

Remedies for Imperfect Transactions in Contracts and Torts

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I. INTRODUCTION

Imperfect transactions are promises or assertions insufficiently supported by the accouterments of formalized agreements to be enforceable as contracts. Lack of mutual consideration, discovery of mutual mistake, fraud, or other misrepresentation, disasters intervening between promise and performance, and illusory promises are the types

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of imperfections that shift our attention away from conventional remedies in contract. When the promisor's conduct is also tortious, conventional tort remedies may also be inappropriate. There is no unified theory of remedies for imperfect transactions.

The papers by Professors DeLong, Wonnell, and Kelly in this Symposium address different types of imperfect transactions. Promises that are the subject of section 90 of the *Restatement (Second) of Contracts* are imperfect in the sense that they lack consideration or are disclaimed in subsequent, formalized, written contracts.¹ Section 90 authorizes courts to find remedies for reasonable but fruitless expenditures induced by parties who make promises on which they should reasonably expect others to rely.² Professor DeLong decries courts' formalist strategies for enforcing disclaimers that eliminate these promisors' potential liability for *intentionally* imperfect transactions.³ Taking Professor DeLong's analysis of imperfect promises one step further sheds light on his critique of formalist analysis of disclaimers. I will hypothesize a rationale for disclaimers and alternative methods for limiting their application that might be appealing to both Professor DeLong and the formalist courts.

The transactions I have described as "imperfect" are not contracts that are breached. They are transactions that are not enforceable as contracts. Professor Wonnell surveys the reasons why a contracting party might change her mind after promising and before performing in order to consider appropriate remedies for each case.⁴ Of his six cases,⁵ four are cases of breach and two involve imperfect transactions as I have just defined that term. Professor Wonnell agrees that an expectation-based damage rule is appropriate in all but the two imperfect transaction cases.⁶ Since I start with the premise that an expectation-based remedy is appropriate in all cases where the court "enforces" a contract, I will focus my reaction on those two "imperfection" cases. I hope my comments will sharpen the definition of these two classes of cases with which Professor Wonnell is concerned. I will also explain why it is likely to be more fruitful to consider those two cases as examples of imperfect transactions rather than as examples of contract breach.

When one party's misrepresentation causes another to suffer a

1. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

2. *Id.*

3. Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (with Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 16 (2001).

4. Christopher T. Wonnell, *Expectation, Reliance, and the Two Contractual Wrongs*, 38 SAN DIEGO L. REV. 53, 59 (2001).

5. *Id.* at 60–79.

6. *Id.* at 90–91.

detriment, the interaction between the two may be described as an imperfect transaction. The misrepresentation may induce the other to assent to an agreement or otherwise rely on the other's assertion. In neither case is there an enforceable contract. Whether the result of the misrepresentation is an unenforceable contract or a less formal transaction, the harm done by the misrepresentation calls for a remedy in tort or contract. Professor Kelly describes remedies for this sort of imperfect transaction in the larger context of comparing tort remedies to contract remedies.⁷ As I am in complete agreement with his conclusions, I will make several arguments that I believe strengthen his argument that tort and contract remedies are both based on the expectation interest.⁸ I will demonstrate how tort damages may be calculated using remedial rules taken from the Uniform Commercial Code and the *Restatement (Second) of Contracts*. It is not surprising that Professor Kelly chose misrepresentation as the most likely candidate in tort law for a break from the conventional expectation measure of damages.⁹ Misrepresentation results in an imperfect transaction analogous to those involving gratuitous promises, mutual mistake, impracticability, and unconscionability. These are all defective transactions for which there is no coherent unifying remedial theory.

II. A RATIONALE FOR DISCLAIMERS AND THEIR ENFORCEMENT

Professor DeLong's article is concerned with sophisticated business people eliminating their potential liability under a promissory estoppel theory.¹⁰ His article offers a detailed account of how clever drafters and formalist courts may deny plaintiffs their recompense by using certain drafting and interpretive strategies. If Professor DeLong's sympathy for the plaintiffs were not so clear, one might suspect that his was a surreptitious "I come to bury Caesar, not to praise him" speech.¹¹ While

7. Michael B. Kelly, *The Phantom Reliance Interest in Tort Damages*, 38 SAN DIEGO L. REV. 169, 170-71 (2001).

8. *Id.*

9. *Id.* at 170-76.

10. DeLong, *supra* note 3, at 16.

11. In William Shakespeare's *Julius Caesar*, Marc Antony offers a speech to his fellow Romans in which, under the cover of scorn, Antony praises Caesar. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2. The speech begins with the words "[f]riends, Romans, countrymen, lend me your ears; I come to bury Caesar, not to praise him. The evil that men do lives after them; the good is oft interrèd with their bones—So let it be with Caesar." *Id.* Under the cover of decrying the evil perpetrated by formalist courts,

decrying the triumph of formalism over realism in the courts that support disclaimers of liability, Professor DeLong graciously draws a clear map for those who wish to limit the reach of section 90 liability.

I will develop two themes. The first offers a relatively simple rationale for enforcing disclaimers that avoids Professor DeLong's critique and supports the outcome of the courts' formalist analysis. The second is an alternative perspective on the courts' legal analysis, which helps identify which disclaimers should not be enforced.

A. *Interpreting Section 90*

Formalist courts enforce disclaimers by insisting that the language of people's promises ought to be taken seriously. Professor DeLong characterizes the formalist approach as applying rules literally, without reference to the underlying policies or purposes of rules.¹² By contrast, the realist approach is more openly normative and provides a closer fit between legal purposes and legal effects. Should the intent of promise disclaimers be considered for section 90 purposes?¹³

Courts might ignore intent if a contract is unconscionable, but what if, as in section 90 cases, there is no contract?¹⁴ The literal text of section 90 does not look at the intent of the promisor to be bound by his promises, damage for detrimental reliance may be awarded without regard to the promisor's intent. If the promisor's intent is irrelevant, his disclaimer is irrelevant.

A formalist would be especially eager to see if other parts of the relevant statute, the *Restatement (Second) of Contracts* in this instance, shed any light on the relevance of intent. Section 21, "Intention to Be Legally Bound," appears among other rules related to the formation of contracts. By its context within the *Restatement*, section 21 applies to situations involving mutual assent, rather than to gratuitous, noncontractual promises of the type covered in section 90. Section 21 has two points. The first is that unsophisticated parties who do not know that they are legally bound by their words and acts may be bound despite their ignorance. The second is that sophisticated parties are not legally bound if they agree not to be legally bound.¹⁵ The second point is most relevant

Professor DeLong describes the path would-be disclaimers must take. DeLong, *supra* note 3, at 21–29.

12. DeLong, *supra* note 3, at 18.

13. Rather than applying to breaches of "contract," section 90 applies to breaches of "promise." See RESTATEMENT, *supra* note 1, § 90(1) (1981).

14. Section 90, comment a, refers to these cases as "half-completed exchange[s]." *Id.*, § 90 cmt. a.

15. Section 21 of *Restatement (Second) of Contracts* reads as follows: "Neither real nor apparent intention that a promise be legally binding is essential to the formation

here. Section 21 places a high value on manifestations of intention in contract formation. It might be that there is no logical reason for such a rule to apply to section 90 promises, because the rule comes from the context of contract formation that requires a manifestation of assent.¹⁶ Is there any logical reason to import the respect for a promisor's intent to section 90 promises?

