

### *Symposium on Jurisprudential Perspectives of Contract*

## Lost Opportunities and Contract Damages

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## LOST OPPORTUNITIES IN CONTRACT DAMAGES

*Richard Bronaugh\**

Many opportunities are lost merely through a failure to be nimble or to pay attention when it matters. However, my interest is in opportunities lost for a very different kind of reason. Because of a contract that I make, I omit to do other things that probably would have been as good, or even better. Of what relevance is this to contract damages? Lawyers often speak as if the quantum of damages is affected, or at least they declare that lost opportunities are an aspect of harm relevant to the justification for awarding any damages in a breach of contract case.<sup>1</sup> Lost opportunities are an important element in the analysis of reliance in a famous paper, which I will be discussing, by Lon Fuller and William Perdue. I shall state flatly at the outset that I think lost opportunities are much overrated. Reaching this conclusion requires following two paths. The first seeks a basis to influence the amount of contract damages. Should the ungained values of optional worlds be cited on the list of harms that a contract breach has caused? The second path is to ask whether or how the fact of lost opportunities could help justify the award of any damages for the breach of contract.

I make a contract with a Christmas tree wholesaler for one thousand trees. I expect to sell them before the holidays. The contract is made six months prior to the delivery date in November, but there is a breach against me, and the trees are not delivered. Before this event, several different things happened, all of which I might have described as missed, forgone, or lost opportunities. The question is whether they constitute any special harm, serious enough themselves to attract the harm principle and the attention of the court.<sup>2</sup>

Consider these possibilities: (1) There were various wholesalers of Christmas trees from whom I might have made my order for the trees. I received several offers. The seller I chose was not the cheapest, but I felt the greatest confidence in him at the time. As it turned out, ones I passed by delivered to their retailers without default. I say that I missed several good opportunities when I signed with the man I did. Is there harm in the fact that there

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1. That lawyers have spoken and do speak as I suggest I merely assert. This essay is a logical analysis and I have not attempted to link the ideas here to any line of cases.

2. The assumption upon which I am proceeding is that courts act to remedy harms to litigants; that they should do so is what I mean by the *harm principle*.

were more reliable persons with whom I had a chance to deal? Before trying to answer that question, let me tell some more.

(2) After contracting, but before the breach, I had become uneasy about my wholesaler. I could not yet claim anticipatory breach, but I considered placing a small order with someone else just to make sure I'd have some trees, even at the risk of more on the lot than I could sell. I also considered insurance. I decided against these measures. I thus forwent, one can fairly say, certain opportunities for self-protection. Is that a contribution to the harm that does result? I believe that this matter can be dealt with summarily, unlike the prior situation and the ones to follow. These "insurance" measures (while they involve making contracts) are not lost opportunities. When lawyers refer to opportunities, they mean alternative contracts to the one that is actually made, or perhaps some other form of activity.<sup>3</sup>

(3) Prior to the breach while still hopeful, I heard of "give-away" wholesalers. Curious, I made some inquiries but found that they no longer existed; I was too late. (4) Or, having made my contract I simply attended to other things, ignoring the rumors, and failed to find an extraordinary opportunity just around the corner. Are evaporated or unpursued possibilities things one has lost? If one can miss an opportunity that was never a living option in one's mind, then the matter of opportunities has an "objective" side. I shall in fact treat this as a plausible notion. The following at least is true: in an environment where other contracts were possible, I neglected or forwent a serious investigation of the chance to find an alternative to my contract. Given the breach against me, did I suffer added harm?

(5) As I prepared to open my tree lot, I received an offer to participate in a time-sharing scheme for a vacation condominium. Here is an offer I would describe as an opportunity that I am unlikely to see again at such a price. There was, alas, a sense of missing

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3. It should also be understood that I am not discussing anticipated contracts or "opportunities" that will only be possible given a performance by my initial co-contractor and which are lost because of a breach I suffer. That is a problem of remoteness, so far as the award of damages is concerned. Another situation falling outside of my discussion is this. Once there is a breach of contract, I may be forced to fill my tree lot with more expensive trees, purchased in the crush of the last days before the holiday. This may indeed cause me to reflect upon past offers. They were rejected then, but look good now. Interesting and typical though these retrospections are, the fact of such losses cannot increase the quantum of damages, for reasons that will become clear in the text.

something good, for I felt I was unable to respond to it. Is this loss a harmful one, especially given that I will suffer a breach? Should an award of damages reflect this loss?

(6) A cheaper wholesaler found me. His offers became progressively more attractive (almost tortious) as time went on. I actively resisted this temptation, saying that I have my bargain, such as it is. I suffer a breach. Merely saying now that I should have waited for the cut-rater is a variation on the bargaining theme in situation (1): variously, I might have done better. Do sour grapes count? More to the point, I say that I could have taken delivery on the spot from this man, and then set myself to refuse the upcoming delivery under my antecedent contract. Is part of the harm I suffer to be found in the fact that another better deal actually would have existed had I been willing to breach?

