Rescission, Restitution, And The Principle of Fair Redress: A Response to Professors Brooks and Stremitzer

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RESCISSION, RESTITUTION, AND THE PRINCIPLE OF FAIR REDRESS: A RESPONSE TO PROFESSORS BROOKS AND STREMITZER

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INTRODUCTION

In a remedy that the Reporter for the Restatement (Third) of Restitution and Unjust Enrichment describes as having “[e]normous practical importance and theoretical interest . . .,”¹ scholars in recent years have produced a flood of articles covering contract

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rescission and restitution. With their 2011 article in the *Yale Law Journal*, Remedies On and Off Contract, Professors Richard Brooks and Alexander Stremitzer weigh in on the discussion. Relying on microeconomic theory that reflects the perspective of rational buyers and sellers, the authors’ thesis is that current legal doctrine is too restrictive in allowing buyers rescission and too liberal in granting them restitution. Although other commentators in prominent journals have cited this article with approval, I respectfully suggest that it has some fundamental flaws on both legal and economic grounds. I will summarize the authors’ argument, identify my concerns, and propose an alternative formulation.

Brooks and Stremitzer write that a limited rescission model is "excessive" and based on a “misunderstanding” of the economic effects of these remedies. Their key premise is that legal authorities have exaggerated the threat to contract stability and other normative values posed by liberal access to rescission. Therefore, the authors posit that rational parties from an ex ante perspective would often bargain for broad rights of rescission even if damages for breach were fully compensatory and costless to enforce. Brooks and Stremitzer’s reasoning is that the existence of a buyer’s expanded ability to rescind after a breach, even if not implemented, influences contracting behavior in several ways. First, the seller will reduce the likelihood of promisee rescission by investing to enhance the quality of performance. Second, the seller will minimize the buyer’s possible use of rescission by lowering prices. In this regard, the authors say that allowing the buyer greater rights of rescission would actually benefit the contracting system by allowing rational parties to create efficient incentives to avoid breach.

The authors further argue that, with regard to monetary redress, the law is trending inappropriately from “rescission and restitution” to “rescission and expectation damages.” Brooks and Stremitzer’s major concern is that the Uniform Commercial Code (U.C.C.) allows buyers returning defective goods to revoke their acceptance and to obtain

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2 The most prominent examples are the three symposium issues, *Restitution Rollout: The Restatement (Third) of Restitution and Unjust Enrichment*, 68 Wash. & Lee L. Rev. (Fall 2011); *The Restitution Roll Out*, 65 Wash. & Lee L. Rev. (Summer 2008); and *Restitution and Unjust Enrichment*, 79 Tex. L. Rev. (June 2001).


5 Remedies, *supra* note 3, at 693.

6 *Id.* at 693.

7 *Id.* at 701.
expectation damages, including lost profits. The authors deem these cumulative remedies as especially harmful because they give the rational buyer an improper incentive to rescind as a dominant strategy. Yet another critique is that the disaffirming buyer receives a windfall of expectation damages if he gets to both exit the contract and to obtain the same payoff (except with a losing contract) as though the bargain had been fully performed. This reform movement, they contend, ironically poses the real threat to contractual stability. Therefore, the authors suggest the law should be changed so that buyer must elect between rescission and damages.

As another part of their reform, and to promote more efficient contracting, Brooks and Stremitzer propose that restitution after rescission should only "come at a price." This concept means the relief should be limited to restoration of the purchase price or the other benefits that the buyer has conferred upon the seller. Therefore, the authors would not support redress for the buyer’s damages in reliance on the contract. Brooks and Stremitzer also do not endorse a remedy for disgorgement of the seller’s ill-gotten gain from the breach, such as where the defaulting seller has taken the buyer’s payment, invested it, and earned additional profits. The authors contend the latter remedies conflict with sound economic theory because they disincentivize the above seller investments and price reductions. The authors also argue that these recoveries contradict the fundamental objective of restitution as restoring the status quo ante because these remedies can leave the seller worse off or the buyer better off than if the contract never existed initially.

In their critique, Brooks and Stremitzer focus almost exclusively on economic issues and sources. Even though their thesis strongly contends that contract law undermines sound economic theory, they do not adequately analyze whether the restricted rescission/excessive restitution model actually exists in statutory and case law. Their legal analysis consists mainly of isolated references to the U.C.C., the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Restatement (Third) of Restitution and Unjust Enrichment, the Restatement (Second) of Contracts, and seven decisions (none later than 1988) along with the prerequisite in rescission for a material breach. In contrast, I will perform a comprehensive case law and statutory analysis showing that the law appropriately follows a principle of “fair redress,” which is founded on a liberal rescission/fair restitution approach. Indeed, the

