all cases in this chart:

On January 1, Courier contracts with business Owner to provide certain delivery services for a six-month period beginning July 1 for a total price of \$12,000, which on that date is the fair market value of those services. The quantity and value of the work to Owner are to be evenly spaced over the period, so that \$2000 of the contract price can be fairly allocated to each month's work. By July 1, the fair market value of Courier's services has fallen to \$9000, and remains constant at that level until after December 31.

		A	B	C
		Courier wrongfully fails to begin work.	Courier is fired after four months for malfeasance costing \$1000 to correct.	Courier works the entire six months. Owner then discovers serious malfeasance costing \$1000 to correct.
1	Owner has paid nothing when Courier acts upon the breach.	O's exp: \$ (3000) O's p/r: \$ 0* O's res: \$ 0*	O's exp: \$ (8000) O's p/r: \$ (7000) O's res: \$ (5000)	O's exp: \$ (11,000)* O's p/r: \$ (11,000)* O's res: \$ (8,000)
2	Owner has paid \$6000 when Courier acts upon the breach.	O's exp: \$ 3000 O's p/r: \$ 6000* O's res: \$ 6000*	O's exp: \$ (2000) O's p/r: \$ (1000) O's res: \$ 1000	O's exp: \$ (5000)* O's p/r: \$ (5000)* O's res: \$ (2000)
3	Owner has paid \$12,000 when Courier acts upon the breach.	O's exp: \$ 9,000 O's p/r: \$ 12,000* O's res: \$ 12,000*	O's exp: \$ 4000 O's p/r: \$ 5000 O's res: \$ 7000	O's exp: \$ 1000* O's p/r: \$ 1000* O's res: \$ 4000

bold type: results permitted or required under extent-of-benefit principle
 (): numbers enclosed in parentheses are negative
 exp: expectation interest
 res: restoration interest
 p/r: expectation/restoration interest prorated under extent-of-benefit principle
 fpr: result reflects the full performance rule
 * : result consistent with majority rule in case law
 + : result consistent with substantial number of decided cases
 # : facts unlikely to arise and/or intuitively correct results

Builder commences work on schedule. After the foundation has been laid, the walls and roof framed up, and other parts of the work done properly, Builder installs material on the roof and exterior walls contrary to the requirements of the contract. The breach is material and Owner justifiably cancels the contract.

Builder has spent \$40,000 on labor and materials. Owner has paid Builder the entire \$100,000 contract price in advance.³⁸⁰ Owner engages another contractor to repair the

380. Again, payment of the full contract price in advance is stipulated in order to simplify the analysis. A similar case in which progress payments are used appears in Part III.D.

work incorrectly done by Builder and to finish the job for \$60,000.

If Owner's restoration interest were fully protected, she would be entitled to restitution of the \$100,000 paid, less the value of Builder's performance. That value obviously is decreased by Builder's malfeasance. Establishing a market value for imperfect, as opposed to merely incomplete, performance might be difficult in some circumstances, but as with the previous hypothetical cases it might be accomplished by subtracting from the value of the properly repaired and completed job (\$90,000) the costs of putting the work into that condition (\$60,000). Under that approach, Builder is entitled to retain \$30,000 of the contract price. Owner would recover the remaining \$70,000 if awarded full restoration damages. Owner pays a total of \$90,000 for the house, recapturing the benefit of the falling lumber market.

Limiting Owner to her expectation interest would give her a claim equal to the \$60,000 she paid to the second contractor. She then would have paid a total of \$100,000 for the repaired and completed house. Builder would be entitled to keep \$40,000 of the contract price, which includes the benefit of the falling lumber market.

Applying the extent-of-benefit principle is complicated in this case by Builder's malfeasance. One effect of the malfeasance might be to inject considerable uncertainty into the determination of the expectation interest. Indeed, the appropriate measure of expectation—cost of repair or diminution in value—might itself be uncertain.³⁸¹ If these difficulties were severe enough, Owner might be

381. In a limited but notorious class of cases, courts must choose between measuring the expectation interest by the relatively high cost to complete or repair the supplier's work, and the lesser amount corresponding to the diminution in value resulting from the breach. See RESTATEMENT (SECOND) OF CONTRACTS § 348(2) (1979); CALAMARI & PERILLO, *supra* note 16, § 14-29; *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (holding that the expectation interest in a case involving a builder's breach of contract for using the wrong brand of pipes "is not the cost of replacement, which would be great, but the difference in value, which would be nominal or nothing"); *Groves v. John Wunder Co.*, 286 N.W. 235, 236-38 (Minn. 1939) (holding that where a contractor breached a contract for the removal of sand and gravel by willfully failing to leave the property at a uniform grade as specified in the contract, the expectation interest should be measured by the reasonable cost of repairing the contractor's work, as opposed to the diminution in value of the land); *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962) (holding that in an action for breach of contract "where the economic benefit which would result to [the injured party] by full performance of the work is grossly disproportionate to the cost of performance, the damages which [the injured party] may recover are limited to the diminution in value resulting to the premises because of the non-performance"), *cert. denied*, 375 U.S. 906 (1963).