What might be learned from these small tales? There is a breach of contract, and people are given to think of what might have been, as if missed opportunities are part of the harm suffered from the breach. What generally is lost opportunity? What's the harm of it? In the first situation above, I lost or forwent opportunities as I bargained. In the remaining cases, because of the existing contract, I refused or missed some choices within and without the tree business. But not every avenue is an opportunity; not every unchosen option is a loss of opportunity. If one's commitment seems best—or no other one seems much better—then there need be (and one hopes there will be) no sense of loss as one views the options, past or present. "Lost opportunity" is an expression of regret. In this light, let me continue.

(7) Situation (1) could have differed in an interesting way. In my search for wholesale Christmas trees prior to contract formation, I encountered a local monopoly. When I contracted for the wholesale trees, I did not see myself as passing by any options, *a fortiori* no opportunities either. They did not exist. When the monopolist (who had oversold his capacity) fails to make delivery to me, there are no forgone opportunities that float in retrospective view. Is this a case in which one contracts but forgoes no opportunities? There is no occasion for regret.

Yet one need not be so narrowly confined. The monopolist is in competition with alternative uses of my resources. There is a distinction between content-opportunity and value-opportunity which has a bearing here. Although the monopolist closes off my content-opportunities in the field of Christmas trees, if I sold ornaments

before the holiday I might achieve an equal or better value gain. I did miss *that* when I contracted with the tree monopolist. It represents a value-opportunity through another content-opportunity not closed off. Although extreme situations may occasionally arise, it would seem to be the way of the world that there is an equally valuable or better opportunity to any commitment that one makes. Regret is always possible. This is undeniably a commonplace if objective value-opportunities are counted. The consequence is that there is some value lost (I do mean *net* loss) in any choice one makes, unless one gets (or perhaps is) that beyond which no greater can be conceived. Now if losing any opportunity for net gain is *harmful* as such, then every single commitment is in fact a harmful thing. There is born in the act of choice by a sorrowful humanity the occasion for a lifetime of regret. Here is the case without end for state attention and moral anxiety. Is this the justification for the human inclination to cite in the face of a broken promise the forgone opportunities of a bygone time? If this thought seems attractive, it is well to notice that these losses of opportunity are not the result of a breach of promise. These so-called harms result even as one's co-contractor performs perfectly. But then the loss of opportunity seems hardly to be an item of damage. The most a breach would seem to do is stimulate the lament over what might have been. These reflections can be refined as follows.

There are opportunities lost in the process of entering a contract: for by one's act a boat is missed, taken by another, or simply gone. But not all such "non-normative" losses, as I shall call them hereafter, are inevitable, for one could accept an offer with no opportunities drying up anywhere. While old opportunities remain viable (though untaken) or fresh opportunities perhaps emerge, the sense in which they are *lost* is normative or juristic. One believes that they cannot be taken for the reason of one's commitment otherwise. I am bound not to take them, so they are lost to me. What is one to make of this idea when a breach occurs? What is one to say to or about those victims who complain that they could have grasped old or new opportunities had they been willing themselves to breach, in some sense, antecedently? Consider the loss through normative belief first, and non-normative second.

Is a person harmed specifically by the fact that he did not free himself by breach in order to "capitalize" on something available after contract formation? Does harm compound because the victim neglected to beat the other to the punch? Such a straightforward option existed in the situations, where I ignored rumors, where I did

not invest in the condominium, and where I resisted pressure. I think one here must distinguish between eschewing opportunism (which is what occurred) and losing opportunities. The law could not conceivably consider the former as an extra kind of compensable injury. The fact that I did not capitalize is also the fact that I did not breach. A steadfast victim has forborne to use breach to seek a gain, he does not suffer an added harm. The point is this, citing the superior opportunities one could have realized as a contract-breaker is of limited relevance. It amounts to no more than saying that one has fulfilled one's side—under certain circumstances. Of course, not having breached is a fact, foremost among several, that is certain to secure to one the right of recovery against the defaulting side. But a forbearance to breach opportunistically cannot generate added damages against another beyond the loss of the value-expectations already experienced from the breach.

What now of non-normative opportunity losses? Evaporations, I have contended, are commonplace; they are indeed inevitable if one recognizes opportunities of which one was unaware. Should any of these losses be thought sufficiently harmful to deserve compensation? About the "objective" ones, no court will examine an unknown or unoffered possibility as an item for which compensation should be calculated. For how could a defendant rightly be made to pay to the plaintiff some amount against a parallel course of action outside the contract and unknown to the plaintiff? That notion is unworthy of further consideration. But what of the real offers that the defendant rejected or could have pursued? Does the victim here show some additional harm beyond the plain loss of expectation from the actual breach? I think that a firm answer to this question can now be given.