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8 Id. at 701 & n.28.
9 Id. at 694.
10 Id. at 719, 726.
11 Id. at 692-93. While in several passages the authors clearly favor only restoration of the purchase price and other benefits conferred upon the seller, they do hedge on the buyer’s entitlement to reliance damages. See infra notes 197-212 and accompanying text.
12 The authors’ chief point of doctrinal discussion is the weight of the evidence for rescission, including the element of material breach. See Remedies, supra note 3, at 695-96. A “material breach” as a pre-requisite for the buyer’s rescission must “go to the root” or “essence” of the agreement between the parties, or be “one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.” 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 63:3 (4th ed. 2003). For a critique of the material doctrine as a supposed high barrier to rescissionary relief, see Amy B. Cohen, Reviving Jacob and Youngs, Inc. v. Kent [129 N.E. 889 (N.Y. 1921): Material Breach Doctrine Reconsidered, 42 Vill. L. Rev. 65, 83-84 (1997); Eric G. Andersen, A New Look at Material Breach in the Law of Contracts, 21 U.C. Davis L. Rev. 1073, 1092 (1988)(test is vague and applied inconsistently). Brooks and Stremitzer do not advert to these criticisms.
authors’ opposition to reliance and disgorgement is particularly counterproductive as it undermines the core policy of rescission and restitution, a traditionally equitable remedy. When courts act in equity, they must avoid rigid formulas that automatically disqualify a particular mode of relief; to this end, courts are free to fashion flexible remedies to meet the needs of justice on a case by case basis.  

Brooks and Stremitzer’s economic analysis is also faulty. The authors’ undue reliance on hypothetical buyers and sellers largely ignores the unique situational factors and relational issues that frequently contribute to whether a particular buyer will rescind for breach. By consistently emphasizing the supposed choices of rational parties, the authors necessarily subscribe to a strict version of Rational Choice Theory, which many commentators have discredited as an all-encompassing theory of economic and contracting behavior. Besides their speculations, the authors have not offered any data that liberal rights of rescission followed by restricted restitution would enhance contractual stability by strongly encourage seller investments and price reductions. Because the authors’ economic premises are unsupported, their proposals for legal reform lack a sound foundation.

Part I of this Article will describe the right of withdrawal that exists in contract law in both legal and non-legal settings. The authorities are far more liberal in granting this remedy than Brooks and Stremitzer describe in their Article. I will first address the nature of rescission and the validity of the authors’ description of this remedy. Second, I will review rescission and the U.C.C., with emphasis on the buyer’s right of rejection under U.C.C. § 2-601 and the buyer’s right to revoke acceptance under U.C.C. § 2-608. Here, the case law shows a decidedly pro-buyer perspective. Third, I will analyze a sampling of special domestic statutes and regulations, most notably the federal Truth in Lending Act, the Federal Trade Commission’s Door to Door Sales Cooling Off Rule, and the laws of New York and California. Fourth, I will examine common mercantile practice on rescission both in the United States and overseas. Fifth, I will explain why the law favors liberal rights of rescission in what I call the principle of “fair redress.” On a deeper level, besides being the first full-length legal analysis of Brooks and Stremitzer’s paper, I will show the consistent thread in diverse areas of U.S. commercial law and practice liberally granting rescission to achieve the ends of the parties’ good faith within the context of their bargain.

Part II of this Article analyzes the parameters of restitution after rescission. First, I consider the election of remedies doctrine as between rescission and monetary recovery under the common law and the U.C.C. Both regimes in their own way properly follow the basic policy of avoiding duplicate recovery for the promisee. Second, I analyze the merits of permitting both rescission and damages (including profits) under the U.C.C. These combined remedies are not a windfall but are consistent with the fundamental rule of making the injured party whole. Third, I analyze whether the contract price should limit restitution in \textit{quantum meruit}, focusing on the authors’ approach to the well-known California Court of Appeals case of \textit{Boomer v. Muir}.  

\textsuperscript{13} See Umphres v. J.R. Mayer Enterprises, Inc., 889 S.W.2d 86, 91 (Mo. App. 1994)(stating general policy). Many cases recognize the “equitable” nature of these remedies. See \textit{infra} notes 16, 23, 81 & 208 and accompanying text.

\textsuperscript{14} 24 P.2d 570 (Cal. Dist. Ct. App. 1933).
authors have misconstrued the case and I will further prove that the majority rule allowing redress in excess of the contract price has a sound legal, normative and economic basis. Fourth, I critique Brooks and Stremitzer’s inflexible rejection of the buyer’s reliance and disgorgement interests in restitution. Fifth, I contest both the authors’ adoption of what amounts to Rational Choice Theory and their failure to incorporate relational contracting principles to their view of rescission and restitution. As with Part I of this Article, my Part II analysis demonstrates the common thread of achieving fair redress for the buyer, which theme supports making the injured party whole (but no further) through the sound exercise of equitable discretion.

I. THE RIGHT OF BUYER WITHDRAWAL: LEGAL AND NON-LEGAL RELIEF

A. The Nature of Rescission

Generally, the authors are correct that an aggrieved buyer encountering a seller’s breach may elect between (1) affirming the contract and seeking money damages or specific performance or (2) disaffirming the contract and pursuing rescission followed by restitution. Brooks and Stremitzer properly define “rescission” as undoing the contract, eliminating all obligations under the contract from the time of breach. They are also correct that “restitution” after disaffirmance means the parties return the money, property or other benefits that restores their pre-contract position.