entitled to the protection of her restoration interest under the certainty principle.³⁸²

If the certainty principle did not govern the case, then the precise portion of Builder's performance that Owner should be required to pay on an expectation basis still would need to be determined. On these facts, compensatory damages might be a practical means of remedying Builder's malfeasance,³⁸³ thereby making the benefit of his performance fully commensurate with the degree of completion. The proration between expectation and restoration then would require distinguishing the costs of repair from the costs of completion. The part of the contract requiring completion after repairs have been made determines the portion of the expectation interest from which Owner may escape.

In a certain class of cases, a third measure of recovery might be appropriate. As pointed out in E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1382-92 (1985), there will be circumstances in which a court might be unwilling to allow the full cost of repair as a measure of damages, but reluctant to limit damages to diminution in value because doing so would permit the breaching supplier to profit unreasonably by the breach. In such cases, the proper measure of recovery might be located between the two extremes, by requiring the supplier to disgorge the benefits realized by the breach. For example, if a builder breaches by using materials inferior to those called for in the contract, he might be required to pay in damages the amount he saved by so doing. Professor Farnsworth's article makes the point, however, that disgorgement as a remedy for breach should be limited to this relatively narrow factual setting. *Id.* Although on the surface disgorgement may appear to be a restitutionary remedy, it properly is understood as a species of expectation damages. Benefits disgorged by the breaching supplier were not received from the recipient. Disgorgement is simply an alternative to two other, unsuitable measures of expectation. The analysis in this Article would be applied by comparing the value of the disgorgement with the value of the recipient's restoration interest and then choosing the proper portion of each that make up the parties' entitlements upon breach.

382. As discussed *supra* in Part III.A, Owner would bear the burden of proof as to the extent of her restoration interest. Determining the value of that interest might itself involve difficulties, because it would consist of the recovery of whatever amount she previously had paid offset by the value of the benefit conferred by Builder. Given the presence of imperfections in the work, particularly if they arise from poor workmanship rather than the use of incorrect materials, the extent of that benefit might be difficult to establish. Owner, however, might find the additional effort of establishing such damages both feasible and worthwhile, if it resulted in a higher damages award.

383. The capacity of compensatory damages to give the recipient the full benefit of a supplier's performance, notwithstanding malfeasance, should be considered as a practical matter. In many cases, damages will be adequate to provide the promised benefit with respect to the portion of the work completed. That will not always be the case, however. It theoretically might be possible to award damages sufficient to compensate for almost any improper performance, but the matter should be evaluated in terms of what the injured recipient realistically can achieve with an award of compensatory damages made under existing principles of law. Any doubts, of course, are to be resolved in the injured party's favor.

On the facts of Hypothetical Case 10, it might be found that, of the \$60,000 paid to the second contractor, \$15,000 was required to repair the faulty work, \$40,000 was spent on additional labor and materials to complete the job, and \$5000 was profit. Builder and the second contractor each had committed the same amount to the completion of the project (disregarding the amount needed for repairs), although Builder may have saved something by using improper materials. On balance, one might conclude that Builder's performance had been approximately fifty percent complete. If so, then under the extent-of-benefit principle Builder would be entitled to retain half the contract price (\$50,000), less the amount allocated to repairs (\$15,000), for a total of \$35,000. Owner would recover the remaining \$65,000 in damages. She then would have her completed house for a total of \$95,000—\$35,000 to Builder, and \$60,000 to the second contractor. With that recovery, she will have split the benefit of the falling market with Builder, although he properly has borne the full economic burden of repairing his malfeasance.

