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Instructing Juries on Noneconomic Contract Damages

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ARTICLES

INSTRUCTING JURIES ON NONECONOMIC CONTRACT DAMAGES

David A. Hoffman* & Alexander S. Radus**

Gathering pattern contract jury instructions from every state, we examine jurisdictions' treatment of noneconomic damages. While the conventional account holds that there is a uniform preference against awards of noneconomic damages, we find four different approaches in pattern instructions, with only one state explicitly prohibiting juries from considering noneconomic losses. Lay juries have considerably more freedom to award the promisee's noneconomic damages than the hornbooks would have us believe.

We substantiate this claim with an online survey experiment asking respondents about a simple contract case and instructing them using the differing pattern forms. We found that subjects routinely awarded more than the promisee's baseline economic losses. In one of the categories of instruction—in which contract juries are instructed to award a tort-like form of remedy—subjects returned almost two times more in damages than the promisee's mere expectation. The resulting picture of contract remedies is considerably more complex than the conventional wisdom portrays, but significantly more realistic.

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INTRODUCTION

What are the natural and probable consequences of breach of contract?
Please illustrate/define/exemplify?¹

Juries may not award noneconomic damages for breach of contract.² The point is often expressed in the major contracts treatises, casebooks, and the *Restatement (First)* and *Restatement (Second) of Contracts*, with copious supporting documentation.³ And yet, venerable authorities acknowledge that such losses may be real,⁴ foreseeable,⁵ or even likely⁶ consequences of

1. This quote is from a jury's note to a judge. Memo Pursuant to R.1:6-2(f) at Ja.-94, *Don Corson Constr. Co. v. Hrebek*, No. MON-L-1725-01 (N.J. Super. Ct. Law Div. Feb. 6, 2006), 2006 WL 6676864.

2. What is noneconomic harm in contract law? Some describe it as mental suffering, 24 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 64:7, at 67 (4th ed. 2002) [hereinafter 24 WILLISTON], mental distress, 2 HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* § 18:6, at 141 (2012) [hereinafter 2 MODERN LAW]; 11 JOSEPH M. PERILLO, *CORBIN ON CONTRACTS* § 59.1, at 535 (2005) [hereinafter 11 CORBIN], mental disappointment, 2 MODERN LAW, *supra*, § 18:6, mental anguish, *id.*, emotional trauma, CORBIN, *supra*, § 59.1, at 535; JOSEPH M. PERILLO, CALAMARI & PERILLO *ON CONTRACTS* § 14.5(b) (6th ed. 2009) [hereinafter CALAMARI & PERILLO]; emotional disturbance, 3 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 12.17, at 291 (2004), or emotional distress, JOHN E. MURRAY, *MURRAY ON CONTRACTS* § 124 (5th ed. 2011). In general, treatise writers use multiple terms and do not distinguish them, perhaps reflecting the variety of terms appearing in court opinions. *E.g.*, 24 WILLISTON, *supra*, § 64:7, at 67, 72, 79 (using the terms “mental suffering,” “mental distress,” “mental disturbance,” “emotional disturbance,” and “injury to a person's feelings”).

3. RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981); RESTATEMENT (FIRST) OF CONTRACTS § 341 (1932); CALAMARI & PERILLO, *supra* note 2, § 14.5(b); 11 CORBIN, *supra* note 2, § 59.1, at 535; 3 FARNSWORTH, *supra* note 2, § 12.17; 2 MODERN LAW, *supra* note 2, § 18:6; MURRAY, *supra* note 2, § 124; 24 WILLISTON, *supra* note 2, § 64:7, at 67.

4. 24 WILLISTON, *supra* note 2, § 64:7, at 67.

5. RESTATEMENT (SECOND) OF CONTRACTS § 353; MURRAY, *supra* note 2, § 124; *see also* 3 FARNSWORTH, *supra* note 2, § 12.17, at 291 (general denial of recovery for emotional harm “even if the limitations of unforeseeability and uncertainty can be overcome”).

6. RESTATEMENT (FIRST) OF CONTRACTS § 341 cmt. a.

contract breach. Corbin takes it a step further, noting that contract breach “practically always causes mental vexation and feelings of disappointment by the plaintiff.”⁷

With a few exceptions,⁸ this conventional wisdom thus concludes that frustrated promisees routinely are denied the opportunity to seek and recover noneconomic damages. This remedial gap is not an accident or a bug of contract adjudication—it is built into the very structure of the system.

The problem with this story is that it overgeneralizes and, consequently, misleads at two levels. First, “contract law” is legion: each state has its own peculiar contracting tradition, doctrine, and practice. Commentators de-emphasize *regional* variety in finding a broad exclusive doctrine against noneconomic losses.⁹ This kind of monistic approach to contract law is common. Our understandings of purportedly uniform contract doctrines—like interpretation¹⁰ and remedies¹¹—are impoverished when we mistake the Restatement’s certainty for the diversity that exists across the states.

But much more significantly, the conventional wisdom operates at the wrong level of analysis. It misses the actual mechanism by which contract damages are shaped in real cases—jury instructions. This Article remedies that failure by conducting the first comprehensive academic study of pattern contract jury instructions in all fifty states and the District of Columbia. Such pattern instructions form the preapproved baseline against which real jury instructions are drafted and exert significant influence at trial.¹² Analysis of these pattern instructions results in a more muddled picture than the treatises would have led us to believe. We find that there are *four* basic approaches to contract remedy instructions, which guide—or fail to guide—

7. 11 CORBIN, *supra* note 2, § 59.1, at 539; *see also* MURRAY, *supra* note 2, § 124 (noting the foreseeability “that [an] aggrieved party will often be unhappy after a breach and [that] the breach may even cause some mental pain and suffering”). Interestingly, Corbin further opines that plaintiffs “seldom think[] of asking” to be compensated for emotional harm. 11 CORBIN, *supra* note 2, § 59.1, at 539.

8. *See, e.g.*, Ronnie Cohen & Shannon O’Byrne, *Cry Me a River: Recovery of Mental Distress Damages in a Breach of Contract Action—A North American Perspective*, 42 AM. BUS. L.J. 97, 100–01 (2005) (noting exceptions); Steven W. Feldman, *Betrayal and Exploitation in Contract Law: A Comment on Breach is for Suckers*, 63 VAND. L. REV. EN BANC 171 (2010), <http://www.vanderbiltlawreview.org/content/articles/2010/11/Feldman-Betrayal-and-Exploitation-63-Vand.-L.-Rev.-En-Banc-171-2010.pdf> (same).

9. This is related to the claim that general contract law, as such, does not and should not exist, as various more specified jurisprudential frames actually govern transactions. *Cf.* Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 86–105 (2009) (defending generalized contract law).

10. *See, e.g.*, Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 149, 150–51 (Jody S. Kraus & Steven D. Walt eds., 2000).

11. For a recent exploration of jurisdictional variance, see Brian H. Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality*, 21 RATIO JURIS 194, 201–02 (2008).

12. *See infra* Part II.

juries through the process of awarding general damages in significantly different ways.

We couple this research with a preliminary psychological experiment in which we test how lay people react to these different pattern jury instructions. In each category, we find jurors eager to “overcompensate” plaintiffs. Most interestingly—and perhaps surprisingly—we find some evidence that this overcompensation is closely linked to more general principles of jury control and may best be explained as an award for noneconomic losses. Therefore, in the majority of American jurisdictions, juries instructed with the pattern instructions may be likely to include noneconomic damages for breach as a matter of course. Indeed, in eight jurisdictions,¹³ jurors hearing contract cases are instructed to award damages in a way that is very hard to distinguish from ordinary tort remedies.

Looking carefully at pattern instructions thus excavates the hidden diversity in contract doctrine, as well as jurisdictions’ surprising flexibility regarding damages. Although it may be true that in many (but not all) states a judge would deny a claim for noneconomic losses if it were squarely presented in a motion, most juries will be instructed in a way that makes the award of noneconomic damages likely. Thus, noneconomic damages in contract cases are not the exception—they are probably the norm.

We proceed as follows. Part I details the conventional wisdom on contract remedies as collected in treatises, casebooks, and court opinions. Part II describes pattern jury instructions, a remarkably neglected source of information about contract law. Part III categorizes existing contract jury instructions on noneconomic losses. Finally, Part IV uses these categories to generate a survey experiment suggesting how lay people will respond to different instructions. Part IV also describes the significance of these results for conventional understandings of the law of contract remedies.

I. CONSTRUCTING THE CONVENTIONAL ACCOUNT

The conventional account of noneconomic contract losses rests on citations to appellate court opinions that dismiss plaintiffs’ claims to have suffered a nonpecuniary loss.¹⁴ Obviously, generalizing from such rare and exceptional opinions may mislead—we have no idea how many contract plaintiffs assert damages based on noneconomic losses, how many such cases are settled before trial for some nontrivial sum, how many cases are tried and not appealed, etc. Treatise writers, unburdened by such doubts, generally assert that cases awarding noneconomic damages are exceptional and rare.¹⁵ They offer various justifications for this state of affairs.¹⁶

13. *See infra* Part III.C.

14. *See supra* note 3 and accompanying text.

15. *See supra* note 3 and accompanying text.

By far the most commonly advanced reason why noneconomic losses are not awarded is that doing so would result in overcompensation. The possibility of economic gain motivates most litigated bargains; expectation damages protect that interest. Parties concerned about nonpecuniary gains and losses will price those items into the contract. By permitting noneconomic losses to be recoverable, the nonbreaching party in effect would be allowed a double recovery.¹⁷

Others invoke arguments grounded in practical concerns about predictability and its effect on future contracting. Noneconomic losses may be unforeseeable¹⁸ or uncertain.¹⁹ Permitting such damages raises floodgate concerns, as they are purportedly more likely to be frivolous or fraudulent.²⁰ Thus, forbidding noneconomic damages might be linked to a larger pro-growth, anti-litigation movement.²¹ If citizens dislike this policy choice, their representatives in the legislature can always intervene.²² So deeply held is the prohibition against noneconomic damages that treatise writers rank it as the fourth general limitation of damages—alongside the trinity of foreseeability, avoidability, and certainty.²³

16. See Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1011 (2010) (arguing that the noneconomic damage bar may relate to a fear of expressive contests in contract law).

17. 3 FARNSWORTH, *supra* note 2, § 12.17, at 292 (“[T]he real basis of [limiting recovery for emotional harm] is that such recovery is likely to result in disproportionate compensation, and that the rule could therefore be subsumed under the more general [unforeseeability limitation.]”); 2 MODERN LAW, *supra* note 2, § 18:6 (noting that one reason for limiting emotional harm damages is that they are not in the contemplation of the parties at the time of contracting). Corbin colorfully explains that “[p]ecuniary deprivation may reduce one to poverty and bankruptcy, resulting in humiliation and mental discomfort, but damages are rarely awarded for such humiliation and discomfort.” 11 CORBIN, *supra* note 2, § 59.1, at 541; see also RESTATEMENT (FIRST) OF CONTRACTS § 341 cmt. a (1932) (“In some cases of sudden poverty or bankruptcy, the suffering may be more severe than in cases involving marriage or death; but for mental suffering so caused, no compensatory damages are given.”); cf. RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (1981) (using similar language, but concluding that “if the contract is not one where [severe emotional disturbance] was a *particularly likely risk*, there is no recovery for [sudden impoverishment or bankruptcy]” (emphasis added)). Corbin claims that emotional harm is “disregarded” because plaintiffs will be entirely satisfied by “an equivalent pecuniary satisfaction for pecuniary injury.” 11 CORBIN, *supra* note 2, § 59.1, at 539.

18. See CALAMARI & PERILLO, *supra* note 2, at xix (listing “mental distress and personal injury” damages as part of a section on foreseeability).

19. See RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) (explaining that “[e]ven if they are foreseeable, [damages for emotional disturbance] are often particularly difficult to establish and to measure”); CALAMARI & PERILLO, *supra* note 2, § 14.5(b) (too remote to be in parties’ contemplation); 11 CORBIN, *supra* note 2, § 59.1, at 535 (same).

20. 2 MODERN LAW, *supra* note 2, § 18:6.

21. See CALAMARI & PERILLO, *supra* note 2, § 14.5(b); 11 CORBIN, *supra* note 2, § 59.1, at 535–36. Corbin claims that this approach has been adopted by “most courts.” 11 CORBIN, *supra* note 2, § 59.1, at 535–36.

22. 24 WILLISTON, *supra* note 2, § 64:7, at 77 (noting that due to the “enormous public policy implications that flow from the allowance of recovery of emotional distress damages from breach of an employment contract,” changes in the law are better left to the legislature).

23. MURRAY, *supra* note 2, § 124, at 787.

Just as there are exceptions to the traditional trinity of limitation, treatise writers admit that the prohibition of noneconomic damages is imperfectly enforced. The literature advances three typical excepting scenarios: (1) when the contract is unusually personal,²⁴ (2) when the breaching party is unusually evil,²⁵ or (3) when the breach creates unusually severe harm.²⁶ We will briefly discuss these three exceptional categories.

A. Unusually Personal Contracts

Many modern commentators focus their discussion of noneconomic damages on developing ever more finely parsed case typologies.²⁷ Typical categories include contracts touching on marriage, common carriers, and contracts for funeral arrangements or other end-of-life matters. That is, contracts of an unusually personal nature.²⁸

Marriage contracts for which courts have allowed recovery of emotional harm include breach of contract to marry,²⁹ or a breach of contract to deliver a bride's trousseau prior to a wedding.³⁰ Corbin argues that breach of contract to marry "must be regarded as *sui generis*."³¹

Courts have awarded noneconomic damages for breach of a variety of other contracts. For example, courts permit emotional harm damages against hotels and inns for mistreating or expelling guests,³² wrongfully

24. RESTATEMENT (SECOND) OF CONTRACTS § 353 (excepting situations in which "the contract or the breach is of such a kind that serious emotional disturbance [is] a particularly likely result" (emphasis added)); 3 FARNSWORTH, *supra* note 2, § 12.17; MURRAY, *supra* note 2, § 124; 24 WILLISTON, *supra* note 2, § 64:7, at 68 (noting that this principle is propounded in the *Restatement (Second) of Contracts*); see also CALAMARI & PERILLO, *supra* note 2, § 14.5(b) (contracts involving "interests of personality" (quoting CHARLES T. MCCORMICK, MCCORMICK ON DAMAGES § 145, at 593 (1935))); 11 CORBIN, *supra* note 2, § 59.1, at 536 (contracts involving "interests of personality" (quoting CHARLES T. MCCORMICK, MCCORMICK ON DAMAGES § 145, at 593 (1935))).

