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COMMENT

ENFORCING COASIAN BRIBES FOR NON-PRICE BENEFITS: A NEW ROLE FOR RESTITUTION

WENDY J. GORDON & TAMAR FRANKEL*

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* Professors of Law, Boston University School of Law. Copyright © 1994 by Wendy J. Gordon and Tamar Frankel. We have discussed this material with numerous persons (not all of whom agree with our thesis) to whom we owe thanks for helpful comments: Randy Barnett, Dan Dobbs, Doug Laycock, Mark Pettit, Richard Markovitz, Rob Merges, Michael Spence, and Manuel Utset. We are particularly grateful to Bob Bone, George Cohen, Thomas Galligan, Saul Levmore, and Paul Shupack for their careful reading of an early draft. Anne Gowen, Hugh Hall, and Ron Turiello provided excellent research assistance, Ellen Leary offered many helpful editing suggestions, and Glenn Parker (who has years of experience in the construction business) provided a helpful reality check.

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I. INTRODUCTION: NATURE OF THE PROBLEM

In *Boomer v. Muir*,[1] a subcontractor on a hydroelectric project continued to provide goods and services even though the value of the performance far exceeded the contract price. The general contractor, who was receiving these goods and services, breached the contract even though he was paying less than market price for them.[2]

In many states, a supplier in the subcontractor's position has among her options the choice of "rescission and restitution."[3] That means the supplier may rescind the contract and seek, under the label of "restitution", payment set at market price (or at her cost)[4] for all the nonreturnable goods and services provided over the course of the project. Under the majority rule, it does not matter whether the market price (or cost) is above the contract price[5] or even above the value of what the defendant has received;[6] if after the other party's material

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1. 24 P.2d 570 (Cal. Ct. App. 1933).

2. *Id.* at 578.

3. *See, e.g.*, United States v. Zara Contracting, Inc., 146 F.2d 606, 610 (2d Cir. 1944); Paul Hardeman, Inc. v. Arkansas Power & Light, 380 F. Supp. 298, 338 (E.D. Ark. 1974); Murdock-Bryant Constr., Inc. v. Pearson, 703 P.2d 1206, 1217 (Ariz. Ct. App. 1984); Majestic Tile Co. v. Nicholls, 29 N.Y.S. 551, 557 (1936); Allen, Heaton & McDonald v. Castle Farm Amusement Co., 86 N.E.2d 782, 783 (Ohio 1949); RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. d (1981).

4. On this measure, see *infra* Part VI.E.

5. *See, e.g.*, City of Philadelphia v. Tripple, 79 A. 703 (1911) (holding that restitutionary recovery is not limited by the contract price).

6. *See, e.g.*, Acme Process Equip. Co. v. United States, 347 F.2d 509 (Ct. Cl. 1965); United States *ex rel.* Susi Contracting Co. v. Zara Contracting Co., 146 F.2d 606, 610-11 (2d Cir. 1944); RESTATEMENT (FIRST) OF CONTRACTS § 347 cmt. c (1932).

The logic of calling such a remedy "restitutionary" has been questioned, on the apparent ground that restitution should always be measured by the benefit to the defendant. *See, e.g.*, Mark Petit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance*

breach the partially-performing supplier chooses to rescind, the court will award her the price (or cost) of what she has supplied.[7] This was in fact the rule applied in the *Muir* case.

Andrew Kull strongly takes issue with this majority approach.[8] He argues that if contracting parties cannot be returned to their pre-contract, status quo positions, restitution should be denied. In his view, restitution should be available only under the limited circumstances where it was permitted under the old common law rules; under those rules, the contract price would effectively cap any restitutionary award.[9] Professor Kull believes that when restitution requires the defendant to pay an amount in excess of the contract price, the result is economically unsound as well as unjust.

In particular, Professor Kull fears that the majority rule—allowing full restitutionary awards to a plaintiff who has provided an extensive amount of nonreturnable goods or services at less than market prices—would have the following effects. He argues it would (1)

Interests in Contract Damages, 38 HASTINGS L.J. 417 (1987). For our response, see the discussion *infra* part VIII.

7. The same appears to be true in cases of mutual mistake, where neither party is at fault. Thus, in *Vickery v. Ritchie*, the building owner and the contractor were each deceived by a third party; the owner signed a contract that stated the price to be $10,000 less than the price contained in the contract signed by the contractor. 88 N.E. 835 (Mass. 1909). Even in such a case, the court did not think that "the right" of the plaintiff should "depend in any degree upon the profit or loss to the owner." *Id.* at 837. The plaintiff was awarded the "fair value of his labor and materials," *id.*, despite a finding that this exceeded the increase in the value of the owner's real estate, *id.* at 837. (We are indebted to Paul Shupack here.).

8. Andrew Kull, *Restitution As a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465 (1994). For others who have argued that the contract price should cap a restitution award, *see, e.g.*, Henry Mather, *Restitution As a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 YALE L.J. 14, 48 (1982); Palmer, *The Contract Price As a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264 (1959); Joseph Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 42 (1981).

Professor Kull's position has much in common with that of Douglas Laycock. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (1985) and the accompanying TEACHERS' GUIDE. (Note that we have Professor Laycock's permission to quote from the *Teachers' Guide.*).

9. In Professor Kull's view, rescission and restitution should be limited along the lines indicated by a much earlier stage of the common law. Kull, *supra* note 8, at 1468, 1513-16. Professor Kull does not insist on exact adherence to the terms of the old common law. *Id.* at 1513-16. He argues that the remedy should be available only when (speaking approximately), it largely appears that (1) defendant's behavior is "tantamount to a repudiation," *id.* at 1514-15; (2) plaintiff has not yet invested a significant amount in performance, *id.* at 1516; and (3) the goods are returnable in specie, or the transaction can be otherwise fully undone, *id.* at 1515-16.

In such cases, restitution is highly unlikely to result in a monetary award in excess of the contract price.

create inefficient incentives for the parties by (a) encouraging the supplier to maneuver the other party into a breach[10] and (b) encouraging that other party to overspend in order to avoid breach-like behavior.[11] He also argues that it would (2) engage courts in the potentially expensive administrative task of going outside the four corners of the contract to value the plaintiff's performance.[12] Professor Kull further argues that such awards in excess of the contract price (3) do not represent a plausible default rule to which the parties themselves would have agreed *ex ante*.[13] Additionally, he contends that such awards are (4) unjustified by the law of restitution itself because the defendant purchaser is not unjustly enriched if he is required to pay the contract price for what he has received.[14]

II. SUMMARY OF OUR PROPOSAL

Professor Kull's article provides a wonderful education in the law, history, morality, and economics of certain contract problems. It is well thought out and stimulating.

However, underlying Professor Kull's argument is the assumption that because of the substantial difference between the contract price and the market price of the goods and services supplied (or the difference between their contract price and their cost to the supplier), the contracts he discusses are "losing contracts." Viewed as spot, short-term contracts and measured by the money only, such contracts may indeed be losing contracts; if so, the consequences that Professor Kull predicts in terms of the effect of a restitutionary rule on the parties' incentives and behavior may well be realistic. In contrast, we propose what we believe to be a more plausible assumption, that many ostensibly losing contracts are in fact beneficial to both parties; then we explore what implications would follow from this assumption and propose a different rule.

A. BEYOND THE FACE OF THE CONTRACT

A pricing shortfall on the face of a contract does not mean the supplier has a losing position; parties often do not price contracts solely by reference to the short-term and monetizable advantages they

10. *Id.* at 1502.
11. *Id.* at 1501-02.
12. *Id.* at 1501.
13. *Id.*
14. *Id.* at 1483-84.

provide.[15] For example, we will suggest (plausibly, we think) that the subcontractor in the *Boomer v. Muir* case did not calculate his compensation at little more than half of its market value by some horrendous mistake.[16] Business people are generally more rational and well-informed. Those who make such mistakes do not stay in business long.

Undertaking to perform and performing a contract at less than market price or less than cost does not necessarily mean that a supplier is mistaken, ignorant, mad, or self-sacrificing. Nor does continuing to perform a contract on such terms necessarily mean that the supplier is acting merely to avoid an action for breach of contract by the other party. It may be more likely that she affirmatively desires to complete the contract. Her behavior may indicate that something else compensates her for the underpriced performance. Similarly, when the defendant misbehaves and instead of suing, the supplier-plaintiff continues to perform despite the fact that her costs are drastically increased by the defendant's misconduct, we can plausibly assume she has some rational motive for doing so. She may fear that she will herself be sued for breach; but in many contexts it will be more likely that she expects to receive some intangible benefit, in addition to the price, from the completion of the contract. Such a supplier's continuing, below-cost performance may be a way of bribing the other party to stay in the contract.

B. Separating Out the Non-losing Contracts: Virtues of a Bifurcated Approach

Critiques of the majority rule are usually premised on the assumption that the contracts at issue are "losers" for the supplying

15. Of course, this is fundamentally an empirical issue. This Comment will suggest possible scenarios of ostensibly losing contracts that are not true "losers"—and thus possible ways for a court to structure its factual investigations.

16. In *Muir*, the court notes that if the plaintiff had completed the contract, he would have received $20,000. Pursuant to his restitution claim, however, he received a judgment for $250,000. 24 P.2d 570, 578 (Cal. Ct. App. 1933).

The facts of the case are somewhat obscure. Professor Laycock suggests that the following might have been the facts: that "[t]he contract price was $333,000"; that "Boomer had received $313,000 in progress payments, and would have been entitled to another $20,000 if he finished the job" and had spent $571,000 "building as much as he did, not counting any waste that was his own fault" and "it would have cost another $29,000 to finish the job." Laycock, *supra* note 8, at 523. The larger a discrepancy, the more likely it resulted from the supplier's deliberate decision rather than his mistake.

party;[17] we will show that those critiques can do no more than persuade courts to limit their restitutionary awards in cases of truly losing contracts. Where, by contrast, intangible, non-price benefits are expected, so that the supplier would not actually lose from contract completion, we argue that it is *desirable* for courts to give suppliers the option of receiving a restitutionary award even if it exceeds the contract price.

Though our approach might involve courts in separating losing from non-losing contracts,[18] our way of handling non-losing contracts has four sets of virtues. First, it creates incentives for the parties to act efficiently by (a) discouraging the recipient of the below-cost goods from exploiting the supplier's desire for contract completion by engaging in opportunistic and wasteful behavior, (b) discouraging the recipient of the below-cost goods from inefficiently breaching the contract, and perhaps most importantly, (c) encouraging efficient contracts to form by, *inter alia*, allowing the parties to take socially-beneficial advantage of asymmetries in information.

Second, such an award structure may also have desirable implications for administrative costs, giving courts a means by which to indirectly measure opportunity cost, reliance, and expectation. In some cases this approach will be more reliable and easier to administer than the usual measures.[19] Third, the restitutionary remedy may accurately reflect what the parties would have viewed to be in their mutual self-interest had they focused their attention on the question *ex ante*. Fourth, we show that in such contexts, allowing restitutionary awards in excess of the contract price is justified by the law of restitution itself.

Where a plaintiff's losses from a contract are ostensible rather than real, courts that adopt a full restitutionary measure would not be making the errors Professor Kull depicts. Rather, in such cases the majority rule simply requires the defendant to give the plaintiff the best equivalent[20] to precisely what the defendant agreed to pay initially: contract price *and* contract completion.

17. In comparison, see Kull, *supra* note 8.

18. On this administrative cost issue, see *infra* Part VII.E.

19. Professor Kull recognizes that courts have sometimes used a restitutionary measure as a proxy for reliance. *See* Kull, *supra* note 8, at 1492.

20. In most cases contracts involve services and goods that are not unique. In these cases specific performance of the contract is not available. *See infra* note 51.

Admittedly, in most contract cases, obtaining the contract price is a supplier's ostensible end. But in cases like *Muir*, the courts may be recognizing that some parties value the *means* to that end as much as the end itself.[21] Further, this value can be quite visible to even the most hard-headed Holmesian among us.[22]

C. Our Proposed Rule

The reader may find it useful if we summarize the approach we think should apply. We tentatively suggest the following as a desirable refinement and restatement of the majority rule:

WHERE

(a) (1) as part of an ongoing contract a supplier provides goods or services at a below-market price;

OR

(2) in entering into a contract a supplier agrees to provide goods or services at a below-market price;

(b) because the supplier expects that contract completion will yield non-price benefits sufficient to make that contract profitable; AND

(c) the recipient of these goods and services accepts them with the knowledge that they are being provided because the supplier expects such non-price benefits; AND

(d) the recipient materially breaches the contract;

THEN

(e) the supplier should be given the option to rescind the contract;

AND

(f) receive a restitutionary award compensating her for any nonreturnable goods and services she provided,

(g) at an amount either equal to her costs, or, if the defendant can prove that market price was lower than the supplier's costs, at market price.[23]

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21. *See* Edwin Baker, *Outcome Equality or Equality of Respect*, 131 U. PA. L. REV. 933 (1983).

22. That is, we show that a broad restitution rule is justifiable without needing to rest on the notion that contracts imply a moral obligation to perform. Regardless of whether one believes, like Justice Holmes, that performing a contract and paying damages for its breach are equally appropriate, one can support imposing on a defendant an obligation to pay more than the contract price. Ordinary expectation and reliance damages can do as much.

23. This rule might be usefully amended to recognize another possible reason for deliberately providing below-market goods and services, namely, a party's belief that the contract required her to make such provision. Where that belief is correct and the receiving party does not breach, then of course the supplier has no relief. However, that belief can be erroneous. Galligan shows us there can be substantial confusion in the administration of

The *Boomer v. Muir* rule (adopted by the majority of the courts) is actually broader than our proposed rule, for it provides restitutionary awards—uncapped by the contract price—even in cases which are truly losing contracts and where other of our conditions are not satisfied. This breadth has various possible explanations as we discuss below,[24] including a desire to simplify judicial proceedings and save administrative costs.