Determining the degree of completion of work that is both imperfect and incomplete will not be simple; mathematical precision, however, is not required. Approximation usually will do. In most cases,³⁸⁴ it will be possible to develop a practical method of determin-

384. For example, in *Bausch & Lomb, Inc. v. Bressler*, 977 F.2d 720 (2d Cir. 1992), the court appears to have applied the extent-of-benefit principle, although it did not frame its analysis in those terms. The supplier, a manufacturer of ophthalmic diagnostic equipment, materially breached a contract to sell exclusively to a buyer-distributor within a specific geographical area. *Id.* at 724, 727. The breach consisted of making unauthorized sales to others, followed by a wrongful repudiation of the contract before the expiration of its term. *Id.* at 724-25. It appeared that the market for the equipment was declining. *Id.* at 731. The court found the recipient-buyer's claim of lost profits uncertain and noted that there was some evidence that the buyer might have suffered a loss under full performance. *Id.* at 728-29. The buyer sought restitution of a \$500,000 fee it had paid for its exclusive distribution rights. *Id.* The court agreed that restitution in excess of expectation was permissible in principle; it declined to affirm the trial court's award of the entire fee, however, on the ground that the buyer had enjoyed the benefit of the exclusive rights for some years prior to the repudiation, even though those rights had not been fully respected by the seller. *Id.* at 730. The court therefore remanded the case for a determination of the portion of the fee that represented the net benefit enjoyed by the seller. *Id.* at 729-30. The court suggested that, on remand, the trial court should prorate the fee according to the portion of the full contractual term during which the contract actually remained in force, with an allowance for loss caused by the unauthorized sales. *Id.*

In light of the uncertainty of gain or loss by the buyer under full performance, assume that the buyer would have broken even under the contract, putting the expectation interest at nil. In that case, prorating the fee based on the time of the seller's repudiation, with an allowance for damages for malfeasance, is precisely the result required by the extent-of-benefit principle.

ing the breaking point between claims of expectation and restoration.³⁸⁵

The decided cases suggest that dividing construction contracts in this manner is feasible. Owners under construction contracts normally do not pay in advance for the supplier's performance, so that division normally occurs in the context of an affirmative claim for relief by the supplier for "restitution" as a plaintiff in default. Because this very common use of the restitution doctrine fundamentally implicates the extent-of-benefit principle, it invites closer scrutiny.

D. "Restitution" for a Plaintiff in Default Revisited

This Article has already shown that the doctrine of "restitution" for a defaulting plaintiff is inaccurately named.³⁸⁶ The measure of the entitlement the party in breach enjoys necessarily is determined by the measure of the injured parties' damages. When the victim is awarded expectation damages, the breacher enjoys an expectation-based entitlement as well; if the victim gets restoration damages, the breacher receives a restoration-based entitlement. If courts actually awarded restitution to breaching parties whenever they were entitled to affirmative relief, the law of damages would look far different.

Unsurprisingly, despite their persistent use of the word "restitution" in connection with a breaching party's claim for relief, courts generally have granted relief consistent with the requirements of the

385. As noted *supra* note 280, a few contracts may consist of exchanges between two suppliers. Such agreements are sufficiently uncommon that they do not warrant extended treatment in this Article. Suffice it to say that the extent-of-benefit principle is applicable to them in principle, although practical difficulties may be encountered in applying the divisibility doctrine. As a general matter, divisibility in this context requires an appropriate pairing of the parties' part performances and a finding that the performance on at least one side is partially or wholly executed. Under such circumstances, the restriction of the injured party to expectation damages never would exceed the extent of the greatest part performance by either party. Suppose, for example, that *A* promises to perform interior decorating in exchange for civil engineering work by *B*. If *B* wrongfully refused to continue performance after *A* had done half the promised decorating and *B* had completed only one-fourth of the engineering work, then the worst possible situation for *A* would be an award of damages based on half the value of the engineering work promised. A court might find that the entire portion of the work done by *A* could not be paired with an equivalent part of *B*'s services. For example, instead of dividing the contract on the basis of hours spent, a court might find that the completion of certain units of *A*'s work—such as the decoration of entire rooms or houses—corresponded in value to certain units of *B*'s work—such as the surveying of residential lots. In that event, *A* might be limited to expectation damages only to the extent of completed units and entitled to the more generous restoration relief for the remaining damages. Remember though that *A* should be awarded full restoration damages only if there were no reasonable means for pairing part of his work with part of *B*'s promised performance.

386. See *supra* Part III.B.

extent-of-benefit principle. Because the doctrine of restitution for a defaulting plaintiff is a standard part of contract remedies, a look at the basis on which such awards are made in practice is warranted.

Consider the following set of facts, which is similar to Hypothetical Case 10 except that Owner has paid for less of the work than Builder has performed and the market price of lumber has risen instead of dropped, making the finished project somewhat more valuable. This is a typical case in which Owner will seek and be entitled to the protection of her expectation interest, because it will be greater than her restoration interest.