25. RESTATEMENT (SECOND) OF CONTRACTS § 353; RESTATEMENT (FIRST) OF CONTRACTS § 341 (1932); 11 CORBIN, *supra* note 2, § 59.1, at 539; 3 FARNSWORTH, *supra* note 2, § 12.17; MURRAY, *supra* note 2, § 124; 24 WILLISTON, *supra* note 2, § 64:7, at 77.

26. See RESTATEMENT (SECOND) OF CONTRACTS § 353; RESTATEMENT (FIRST) OF CONTRACTS § 341; 11 CORBIN, *supra* note 2, § 59.1, at 539; 3 FARNSWORTH, *supra* note 2, § 12.17; MURRAY, *supra* note 2, § 124; 24 WILLISTON, *supra* note 2, § 64:7, at 68 (noting that this principle is propounded in the *Restatement (Second) of Contracts*).

27. RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a; RESTATEMENT (FIRST) OF CONTRACTS § 341 cmt. a; 11 CORBIN, *supra* note 2, § 59.1, at 541.

28. *E.g.*, Feldman, *supra* note 8, at 181.

29. 11 CORBIN, *supra* note 2, § 59.1, at 541.

30. 24 WILLISTON, *supra* note 2, § 64:7, at 75.

31. 11 CORBIN, *supra* note 2, § 59.1, at 543.

32. CALAMARI & PERILLO, *supra* note 2, § 14.5(b); 11 CORBIN, *supra* note 2, § 59.1, at 536; MURRAY, *supra* note 2, § 124.

removing passengers from common carriers³³ or cars,³⁴ or ticket holders from entertainment venues.³⁵

Finally, courts permit emotional harm recovery for breach of contracts with sensitive subject matters like burial contracts of spouses or other relatives,³⁶ failure to properly transport or prepare a corpse,³⁷ and breach of contract to deliver communications of death or illness.³⁸ Other types of breaches that warrant recovery for emotional harm include harassing methods of debt collection and breach of contracts for medical services.³⁹ Courts have placed breach of confidentiality agreements in this category, including a psychiatrist improperly disclosing confidential information⁴⁰ and the failure to hide, as agreed, the faces of participants in a television broadcast.⁴¹

B. Unusually Evil Breaching Parties

Whether it is called willful,⁴² reckless,⁴³ wanton,⁴⁴ insulting,⁴⁵ or reprehensible,⁴⁶ the Restatements and most treatises discuss whether and when intentional behavior may lead to recovery for emotional harm in contract cases.⁴⁷ There is, however, a notable lack of consistency of treatment, illustrating Corbin's claim that "the law cannot be said to be entirely settled."⁴⁸

33. CALAMARI & PERILLO, *supra* note 2, § 14.5(b); 11 CORBIN, *supra* note 2, § 59.1, at 536; MURRAY, *supra* note 2, § 124.

34. 11 CORBIN, *supra* note 2, § 59.1, at 543.

35. CALAMARI & PERILLO, *supra* note 2, § 14.5(b); 11 CORBIN, *supra* note 2, § 59.1, at 536; MURRAY, *supra* note 2, § 124.

36. CALAMARI & PERILLO, *supra* note 2, § 14.5(b); 11 CORBIN, *supra* note 2, § 59.1, at 536; MURRAY, *supra* note 2, § 124; 24 WILLISTON, *supra* note 2, § 64:7, at 75–76.

37. 24 WILLISTON, *supra* note 2, § 64:7, at 75–76.

38. 11 CORBIN, *supra* note 2, § 59.1, at 547; MURRAY, *supra* note 2, § 124.

39. 24 WILLISTON, *supra* note 2, § 64:7, at 75.

40. 11 CORBIN, *supra* note 2, § 59.1, at 537.

41. MURRAY, *supra* note 2, § 124.

42. *E.g.*, 11 CORBIN, *supra* note 2, § 59.1, at 540.

43. *E.g.*, RESTATEMENT (FIRST) OF CONTRACTS § 341 (1932).

44. *E.g.*, 11 CORBIN, *supra* note 2, § 59.1, at 540.

45. *E.g.*, MURRAY, *supra* note 2, § 124.

46. 3 FARNSWORTH, *supra* note 2, § 12.17, at 293.

47. RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981); RESTATEMENT (FIRST) OF CONTRACTS § 341; 11 CORBIN, *supra* note 2, § 59.1, at 539 ("wanton or reckless"); 3 FARNSWORTH, *supra* note 2, § 12.17; MURRAY, *supra* note 2, § 124; 24 WILLISTON, *supra* note 2, § 64:7, at 77.

48. 11 CORBIN, *supra* note 2, § 59.1, at 540–41. Williston claims that the majority of courts adopt the rule stated in section 353 of the *Second Restatement*. 24 WILLISTON, *supra* note 2, § 64:7, at 73–74. According to Corbin, however, "sufficient authority" also exists to support the version adopted in section 341 of the *First Restatement*. 11 CORBIN, *supra* note 2, § 59.1, at 540; *see also* 24 WILLISTON, *supra* note 2, § 64:7, at 73 ("[A] number of courts adopted the original Restatement's expression of the rule . . .").

The difference between the *First Restatement's* and *Second Restatement's* positions on recovery for emotional harm is significant,⁴⁹ though some treatises attempt to downplay the difference.⁵⁰ Section 341 of the *First Restatement* makes “wanton or reckless” breach a centerpiece of its exception for emotional harm⁵¹ and devotes almost the entirety of the comment accompanying that section to expanding upon the claim that “the rule stated in this [s]ection denies recovery of damages for mental suffering, unless the breach was wanton or reckless.”⁵² The *Second Restatement*, by contrast, makes no explicit mention of the defendant’s behavior in either the rule⁵³ or comment.⁵⁴ Instead, it allows recovery for emotional harm based on whether it is a particularly likely result of “the contract *or* the breach.”⁵⁵ The disjunctive may imply that certain kinds of breach (e.g., intentional, willful, or reprehensible breaches) warrant recovery for emotional harm. This reading is not obvious, however.

Other variations exist. A “strong minority” of jurisdictions requires a contract that is particularly likely to cause emotional harm but expands recovery to cases of mere negligence.⁵⁶ Also, where “willful or wanton infliction of mental distress” is recognized as a tort independent of bodily injury, “the fact that the infliction of such suffering is also a breach of

49. Compare RESTATEMENT (SECOND) OF CONTRACTS § 353 (“Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”), with RESTATEMENT (FIRST) OF CONTRACTS § 341 (“In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm and where it was the wanton or reckless breach of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.”).

50. Farnsworth contrasts courts that look to the “nature of the contract” (thus following the *Second Restatement*) with courts that consider the “nature of the breach.” 3 FARNSWORTH, *supra* note 2, § 12.17, at 292–93. In doing so, Farnsworth appears to read the *Second Restatement* as not allowing recovery for emotional harm based on the manner of the breach. Williston, by contrast, characterizes the *Second Restatement* as “an essentially similar, though perhaps slightly more liberal” recodification of the original rule. 24 WILLISTON, *supra* note 2, § 64:7, at 74.

51. RESTATEMENT (FIRST) OF CONTRACTS § 341.

52. *Id.* § 341 cmt. a.

53. RESTATEMENT (SECOND) OF CONTRACTS § 353.

54. *Id.* § 353 cmt. a.

55. *Id.* § 353 (emphasis added). Murray’s first exception to the general rule against emotional harm recovery also does not indicate that the type of contract is at issue, instead characterizing the exception as occurring when emotional harm is “a particularly likely result of a breach.” MURRAY, *supra* note 2, § 124. For two reasons, however, Murray appears to be discussing the nature of the contract rather than the nature of the breach. First, under his characterization, Murray only discusses types of contracts. *Id.* For example, he states that burial contracts fall in the first exception and claims that “[a]ny funeral director should be aware of the emotional nature of [burial] contracts and that a breach may very well cause emotional distress.” *Id.* Second, Murray later discusses “wilful, wanton, or insulting conduct” under his second exception: breaches that involve physical injury. *Id.*

56. 11 CORBIN, *supra* note 2, § 59.1, at 541.

contract will not prevent the award of damages.”⁵⁷ Not all cases, however, require tortious conduct to recover for emotional harm; “[r]ather, wilful, wanton, or insulting conduct . . . will be sufficient.”⁵⁸

Examples of contracts in which willful conduct has been dispositive are bad faith refusals by insurance companies “to settle . . . liability action[s] within policy limits, bad faith refusal[s] to pay disability, fire or health claims and other special situations.”⁵⁹ Contracts in which intentional conduct is typically not at issue are those against communication companies for breaching contracts to communicate death, burial, or illness messages.⁶⁰ Such breaches have turned on “mere[] neglect to perform [a] contractual duty.”⁶¹

C. Unusually Harmful Breach

Another common exception to the general prohibition on noneconomic damages is when a breach of contract results in physical injury or extreme hardship.⁶² Treatises frequently note the difficulty in distinguishing whether such actions are recoverable under a tort or contract theory.⁶³ Bodily injury due to either intentional or negligent wrongful conduct “is nearly always tortious.”⁶⁴ The difficulty is compounded by the fact that, due to procedural reforms, it is often impossible to determine whether a case sounds in contract, tort, or both.⁶⁵ The *First Restatement* further notes that “it is common for a decision to be given without classifying the wrong for which damages are awarded.”⁶⁶

In allowing recovery for noneconomic harm when physical injury attends a contract breach, courts may impose a variety of caveats. Some only permit such recovery when the injury was within the contemplation of the parties when forming the contract,⁶⁷ while others require that the injury rises to the level of a tort.⁶⁸ Those that do not require tortious conduct may

57. *Id.* at 540.

58. MURRAY, *supra* note 2, § 124.

59. 11 CORBIN, *supra* note 2, § 59.1, at 542.

60. *Id.* at 547.

61. *Id.*

62. RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981); RESTATEMENT (FIRST) OF CONTRACTS § 341 (1932); 11 CORBIN, *supra* note 2, § 59.1, at 539; 3 FARNSWORTH, *supra* note 2, § 12.17; MURRAY, *supra* note 2, § 124; 24 WILLISTON, *supra* note 2, § 64:7, at 68.

63. 11 CORBIN, *supra* note 2, § 59.1, at 540; MURRAY, *supra* note 2, § 124; 24 WILLISTON, *supra* note 2, § 64:7, at 79.

64. 11 CORBIN, *supra* note 2, § 59.1, at 540; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a; RESTATEMENT (FIRST) OF CONTRACTS § 341 cmt. a; 24 WILLISTON, *supra* note 2, § 64:7, at 79.

65. 11 CORBIN, *supra* note 2, § 59.1, at 538; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a; RESTATEMENT (FIRST) OF CONTRACTS § 341 cmt. a; MURRAY, *supra* note 2, § 124.

66. RESTATEMENT (FIRST) OF CONTRACTS § 341 cmt. a.

67. 24 WILLISTON, *supra* note 2, § 64:7, at 79.

68. CALAMARI & PERILLO, *supra* note 2, § 14.5(b); MURRAY, *supra* note 2, § 124. Corbin argues that when tortious conduct resulting in “bodily injury and mental distress”

still require that the breach be willful, wanton, or insulting.⁶⁹ Corbin argues that a valid contract may include provisions for emotional harm damages due to physical injury, even though the conduct is not tortious.⁷⁰ Examples of cases include the breach of a promise to avoid a stillbirth by performing a Caesarean operation, or breach of a contract to perform cosmetic surgery.⁷¹

The conventional wisdom thus concludes that emotional damages are for highly unusual contracts, which do not fit into the core of contract law. Although this may be the case in terms of official doctrine, we have reason to suspect that juries will take emotional damages into account even in regular core contracts cases.

II. PATTERN CONTRACT JURY INSTRUCTIONS

Jury instructions are the channel through which trial court judges communicate our highly specialized law to citizens.⁷² Pattern jury instructions are generalized instructions that are published (and sometimes modified) for application to a specific case.⁷³ A state bar association typically approves such instructions⁷⁴ and courts usually accept them as authoritative.⁷⁵

Each instruction contains a single legal proposition, which, when combined, “form[s] a skeleton for the judge’s charge to the jury.”⁷⁶ A set of jury instructions commonly includes “1) [i]ntroductory instructions to

also breaches an express contract, “there seems to be no good reason for applying a different rule as to the damages to be awarded.” 11 CORBIN, *supra* note 2, § 59.1, at 540.

69. MURRAY, *supra* note 2, § 124.

70. 11 CORBIN, *supra* note 2, § 59.1, at 540.

71. MURRAY, *supra* note 2, § 124, at 788.

72. *E.g.*, Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 536 (1986).

73. Don Musser, *Instructing the Jury—Pattern Instructions*, in 6 AM. JUR., TRIALS: PRACTICE, STRATEGY, CONTROLS § 4, at 930 (Roy Miller ed., 1964); *see also* 2 ROBERT E. KEHOE, JR., JURY INSTRUCTIONS FOR CONTRACT CASES 1305 (1995) (noting that for the purposes of flexible application, pattern instructions are “necessarily abstract”). Pattern instructions are also called “standard, model, uniform, approved, and recommended jury instructions.” Robert G. Nieland, *Assessing the Impact of Pattern Jury Instructions*, 62 JUDICATURE 185, 185 (1978). *But see* 2 KEHOE, *supra*, at 1215 (pattern instructions are often no more than an illustrative template, while standardized instructions are intended for use “with virtually no modifications”).