D. Categories of Relief

Arguably, we discuss cases that might be resolved by expectation-based or reliance-based compensation. That is because we explain apparently losing contracts, in which a party provides goods or services substantially below market price or costs, by the parties' expectations for non-price benefits (from existence or completion of the contracts), or by the parties' reliance on the contract for such benefits.[25] In fact, however, the courts are unlikely to award the plaintiffs in the cases we discuss expectation and reliance compensation because of the degree of proof which the courts would demand for such non-price benefits. Some recent cases have granted somewhat speculative expectation damages, however, and if this new trend continues and

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construction contracts, often forcing suppliers to give more than they are legally required to. Thomas C. Galligan, Jr., *Extra Work in Construction Cases: Restitution, Relationship, and Revision*, 63 Tul. L. Rev. 799, 800 (1989). Where that happens, allowing restitution to the mistaken party may be proper under another doctrine of unjust enrichment law: that is, restitution may operate to recover goods or monies that were paid under a mistaken belief that one was legally obligated to provide them, *see, e.g.*, Peter Birks, An Introduction to the Law of Restitution 149-53 (1985) (liability mistakes by plaintiffs) (English law), particularly when the person receiving the goods or monies is aware of the belief that motivated the transfer. *See id.* ch. VIII (free acceptance by defendants); *cf.* Galligan, *supra*, at 803 (courts typically award restitution in construction cases where there has been exploitable ambiguity as to a performing party's obligations).

This "liability error" approach applies to losing as well as non-losing contracts, and as such is outside the scope of this Comment. Nevertheless, if we were to restate our proposed rule with explicit mention of this wrinkle, it would look roughly like this (with the changes italicized):

> (a) where in entering or performing a contract (b) a supplier provides goods or services at a below-market price (c) *either [i]* in the expectation of receiving non-price benefits from contract completion, *or [ii] in the erroneous belief she is legally required to provide those goods or services*, and (d) the recipient of these goods and services accepts them with knowledge that they are motivated by the supplier's expectations *(as in [i]) or by the supplier's belief in her liability (as in [ii])*, then (e) when the recipient breaches the contract, the supplier should be entitled to receive an award compensating her for any nonreturnable goods and services she provided, either at her costs, or, if the defendant can prove market price would be lower than plaintiff's costs, at market price.

24. *See infra* part IX.

25. That is, we will show the benefits that the majority approach provides in the context of ostensibly losing, but actually mutually-beneficial, contractual relationships.

widens, such expectation damages might subsume many situations in which courts have granted restitutionary damages in the past.

Nevertheless, if the traditional requirements of certainty and specification of the scope of risk do not work perfectly in the context of cases such as those we discuss, the best practical response may not be to erode contract rules that have great usefulness in the ordinary context. It may be preferable to embrace a special remedy (restitution) for a special case. As Fuller and Perdue noted long ago, those situations which unite loss to plaintiff and gain to defendant have special claim to rectification.[26]

E. Outline of Comment

This Comment is structured as follows. We first survey the possible benefits that might flow from ostensibly losing contracts.[27] We next discuss fairness to the defendant, particularly whether the award of restitutionary remedy must depend on whether the defendant had notice of the plaintiff's expectation of nonmonetary benefits[28] and the importance of there being an actual contract in addition to a transfer of benefits to the defendant.[29] We then turn to the issue of primary resource allocation[30] and compare with our approach a rule that would cap plaintiff's remedy at the contract price;[31] in this regard we pay particular attention to discouraging both opportunism and inefficient breach and encouraging efficient use of informational asymmetries. We follow this comparison with a discussion of the administrative costs.[32] Penultimately, we deal with the relationship between expectation, reliance, and restitutionary damages. We conclude that even though the courts may be expanding expectation damages, they are not yet covering all restitutionary cases under that

26. *See* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 Yale L.J. 52, 56 (1936) (citing Aristotle, Nicomacheian Ethics 120-23 (Martin Oswald trans., 1962)). For a Lockean rationale justifying roughly the same normative claim, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149, 208-10 (1992).

27. *See infra* part III.

28. *See infra* part IV.

29. *See infra* part V.

30. The "primary" or "allocative" cost locution refers to economic impacts out in the world, as opposed to "administrative" costs. *Cf.* Guido Calabresi, Costs of Accidents: A Legal and Economic Analysis 21, 27, 28 (1970) (opposing primary and secondary real-world costs with "tertiary" administrative costs).

31. *See infra* part VI. We recognize that other proposals exist as well, but do not specifically discuss each.

32. *See infra* part VII.

rubric[33] and that giving restitutionary awards in the *Muir* context is consistent with underlying doctrinal patterns and policies.[34] The issue of whether restitution should be awarded under an expanded rubric of expectations is left for another day.[35]

III. THE INTANGIBLE BENEFITS OF SEEMINGLY LOSING CONTRACTS

A. Intangible Benefits in Exchange for Discounted Price

A large part of Professor Kull's argument against the restitutionary remedy in cases like *Muir* is that the parties should get "what they bargained for" and no more.[36] We agree with the principle. We disagree with its application, however. While Professor Kull considers the price to be the only thing for which the supplier bargained, we suggest that *Muir* and similar decisions reflect that the supplier had factored into her bargain something more than just the price.

Thus, a contract that promises a supplier lower monetary consideration than the market price is not necessarily a "losing contract." In fact, it is more likely that such a contract will carry with it nonmonetized expectations. A supplier may value the contractual relationship for the sake of the benefits (in addition to receipt of the contract price) that she believes will flow from the existence and completion of the contract.[37] The following will discuss some of the non-price benefits that might compensate for the monetary discount a supplier may offer.

1. *Benefits from Third Parties: Contract Existence and Completion*

A contract relationship may enhance the supplier's reputation. If so, contract completion[38] may provide a supplier of goods or services an opportunity of gaining future benefits from third parties.

For example, consider an experienced but unknown architect who leaves her staff position at a large architectural firm to start her own

33. *See infra* part VIII.

34. *See infra* part IX.

35. *See infra* part IX.B.

36. *See* Kull, *supra* note 8, at 1478-84.

37. Discussion of that general point will occur in the following sections. *See infra* part III.A.1-III.B.

38. As for skill training, contract completion will be important only in those cases when the relevant skill is that of completion—for example, the opportunity to take a large building project through full construction.

business. Her prior projects probably bear the firm's name rather than her own. She might well be willing to offer her services at less than market price in order to establish an independent reputation in the market by having a building fully credited to her. If the architect is rational, and we assume that she is, this intangible value will equal or exceed any difference between the discount price in the contract and the market price.[39] That difference, or shortfall, can itself be used as a minimum measure of the contract's intangible value to the plaintiff.

2. *Benefits from the Other Party: Reciprocity*

Alternatively, or in addition, a supplier may offer a discount to the other party in the hope of receiving future benefits from that other party. Such expectations generally arise in ongoing relationships and are based on the strong inclination of people to expect and offer reciprocal treatment.[40] That is why one practice of salesmanship is: be first to give something to a potential buyer—that person will feel obligated to reciprocate and buy. A gift or the offer of a price discount can create moral, psychological, and social pressures to reciprocate.

For example, assume that a buyer of goods and services knows[41] that the supplying party is willing to accept an under-market price now in the expectation of being rehired later. If the buyer nevertheless materially breaches this contract, that may be tantamount to repudiation[42] of the understanding regarding possible reciprocity in the future—and entitle the other party to the value of the expected reciprocal benefits.

Thus, it is possible that the subcontractor in the *Muir* case agreed to provide or continued to provide services at less than the market price in order to obtain work from the contractor in the future.[43] The contractor was engaged in a large project: building a dam at a cost of

39. For example, if she has a 40% expectation of receiving $100,000 in new business from successful completion of a given building, she may be willing to accept $40,000 less for providing services toward that building than she might otherwise demand.

40. For a fascinating discussion of the subject, see LAWRENCE C. BECKER, RECIPROCITY 73, 354, 346-51, 383 (1986) (discussing self esteem; strategy of tit for tat; and family).

41. On the role of notice, see *infra* Part IV.

42. Compare Kull's discussion of what *kind* of breach (repudiatory, et cetera) should be required as prerequisite to plaintiff's obtaining rescission. Kull, *supra* note 8, at 1495, 1514-15.

43. In *Muir*, the court does not mention this explanation, instead focusing on the possibility that the defendant's conduct rendered the plaintiff's performance unprofitable. Boomer v. Muir, 24 P.2d 570, 578 (Cal. Ct. App. 1933).

over $7 million (about $1 billion in today's currency).[44] This would be the kind of project in which a subcontractor might expect future assignments. In such a case the subcontractor would not view the contract as a losing one but for a breach by the defendant that makes clear that future assignments will not be forthcoming.

To be sure, the expectation of reciprocity is not rational in spot, short-term contracts. Reciprocity is practiced and expected, however, among parties in long-term relationships, among members of a profession or trade,[45] and among groups that are dependent on each other for their business, such as specialized subcontractors (electricians, plasterers, and painters) and contractors in the building business.[46]

There are some empirical data to suggest that U.S. businessmen in some regions will perform their contracts because they value honor and reputation over money no matter how much they might lose.[47] Such evidence may be interpreted to contradict our assumptions, for it may indicate that far more losing contracts exist than our argument assumes. That is, conceivably some business persons supply below-cost goods and services out of an erroneous belief they are legally obligated to do so and not because they expect non-price benefits out of reciprocity. However, these cases may be amenable to restitution under another doctrine, namely, benefits conferred under mistake of law.[48]

This evidence, moreover, may strengthen rather than undercut our argument. Honor may be efficient,[49] and reciprocity (one of the

44. *Id.* at 571.

45. For example, even though real estate brokers compete for customers they need each other to efficiently identify potential buyers or sellers beyond their own client base. They often refer customers to each other in the expectation of reciprocity and rarely fail to reciprocate. Medical doctors and lawyers act in a similar way.

46. The bargaining position of the parties may change depending on the extent of labor shortage. Long-term, each group member recognizes the dependence on the good graces of the other. Even if the business of these actors is national or international, reciprocity in particular localities must be maintained to reduce the cost of moving personnel and gaining community acceptance.

47. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 154, 189-90 (1991) (discussing the work of Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63 (1963)). Businessmen in the midwest believed that you should stick by your words "in almost all situations." *Id.*

48. *See* BIRKS, *supra* note 23, at 140-53 (English law).

49. Honor and reputation are valuable in contracts within ongoing relationships because if everyone adheres to the code of honor the costs of monitoring and enforcement are reduced for all parties. *See* ELLICKSON, *supra* note 47, at 189-91.

forms of non-price benefit) is a form of honor. Reciprocity and keeping one's word "at all costs" may go together.

Thus, a serious error made by one party is likely to lead to an adjustment either in the particular contract or through future arrangements by reciprocity. Group pressure to perform at any cost is compensated by long-term relationships which enable the parties to adjust exchange discrepancies, thus suggesting reciprocity will be a norm among these same business people.[50]

In short, in some types of contracts reciprocity may constitute an intangible, but acknowledged and highly valued benefit. Because in many of these cases specific performance is not available,[51] a restitutionary remedy is appropriately awarded.

3. *Benefits from the Contract Period Coverage*

Contract duration itself can constitute a non-price benefit for which the parties bargained. Thus, contract completion can have value when the contract covers a period over which compensation is expected to fluctuate, as with a contract to supply seasonal goods or services. A supplier of seasonal services will often agree to compensation below the market price in high season provided that the contract extends throughout the low season as well. Such a supplier will typically demand compensation at a price that is close to the weighted average of both seasons' market prices. In this case it is obvious that the completion of the contract has for the supplier a special value that affected her consent to the level of compensation. Therefore, if the other party breaches the contract at the point when high seasonal prices begin to drop, the supplier should be entitled to compensation for what she has already supplied—and not just at the contract price,

50. Though we know of no research explicitly examining whether the "stick by your word" norm and the "reciprocity" norm are likely to appear together, the fact that both are likely components of "honor" suggest that they do. Reciprocity is at least as common a norm as is the other. *Cf. id.* at 154 (reciprocity is " 'a norm that is one of the world's commonest' " (quoting George C. Homans, The Human Group 284 (1950))).

51. With few unique exceptions, courts deny specific performance of service contracts and refuse to impose a duty to perform on the party that undertook to provide the service. *See* E. Allan Farnsworth, Contracts § 12.4 (2d ed. 1990). For reasons of equal treatment, courts will also deny specific performance to the other party to the contract. In addition, courts will not grant specific performance when the costs of monitoring the remedy are high. *Id.* § 12.7. In the *Boomer v. Muir* case, specific performance would require two warring parties to cooperate and work together and require the court to supervise and maintain the relationship. It is doubtful whether that relationship could be maintained, and even if it could, the judicial enforcement costs would probably be high.

but rather at the higher market rate (or her costs).[52] Had she known the contract would last only for the high season, she would have charged a high-season price.

A similar point can be made about cases in which market-price fluctuations cannot be predicted in advance. In any case where a supplier continues to provide services at a contract price after the market prices have risen above that price, and the other party later breaches the contract when market prices have fallen below the contract price, the supplier should be entitled to compensation for materials and services already delivered at the higher market price she would have received had there been no contract in effect.[53] Admittedly, in such cases the supplier may not have expected to be providing goods or services at a below-market price (distinguishing the supplier from the provider under a seasonal contract), but she did bargain with the expectation of accepting risk for the whole contract period. Sans the whole period, the benefits she bargained for will not be forthcoming.[54]

B. Non-price Benefits from Contract Completion

1. *Benefits of Contract Completion*

Intangible benefits can explain not only why a supplier agrees to a discounted contract price but also why a supplier, who enters a contract at the full price, continues to perform the contract at a loss caused by the breach of the other party, rather than repudiate the contract. For example, in the *Muir* case, the contractor breached the express terms of the contract from day one, failing to transfer control over the necessary power equipment to the subcontractor and failing to provide the materials that the subcontractor needed in order to perform the work.[55] The jury also found that, notwithstanding these breaches, the subcontractor did not leave the work, but continued to make both himself and his crew available; at the same time he protested the contractor's breach of the contract.[56]

52. *See* Wellston Coal Co. v. Franklin Paper Co., 48 N.E. 888, 889 (Ohio 1897).