Before looking for justifications for importing section 21 values into section 90, note that the *Restatement* recognizes that parties' statements may turn otherwise enforceable contracts into imperfect transactions. A party's unilateral declaration that it will not be bound and agreements between parties that one of them will not be bound both raise the possibility that a court will decline to enforce the agreement because the disclaimer creates an imperfect transaction. The court may decline to enforce all or part of the agreement on a variety of grounds. While such agreements are given effect:

[They] may present difficult questions of interpretation: it may mean that no bargain has been reached, or that a particular manifestation of intention is not a promise; it may reserve a power to revoke or terminate a promise under certain circumstances but not others. In a written document prepared by one party it may raise a question of misrepresentation or mistake or overreaching; to avoid such questions it may be read against the party who prepared it.¹⁷

This language, which seems equally relevant to section 90 promises as to section 21 agreements, suggests that there is no problem with disclaimers per se. It may be that the problem with disclaimers is with the way they are phrased, contextually framed, or imposed on the other party. If so, the solution is either to recognize only those disclaimers that do not raise questions of misrepresentation, mistake, or overreaching, or to adopt the conventional approach of interpreting ambiguous language against the drafter of the disclaimer.

If courts are to choose which disclaimers to enforce, they need a way to distinguish among them. Are there legitimate reasons for disclaimers or are they inevitably abusive? If there are legitimate purposes for disclaimers, perhaps we should respect the promisor's intentions. Is there any reason to import section 21's solicitude for the promisor's

of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract." *RESTATEMENT, supra* note 1, § 21 (1981).

16. *See* *RESTATEMENT (SECOND) OF CONTRACTS*, Chap. 3, Formation of Contracts—Mutual Assent.

17. *RESTATEMENT (SECOND) OF CONTRACTS* § 21 cmt. b.

intent into section 90? It is easy to imagine that section 90 might have been designed to shift losses, create incentives, or somehow affect behavior. When might one or both parties want to avoid the promisor's section 90 liability? By disclaiming liability, a promisor shifts to the promisee the risk of his not following through on his promise,¹⁸ which might mean the risk of his not fulfilling his gratuitous promise.¹⁹ He also shifts the risk of failing to reach an agreement with the other²⁰ and the risk that prior negotiations and superseded bargaining positions will be confused with the final contractual obligations.²¹ Is it legitimate to ask who should bear these risks?

Section 90 is often viewed from a torts perspective because courts award damages only when the promisee's expenditures were reasonable. Curiously, it does not matter whether the promisor acted reasonably or not. All that is required is that the promisor could reasonably have foreseen the other's reliance. Whether it was reasonable to make the promise does not matter. This is a curious mixture of obligations making the promisor liable without regard to fault, but limiting the promisee's recovery only if she was negligent. Given this mixture, what can the promisor do to share or shift the risks of a reasonable promise? From a torts perspective, the promisee's reliance is reasonable if the benefits of her preperformance reliance exceed the probability of the promisor's nonperformance times the associated loss if there is nonperformance. How can the promisee avoid these losses? How can the promisor avoid them?

When allocation of risk is discussed, we naturally consider the possibility that one person may be in a better position to insure against risks than another. The promisor can avoid the wasted costs of early investment by the promisee by declining to promise or by disclaiming. The benefit of disclaiming to the promisor is clear; he will be more willing to promise. The promisee may also benefit from the disclaimer by obtaining the promise more inexpensively or more readily. A

18. The idea that risk allocation is a fundamental part of contracting is hardly original. "Ordinary commercial contracts also shift risks, and thus provide a form of insurance." Wonnell, *supra* note 4, at 104 n.173 (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 116 (5th ed. 1998)).

19. *See, e.g.*, *Spooner v. Reserve Life Ins. Co.*, 287 P.2d 735, 738 (Wash. 1955); DeLong, *supra* note 3, at 25-26.

20. *See, e.g.*, *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 272 (Wis. 1965); *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163, 167 (Mo. Ct. App. 1959); DeLong, *supra* note 3, at 24.

21. *See, e.g.*, *Arlington Fin. Corp. v. Ben Franklin Bank of Ill.*, No. 98 C 7068, 1999 U.S. Dist. LEXIS 1690, at *15 (N.D. Ill. Feb 10, 1999); *Puri v. Blockbuster Music Retail, Inc.*, No. 95 C 50018, 1995 U.S. Dist. LEXIS 18819, at *11 (N.D. Ill. Dec. 20, 1995); *W.R. Grace & Co.-Conn. v. Taco Tico Acquisition Corp.*, 454 S.E.2d 789, 790 (Ga. Ct. App. 1995); DeLong, *supra* note 3, at 28.

promisee may also be in a better position to evaluate the risks because she knows the nature and extent of her potentially profitable reliance and knows what precautions she can take to insure that her reliance expenditures are not wasted in the event of nonperformance or nonagreement. She knows the risks and can insure against them. It is easy to imagine that the promisee is the better avoider of risks. The promisee is either beginning performance or incurring surplus-enhancing expenses and is likely to be in the best position to judge their worthiness. While the promisor has a better estimate of his own probability of not performing his gratuitous promise, he may not be in a better position to know whether negotiations will be successful or whether negotiations might lead to confusion about the terms of the final contract. Allowing disclaimers recognizes the possibility that the promisee may be the best cost avoider and permits parties to allocate that risk to the promisee.

Section 90 provides insurance against not reaching agreement, confusion about contract terms, or failure of the promisor to perform. The disclaimer says that the promisor is not going to pay for this insurance and implicitly warns the promisee to take steps to encourage agreement, avoid confusion, and invest prudently in reliance expenditures. Courts might sensibly recognize the desirability of risk shifting. A promisee might reasonably rely despite a disclaimer. The potential gains may be sufficient to justify reliance without the promisor's insurance coverage. If the promisee relies after receiving a disclaimer, it may be and presumably is because it was reasonable to rely given the reputation and economic interests of the other and the promisee's own benefits of relying. Courts may promote exchange and enhance the value of promising by enforcing disclaimers in such cases.

Courts do not usually question the allocation of risk if it is not unconscionable. Perhaps Professor DeLong is primarily concerned with the imperfect transactions he chose to discuss because they are unconscionable. Given the potential for misrepresentation, mistake, and overreaching identified by comment b, section 21 of *Restatement (Second) of Contracts*, we should consider which disclaimers ought to be enforced and which should not be recognized.

B. Which Disclaimers Should Be Enforced?

Perhaps the fundamental objection to disclaimers is that they are hidden or poorly understood or appreciated. Professor DeLong identifies three types of disclaimers: (1) embedded, (2) peremptory, and

(3) postpromise disclaimers.²² Embedded disclaimers are those accompanying a promise, but overwhelmed, sensorially, by language describing the promise. In *Spooner v. Reserve Life Insurance Co.*,²³ the court denied agents their promised bonuses because of the embedded disclaimer. If the agents were induced to stay with the company and work harder because of the disclaimed promise, “it was because they were relying on the corporate conscience of the appellant and not upon an enforceable [sic] contract.”²⁴ It is not unreasonable to rely on the reputation or conscience of another; those factors provide some guarantee of performance even if they provide no compensation.