74. Civil jury instruction committees responding to a 2008 survey were frequently sponsored and funded by state bar associations. *See* PAULA L. HANNAFORD-AGOR & STEPHANIE N. LASSITER, CONTEMPORARY PATTERN JURY INSTRUCTION COMMITTEES: A SNAPSHOT OF CURRENT OPERATIONS AND POSSIBLE FUTURE DIRECTIONS 3 (2008), available at <http://www.ncsc-jurystudies.org/What-We-Do/~media/Microsites/Files/CJS/What%20We%20Do/Contemporary%20Pattern.ashx>.

75. BLACK’S LAW DICTIONARY 935–36 (9th ed. 2009); *see also* Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451 (2006) (“[J]udges are reluctant to deviate from [pattern jury instructions] because the instructions have received the imprimatur of appellate courts.”).

76. Nieland, *supra* note 73, at 185.

explain the jurors' duties, 2) [r]udimentary guidance on legal procedure (principally on burden of proof), 3) [a] statement of the elements of the governing substantive law (including damages), and 4) [c]autionary instructions about processing the evidence."⁷⁷ To promote flexibility, pattern instructions may include optional parenthetical or bracketed text that users can insert as needed.⁷⁸ Pattern instructions are often followed by supplementary material, which typically includes selected and annotated commentary,⁷⁹ references to associated statutes,⁸⁰ as well as cross-references to Restatements and treatises,⁸¹ practice aids,⁸² and appellate opinions.⁸³ These materials highlight how the instructions have been previously used and draw attention to cautionary or explanatory items.⁸⁴

Although jury instructions are intended to inform juries of the applicable law, pattern instructions are generally drafted by legal professionals for a professional audience.⁸⁵ Pattern instructions are authored by committees of judges,⁸⁶ judges and practicing lawyers,⁸⁷ and many other sources.⁸⁸ Often

77. 2 KEHOE, *supra* note 73, at 1188 (citing J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 74–76 (1990)).

78. Musser, *supra* note 73, § 4, at 930; *e.g.*, CIVIL JURY INSTRUCTIONS COMM. OF THE STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) § 17 (4th ed. 2005), available at <http://www.azbar.org/media/58793/contract.pdf> (“The damages you award for breach of contract must be the amount of money that will place [name of plaintiff] in the position [name of plaintiff] would have been in if the contract had been performed. To determine those damages, you should consider the following: [The profit that [name of plaintiff] would have received had the contract been performed;] [The return of the value of the things or services that [name of plaintiff] provided to the [name of defendant;]] [The value of things or services expended by [name of plaintiff] in preparing to perform his part of the contract or in preparing to accept the benefits of [name of defendant]’s expected performance;] [Whether [name of plaintiff], by not having to perform his part of the contract, has avoided any cost [or loss] which should be deducted from his damages.]” (footnotes omitted)).

79. *E.g.*, Musser, *supra* note 73, § 4, at 930.

80. *E.g.*, JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS No. 350 (2012).

81. *E.g.*, MISS. JUDICIAL COLL., MISSISSIPPI MODEL JURY INSTRUCTIONS CIVIL § 11:42 (2d ed. 2009).

82. *E.g.*, ALA. PATTERN JURY INSTRUCTIONS COMM.—CIVIL, 1 ALABAMA PATTERN JURY INSTRUCTIONS CIVIL § 10.36 (2d ed. 1993).

83. 2 KEHOE, *supra* note 73, at 1301 (“[P]attern instructions frequently serve as an index to appellate case law . . . that may be of particular interest to the reader.”).

84. Musser, *supra* note 73, § 4, at 930.

85. *See* Marder, *supra* note 75, at 461 (“[P]attern jury instructions are drafted by professionals who are immersed in the law and who address other professionals similarly trained.”); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK L. REV. 1081, 1084 (2001) (instructions often use wording from cases and statutes which “are written primarily for an audience of lawyers and, thus, have never been intended to be read and understood by the lay public”).

86. Marder, *supra* note 75, at 458–59 (noting California as an example of this approach).

87. *Id.* (noting Illinois as an example of this approach).

88. Judges have collected instructions from their trials and disseminated them as templates for other courts. *E.g.*, 2 KEHOE, *supra* note 73, at 1735 (citing GEORGE TURNER CANN, REQUESTS TO CHARGE IN CIVIL AND CRIMINAL CASES (1909) (“This work was prepared by a Georgia trial judge who reprinted excerpts from unreversed charges which he

pattern instructions track specialized language from statutes⁸⁹ or appellate opinions,⁹⁰ striving to accurately encapsulate the law.⁹¹ Standardizing instruction language and content helps avoid reversal and alleviates the burden on judges and lawyers to write new instructions for each case.⁹² Additionally, drafters use pattern instructions to remove the judge from the sphere of advocacy by neutralizing the instructions' language.⁹³

had given in cases tried in his own courtroom.”). Still other sources of pattern jury instructions include “state bar associations, judicial conferences, state supreme courts, judges’ associations, administrative offices, law schools, and trial lawyers’ associations.” HANNAFORD-AGOR & LASSITER, *supra* note 74, at 1. As of 2008, there were “88 known state pattern jury instruction committees across the nation and nine known federal committees Seven states have no formal committee, but several of these have some form of pattern jury instructions, which usually have been developed or compiled by a single person.” *Id.* at 3.

89. See Marder, *supra* note 75, at 451.

90. See Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 708–09 (2000).

91. See Marder, *supra* note 75, at 460 (noting that drafters “are concerned with the nuances of words and phrases and whether an instruction . . . accurately tracks the requirements of a statute or the elements of a judicial test”); Tiersma, *supra* note 85, at 1084 (calling this approach the “philosophy of much of the original pattern jury instruction movement”). Since the 1970s, many studies have demonstrated that lay jurors do not understand the legal language in jury instructions. *E.g.*, AMIRAM ELWORK, BRUCE D. SALES & JAMES J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982) (recommending psycholinguistic techniques for making jury instructions more understandable to jurors); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (finding that subjects understood roughly one-half of the instructions). Some states have taken steps to reform how jury instructions are drafted. *E.g.*, HANNAFORD-AGOR & LASSITER, *supra* note 74, at 9–10 (listing committees in Wisconsin, Vermont, Alabama, Pennsylvania, and Maryland); Dumas, *supra* note 90, at 709–10 (listing committees in District of Columbia, New York, and Tennessee); Marder, *supra* note 75, at 453 (listing committees in Arizona, California, Delaware, and Illinois). Many jurisdictions, however, have resisted change. *E.g.*, *id.* at 452–53.

92. See, *e.g.*, HANNAFORD-AGOR & LASSITER, *supra* note 74, at 2 (pattern instruction committees have been especially successful in reducing the “number of appeals and reversals based on inaccurate instructions”); Marder, *supra* note 75, at 459 (explaining that drafters follow language from statutes or case law to avoid “problems for a trial judge when the case goes up on appeal”); Nieland, *supra* note 73, at 187–88 (citing a survey conducted by the Illinois Judicial Conference (IJC) which found that 700 Illinois appellate decisions between 1930 and 1955 passed on questions of instructions and that 38% resulted in reversals). Based on this study, the IJC recommended that the Illinois Supreme Court establish a committee to write pattern jury instructions. *Id.* (observing that pattern instructions may save time by (1) reducing research necessary in preparing instructions; (2) reducing judicial conference time necessary to settle conflicts over instructions; and (3) eliminating the need to draft instructions entirely).

93. *E.g.*, Musser, *supra* note 73, § 5, at 931; see also Marder, *supra* note 75, at 460 (drafters “strive to use ‘neutral’ language that does not favor plaintiffs or defendants”). But see William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 737–38 (1981) (arguing that pattern instructions do not completely dampen argumentative jury instructions). Prior to the adoption of pattern instructions, attorneys penned argumentative instructions designed to persuade jurors to render favorable verdicts. See HANNAFORD-AGOR & LASSITER, *supra* note 74, at 1 (these argumentative instructions

Pattern instructions for contract cases developed relatively late.⁹⁴ Originally, contract instructions were included in collections of sample instructions that had survived appellate scrutiny.⁹⁵ The “first wave” of standardized instructions, influenced by the California and Illinois models, however, almost completely omitted contract instructions.⁹⁶ Instead, these efforts focused heavily on torts. Indeed, drafting committees were openly skeptical of the feasibility of encapsulating the wide range of issues in contract cases into standardized pattern instructions.⁹⁷

were often “confusing, or did not accurately state the law”). These instructions were submitted to the court to be accepted or rejected.

93. *E.g.*, Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 205–06 (1998).

94. 2 KEHOE, *supra* note 73, at 1295.

95. *Id.* An early work is JOHN PROFATT, A TREATISE ON TRIAL BY JURY INCLUDING QUESTIONS OF LAW AND FACT (H.O. Houghton & Co. 1877). *See* 2 KEHOE, *supra* note 72, at 1218 n.59. “[S]ample instructions differed from patterns in that they usually contained a large amount of jargon and were prepared with a particular set of facts in mind. Their main value was simply that they brought together the primary sources for the preparation of instructions to the jury.” Nieland, *supra* note 73, at 186.

96. 2 KEHOE, *supra* note 73, at 1224. In the late 1930s, judges of the Superior Court of Los Angeles, led by Judge William J. Palmer, compiled the combined experience of over one hundred Los Angeles County trial courts into the first set of pattern instructions, the California Jury Instructions—Civil. *E.g.*, Musser, *supra* note 73, § 2, at 927. The result of their effort was eventually adopted as California’s statewide pattern instructions. THE JUDGES OF THE SUPER. COURT OF L.A. CNTY., CAL., BOOK OF APPROVED JURY INSTRUCTIONS (1938). California’s pioneering effort influenced other jurisdictions, and the use of pattern instructions spread across the country. *E.g.*, Musser, *supra* note 73, § 2, at 927 (“In a short time [Book of Approved Jury Instructions] came into general use throughout California, and is now also used as a guide in other jurisdictions.”).

In 1955, the Illinois Supreme Court took the unprecedented step of commissioning a committee to draft mandatory pattern jury instructions. *E.g.*, 2 KEHOE, *supra* note 73, at 1222; *see also* Gerald C. Snyder, *Jury Instructions Revolutionized! Illinois Pattern Jury Instructions (IPI)*, 42 CHI. B. REC. 105, 105 (1960) (discussing the Illinois Supreme Court’s “pioneer[ing]” commission of the Illinois Supreme Court Committee on Jury Instructions). The ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL (known as “IPI”) “ignited a national wild fire of reform in the 1960s.” 2 KEHOE, *supra* note 73, at 1222. Similar to California’s experience, what emerged from the Illinois project was “a narrative charge, subdivided into individual instructions that are each limited to a single topic or point of law.” *Id.* at 1223.

97. *E.g.*, 2 KEHOE, *supra* note 73, at 1295–96 (“Not only were its concepts difficult to reduce to lay language . . . but contract disputes could generate such a wide range of issues that the potential permutations of pattern instructions seemed staggering.”); *see also* Barbara Page, *Utah Uniform Jury Instructions: Readied for Final Distribution*, 5 UTAH L. REV. 149, 151 (1956) (“[O]bviously there is another reason why emphasis should be placed on negligence law. In contracts . . . it is almost impossible to frame suitable generalized instructions.”). Additionally, drafters focused on torts because courts were overwhelmed with negligence claims beginning during industrialization and continuing unabated into the mid-twentieth century. 2 KEHOE, *supra* note 73, at 1146–47, 1205–06, 1295 (the need for reform of tort cases dominating dockets caused drafting committees to skip “commercial topics”); *see also* Page, *supra*, at 151 (noting that Utah’s new instructions focus on torts because “negligence trials preponderate in our courtrooms”). Pattern instructions were intended to save drafting time and minimize appeals for erroneous instructions. *See supra* notes 88–91 and accompanying text.

As pattern instructions for torts and other legal fields were successfully introduced, drafters grew more confident.⁹⁸ In 1966, North Dakota published the first set of contracts instructions.⁹⁹ A few nearby states soon followed its lead,¹⁰⁰ though by the end of the 1970s only twelve other states had drafted contracts instructions.¹⁰¹ After a rush in the 1980s,¹⁰² contract pattern instructions, approved or otherwise, are currently available in every state.¹⁰³

Despite the relative uniformity of substantive contract principles, contract pattern instructions are highly diverse from state to state.¹⁰⁴ At least one commentator credits this diversity to the elusiveness of the “right” approach to contract instructions and the “stubborn[] idiosyncra[cy]” of those already in existence.¹⁰⁵ As Kehoe explains:

Although the rules for determining liability for breach of contract usually coincide with social morality, the conventional legal measures of contract damages are often at odds with what the jury thinks is an appropriate award. Contract law is generally less compensatory than tort law, and yet the court’s instructions on damages typically provide little effective guidance for determining the amount to be awarded. They usually tell the jury nothing more than to place the plaintiff in the position it would have occupied if the breach had not occurred. What that means in operation is left to the jury. The amount of damages awarded to the plaintiff is too often derived without any studied deliberations of meaningful instructions¹⁰⁶

98. 2 KEHOE, *supra* note 73, at 1295. Kehoe also notes that earlier, less influential publications of contract pattern instructions existed in Illinois, New York, and Florida. *Id.* at 1225–26 n.77.

99. *Id.* at 1226.

100. Colorado, Kansas, and Missouri were the only other states to publish contract instructions in the 1960s. *Id.* at 1298.

101. *Id.* Alabama, Idaho, Maryland, Mississippi, New Jersey, North Carolina, Wisconsin, and Virginia. *Id.*

102. *Id.* at 1226. Seventeen states published contract instructions between 1980 and 1993: Alaska, Arizona, California, Illinois, Indiana, Massachusetts, Nebraska, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Wyoming. *Id.* at 1298.

103. See *infra* note 110 and accompanying text for the availability of pattern contract instructions in the fifty states and District of Columbia. If pattern instruction committees are influenced by other states’ efforts, they rarely discuss it in their commentaries. Arkansas is one notable exception. The comment to Arkansas’s contract damage instruction cites instructions from Colorado, Illinois, New York, and Texas. ARKANSAS MODEL JURY INSTRUCTIONS § 2442 cmt. (2011).

104. 2 KEHOE, *supra* note 73, at 1183.

105. *Id.* at 1183, 1296 (“[T]he efforts to standardize jury instructions for the law of contract have been somewhat disappointing . . .”).