53. *See* Clark v. Manchester, 51 N.H. 594, 595-96 (1872).

54. Thus, it may not have been only the threat of the other party's suit that encouraged her to continue her supply activity after the market price rose; she may think that in the long run she won't be hurt by the short-term shortfall.

55. Boomer v. Muir, 24 P.2d 570, 572-73 (Cal. Ct. App. 1933).

56. *Id.* at 574.

Arguably, the plaintiff simply threw good money after bad, performing irrationally or by error. A better explanation is that he continued to perform after the defendant's breach, at excess cost to himself, because the plaintiff expected such non-price benefits in the form of future work[57] from the contractor in reciprocity.

The defendant's contract termination eliminated a valuable component of the plaintiff's benefits. To make the plaintiff whole, the defendant was required to pay the full value of the plaintiff's services—sans the contract relationship and the future expected benefits it provided. This value can be roughly measured by the difference between the price the plaintiff was to receive under the contract, and his performance costs or the market price of the goods and services.

2. *Exceptions and Apparent Exceptions*

We readily concede that not all discounts are offered with the expectation of intangible non-price benefits. For example, a supplier may offer a deep discount because he made an error in pricing. In such a case, if the other party breaches the contract it would be unjust to the breaching party to award the supplier more than the contract price.[58] Such a result would undermine an important policy of

57. During the contract period, the parties renegotiated and adjusted important terms of the contract: The subcontractor's price was increased, the amounts to be withheld until the completion of his work were paid to him, and the subcontractor agreed to meet periodic targets for pouring cement. *Id.* at 572. Although in Professor Kull's story "[t]he general contractor failed to deliver some item of materials, the subcontractor left the job unfinished, and the parties went to court, each accusing the other of substantial breach. The jury decided this issue, which could have gone either way, in favor of the subcontractor." Kull, *supra* note 8, at 1471. We need not speculate whether the case could have gone either way. The fact is that the subcontractor won—the contractor was held to have breached, and the subcontractor was justified in leaving the job unfinished. Such behavior seems to be based on the value which the subcontractor attributed to the existence of the contract.

58. Courts have noted that a wide disparity between an offered price and a market price can indicate a unilateral mistake as to the terms of the agreement of which an offeree should be aware. *See In re* Jay's Trucking Co., 26 B.R. 73, 76 (Bankr. E.D. Va. 1982). Alternatively, an error may be due to a computational or technical error for which it would be inequitable to hold a party to the stated price. *See* S.T.S. Transp. Serv. v. Volvo White Truck Corp., 766 F.2d 1089, 1093 (7th Cir. 1984). In either case, the contract may be voidable. RESTATEMENT (SECOND) OF CONTRACTS §§ 152-54 (1981); *see* Rushlight Automatic Sprinkler Co. v. City of Portland, 219 P.2d 732 (Ore. 1950). Despite these possibilities, as the disparity grows, the likelihood that a supplier made an error in judging economic conditions or costs decreases.

A potential counter-example is *Aydin Corp. v. United States.* There the plaintiff sued the government after receiving information under the Freedom of Information Act that showed that its bid was 40% less than the only other bid. The plaintiff sought rescission and restitution under a *quantum valebant* theory. The court denied this relief because the plaintiff's error was simply

encouraging people to collect the necessary information to avoid such mistakes.

We suspect, however, that if market prices are available during contract negotiations, a real error is likely to involve a small differential. In such cases the parties will not have much to fight about; they may settle the difference.

As the difference between the market price and contract price increases, however, the probability that the supplier made an error diminishes. The market price offers a strong signal calling for the supplier's attention, and in cases of extreme divergence between market and contract price, it is far more likely that the supplier expected non-price benefits from the contract than that she made an error in offering such a low price. We argue that most business people act in a rational manner and would offer deep discounts only if they expected other intangible benefits from the contracts.

Against our supposition, it might be argued that some subcontractors offer a deep discount because they could not find a buyer for their services or goods. In theory, if a supplier agrees to the low price because he has no choice, and the contractor drove a hard bargain, we agree that the subcontractor should be awarded the contract price rather than the higher market price. Yet in such cases, this is likely to be a distinction without a difference.

If the supplier offered discounted prices because of low demand for its services or goods, the market price would have reflected this low demand, and the contract price would have represented no discount at all. Similarly, a supplier may agree to a low contract price because the quality of the goods or services is low. In such a case the market price for such low quality offerings will match the contract price, and there would be no real discount because these two prices will coincide. Or perhaps, the supplier offered an apparent discount because of personal deficiencies, such as a bad reputation or a criminal record; in this case, again, the market price for the offering will coincide with the contract price. Thus, such instances are not counter-examples to our argument.

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an error in judgment and uot a mistake of which the defendant should have been aware. 669 F.2d 681, 686 (Ct. Cl. 1982).

However, a 40% discrepancy such as that seen in *Aydin* might be explainable not on the ground of a conspiracy among the bidders, perhaps suspected by the court but not proved.

IV. FAIRNESS TO THE DEFENDANT: NOTICE OF EXPECTED INTANGIBLE BENEFITS

Many cases reflect the concern that compensating the plaintiff for loss of non-price benefits may be unfair to the other (breaching) party.[59] Arguably, that other party may not be aware of the plaintiff's expectations and hopes for intangible benefits. Because contract parties provide each other with guarantees against risks it is often seen as wrong to hold a party liable for losses against which it did not agree to provide guarantees, particularly losses of uncertain magnitude.

We do not argue with this principle; but it is not the issue here. The disagreement is about the facts: Is the other party usually unaware of the non-price benefits the supplier expects to receive?

We believe that in many situations involving expected non-price benefits the other party has, indeed, received express or implied notice of the expectations; and in these situations restitutionary remedies are appropriate.[60]

Proof of such notice may reside in explicit statements. Consider a supplier who says to the other party: "I am offering you my services at an extraordinarily low price because I hope that if my services are satisfactory you will recommend me to other customers." Or a supplier who says to the other party: "I will supply you goods and services at a deep discount because I hope that, if you are satisfied, you will employ me on your next project."

Or proof may arise out of context. There are cases in which the very circumstances serve as notice of a party's expectations. For example, construction contracts lend themselves to expectations of reciprocity.[61] During the performance of these contracts each party

59. Under the rule announced in *Hadley v. Baxendale* courts limit damages in a contract action to those damages that are reasonably foreseeable by the breaching party. 156 Eng. Rep. 145 (Ex. 1854); *see* Paul Hardeman, Inc. v. Arkansas Power & Light, 380 F. Supp. 298, 319 (E.D. Ark. 1974) (quoting Benedict I. Lubell, *Unilateral Palpable and Impalpable Mistake in Construction Contracts*, 16 MINN. L. REV. 137 (1931)).

60. When the expectations of the supplier are not legally binding and enforceable, (where, for example, the expectations are for future assignments) the other party is not required to honor these expectations and need not reciprocate. However, the other party must deal with the supplier in good faith. If it is aware of the expectations, it should not be permitted to take advantage of the discounted price and then breach the contract in violation of the expectations. *See infra* part V.

61. *See, e.g.*, Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical & Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

may, at some point, give more than it is required to give under the contract. That party can rationally expect to be rewarded, either during the contract period or later: I will do more than we agreed upon now, but "you owe me one" (or more).

The *Muir* case, on which Professor Kull focuses, offers an example of such notice by implication. In that case, the subcontractor/supplier continued to perform at a losing rate caused by the contractor's misbehavior. The contractor had notice of these additional supplies.[62] The contractor could not have avoided taking notice because the subcontractor complained bitterly about the excess cost and about the breaches.[63] The court could have viewed the express complaints of the subcontractor and his continued performance at a cost far higher than the contract price as evidence of notice to the contractor that the subcontractor expected some intangible benefits from the continuation of the contract. Indeed, Thomas Galligan tells us that in construction contracts it is common for one party to provide more supplies and services than it has undertaken contractually and that such excess supplies are usually compensated for by the other party.[64] Impliedly, benefits that the contractor receives may also constitute notice of the subcontractor's expected non-price benefits. In many cases, it would be irrational for the contractor to view the supply of additional goods as "free lunch."

When the defendant breaches such a contract he signals that he will not fulfill the plaintiff's expectations. If the defendant materially breaches the contract after receiving the benefit of the bargain (or more) under the contract, the defendant must compensate the plaintiff not only by the monetized contract terms but also for the failed and known expectations that depended on the continuation of the contract.[65]

62. For cases where the courts awarded special damages even though the special circumstances were communicated to the breaching party after the contract was made, see J.N. Adams, Hadley v. Baxendale *and the Contract/Tort Dichotomy*, 8 ANGLO-AM. L. REV. 147 (1979). Liability in these cases might be grounded on intentional tort: the courts' finding that the breaching party had capacity to perform and made a conscious choice not to perform the contract.

Paul Shupack has intringuingly suggested that intentional tort might provide an alternative explanation or grounding for many cases in which restitution was awarded in excess of contract price.

63. Boomer v. Muir, 24 P.2d 570, 573-74 (Cal. Ct. App. 1933).

64. Galligan, *supra* note 23, at 800, 811 (1989) (stating that "[t]he perfectly discrete transaction does not exist").

65. If a contract becomes a losing contract after it has taken effect because of external circumstances, for example, because prices have changed, the losing party will be bound to the

V. MERE EXPECTATIONS STANDING ALONE ARE NOT A BASIS FOR RESTITUTION

We concluded in the prior section that a breaching party should be liable for the other party's expectations only if the breaching party had express or implied notice of the expectations. Our rule also assumes that another condition will be met if the defendant is to be made liable for expectations that do not independently constitute legal obligations: A related contract exists among the parties.

A. Expectations That Do Not Amount to Legal Obligations

We believe that there is a rich variety of circumstances which fall between enforceable contracts and nonenforceable social and business understandings. Even if these understandings could be translated into binding contractual agreements the costs of the translation could be too high because these understandings may be too vague and contingent. More importantly, many contractually binding deals are accompanied by "soft" promises ("I'll do my best, but will not obligate myself contractually") and acceptance of such promises. For example, the other party may acknowledge a supplier's expectations involved in offering goods at a discount but may not be willing to promise the supplier additional orders for the goods in the future.

No doubt, the courts are aware of these "shadow" understandings and of their social utility.[66] Therefore, courts will not enforce these understandings when the promising party fulfills its contractual obligations; so long as it does not breach the contract, it is not bound to meet the understandings and "soft" expectations at all,[67] and even if it breaches the contract, it is not bound to meet the understandings if it has received no benefits on account of them. Once it has breached the contract, however, a breaching party *who has knowingly received benefits because of the expectations*, should be required to return the

contract. In fact, the losing party usually demands and receives compensation for the potential losses.

66. We have all heard of "bargaining in the shadow of the law"; here we are talking about "making law in the shadow of bargaius."

67. The breaching party could argue that the supplier's expectations were not worth much, in light of his disappointing performance. For a discussion of this point, see *supra* Part II.

benefits or compensate the supplier for the loss of these expectations[68] up to the amount it cost the supplier to provide the benefits or their market value; the courts will use restitution to accomplish this.

In Part III we dealt with two types of expectations: those expectations that a supplier hopes to receive from third persons who are not parties to the contract, such as enhanced reputation, and those expectations that a supplier hopes to receive from the other party to the contract, such as reciprocity. In the first case, the other party to the contract has less control over the satisfaction of these expectations, although it might contribute to the reputation of the other party. In the second case, it has more control over the satisfaction of these expectations, yet such obligations may turn out to be a too speculative and unsuitable subject for a binding contract. In both cases the breaching party is not legally obligated to provide these additional benefits, and, had the party not breached the contract, the supplier would have no claim against it either for enhanced reputation or for reciprocity. Is our rule nonetheless too expansive?

B. The Existence of Related Contract Among the Parties

The reader might be concerned that we are proposing that restitutionary remedies be allowed for breach of expectations whenever the other party had notice of these expectations. This is not our position. As Peter Birks writes of the British law on the subject, although mistake is a classic ground on which restitution can be granted, mere mistaken expectations standing alone are not the proper premise of a suit for restitution.[69] Expectations in the contractual context, coupled with the other party's free and knowing acceptance of the goods the expectations have brought forth, may be another matter.

Tort law makes a similar distinction. For example, many states have strong limits on the ability of negligence plaintiffs to recover for

68. For reasons explored at Part VIII, the measure of these benefits should be the supplier's costs or the fair market value (whichever is less) and *not* the increase in the defendant's asset value produced by the supplier's efforts.

69. He writes:

> Suppose . . . I do months of work preparing plans for your building in the confident belief that you will give me the contract to clear the site and carry out the development. These are predictions and, when I find myself disappointed, mispredictions. I may call them mistakes, but they are a kind of mistake which does not count. If you stood by without warning me that my hopes were vain, I may be able to make out a claim based on free acceptance, but not on mistake.