Professor DeLong objects to the interpretive mechanisms used by courts in the embedded disclaimer cases. He complains about the outcome (enforcing the disclaimer) by criticizing the courts’ methodology. He does not evaluate the reasons for the disclaimer. He objects that the court enforced the plain language of the disclaimer rather than looking at the language of the contract as a whole. Professor DeLong argues that the announcement was ambiguously inconsistent, “should be given a meaning that is consistent with the express promises” that “should be deemed to have been superceded by the promises that followed,” and “should be deemed inoperative as a matter of law.”²⁵ He faults the promise as unconscionable or procedurally defective, saying that the disclaimer was “sandwiched between statements that are unqualified commitments.”²⁶ The court itself acknowledges that the announcement was a “one-sided proposition[.]”²⁷ All of this language suggests that the promise was in some way unconscionable. Unfairness calls for remedial action, but that does not mean that all disclaimers should be rejected. Professor DeLong claims that the disclaimer accompanying a promise should be inoperative as a matter of law, but offers no argument for that position.²⁸ He does not consider when a promisor might want to offer a lower level of guarantee (reputation and conscience) than full damages or whether a promisee might prefer a poorly guaranteed promise to no promise at all.

A peremptory disclaimer purportedly nullifies all other promises, “whenever they were uttered.”²⁹ These disclaimers typically require that a written, signed agreement accompany all promises enforceable by

22. DeLong, *supra* note 3, at 25–30.

23. 287 P.2d 735 (Wash. 1955).

24. *Id.* at 738.

25. *See* DeLong, *supra* note 3, at 27.

26. *Id.* at 26.

27. 287 P.2d at 738.

28. DeLong, *supra* note 3, at 27.

29. *Id.* at 28.

damages. Where a party or parties intend not to be bound by unwritten promises, courts hold that it is unreasonable to rely on unwritten promises. Professor DeLong says that courts follow three types of senseless strategies to come to this conclusion.³⁰ The first strategy is following a formalist fiction about the state of mind of the promisee. Courts seem to assume, contrary to reason, that promisees understand from the context that promises are meaningless.³¹ The second and third strategies involve courts' use of formalist interpretive constructions. The constructions include such absurdities as disclaimers are never superseded by later language³² and disclaimers always trump commitments.³³ It is important to recognize the flaws in courts' legal analysis. The next step, however, should be taken with caution. Should all disclaimers in section 90 cases be ignored?³⁴

If courts recognize alternative approaches to imperfect transactions and legitimate justifications for disclaimers, they might sensibly enforce some peremptory disclaimers. The strategies Professor DeLong identifies are complaints about the fairness of the disclaimer. If promisees do not understand that promises are meaningless, if the promisor's language is ambiguous, if the disclaimer is contextually superseded by subsequent promises, or if the language actually suggests that the disclaimer trumps the promise, perhaps the disclaimers should be ignored. But they should be ignored because the transaction was imperfect, not because disclaimers are inevitably abusive. These types of strategies are better analyzed as procedural defects that might lead to a conclusion that the purported contract is unconscionable and should therefore be treated as an imperfect transaction. A less cynical commentator, hypothesizing that there is a legitimate purpose for disclaimers, might characterize the promisor's statement as follows: "These promises are intended to be uninsured, and that is why I didn't bother to make a binding commitment here" or "There are risks associated with assuming that this promise will be fulfilled and the promisee agrees to accept those risks." This presumption seems entirely sensible in some situations and a sufficient reason for recognizing some

30. *Id.* at 29–31.

31. *Id.* at 29–30.

32. *Id.* at 30.

33. *Id.*

34. Professor DeLong briefly discusses the utility of disclaimers without commenting on whether the utility justifies enforcing such disclaimers or identifying which should be enforced. That, of course, is not his mission in this paper.

disclaimers. The bottom line is that there are two questions involved in deciding whether a disclaimer should be recognized. The first is whether all disclaimers are evil. The second is whether, given the context of the transaction, a particular disclaimer should be recognized.

The most powerful, postpromise disclaimers are those contained in binding, completely integrated agreements discharging prior promises inconsistent with the agreement. In Professor DeLong's sample case, a later disclaimer by the promisor before the promisee's reliance made subsequent reliance unreasonable. This seems appropriate. Professor DeLong identifies nothing about disclaimers that justifies a departure from the general rule governing binding, completely integrated agreements.

Critical analyses of court holdings are immensely important, especially when the holdings are contrary to widely accepted rules such as liability under a promissory estoppel theory. It is particularly valuable for commentators such as Professor DeLong to remind academia that the rules as written do not always reflect the way rules apply in practice. In their 1936 article *The Reliance Interest in Contract Damages: I*, L.L. Fuller and William R. Perdue, Jr. observed:

T[he] proposition that legal rules can be understood only with reference to the purposes they serve would today scarcely be regarded as an exciting truth We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end is this activity directed? Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do, retains a discomfiting relevance to legal science.³⁵

Our understanding of the role of disclaimers in contract law and the law's remedial responses to unconscionable disclaimers would certainly benefit from more than the sketchy analysis I have given it here.

III. REMEDIES FOR IMPERFECT TRANSACTIONS

In order to develop a theory of remedies for breach of contract, Professor Wonnell explores six reasons why a contracting party might change her mind after promising and before performing.³⁶ For Cases 1 through 4, he concludes that the traditional expectation measure of damages is appropriate.³⁷ Cases 5 and 6, by contrast, present complications that raise concerns about applying the usual measure.³⁸

35. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 52 (1936).

36. Wonnell, *supra* note 4, at 60-79.

37. *Id.* at 60-71.

38. *Id.* at 72-79.

These situations, unlike Cases 1 through 4, involve imperfect transactions, promises that are insufficiently supported by the accouterments of formalized agreements to be enforceable as contracts. The challenge is to find a remedy to fit these cases.

In Professor Wonnell's Cases 5 and 6, the missing accouterments relate to the underlying theoretical assumptions that support enforcement. Formation defenses, such as duress, undue influence, mistake, fraud, incapacity due to intoxication, immaturity, or mental illness, are all examples of pure procedural defects creating imperfect transactions without regard to whether other formalities, such as consideration or the requirement of a signed writing, are met. Where those procedural defects are present, the contract was formed under conditions unlike the "meeting of the minds" standard suggested as the model for contract formation. We rely on this meeting of the minds to assure us that both parties believed they would be made better off by contracting. When the model for contract formation is not matched, we do not know whether both parties are being made better off by contracting or not. The question is, how should courts respond to these cases?

The personal and social desirability of voluntary exchange rests on a number of assumptions. The first is that exchange is voluntary. If people are not permitted to express and act on their preferences regarding an exchange, there is no reason to think that the exchange makes them better off. Doctrines of duress, coercion, and undue influence respond to this imperfection. The second is that people are able to obtain and rationally evaluate information. If people do not appreciate the implications of a proposed exchange, either because of insufficient information or insufficient ability to process that information, there is no assurance that the exchange will improve their well-being. The doctrines of mistake, impracticability, and impossibility respond to these concerns. The third assumption is that the exchange has no detrimental effect on people who are not party to the exchange. Here the social and personal analyses diverge. An exchange may benefit the contracting parties but have disastrous effects on other members of society. When this third assumption is not met, courts void contracts as being contrary to public policy. Contract law recognizes exceptions to the general rule of enforceability of contracts when these assumptions are violated. Professor Wonnell's analysis of appropriate remedies may appropriately be extended to all of these unenforced agreements. Taking

that more global position suggests a search for a coherent set of remedial responses other than expectation damages that is appropriate in all of these examples of imperfect transactions.

Professor Wonnell offers the strongest argument for an alternative to expectation damages in cases of impracticability and mistake, cases where courts conclude that performance should be at least partially excused. For the purpose of developing a coherent set of remedial responses, this is a useful beginning. The difference Professor Wonnell identifies in Case 4 between exploiting existing ignorance (the farmer who does not know there is oil under his land), and creating new ignorance (the lender with confusing credit terms) is quite sensible. Professor Wonnell recommends the expectation measure of damages in the first situation, because a social function is served by new information,³⁹ and the reliance measure in the second case, because no social function is served by imperfect transactions.⁴⁰ The difficulty presented by “new ignorance” is the problem posed by the imperfect transactions in Cases 5 and 6.