106. 2 KEHOE, *supra* note 73, at 1023; see also George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1228–29 (1994) (discussing the undercompensatory nature of expectation damages); Wilkinson-Ryan & Hoffman, *supra* note 16, at 1006–07 (noting that expectation damages are undercompensatory both due to the doctrines of limitation and because they do not account for subjective harms).

Thus, even though modern juries are instructed on contract damages, it is not clear that they receive enough information—or the right information—necessary to restrain them from awarding noneconomic damages.¹⁰⁷ In fact, abstract instructions are more likely to pass trial and appellate scrutiny than specific instructions.¹⁰⁸ The practice of using instructions that permit the jury to rely on its “innate sense of what would be right or wrong in carrying out promises” has garnered wide acceptance.¹⁰⁹

III. A TYPOLOGY OF CONTRACT JURY INSTRUCTIONS

The extent to which pattern instructions guide juries through the process of awarding damages may significantly influence whether juries will award noneconomic losses. Taking the conventional account at face value, pattern instructions should routinely and explicitly bar juries from awarding noneconomic damages, save perhaps for traditional exceptions. They do not.

We identified pattern instructions for general contract damages in forty-eight states and the District of Columbia.¹¹⁰ Instructions in only one

107. 2 KEHOE, *supra* note 73, at 1023; *cf.* Perlman, *supra* note 72, at 533 (“Jury instructions often employ legal terms in order to structure but not to eliminate the discretion of the jury. These terms are left without bright parameters in order to facilitate the jury’s obligation to impose some form of community standard.”). *But cf.* Jill S. Gelineau, *Using Jury Instructions To Shape the Trial*, in CONDEMNATION 101: FUNDAMENTALS OF CONDEMNATION LAW AND LAND VALUATION 295, 297 (Am. Law Inst. 2007) (“Vague instructions allow the jury to decide the case with little direction: the greater the detail in the instruction, the more control the judge exerts.”).

108. 2 KEHOE, *supra* note 73, at 1318 (noting, however, a growing dissatisfaction with abstract damage instructions and the possibility of warm reception for closer jury regulation).

109. *Id.* at 1022–23, 1025 (positing that there is a value to “flexible application of social norms” by jurors in contract law and that “modern contract law continues to embrace more jury-oriented principles of fairness and reasonableness in lieu of the seemingly mechanical rules of classical contract”); *see also* Perlman, *supra* note 72, at 528 (noting that juries historically have been thought to contribute a measure of “community consensus,” allowing them “discretion to depart from the judge’s view of the case”).

110. *See* Appendix. Multiple pattern instructions are available in many states. Where possible, this Article refers to those pattern instructions that have been approved for use. Where such official pattern instructions are not available, or do not have a general damages instruction, this Article cites nonapproved pattern instructions.

We could not find pattern contract instructions for general contract damages in three states: Kentucky, Louisiana, and Maine. Kentucky’s instructions address specific breaches, such as those involving auto insurance, JOHN S. PALMORE & DONALD P. CETRULO, KENTUCKY JURY INSTRUCTIONS, CIVIL § 39.25 (2006), real estate, *id.* § 39.27, and sales of business supplies, *id.* § 38.04. Section 39.24, “Mitigation of Damages; Breach of Contract Generally” is not on point. *Id.* § 39.24. Similarly, Louisiana’s civil jury instructions contain chapters on both contracts and damages, but neither explicitly references contract damages. H. ALSTON JOHNSON, LOUISIANA CIVIL LAW TREATISE—CIVIL JURY INSTRUCTIONS chs. 18–19 (3d ed. 2011). We inquired with Professor Johnson, Chair of Louisiana’s Supreme Court appointed Committee to Study Plain Civil Jury Instructions, who confirmed that Louisiana has no specific contract damage instruction. Email from H. Alston Johnson, Chair, Comm. to Study Plain Civil Jury Instructions, to author (Nov. 20, 2011, 12:41 EST) (on file with author). Meanwhile, Maine’s sections on contracts do not contain a general contract damage

state—New Hampshire—explicitly tell juries not to award noneconomic damages.¹¹¹ No state’s pattern instructions surveyed explicitly permitted noneconomic damages, although until quite recently some did.¹¹² The remaining jurisdictions do not address the matter.

instruction. DONALD G. ALEXANDER, MAINE JURY INSTRUCTION MANUAL §§ 7-20 to 7-29 (4th ed. 2011).

111. SUPERIOR COURT CIVIL JURY INSTRUCTIONS COMM., NEW HAMPSHIRE CIVIL JURY INSTRUCTIONS § 32.46 (Daniel C. Pope ed., 2012) (“You may not award to the plaintiff any damages representing compensation for any mental or emotional distress which the plaintiff claims resulted from the violation of the contract by the defendant. Recovery of such damages in contract actions is not permitted.”).

112. Noneconomic damage instructions were available until recently in Alabama, ALA. PATTERN JURY INSTRUCTIONS COMM.—CIVIL, 1 ALABAMA PATTERN JURY INSTRUCTIONS CIVIL § 10.28 (2d ed. 1993), Colorado, COLO. SUPREME COURT COMM. ON CIVIL JURY INSTRUCTIONS, COLORADO JURY INSTRUCTIONS FOR CIVIL TRIALS § 30:38 (4th ed. 2010) (amended 2004), and North Carolina, 1 N.C. CONFERENCE OF SUPERIOR COURT JUDGES, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES §§ 517.30, 517.80 (2011). *Cf.* WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CIVIL § 303.01 (5th ed. 2011), available at <http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=PatternJuryInstructions>. These instructions limited noneconomic damages to traditional exceptions based on the nature of the contract and the existence of intentional conduct. *See supra* Part I.A–B.

Alabama and North Carolina considered the nature of the contract. *See* 1 ALABAMA PATTERN JURY INSTRUCTIONS CIVIL § 10.28 (“Where the contractual duty or obligation is so related with matters of mental concern or apprehensiveness or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessitate or reasonably result in mental anguish or suffering . . . then in such event, if the Plaintiff is entitled to recover, he would be entitled to recover such sum as would reasonably compensate him for such mental anguish”); NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 517.30 (“Before you may award such damages, (*identify party claiming damages*) must prove . . . that the contract was so personal and so coupled with matters of mental concern or solitude, or with the sensibilities of (*identify party claiming damages*), that it was reasonably foreseeable at the time the contract was made, that a breach of contract could result in mental anguish to (*identify party claiming damages*).”).

Both Colorado and North Carolina focused on the defendant’s behavior (i.e., whether there was a willful breach or wanton conduct). *See* COLORADO JURY INSTRUCTIONS FOR CIVIL TRIALS § 30:38 (“If you find that the defendant’s breach of contract was willful and wanton, then you may also award plaintiff an amount that will reasonably compensate the plaintiff for any mental suffering that was the natural and probable consequence of the breach.”); NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 517.30 (“Mental anguish is that distress which may arise when a party’s breach is wanton or reckless or when such party’s conduct exceeds all bounds usually tolerated by a decent society and the conduct or breach causes mental distress of a very serious nature.”).

Colorado law now prohibits the use of this noneconomic damages instruction for cases filed on or after July 1, 2004. COLO. REV. STAT. ANN. § 13-21-102.5(6)(a) (West 2004); COLORADO JURY INSTRUCTIONS FOR CIVIL TRIALS § 30:38, notes on use 2; *see* Thompson v. Thornton, 198 P.3d 1281 (Colo. App. 2008) (noneconomic losses generally not available in breach of contract case). The Colorado legislature found that noneconomic “awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in [Colorado].” § 13-21-102.5(6)(a).

Washington’s instruction is unique. It appears to permit noneconomic damages, though it is far from explicit. 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CIVIL § 303.01. Washington’s instruction reads in pertinent part: “In order to recover actual damages, the plaintiff has the burden of proving that the defendant breached a contract . . . and that plaintiff incurred actual [*economic*] damages as a result of the

The extent to which instructions guide jurors through measuring expectation damages varies greatly. While some take a step-by-step approach, others merely state abstract principles. The differences among them may influence how jurors perceive the availability of recovery for emotional harm. This Article uses this variation in jury instructions to categorize general damage instructions by their likelihood to constrain juries' discretion to award noneconomic losses. Four general models for contract damage instructions emerge: one catchall category and three specific approaches.

In fourteen states, instructions are determined largely on a case-by-case basis.¹¹³ A typical example is Colorado, which merely instructs the user to “[i]nser[t] the proper measure of general damages.”¹¹⁴ We imagine that in most cases, the parties will confer and create a list of claimed damages. But

defendant's breach, and the amount of those damages.” *Id.* (emphasis added). Washington uses brackets to indicate alternatives; the adjective “economic” may be inserted or omitted. The notes on use contemplate that this feature will influence whether noneconomic damages are awarded. This section instructs the proponent to “[u]se the limiting adjective ‘economic’ before ‘damages’ in the second paragraph, unless the case falls within the exceptions noted in the Comment under the heading ‘Mental Distress.’” *Id.* note on use. The comment embraces the conventional exception for noneconomic damages based on contract type. “[D]amages for mental suffering are not recoverable in a contract action except for certain categories of contracts for which a breach is particularly likely to lead to emotional distress.” *Id.* cmt.; see also *supra* Part I.A.

113. See Appendix A for details. Approaches vary. Oklahoma asks the user to “set out the appropriate measure of damages.” VERNON'S OKLAHOMA FORMS 2D, OKLAHOMA UNIF. JURY INSTRUCTIONS—CIVIL, No. 23.51 (2011), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=435216>. Idaho instructs the user to “[i]nser[t] the elements of damage that have a basis in the evidence.” IDAHO CIVIL JURY INSTRUCTIONS § 9.03 (2009), available at <http://www.isc.idaho.gov/problem-solving/civil-jury-instructions>.

The comments often include instructions on what needs to be inserted in the bracketed text. Frequently, there is a “menu” of other damage instructions that can be chosen for insertion. For example, in Nebraska “[t]he measure of damages to be inserted in place of the first set of parentheses in the above instruction must be the measure that is appropriate for the kind of breach involved, the pleadings, and the evidence in the case. NJI2d Civ. 4.41 through 4.59 set out the appropriate measures of damages, under Nebraska law, for a number of different, specific kinds of breaches of contract.” NEB. SUPREME COURT COMM. ON PRACTICE AND PROCEDURE, 1 NEBRASKA JURY INSTRUCTIONS—CIVIL § 4.40 cmt. (2011–2012).

In other cases, the to-be-inserted text is left up to the judge and counsel. For example, Alaska's notes on use state that “[i]n most cases, it will be appropriate to give additional instructions telling the jury how to calculate the specific items of the loss of expectation interest.” HARVEY S. PERLMAN & STEPHEN A. SALTZBURG, ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 24.09A, use note (2006), available at <http://courts.alaska.gov/juryins.htm#24>. The user is then referred to the comment, which discusses expectation damages and cites relevant case law. *Id.* cmt. Iowa instructs users to “[l]ist the items of damage claimed and allowable according to the facts of the case.” IOWA STATE BAR ASSOC. UNIF. COURT INSTRUCTION COMM., IOWA CIVIL JURY INSTRUCTIONS § 220.1 (2004). The notes to Kansas's instructions require the court to “determine as a matter of law the elements of damage that are properly recoverable under the evidence.” PATTERN INSTRUCTION KAN. CIVIL ADVISORY COMM., PATTERN INSTRUCTIONS KANSAS: CIVIL § 124.16 note (4th ed. 2008).

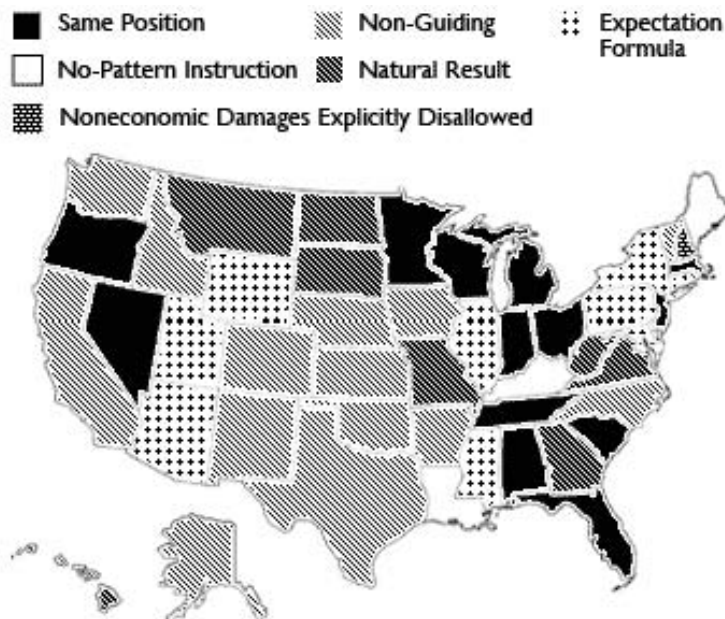
114. COLO. SUPREME COURT COMM. ON CIVIL JURY INSTRUCTIONS, COLORADO JURY INSTRUCTIONS FOR CIVIL TRIALS § 30:37 (4th ed. 2010).

it is difficult to generalize from these placeholder or catchall pattern instructions, which we call “Non-Guiding” instructions. We discard them and focus on those pattern instructions that make a more complete attempt to guide the jury in awarding damages. Three approaches remain¹¹⁵:

- (1) instructions that explicitly instruct juries using a formulaic, traditional expectation damages approach (which we call “Expectation Formula”);
- (2) instructions that require the jury to put the nonbreaching party in the same position as if the contract had been performed but omit the traditional expectation formula (which we call “Same Position”); and
- (3) instructions that merely ask the jury to award damages for harms that directly or naturally flow from, or are otherwise caused by, the breach (which we call “Natural Result”).¹¹⁶

Figure 1, below, summarizes our categorization. As it illustrates, the instruction categories have geographic correlates—almost all of the plains states, for instance, use Non-Guiding instructions, while the upper Midwest uses the Same Position instruction. These similarities probably indicate the influence of regional legal culture.