BIRKS, *supra* note 23, at 147 (footnotes omitted); *see id.* at 153 (making the same point about payments made in expectation of reciprocity).

emotional[70] or economic[71] harms when they stand alone. Plaintiffs who cannot sue for these same items, lest an explosion of suits and liability result, can sue on these items when their suit is coupled with a breach of a more easily provable and less-omnipresent injury. Thus, when there is physical harm, a plaintiff can also collect for emotional harm (such as pain and suffering) and economic harm (such as lost wages). The provable injury opens the door to proof of these other, "parasitic" damages.[72]

There is no intrinsic reason why the law should deny recovery to purely economic and emotional harms.[73] The reasons have to do with our "imperfect technology of justice"[74] and the concern that any accident is capable of causing an almost infinite domino effect of emotional and financial harms. The requirement of a claimant's physical damage largely obviates this expansive tendency.

In our area, there may be many reasons for denying restitutionary remedies to suppliers for transfers made on the mistaken expectation of non-price benefits. But two are these: difficulty of proof (for example, which items were pure gifts?),[75] and the desirability of encouraging people to be clear about the duties they hope to impose on others. These two considerations do not have strong force in our case. The presence of a contract gives us something definite on which to anchor a commercial, nondonative expectation. And the difficulty of specifying all details in a contract weighs against the desire to encourage extreme specificity.

VI. IMPLICATIONS FOR EFFICIENCY

To recap briefly, we have argued that if both parties recognize that a supplier's willingness to contract at a discounted price (or her

70. *See* Cauman v. George Washington Univ., 630 A.2d 1104, 1107 (D.C. Cir. 1993).

71. *See* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1027 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 828 (8th Cir. 1983).

72. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56-57 (5th ed. 1984).

73. In fact, some states have moved toward allowing their recovery. *See infra* part VI. *Compare* State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282 (Cal. 1952) *with* Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989).

74. The phrase is from BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 20 (1980).

75. *See, e.g.*, BIRKS, *supra* note 23, at 153.

willingness to supply goods and services at a below-market price)[76] is motivated by her expecting a net gain because of non-price benefits resulting from contract completion, then she should not lose by this discount if the other party breaches. Reliance and expectation damages may in some cases compensate her for the loss; where the value of the damages cannot be determined with sufficient specificity, however, an award of reliance or expectation damages would not fully compensate her for the expected non-price benefits, or even the discount that they motivated. Restitutionary remedies may be necessary to avoid inefficient and wasteful behavior in contexts where non-price benefits make a contract worthwhile for the supplier.

(This is a far different proposition from that advanced by Professor Kull. He is concerned that a rule like ours would lead to inefficient and wasteful behavior.[77] To the contrary, the following will show that only our rule avoids the most likely inefficiencies and waste.)

We argue that awarding restitution in excess of the contract price in such cases creates efficient incentives in at least three ways.

Since the recipient realizes the supplier has a strong desire for contract completion, in the absence of a rule like ours the recipient may try to wring ever more price or service concessions out of the supplier. Any expense that is incurred to extract mere transfer payments is wasteful,[78] and strategic maneuvering can be expensive. Further, a recipient who receives goods at a below-cost price may be likely to use them wastefully. Thus, restitutionary awards will discourage the recipient of the below-cost goods from engaging in opportunistic and wasteful behavior that might otherwise tempt him.

Second, the restitutionary remedy discourages the receiving party from breaching the contract in contexts where such a breach would be inefficient.[79] The most obvious way the remedy can induce efficient behavior is by threatening to apply an expensive negative sanction (a

76. If the supplier has provided goods or services to the breaching party, the gap between market price (or cost) and contract price may provide a good measure of these non-price benefits. Restitution may thus, properly, allow her to recoup such benefits.

77. *See* Kull, *supra* note 8.

78. Avoiding such maneuvering can be important. For example, many commentators have argued that the policy of achieving such avoidance is the primary justification for criminalizing blackmail. See sources collected in Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741 (1993) [hereinafter Gordon, *Truth and Consequences*].

79. As to a third economic concern—administrative costs—see *infra* Part VII.

"stick") to recipients who might otherwise be tempted to breach inefficiently. The other way the remedy can induce efficient behavior is by safeguarding the "carrot" that the supplier has proffered. That is, the restitutionary remedy is an important way to enforce the carrot—the "bribe" that a supplier has paid, via discounts and the like, to induce a recipient to stay in the contract.

Third, our remedy encourages efficient contracting that might not otherwise take place. It does this primarily by allowing the parties to take advantage of asymmetries of information.

A. Avoiding Wasteful Opportunistic Behavior

It has been argued that without a contract cap in place, the supplying party will wastefully engage in opportunistic behavior, trying to provoke a breach and that the defendant will wastefully engage in overprotective behavior trying to avoid a breach.[80] However, this is unlikely to be a problem:[81] If the losing party has indeed induced a breach, the court is not likely to award it the value of its services. More importantly, where non-price benefits make an ostensibly losing contract a mutually beneficial one, allowing restitution to be awarded above the contract price will produce *better* incentives for efficient behavior in regard to waste and other forms of opportunism than would capping the plaintiff's award at the contract price.[82]

In these cases—which our rule defines, *inter alia*, as situations where the recipient party *has notice* of the supplier's non-price benefits[83]—the recipient party knows of the other's eagerness to perform. Accordingly, the recipient (like the general contractor in *Muir*) can extract money from the supplier, either directly (as by bribes[84]) or indirectly (for example, the foot-dragging by the defendant in the

80. Kull, *supra* note 8, at 1506-11; *see* Laycock, Teacher's Guide, *supra* note 8, at 159.

81. Those commentators who, like Professor Laycock, assume that judges often err in judging who is at breach in construction contracts will disagree. *See* Laycock, *supra* note 8, at 159 ("The risk of error is inherent in litigation; it is especially acute in litigation over long term contracts.... There is reason to avoid a measure of recovery that increases the stakes riding on an uncertain decision."); Kull, *supra* note 8, at 1510-11.

82. Professor Kull emphasizes that the supplier will act opportunistically. But, as Professor Kull also acknowledges, if the restitutionary award (or other modes of measuring the true value of the contract to plaintiff) is *not* available, then the opportunism shoe fits on the other foot. *See* Kull, *supra* note 8, at 1503-04.

83. For our proposed rule, see *supra* Part II.C.

84. *See infra* part VI.C.2.

Muir case).[85] Thus the opportunistic temptations open to the two parties are, to say the least, symmetrical. Further, Professor Galligan has suggested that the tendency is for the recipients in construction contracts, not the suppliers, to be the more opportunistic parties.[86]

For example, the *Muir* defendant may have been so slow in providing the plaintiff with the needed material and energy (compressed air) because he knew that the plaintiff was much less likely to quit the job in a huff than were other subcontractors. In the clamor for material and energy on a big hydroelectric project, the defendant contractor in *Muir* may have systematically discriminated against the plaintiff, keeping plaintiff's crews waiting uselessly but expensively for needed material. If the general contractor had known bad behavior could result in a money judgment reflecting plaintiff's full value (over $200,000), he might not have been so willing to play wasteful games.

The danger of opportunism has another implication. As will be shown by numerical example below,[87] in the absence of a rule like ours, a subcontractor or architect may not enter efficient contracts out of fear that the purchaser will manipulate her into spending more on performance than the contract is worth to her.

In conclusion, underlying the arguments of those who favor contract-price caps is a particular image of opportunism: that, under a rule like *Muir*'s, a supplier who has made a bad deal will maneuver the other party into breaching, effectively making the other party pay for the supplier's own error or overconfidence. In the case of contracts involving significant non-price benefits, the issue separates into two parts.

First: Does a default rule like *Muir*'s and ours, that allows suppliers to collect for monies expended, encourage overconfident and incompetent suppliers to get themselves (and their contracting partners) in over their heads? Second: Will a supplier who is over her head be able to maneuver the other party into doing something that the courts will interpret as an unjustified breach?

The latter issue is the easier to address. If a court indeed cannot tell who is responsible for a contractual breakdown—so that a "maneuvered-against" party is treated as a breacher rather than as a

85. If a recipient party (such as an owner or a general contractor) knows a subcontractor or architect values the contract at a high amount, the recipient party will have an incentive to extract this amount.

86. *See* Galligan, *supra* note 23, at 840.

87. *See infra* part VI.C.

rightful repudiator—then the fundamental law of construction contracts needs to be rewritten. It is not appropriate to say, "the courts can't tell whose fault it really is," and then formulate a remedy that seems to be premised on the notion that the courts will get it *wrong* most of the time. If the courts get it right most of the time, we submit that the *Muir* rule is best.

As for the first issue—the overconfident supplier—we concede that a contract-price rule may discourage the confident from giving loss-leader deals more than our rule will. We even concede that perhaps a contract-cap type rule might usefully encourage the incompetent to enter another line of work.[88] However, under our proposed rule the over-confident incompetent will not be able to recover all costs because, under subpart (g) of the rule, the restitutionary remedy is limited by the market value of what was supplied.[89] So even if the over-confident supplier can collect a bit over the contract price, our rule hardly induces massive over-investments by such a person.

Also, beginners and newcomers to a field are the persons most likely to make loss-leader type offers. There is a social value in encouraging both beginners and established firms to expand into new fields. The default rule should be in their favor.

B. Assuring That the Recipient Will Not Breach Inefficiently

The basic notion of "inefficient breach" is simple: The presence of negative externalities tends to encourage over-investment in harmful behavior. Thus, where an actor can cause harm to another without being forced to pay a properly-calibrated amount of damages,[90] the actor may engage in the behavior even when the (external, social) harm it causes outweighs the (private) benefits it brings him.[91] A contract remedy should provide the recipient party with incentive to

88. We are indebted for this argument to Professor Robert Bone, who has suggested that a contract-price cap would usefully work to distinguish competent from non-competent suppliers—in that the latter would simply leave the field rather than take the risk that their loss-lead contract would simply mean long-term loss for them.

89. *See supra* part II.C.

90. The damage award is commonly assumed to be proper when set at a level equal to the harm caused. For an introduction to the more complex variations that can be rung on this scenario (taking into account, in particular, less than certain enforcement), see A. Mitchell Polinsky, Introduction to Law & Economics 34 (2d ed. 1989).

91. *See, e.g.*, Richard A. Posner, Economic Analysis of Law 117 (4th ed. 1993); Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 Rutgers L. Rev. 273 (1970).

breach the contract if, and only if, his benefits from the breach exceed the expected value of the bargain to the supplier.[92] That is one reason why in the *Muir* case, and in cases like it, we argue that the remedies should compensate the supplier with a measure that better approximates the expected value of the bargain.[93]

If we agree that in *Boomer v. Muir* the subcontractor's expectations amounted to the market value or cost of his services and not merely to the contract price, then the contractor should not have breached the contract unless his profit from the new opportunity (over what the contractor would have earned from his contract with the subcontractor) exceeded what the subcontractor expected to gain, as reflected by his investment in supply efforts. The subcontractor had invested over $200,000 of his own money.[94] The restitutionary remedy encourages the contractor to refrain from breaching in just this way: If he has to pay over $200,000, he will not breach unless the new opportunity is worth at least that much extra to him.

If by contrast the contractor knew he would be required on breach to pay only the contract price of roughly $20,000, he will have incentive to breach whenever his benefits from the breach exceed that trifling amount. A remedy limited to contract expectancy, such as is

92. Admittedly, we argue elsewhere in the comment for honoring a subjective expectation of non-price benefit, without requiring further inquiry into its objective reasonableness. It might be argued, therefore, that we claim too much here—that a subjective expectation is not a reliable guide to judgments of economic efficiency. However, as we suggest elsewhere, *see infra* part VII.D.2, this is an area in which subjective assessments may be unusually reliable. *See* Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982). Thus, while a supplier's provision of goods and services may be a less than perfect measure of the actual non-price benefits the contract will bring her, it may be the best measure available, and certainly less likely to cause systematic errors than would a rule that always capped the supplier's remedy at the contract price.

93. Under our rule, the restitution measure applies ouly in contexts where both parties are aware of this value. There are many reasons why recovery should be allowed only if there is notice to the potential defendant. We have previously focused on fairness-oriented reasons. *See supra* part IV. However, notice also has an economic function.

Remedies will have the desired impact only if those to be affected by them have some notice of the costs they will incur. Thus, unless both the price and non-price benefits that the plaintiff expects are known to the recipient party (so that he knows the likely amount of a restitutionary remedy that might be imposed upon him if he breaches), he might breach prematurely, for example, abandoning a contract worth $200,000 to the supplier in order to pursue a new opportunity worth only $75,000.

94. Boomer v. Muir, 24 P.2d 570, 572 (Cal. Ct. App. 1933).

proposed by Professor Kull, therefore could encourage an inefficient breach.[95] Our rule would better avoid such breaches.

For another example, consider an architect who, wishing to establish her repntation, agrees to work for $5000 where the market value of her work (her opportunity cost) is $20,000.[96] She expects $36,000 in reputational value to result from the completion. The building owner expects $16,000 profit from the architect's work. When the architect has put in $15,000 worth of work, the defendant is tempted by an opportunity that would earn him $9,000 more than he's making from the instant contract, but would require him to repudiate his contract with the architect. If he repudiates, it will mean a societal loss of at least $16,000 (that is, the excess of $36,000 over $20,000) which exceeds $9000. Let us assume that precedent tells the building owner that if he breaches, he will have to pay the architect a total of $15,000 (less contract monies already paid) as our proposal would require. Such a payment would wipe out his anticipated gain from the new contract. Our rule would thus help society to avoid an allocative loss.