Professor Wonnell offers Case 5 as an example of mutual mistake,⁴¹ but neither illustration seems to fit that category. Both Dumb and Dumber believe that the rock that is the subject matter of the contract is the Hope Diamond. Professor Wonnell’s hypothetical case has a mistake on both sides because it refers to an erroneous belief relating to the facts as they exist at the time of making the contract.⁴² But Dumb and Dumber did not make a mutual mistake that is recognized by the common law because the risk of error was contractually allocated to Dumb. The risk was allocated to Dumb because Dumb said, “I guarantee that this is the Hope Diamond.”⁴³ Professor Wonnell’s actual case has neither a mutual mistake nor an unallocated risk. According to Professor Wonnell, both Chatlos Systems, Inc. and the National Cash Register Corporation (hereinafter “NCR”) believed that a six-function accounting system could profitably be installed for \$46,020.⁴⁴

39. *Id.* at 66, 69–70.

40. *Id.* at 70.

41. *Id.* at 72–75. These categorizations are, for the most part, mine. Because he was attempting to make a larger point, Professor Wonnell made no attempt to fit his cases into the typical *Restatement* categories. I find the *Restatement* categories useful because my comments illustrate that Professor Wonnell’s arguments are most powerful when applied to those categories of imperfect transactions rather than applied to cases of contract breach.

42. See RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (1981) (defining mistake).

43. Wonnell, *supra* note 4, at 73; RESTATEMENT (SECOND) OF CONTRACTS § 154 (a) (1981) (describing who bears the risk of a mistake).

44. Wonnell, *supra* note 4, at 74; *Chatlos Sys., Inc. v. Nat’l Cash Register Corp.*, 670 F.2d 1304, 1307–08 (3d Cir. 1982) (Rosenn, J., dissenting).

Technically, this is not a mistake for NCR because it is a prediction or judgment as to events to occur in the future.⁴⁵ But even if it is a mutual mistake, the risk might reasonably be allocated to NCR either because NCR decided to proceed with the installation, treating its limited knowledge about the costs of installation as sufficient, or because the court might hold that it is reasonable to allocate the risk to the party in the best position to evaluate and avoid it, which would be the installer.⁴⁶ As the Introductory Note to chapter 11 of *Restatement (Second) of Contracts* points out, “[i]t is an accepted maxim that *pacta sunt servanda*, contracts are to be kept.”⁴⁷ The mutual mistake doctrine adheres to the allocation of risk stated in the contract.

Assuming that these are mutual mistake cases, however, consider the underlying principle Professor Wonnell illustrates. Case 5 is, according to Professor Wonnell’s heading, a mistake that makes the contract more burdensome to the promisor and correspondingly more profitable to the promisee.⁴⁸ It may be that neither case fits the model. If we ignore Dumb’s guarantee, the fact that the rock is not the Hope Diamond does not make relinquishing the rock more burdensome to the promisor, Dumb. And the mistake makes the delivery less rather than more profitable to the promisee, Dumber, once he discovers it is just a rock. Dumb and Dumber do not illustrate Professor Wonnell’s point.

The facts of *Chatlos Systems, Inc. v. National Cash Register Corp.*⁴⁹ fit the model only slightly better. The mistake does make performance much more burdensome to NCR, because it must invent and install a much fancier system. But would the fancier system be “correspondingly more profitable to the promisee”? If Chatlos will gain no more advantage from the fancy system than from the one promised, the mistake makes the promise no more profitable (unless we consider that, after NCR installs it, Chatlos rips it out and resells it on the open market). Imagine that Chatlos would have been willing to pay as much

45. See RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (defining mistake).

46. See *id.* § 154(b)–(c) (describing who bears the risk of a mistake).

47. *Id.* ch. 11, introductory note, at 309.

The obligor who does not wish to undertake so extensive an obligation may contract for a lesser one by using one of a variety of common clauses: he may agree only to use his “best efforts”; . . . he may reserve a right to cancel the contract; [or] he may use a flexible pricing arrangement such as a “cost plus” term

Id. at 309. All of these options would have been available to NCR.

48. Wonnell, *supra* note 4, at 72.

49. 670 F.2d 1304, 1307–08 (3d Cir. 1982).

as \$56,020 for the promised system and felt they had obtained a good deal paying only \$46,020 for it. If they get a system that performs as promised but costs NCR \$201,826.50 to build, Chatlos's profit is still only \$10,000. According to the court's opinion, the figure \$201,826.50 was the difference between the fair market price of the system as promised (\$207,826.50) and the value of the goods as delivered (\$6000).⁵⁰ This calculation does not reflect the value of the system to Chatlos, because they planned to use the system, not resell it. They might never have been willing to pay \$207,000 for the services the system would have delivered. Thus neither Dumb and Dumber nor *Chatlos* are examples of the principle Professor Wonnell seeks to illustrate. The principle and his observation that expectation damages seem inappropriate in some situations is sound and constructive. Those situations are bona fide cases of mutual mistake and cases of impracticability and impossibility.

Professor Wonnell offers Case 6 as a case of efficient breach.⁵¹ He concludes that expectation damages are not an appropriate remedy in such cases.⁵² Case 6 involves a mistake that makes the contract more burdensome than anticipated to the promisor (like Case 5) without becoming correspondingly more profitable to the promisee.⁵³ Professor Wonnell offers an example of inefficient performance that fits this description. The driller's costs double without creating any benefit for the promisee. It is a case where breach is efficient, but not a prototypical case. Wonnell's example is a case closer to the impracticability or impossibility situation, which demonstrates that it, like Case 5, is an example of an imperfect transaction. Both are unenforceable contracts.⁵⁴

50. *Id.* at 1305 n.2. This calculation is demanded by the general provisions for breach of warranty, which asks for the difference between "the value of the goods accepted and the value they would have had if they had been as warranted." U.C.C. § 2-714(2) (1989). The facts of this case make it appealing for Professor Wonnell's point that there is a great windfall to the promisee. It is the court's improper, though common, interpretation of the word "value" that gives this case its utility to Professor Wonnell. If the court had been applying the expectation measure of damages, it would have interpreted "value" as the benefits NCR's installation of the computer system would bring to Chatlos. To avoid making the promisee better off than performance would have done (which would be contrary to U.C.C. § 1-106(1), which requires that "the aggrieved party may be put in as good a position as if the other party had fully performed." U.C.C. § 1-106(1) (1989), the court must consider the difference in surplus or profit Chatlos received from the goods accepted and the goods as promised. I discuss this interpretive difficulty briefly below, see *infra* Section IV (discussion of Professor Kelly's article), and at greater length in David W. Barnes, *The Meaning of Value in Contract Damages and Contract Theory*, 46 AM. U. L. REV. 1 (1996).