Figure 1: Instruction Categories



115. There is, of course, overlap. The purpose of the categories is not to suggest that their language is entirely dissimilar from each other. Rather, it is to show three distinct levels in the depth of guidance juries receive from pattern contract damage instructions.

116. See Appendix for details.

A. Expectation Formula

Expectation Formula instructions are those that both state the intention to place the innocent party in the same position as if the contract had been performed *and* guide the jury through the process of calculating that award. In other words, these instructions state the destination (same position) and provide a roadmap (loss + consequential and incidental damages – costs saved). Of the three categories, Expectation Formula instructions offer the most guidance in determining damages and may be most likely to constrain the jury’s discretion.¹¹⁷

Ten jurisdictions take this approach.¹¹⁸ The District of Columbia’s instruction exemplifies a “pure” expectation calculation:

The measure of damages for a breach of contract is that amount of money necessary to place the injured party in the same economic position [he] [she] would have been in if the contract had not been breached. To calculate the damages, first determine the amount of money the plaintiff would have received had the contract not been breached. Next, add both incidental damages and consequential damages, if any. Lastly, subtract from that any money [he] [she] saved because [he] [she] did not have to complete the contract.¹¹⁹

Expectation Formula instructions in other states differ, but at base they all guide juries through a calculation of damages.¹²⁰ For instance, Illinois

117. To promote clarity, linguists recommend that drafters make use of such an “algorithmic” approach, which “lead[s] the jury in orderly fashion” through the pattern instruction. 2 KEHOE, *supra* note 73, at 1268.

118. See Appendix B.

119. STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 11.31 (2012); see also *id.* § 11.31 cmt. (citing RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981)).

120. Other elements of Expectation Formula instructions may also help influence how likely jurors are to award noneconomic damages. For instance, framing damages in monetary or mathematical terms such as instructing juries to award “profits,” MD. STATE BAR ASSOC., MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 10:29 (2008), or to “compute” damages, 2 COMM. ON PATTERN JURY INSTRUCTIONS ASS’N OF JUSTICES OF THE SUPREME COURT OF THE STATE OF N.Y., NEW YORK PATTERN JURY INSTRUCTIONS CIVIL § 4:20 (2d ed. 2012), may act to further dampen juries’ sensibilities that breach of contract is morally charged. Other jurisdictions require juries to put the non-breaching party in the same *economic* position it would have occupied but for the breach. *E.g.*, STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 11.31. Utah’s jury instructions appear to preclude emotional harm by only allowing juries to consider the “loss of the *benefits* from the contract.” ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, MODEL UTAH JURY INSTRUCTIONS—CIVIL § CV2135 (2d ed. 2011) (emphasis added), available at <http://www.utcourts.gov/resources/muji/>.

On the other hand, Mississippi simply requires the jury to “consider the losses incurred and the gains not realized.” MISS. JUDICIAL COLL., MISSISSIPPI MODEL JURY INSTRUCTIONS CIVIL § 11:42 (2d ed. 2009). Wyoming instructs jurors to place the plaintiff in the “*condition* [the plaintiff] would have been in if the other party had adequately performed the contract, less that which was saved by the non-breaching party.” CIVIL JURY INSTRUCTIONS COMM OF THE WYO. STATE BAR, WYOMING CIVIL PATTERN JURY INSTRUCTIONS § 15.20 (2011) (emphasis added). In the absence of instructions like

requires the jury to calculate damages “by determining the value of the contract benefits [plaintiff’s name] did not receive because of [defendant’s name]’s breach and then subtracting from that value, the amount you calculate the value of whatever expenses [plaintiff’s name] saved because of the breach.”¹²¹

Other jurisdictions allow juries more discretion. Mississippi jurors, for example, “*can consider* the losses incurred and the gains not realized” due to the breach.¹²² Expenses saved by the nonbreaching party, however, “*should* be deducted from the amount awarded.”¹²³

Still, opinions from Expectation Formula jurisdictions demonstrate that juries may be only imperfectly constrained by step-by-step instructions. Thus, in *Mattuck v. DaimlerChrysler Corp.*,¹²⁴ the plaintiff sued an auto manufacturer for breach of warranty when his leased vehicle experienced braking problems after several repairs.¹²⁵ The jury awarded the plaintiff \$6,000 for breach of warranty and \$2,500 for aggravation and inconvenience.¹²⁶ The defendant appealed, arguing that the plaintiff presented no evidence of damages.¹²⁷ The court’s charge to the jury, similar to Illinois’ pattern instruction, read in pertinent part:

In calculating Plaintiff’s damages, you should determine that sum of money that will put the Plaintiff in as good a position as he would have been in if both Plaintiff and Defendant had performed all their promises under Defendant’s written limited warranty and as required by law under the implied warranty of merchantability. *The elements of damage claimed*

Maryland or New York’s that define losses in monetary terms, juries may consider noneconomic damages to be a “loss incurred” or a “condition” to be rectified.

Further, three jurisdictions in the Expectation Formula category, Arizona, Illinois, and New York, engage subjective moral norms, instructing juries to award damages that will “fairly” compensate the plaintiff. CIVIL JURY INSTRUCTIONS COMM. OF THE STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS: CIVIL § 17 (4th ed. 2005), available at <http://www.azbar.org/media/58793/contract.pdf>; ILLINOIS PATTERN JURY INSTRUCTIONS CIVIL § 700.13 (2011); NEW YORK PATTERN JURY INSTRUCTIONS § 4:20.

121. ILLINOIS PATTERN JURY INSTRUCTIONS CIVIL § 700.13.

122. MISSISSIPPI MODEL JURY INSTRUCTIONS CIVIL § 11:42 (emphasis added); see also REVISED ARIZONA JURY INSTRUCTIONS: CIVIL § 17 (“The damages you award . . . must . . . place [name of plaintiff] in the position [name of plaintiff] would have been in if the contract had been performed. To determine those damages, you should consider the following: [The profit that [name of plaintiff] would have received had the contract been performed;] [The return of the value of the things or services that [name of plaintiff] provided to the [name of defendant;] The value of things or services expended by [name of plaintiff] in preparing to perform his part of the contract or in preparing to accept the benefits of [name of defendant]’s expected performance;] [Whether [name of plaintiff], by not having to perform his part of the contract, has avoided any cost [or loss] which should be deducted from his damages.]” (emphasis added) (footnotes omitted)).

123. MISSISSIPPI MODEL JURY INSTRUCTIONS CIVIL § 11:42 (emphasis added).

124. 852 N.E.2d 485 (Ill. App. Ct. 2006), vacated, 877 N.E.2d 1 (Ill. 2007). As our focus is on how juries behave when confronting certain instructions, for our purposes it is of no moment that the court’s decision was vacated.

125. *Id.* at 488–89.

126. *Id.* at 489.

127. *Id.*

*by plaintiff in this case are the difference between the value of the vehicle as it was warranted and the value of the vehicle delivered in its defective state and/or incidental/consequential damages.*¹²⁸

The defendant argued that the plaintiff failed to prove the applicable standard of “measureable damages resulting from the breach.”¹²⁹ The jury’s \$6,000 award for breach of warranty matched the calculation of the plaintiff’s expert witness estimating the vehicle’s diminution in value.¹³⁰ The appellate court thus concluded that the jury was “properly instructed on how to weigh plaintiff’s damages” and declined to alter the award.¹³¹ But the court failed to comment on the \$2,500 of damages for aggravation and inconvenience.

B. Same Position

Rhode Island’s pattern instruction neatly sums up the traditional purpose of expectation damages: “The underlying rationale on a breach of contract action is to place the innocent party in the position he/she would have been in if the contract had been fully performed.”¹³² Same Position instructions in fifteen jurisdictions¹³³ guide jurors no further.¹³⁴ Unlike the destination and road map approach of Expectation Formula instructions, Same Position instructions merely state the destination, leaving the jury to find its way.

Alabama is representative:

If you decide that (name of plaintiff) proved [his/her/its] claim against (name of defendant) for breach of contract, you also must decide how much money will reasonably compensate (name of plaintiff) for the harm caused by the breach. . . . The purpose of such damages is to put (name of plaintiff) in as good a position as [he/she/it] would have been in (name of defendant) had not broken the contract.¹³⁵

128. *Id.* at 492–93; *cf.* ILLINOIS PATTERN JURY INSTRUCTIONS CIVIL § 700.13 (2011) (“In calculating [plaintiff’s name]’s damages, you should determine that sum of money that will put [plaintiff’s name] in as good a position as [he][she][it] would have been in if [both][the] [plaintiff’s name] and [defendant’s name] had performed all of their promises under the contract.”).

129. *Mattuck*, 852 N.E.2d at 495.

130. *Id.* at 489–92, 495.

131. *Id.* at 495.

132. R.I. BAR ASSOC., SUPERIOR COURT BENCH/BAR COMM., MODEL CIVIL JURY INSTRUCTIONS FOR RHODE ISLAND § 10101 (2d ed. 2003).

133. *See* Appendix C.

134. Some Same Position instructions instruct jurors to limit awards to foreseeable and certain harm. *E.g.*, 1 JURY INSTRUCTIONS COMM. OF THE OHIO JUDICIAL CONFERENCE, OHIO JURY INSTRUCTIONS: CIVIL § 501.33 (2009) (“[T]he plaintiff is entitled to damages in the amount sufficient to place him/her in the same position in which he/she would have been in if the contract had been fully performed by the defendant to the extent that the damages are reasonably certain and reasonably foreseeable.” (emphasis added)). Although these factors may temper jurors’ discretion to some extent, they stop short of a road map calculation of damages.

135. ALA. PATTERN JURY INSTRUCTIONS COMM.—CIVIL, 1 ALABAMA PATTERN JURY INSTRUCTIONS CIVIL § 10.36 (2d ed. 1993).

The wording of such instructions varies.¹³⁶ Jurors are asked to put the nonbreaching party in the “same position”¹³⁷ or “as good a position”¹³⁸ as if the breach had not occurred. Other versions admonish the jury not to put the innocent party in a better position than if the contract had been fulfilled.¹³⁹ Some instructions combine approaches.¹⁴⁰ At base, all Same Position instructions provide the jury with an abstract target and little guidance on how to reach it.

Case law illustrates the operation of Same Position instructions at the trial level. In *Tri State Grease & Tallow Co. v. BJB, LLC*,¹⁴¹ the defendant BJB argued that a Same Position instruction was an incomplete measure of damages.¹⁴² The jury awarded Tri-State \$478,890 in lost profits for breach of a covenant not to compete.¹⁴³ The award was higher than the loss of \$469,163.40 estimated by the plaintiff’s co-owner.¹⁴⁴ It was also significantly higher than the estimate given by plaintiff’s accountant, who testified that the firm’s net profit during the relevant time period was merely \$37,750.¹⁴⁵

BJB moved for a new trial because the trial court declined to read its proposed jury instructions on lost-profit damages.¹⁴⁶ The trial court denied the motion, stating that its proposed instruction would be duplicative with the instruction given, which “closely tracked” Minnesota’s pattern instruction on contract damages.¹⁴⁷ The instruction given read, in pertinent

136. Cf. 1 KEHOE, *supra* note 73, at 772–73 (noting there is no particular standard for the wording of benefit of the bargain instructions).

137. E.g., SUPERIOR COURT OF DEL., PATTERN JURY INSTRUCTIONS FOR CIVIL PRACTICE IN THE SUPERIOR COURT OF THE STATE OF DELAWARE § 22.24 (2006), available at <http://courts.delaware.gov/Superior/pattern/pattern.stm> (“[T]he other party is entitled to compensation in an amount that will place it in the same position it would have been in if the contract had been properly performed.”).

138. E.g., COMM. ON MODEL CIVIL JURY INSTRUCTIONS, MICHIGAN MODEL CIVIL JURY INSTRUCTIONS § 142.31 (2011), available at <http://www.courts.michigan.gov/courts/michigansupremecourt/mcji/pages/contracts.aspx> (“Contract damages are intended to give the party the benefit of the party’s bargain by awarding him a sum of money that will, to the extent possible, put [him/her/it] in as good a position as [he/she/it] would have been in had the contract been fully performed.”).

139. E.g., TENNESSEE PATTERN JURY INSTRUCTIONS—CIVIL § 14.70 (2010) (“The plaintiff is not entitled to be put in a better position by a recovery of damages for breach of contract than would have been realized had there been full performance.”).

140. E.g., IND. JUDGES ASSOC., 1 INDIANA MODEL CIVIL JURY INSTRUCTIONS No. 3313 (2011) (“[T]he measure of [plaintiff]’s damages is the amount that would put [plaintiff] in the same position [he][she][it] would have been in had the contract been fulfilled. [Plaintiff] may only recover the loss actually suffered and should not be placed in a better position than if [defendant] had not breached the contract.”).

141. No. A10-1560, 2011 WL 2518954 (Minn. Ct. App. June 27, 2011).

142. *Id.* at *6.

143. Special Verdict Form at 5, *Tri-State Grease & Tallow Co. v. BJB, LLC*, No. CV-08-1060, 2010 WL 1751800 (Minn. Dist. Ct. Apr. 12, 2010), 2010 WL 1739466.

144. *Tri State Grease & Tallow Co.*, 2011 WL 2518954, at *3.

145. *Id.*

146. *Id.* at *6.

147. *Id.*

part: “[Y]ou are to determine the amount of money that will fairly and adequately compensate Tri-State . . . for damages caused by BJB’s . . . breach of contract. The damages award, if any, should put Tri-State . . . in the position it would have been in, had BJB . . . not breached the contract.”¹⁴⁸

The defendant appealed, arguing that this instruction was incomplete because it failed to “provide the jury specific guidance on lost-profits damages.”¹⁴⁹ The appeals court, affirming the judgment, noted that lost-profit damages in Minnesota shared the same principles as general damages.¹⁵⁰ Lost profits must be: (1) the “natural and probable consequence” of the breach; (2) reasonably certain; and (3) not be speculative, remote, or conjectural.¹⁵¹ The court stated that these principles were communicated to the jury by the instruction given, obviating the need for more specific instructions.¹⁵²

C. Natural Result

Pattern contract damage instructions in eight states jettison the Same Position destination as well as the Expectation Formula road map.¹⁵³ Instead, these jurisdictions use abstract language that grants juries considerable discretion and provides little guidance on how to measure damages.¹⁵⁴ We call these “Natural Result” instructions.