C. Effectuating Coasian "Bribes"

1. *Inefficient Breaches and Transaction Costs*

Ian Macneil has pointed out that, but for transaction costs, inefficient breaches will be avoided regardless of the remedial rule a court adopts. For instance, even if the recipient's liability were capped at the contract price, a supplier who valued the contract at a higher amount could "bribe" the recipient to stay in the contract,[97] much as Professor Coase suggests that parties can "bargain around" inefficient legal rules.[98] Thus, one might draw from Professor Macneil's Coasian analysis the lesson that, in the absence of transaction costs, nothing hangs on the choice between a limited restitution rule and a rule like ours that allows plaintiffs to collect in excess of the contract price. If

95. However, in cases of truly losing contracts, or in cases where non-price benefits could be recoverable under reliance or expectation theories, the *Muir* rule would not be necessary to achieve proper discouragement of inefficient breaches.

96. See Knapp v. Gaston Teyssier, 96 Pa. Super. 193 (1929), for a possible variant of such a case.

97. Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982) [hereinafter Macneil, *Efficient Breach*].

98. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Professor Coase argued, *inter alia*, that in the absence of transaction costs, the law's initial placement of legal entitlements would be irrelevant to efficiency: When the law failed to award a resource to the highest-valued user, that user could pay the other party ("bribe" him) to transfer the resource.

transaction costs are low enough, the parties can compensate for any failure in the law by paying to alter the pattern of resource use. With these payments, which the literature ironically terms "bribes,"[99] one party can persuade the other party to undertake value-maximizing behavior.

Professor Macneil's argument would not much undermine the importance of our thesis, however. First, in cases where breach occurs unexpectedly, transaction costs are likely to be sizeable and not symmetrical. We believe (by "casual empiricism"[100]) that parties who are about to breach rarely warn the other party in time to enable them to offer a pre-breach Coasian bribe to stay in the contract. If this is so, a proper crafting of the remedial rule is necessary. Second, and more importantly, when Coasian bribes *are* paid, restitutionary awards make them workable.

2. *Our Basic Argument: Encouraging Efficient Contracting by Utilizing Informational Asymmetries*

The whole point of the supplier giving a large price discount to the recipient is to persuade the latter to stay in a contract from which the supplier expects non-price benefits that the recipient is not required legally to give. Contracts containing such discounts may be value-maximizing and may not occur unless the discount is refundable in cases of the recipient's breach. This is what the restitution remedy, freed of a contract-price cap, can accomplish.

The price discount that a supplier agrees to in the hope of non-price benefits is a Coasian bribe, and one paid well in advance of the other party's possible breach. Similarly, the goods or services that a supplier provides outside the strict requisites of a contract may be a Coasian bribe. The restitutionary remedy essentially mandates that

99. Although the law and economics literature conventionally refers to Coasian payments as "bribes," the term is in fact a deliberate irony. Taken literally, it is a misnomer. As Ronald Coase has pointed out, the term "bribe" connotes something illicit, while there is nothing necessarily illicit about making payments to alter the assignment of legal entitlements—far from it. Telephone Interview with Ronald H. Coase, Professor of Law, University of Chicago Law School (June 20, 1994). As Professor Coase points out in *The Problem of Social Cost*, the very point of the market is to enable persons to shift resource entitlements to their highest-valued uses. Coase, *supra* note 98.

100. We agree with Professor Macneil that the efficient-breach theory "is simply [a matter] of relative transaction costs in which no a priori assumptions can be made about the efficiency" of any particular remedy. Macneil, *Efficient Breach*, *supra* note 97, at 953 n.23. But it is not outrageous to use casual empiricism (as he notes), *id.* at 953 n.25, to estimate the likely transaction costs and institutional patterns.

these bribes be refunded if the recipient breaches the contract; the remedy therefore provides enforcement for Coasian bribes which may be necessary to ensure efficient resource use.

In theory such bribes could also be enforced by explicit contractual provisions. However, the complexity and messiness that characterize some contracts, such as the typical ongoing construction project,[101] may preclude continual specification by explicit agreement. Enforcement of these bribes is necessary if the law is to encourage efficient contracting by persons who value contract completion above the contract price they can obtain.

Also, our rule makes it easier for the parties to avail themselves of an asymmetry in information: In most cases the supplier knows the quality of her goods and services better than the recipient does, and is better able to calculate the odds that she will do good enough work that her hopes of reputational advantage or reciprocity will materialize. With our rule, such a supplier can bet on herself[102] without requiring the other party to bet on more than his own likelihood of contract completion.

3. *Encouraging Efficient Contracting: A Numerical Example*

A rule that did not enforce Coasian bribes could discourage young architects or gung-ho contractors from selling their services efficiently.[103] With a default rule such as Professor Kull's, that prohibited such suppliers from recovering the value of their services in case of a buyer's breach, such suppliers might fear that after they had sunk significant costs into performing, the other party could manipulate them into expending still more. As a result, they could refuse to make an efficient contract now, out of fear that the other party's opportunism might deprive them of the benefit of their Coasian bribes, and require them to "pay" even more than the contract was worth to them.

The price discounts themselves may lock the supplying party into bad contracts if the discounts cannot be recovered. For example, in a *Muir*-type case, assume that contract completion is worth $190,000 to the subcontractor ($170,000 in non-price benefits, plus $20,000 contract price). Assume further that the subcontractor has already

101. *See infra* part VII.B.

102. *Cf.* Levmore, *supra* note 92 (discussing self-assessment of damages).

103. This might be particularly likely to occur in a buyer's market, where many architects were available. *Cf. id.* (discussing the self-assessment of damages).

"sunk" $189,000 into performance when the general contractor continues his foot-dragging. At this point, the subcontractor has two choices: either repudiating the contract, or sinking even more money (say, another $40,000) into performance. Without a restitutionary rule, the subcontractor upon repudiation would receive in his lawsuit only the contract price, approximately $20,000—a loss to the subcontractor of $169,000 ($189,000 already expended less the contract price of $20,000). If the contract when completed would be worth $190,000 to him, the subcontractor will lose less by continuing to perform—$39,000[104]—than he would by repudiation—which wonld involve a loss of $169,000. As a result, he would continue perforce to perform. If a restitutionary rule, like that proposed above,[105] is in place, he could receive $189,000 if he sues—giving him a tool to "persuade" the other party stop its foot-dragging and perhaps even renegotiate the contract price.[106]

In this way the subcontractor might (absent the proposed rule) be forced into paying much more than the contract was worth to him. The restitution rule, by contrast, might discourage the general contractor from doing such foot-dragging in the first place, and assure the subcontractor that he will not be manipulated into a net loss position. He will then feel freer to enter into efficient contracts.

D. Two Challenges

1. *Second-Order or Second-Best Allocative Effects*

Even the simplest case can be criticized as ignoring second-best problems and second-order effects. For example, against our thesis it might be argued that the reputational or other non-price benefits in a case like *Boomer v. Muir* may represent merely a private benefit with no allocative consequences. In such an instance, what appears to be efficient may not in reality be so.

Consider, for example, our argument regarding the desirability of preventing inefficient breaches. In the above architect example the

104. The $39,000 is the plaintiff's costs of $229,000 ($189,000 already sunk, plus $40,000 more to be expended), less $190,000 as the value of contract completion.

105. *See supra* part II.C.

106. Ideally, this renegotiated price would cover additional costs attributable to the foot-dragging. However, there is a possibility that the supplier could use the repudiation option to squeeze additional monies out of the other party. This consideration puts a challenge to our rule, discussed above at Part VI.A.

proposed rule appeared to provide society a means to avoid an allocative loss by encouraging the building owner not to breach. However, the private gain to the architect may not really have translated into the same amount of allocative gain. By establishing herself as an independent architect via this project, the plaintiff may simply draw future business that comes at the expense of other architects, so that the reputational gain might be basically transferred from these other architects to her without representing an allocative gain. If so, the building owner's temptation may not have represented an inefficient breach after all.

In such a context, we can only speculate about the form second-order effects might take. But it seems likely that if the architect's reputation did grow in the way she hopes, it would increase the price competition among architects, which is allocatively desirable. Thus, though it is difficult to give a precise value to the allocative pay-off from deterring this defendant's breach, the likely effect of adopting a restitutionary measure of relief seems positive.[107]

2. *Discouraging Some Potentially Efficient Contracts*

It might be argued that under our rule, some potentially efficient contracts might not be entered into. Conceivably, a potential employer of hungry suppliers or up-and-coming young architects will not do business with them out of fear that if he breaches, he will have to pay a restitutionary award above the contract price (or that the threat of such a remedy will force him to disadvantageously renegotiate the contract price).[108] If some such forgone contracts may be efficient ones, it would be argued, this may decrease the economic gains otherwise to be achieved through our rule.

Whether or not otherwise efficient contracts would be forgone as a result of our rule,[109] the opposite rule causes at least an equal degree

107. Moreover, the issue of "second best" applies not only to our rule but to any rule. Thus, a limited-restitutionary rule would face the same challenge, and Professor Kull has made no showing that in a second-best world the direction of the shifts caused by his rule would be as likely as ours to be positive.

108. Such fear may be particularly likely if our rule applies even when a purchaser's breach is caused by factors outside of his control. Our current rule does *not* limit the application of above-contract-price restitutionary awards to instances where the defendant has breached in bad faith. As indicated, we have not ruled out the possibility that such a limitation may be desirable. *See infra* note 145.

109. The forgone-contract problem will likely be a difficulty only in the case of a buyer's market, that is, where the buyers have many suppliers of goods and services vying for their business and can pick and choose among them. In a seller's market, where, for example, a

of loss. That is, as discussed above,[110] without our rule, potential suppliers may be discouraged from entering into efficient contracts out of a fear they will be manipulated into putting more into contract performance than the contract is worth to them.

Finally, the parties can reverse our rule by agreement. For example, a young architect who plans on giving below-cost services and wants to reassure potential clients that their liability will be limited, can waive any restitutionary claim.[111]

Admittedly, the opposite rule is equally reversible by the parties. But there is an advantage in making our rule the default in non-losing contract situations: The silence allowed by our rule permits the flexibility necessary to so many construction contract situations, particularly in cases where the parties' duties are interdependent, as in *Muir*.[112]

E. Implications for the Measure of Enrichment: Plaintiff's Costs, Market Value of Plaintiff's Performance, or Defendant's Gain

Of the many possible measures of unjust enrichment that might be used in these cases, let us consider three: One measure is the plaintiff's costs; a second is the market value of what the plaintiff supplied; and a third is the increase in the value of the defendant's assets[113] that resulted from the plaintiff's efforts. Under our rule,[114] we propose setting a restitutionary remedy equal to either of the first two measures, whichever is less.

We chose whatever is *less* between these first two measures in order to keep the plaintiff working efficiently. Even if the subcontractor is maneuvered into doing extra work, she should spend no more on that extra performance than a competent subcontractor would.[115] If she is working efficiently, her costs should be close to the market

landowner may be desperate for a competent architect or contractor to begin work on her land, such contract discouragement is unlikely to take place.

110. *See supra* part VI.C.3.

111. By bargaining for low liquidated damages the parties can contract out of restitutionary awards. *See* Lars A. Stole, *The Economics of Liquidated Damage Clauses in Contractual Environments with Private Information*, 8 J.L. Econ. & Org. 582 (1992).

112. *See infra* part VII.B.

113. A fuller discussion would *separately* parse, for example, defendant's subjective valuation and the market valuation of the asset.

114. *See supra* part II.C.

115. *See infra* part VIII.B.

value. To the extent the costs are significantly higher, fairness to the defendant nevertheless suggests that the most that can be asked of him is to make the plaintiff whole.

More controversially, we argue that either of the first two measures (plaintiff's cost or market value of plaintiff's effort) is preferable to awarding the plaintiff only the amount of enrichment the defendant experienced. We make this recommendation—despite the fact that it may be perceived as inconsistent with the restitutionary impulse[116]—as a means of assuring that the economic functions of our rule can be achieved.

Measuring restitution only by the *defendant's gain* would encourage the defendant to be wasteful with plaintiff's efforts. The defendant should instead be encouraged to value what he receives at its full market value. The contractor in the *Muir* case undoubtedly valued plaintiff's goods and services at less than market price because that is how the contractor was charged and that is how he behaved. That is, had the defendant *known* that he would be required to pay the full market value, he would not have dragged his feet on providing material and energy to the subcontractor. To limit the amount he will have to pay upon breach to the value *he* gained from plaintiff's performance—rather than requiring the defendant to pay something equivalent to the *social* loss—would merely repeat the mistake.

Another reason for setting the measure of restitutionary remedy at *social* loss is to deter inefficient breach, as discussed above. Also, unless the contract remedy effectively returns to suppliers any discount they gave the recipient in the expectation of non-price benefits, some suppliers will be discouraged from entering into efficient contracts. To avoid this result, the measure of relief should be keyed more to the plaintiff's loss (or the value of the plaintiff's effort) rather than keyed to the defendant's gain.

VII. JUDICIAL ADMINISTRATIVE COSTS

A. Introduction

Ordinarily, law does not require people to pay for all benefits which they receive in nondonative contexts. That is so even where they are aware of the other party's expectations for which the benefits are given, and even when they in bad faith violate those expectations.

116. *See, e.g.*, Pettit, *supra* note 6 (arguing that using a measure tied to plaintiff's loss rather than defendant's gain is indicative of a non-restitutionary rationale).

One of the reasons for the law is the concern that an inquiry into such expectations will result in judicial administrative costs that are too high. Under a limited set of circumstances, however, the award of restitution for such expectations may impose only low administrative costs: where a contract exists, which the courts must perforce investigate, and where by its nature, judicial administration may be less expensive (and more practical) than requiring detailed specification of mutually advantageous contract terms and the parties' expectations. Such is suggested by our arguments elsewhere.[117]

The argument for limiting restitutionary remedies to the contract price in cases such as *Muir* rests in part on the desirability of using judicial resources frugally: The costs of ascertaining the contract price are said to be significantly lower than the costs of ascertaining the market price or the plaintiff's costs[118] because, Professor Kull argues, the supplier's expectations are not sufficiently specific.[119] Therefore, as a measure of the remedy, contract price is preferable. We argue that Professor Kull's concern with administrative costs is appropriate but overstated for a number of reasons.