51. See Wonnell, *supra* note 4, at 75-79.

52. See *id.* at 78-79.

53. See *id.* at 75.

54. Similarly, Professor Wonnell refers to two of George M. Cohen's categorizations of types of breaches as "efficient breach" scenarios: contracts that should

The prototypical case of efficient breach is one where the promisor has discovered an alternative use for his performance that gives him a greater profit.⁵⁵ That use is prototypically a sale to another buyer who values the seller's performance more highly than does the promisee. The existence of that alternative raises the seller's opportunity cost, making the contract more burdensome than anticipated, without affecting the value the promisee attaches to performance. In the prototypical efficient breach case, breach is desirable because the alternative use is more valuable than the promised use; the alternative buyer is willing to pay more for the good or service than is the promisee. The rock drilling case is more like the impracticability cases. They are, technically, efficient breach cases because it is more desirable not to perform than to perform. But in the impracticability cases, like the drilling case, it is more efficient to let the resource (drilling services) lie idle than to drill holes in this rock.

Professor Wonnell's example helps us distinguish impracticability, an excuse from performance for which a nonexpectation remedy might be appropriate, from other cases of efficient breach, for which expectation remains appropriate. To appreciate the distinction, we must recognize that each party has an anticipated surplus or profit and each has

not have been made and contracts that should not be performed. *See id.* at 106. I think including all such contracts under the "efficient breach" heading is deceptive. The classification is unhelpful because, for both types of contracts, we would enforce some contracts and not others. With respect to those that should not be performed, my objection is that the category includes not only the prototypical efficient breach cases, described in the text accompanying this note, but also those involving impracticability for which another remedy might be appropriate. We enforce some efficient breach cases with the expectation measure of damages. But we do not enforce the impractical or impossible contracts. We treat them differently because they are imperfect transactions, along with other situations in which promises are unenforceable. With respect to those cases involving promises that should not have been made, some would be enforceable and others not. Some are contracts where we know performance is inefficient and some are contracts where we cannot know. Consider promises made by people lacking capacity; a rationale for voiding such contracts is that we do not know whether the exchange was efficient or not because one of the parties was incompetent to determine whether the exchange would make himself or herself better off. That rationale is appealing because we do enforce contracts by incompetents for necessities, which logically will make them better off. But that rationale is quite different from the efficient breach story, where we know performance is undesirable. Again, we would expect different remedies for voidable contracts than for efficient breaches of contract: hence my suggestion that we change the categories. Rather than treating efficient breach cases differently from other reasons, I suggest we focus on treating imperfect transactions differently from enforceable contracts.

55. *See, e.g.,* Wonnell, *supra* note 4, at 82.

anticipated costs. In the prototypical efficient breach case, the breaching promisor earns more than his anticipated surplus, enough more to compensate the promisee for his anticipated but unrealized surplus, to transfer the resource to a more productive use, and, probably, to create additional surplus in the hands of the third party buyer. The expectation remedy would encourage the promisor to perform, even at a loss, if his loss is less than the promisee's gain. If the promisor does not perform, he must pay in damages an amount equal to the promisee's anticipated gain, so he is better off performing. It is only when the promisor's loss is greater than the promisee's gain that declining to perform is efficient. That means not only that the promisor fails to earn a profit, but that he suffers a loss greater than the promisee's gain. This is a dramatic shift from what the parties anticipated at the time of contract formation. Perhaps this is what impracticability means.⁵⁶

Professor Wonnell's illustration of Case 6 has these characteristics of what might, from an efficient breach perspective, be an impracticability case. At the time of contract formation, the owner and driller each anticipated a \$250 profit. At the time performance was due, the driller's profit would have been -\$1000, which means, not only does he earn no profit, he would be \$1000 in the hole, so to speak. The amount of the driller's loss is greater than the owner's anticipated profit. This is a contract that has not merely become unprofitable to the promisor, but has wiped out all of society's interest in enforcing the contract. This

56. The efficiency of a particular breach is, of course, more complicated than the simple examples suggest. As I have discussed elsewhere, a breach may entail a variety of offsetting benefits that are properly weighed against the detriments. An exhaustive list of the detrimental effects of the breach to the promisee includes: (a) the surplus the promisor would have earned from performing for the promisee offset by the surplus to the promisor from the alternative use; (b) the surplus the promisee would have earned from the promisor's performance offset by any surplus he can obtain from substitute performance; (c) the costs incurred by the promisee in beginning his performance for the promisor prior to the promisor's breach offset by any benefits either the promisee or promisor obtained from that performance; (d) the costs incurred by the promisee prior to breach in an attempt to enhance the surplus he expected to obtain from the promisor's performance offset by any benefit the promisee obtained from those expenses; (e) the breach-related costs (consequential or incidental, in the *Restatement* § 349 sense, including litigation costs); (f) the performance costs incurred by the promisor prior to breach offset by any benefit the promisor or promisee obtained from that performance; and (g) the costs incurred by the promisor prior to breach to enhance the promisee's anticipated performance offset by any benefit the promisor obtains. All of these variables must be considered by the party contemplating breach and facing an expectation damage award and by the court in awarding damages. See David W. Barnes, *The Anatomy of Contract Damages and Efficient Breach Theory*, 6 S. CAL. INTERDISC. L.J. 397, 489-90 (1998) (demonstrating the equivalence between the conditions necessary for profitable breach and for efficient breach under the expectation measure of damages). The efficiency of breach in the impracticability context is, therefore, a more complicated question than the simple efficiency-based rule suggests.

seems to be what Professor Wonnell means by a “serious mistake” in his motivation for breaking a particular contract.⁵⁷

According to the *Restatement (Second) of Contracts*, what separates the impracticability and impossibility cases from the efficient breach cases is that, in the former, “[a]n extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance.”⁵⁸ Comment d of section 261 of the *Restatement (Second) of Contracts* states that “[p]erformance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved.”⁵⁹ Those extraordinary circumstances are, however, elsewhere in the *Restatement* described as “disasters,”⁶⁰ from which perspective the proposed, efficient breach-based definition of impracticability seems a little lax. But like Professor Wonnell’s principle, the traditional view of impracticability and impossibility cases envisions a loss to the promisor and no gain to the promisee.

“Fairness” is another reason for separating the impracticability cases from other examples of efficient breach. While the prototypical case of efficient breach elicits no sympathy for the promisor, the impracticability and mistake cases do. Some commentators have suggested that the promisor who benefits from an efficient breach should be required to share his augmented surplus with the promisee.⁶¹ But it is generally recognized that some remedy less onerous than the expectation measure of damages is appropriate in the case of mistake or impracticability.

Professor Wonnell observes that while expectation damages may be fine for the normal efficient breach case, where courts may be unable to determine whether the breach is efficient or not, in the case of a disastrous change in circumstances, the probability of administrative error is substantially reduced.⁶² Expectation damages are not necessary in impracticability cases to maintain incentives, or even appealing, as

57. Wonnell, *supra* note 4, at 77.

58. RESTATEMENT (SECOND) OF CONTRACTS, ch. 11, introductory note, at 309.

59. *Id.* § 261 cmt. d.

60. *Id.* ch. 11, introductory note, at 311.

61. See, e.g., Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1444–45 (1980) (making a case for supercompensatory damages based on difficulty of detection of defects in performance and the high cost of pursuing litigation).