148. Final Jury Instructions at 7–8, *Tri-State Grease & Tallow Co.*, No. CV-08-1060, 2010 WL 1751800, 2010 WL 1739299.

149. *Tri State Grease & Tallow Co.*, 2011 WL 2518954, at *6.

150. *Id.*

151. *Id.*

152. *Id.*

153. See Appendix D.

154. Commentators have noted the prevalence of abstract pattern instructions. See, e.g., 2 KEHOE, *supra* note 73, at 1295 (noting recent enthusiasm for abstract pattern instructions). As with Natural Result instructions, abstract instructions generally “stop short of telling the jury what to do with the legal rule that is presented in the instruction.” *Id.* at 1306. Many of these instructions contain phrases similar to traditional descriptions of the foreseeability limitation on contract damages, such as requiring damages that are likely to result in the “ordinary course of things.” E.g., STATE BAR OF S.D., SOUTH DAKOTA PATTERN JURY INSTRUCTIONS CIVIL § 50-70-10 (2009); see also *Conner v. S. Nev. Paving, Inc.*, 741 P.2d 800, 801 (Nev. 1987) (“Damages from a breach of contract should be such as may fairly and reasonably be considered as arising naturally, or were reasonably contemplated by both parties at the time they made the contract.” (citing *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Ex.) 151)); RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a *probable result* of the breach when the contract was made. (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach (a) in the *ordinary course of events*” (emphasis added)); RESTATEMENT (FIRST) OF CONTRACTS § 330 (1932) (“In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a *probable result* of his breach when the contract was made. If the injury is one that follows the breach in the *usual course of events*, there is sufficient reason for the defendant to foresee it” (emphasis added)).

Virginia's instruction is representative: "If you find your verdict for the plaintiff, then he is entitled to recover as damages all of the losses he sustained [,including gains prevented,] that are a *natural and ordinary result* of the breach and that he has proved by the greater weight of the evidence."¹⁵⁵

Other states use similarly vague language.¹⁵⁶ Juries are instructed to award recovery for damages that "arise naturally,"¹⁵⁷ those that occur within the "ordinary"¹⁵⁸ or "usual"¹⁵⁹ course of things, and those that are "likely to result,"¹⁶⁰ or are "probable and natural."¹⁶¹ Juries may also be instructed to award damages "proximately caused" by the breach.¹⁶²

C.C. Payne v. Ace House Movers, Inc.,¹⁶³ demonstrates a defendant's failed attempt to assign error to the broad wording of a Natural Result instruction and to advocate for the use of an Expectation Formula-type alternative. The plaintiff homeowner hired the defendant moving company to relocate his house,¹⁶⁴ and the house and its foundation were damaged during the move.¹⁶⁵

The plaintiff sought \$2,544.09 for repairs due to breach of contract.¹⁶⁶ The jury returned a verdict of \$4,000.¹⁶⁷ The sole instruction read: "[Should the jury find for the plaintiff,] they should allow him such sum as

155. SUPREME COURT OF VA. MODEL JURY INSTRUCTION COMM., 2-45 VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL No. 45.500 (2011) (emphasis added).

156. In addition to providing little guidance as to the proper measure of damages, many Natural Result jurisdictions use morally subjective language, instructing the jury to award damages that "fairly" compensate the plaintiff for the breach. *E.g.*, CIVIL PATTERN JURY INSTRUCTIONS COMM., HAWAII STANDARD CIVIL JURY INSTRUCTIONS No. 15.10 (2009), available at http://www.courts.state.hi.us/docs/legal_references/jury_instructions_civil.pdf. Such elements provide juries even greater discretion and may further encourage noneconomic damages.

157. COUNCIL OF SUPERIOR COURT JUDGES OF GA., 1 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS: CIVIL CASES § 18.010 (2007).

158. STATE BAR OF S.D., SOUTH DAKOTA PATTERN JURY INSTRUCTIONS CIVIL § 50-70-10 (2009); STATE BAR ASS'N OF N.D., NORTH DAKOTA PATTERN JURY INSTRUCTIONS—CIVIL § C-74.00 (2008), available at <http://www.sband.org/PatternJuryInstruction>.

159. 1 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS: CIVIL CASES § 18.010.

160. SOUTH DAKOTA PATTERN JURY INSTRUCTIONS CIVIL § 50-70-10; NORTH DAKOTA PATTERN JURY INSTRUCTIONS—CIVIL § C-74.00.

161. NORTH DAKOTA PATTERN JURY INSTRUCTIONS—CIVIL § C-74.00.

162. *Id.*

163. 112 S.E.2d 449 (W. Va. 1960); *see also* *Jones v. Panhandle Distribs., Inc.*, 792 P.2d 315, 323, n.8 (Idaho 1990) (Natural Result instruction prompting the court to declare that "any award of damages made by the Court would have been far less than the award made, and it would have been sufficiently less to convince me that the award of compensatory damages could only be the result of passion and prejudice." (internal quotation marks omitted)).

164. *Payne*, 112 S.E.2d at 450.

165. *Id.*

166. *Id.* at 451.

167. *Id.*

the evidence shows will fairly compensate him for the loss sustained by him by reason of the damage done him.”¹⁶⁸

The defendant objected that the instruction did not reflect “the true rule for ascertainment of damages in an action of assumpsit.”¹⁶⁹ Instead, the defendant urged that “the proper measure of damages . . . is the difference between the fair market value of the property immediately before the injury and the fair market value thereof immediately following the injury, plus necessary and reasonable expenses incurred by the owner in connection with the injury.”¹⁷⁰

The court rejected the defendant’s argument, reasoning that the defendant’s suggested instruction was for tort cases, not contract.¹⁷¹ The court stated that the proper measure of damages was the reasonable cost of repairs necessary due to the damage, and thus the instruction was proper even though it did not “define any specific measure of recovery.”¹⁷² Ultimately, the court found the jury’s verdict excessive and granted a new trial but stopped short of blaming the instruction.¹⁷³

Missouri provides an illuminating study of Natural Result instructions. Its rich case law interprets and ultimately defends its general damage instruction, section 4.01 of the Missouri Approved Jury Instructions (MAI 4.01).¹⁷⁴ This attention is likely due to MAI 4.01’s abstract nature¹⁷⁵ and the fact that use of Missouri pattern instructions is mandatory.¹⁷⁶

MAI 4.01 reads, in pertinent part:

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future] as a *direct result* of the occurrence mentioned in the evidence.¹⁷⁷

Soon after its adoption, the Missouri Supreme Court in *Boten v. Brecklein*¹⁷⁸ gave MAI 4.01 the dubious distinction of being appropriate

168. *Id.* at 450. This language is identical to the jury instructions for West Virginia. *See* 2B INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 26-103 (2001).

169. *Payne*, 112 S.E.2d at 450.

170. *Id.*

171. *Id.* at 450–51.

172. *Id.* at 451.

173. *Id.*

174. MO. SUPREME COURT COMM. ON JURY INSTRUCTIONS, MISSOURI APPROVED JURY INSTRUCTIONS (CIVIL) § 4.01 (Stephen H. Ringkamp et al. eds., 7th ed. 2012).

175. 2 KEHOE, *supra* note 73, at 1224 n.74 (“Plainly . . . this tort oriented instruction fails to convey the proper measure of contract damage.”).

176. MISSOURI SUPREME COURT RULE 70.02(b) INSTRUCTIONS TO JURIES, *available at* <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/0ca70015354b0dcf86256ca600521567?OpenDocument>.

177. MISSOURI APPROVED JURY INSTRUCTIONS (CIVIL) § 4.01 (emphasis added) (footnotes omitted).

178. 452 S.W.2d 86 (Mo. 1970).

until a “more detailed” instruction was drafted.¹⁷⁹ The defendants, appealing a jury verdict for breach of contract, claimed that MAI 4.01 was too general for contract claims and only appropriate for tort cases.¹⁸⁰ The court disagreed, characterizing MAI 4.01 as “a short, simple, general instruction which directs an award which will fairly compensate plaintiffs for their damages.”¹⁸¹ Further, because the trial court used MAI 4.01, the court reasoned that it did not need to “precisely delineate the measure of damages.”¹⁸² The court ultimately rejected the defendant’s argument that the jury award was excessive and evidenced jury bias.¹⁸³

Missouri courts strict adherence to pattern instructions appeared to loosen in *Crank v. Firestone Tire & Rubber Co.*¹⁸⁴ In *Crank*, the plaintiff brought his car to the defendant, a mechanic, to have an oil filter installed.¹⁸⁵ Later, the gasket between the oil filter and engine ruptured, ruining the engine and rendering the car worthless.¹⁸⁶ Plaintiff incurred additional damages including missed income, car rental, and interest on money borrowed to pay the repair bill.¹⁸⁷ According to the plaintiff, his entire damages totaled \$4,759.45.¹⁸⁸ The jury awarded him \$7,000, leading the court to conclude that “prejudice . . . is obvious.”¹⁸⁹ The court determined that the pattern instruction did not instruct the jury on damages reasonably contemplated at the time of contracting and remanded for retrial on the damages issue.¹⁹⁰

IV. AN EXPERIMENT AND DISCUSSION

A. Methodology

To test the influence that differing jury instructions might have on actual verdict awards, we undertook a simple survey experiment, asking subjects to read about a simple breach of contract problem:

179. *Id.* at 93. Although MAI 4.01 was revised in 2002, the 1970 instruction is nearly identical to the current version. Instruction No. 6 given in *Boten* reads: “If you find the issues in favor of plaintiffs, then you must award the plaintiffs such sum as you believe will fairly and justly compensate plaintiffs for any damages you believe they sustained as a direct result of the defendants’ termination of said contract.” *Id.* at 92.

180. *Id.* at 93.

181. *Id.* Despite its conclusion, the court announced more familiar measures of general damages in its analysis: “the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented . . . the value of the performance of the contract . . . the position [the injured party] would have been in had the contract been performed . . . the benefit of his bargain” *Id.*

182. *Id.*

183. *Id.* at 97.

184. 692 S.W.2d 397 (Mo. Ct. App. 1985).

185. *Id.* at 399.

186. *Id.* at 400.

187. *Id.*

188. *Id.* at 403.

189. *Id.*

190. *Id.*

Please imagine that Sally is a homeowner. She was preparing to put her home on the market. Before she sold her house, Sally wanted to fix the plumbing in two bathrooms.

According to a reliable realtor, having modern plumbing in the bathroom would increase the sale price by \$7,000 in total. Sally contacted a local plumber, John, who suggested that he could do the job for \$5,000. Sally's house is old and requires certain kinds of pipes, which John agreed to use. John and Sally signed a contract agreeing to the date, price, and nature of the service. Sally's payment was due on installation, and the work was to be done right before the first open house.

When purchasing materials for the job, John decided to save money with cheap silicone piping rather than the costly copper pipe that Sally's house needed.

On the morning before the open house, Sally turned on the sink in one of the bathrooms. Water splattered wildly, and then leaked out of the vanity. Sally could not reach John so she called a local contractor. That contractor was able to fix the problem, but it cost \$8,000 because of the damage and the short notice. Sally had not yet paid John's fee.

Sally sued John for breach of contract. The court found that John breached the contract because he failed to install the appropriate pipes.

The only question left for you—the jury in the case—is what John owes Sally.

We assigned subjects to three conditions, telling them that the relevant law looked like the (1) Expectation Formula,¹⁹¹ (2) Same Position,¹⁹² or (3) Natural Result.¹⁹³ For each condition, we asked subjects to indicate the amount that they would award in damages as a juror, their assignment of the morality of the promisor's conduct, and their prediction of how satisfied the promisee would be with their verdict.¹⁹⁴

191. "The measure of damages for a breach of contract is that amount of money necessary to place Sally in the same economic position she would have been in if the contract had not been breached. To calculate the damages, first determine the amount of money Sally would have received had the contract not been breached. Next, add the amount of incidental and consequential damages, if any. Incidental damages include any costs Sally incurred while making reasonable efforts to avoid losses, whether the efforts were successful or not. Consequential damages include damages resulting from the breach, such as injury to persons or property. Lastly, subtract from that any money Sally saved because John did not have to complete the contract. How much would you award Sally in damages?"

192. "Now that Sally has proved her claim against John for breach of contract, you also must decide how much money will reasonably compensate Sally for the harm caused by the breach. This compensation is called 'damages.' The purpose of such damages is to put Sally in as good a position as she would have been in if John had not broken the contract. How much would you award Sally in damages?"

193. "Sally is entitled to recover as damages all of the losses she sustained, including gains prevented that are a natural and ordinary result of the breach. How much would you award Sally in damages?"

194. Subjects had to award damages prior to viewing pages asking them to assign scores for morality or to predict satisfaction. Therefore, their damage awards were not influenced by these subsequent questions.

Next, for each of our three main conditions, we added an alternative scenario, where the subjects were told—in addition to the information conveyed above—that the breach of contract had occasioned a specified emotional harm:

During the trial, Sally testified as follows:

Q: How did John's breach of contract make you feel?

S: I felt betrayed. It's frustrating because you really have to go on someone's word when you hire them. I'm not a plumber—I just have to trust him. And his word was no good. Now it's going to be harder to trust people.

Thus, we assigned subjects to six total conditions: an emotionally inflected and an emotionally neutral version of each of the three damage instructions.