To advance the argument to its end, consider that I have five options in what may be called "my bargaining environment". One of these options is unknown to me (if I may be allowed to say so) but this "objective" option is quite an extraordinary value. There are, therefore, four real options, each of which has come before me as an offer. Assume that a relevant comparative measure of the value of each of these can be given. I am aware of these values, and reject one as no good for my purposes. Of the remaining three, two are of equal value for practical purposes (which value of course should be discounted by a measure of the probability of its realization). One offer is superior, but unaccountably I do not accept it. (If I had accepted the superior offer, I would have missed no opportunities except the extraordinary "objective" one.) The offer I did accept, of

course, came from the defendant, from whom I am now seeking some compensation for the opportunities I lost, as well as for my loss of expectation.

I discover at once that the court does not wish to hear of that extraordinary possibility of which I myself only lately became aware. Also, no one need hear of the inferior offer I rejected, for it does not speak to the loss of any opportunity. But it does remain in my hands to cite the superior offer that I rejected or the equal offer I passed by in making the contract that I did. With respect to the known superior offer that I did not take, an award in excess of the value of the defendant's promise must be demanded. It would follow that the defendant is to compensate me for more than the deal *we made*. Since he cannot be required to do that, the citation of a superior offer is irrelevant. (Even if exemplary damages were introduced into the theory of awards so that the defaulter will pay more, it would not be plausible to justify this punishment on the ground that either there were probably some better bargains available to the plaintiff or, in the face of emergent opportunities, the plaintiff was in fact no opportunist.) However, I remain free to describe all practically equivalent opportunities that I forwent. These severally could have had a lower cash result for me but better probability discounts, producing equivalence. Where does this bring me? Being practically equal in worth, there is nothing in the remaining pair that is significantly greater or less than the original expectation value of the promise I got. Referring to them would seem irrelevant to the quantum of damage.

The argument is easily summarized. (i) There are opportunities that one misses as one contracts. Some of these the plaintiff had rejected at the time; they may only now come to be regarded in hindsight as opportunities. Others were missed because the plaintiff did not know of their availability. But, in any case, by making a contract one forgoes (in the normative act) all alternative options and opportunities whether one knew of them or not. The question is whether any of these should be cited as a matter for damages. The unknown surely cannot be. But should the plaintiff be allowed to cite the offers he did not pursue or that he rejected outright? One must ask to what purpose. Citing an inferior or equivalent option could at best leave damages alone, at the level of the expectancy from the actual promise of the defendant. No more than that could be claimed. Only citing some superior opportunity will possibly affect the quantum of damages. Will it? This question cannot be answered by deciding that harm is truly suffered in such a manner. The difficulty is in requir-

ing the promisor to pay damages beyond the expectancy of the promise. There would seem to be no basis in contract law to assign to the counter-breaker that added responsibility. (ii) There are opportunities that one forgoes because one already has contracted and also there are opportunities that evaporate after one has contracted. In the former case, one eschews opportunism and leaves alone interesting possibilities for the reason of one's normative or juristic commitment. To seek damages in light of one's forbearance to behave opportunistically, however, is only to seek damages in the light of the fact that one has performed one's own side of the contract. So no added damages make sense. When options, latterly, are just no longer in the field of view, for whatever reason, they are lost in a non-normative way. In the case of evaporated opportunities the same argument applies from the (i) section: only a superior option could make a quantitative difference and it must demand of the defendant more than he had promised to give, as if he is required to pay on a promise that he did not make. I must conclude that lost opportunities cannot affect the quantum of damages.

(iii) The person who points to opportunities missed, forgone, or lost has a *point* to make. A message emerges. The plaintiff stresses the avoidable character of the harm he has experienced—so long as he does not turn to objective opportunities. He says that there were more reliable persons than this defendant with whom he might have dealt. He heightens his status as a victim. When there are post-bargain opportunities forgone, he calls attention to the fact that he *could* have breached to advantage. He has been steadfast while the other has not. The message is a way of insisting on one's rights and of placing one's present claim in a favorable light. In a word, the appeal to missed opportunities is rhetorical.

Unless one is prepared to force the defaulter to pay more than the value of his promise, the loss of opportunities is irrelevant to the quantification of damages in contract. But conclusion (iii) may be premature or insufficiently developed, even if (i) and (ii) are established for good. Can the fact of lost opportunities help justify the practice of awarding damages for a breach of contract, even if it is irrelevant to the quantum of damages? Or is its use rhetorical?