First, although contractual specificity reduces the costs of judicial administration, the cases in which courts grant restitution meet an acceptable standard of specificity, although a somewhat lower standard. More importantly, many contracts are not amenable to a high degree of certainty; they deal with unpredictable and changeable situations in which specific provisions may be virtually impossible to establish. Many of the cases in which courts grant restitution involved precisely such contracts (for example, construction contracts).

Second, even assuming that the costs of distinguishing between truly and apparently losing contracts and the costs of ascertaining measures of the plaintiff's non-price intangible benefits are higher than the costs of ascertaining the contract prices, we argue that the difference is relatively small. Professor Kull's own rule requires courts to make inquiries outside the four corners of the contract.[120]

117. For a discussion of the inability to sue for expectations standing alone, see *supra* Part V. This theme is also developed further immediately below. *See infra* text accompanying notes 118-21.

118. Kull, *supra* note 8, at 1495.

119. *Id.*

120. As we understand Professor Kull's proposed rule, the cost savings of utilizing contract price will be one-sided. Contract price will serve as a *ceiling* on restitutionary damages, not as a floor. His proposed rule would allow the breaching defendant to seek judicial evaluation of the plaintiff's part performance if the defendant argues that the plaintiff's actual costs or market

Third, in designing rules, courts can legitimately decide that justice and economics are not coterminous and that justice must be the leading factor. While one can debate the proper interplay between economics and "other justice,"[121] we need not enter here into such a debate extensively, for we argue that our approach "buys" a more just approach at only minimal economic cost to the system. Thus, although we believe that saving judicial costs by requiring extreme specificity in a contract may be a good thing, it is not good enough to trump the real and fair expectations of the parties.

In the next section we discuss the type of contract that is not amenable to specificity and closure and that because of its nature renders judicial interference inevitable. Then we demonstrate the limited nature of the additional administrative costs involved in distinguishing between truly and apparently losing contracts and the limited additional administrative costs involved in quantifying restitutionary awards.

B. Contract Specificity and Contract Closure

The argument that all or most non-price benefits should not be recognized under contract law is based on a view of a contract as a "spot" relationship: impersonal, usually relatively short-term, and "frozen." In contrast to agreements within ongoing relationships, this type of contract must contain specific and unchangeable terms, designed to limit, rather than leave room for, renegotiation.[122] In a mobile society, where excess performance costs to the parties cannot be later adjusted within the framework of an ongoing relationship, this contract model is useful and appropriate—specificity and closure are crucial to reduce misunderstandings and breaches of contract. Further, in an unstable environment, contract specificity and closure bring additional benefits, such as providing each party a basis for future planning.

price are lower than the contract price. Under the proposed rule, therefore, judicial costs will be reduced with respect to the plaintiff's claims but not with respect to the defendant's claims.

121. *See, e.g.*, Calabresi, *supra* note 30, at 289-308; Thomas Nagel, The View from Nowhere 185-88 (1986) (discussing generally the interplay between deontologic and consequentialist ethics); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49 (1978); *see also* Gordon, *Truth and Consequences*, *supra* note 78, at 1785 (One's "final judgment on . . . any law . . . should depend neither on consequentialism nor on deontologic morality, but on some as yet unstated combination of the two.").

122. Professor Macneil has identified the problem of specificity costs as a governance problem, for which the courts provide rules of adjusting the contract terms. Macneil, *supra* note 61; *see also* Galligan, *supra* note 23 (identifying the same problem).

Some types of contracts, however, by their very nature, cannot be sufficiently specific or provide total closure. These types of contracts are especially amenable to restitutionary remedies, where greater judicial discretion is inescapable.[123]

The *Muir* case and similar construction cases provide a good illustration of such contracts. Specific and predetermined terms in construction contracts are costly[124] because construction involves many unknown and unpredictable developments and is likely to require continuous contract changes. Therefore, these contracts do not contain the terms that cover all eventualities and do not lend themselves to full closure. Even the most detailed of these contracts might cover a smaller percentage of possible contingencies than other types of contracts, and everyone involved understands that the contract serves as a framework for renegotiation. A party may give more than is specified in the contract and expect to be rewarded, either during the contract period or later.[125]

In the *Muir* case, for example, the allocation of the parties' obligations and decisionmaking power required continuous cooperation and adjustments among them. Much depended on mutual self-limitation. Because the contractor was paying for materials and energy, the subcontractor had little self-interested incentive to use them frugally;[126] because the subcontractor was paying his crew's wages, the contractor had little self-interested incentive to keep the subcontractor's crew fully occupied. Similarly, while the subcontractor undertook to finish the work within a specific period, the contractor

123. It has been suggested that the doctrine within restitution law that has the primary role in cases like *Boomer v. Muir*—namely, *quantum meruit*—has its roots in the common law rather than in equity. *See* Douglas Laycock, *The Triumph of Equity*, LAW & CONTEMP. PROBS., Summer 1993, at 53. That is largely irrelevant, however; the role of judicial discretion that has been traditionally thought of as "equitable" is now spread throughout our system, largely without reference to whether the matter at issue has historical roots on the law or the equity side. *Id.* at 71-73.

In any event, the suggestion that restitution's roots are primarily legal may not be entirely accurate because throughout the centuries the common law courts have absorbed into contract law the holding and remedies of the chancery courts. *See, e.g.*, A.W.B. SIMPSON, *The Penal Bond with Conditional Defeasance*, *in* LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 111 (1987).

124. *See* Galligan, *supra* note 23, at 811.

125. Just as it is costly to specify the parties' obligations in the contract in advance, it can be also costly to specify all the interim arrangements on which the parties agree during the contract period. Many terms might be left open, and, we assume that in most cases the parties renegotiate and settle.

126. The contractor therefore also asserted control over the energy and power in breach of the contract.

controlled the work's progress by determining when to supply the materials and power. Thus, each party's performance depended on the cooperation of the other; that made it difficult for the parties to determine their responsibilities with accuracy in advance. It is not surprising that during the contract period the parties renegotiated the terms of the contract. This contract was amenable to mutual adjustments, not to specificity or closure.[127]

Arguably, the supplying party should specify in the contract that non-price benefits exist and should be recouped if the other party breaches the contract. The answer to this argument is, first, that it is costly to specifically add such expectations, especially to anticipate accurately all situations where one party or the other will bear the risk. Second, the recipient party has no real need for such specification to protect himself from paying the supplier more than the worth of what he has received, since if the architect or other supplier overestimated her abilities, the market price for services of the quality she rendered will cap the measure of relief, even under a restitutionary rule.[128] Third, we make a normative claim: If what the supplier gives is indeed worth more than the contract price, and the recipient breaches, then it is legitimate to charge the recipient for what he has received. If this normative claim is correct, it should be up to the party seeking the non-fair allocation to so specify.

C. What Rule Should the Courts Adopt?

If Professor Kull is right about truly losing contracts and we are right about apparently losing contracts, what rule should the courts adopt? If administrative costs were zero, we would recommend a rule requiring the courts to distinguish between the two kinds of contracts and apply our pro-restitution rule in cases of ostensibly but not truly losing contracts, and Professor Kull's narrow restitution approach in cases of truly losing contracts.

In the real world, however, cost must be considered. The question then is: What rule would involve the highest costs? Would it be (i) a rule under which courts would try to distinguish between the two

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127. *See* Galligan, *supra* note 23, at 800.

128. See sub-part (g) of the proposed rule, *supra* Part II.C. On the contrary, it might be argued that being forced to pay even market price for something one hasn't ordered causes harm. (This is sometimes known as the argument of "subjective valuation.") This argument has only limited merit in the context where the party being charged is a wrongdoer—a breaching party.

classes of cases? (ii) a rule where courts would apply our pro-restitution rule to all cases, thus triggering the costs and arguable injustices that critics of the majority rule are concerned about in losing contract situations? (iii) a rule under which courts would cap the plaintiff's recovery at the contract price in all cases, thus triggering the costs and arguable injustices about which our Comment is concerned?

D. Administrative Costs Involved in Our Proposed Approach

1. *The Costs of Distinguishing Between Actually and Ostensibly Losing Contracts*

A rule that requires courts to distinguish between losing and seemingly losing contracts could be costly, involving the courts in factual investigation of the truthfulness, reasonableness, and accuracy of the plaintiff's expectations. Yet, in some cases relatively little cost is involved in judicial distinction between losing and apparently losing contracts.

For example, as we discussed earlier, the presence of an extremely deep discount at the time of contracting will signal that both parties probably knew what they were doing, in expectation of non-price benefits.[129] Conversely, if the "loss" occurs because of an unanticipated, sudden change in market price after contract formation, this will likely indicate that the supplier's loss did *not* result from a calculated reach for non-price benefits. The determination in both cases is unlikely to involve high administrative costs.[130]

2. *The Costs of Quantifying Non-price Benefits*

We assume that in most cases where there is, at the time of the contract formation, a large difference between the contract price on the one hand, and the market price or the supplier's costs on the other hand, this difference represents the intangible advantages that the supplier expects from the contract or its completion. That is, the supplier's investment in the contract above the price he expects to receive can be a measure of the non-price benefits he expects.

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129. This analysis may be complicated if duration was an important part of the contract. *See supra* part III.A.3.

130. As for high performance costs that result from disagreements over what the contract requires the supplier to do, see *supra* note 23 (showing that our restitutionary approach is consistent with the pattern Professor Galligan has seen in these cases).

In these situations, the judicial costs of quantifying the non-price expected benefits from the contract would be quite low. Once non-price expectations are shown,[131] the courts would establish the difference between the contract and market prices. That difference could constitute the amount by which the supplier valued the contract's existence and completion[132] and provide a more accurate measure of the supplier's reliance and expectation losses than will the contract price. This method helps quantify and monetize subjective expectations and answers one of the objections to the majority rule and to our argument. For example, the supplier's costs can be established by receipts and other proof of payment. Even though the establishment of market price depends on the liquidity of the market, in many cases market price can be ascertained with little effort.[133]

In addition, the courts have not one but two measures by which to evaluate expected non-price benefits: the supplier's actual costs (easily verifiable by receipts and means of payments) and the market price, which may be often (not always) easily available. The market price for the supplier's services and goods provides an inexpensive method to test whether her costs were too high due to inefficient performance. The supplier's costs can help ascertain the market price in an illiquid market.

The same reliance on supplier's costs (or market value) should be followed even if the supplier overestimated the intangible benefits that she would receive from the contract. Admittedly, in such a case the supplier would offer services at a contract price that is too low, and the difference between this low price and market price would be too high to represent the supplier's expectations objectively. If proof of the objective value of expectations were allowed, the costs of judicial administration would indeed rise.[134] Professor Kull's objection to

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131. See the proposed rule, *supra* Part II.C.

132. If the supplier really did not value the contract, she would not continue to perform but would rather agree with the defendant to terminate the relationship. The facts of cases such as *Muir*, however, are otherwise: The underpricing supplier continues to perform; she is not the one who breaches.

133. We admit this will not always be the case.

134. A factual inquiry into such questions could be expensive. For example, the supplier may have assigned a 40% probability to the expectation that the contract would enhance her reputation and bring her jobs worth $100,000; or she may have believed that there was a 40% probability that the other party would reciprocate with future assignments worth $100,000; or, perhaps like the subcontractor in *Muir*, she may have continued to perform at a loss due to the other party's breach because she evaluated her chance of obtaining $100,000 worth of additional work at 40%. In all these cases the supplier would rationally have invested in the contract any amount up to $40,000 (40% of $100,000). Suppose, however, that the hopes of the plaintiff/

restitutionary remedy in the *Muir* case then might be more compelling, even as to the ostensibly losing, but actually profitable contracts on which we focus.

Our answer to this counter-argument and the concern with administrative burden is as follows: Plaintiffs may, and indeed do, err in evaluating probabilities of intangible benefits *ex ante*. But so long as a defendant has notice of a plaintiff's expectations, *and* so long as plaintiff gave the defendant benefits because of her expectations, such errors should be deemed legally irrelevant in cases such as ours.[135] Market value (or cost) should be the governing measure. A supplier's overly optimistic expectations will benefit the other party if that party *does not* breach and benefit the supplier if the other party *does* breach.[136] Moreover, it is the defendant, the receiving party, who has the power to decide *which* party would bear the cost[137] of the plaintiff's potentially unwarranted optimism.[138]

Further, there may be little substantive payoff from allowing proof on whether plaintiff's expectations are realistic. Evaluation of probabilities *ex ante* is rarely exact; what may seem unrealistic and erroneous *post facto* may be rational *ex ante*. Besides, the supplier's calculation of probabilities should be determined as of the contract date; these probabilities, which may change thereafter, are highly speculative. Therefore, we believe that a breaching party who has received benefits as a result of a supplier's expectations should be allowed to argue only that he had no notice of the other party's expectation. If he had such notice, the breaching party should not be allowed to raise the issue of how justified the supplier's expectations were. The plaintiff's expenditures—which *can* be determined with a fair degree of ease—should be sufficient proof.

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subcontractor were far too high and that the defendant could show that plaintiff's expectations should not have exceeded a 15% chance of $100,000 (for an expected value of $15,000).

135. Legal irrelevancies give rise to little in the way of judicial administrative cost. The amount expended—its cost or market price—should be the measure of relief. Even if the receiving party breaches and is required to pay for expenditures that the plaintiff made on the basis of an unrealistic expectation, the breaching party (like the contractor in *Muir*) *has received* the benefit of these expenditures.

136. The gain from the breaches, however, is not likely to provide the supplier with incentives to cause a breach. This argument is discussed in Part VI of this Comment.