62. See Wonnell, *supra* note 4, at 108.

Professor Wonnell observes.⁶³ Does that mean that the reliance measure is appropriate? Why is the promisor less sympathetic than the promisee? In the mistake cases, both parties were equally mistaken about the facts. In the impracticability cases, both parties were the victims of external circumstances. Why should either insure the other? Would it be best simply to undo the deal by returning to each the benefit she has conferred on the other, that is, restitution? Wonnell treats making “an unconditional promise to the promisee” as a kind of fault,⁶⁴ thereby justifying the reliance measure. Assigning liability for this behavior, however, is more like strict liability than fault. There is no obvious reason to make the promisor pay for the reliance damages that resulted.⁶⁵

It is very useful that Professor Wonnell has led us to ask what is the appropriate remedy for imperfect transactions such as breaches of contracts society does not want to enforce. His analytical approach is to divide the question in two by considering the optimal incentives with respect to two decisions, the decision to contract and the decision to breach. His discussion in Part II attempts to “envision a remedy that represents a kind of optimal trade-off” that balances incentives with respect to both decisions.⁶⁶ Later in the article, he discusses optimizing by using the pricing mechanism and judicial balancing to optimize damages.⁶⁷ Another solution, which does not require some joint optimization, is to use the expectation measure for all contracts we wish to enforce and find another measure for those we do not. As long as

63. *Id.* at 77.

64. *Id.* at 90.

65. Wonnell frequently analogizes to tort law when describing mistaken and impractical promises. “[T]he reliance interest is . . . a principled response to the tort of entering into an obligation that purports to be binding but in fact is not because of the unanticipated burden enforcement would entail.” *Id.* at 102. In torts, however, strict liability is not the norm. Strict liability may be justified where we can be fairly certain that the liable person is best able to avoid the costs imposed. This is likely to be true for harms caused by possessors of wild animals, people engaged in blasting, and manufacturers of goods with manufacturing defects, but not by people who, along with their contractual counterparts, have made mistakes of fact, or of people whose performance is made impracticable by disastrous, externally imposed circumstances. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (strict liability for suppliers of chattels); *id.* § 402B (strict liability for misrepresentation by sellers of chattels to consumers); *id.* §§ 504–518 (1977) (liability of possessors of animals); *id.* §§ 519–524A (liability for abnormally dangerous activities). See also DAVID W. BARNES & LYNN A. STOUT, *THE ECONOMIC ANALYSIS OF TORT LAW* 108–42 (1992) (describing economic rationale for strict liability). In mistake, impracticability, and impossibility cases, this justification does not apply. Moreover, the analogy to torts is not helpful to Professor Wonnell’s argument, since tort damages are calculated by the expectation measure of damages rather than the reliance measure. See *infra* Part III (discussing Professor Kelly’s analysis of tort damages).

66. Wonnell, *supra* note 4, at 88.

67. *Id.* at 89–90.

there is no game playing by breachers attempting to fool the court about which type of contract we have, the question of appropriate remedy is separate for each type of contract. Since we have a widely accepted remedy for enforceable contracts, the expectation measure, that means we just need to develop a unified theory of remedies for imperfect transactions, including Professor Wonnell's cases of mutual mistake and impracticability.

To my knowledge, a unified theory of remedies for imperfect transactions does not exist. Professor Wonnell is attempting this task by recommending joint optimization, but perhaps he is making the task too hard for himself by looking at both decisions together. It might be more fruitful to consider Cases 5 and 6 as examples of unenforceable contracts like contracts against public policy, promises made under duress, and promises made by people lacking capacity. Then we could consider whether a single measure of damages, perhaps the reliance measure, fits all of those. I think that would be a more logical structure for future debates. Expectation is the measure of damages for breaches of enforceable contracts. As was true for the promissory estoppel cases discussed by Professor DeLong, Professor Wonnell's problem is finding an appropriate remedy for breach of unenforceable promises.

IV. THE SIMILARITY OF TORT AND CONTRACT REMEDIES

Torts are the ultimate in imperfect transactions. Should they be treated in the same way as breaches of enforceable contracts, or, alternatively, as agreements we do not want to enforce? If the former, the expectation measure of damages is appropriate. I agree completely with Professor Kelly that the expectation measure is appropriate, but will offer a different analogy between torts and breaches of enforceable contracts and a different argument for why damages for tortious behavior is identical to damages for breaches of enforceable contracts.

A. *Torts as Breaches of Enforceable Contracts*

Professor Kelly observes that tort damages, like contract damages, are measured by the expectation interest.⁶⁸ If the analogy of torts to contracts is correct, a tort may be viewed as a breach of contract, perhaps of a social contract. Breaches of the written parts of the social

68. See Kelly, *supra* note 7, at 170–71.

contract are breaches of the duties created by statutes. Failure to adhere to customary measures adopted for the protection of others are breaches of implied terms, analogous to a failure to follow ordinary business practices. Negligence is a breach of the implied warranty that our conduct will “pass without objection in the trade,” be “of fair average quality,” and be “fit for the ordinary purposes” of interacting in society.⁶⁹ Comparing this tort analogy to the Uniform Commercial Code’s implied warranty of merchantability, we can see that Kelly’s rejection of the reliance approach in torts is correct. As he points out, the reliance measure asks us to consider what position the tort plaintiff would have occupied if the defendant had no duty to behave in a particular way (for example, no duty to stop at stop signs). This would be a silly inquiry in torts because tort plaintiffs must prove that there the defendant did have a duty and breached that duty in order to recover damages.

There is another sense in which it is silly to talk about the reliance interest in torts. In contract law, we think of reliance damages as expenses a promisee has incurred because of the other’s promise. The contract literature recognizes that these out-of-pocket expenses may be incurred for the purpose of beginning one’s performance⁷⁰ or for the purpose of enhancing the benefit the promisee anticipated from the other’s performance.⁷¹ In torts, we do not find for this sort of reciprocal behavior, unless the tort has contractual elements, as the tort of misrepresentation does. We might say that a person buys a car or a house “in reliance” on no one stealing or vandalizing it, but that is a bizarre construction. I suppose I might have a healthy leg in reliance on no one breaking it, but it is strange to think of my motivation for keeping

69. See U.C.C. § 2-314(2)(a)–(c) (1989) (describing a breach of the implied warranty of merchantability).

70. “Fuller and Perdue described these as ‘essential reliance’ costs. Their terminology was adopted by the *Restatement (Second) of Contracts* § 349 cmt. a (1981). The term *performance costs* seems more straightforward and helps distinguish these costs from other expenses incurred in reliance on the other’s promise.” David W. Barnes, *The Net Expectation Interest in Contract Damages*, 48 EMORY L.J. 1137, 1147 n.31 (1999) (citation omitted).

71. These may be described as incidental (surplus-enhancing) reliance costs. See Fuller & Perdue, *supra* note 35, at 78 (describing these as incidental reliance costs, a confusing label given common use of the term *incidental* to describe another loss, the costs incurred in arranging substitute transaction after a breach). See also RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. c (1981) (including incidental losses as recoverable damages and defining them). The Uniform Commercial Code employs a similar usage. See U.C.C. § 2-715(1) (1989) (allowing buyer’s recovery of incidental loss resulting from seller’s breach). The term *surplus-enhancing reliance cost* appears to have been used first by Robert Cooter and Melvin A. Eisenberg. See Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1434, 1465 (1985) (referring to “discretionary reliance by a contracting party that is undertaken to increase the surplus over and above what he would enjoy had he simply done what was explicitly or implicitly required under the contract”).

my legs fit that way. Tort damages are much more like the “incidentals and consequential[s]” of section 347 of the *Restatement (Second) of Contracts*.⁷²

I have elsewhere contrasted the “curative” interest to the expectation, reliance, and restitutionary interests commonly recognized in contract remedies.⁷³ This fourth interest is recognized only implicitly in philosophical, theoretical, or conceptual treatments of contract damages. A breach of contract may impose unanticipated costs on the nonbreaching party, such as her costs of litigation, minimizing other losses, liability to third parties with whom she has contracted, personal injury, and property damage. These costs are distinguished from reliance costs because the nonbreaching party had not anticipated incurring them and would not have incurred them had there been no breach. These are costs caused by the breach rather than in reliance on the promise. Section 347 of *Restatement (Second) of Contracts* distinguishes these costs from “cost[s] . . . avoided” by including them as “any other loss, including incidental or consequential loss, caused by the breach.”⁷⁴ The amount of these *breach-related costs*⁷⁵ bears no necessary relation to anything “contractual” (such as value of the contract to either party, the cost of either party’s performance, the surplus-enhancing costs incurred by the promisee, or benefits received by either party) and so fits the torts model quite nicely. From the perspective of the expectation interest, another’s imposition of breach-related costs inevitably reduces the injured party’s well-being. The other must reimburse the injured party for those costs if the latter is to achieve the improvement in well-being she anticipated. Tort damages do not resemble reliance damages.