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In 1936 Lon Fuller and law student William Perdue, Jr., published the first installment of "The Reliance Interest in Contract



Damages."<sup>4</sup> The whole essay has become one of the most respected legal studies, and as a landmark or signpost it has meant many things to many people.<sup>5</sup> Fuller and Perdue reach, as I shall be explaining presently, a conclusion rather like my (i) and (ii) concerning the quantification of damages, but they perceive a potential for "divergence of measure and motive," noting "that it is impossible to assume that when a court enforces a promise . . . the purpose or interest which forms the rationale of the court's action necessarily furnishes the measure of the promisee's recovery."<sup>6</sup> The measure of recovery in contract is, of course, the promisee's expectation. It would appear then that there is an interest called the "expectation interest." Satisfaction of that interest, it might naturally be thought, is achieved by an award of damages that fulfills the promisee's expectation. But it is "not at all far-fetched," as they will seek to show, that in the background is another interest. That interest is the reliance interest, the satisfaction of which dominates in the light of justice any interest there might be in pure expectation.

Before discussing the Fuller-Perdue theory of the 'motive' for contract damages, however, I want to discuss their analysis of the 'measure,' that is, their theory of the quantum of damages. Indeed, though the authors express some caution about lost opportunities as an item of damages, they do allow for it: ". . . if some considerations of policy were conceived to exclude from compensation 'the lost profit' on a contract to marry, the same consideration would, no doubt, affect also a claim for a generalized and undefined loss of other opportunities to marry, but it would not necessarily carry over to a claim for the loss involved in turning down a specific proposal of marriage."<sup>7</sup> Their suggestion is that the difficulty about compensation for lost opportunities (to marry) is simply one of general policy. The problem is worse than that, as in fact their own analysis will reveal.

Having three suitors, when Jill accepts the proposal of Jack, she necessarily forgoes the proposal of the rich John. The proposal of impecunious Jake can hardly be thought an opportunity at all.

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4. Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936).

5. Professor P. S. Atiyah writes: "In many respects, this article has been the starting-point for the whole of this book." P. ATIYAH, *THE DECLINE AND FALL OF THE FREEDOM OF CONTRACT 1* (1979).

6. Fuller & Perdue, *supra* note 4, at 66.

7. Fuller & Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 417 (1937).

The engagement is long, during which time John tries once more and then marries another. Meanwhile, Jack grows wary of Jill and he breaches his promise to marry her. Jill sues Jack. Jake remains available but is of no interest to her. If she can cite the loss of her chance to marry John, and be rich, as an item of contract damage then in theory Jack could have quite a problem.

Fuller and Perdue recognize the problem. It was fundamental to my prior conclusion, (i) and (ii), on the irrelevance of lost opportunities to the quantum of damages. There is an excess of reliance interest over the expectation. To force Jack through an award to make Jill rich (Jill being unwilling to "mitigate" with Jake) is to permit "the plaintiff to shift to the defendant [her] own contractual losses, when the defendant is guilty of nothing more reprehensible than breach of contract."<sup>8</sup> Jill, on their theory, had entered a losing bargain for which Jack (who had no control of John's ardor or Jill's disdain) should not be made to pay extra. To solve the problem Fuller and Perdue set forth a "formula," roughly: in a suit grounded on reliance, damages should not exceed the money needed to put the plaintiff in the position she would have occupied had the contract been fully performed.<sup>9</sup> The formula means that when the amount of money needed to make one whole again exceeds the value-expectation under the contract, the latter value will limit the amount of the award. But this is a telling principle. What are its implications for Jill? Quite frankly, it means that her lost chance to marry rich John is as irrelevant as the proposals of poor Jake.

The terrain is now familiar but it deserves a brief survey. Lost opportunities are either practically equivalent or superior to the actual contract value. A genuinely inferior option, while it may be relevant to the mitigation of damages, is not a lost opportunity. Jill's only forgone opportunity in reliance on Jack's promise occurred when John made his final try. She did not rely twice, once initially as she contracted (though Fuller and Perdue would say she did), and then later.<sup>10</sup> If Jill is harmed by her loss of Jack (her expectation), is she additionally harmed by her loss of John (her opportunity)? The answer is not difficult, for on the Fuller-Perdue formula, whether or not the lost opportunity is "harmful," it will not af-

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8. Fuller & Perdue, *supra* note 4, at 78.

9. "We will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed." Fuller & Perdue, *supra* note 4, at 79. (Italics in original).

10. I shall argue for that point below.

fect the extent of damages. If compensation for detrimental reliance cannot exceed expectation losses, then a possible world consisting of Jack the breacher and the rejected John is not a world that owes more to Jill than one in which John is indifferent to Jill. The formula leaves the reliance interest as such to influence effectively the quantum of damages falling below the value-expectation, as was the case when the award for breach of promise to marry was limited to disbursements. The upshot is that even on Fuller and Perdue's own grounds, the fact that one passed by some good opportunities upon contracting and later, is not an interesting fact for the assessment of damages.