Hypothetical Case 11:

In January, Builder contracts to construct a new home for Owner on her property. The contract price is \$100,000, with work to commence in June. Builder estimates his total cost of performance at \$90,000, based in part on the current price of lumber. Because of an intervening increase in the price of lumber, by the time performance is to begin Builder's costs have risen to \$100,000. At that time it would cost Owner \$110,000 to make the same contract with an equally competent contractor.

Builder commences work on schedule. After the foundation has been laid, the walls and roof framed up, and other parts of the work done properly, Builder installs materials on the roof and exterior walls contrary to the requirements of the contract. The breach is material and Owner justifiably cancels the contract.

Builder has spent \$50,000 on labor and materials. Owner has paid Builder \$25,000 of the contract price in progress payments. Owner pays another contractor \$70,000 to repair the work that Builder incorrectly completed and to finish the job. Of the \$70,000, \$15,000 is required to repair the faulty work, \$50,000 is required for labor and materials to complete the project, and \$5000 is profit for the second contractor.

Builder is the plaintiff in this case, and he brings his claim under the familiar restitutionary rubric of *quantum meruit*. In fact, most courts would award him an expectation-based recovery, but refer to it as "restitution." If Builder really were entitled to restitution, then he would be awarded the value of the benefit conferred on Owner, less the \$25,000 in progress payments already received. That value might be calculated, as in the Hypothetical Cases already discussed, by subtracting the \$70,000 repair and completion cost from the \$110,000 value of the completed house, for a total of \$40,000. Alternatively, the

value of Builder's performance might be determined by giving him credit for half the value of the completed structure (\$55,000) and subtracting the cost of repairs (\$15,000). Either method yields the same result. After giving Owner credit for the \$25,000 already paid, Builder would be entitled to collect an additional \$15,000.

Owner would not accept that result because she would end up paying \$110,000 for the house—\$40,000 to Builder and \$70,000 to the second contractor—rather than the \$100,000 contract price.³⁸⁷ Owner would instead seek protection of her more favorable expectation interest, which would require her to pay no more than the contract price for the finished house. By firing Builder, she avoided paying \$75,000 of the contract price. She paid \$70,000 to his replacement, therefore saving only \$5000. She would argue that Builder is entitled only to an additional \$5000 beyond the \$25,000 she has already paid.

Such a result would protect Owner's expectation interest. Inescapably, it also would base Builder's so-called "restitution" on his own expectation interest. Builder's expectation interest begins with an entitlement to the contract price, but places on him the risk of increases in the price of lumber. The increases that occurred exactly eliminated his anticipated \$10,000 profit, leaving him in a break-even position. Moreover, Builder's malfeasance cost \$15,000 to repair, subjecting him to a loss to that extent. Finally, because Builder was justifiably fired for his breach, he was accountable for the \$5000 worth of profit Owner paid the second contractor to finish the job at current market rates. As a result, expectation exacts a total loss of \$20,000 from Builder, as reflected in his receipt of a total of \$30,000 from Owner (\$25,000 in progress payments plus \$5000 "restitution") against his costs of \$50,000.

The doctrine of "restitution" for a materially breaching party implicitly has recognized from its earliest days that the party in default must be held to an expectation-based recovery in order to protect the injured party's expectation interest. In *Britton v. Turner*,³⁸⁸ the court said that "in estimating the value of [the benefit conferred by the party in breach], the contract price for the service can not be exceeded."³⁸⁹

387. Such an award would represent Owner's restoration interest, as it must if Builder is truly given restitution.

388. 6 N.H. 481 (1834).

389. *Id.* at 494.

The Second Restatement affirms that rule,³⁹⁰ and courts comply with it in many cases by the simple expedient of resorting to the contract price as the basis for the injured party's award.³⁹¹

When the expectation interest is favorable to the injured party as in Hypothetical Case 11, basing the breaching party's entitlement on expectation rather than restoration limits the breacher's recovery. But in most of the cases discussed in this Article, in which the breach victim's restoration interest exceeds expectation, basing the parties' remedial entitlements on expectation would constrain the victim and favor the breacher. In such cases, when the supplier has partially performed, the remedial entitlements should be prorated between expectation and restoration by the extent-of-benefit principle, provided that division of the contract is feasible. Cases in which courts have valued a breaching supplier's performance at the contract price demonstrate that this proration does occur. As Professor Farnsworth has noted, "The result is as generous as if recovery were allowed on the contract."³⁹² One of the principal arguments of this Article is that, to the extent the recipient benefits from the supplier's performance, recovery "on the contract"—that is, a recovery based on the expectation interest—is precisely the correct result.