72. RESTATEMENT (SECOND) OF CONTRACTS § 347(b) (1981).

73. Barnes, *supra* note 70, at 1149–50.

74. RESTATEMENT (SECOND) OF CONTRACTS § 347(b)–(c) (1981).

75. I prefer the term *breach-related* to *consequential* or *incidental*. The term *consequential* customarily includes lost profits in both the Uniform Commercial Code and commentaries. See, e.g., U.C.C. § 2-715(2)(a) (1989) (defining consequential damages as losses foreseeable to the seller which could not be prevented by cover); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 268 (3d ed. 1988) (explaining that the most common claim for consequential damages involves lost profits). By contrast, in *Restatement (Second) of Contracts*, consequential damages are costs imposed by the fact of the breach that would not have been incurred otherwise. See RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. c, illus. 4 (1981) (defining consequential damages as injury to person or property resulting from defective performance and offering as an example a defective machine that damages the injured party’s property).

Professor Kelly offers an explanation for why people want to import what Kelly calls “tort’s . . . [nonexistent] use of the reliance measure” to contracts.⁷⁶ He suggests that those who would require reliance as a basis for damages in contract are attracted to the harm requirement in torts and antitrust, which may be viewed as a codified tort. He correctly states that “[n]egligence liability does not exist unless the defendant’s negligence actually injures someone.”⁷⁷ The intentional torts, such as assault, battery, trespass, and false imprisonment, however, do not require harm to be actionable. Nominal damages are permitted, as in contract, despite the lack of a harm.

Courts award damages for some tort theories despite the lack of harm by recognizing a difference between harm and injury.⁷⁸ An injury is an invasion of a protected interest, such as the interest in being free from harmful or offensive bodily contact. An intentional invasion of a protected interest is actionable by itself, even if it is not accompanied by a harm, a loss, or detriment in fact. A harm may result from another’s action even though no legally recognized interest is protected, but without the invasion of a protected interest, courts allow no recovery.⁷⁹ Recovery under intentional tort theories requires only an injury. It is only for legal theories other than intentional torts that the plaintiff must prove both an injury and a harm. Also, there is no harm requirement in antitrust law as Professor Kelly suggests. There is only a requirement of an injury. I had never thought of this requirement of proof of “antitrust injury” as reflecting the tort definition of injury, but it does. Antitrust injury, an injury of the kind antitrust law is designed to prevent, is a prerequisite to receiving any damages or injunctive relief; however, nominal damages are permitted without proof of harm.⁸⁰

76. Kelly, *supra* note 7, at 192.

77. *Id.* at 191.

78. See RESTATEMENT (SECOND) OF TORTS § 7 (1965).

79. *Id.* cmts. a–d.

80. The source of the antitrust injury requirement is section 4 of the Clayton Act, under which private individuals may bring actions for damages. 15 U.S.C. § 15 (1994). Under this section:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.

Id. § 15(a). In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Supreme Court held that plaintiffs seeking treble damages under section 4 must show more than simply an “injury causally linked” to a particular merger; instead, “[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants’ acts unlawful.” *Id.* at 489. Nominal damages may be recovered if there is no actual injury proven. See, e.g., *United States Football League v. Nat’l Football League*, 644 F. Supp. 1040, 1053 (S.D.N.Y. 1986) (concluding that “[n]umerous federal courts have approved awards of

There is no comparable distinction between intentional and negligent breaches in contract law, since contract liability is strict liability. Perhaps what Professor Kelly is suggesting is that people who wish to import the reliance measure of damages from torts are doing so because the closest analog between torts and contract is strict liability, in which an injury and an actual harm are both required. But strict liability for personal injury in torts, as for all tort theories, results in damages based on the expectation interest. There is no area of torts that provides a close analogy to the requirement of proof and the measure of damages proposed by those preferring a reliance measure in contracts.

B. Measuring Tort Damages Using Contract Damage Rules

If tort damages are based on expectations, we might expect that the rules governing contract remedies could be applied to breaches of the social contract as to breaches of negotiated, private contracts. Section 347 of the *Restatement (Second) of Contracts* supplies the “Measure of Damages in General”:

[T]he injured party has a right to damages based on his expectation interest as measured by

- (a) the loss in the value to him of the other party’s performance caused by its failure or deficiency, plus
- (b) any other loss, including incidental or consequential loss, caused by the breach, less
- (c) any cost or other loss that he has avoided by not having to perform.⁸¹

To apply this rule to either tort or contract cases, we need to know what “value” means in subparagraph (a). In some contexts, value means the total benefits or revenues the promisor’s performance would bring to the promisee.⁸² Imagine a simple case in which there is no reliance and there are no breach-related costs. Where the promisee anticipated earning \$20,000 in revenues from the promisor’s performance and incurring \$17,000 in costs from the promisee’s own performance, the surplus lost

nominal damages in antitrust cases” (citing *Rosebrough Monument Co. v. Memorial Park Cemetery Ass’n*, 666 F.2d 1130, 1147 (8th Cir. 1981) (awarding \$3 in nominal damages)). See also M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 ANTITRUST L.J. 311, 349 n.176 (1997) (citing *Home Placement Serv., Inc. v. Providence Journal Co.*, 573 F. Supp. 1423, 1432 (D.R.I. 1983) (\$3 in nominal damages); *Knutson v. Daily Review, Inc.*, 468 F. Supp. 226, 240 (N.D. Cal. 1979) (\$3 in nominal damages)).

81. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

82. See Barnes, *supra* note 50, at 29 (discussing the meaning of value in various contract damage rules).

due to breach is \$3,000. Section 347(a) and (c) easily gives that result by subtracting costs avoided, \$17,000, from the anticipated revenues, \$20,000. Focusing on the surplus aids our understanding of the result. Following section 347(b) and (c), respectively, breach-related costs and reliance costs not “avoided” are added to the damages.

Value means something different from total revenues in a partial performance case decided under the *Restatement* rules.⁸³ When there is partial or substitute performance, the injured party is awarded the difference in value. This “value” does not mean “revenues,” it means the difference in the surplus earned between what was anticipated and what was actually realized. For example, a promisee might substitute a more profitable transaction for the breached contract, but would not be awarded damages even though the breached contract would have brought more “revenue.” It is the bottom line, the surplus, that is important in both types of cases. A surplus-based rule for contract damages might appear as follows:

The Measure of Damages Generally: A Surplus-Based Approach

When a contract is not fully performed, an injured party may recover damages as measured by the lost surplus, which is the difference between anticipated surplus and actual surplus.

- (a) The anticipated surplus of an injured party is the difference between the revenues that party would have received and costs that party would have incurred had the contract been fully performed.
- (b) The actual surplus of an injured party is the difference between the revenue the injured party received and costs the injured party incurred because the contract was not fully performed.