So much for the claim that lost opportunities are a matter of importance for the measurement of contract damages. I should like now to turn to what Fuller and Perdue have to say on lost opportunities and the general rationale (or 'motive') for any contract damages. First consider the reliance interest itself.

The reliance interest is affected when "the plaintiff has in reliance on the promise of the defendant changed his position."<sup>11</sup> They write that "though reliance ordinarily results in 'losses' of an affirmative nature (expenditures of labor and money) it is also true that opportunities for gain may be foregone [sic] in reliance on a promise."<sup>12</sup> The picture appears to be of a settled agreement with respect to the substance of which a contractor later changes in a direction he might not have otherwise, or does not change when otherwise he might have. The remedy aims, in regard to the reliance interest, "to put [the plaintiff] in as good a position as he was in before the promise was made."<sup>13</sup> In what way is the reliance interest involved when there is a breach of contract? One perhaps had performed one's own side already and now gets nothing from the co-contractor; one had changed one's position because of the settled agreement to one's detriment given the breach. However, satisfaction of the reliance interest in such post-bargain contexts will not demand a recovery of the value-expectation of the defendant's promise; justice here will only produce an award that makes the victim whole—typically a smaller sum.

Fuller and Perdue thus must seek reliance within the process of contract formation itself, if they are to connect the reliance rationale to the expectation award. The idea is that a kind of reliance

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11. Fuller & Perdue, *supra* note 4, at 54.

12. *Id.* at 55.

13. *Id.* at 54.

may exist here which will justify the recovery of an expectation. How can that be? An act of relying must first be found. This is achieved by citing the lost opportunities. When there is a breach one will say that one *relied upon* the defendant's promise by failing to make a satisfactory deal that was available elsewhere at the time. The argument depends explicitly on the description of the unchosen options in the bargaining context as forgone *in reliance on the defendant's promise*. One is thus harmed. But knowing how much recovery to give a plaintiff for that kind of injury, involving as it does a counterfactual claim, is unusually difficult.<sup>14</sup> One turns to the *known* expectation derived from the existing contract. And, in this light, that the court will give an expectancy award "as the most effective means of compensation for detrimental reliance seems not at all far-fetched."<sup>15</sup> This somewhat convoluted thesis (a conjecture for which the whole Fuller-Perdue study is thought by many to stand) depends explicitly upon taking "into account 'gains prevented' by reliance, that is losses involved in foregoing [sic] the opportunity to enter other contracts. . . ."<sup>16</sup> They are employed by Fuller and Perdue to forge a link between the award (or measure) of expectancy and the purpose (or motive) of reliance.

This link presumably—though this conclusion is not stressed by them—would preclude any serious examination of the so-called expectation *interest*, the satisfaction of which justice, in any case, does not strongly demand. They write that "the promisee who has actually relied on the promise . . . certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him. . . . The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. . . . With the transition, the justification for legal relief loses its self-evident quality."<sup>17</sup> The thesis I have been examining is motivated, it would seem clear, by the desire to bolster the justice of awarding *expectation damages* by connecting them (via lost opportunities) to the self-evident need to repair the real injuries suffered in an act of reliance.

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14. Fuller and Perdue write: "This foregoing [sic] of other opportunities is involved to some extent in entering most contracts, and the impossibility of subjecting this type of reliance to any kind of measurement may justify a categorical rule granting the value of the expectancy as the most effective way of compensating for such losses." Fuller & Perdue, *supra* note 4, at 60.

15. Fuller & Perdue, *supra* note 4, at 60

16. *Id.*

17. *Id.* at 56.

The Fuller-Perdue thesis consciously depends upon the existence of equivalent or better choices in the market at the time of bargaining. The detrimental reliance that occurs there is the forgoing of alternative similar contracts, or possibly missing out some different beneficial activity. Fuller and Perdue claim also that reducing damages in the light of mitigation "tends to corroborate the suspicion that there lies hidden behind the protection of the expectancy a concern to compensate the plaintiff for the loss of opportunity to enter other contracts."<sup>18</sup> But there is reason to doubt the relevance of this claim. The rule of mitigation, indeed, shows a consciousness of the fact that there are often alternatives, even inferior avenues, to the same end after a breach is suffered. But this rule takes no interest in the options that were forgone at the time of contract formation. The rule concerns post-breach conduct and protects the original expectancy only for what self-help was in principle unable to salvage. Thus, if my expectation from a contract is \$1,000, but I could have dealt post-breach with another for \$600 at best, my award will be \$400, whether I acted or not. Accordingly, if I could have achieved the full contractual object by turning to another (often emergent) opportunity, then there will be no damages at all, even if I do nothing. What the rule effects is full compensation for the plaintiff only when there are no available options by means of which he can achieve his contractual end. But this so-called "duty" to mitigate does not exist to compensate for the opportunities forgone in the act of contract formation, and so is irrelevant to the main Fuller-Perdue thesis.