Brooks and Stremitzer further have a point that rescission should not be available for promisees who will abuse the remedy as a pretext to avoid an unfavorable contract. Some decisions do rely on this consideration. Along similar lines, the authors are correct that some cases emphasize the instability that results from inappropriately

15 Remedies, supra note 3, at 692.
16 Id. at 692 n.2. Compare McEnroe v. Morgan, 678 P.2d 595, 598 (Idaho Ct. App. 1984)(“Rescission is an equitable remedy that totally abrogates the contract and restores the parties to their original positions); Busch v. Model Corp., 708 N.W.2d 546, 551 (Minn. App. 2006)(rescission is an “equitable remedy” that places the parties “in the same position they would have been had the contract never existed”); Bossie v. Boone County Bd. of Educ., 568 S.E.2d 1, 5 (W.Va. 2002): “Generally speaking, the effect of a rescission of a contract is to extinguish the contract and to annihilate it so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken”.
17 Head & Seemann, Inc. v. Gregg, 311 N.W.2d 667, 669 (Wis. Ct. App. 1981), aff’d, 318 N.W.2d 381 (Wis. 1982)(also noting that “rescission is always coupled with restitution”). See also Glendale Federal Bank, FSB v. United States, 239 F.3d 1374, 1380 (Fed. Cir. 2001)(“The idea behind restitution is to restore--that is, to restore the non-breaching party to the position he would have been in had there never been a contract to breach concern with fairness to the injured party combined with remedial economy”).
18 Remedies, supra note 3, at 714-15.
19 E.g., Phez Co. v. Salem Fruit Union, 201 P. 222, 231 (Or. 1921)(“This pretext of rescission seems to us to have been an afterthought, conjured up to escape the consequences of what war conditions had rendered an unprofitable, if not a losing, contract”).

Although the authors assert that the undue availability of rescission “has been a source of great anxiety among legal authorities,” Remedies, supra note 3, at 693, they fail to cite any case law for this proposition. My reading of the cases is that the courts approach this issue much more matter of factly. See, e.g., Janusz v. Gilliam, 947 A.2d 560, 566 (Md. 2008)(no party has a right to rescind a contract merely because he or she finds, in the light of changed conditions, that he or she has made a bad deal).
undoing contracts, because the “public has an interest in the sanctity of contract which forms the foundation for economic development and the free flow of goods and services.”

This “sanctity of contract” also reflects a moral judgment that contracts should be upheld whenever possible.

Undoubtedly, these policies do caution against the overly lenient allowance of rescission for breach of contract.

Beyond the above observations, however, Brooks and Stremitzer’s legal analysis is incorrect about the essential nature of rescission and restitution. The authors call restitution both a contract remedy and a substantive basis for liability. To the contrary “Restitution . . . is not a cause of action; it is a remedy for various causes of action.”

More importantly, the authors greatly overstate the case that it is “doctrinal orthodoxy” that rescission and restitution is “indisputably” an “off-contract remedy” as compared with damages or specific performance being an “on contract remedy.”

While a number of decisions do indeed support their view, other judicial opinions observe that “[a] party seeking rescission and restitution in a breach of contract action does not seek to undo the contract from its beginning.” Courts have observed, “It has long been recognized that the right to damages or restitution are both remedial rights based on the contract.”

To the same effect, the Restatement (Third) of Restitution And Unjust Enrichment, Section 38, comment a, states that rescission and restitution and restitution as a remedy for breach are equally a remedy “on contract.” Along these same lines, perhaps the most influential commentators on restitution, Lon Fuller and William Perdue, Jr., concluded it was “remarkable that . . . restitution as a remedy [for breach should have come to be seen as] entirely distinct from the usual suit on a contract.” Because the “on/off” test is not very helpful, the result is that most courts do not use this paradigm, but more precisely

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22 Remedies, supra note 3, at 697 (“Restitution steps in as the new legal basis for the promisor’s obligation to provide relief as soon as the prior contractual obligation is disaffirmed.”); id. at 718, n.77 (“We emphasize that we are referring to restitution as a source of obligation, not as a measure of damages as it is sometimes understood”).


24 Remedies, supra note 3, at 692.


26 CBS, Inc. v. Merrick, 716 F.2d 1292, 1296-97 (9th Cir. 1983)(Nelson, J., concurring)(citing Richard v. Credit Suisse, 152 N.E. 110, 111 (1926) (Cardozo, J.)).


28 In their seminal article, Lon L. Fuller & William R. Perdue, Jr. observed, “The conception (or perhaps we should say “visualization”) of restitution as something entirely different from a suit “on the contract” has had a number of unfortunate consequences.” Lon L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages: I, 46 Yale L.J. 52, 72 (1936).
recognize that the rescinded contract no longer has a legal existence to cap the plaintiff’s recovery at the defunct contract’s price.29