This would always give the same damage award as the *Restatement* rule, properly applied. How well do these rules work in torts?

The death of a tort victim offers the simplest analogy to a total breach of contract. A single tort may cause damages to two classes of plaintiffs, the decedent’s estate and the decedent’s dependent family. For the survival action, brought by the decedent’s estate, we could calculate an expectation-based tort damage award by adapting section 347 of the *Restatement (Second) of Contracts* as follows:

The injured party has a right to tort damages based on his expectation interest, as measured by

- (a) the loss in the value to the injured party of the other party’s performance caused by its failure or deficiency, i.e., the decrease in revenues (lost earnings or earning capacity) and other benefits (hedonic damages) the injured party would have obtained had he not died, plus
- (b) any other loss, including incidental or consequential loss, caused by

83. *Id.* at 29–35. See also RESTATEMENT (SECOND) OF CONTRACTS § 347.

the breach, i.e., medical expenses, pain and suffering, funeral expenses, and other breach-related costs, less

(c) any cost or other loss that he has avoided by not having to perform, i.e., savings from not having to support or maintain himself—his lifetime consumption.

To put it in contract terms, a tort suit by the estate logically would end in an award large enough to ensure that the estate would receive the “profit” the decedent would have received. That lost profit or surplus is the revenues and benefits (“loss in value”) less costs of producing those benefits (consumption expenses, which are “costs avoided”). The surplus-based approach yields the same answer; the difference between anticipated surplus and actual surplus is what would have been revenue and benefits “left over” after consumption expenses but for the accident. Some states allow recovery of this surplus as part of the wrongful death action (the action by the dependents) that accompanies the survival action rather than as part of the survival action itself.⁸⁴ Either way, the award reflects an expectation rather than a reliance interest. The fundamental principle in tort recovery is to put the plaintiff in the position she would have occupied had the other acted reasonably, that is, had not breached his social contract. This sounds suspiciously like section 1-106 of the Uniform Commercial Code: “The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed”⁸⁵

There are other parallels between Uniform Commercial Code article 2 damage remedies and tort remedies. Consider, for instance, section 2-714(2), entitled “Buyer’s Damages for Breach in Regard to Accepted Goods,” which allows buyers recovery of the difference between the value of the goods accepted and the value they would have had if they had been as warranted, plus incidental and consequential damages.⁸⁶ For tort law purposes, section 2-714 would appear as follows:

84. Among the states that award this surplus as part of the wrongful death recovery, some limit it to the amount of that excess that would have gone to support dependents. This understates the expectation amount but in no way reflects what could be considered a reliance interest. The other states award an amount that exactly reflects the lost surplus, calling it a “loss of projected lifetime savings of the deceased.” DAN B. DOBBS, *DOBBS LAW OF REMEDIES* § 8.3(2)–(3) (2d ed. 1993).

85. U.C.C. § 1-106 (1989).

86. *Id.* § 2-714(2).

Torts Damages for Personal Injury

A party injured by another's breach of the social contract may recover the

- (a) Value of Goods Accepted, that is, earning and enjoyment capacity of torts plaintiff but for the injury; less the
- (b) Value of Goods Received, that is, earning and enjoyment capacity of torts plaintiff with the injury, plus
- (c) Incidental and consequential damages including expenses reasonably incurred in care and custody of goods received and injury to person or property proximately resulting from any breach, that is, breach-related costs such as medical expenses, funeral expenses, pain and suffering, etc.

If value is correctly interpreted as lost surplus,⁸⁷ the result of this calculation is the same as a calculation based on section 347 or the surplus approach, lost surplus plus breach-related costs.

Numerous other examples of recovery based on the expectation interest are available from the remedies for different torts. For a conversion, for instance, the plaintiff is entitled to the value of the subject matter at the time and place of the conversion plus "the amount of any further pecuniary loss of which the deprivation has been a legal cause" and "compensation for the loss of use not otherwise compensated."⁸⁸ Conversion resembles a total breach of contract. Trespass to chattels resembles a partial contractual performance. Section 928 measures harm to chattels from a trespass that does not amount to a conversion. The damages include compensation for:

- (a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs, and
- (b) the loss of use.⁸⁹

These remedies are forward-looking, reflecting the expectation interest, rather than backward-looking, like the reliance measure of damages.

More evidence of the expectation basis for tort damages seems merely cumulative. There are circumstances in which prospective economic advantage is not awarded, such as cases where the tort has caused future economic loss but neither physical harm nor property damage.⁹⁰ But the

87. Barnes, *supra* note 50 (explaining the correct interpretation of "value" in measuring contract damages).

88. RESTATEMENT (SECOND) OF TORTS § 927(b), (d) (1979).

89. *Id.* § 928.

90. *See, e.g.*, *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985).

The single characteristic that distinguishes parties in negligence suits whose claims for economic losses have been regularly denied by American and English courts from those who have recovered economic losses is, with respect to the successful claimants, the fortuitous occurrence of physical harm or property damage, however slight. It is well-accepted that a defendant who negligently injures a plaintiff or his property may be liable for all proximately

reason for denial of anticipated surplus reflects evidentiary concerns and courts' desire to limit the number of prospective plaintiffs to whom a defendant might be liable.⁹¹ In this regard, recovery of lost surplus is treated like recovery of damages for emotional suffering unaccompanied by physical harm.⁹² In both areas, exceptions to the rule of nonrecovery have emerged to bring these damage rules in line with the expectation measure that would allow recovery of prospective surplus.⁹³

The single area of torts for which Professor Kelly suggests an alternative to expectation damages is misrepresentation. This is not surprising, because an actionable misrepresentation in contracts must be "likely to induce a reasonable person to manifest his assent" or it must be known to the maker of the misrepresentation "that it would be likely to induce the recipient to do so."⁹⁴ In torts, one who makes a fraudulent misrepresentation is liable to those "whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation."⁹⁵ Both legal actions are for imperfect transactions involving fraudulent inducement of the other to respond in some way. Both involve actions by the party that give rise to damages despite the lack of an enforceable contract.

Without disputing Professor Kelly's conclusion that expectation damages seem to be the customary response of courts in tortious misrepresentation cases,⁹⁶ it is hard to miss the similarity between tortious misrepresentation and the cases of unenforceable contracts discussed by Professors Wonnell and DeLong. There seems to be no

caused harm, including economic losses. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); W. Prosser & W. Keeton, *The Law of Torts* § 129, at 997 (5th ed. 1984) (Prosser & Keeton). Nevertheless, a virtually *per se* rule barring recovery for economic loss unless the negligent conduct also caused physical harm has evolved throughout this century, based, in part, on *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 2d 290 (1927) and *Cattle v. Stockton Waterworks Co.*, 10 Q.B. 453 (1875).

Id. at 109.

91. *Id.* at 110.

92. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 361 (5th ed. 1984) (describing the rule limiting recovery for emotional harm without accompanying physical harm).

93. See *People Express Airlines, Inc.*, 495 A.2d at 112-15 (reviewing exceptions to denial of recovery for prospective economic advantage unaccompanied by physical harm); KEETON ET AL., *supra* note 92, at 362-66 (describing exceptions to denial of recovery for emotional harm unaccompanied by physical harm).

94. RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (1981).

95. RESTATEMENT (SECOND) OF TORTS § 531 (1977).

96. Kelly, *supra* note 7, at 176.

coherent theory of remedies unifying all of these cases of imperfect transactions as there is for breaches of enforceable contracts.