Of course, if there were no better or equivalent options in the market, then when one entered the contract one forwent no opportunities, and the expectation award cannot be seen to rest on one's reliance as one bargained. So Fuller and Perdue note: "The argument that granting the value of the expectancy merely compensates for the loss [of bargaining opportunities], loses force to the extent that actual conditions depart from those of. . ." a perfect market.<sup>19</sup> But this is an uncommon situation in commercial contexts where expectation damages are awarded most often; in any case, the reliance interest will still be relevant regarding the plaintiff's post-bargain behavior, though by rights, recovery here should only be such as to make one whole again. It would follow on their view, I believe, that if the plaintiff demonstrably forwent no opportunities and suffered

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18. *Id.* at 61.

19. *Id.* at 62.

no subsequent loss in reliance, then the claim for the value-expectation will either not be strong or be based simply upon generalized support for the practice itself.<sup>20</sup>

Fuller and Perdue suggest the following: "We might easily base the whole law of contract on a fundamental premise that only those promises which have been relied on will be enforced. As the chief exception to this principle we should have to list the bilateral business agreement. The rationale for this exception could be found in the fact that in such agreements reliance is extremely likely to occur and extremely difficult to prove."<sup>21</sup> As a way of bringing the bilateral business agreement into the fold of reliance, they suggest the idea of a judicially conferred "conclusive presumption" of reliance.<sup>22</sup> But one should not fail to notice that the reason that reliance is so likely, but so hard to show in the business context, is the elusive nature of missed and forgone opportunities. This completes their central (but rather couched) argument. If there is reason to doubt that the losing of opportunities as one bargains is something that results from reliance on a promise, then there is reason to doubt the Fuller-Perdue thesis, the "suggestion that the expectation interest is adopted as a kind of surrogate for the reliance interest because of the difficulty of proving reliance. . . ."<sup>23</sup> It is now time to raise these doubts.

Fuller and Perdue introduce a distinction about reliance which complicates the picture in this way. One may change one's position in "essential reliance" or in "incidental reliance" on a promise. In essential reliance one does those "acts necessary to the perfection of [one's] rights on the contract. . . ."<sup>24</sup> Incidental reliance consists in other kinds of acts done "naturally from the contract."<sup>25</sup> This latter sort would all seem to be post-bargain acts of reliance, performed according to the picture of a settled contract upon which one depends in changing position. Essential reliance, one gathers, may appear in the process of making the bargain or contract, as well as afterwards. "For example," they write, "the buyer under a contract for the sale of the land has incurred expense in the investigation of the seller's

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20. "The rule enforcing the unrelieved-upon promise finds the same justification ['as a prophylaxis'] . . . as an ordinance which fines a man for driving through a stop-light when no other vehicle is in sight." Fuller & Perdue, *supra* note 4, at 61.

21. Fuller & Perdue, *supra* note 4, at 70.

22. *See id.*

23. Fuller & Perdue, *supra* note 4, at 64-65.

24. *Id.* at 78.

25. *Id.*

title, or has neglected the opportunity to enter other contracts.”<sup>26</sup> The title search expense is both essential reliance and post-bargain. The neglect of opportunities, however, could happen either essentially or incidentally, depending on whether it perfects rights. Neglecting opportunities would be essential (to the perfection of one’s rights) when it occurs upon contract formation. So the neglect of opportunities would seem to be the kind of thing that will occur immediately (in the act of contract formation) as well as in post-bargain reliance on the formed contract. Here I should like to add a compatible dimension to their analysis, familiar from my antecedent discussion. Any “essential” neglect of options (among which will probably have been some opportunities) is a logical result of any normative commitment, because every option cannot be chosen. It does not, of course, follow that these unselected options will evaporate. If they do, then they are lost in the non-normative way, gone or taken by someone else. But if they remain, they are forgone or lost only in the juristic or normative sense. One is bound not to take them. Using these distinctions about the missing of opportunities through reliance, let me work with some more examples.

(a) The following year—I’ve given up on trees—I received three offers from Christmas ornament wholesalers. I thought things over and accepted the offer from Red, rejecting those of White and Blue. I lost these alternatives (they were probably equivalent though possibly superior) *as* I accepted Red’s offer. The loss was due to my commitment, for I bound myself otherwise than to White or Blue. This kind of reliance (so-called by Fuller and Perdue) ‘perfects my contractual rights’ within the process of entering the contract. The reliance that produced this loss of opportunity may be described now as essential, immediate, and normative.