137. Thus, if the contract price is unrealistically low, so long as the receiving party does not breach the contract it benefits from the supplier's mistaken expectations. If the receiving party *does* breach the contract, it will pay a restitutionary award that is higher than plaintiff's objective expectation.

138. For a discussion of opportunistic behavior, see *supra* Part VI.A.

Thus, while it is true that the contract price is easily ascertainable, it is also true that generally there are easily-derived market figures for the cost (or value) of most of the supplied goods and services. The difference between the two figures can be established with relatively little additional expense to the judicial system.

E. Comparing the Administrative Costs of Other Options

The current judicial majority rule does not distinguish between losing and non-losing contracts. Neither does the approach of Professor Kull who would cap the recovery at the contract price. We think that an overbroad rule can be legitimate whenever the likely administrative cost of distinguishing between the truly losing contracts and the seemingly losing contracts exceeds the allocative costs of the overbreadth.

The majority rule is likely to have fewer overbreadth costs than a rule like Professor Kull's if we are correct that business people will usually be rational and informed. Under our assumptions, in the cases when business people agree to provide goods or services at substantially lower price than market price, or continue to perform contracts at highly discounted prices, ostensibly losing contracts will far outnumber real losing contracts. For if contracts are truly losers, business people will seek to be released of them when the other party to the contract seems to wish release also. Therefore, when the administrative costs of distinguishing between apparently and truly losing contracts are very high, the current majority rule is probably better than the one Professor Kull is recommending.

VIII. IS IT REALLY RESTITUTION?

A. Is It Really Restitution if the Recovery Exceeds the Contract Price?

Some commentators argue that awards in excess of the contract price cannot be justified by the law of restitution. For example, one of Professor Kull's primary contentions is that, as a conceptual and definitional matter, a defendant contracting party cannot be "unjustly enriched" by possessing what the plaintiff has given him in the course

of performing the contract if the defendant is required to pay the contract price.[139] Once that price is paid, Professor Kull argues, there is no enrichment left for which plaintiff can seek restitution.[140]

We agree with Professor Kull that it can be appropriate for a restitution court to look to the parties to evaluate the worth of what they expect to receive during the course of a contract.[141] But such an analysis hardly leads unequivocally to Professor Kull's result. In our view, the *Muir*-type rule that we advocate requires the defendant to give the plaintiff the closest equivalent to what, in exchange for plaintiff's performance, he agreed to pay initially: contract price *and* contract completion.

Moreover, the *Muir*-type result is consistent with the principle that Peter Birks, in his treatise on the English law of restitution, calls "free acceptance."[142] Professor Birks suggests, as a doctrinal matter, that parties who give benefits in the hope of being repaid have a ground for seeking restitution if the receiving party knew the first was giving the goods or services "in the expectation of being repaid," and was in a position to disabuse the supplying party of his expectation but refused to do so in the hope of getting something for nothing. In such a case, the recipient may be liable in *quantum meruit* (for goods) or *quantum valebat* (for services). An example Professor Birks gives is of a window cleaner who comes to his house

> merely in the hope that I, like my various neighbors, would want the [windows] done and would agree to pay. . . . [H]ad I been out, he would have had no basis on which to claim restitution. But because I stood by and tacitly accepted the work he can . . . claim its reasonable value. This, therefore, is the essential point: volunteers who are disappointed risk-takers can get restitution on the basis of free acceptance.[143]

Like a building proprietor who coyly hides behind the curtains until the window washer has cleaned each pane, or like a homeowner who

139. Kull, *supra* note 8, at 1478-84.

140. *Id.*

141. We do no more than concede it may *sometimes* be appropriate to proceed in this way. But even if we were to concede arguendo Professor Kull's larger contention—that a restitution court must always defer to the parties' pre-performance contractual evaluations, *id.*—our result differs from his because we have a different view of the parties' pre-performance expectations.

142. *See* Birks, *supra* note 23, at 265-93. Professor Birks' "free acceptance" principle may be overbroad; that is, from both a policy and doctrinal perspective, "free acceptance" may not always provide a sufficient justification for granting restitution. Nevertheless, some notion akin to "free acceptance" is surely operative in the case law and is suggestive for the problem at hand.

143. *Id.* at 266, 104.

stands by while his neighbor builds a party wall that the homeowner knows the neighbor expects him to help pay for,[144] the defendant in *Muir* should not be able to come out at the last minute[145] and disown what he has irrevocably received.

B. Is It Really Restitution if the Recovery Exceeds the Increase in the Value of Defendant's Assets?

One may ask: Is the majority rule really restitutionary if it requires a defendant to do more than disgorge—that is, if it requires payment of *more* in a lawsuit than an amount representing the value (subjective or objective) that the defendant places on the benefit received? Definitions of restitution typically focus on "the recapture of a benefit conferred on the *defendant*" and remedies that measure "recoveries . . . by the amount of a *defendant*'s unjust enrichment."[146] Yet under our rule a defaulting defendant may have to pay out an amount equivalent to the *plaintiff*'s costs (or to the value of the goods and services that the *plaintiff* provided), even if this amount is higher than the increase in the asset value[147] produced by the plaintiff's efforts. As a result, our rule might be criticized as inconsistent with standard definitions of restitution.[148]

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144. *See* Day v. Caton, 119 Mass. 513 (1876) (stating that "silence with a knowledge that another was doing valuable work for [one's] benefit, and with the expectation of payment" may, as a factual matter, "indicate[ ] that consent which would give rise to the inference of a contract"). Note this is a case where a contract could be implied in fact, while we are dealing with contracts implied in law. In a case like *Day*, we think either analysis could be used.

145. It might be argued when a recipient like the defendant in *Muir* is silent while receiving significantly discounted benefits, that silence does not necessarily hide a bad faith desire (like that of the homeowner in the window-washer example) to get something for nothing. Perhaps the recipient is in good faith during the bulk of the supplier's performance and only at the last minute discovers an irresistible temptation which leads him to breach the contract. Our current "rule", *see supra* part II.C, does not distinguish between good faith and bad faith receipt of discounted supplies; we have not closed our minds to the possibility that it might be advisable to make such a distinction.

146. Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law 295 (4th ed. 1981) (emphasis added).

147. The reference to the defendant's "asset value" assumes that the defendant is the owner on whose project the supplier/plaintiff was working. The concept is equally applicable when the defendant is merely responsible for a project on a third party's land—in such a case, the "increase in asset value" might be translated into the "decrease in the defendant's responsibilities" produced by plaintiff.

Thus, the defendant in *Muir* did not own the land on which the hydroelectric dam was built; his concern was with fulfilling the duties of a general contractor. He fulfilled these duties by, among other things, hiring subcontractors like the plaintiff. A narrow view of restitution might argue that the plaintiff had benefitted the defendant only to the extent the plaintiff's efforts had saved the defendant money in fulfilling his overall responsibilities.

148. *See* Kull, *supra* note 8, at 1480; Petit, *supra* note 6.

However, such a criticism would depend on defining the slippery notions of "benefit conferred" or "unjust enrichment." Looking to the increase in a defendant's asset value is not the only plausible way to measure the defendant's enrichment; it is equally plausible to argue that a defendant that received goods and services at a discount and then breached the contract is enriched at least to the extent of the discount on the price.

Moreover, the *Boomer v. Muir* case also demonstrates how parties can change their balance of power within the contract and move towards a fiduciary relationship, which lends itself to restitutionary remedies. In the *Muir* case, the contractor controlled the timing of the delivery of the materials to the subcontractor. In addition, and in violation of his contract obligation, the contractor retained control over the source of energy that the subcontractor needed to perform his tasks. Thus, the contractor "misappropriated" the power to use the source of energy that belonged to the subcontractor and diverted the use to some other works in which the contractor was engaged. Arguably, the benefits that the contractor received from such a wrongful use rightly belonged to the subcontractor.

Or, alternatively, it might be argued that the defendant received the "benefit" which he sought or accepted, namely, goods and services, from the plaintiff.[149] That being so, it may not be inconsistent with a proper respect for the defendant's autonomy to assume that the defendant saw the performance as itself a benefit to him. Certainly the defendant might have been wrong—the performance may end up being more costly than the increase in asset value it produced—and certainly the defendant might have *hoped* to get the goods and services at a below-market price. But if he has induced or accepted these items, it seems appropriate to make the defendant pay their market price (or cost, whichever is less) since by committing a breach so material that the other party is entitled to repudiate, the defendant has forfeited the contract through which he might have obtained the below-market price.[150]

149. This is the rationale implied by United States v. Zara Contracting, Inc., 146 F.2d 606, 611 (2d Cir. 1944) (Since the "plaintiff's performance here is 'part of the very performance' for which the defendant had bargained, 'it is to be valued . . . by the amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position at the time they were rendered.' ") (quoting RESTATEMENT (FIRST) OF CONTRACTS § 347 cmt. c (1932)).

150. Robert Childres & Jack Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 Nw. U. L. REV. 433 (1969). Childres and Garamella seem to think that those who approve the *Boomer v. Muir* approach do so only because they believe that the breacher of a

Critics of the majority rule have argued that one cannot so dispense with the contract, since (it is argued) it is only the contract that keeps the supplier from being an "officious intermeddler" unable to recover on a restitutionary basis.[151] But that is not so; as we saw earlier, one who accepts goods or services with a knowledge that they are not a gift, and who has an opportunity to reject them, may be responsible for them in restitution.[152]

But all this is somewhat beside the point; as intimated above, the definition of "benefit" or "enrichment" is a notoriously unstable basis for argument. It is better to note three things. First, contract doctrine has historically used the value of plaintiff's goods and services as a restitutionary measure.[153] Second, the restitutionary principles that favor avoiding harm to the defendant—such as those principles that would measure a recovery by the defendant's own experience of benefit—are premised upon a defendant's innocent passivity.[154] For example, when a creditor receives two full payments on the same debt, he

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contract is a morally "bad man." *Id.* at 435. However, we do not see that belief as necessary to our argument. Once a contract is repudiated, *quantum meruit* seems a fairly neutral fall-back position. It was even used in a case where neither plaintiff nor defendant was at fault in any way. See the discussion of Vickery v. Ritchie, 88 N.E. 835 (Mass. 1909), *supra* note 7.

151. *See, e.g.*, LAYCOCK, TEACHERS' GUIDE, *supra* note 8.

152. *See supra* text accompanying notes 143-44. Such a principle of "free acceptance" may however be dangerously broad.

153. Thus, the same casebook that presented a standard definition of restitution—that is, one focused on the defendant's benefit, *see supra* text accompanying note 146—also notes that restitution has a significant overlap with reliance and its focus on the plaintiff's loss. FULLER & EISENBERG, *supra* note 146, at 311 (citing Childres & Garamella, *supra* note 150, at 435-36). Childres and Garamella argue that recoveries like that awarded in *Boomer v. Muir* are incorrect because, *inter alia*, such fact patterns merely present versions of reliance damages, which should be dealt with by reference to the contract terms.

154. In perceiving a need to avoid imposing a net harm on defendants in unjust enrichment cases, courts seem to draw a distinction between persons who have passively come into possession of something belonging to another, and those persons who have taken an active role to direct the contested benefit by themselves. *Cf. supra* note 150 (stating that our position is not dependent on the "bad man" view of contract breach).

An innocently passive defendant who has received the benefit of a stranger's services without request generally will be liable for no more than "the amount by which the recipient or his property has benefitted." RESTATEMENT OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 155 cmt. d (1937) [hereinafter RESTATEMENT OF RESTITUTION]. Similarly, when a trespasser adds extraordinary value and has not committed the trespass intentionally, the owner can claim only the value of the materials taken but is not entitled either to the thing taken or its increased value. *See* AMERICAN LAW OF PROPERTY § 19.9 (A. James Casner ed., 1952). Persons who violate the rights of others, particularly if they do so knowingly, may be treated quite differently. *See, e.g., id.* § 129(3) cmt. d, illus. 5 (where a trespasser takes shrubs, knowing they are not his, and doubles their value through his gardening efforts, the plaintiff is entitled to their value as improved, thus granting plaintiff the advantage of defendant's efforts). Fiduciaries who violate their trust, for example, may be required to disgorge all profits, including those that

passively finds himself enriched; a court might be reluctant to force this overpaid creditor to disgorge the benefit if he would suffer a net harm by being required to return it.[155] But in our cases, the defendant has committed a breach of contract; he is not innocent or passive. And where a defendant is not a passive innocent, the courts will be less concerned with protecting his autonomy from any possible harm.[156] Similarly, Professor Birks believes that with "free acceptance," a defendant forfeits his right to complain that the restitutionary remedy costs him more than his subjective valuation of the benefit received.

Third, and perhaps most importantly, objections premised upon the nature of restitution fundamentally mistake the concerns that uniquely demark that doctrinal area's sphere of dominance. The proper triggering event for the various doctrines known as restitutionary is the presence of *some* positive value that defendant has reaped (or has sought to reap) as a result of plaintiff's efforts. The presence of such positive effects requires use of a distinct approach, which our law largely groups under the title restitution.[157] However, the measure of recovery need not be limited to the triggering event.[158]

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result not from the plaintiff's resources but from the fiduciary's own entrepreneurial ability. *See* 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 2.11 (1978). A trustee may be held "accountable for the profits made by his employees even though he received none of the profit." *Id.* § 2.11, at 142.

Sometimes even in the case of passive defendants, the court will impose a recovery in excess of the benefit the defendant had received. *See, e.g.*, RESTATEMENT OF RESTITUTION § 1 cmt. e (1937) (stating that the estate of an accident victim who is assisted skillfully, but fruitlessly, by a medical professional during an emergency must pay regardless of the fact that the defeudant was not "enriched thereby"); *see id.* § 155 cmt. d. There is enough flexibility in the term "benefit," however, to make any such inquiry ambiguous.