SUMMARY AND CONCLUSION

This Article revisits the expectation, reliance, and restitution interests developed by Fuller and Perdue and now embodied in the Second Restatement and much of the case law. Those concepts have been instrumental in shaping our understanding of contract remedies. Yet, they have failed to produce an internally consistent remedial regime. A superior model is bipolar, with the expectation interest standing opposite the restoration interest. Those two interests—one pulling toward the economic equivalence of full performance and the other toward the replication of the status quo—should constitute the alternatives that determine the measure of damages for breach.

390. RESTATEMENT (SECOND) OF CONTRACTS § 374 cmt. b (1979) ("[I]n no case will the party in breach be allowed to recover more than a ratable portion of the total contract price where such a portion can be determined.").

391. See, e.g., *R.J. Berke & Co. v. J.P. Griffin, Inc.*, 367 A.2d 583, 587 (N.H. 1976) (holding that a subcontractor who did not render substantial performance should be allowed restitution equal to the contract price less the cost of completing and repairing its performance); *Kreyer v. Driscoll*, 159 N.W.2d 680, 683 (Wis. 1968) (awarding restitution of the contract price less the cost of completion and other harm when a contractor failed to complete construction of a house).

392. FARNSWORTH, *supra* note 5, § 8.14, at 434.

The restoration interest consists of three components. The first is restitution. When the breaching party receives a net benefit from the contractual performance of the victim, protection of the victim's restoration interest requires that the value of that benefit be returned to the victim. The second component is compensation for "other loss." It compensates for harms to the breach victim on account of the breach, but outside the scope of restitution. Such losses essentially are the consequential and incidental losses traditionally associated with expectation damages, subject to the standard limitations of avoidability, foreseeability, and certainty. The third component of restoration is the discharge of executory obligations. To restore the injured party to the *status quo ante*, the rights that person "gave" to the other must be "returned." A return of those rights is accomplished by eliminating the obligations in question. Failing to recognize discharge as an element of the restoration interest makes it easy, in some cases, to overlook that the restoration interest has been protected.

Once the restoration interest has been defined, the task is to find the principles that accommodate it to the demands of expectation. This Article examines cases in which restoration exceeds expectation as the primary vehicle for this analysis. Such cases are valuable because they reveal the restoration interest when it eclipses the typically greater expectation interest. The resulting view of restoration reveals not only the proper resolution of these cases, but more important things about both the expectation and restoration interests as well. In particular, it casts new light on the routinely invoked doctrine of "restitution" for a plaintiff in default. The party who breaches a contract enjoys a contractual entitlement that is necessarily measured on the same basis as are the injured party's damages. Expectation damages for the victim produce an expectation-based entitlement for the breaching party. If the victim's restoration interest is protected, then the breaching party has a restoration-based entitlement as well. Any recovery by the breaching party must be considered part and parcel of a larger remedial system, not merely a restitutionary outlier unconnected with the contract.

When the injured party seeks restoration damages, the first step is to apply the certainty principle. That principle places on the breaching party the burden of proving that restoration clearly exceeds expectation. If that showing is not made, then the case is treated as if restoration does not exceed expectation. Under the firmly established rule entitling a breach victim to expectation damages at a minimum, restoration damages are available.

If it is clear that restoration exceeds expectation, the extent-of-benefit principle comes into play. This principle limits the injured party to expectation damages and grants the breaching party an expectation-based entitlement to the extent the benefit of the supplier's performance has been made available to the recipient. The extent-of-benefit principle is applied by means of the divisibility doctrine, which requires one to quantify, on some reasonable and practicable basis, the portion of the benefits of the supplier's performance that are available to the recipient regardless of which party is in breach. If no such division can be made, then full restoration is available to the injured party.

The extent-of-benefit principle recognizes that the boundary between the claims of expectation and restoration moves as the supplier's performance of the contract proceeds. When the agreement is fully executory, a material breach by either party entitles the victim to complete restoration. If the supplier's performance has been fully and properly executed, then the injured party is restricted to expectation damages as recognized by the full performance rule. If the supplier's performance is less than complete or is imperfect, then practical judgment is required to determine the extent to which the injured party is entitled to escape the constraints of the expectation interest and be restored to the *status quo ante* by means of restoration damages.

Many, though not all, of the decided cases are consistent with this description of the restoration interest and its governing principles. For years courts have been protecting the restoration interest intuitively, without explicitly recognizing it as such. It would be a step forward to replace the current concoction of damages "on" and "off" the contract with those produced by the conceptually integrated, expectation-restoration regime of remedial interests.