(b) When I accepted Red’s offer, White disappeared and Blue delivered everything to another retailer. They are now lost to me in the non-normative way, for I could not retrieve them even if I slipped my bonds. Such a loss is not essential to the perfection of my contractual rights. Reliance here therefore produces loss of opportunity incidentally, in post-bargain time, and non-normatively.

(c) White returns from nowhere and persists in making fresh good offers. I reject them all, saying I made my deal with Red. Missing his offers will not perfect my present rights, for the only way I could accept one of them, barring a release from Red, is by a breach of my contract. Since I am relying on the existing contract,

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26. *Id.* at 54.

my forbearance to deal with White is normative, and is no part of a "neglect" that occurs as one contracts. These opportunities I have lost by a reliance that is incidental, post-bargain, and normative.

(d) In contracting with Red, he required me to promise not only to buy the ornaments, but to buy no additional ones, which I might later require, from White or Blue. Assuming that this is a legal contract term, it means that I have normatively lost certain opportunities to supplement my future inventory. I must forbear these external purchases to perfect, or at least, retain my rights on the contract. This has the same post-bargain structure as the title search example given by Fuller and Perdue. So the reliance producing the loss of opportunity is essential, post-bargain, and normative.

(There seem to be no cases of the remaining combinations. By definition, there are no incidentally lost opportunities within the process of contract formation itself. The category of purely non-normative loss essential to the perfection of rights is also empty.)

I believe that one can raise an immediate objection to the way Fuller and Perdue would describe case (a), where I simply accepted Red's offer and rejected White and Blue. This objection attacks a fundamental aspect of their reliance thesis. I have noted that refused options are a logical result of any choice or normative commitment that one makes. But has one forgone such options or changed one's position *in reliance on a promise* from the defendant? One has not. The fallacy in thinking that one has relied on a promise is clearly shown in another example Fuller and Perdue give of this so-called essential reliance given in the process of contract formation: it is "the performance of the act requested by an offer for a unilateral contract, and preparations to perform [the act of acceptance] . . . ." <sup>27</sup> There are indeed changes of position by the plaintiff-to-be (in performing the action that forms a unilateral contract or in preparing to), but these are not changes *in reliance on a promise*. The reason is that offers are only conditional promises. Before the condition or request is met, there is no promise upon which reliance can be placed. Whatever form acceptance takes, it is not correctly described as 'perfecting rights'. An act of acceptance *creates* rights, upon which reliance can then be placed in the post-bargain context. In case (a) I chose Red. In Fuller and Perdue's mistaken conception, by that act I relied essentially on Red's promise. But if there is no promise until there is acceptance, then my change of position is not given in reliance on Red's promise. I conclude that there simply is

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27. *Id.* at 78.



no such thing as essential reliance on a promise in the process of contract formation. This conclusion has serious consequences, which I will elaborate shortly, for the Fuller-Perdue thesis.

Case (b) found me isolated. White left town and Blue sold out. Is the loss of those opportunities to be described as a reliance loss (incidental, post-bargain, and non-normative)? They are remote consequences of the fact that I signed with Red. They result from someone else's awareness of my contract; they are not changes made by me in reliance upon the contract. That removes them as well from the proper category of reliance losses.

Case (c) has White knocking on my door again. Now I *do* rely normatively on my contract with Red and turn White away. It is incidental to my rights (rejecting him does not perfect them), and occurs in post-bargain time. It is not an instance of reliance occurring in the process of contract formation.

Case (d) can also be described as reliance on a contract or promise. I deal only with Red, as I had promised to do. This act is essential to my rights as expressed in the agreement, having promised not to seek other supplementary opportunities. It does not purport to be reliance occurring in the process of contract formation, either.

(e) There is another occasion for reliance, which does not occur in post-bargain time (or seem to occur in the process of bargaining). It might be called pre-bargain reliance. It should be mentioned briefly. Say that I had once intended (long ago and far away) to enter into the Christmas provisions business with one Green. Without ever reaching an agreement of partnership, I relied detrimentally upon Green's 'temporizing assurances'. I quit my job and pulled up some roots. It is clear that one may pass by opportunities in reliance upon a contract-in-prospect, as much as upon any other kind of prediction. But it should also be clear that, in Charles Fried's words: "Promissory obligation is not the only basis for liability; principles of tort are sufficient to provide that people who give vague assurances that cause foreseeable harm to others should make compensation."<sup>28</sup>

Of the five kinds of situation just described, reliance on a promise only occurs twice, once incidentally, in (c), when I turned White away on the strength of my existing contract with Red and, once essentially, in (d), when I did not supplement my inventory through external bargains. Contractual reliance occurs only in post-bargain

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28. C. FRIED, CONTRACT AS PROMISE 24 (1981).

contexts, when it is reliance on a promise. The idea of relying on the promise of one's co-contractor as one forms a contract with that party is an incoherent idea. Therefore there is reason to doubt the Fuller-Perdue thesis. Of course not all opportunities lost in the post-bargain context are reliance losses; there are the "evaporations" of (b), occurring as they did independently of my reliance on the existing contract. But why, in any case, must the Fuller-Perdue thesis depend upon an idea of reliance on a promise in the act of contract formation?