The most telling objection against the assertion that the “on/off” contract construct is a part of the “legal orthodoxy” is that the U.C.C. does not follow this characterization for rescission and revocation. The reason is that the U.C.C. deems all remedies by definition to be contract terms. Thus, under U.C.C. §§ 1-201(3, 11) and U.C.C. 1-205, a “contract” incorporates all applicable U.C.C. statutes, which means that all such contracts for the sale of goods ordinarily include those Article 2 terms covering rejection and revocation.30 As a commentator correctly observes, “For all intents and purposes, the availability of rescission and suit off the contract is a non-issue for the buyer in any kind of contract governed by the U.C.C.”31 Brooks and Stremitzer do not seize on this important aspect of a “contract” under the UCC. Further, the authors fail to mention that where the parties include post-performance terms and obligations they agree will continue after contract cessation, such as dispute resolution procedures, the contract is not totally abrogated because these provisions will survive a rescission.32

Lastly, the authors have overlooked the sea change in the cases giving greater importance to rescission as a response to breach. A United States district court decision properly states that the law “[c]learly allows and even encourages rescission as a remedy for complaint that sounds in breach of contract.”33 Furthermore, the current edition of Williston on Contracts observes “[s]ince at least the Second World War, the courts have shown a marked increase in their willingness to grant rescission and most especially, restitution by means of quasi–contract.”34 Indeed, that same treatise comments that “What was certainly a ground-shift in the middle of the last century became a virtual landslide during its final twenty five years.”35 These case law trends contradict the authors’ contention that the law inappropriately restricts rescission for deserving plaintiffs.

B. The U.C.C. and Rescission

In their centerpiece legal criticism, Brooks and Stremitzer analyze rescission under the U.C.C., and therefore this Article will give this area the greatest emphasis as well.36 The authors’ argument can be summarized as follows. They claim that parties

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30 The exception is that, generally, the parties may vary a U.C.C. requirement by agreement, U.C.C. § 1-302(a), subject to the exception that “Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, a remedy may be had as provided in this Act.” See U.C.C. § 2-719(2) & cmt. 1.
35 Id.
36 Brooks and Stremitzer also argue that the United Nations Convention on Contracts for the International Sale of Goods (CISG) suffers from the same defects as the U.C.C. in unduly restricting rescission and overly generous in providing restitution See Remedies, supra note 3, at 701 nn. 27-28. The CISG, a product
have restricted rights to avoid a contract under the U.C.C.\textsuperscript{37} Relying upon U.C.C. § 2-608, which deals with the buyer’s revocation of acceptance, Brooks and Stremitzer assert that this section “makes clear that rescission was avoided in the Code because of concern that the term was capable of ambiguous application and . . . susceptible also of confusion with cancellation.”\textsuperscript{38} In making this argument, the authors rely heavily on the comment I to U.C.C. § 2-608, which states “[t]he section no longer speaks of ‘rescission.’”\textsuperscript{39} The authors immediately back away from their claim, however, when they say the U.C.C. “remains confused” on this point. Brooks and Stremitzer observe “the Code itself sometimes [uses] the term ‘rescission’ and nowhere defines what it means by that usage or explaining if it differs in application from “revocation of acceptance.”\textsuperscript{40} They further observe that the U.C.C. § 2-608 has also “contributed to the concealment of rescission through the murky label ‘revocation of acceptance’”\textsuperscript{41} but the authors make no efforts to explain the elements of the revocation remedy.

I disagree with Brooks and Stremitzer’s argument that the U.C.C. is opposed to rescission. The first flaw in the authors’ contention is they fail to mention that the U.C.C. co-exists with a common law remedy for rescission in contracts for the sale of goods. Relying on U.C.C. § 1-103, which states that the U.C.C. is supplemented by the

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\textsuperscript{37} Remedies, supra note 3, at 693 ("[T]he authorities have limited the ease with which rescission may be elected.").

\textsuperscript{38} Remedies, supra note 3, at 692, n.2. Several authors note that instead of using the term “rescission,” U.C.C. § 2-106(3, 4) contrasts “cancellation,” which occurs when either party puts an end to the contract for breach by the other party, and “termination,” which is the same “cancellation” except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 21.2 (4th ed. 1998).


\textsuperscript{39} U.C.C. § 2-608 cmt. 1.

\textsuperscript{40} Remedies, supra note 3, at 692, n.2.

\textsuperscript{41} \textit{Id.} at 697, n.13.
prevailing rules of law and equity, the Kansas Court of Appeals ruled that “a party's right to seek the equitable remedy of rescission has not been affected by any provision of the U.C.C.”42 The existence in many jurisdictions of this parallel statutory and common law power in contracts for the sale of goods, and the concomitant expanded remedial choices available to the plaintiff, undercuts Brooks and Stremitzer’s contention that the UCC is restrictive on rescission.43

The authors also have misconstrued the U.C.C.’s references to rescission in various Code sections and commentary. Although U.C.C. § 2-608, comment 1, does indeed say “the section no longer speaks of “rescission,”” the authors are wrong in claiming that the term rescission was avoided in the Code. Technically, the quoted statement appears in a comment that pertains to only one section, U.C.C. § 2-608, but such comments are not part of the U.C.C. itself; they can have only “persuasive” weight.44 Otherwise, the Code repeatedly embraces “rescission” without reservation. U.C.C. § 2-720 explicitly says that parties may use the word “rescission” to reserve a right of action for breach of contract. U.C.C. § 2-721 unqualifiedly uses the word “rescission” when it states, “Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.” U.C.C. § 2-209 (not mentioned by the authors) further embraces rescission as a remedy when it states that a signed agreement which excludes modification or “rescission” except by a signed writing generally cannot be otherwise modified or rescinded. Therefore, I concur with the current edition of Corbin on Contracts when it opines, “The present author does not agree that U.C.C. Article 2 was intended to abolish the concept of rescission.”45

Another important gap in Brooks and Stremitzer’s analysis is that they do not address the case law upholding the right of rescission under the U.C.C. My analysis below concentrates on the two most important U.C.C. sections in this area, Section 2-601 on the buyer’s right to reject improper delivery, and Section 2-608 on buyer revocation of acceptance.