155. Thus, a defendant who receives property by mistake probably need not pay if the property is lost before the mistake is discovered. DAN DOBBS, HORNBOOK ON THE LAW OF REMEDIES § 4.6, at 280-81 (1973).

156. *See* Gordon, *supra* note 26, at 199 n.193.

157. *See, e.g.*, Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution and Intellectual Property*, 21 J. LEGAL STUD. 449 (1992) (exploring the different rules that should apply when positive as compared with negative externalities are at issue); Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57 (1984) (same).

158. For a brief discussion of this controversial issue, see Laycock, *supra* note 123.

IX. UNJUST ENRICHMENT, DEFAULT RULES, RELIANCE, AND EXPECTATION: UNITED BUT DISTINGUISHED THEY STAND

Whether one classifies cases like *Boomer v. Muir* as restitution, as reliance, or as expectation, the result should be the same:[159] In cases of ostensibly-but-not-truly-losing contracts where the supplier partially performs, a recovery should be appropriately keyed to what the supplier has provided—rather than to what the defendant has received or the contract states as its price. We hope we have proved the substantive appropriateness of our approach. In this section, we also suggest that our rule can be consistent with the concerns underlying various classifications' approaches, even though those other classifications may be encrusted with subrules that inhibit their reaching a *Muir*-type recovery.

A. Overlap

The majority rule's restitution measure both reflects what the plaintiff expended in reliance *and* can indicate that the plaintiff expected to receive at least that much in benefit from the contract. Just as reliance is sometimes said to be the best measure of expectation,[160] in some contexts restitution may serve as the best measure of both reliance and expectation.[161] In part for that very reason, our rule well represents the most plausible default rule.[162]

159. Thus, for example, Childres and Garamella would classify *Boomer v. Muir* as a reliance case, and they criticize its result on that account. Childres & Garamella, *supra* note 150, at 448. We think the case is mischaracterized as simply a matter of reliance, since the monies spent by plaintiff were spent *for* the benefit of the defendant. Yet even Childres and Garamella, who would place the case solely within the reliance camp, recognize that the most important issue is not classification but result. *Id.* at 438.

160. *See* Fuller & Perdue, *supra* note 26.

161. For further discussion, see *supra* Part II.D.

162. We are assuming here an approach to default rules that seeks to emulate what the parties would have chosen. *Cf.* David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1815 (1991) (evaluating the approach which asks, "what would the parties have agreed to had they explicitly averted to the issue?"). In some contexts different approaches to default rules should be used; thus, for example, it is suggested in Ian Ayres & Robert Gertner, *Filling Gaps in Complete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989), that parties should sometimes be penalized for failing to fill in their terms—but our case is not one of those where a "penalty" approach should be employed. As previously explored, we think the cost of the parties' specifying the terms of all non-price benefits—including the cost inherent in possibly eroding the trust on which necessary reciprocity may rest—is far higher than the cost of judicial administration to determine these terms. *See supra* part VII.D.2. This notion is discussed further *infra* Part IX.B.

Thus, if the parties had thought to discuss the issue, the supplier might have said, "I'll give you goods and services at a below-market price because I put a value on the contract for reasons [*a b c*], which make the contract worth more to me than just the money you'll pay me under it. If you don't follow through, however, that means I'll lose [*x y z*], as well as whatever I've spent or forgone in performing the contract for you.[163] If that happens, at least you should reimburse my costs. (I'll even concede that if for some reason my costs are higher than the market value of the goods and services I provided, you should pay me only the market value.[164]) This proposal of mine seems fair, since you're getting such a price break, and since this eventuality only comes up if you breach, and since *even then* I'd only be asking you to pay for what you receive." In all likelihood, the defendant would agree—after all, he expects to get below-market goods and services, and at time of inception has no plans to cancel.

B. Is Restitution Necessary?

Even someone who agreed with the foregoing might contend that our rule is unnecessary—that the cases we discuss in this Comment are those in which the courts would award expectation or reliance damages, so that restitution would be superfluous. We disagree. The cases we discuss—of ostensibly but not-truly-losing contracts—are not insignificant in number and scale, yet they are likely to fall outside the kind of expectations and reliance that courts traditionally enforce.

Reliance damages in excess of contract price are unlikely to cover cases such as *Muir* because such damages are usually awarded when the plaintiff expended funds *outside his contract obligations* in reliance on the future performance of the contract by the defendant.[165] A large part of the reason for this rule, which prohibits recovery for "essential" expenditures under a reliance theory, is a fear of double

163. The necessary implication is: I value [*x y z*] more than I value the difference between the market price (or my cost) and the contract price.

164. Recall that under our rule, a plaintiff who spends wastefully on partial performance will not be able to collect full reimbursement for costs: If the defendant can prove those costs were above the market value of what the plaintiff provided, the court would require the defendant to pay only market value. *See supra* part II.C (our rule); *see also supra* part VI.E (discussing remedial measures).

165. Fuller & Perdue, *supra* note 26, at 78-79 (discussing essential versus incidental reliance). Further, it is doubtful that a supplier's opportunity cost would be compensated for under a reliance theory. *Id.* at 82.

recovery: The plaintiff's costs of contract completion are already calculated into the lost profits the plaintiff can obtain under an "expectation" measure.[166] In our situation, there is no danger of double recovery unless expectation damages are significantly broadened,[167] yet the way the reliance formulae are usually stated would make reliance damages difficult to obtain.[168]

Expectation damages are also unlikely to cover our type of cases, because non-price benefits are hard to prove under prevailing requirements of foreseeability and certainty. Over the last several years, American courts have significantly lowered the threshold of proof required to establish the intangible or future benefits of a contract.[169] In some cases, courts require parties to show the other party's liability by a preponderance of the evidence but lessened the standard for establishing the extent of damages.[170] Following this general shift, courts in various jurisdictions have considered claims for loss of goodwill,[171] damage to reputation,[172] lost profits after part performance,[173]

166. *See, e.g.*, Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 546 (1903).

167. *See infra* text accompanying notes 179-81.

168. Some courts do, admittedly, give "essential reliance" damages where expectation measures are unavailable.

169. FARNSWORTH, *supra* note 51, § 12.15.

170. *See* Massman Constr. Co. v. Tennessee Valley Auth., 769 F.2d 1114, 1122 (E.D. Tenn. 1985) (citing Locke v. United States, 283 F.2d 521 (Ct. Cl. 1955) ("If the reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery.")). Professor Farnsworth describes this as the "extreme view." FARNSWORTH, *supra* note 51, § 12.15.

171. *See* Westric Battery Co. v. Standard Elec. Co., 522 F.2d 986, 987 (10th Cir. 1975). Some states categorically deny damages for loss of goodwill. *See* Argo Welded Prods. v. J.T. Ryerson Steel & Sons, 528 F. Supp. 583, 588 (E.D. Pa. 1981).

172. Indiana & Mich. Elec. v. Terre Haute Indus., 507 N.E.2d 588, 606-07 (Ind. Ct. App. 1987) (denying recovery because the quantification of damages was "wholly conjectural" and no relevant authority supported recovery for "loss of face" due to a breach of contract); *see also* Dresser Indus., Inc. v. Gradall Co., 965 F.2d 1442, 1448 (7th Cir. 1992) (allowing recovery for lost profits on future contracts but denying recovery for damage to reputation); Redgrave v. Boston Symphony Orchestra, 855 F.2d 888, 893-94 (1st Cir. 1988) (en banc) (denying recovery for damage to reputation for failure to show specific lost opportunities), *cert. denied*, 485 U.S. 1043 (1989).

173. *Terre Haute Indus.*, 507 N.E.2d at 601-02 (allowing recovery of lost profits after an owner discharged a contractor prior to the completion of their contract). Given sufficient evidence, courts can easily calculate the present value of lost future profits. *See* Walgreen Co. v. Sara Creek Property Co., 966 F.2d 273, 274-75 (7th Cir. 1992). Courts have also been willing to award the value of a "chance." *See* Miller v. Allstate Ins. Co., 573 So. 2d 24, 29 (Fla. Dist. Ct. App. 1990); Anderson v. Gailey, 606 P.2d 93 (Idaho 1980) (stating that even though determining the value of a chance is difficult, "the difficulty of the task does not warrant the abandonment of the duty"). The value of a chance is the likelihood of the profits occurring multiplied by their present value.

lost future profits,[174] lost opportunities,[175] and opportunity costs.[176] Non-price benefits can include just such factors.[177]

Nevertheless, despite the loosening of the requirements of foreseeability and certainty, in many cases in which parties claim intangible and future benefits flowing from the existence or completion of a contract, courts still deny recovery.[178] An expectation measure of damages is therefore unlikely to capture many of the *Muir*-type cases where non-price benefits are anticipated.

But should expectation damages be broadened to do so? Arguably, some recent cases have awarded damages for what traditionally would be considered speculative expectations. If this trend continues, then perhaps plaintiffs in cases such as *Muir* could be awarded the equivalent of restitutionary relief under the heading of expectation damages covering the plaintiffs' non-price benefits.

Assuming one is persuaded of our overall approach, which is the better remedial form? Maintaining the restitutionary remedies, or extending expectation remedies to include traditionally restitutionary remedies and limiting restitution as a contract remedy to the old common law boundaries?[179]

It may be desirable to move restitutionary remedies to rest under the expectation umbrella in order to streamline and simplify the categories of contract remedies. But, blending expectation damages with our type of case would arguably *over*compensate plaintiffs and increase administrative costs. A plaintiff like the subcontractor in *Muir* should not receive compensation for his non-price expectations

174. Dallman Co. v. Southern Heater Co., 68 Cal. Rptr. 873, 878-81 (Cal. Ct. App. 1968) (allowing recovery for projected profits from contracts with third parties).

175. Air Technology Corp. v. General Elec. Co., 199 N.E.2d 538, 548 (Mass. 1962) (allowing recovery).

176. Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1369-70 (7th Cir. 1985) (denying recovery and noting that the law had not "evolved to the point where every time a buyer breaks a contract, the seller is entitled to the time value of money").

177. In *Paul Hardeman, Inc. v. Arkansas Power & Light*, the plaintiff was a new and growing business. In their discussion of the bid, a "losing contract" according to their figures, the defendants speculated that perhaps Hardeman had submitted a low bid in order to gain entry into the power transmission field. 380 F. Supp. 298, 309 (E.D. Ark. 1974). Furthermore, the court notes that the plaintiff's cost of performance was higher because it was forced to learn on the job. *Id.* at 311.

178. *See, e.g.*, Debra T. Landis, Annotation, *Measure and Elements of Damages for Breach of Contract to Lend Money*, 4 A.L.R.4th 682, 719-20 (Supp. 1994); *supra* notes 164-65 and accompanying text.

179. We assume that Professor Kull will both object to the extension of expectation remedies and advocate the limitation of restitution.

unless he provided significantly discounted supplies. Such supplies, whether of goods or services, both demonstrate the existence of expectations,[180] and, perhaps more importantly, shift the balance of the equities. Expectations in the absence of benefits transferred to defendant should be handled under traditional expectation rules, with their constraints regarding speculativeness and certainty.

Reducing or eliminating the coverage of restitutionary equitable remedies, further, may blur the flavors of, and differences between, the remedies. Contract remedies may become more explicitly discretionary[181] and restitutionary remedies may become more limited by reference to the contract. Whether these changes are desirable is an important question, which we leave for another day.

X. CONCLUSION

Our departure point, as our starting point, is the issue raised in the *Muir* case: Should a supplier of goods and services at below-market price be awarded, upon breach by the other party, restitutionary relief—actual cost or market price far exceeding the contract price? No, says Professor Kull. The supplier should receive "what he bargained for"—the contract price. We agree that the supplier should receive what he bargained for. We disagree that what he bargained for is the contract price. We do not presume that the supplier is foolish but rather that he provided a discount in order to obtain non-price benefits from the contract completion, for example, enhanced reputation or reciprocal treatment from the other party. If the other party agreed to receive the discounted price and had notice of the supplier's expectations, that party should be permitted to take advantage of the discount without meeting the expectation if and only if the party performs its part of the bargain. If that party breaches the contract, the discount—which was premised upon the promise of contract completion—should no longer be available to it. Under the *Muir* majority

180. The plaintiff has put his money where his mouth is: The plaintiff incurred costs, and in many cases substantial costs, in exchange for a chance to gain the non-price benefits. Such cases constitute a sufficiently distinct and narrow group that they would not open the floodgates to litigation. In addition, the courts' costs of determining the value of the plaintiffs' expectations are minimized by following the plaintiffs' expenditures. These expenditures are likely to provide the courts a reliable guide to assess the value of the plaintiffs' expectations. For an alternative view see Levmore, *supra* note 92. For these reasons judicial determination of restitutionary remedies involves relatively modest increases in administrative costs, as compared to other remedies, such as expectation and reliance damages.

181. For an introduction to the many ways in which contract damage remedies already reflect judicial discretion, see Laycock, *supra* note 123.

rule, accordingly, the supplier has the option of rescinding the contract and demanding the full market price (or costs) for the goods and services supplied.

Under traditional contract law plaintiffs such as the subcontractor in the *Muir* case cannot claim expectation-based or reliance-based compensation because their expectations are too speculative. If contract law expands expectation remedies to include non-price benefits of the kind examined here, then perhaps restitutionary remedies could be subsumed under that category of remedies. Whether such a move is desirable is a matter we leave for another day. Until such time, however, restitutionary remedies should be maintained, or, better yet, a rule such as ours should be adopted, distinguishing between genuinely losing and ostensibly losing contracts. In both events, plaintiffs such as the subcontractor in *Boomer v. Muir* should be compensated for the non-price benefits that motivated their contractual behavior.