For one thing (though this consideration is not made explicit by Fuller and Perdue), there is an unseemliness in citing one's own fidelity, occurring in a post-bargain context, as a kind of injury for which compensation should be paid. Furthermore, if one wishes to stress plain reliance losses, such as disbursements, then the expectation award is not appropriate. No, in order to forge the connection the authors want between the reliance interest and the expectation award (with the reduced appeal to an expectation interest), they must find reliance in the act of contract formation itself. It is that idea about which these doubts are expressed.

Now it may be said that my argument against Fuller and Perdue takes too seriously their claim that the act of contract formation is an act of reliance on a *promise*. It might be noticed that a contractor does change position in the act of accepting an *offer*. That change of position, it might be said, is an act of reliance on an offer, a main consequence of which is almost always forgoing other options. One immediate observation is this. If that argument for reliance were sound, then no contract could be described as "unrelied-upon" unless the contractor forwent no opportunities, as when the best possible bargain is made. It would follow that when one chooses among several practically equivalent options one automatically shows reliance. Or one may show reliance by restricting one's choices to inferior options. But one will not be able to show reliance if one is fortunate enough to select the very best. However, I will not rest my case directly on these paradoxes. Let me step back and argue more commensensically. When I chose to deal with Red I forwent to contract with White and Blue. Perhaps a right characterization of this event will save the Fuller-Perdue thesis. The heart of the matter is merely that in dealing with Red, I suffered the detriment of missing the opportunity involved in an alternative deal.

Once again it should be noticed that this a detriment I experience even though Red performs, because it occurs independently of what Red does subsequently. But of course one only tends to

think of White and Blue should a breach happen, and a law suit mounted. But I shall ignore that mild paradox. The issue comes down to this: Can Fuller and Perdue make the link that they want between expectation award and reliance interest if they follow this suggestion and speak not of reliance on a promise in the act of contract formation but of reliance on an offer? It should be remembered that Fuller and Perdue wrote: ". . . the plaintiff has in reliance on the promise of the defendant changed his position."<sup>29</sup> While accepting an offer is a change of position, is that sufficient to establish that there is also an act of reliance? Two things are quite clear: this is not reliance on a promise (which occurs anyway only in post-bargain contexts), and it is not reliance on a mere contract-in-prospect (prior to any offer). It is well to notice in any case that neither of these proper occasions of reliance will justify the *expectation* award.<sup>30</sup> To evaluate the question, one must determine what it is that one relies upon when one relies upon an offer. This would appear to take one of two forms. First, there is reliance during the *life* of an offer (that is, after it is made but before it is accepted or withdrawn) and, second, there is reliance within the act of contract acceptance or formation itself. With respect to reliance during the life of an offer, injury here would at best bring a *reliance* award; justice may require that one be made whole for disbursements, when one was led to believe that an offer would be left open. So the real issue resolves itself to the meaning of the expression 'reliance on an offer' and the relevance of this to the expectation award. One says: *by the act of acceptance an offeree exhibits a kind of reliance that will justify the award of expectation damages*. Now surely the cat is out. Of what use is the notion of reliance here at all? Why not simply say, as is always said, that by an act of acceptance an offeree does what will justify an award of expectation damages? A contract is formed. The appeal to reliance here may cause one to think of opportunities forgone or missed. But that is a rhetorical purpose, serving the honorable end of putting one's conduct in a favorable light, something that must seem necessary to those who hold the expectation interest in low esteem.

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29. Fuller & Perdue, *supra* note 4, at 54.

30. A substantial portion of "The Reliance Interest in Contract Damages" is devoted to the question of the quantum of damages for reliance prior to contract formation. See Fuller & Perdue, *supra* note 4, at 64f. Fuller and Perdue do not favor the expectation award in these situations; the concluding words of the whole essay are ". . . we cannot solve the problem of reimbursing reliance simply by converting the relied-on promise into a 'contract' like every other contract. The need for compensating reliance must be treated as a distinct promissory interest, deserving recognition on its own account." Fuller & Perdue, *supra* note 7, at 420.

**CONTRIBUTOR'S COMMENTS**

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COUNTERSUITS**

*Jean M. Rawson*

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FOR RE-EXAMINATION OF OLD TRADITIONS**

*David M. Hamacher*

*Bruce A. Lambka*