The decisions commonly use the “rescission” terminology in describing the U.C.C.’s approach on the buyer’s right to reject the tender or delivery of the goods. Thus, U.C.C. § 2-601 provides that the buyer upon receipt of goods in a one shot (single delivery) contract which “fail in any respect to conform to the contract” may reject them, accept them or accept only some of a number of commercial units.46 With every court

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43 Remedies, supra note 3, at 693,701, 714, 715 (stating how the law uses various techniques to “restrict rescission rights”).
44 General Motors Acceptance Corp. v. Anaya, 703 P.2d 169, 172 (N.M. 1985) (also stating that U.C.C. comments “are not binding on the courts”).
46 For the rules on rescission of installment contracts, see U.C.C. § 2-612(2)-(3). The CISG follows a U.C.C. Article 2-type policy in Chapter II, Section II. As one commentator observes, “Where the buyer has not accepted the goods (i.e., the seller has not delivered or the buyer refuses to retain the goods) avoidance under the Convention yields results very similar to those under U.C.C. Article 2.” Harry M. Flechtner, Remedies Under The New International Sales Convention: The Perspective From Article 2 Of The U.C.C., 8 J.L. & Com. 53, 62 n.36 (1988). Some relatively minor differences exist, such as the CISG does not follow a strict version of the perfect tender rule. See CISG-AC Opinion no 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, para. 3.3, 7 May 2005, Badenweiler (Germany)
considering the matter indicating that rejection under U.C.C. § 2-601 is a remedy “similar” to (and providing the same relief as) common law “equitable rescission,”⁴⁷ the U.C.C. allows a buyer to reject whenever the tender of delivery or the goods so delivered were not “perfectly in conformity with the contract.” Often called the “perfect tender rule,”⁴⁸ this rule is subject to limited exceptions, such as the seller’s right to cure the defects under U.C.C. § 2-508, which allows the seller to repair the items or to provide substitute or missing items.⁴⁹ Nevertheless, consistent with the injunction of U.C.C. § 1-102(1) & U.C.C. §1-106(1) that remedies shall be “liberally construed,” the decisions say that U.C.C. § 2-601 displays a pro-buyer perspective in that courts must give “all reasonable leeway” to the “rightfully rejecting . . . buyer.”⁵⁰

Next, in denying the existence of rescission under the U.C.C., and by giving so much weight to Comment 1 to U.C.C. § 2-608, the authors do not cite the numerous cases equating common law rescission and revocation of acceptance under U.C.C. § 2-608. Most decisions have found that the U.C.C. § 2-608 “is intended to provide a buyer with the same relief as the common law remedy of equitable rescission.”⁵¹ Thus, as with common law rescission, “the remedies associated with revocation of acceptance are intended to return the buyer and seller to their presale positions.”⁵² Further, U.C.C. § 2-608(3) grants a buyer who revokes his acceptance “the same rights and duties with regard to the goods involved as if he had rejected them” under U.C.C. § 2-601. For all these reasons, most courts either give lip service to the brief aside in comment 1 to U.C.C. § 2-608⁵³ so heavily stressed by Brooks and Stremitzer or omit the comment altogether.⁵⁴

(mentioning that CISG through Article 52 follows a limited perfect tender rule). Thus, Brooks and Stremitzer’s contention is unsupported that the CISG represents a demand to restrict the availability of rescission. Compare Remedies, supra note 3, at 701 & n.28.


⁴⁸ E.g., Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017, 1024 (2d Cir. 1978); Moulton Cavity & Mold, Inc. v. Lyn-Flex Industries, Inc., 396 A.2d 1024, 1027 (Me. 1979)(citing cases).

⁴⁹ Compare William H. Lawrence, The Prematurely Reported Demise of The Perfect Tender Rule, 35 U. Kan. L. Rev. 557, 590 (1987)(“Despite the views of commentators and some courts, the perfect tender rule in Article 2 is not so undercut by other Code provisions so as to make it a shadow of its former self”).


⁵³ E.g., Ramirez v. Autosport, 440 A.2d 1345, 1351 (N.J. 1982) (citing comment but also observing that revocation is “tantamount” to rescission); Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc., 587 P.2d 816, 818 (Idaho 1978)(citing comment and observing that rescission and revocation amount to the same thing).