We recruited subjects from Amazon Mechanical Turk, paying them between \$0.70 and \$0.90 per completed survey.¹⁹⁵ A total of 409 subjects successfully completed a survey¹⁹⁶: 208 (50.9%) were men. The average age in the pool was thirty-three, and subjects ranged from eighteen to seventy-three. Across all conditions, 332 subjects (81%) self-identified as White/non-Hispanic; 27 (6.6%) self-identified as Asian/Pacific Islander; and 20 (4.8%) self-identified as Black/African American.¹⁹⁷

B. Results

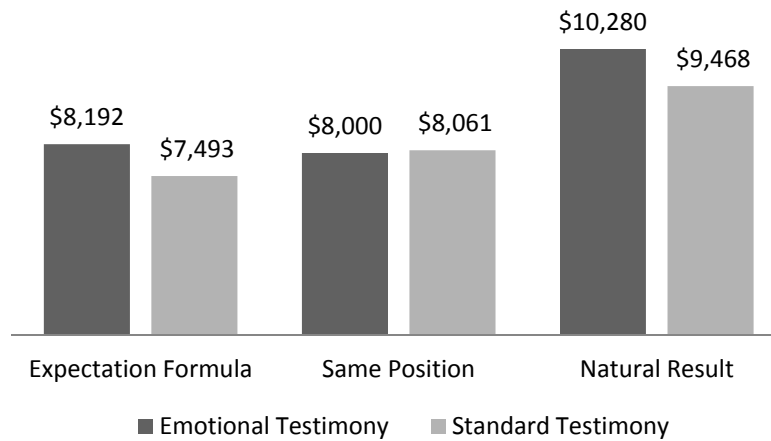
Figure 2 reports summary statistics consisting of the mean damages for each condition. As Figure 2 illustrates, in two of the three conditions, subjects in the “emotional” condition awarded greater damages than in the “standard” condition. Further, Figure 2 demonstrates that subjects in the Natural Result jurisdiction awarded much more in damages than in either of the Expectation Formula or Same Position jurisdictions.

195. Recent research supports the use of Amazon Mechanical Turk in psychology experiments like this one. Gabriele Paolacci, Jesse Chandler & Panagiotis G. Ipeirotis, *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411 (2010); David G. Rand, *The Promise of Mechanical Turk: How Online Labor Markets Can Help Theorists Run Behavioral Experiments*, 229 J. THEORETICAL BIOLOGY 172 (2012).

196. We recruited 651 subjects from Amazon Mechanical Turk. We eliminated eighty-four subjects because they had previously been exposed to a similar stimuli in a previous experiment by one of the authors. An additional seventy-eight subjects failed a manipulation check, in which we asked subjects how much Sally had agreed to pay John in the contract; any subject who did not provide the correct answer (\$5,000) was dropped. Finally, we eliminated subjects who completed the survey in an excessively short period of time (less than two minutes). These manipulation checks are especially important when dealing, as we are here, with anonymous internet respondents. See generally Daniel M. Oppenheimer, Tom Meyvis & Nicolas Davidenko, *Instructional Manipulation Checks: Detecting Satisficing To Increase Statistical Power*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 867 (2009).

197. The remaining twelve subjects were in other ethnic categories.

Figure 2: Mean Damages, Per Condition



One can analyze these data in a variety of ways. Though traditionally social psychologists have used analysis of variance (ANOVA) and related approaches for experimental models, a more comprehensive approach relies on multiple regression.¹⁹⁸ Here, our dependent variable is continuous, making a linear regression both convenient and easy to interpret.

In the linear regression reported in Table 1 below, we regress damages awarded against a variety of control variables, including dummies for the experimental conditions, and control variables including the age, ethnicity, education,¹⁹⁹ and gender. We omit the standard expectation formula condition: thus, all results refer to that baseline.

198. Charles M. Judd, *Everyday Data Analysis in Social Psychology: Comparisons of Linear Models*, in HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 370, 371 (Harry T. Reis & Charles M. Judd eds., 2000). See generally CHARLES M. JUDD, GARY H. MCCLELLAND & CAREY S. RYAN, DATA ANALYSIS: A MODEL COMPARISON APPROACH (2d ed. 2009).

199. We questioned subjects about their educational attainment. In our pool, 2.5% lacked a high school degree, 12% graduated high school, 30% attended college but do not have a degree, 8.5% have an associate's degree, 31% a bachelor's degree, 12% a master's degree, 2.5% a professional degree, and 2% a doctoral degree.

Table 1: Multivariate Regression Analysis

Emotional Expectation Formula	833.82	(713.70)
Emotional Same Position	508.67	(691.5)
Standard Same Position	778.71	(731.12)
Emotional Natural Result	2502.32**	(719.85)
Standard Natural Result	2214.50**	(714.56)
Male	829.54*	(424.73)
Age	-35.18*	(18.41)
Other controls	Yes	
Constant	8543.001	(1732.79)
R ²	0.0924	

N = 406. Dependent variable is Damages. Standard errors are in parentheses. Bold type indicates that the predictor coefficient or change in *F* statistic is significant, those with ** denoting significance where $p < 0.05$, and * denoting significance where $p < .10$.

Interpreting this regression is straightforward. Both versions of the Natural Result condition produce damage estimates that are significantly more—both in practical and statistical terms—than either the Same Position or the Expectation Formula instructions. Indeed, the coefficients imply that holding all else equal, Natural Result instructions (in the standard condition) will result in \$2,214.50 more in damages than the Expectation Formula—an increase of over 40%. Or to put it differently: the Natural Result instruction motivates subjects to be *much more generous to promisees than either of the other two conditions*.

A corollary is that the Same Position and the Expectation Formula do not produce statistically distinguishable damage results from one another. Moreover, although the emotional variants produce higher damages than the standard variants in both the Expectation Formula and Natural Result conditions, the differences are not statistically significant.²⁰⁰

Some of our controls produce marginally significant results, though not in ways that are easy to explain *ex ante*. There is a modest effect for age (older respondents award fewer dollars in damage) and for gender (male respondents award more in damages than female respondents). We find no significant effects for educational attainment or ethnicity.²⁰¹

200. A *t*-test produces the same result. For the differences between versions of the Expectation Formula, we find $t = 0.9340$, and $p = 0.1760$. For the differences between versions of the Same Position instruction, we find $t = -0.0896$, and $p = 0.5356$. For the differences between versions of the Natural Result instruction, we find $t = 1.1034$, and $p = 0.1359$. However, and crucially, given the large standard deviations, the sample sizes (all < 100) are much too low for us to confidently conclude that we have avoided Type II error. A basic power calculation suggests that with standard deviations of ~500 and means of ~9,000, we would require 500 observations in each condition to confidently test the null hypothesis.

201. In an additional prompt, we asked individuals to report on their perception of the moral wrongfulness of the promisor's conduct. We found, as expected, that individuals

C. Discussion

This very simple survey experiment illustrates the power of pattern jury instructions to shape damage awards. We highlight several results in this subsection.

First, although their wordings differed, the Same Position and Expectation Formula would produce basically equivalent jury outcomes. This suggests that the two kinds of instructions, which together represent the overwhelming majority of jurisdictions with instructions available, should be viewed as interchangeable. To a degree, this finding undermines a justification for the formulaic approach, which sacrifices lay clarity to purportedly achieve greater compliance and predictability.

Second, according to the most parsimonious understanding, the amount of money necessary to put Sally in the position she would have been in had the contract been performed is \$3,000: calculated as the difference between \$8,000 (her loss in value) and \$5,000 (what she saved by not paying John).²⁰² But mean award in the standard Expectation Formula condition was \$7,498: a whopping 150% increase.²⁰³

There are at least two ways to frame such excessive awards. Clearly, in all conditions—even in the Standard Expectation Formula—our subjects were likely to award more in damages than necessary to put the promisee in the position she would have been in had the contract been performed.²⁰⁴ Reworking Figure 2 to calculate the difference between the observed awards and those that the expectation interest alone would apparently justify, we find a significant premium in every experiment.

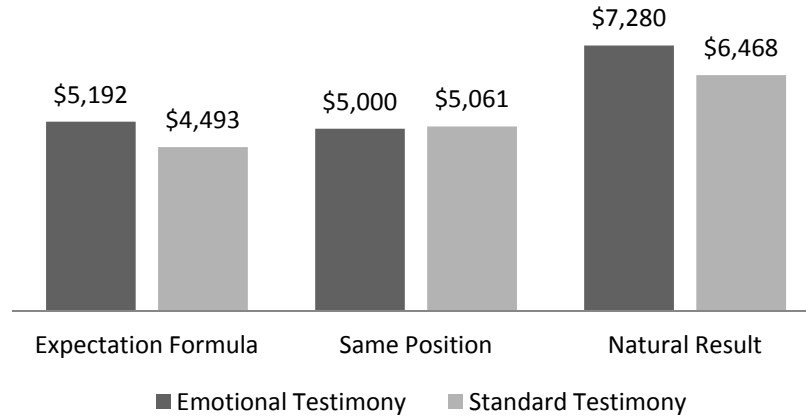
reported higher amounts of moral outrage in emotional variants of conditions. However, the differences were not significant. The only significant effect was age; younger subjects were less likely to find the breach morally offensive.

202. Or, the difference between the market value of services at the time of breach (\$8,000) and the price of those services at the time of contracting (\$5,000).

203. For the purposes of expositional simplicity, we ignored a possible set-off that would reduce the damage award as a consequence of the promisee in effect being insured against her contract becoming a losing one.

204. In an open-ended essay, subjects offered various explanations for their awards. One pointed out “John could have caused Sally more problems later. This kind of behavior makes me very angry.” Another pointed to the “inconvenience factor.”

Figure 3: The Difference Between Observed Damage Awards and Awards Resulting from a Pure Economic Calculus



From one perspective, subjects appeared to use Sally's \$8,000 loss as their anchor—especially in the Expectation Formula and Same Position instructions.²⁰⁵ Rather than incorporating Sally's expected profit, subjects awarded her *reliance* costs. Only in the Natural Result condition did subjects award an additional amount for lost profits—while failing to subtract what Sally would have paid.

A complementary explanation attributes the observed premiums in part to subjects compensating noneconomic losses. Notably, in two of the conditions Sally's emotional losses produced higher damage awards, though such differences were not statistically significant. In addition, the Natural Result instruction—which provides the most latitude for jurors to express their intuitions by referring to just and fair compensation—had significantly higher awards than the other instructions. The anchoring rationale described above would not explain this difference.

In sum, we have found *some* evidence that pattern jury instructions used in almost all American states do not constrain juries to the promisee's bargained-for benefit particularly well. Rather, juries may be permitted to express their feeling that damage verdicts alone are unlikely to make promisees whole.²⁰⁶

205. This anchoring effect is well known from experiments on tort law damages. See, e.g., Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1167–70 (2002).

206. See Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 423 (2009).

CONCLUSION

The conventional story of noneconomic contract damages is too simple. In that story, almost no contract cases will end with an award of noneconomic damages. Only rare cases—the kind that end up torturing 1Ls in our perverse casebooks—engender righteous recoveries of emotional losses. In this way, we protect the contract law adjudication system from overcompensation and whimsy, while dampening the public emotional stakes of breach.²⁰⁷

We accept that in *most* jurisdictions, judges will deny *most* forms of noneconomic damages, if the right motion is presented at the right moment in the life of the case. But litigations that result in considered appellate opinions are not just rare: they are exceptional.²⁰⁸ Most cases settle in the shadow of an expected jury verdict. And those expected jury verdicts relate to pattern instructions. As we have demonstrated, contract pattern instructions are significantly less restrictive of noneconomic losses than the treatises would have led us to believe. Controlled testing found that almost no experimental subjects awarded the promisee's bare economic expectation. Rather, they usually awarded more when provided with information about emotional losses, and they were especially likely to do so when instructed with the Natural Result prompt—common in eight States.

We thus provide a more realistic picture of how contract litigation may proceed in actual cases. Because jurists lack a full set of information about contract dispositions, whether in federal or state court,²⁰⁹ our work, which combines experimental findings and real world jury instructions, sheds important light on an understudied area of law. It could serve as a model for studying jurisdictional variation in other areas of contract doctrine, especially those practically consequential issues of interpretation, material breach, and defenses. Indeed, all of us who would seek to generalize about contract “law” should work to understand how it is translated to lay fact finders. We may find a more complex and interesting world than the treatises have led us to imagine.

207. See Wilkinson-Ryan & Hoffman, *supra* note 16, at 1008.

208. See David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (noting a small percentage of cases resulting in opinion or appeal).

209. Cf. Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want To Know About Contract Litigation*, 2001 WIS. L. REV. 577, 581–83 (providing a general look at contract cases).

APPENDIX: PATTERN CONTRACT DAMAGE INSTRUCTIONS

A. *Non-Guiding Instructions*

Alaska:	HARVEY S. PERLMAN & STEPHEN A. SALTZBURG, ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 24.09A (2011), <i>available at</i> http://courts.alaska.gov/juryins.htm#24 (“[Now I will explain to you how to measure damages requested by the plaintiff so that the plaintiff will be in the same position that the plaintiff would have been in if the defendant had kept (his) (her) (its) promise: [insert proper measure of damages].]”).
Arkansas:	ARK. SUPREME COURT COMM. ON JURY INSTRUCTIONS—CIVIL, ARKANSAS MODEL JURY INSTRUCTIONS § 2442 (2011) (“The element(s) of damage that [plaintiff] claims [is] [are]:”), <i>cited in</i> Carrick Trucking Inc. v. Nietert, No. 09-2053, 2010 WL 1856299, at *7 (W.D. Ark. April 30, 2010); QHG of Springdale, Inc. v. Archer, 373 S.W.3d 318, 323 (Ark. Ct. App. 2009); ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL, § 2442 note on use (“Complete this instruction with the measure(s) of damages permitted by law . . .”).
California:	JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS No. 350 (2012) (“[Name of plaintiff] . . . must prove the amount of [his/her/its] damages <i>according to the following instructions.</i> ”); <i>id.</i> directions for use (“This instruction should always be read before any of the following specific damages instructions.”).
Colorado:	COLO. SUPREME COURT COMM. ON CIVIL JURY INSTRUCTIONS, COLORADO JURY INSTRUCTIONS FOR CIVIL TRIALS § 30:37 (4th ed. 2010) (“If actual damages have been proved, you shall award: 1 (<i>Insert the proper measure of general damages that have been proved depending on the kind of contract involved</i>) (; and) 2 (<i>Insert the proper measure of any recoverable special damages that have been proved.</i>)”).