Indeed, at least one court contends that comment 1 to U.C.C. § 2-608 supports, rather than abolishes, rescission under the Code.\(^55\)

The authors further overlook that U.C.C. § 2-608 “lives on” as the successor to the traditional equitable remedy of rescission and that it is a “liberalization” of this relief as compared with the common law.\(^56\) Buyer subjectivity is the focus for this remedy. The test for revocation under U.C.C. § 2-608(1) is whether the value of the goods was “substantially impaired.” The test for substantial impairment is not the reduced value of the goods on the open market or their value to the average buyer, but rather the detriment to the “particular buyer involved.”\(^57\) Accordingly, if the defect “shakes the buyer's faith” or undermines his confidence in the reliability and integrity of the purchased item, even where the defect is curable, that circumstance can support revocation.\(^58\) The authors discuss none of these liberal elements of U.C.C. § 2-608.

Contrary to Brooks and Stremitzer’s characterization of U.C.C. § 2-608 as “concealing rescission” and being “murky,”\(^59\) the above analysis has shown that numerous principles mark clear boundaries for this generous remedy. In all respects, consistent with the injunction of U.C.C. § 1-102 that remedies shall be “liberally construed,” the U.C.C. displays a pro-buyer revocation policy in that courts must give “all reasonable leeway” to the “rightfully . . . revoking buyer.”\(^60\)

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The buyer’s power under the CISG to avoid the contract after the goods have been delivered is “strikingly similar” to the buyer’s power to revoke acceptance under U.C.C. Article 2. Harry M. Flechtner, Remedies Under The New International Sales Convention: The Perspective From Article 2 Of The U.C.C., 8 J.L. & Com. 53, 63 (1988). Accord 1 GUIDE TO INTERNATIONAL SALE OF GOODS CONVENTION § 1:26 (2011)(CISG “takes “a very similar approach to UCC 2-608 but in a much more direct fashion).


\(^{59}\) Remedies, supra note 3, at 697, n.13.

C. Special Domestic Statutes and Regulations

Brooks and Stremitzer further fail to mention that besides the U.C.C., a number of federal statutes and regulations in the United States generally aimed at consumers support a broad right of rescission. These rights comprise a significant part of the U.S. economy. In the federal system, examples of these tools are the Truth in Lending Act (TILA) and the Federal Trade Commission (FTC) Door-to-Door Sales Cooling Off Rule. In addition, state statutes provide rights of avoidance in multitudinous contracts for services. A flavor of these broad rights may be shown by consulting the laws of California and New York, two bellwether states for commercial transactions in the United States.

1. TILA

The TILA and its implementing regulations assure the meaningful disclosure of credit so that consumers can readily compare various terms and avoid the uninformed use of credit.\(^{61}\) To accomplish this purpose, the TILA generally requires disclosure of credit terms in an understandable manner for the consumer.\(^{62}\)

When the transaction, other than for the purchase of the home, involves the taking of the consumer's principal dwelling as collateral, the TILA grants consumers the right to rescind the transaction. The consumer has this unimpaired right for three days, but it may last for up to three years if the homeowner does not sell the home and if the seller fails to provide important TILA disclosures at the time of the original credit transaction.\(^{63}\) Two types of trigger events will extend the time to rescind: (1) a failure to provide the consumer having an interest in the property with one copy of the TILA disclosure form that has all the material information correctly disclosed; and (2) failure to give the consumer two copies of the notice of the right to cancel, one copy to keep and one to use if the consumer exercises the option to rescind.\(^{64}\)

TILA is a remedial statute with a strong pro-buyer perspective liberally construed in favor of the rescinding consumer and strictly enforced against the creditor.\(^{65}\) Lenders are generally strictly liable for inaccuracies, even absent a showing that the inaccuracies are misleading.\(^{66}\) Accordingly, a court has no discretion to decline TILA rescission notwithstanding any equities in favor of the seller.\(^{67}\)

2. FTC Door-to-Door Sales Cooling Off Rule

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\(^{64}\) 15 U.S.C. § 1635(a); 12 C.F.R. §§ 226.5(b), 226.15(b), and 226.23(b) (cited in In re Regan, 439 B.R. 522, 527 (Bankr. D. Kan. 2010)).
\(^{66}\) Smith v. Cash Store Management, Inc., 195 F.3d 325, 328 (7th Cir. 1999).
\(^{67}\) In re Regan, 439 B.R. 522, 527 (Bankr. D. Kan. 2010).
The FTC Rule, 16 Code of Federal Regulations (CFR) Part 429, provides that in connection with door-to-door sales, it constitutes an unfair and deceptive act or practice for any seller that fails to furnish the buyer with a fully completed copy of the contract, and that contains a statement in substantially the following form in ten point, bold face type:

“You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.”\(^{68}\)

In broad pro-buyer coverage, the Rule defines a “door-to-door sale” as a sale, lease, or rental of consumer goods or services with a purchase price of $25 or more, whether under single or multiple contracts. For the consumer to invoke the rule, he must show the seller or his representative personally solicited the sale, including those sales in response to or following an invitation by the buyer. Lastly, the regulation applies where the buyer's agreement or offer to purchase is made at a place other than the seller’s place of business.\(^{69}\) The regulation has limited exemptions, such as for sellers of arts or crafts sold at fairs or similar places.

The above form must contain all pertinent details of the right to cancel and the seller must further explain this right to the purchaser, except in emergencies.\(^{70}\) Subject to giving the seller written notice, the buyer may cancel for any reason within three business days of the agreement.\(^{71}\) The pro-buyer policy is that consumers are entitled to protection from unscrupulous or high pressure sales practices. Therefore, the law allows an extended time for buyers to contemplate the possible consequences of the transaction and to reverse their commitment, without penalty.\(^{72}\)

### 3. State Policies

Every state has a similar cooling-off statute\(^{73}\) to the above FTC rule and some jurisdictions have even broader coverage, such as for telemarketing transactions.\(^{74}\) Further, almost all states have adopted many other consumer protection statutes that allow rescission as a corrective remedy. This section will focus on two jurisdictions, California and New York.

California permits purchaser avoidance for the following contracts: credit repair services; dance studio services; dating services; dental services; discount buying services; door-to-door sales; electric service; employment counseling services; endless chain scheme; franchise sales; funeral agreements (pre-need); health studio services; home equity sale during foreclosure; home improvements agreements; home loans; home repair

\(^{68}\) 16 C.F.R. § 429.1.

\(^{69}\) Id.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) See Byron D. Sher, The “Cooling Off” Period in Door to Door Sales, 15 UCLA L. Rev. 717 (1968).


\(^{74}\) E.g., Ala. Code 8-19A-14(a) (1975) (fourteen day cancellation period).
or restoration agreements following a disaster; home-secured transactions; home solicitation sales; immigration consultant services; insurance (life under $10,000); insurance (disability, seniors, life); insurance (property); Internet Sales (when the order has not been filled); job listing services; legal document assistant; manufactured or mobile home transfer; mail/telephone sales (when order has not been filled); membership camping agreements; mortgage foreclosure consultant services; personal emergency response unit agreement; private child support collectors; real estate transfer -- delayed or materially amended transfer disclosure statement; retail installment agreements; seller assisted marketing plans; seminar sales; service contracts for: (a) used cars, home appliances, and home electronic products, (b) new motor vehicles, (c) any type of goods, pro-rata refund less cancellation fee, and (d) telephone sales (when order has not been filled); time shares (short term); undivided interest subdivisions; unlawful detainer assistants; water treatment devices; and weight-loss services.  

New York similarly authorizes purchaser avoidance of numerous transactions: automobile broker business contracts; charitable organization contracts with a professional fund raiser; credit services business contracts; door-to-door sales contracts; health club contracts; home food service plan sales; home improvement contracts; campground memberships; personal emergency service response agreements; prize award schemes; sale of urea-formaldehyde foam insulation; sale or lease contracts for subdivided lands; social referral (dating) services; and telephone sales contracts.

These statutory schemes have the same objective--to protect the gullible individual from wily salespersons so that consumers have a window to cancel contracts they may have signed while under pressure or where they lack adequate information. These statutes do not undermine the stability of contracting, but accomplish the opposite effect by encouraging higher standards of good faith and fair dealing in the market place. Once again, Brooks and Stremitzer have overlooked key federal and state laws and regulations follow sound public policy in recognizing the buyer’s broad rights of rescission in targeted transactions.

D. Common Commercial Practices and Rescission

Common mercantile practices further support the widespread availability of rescission to consumers. Brooks and Stremitzer neglect to mention that many merchants in prescribed circumstances demur from enforcing their rights against customers seeking rescission because they are more interested in maintaining good customer relations for future purchases. As several commentators have noted, while the details can differ, many retailers in the United States and Europe allow purchasers a “core right to withdraw” from the transaction.

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Regarding the United States, Ben-Shahar and Posner have examined in detail the return policies of two major retailers, Walmart and Target, for both in-store and on-line sales. In these establishments, the customer can return without question and without receipts almost all items for cash or store credit. Some qualifications exist, for example, apparel must be returned unworn with tickets attached and books must be unused and unmarked. Another restriction is that the purchaser must return the item within a prescribed period, ordinarily 90 days. Apart from these qualifications, these merchants expect and even invite these returns as part of good customer relations if the buyer is dissatisfied with the product for any reason.\footnote{See Omri Ben-Shahar & Eric A. Posner, \textit{The Right to Withdraw in Contract Law}, 40 J. Legal Stud. 115, 118 nn.5-6 (2011)(citing “Returns Policy” on the Walmart Web site, http://www.walmart.com/cp/Returns-Policy/538459; “Target Stores Refund Policy” on the Target Web site, http://www.target.com/Return-Refund-Policy-Returns-efunds/b/?ie=UTF8&node=13685491).}

Notably, Ben-Shahar and Posner did not report that very many merchants in the United States stand upon their U.C.C. rights in resisting rescission.

Other researchers have reached the same conclusion about common commercial practice in the United States and overseas. Performing a survey of the general conditions of thirty-two shops in the United States and various European nations that consumers visit regularly, Smits writes,

\begin{quote}
Many retail shops throughout the world have adopted the policy that customers can do so at will and receive back the contract price or at least a credit note with which they can buy a different product in the same shop. This return policy is often laid down in the general conditions of the retailer. These contractual rights are even so common that the general public in some countries seems to think that there is a “general right to return goods.”
\end{quote}

Besides their incomplete legal analysis, Brooks and Stremitzer have overlooked the scope and importance of the pro-buyer rescissionary practices at the ground level in the American and European marketplace.