Idaho:	IDAHO CIVIL JURY INSTRUCTIONS § 9.03 (2009), <i>available at</i> http://www.isc.idaho.gov/problem-solving/civil-jury-instructions (“[T]he jury must determine the amount of money that will reasonable [sic] and fairly compensate the plaintiff for any of the following elements of damages proved by the evidence to have resulted from the defendant’s breach of contract: [Insert the elements of damage that have a basis in the evidence].”).
Iowa:	IOWA STATE BAR ASSOC. UNIF. COURT INSTRUCTIONS COMM., IOWA CIVIL JURY INSTRUCTIONS § 220.1 (2004) (“In your consideration of the damages, you may consider the following: (List the items of damage claimed and allowable according to the facts of the case.)”).
Kansas:	PATTERN INSTRUCTIONS KAN. CIVIL ADVISORY COMM., PATTERN INSTRUCTIONS KANSAS: CIVIL § 124.16 (4th ed. 2008) (“In determining plaintiff’s damages you should consider any of the following elements of damage that you find were the result of the breach: (<i>List the elements of damage claimed by plaintiff here</i>).”); <i>id.</i> notes on use (“The court should determine as a matter of law the elements of damage that are properly recoverable under the evidence, and each element should be listed.”).
Nebraska:	NEB. SUPREME COURT COMM. ON PRACTICE AND PROCEDURE, 1 NEBRASKA JURY INSTRUCTIONS—CIVIL § 4.40 (2d ed. 2010) (“If you find in favor of the plaintiff on . . . then you must determine the amount of plaintiff’s damages. (<i>Here insert the proper measure of general damages.</i>) (<i>Here insert the proper measure of special damages.</i>).”).
New Mexico:	NEW MEXICO UNIF. JURY INSTRUCTIONS—CIVIL § 13-843 (2011), <i>available at</i> http://www.nmonesource.com/nmpublic/gateway.dll/?f=templates&fn=default.htm (“([P]laintiff’s) claims for damages are: (NOTE: Here insert the proper elements of damages.)”); <i>id.</i> directions for use (“Common elements of damages . . . may be inserted . . .”).
North Carolina:	1 N.C. CONFERENCE OF SUPERIOR COURT JUDGES, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 503.09–.54 (2011) (listing multiple direct damage instructions for specific types of breach and inviting the user to “state any other type of damage supported by the evidence”).

Oklahoma:	VERNON'S OKLAHOMA FORMS 2D, OKLAHOMA UNIF. JURY INSTRUCTIONS—CIVIL, No. 23.51 (2011), <i>available at</i> http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=435216 (“In this case, the amount of damages should be determined as follows: [set out the appropriate measure of damages].”), <i>cited with approval in</i> <i>Elmore v. Doenges Bros. Ford, Inc.</i> , 21 P.3d 65, 72–73 (Okla. Civ. App. 2000).
Texas:	COMM. ON PATTERN JURY CHARGES OF THE STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT § 115.2 (2010) (“Consider the following elements of damages [Insert appropriate instructions. See samples . . . and instructions]”).
Vermont:	VT. PLAIN ENGLISH CIVIL JURY INSTRUCTIONS COMM., MODEL INSTRUCTIONS FROM THE VERMONT PLAIN ENGLISH CIVIL JURY INSTRUCTIONS COMM. § 11.0 (2008), <i>available at</i> http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/index.htm (“[I]f you decide for [Name of Plaintiff], you must award [Name of Plaintiff] an amount of money that you believe will put [him/her], as nearly as possible, in the position [he/ she] would have occupied if the [describe event at issue, like ‘car accident,’ or state ‘events described at trial’] had not happened. <i>Here are some further instructions to help you do that:</i> ” (emphasis added)). We confirmed that § 11.0 is intended to cover both contract and torts claims with the Vermont Plain English Civil Jury Instruction Committee. Email from Daniel P. Richardson, Vt. Plain English Civil Jury Instructions Comm., to author (Nov. 20, 2011 3:23 EST) (on file with author).

Washington:	<p>WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CIVIL § 303.01 (5th ed. 2011), <i>available at</i> http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=PPatternJuryInstructions. The Note on Use for Washington’s pattern instruction refers the user to § 303.03 for “an explanation of direct damages.” <i>Id.</i> note on use. Section 303.03 states: “With regard to the breach of contract claim[s] of [<i>plaintiff</i>] [<i>defendant</i>], in your determination of damages you are to use the following measure of damages, in the amounts proved by [<i>plaintiff</i>] [<i>defendant</i>]: (here insert the measure of damages appropriate to the type of contract breach). <i>Id.</i> § 303.03.</p>
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B. Expectation Formula Instructions

Arizona:	<p>CIVIL JURY INSTRUCTIONS COMM. OF THE STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS: CIVIL § 17 (4th ed. 2005), <i>available at</i> http://www.azbar.org/media/58793/contract.pdf. Arizona guides juries through the measure of damages, but only asks them to “consider” lost profits and avoided costs. <i>Id.</i> It is a closer call than other Expectation Formula instructions.</p>
Connecticut:	<p>CIVIL JURY INSTRUCTIONS COMM., CONNECTICUT CIVIL JURY INSTRUCTIONS § 4.5-6 (2008), <i>available at</i> http://www.jud.ct.gov/JI/Civil/part4/4.5-6.htm.</p>
District of Columbia:	<p>MATTHEW BENDER & CO., STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 11.31 (2011), <i>cited in</i> E. Capitol View Cmty. Dev. Corp. v. Robinson, 941 A.2d 1036, 1038 (D.C. 2008).</p>
Illinois:	<p>ILLINOIS PATTERN JURY INSTRUCTIONS CIVIL § 700.13 (2011).</p>
Maryland:	<p>MD. STATE BAR ASSOC., MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 10:29 (2009), <i>cited in</i> Goldman, Skeen & Wadler, P.A. v. Cooper, Beckman & Tuerk, L.L.P., 712 A.2d 1, 13–14 (Md. Ct. Spec. App. 1998).</p>
Mississippi:	<p>MISS. JUDICIAL COLL., MISSISSIPPI MODEL JURY INSTRUCTIONS CIVIL § 11:42 (2d ed. 2009); <i>see also</i> Harrison v. Walker, 91 So. 3d 41, 46–47 (Miss. Ct. App. 2011) (upholding a similar instruction).</p>

New York:	2 COMM. ON PATTERN JURY INSTRUCTIONS ASS'N OF JUSTICES OF THE SUPREME COURT OF THE STATE OF N.Y., NEW YORK PATTERN JURY INSTRUCTIONS CIVIL § 4:20 (2d ed. 2012). New York's damage instruction reads as though it is specific to cases involving builder contractors. The comment points out that this is intended as a hypothetical example. <i>Id.</i> cmt.
Pennsylvania:	PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 19.270 (4th ed. 2011).
Utah:	ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, MODEL UTAH JURY INSTRUCTIONS—CIVIL § CV2135 (2d ed. 2011), <i>available at</i> http://www.utcourts.gov/resources/muji/ .
Wyoming:	CIVIL JURY INSTRUCTIONS COMM. OF THE WYO. STATE BAR, WYOMING CIVIL PATTERN JURY INSTRUCTIONS § 15.20 (2011); <i>see also</i> <i>Alpine Climate Control, Inc. v. DJ's, Inc.</i> , 78 P.3d 685, 690 (Wyo. 2003) (citing a similar instruction).

C. Same Position

Alabama:	ALA. PATTERN JURY INSTRUCTIONS COMM.—CIVIL, 1 ALABAMA PATTERN JURY INSTRUCTIONS CIVIL § 10.36 (2d ed. 1993).
Delaware:	SUPERIOR COURT OF DEL., PATTERN JURY INSTRUCTIONS FOR CIVIL PRACTICE IN THE SUPERIOR COURT OF THE STATE OF DELAWARE § 22.24 (2006), <i>available at</i> http://courts.delaware.gov/Superior/pattern/pattern.stm .
Florida:	FRANK VALDES, 1 FLORIDA FORMS OF JURY INSTRUCTION § 34.02 (Matthew Bender & Co. 2012). Florida has a set of civil pattern instructions approved by the Florida Supreme Court; however, it does not have a section on contracts. FLA. STANDARD JURY INSTRUCTIONS COMM.: CIVIL, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES (2008), <i>available at</i> http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml .
Indiana:	IND. JUDGES ASSOC., 1 INDIANA MODEL CIVIL JURY INSTRUCTIONS No. 3313 (LexisNexis Matthew Bender 2011); <i>see also</i> <i>Malott v. State Farm Mut. Auto. Ins. Co.</i> , 798 N.E.2d 924, 925–927 (Ind. Ct. App. 2004) (instruction used but not cited).

Massachusetts:	STEVEN D. ANDERSON ET AL., MASS. CONTINUING LEGAL EDUC. INC., 2 MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS §§ 14.9–14.9.1 (2008).
Michigan:	COMM. ON MODEL CIVIL JURY INSTRUCTIONS, MICHIGAN MODEL CIVIL JURY INSTRUCTIONS § 142.31 (2011), <i>available at</i> http://www.courts.michigan.gov/courts/michigansupremecourt/mcji/pages/contracts.aspx ; <i>see also</i> Riley v. State Farm Fire & Cas. Co., No. 276195, 2008 WL 4367473, at *2 (Mich. Ct. App. Sept. 25, 2008) (instruction used but not cited).
Minnesota:	MINN. DIST. JUDGES ASSOC., COMM. ON CIVIL JURY INSTRUCTION GUIDES, 4A MINN. PRACTICE: MINN. JURY INSTRUCTION GUIDES: CIVIL § 20.60 (5th ed. 2006), <i>cited in</i> Tri State Grease & Tallow Co. v. BJB, LLC, No. A10-1560, 2011 WL 2518954, at *6 (Minn. Ct. App. June 27, 2011).
Nevada:	STATE BAR OF NEV., NEVADA JURY INSTRUCTIONS—CIVIL § 13CN.46 (2011).
New Jersey:	MODEL CIVIL JURY CHARGES COMM., NEW JERSEY MODEL CIVIL JURY CHARGES § 8.45 (2009).
Ohio:	1 JURY INSTRUCTIONS COMM. OF THE OHIO JUDICIAL CONFERENCE, OHIO JURY INSTRUCTIONS—CIVIL § 501.33 (2009), <i>cited in</i> Hylant Grp., Inc. v. Cummings, No. 3:10CV1782, 2011 WL 767399, at *2 (N.D. Ohio Feb. 28, 2011); <i>see also</i> Aey Electric v. Battaglini, 2004 WL 2808408, at *6 (Ohio Ct. App. 2004) (approving but not citing to instruction).
Oregon:	OR. STATE BAR UNIF. CIVIL JURY INSTRUCTIONS COMM., OREGON UNIF. CIVIL JURY INSTRUCTIONS No. 65.18 (2005).
Rhode Island:	R.I. BAR ASSOC., SUPERIOR COURT BENCH/BAR COMM., MODEL CIVIL JURY INSTRUCTIONS FOR RHODE ISLAND § 10101 (2d ed. 2003).
South Carolina:	RALPH KING ANDERSON, JR., ANDERSON'S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL § 19-27 (2009).
Tennessee:	TENNESSEE PATTERN JURY INSTRUCTIONS—CIVIL § 14.70 (2010).

Wisconsin:	WISCONSIN JURY INSTRUCTIONS: CIVIL § 3735 (2002), <i>cited in</i> Magestro v. N. Star Envtl. Constr., 649 N.W.2d 722, 727 (Wis. Ct. App. 2002).
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D. Natural Result

Georgia:	COUNCIL OF SUPERIOR COURT JUDGES OF GA., 1 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS: CIVIL CASES § 18.010 (2007); <i>see also</i> Commercial & Military Sys. Co. v. Sudimat, C.A., 599 S.E.2d 7, 14 (Ga. Ct. App. 2004) (approving but not citing to instruction); Pool Mkts. S. Inc. v. Coggins, 392 S.E.2d 552, 554 (Ga. Ct. App. 1990) (approving but not citing to instruction).
Hawaii:	CIVIL PATTERN JURY INSTRUCTIONS COMM., HAWAII STANDARD CIVIL JURY INSTRUCTIONS No. 15.10 (2009), <i>available at</i> http://www.courts.state.hi.us/docs/legal_references/jury_instructions_civil.pdf .
Missouri:	MO. SUPREME COURT COMM. ON JURY INSTRUCTIONS, MISSOURI APPROVED JURY INSTRUCTIONS (CIVIL) § 4.01 (Stephen H. Ringkamp et al. eds., 7th ed. 2012).
Montana:	MONT. STATE BAR, MONTANA PATTERN JURY INSTRUCTIONS: CIVIL § 25.43 (2d ed. 2003); <i>see also</i> Biing Song Lee v. Kane, 893 P.2d 854, 857–58 (Mont. 1995) (noting that the district court gave identical instructions in Stensvad v. Miners & Merch. Bank of Roundup, 640 P.2d 1303 (Mont. 1982)); State Bank of Townsend v. Maryann's, Inc., 664 P.2d 295, 303 (Mont. 1983) (upholding nearly identical instructions).
North Dakota:	STATE BAR ASS'N OF N.D., NORTH DAKOTA PATTERN JURY INSTRUCTIONS—CIVIL § C-74.00 (2008), <i>available at</i> http://www.sband.org/PatternJuryInstruction/ .
South Dakota:	STATE BAR OF S.D., SOUTH DAKOTA PATTERN JURY INSTRUCTIONS CIVIL § 50-70-10 (2009); <i>see also</i> Von Sternberg v. Caffee 692 N.W.2d 549, 555 (S.D. 2005) (upholding but not citing to instruction).
Virginia:	SUPREME COURT OF VA. MODEL JURY INSTRUCTIONS COMM., 2-45 VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL No. 45.500 (2011); <i>see also</i> Reese Merrifalls LLC v. Park's Rest. Enters., No. CL-2009-17180, 2011 Va. Cir. LEXIS 50, at *2–4 (Va. Cir. Ct. Mar. 17, 2011) (upholding an instruction with similar wording).

West Virginia:	2B INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 26-103 (2001); <i>see also</i> C.C. Payne v. Ace House Movers, Inc., 112 S.E.2d 449, 450 (W. Va. 1960) (upholding but not citing to instruction).
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