E. Rescission and the Principle of “Fair Redress”

As demonstrated above, Brooks and Stremitzer are incorrect that buyers have restricted statutory and common law rights to rescind for breach of contract or that a trend exists for further retrenchment. Indeed, the law addressing broad powers of

\begin{quote}
Even in areas where mandatory withdrawal rights exist, retailers usually allow their customers to withdraw from the contract for a longer period than necessary. The most plausible reason why they do so is to attract customers, and the only way to do this is to go further than the statutory rule prescribes.
\end{quote}

\textit{Id.} at 682.
rescission is so pervasive that several commentators have noted a “right to withdraw” in
the general law of contracts. 80

On a more fundamental level, Brooks and Stremitzer have missed that, with few
exceptions, the law welcomes rescission for breach when doing so enables the legal
system to promote a fair redress and the parties’ good faith. It must always be
remembered that “rescission is an equitable remedy.” 81 As stated by the Restatement
(Third) of Restitution and Unjust Enrichment, “[T]he justification of rescission as an
alternative remedy for breach is . . . a concern with fairness to the injured party
combined with remedial economy.” 82 The Restatement further observes, “The effect of
rescission in shifting losses can be tolerated as an incidental consequence of a remedy
whose principal function is to release the claimant from an involuntary exchange . . . “. 83

These policies are long standing. In discussing rescission, Williston observed in
1903,

The remedy of rescission, if allowed at all, is allowed on broad principles of justice.
The basis of the remedy is that the buyer has not bought what he bargained for ... [W]hen a buyer buys a horse, warranted sound, the real thing he is after is a sound horse. It is the performance of the warranty, not damages for the breach of it, which is in his mind. He does not want an unsound horse, worth half the money, and the difference in damages.... [I]f the one transferred to him is not sound, he is as truly forced to perform a bargain which he never intended to make, as is any defendant, if compelled to perform his part of a contract when the plaintiff is materially in
default. 84

Williston’s reasoning remains valid to this day and is rooted in the nature of
contract. As modern authorities have said, unless mandated by law, a contract is a private
“ordering” 85 where the parties freely select their partners, trust the other's willingness to
honor his commitments, and define their respective obligations, rewards and risks. 86 The
remedy of rescission, therefore, furthers the general policy of permitting the parties to a
contractual relationship to determine the allocation of risk. 87 Rescission is also part of

80 Omri Ben-Shahar & Eric Posner, The Right To Withdraw In Contract Law, 40 J. Legal Stud. 115, 115
(2011); Jan M. Smits, Rethinking The Usefulness Of Mandatory Rights Of Withdrawal In Consumer
82 RESTATMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 cmt. e (2011). See
also id. at § 37, cmt. a (“The justification for the rescission remedy combines remedial economy and
elementary fairness to the plaintiff”).
83 RESTATMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 cmt. k (2001).
84 Samuel Williston, Rescission for Breach of Warranty, 16 Harv. L. Rev. 465, 472 (1903)(emphasis
supplied).
freedom of contract, a fundamental constitutional and statutory right. The policy here would be “courts have hesitated to compel persons to work together or to enforce other ongoing human relationships.” Accordingly, parties today can agree to rescind for any reason and are essentially afforded the same freedom of contract to rescind an agreement as they have to enter into an agreement. With respect to rescission, Brooks and Stremitzer have ignored the principle of fair redress established in the cases.

II. THE RIGHT OF FAIR REDRESS: THE PARAMETERS OF RESTITUTION AFTER RECISSION

The authors argue that the existing law of restitution after rescission is too generous. They posit that a number of jurisdictions are moving toward combining rescission with expectation damages. Citing various sections of the U.C.C. and several books and articles, the authors claim that United States statutory law allows for combined remedies with no requirement for the plaintiff to elect remedies as between revocation of acceptance and a suit for breach.

The authors also reject current case law on the scope of restitution. The authors express concern with the established view that the rescinding buyer can be entitled to reliance damages, for example, the buyer’s expenses in transporting defective goods back to the seller or for repairing the buyer’s other property injured by the seller’s defective goods. Brooks and Stremitzer further disagree with allowing the buyer’s disgorgement of the seller’s ill-gotten gain, such as where the seller has taken the buyer’s payment, invested it, and earned additional profits. To counter the courts’ asserted tendency to grant excessive restitutionary recovery, Brooks and Stremitzer propose that

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89 U.C.C. § 1-102 cmt. 2. See also Caroline Edwards, Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment, 78 St. John’s L. Rev. 663, 691 (2004)(“Freedom of contract provides the fundamental component of Article 2’s structure”).
93 Remedies, supra note 3, at 701. Brooks and Stremitzer here rely upon the Restatement (Second) of Contracts, Section 344, formulation of “expectation damages” – the plaintiff’s “[i]nterest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.” Id. at 698 & n.16.
94 Id. at 701 n.28.
95 Id. at 720, 726.
96 Id. at 693, 719.
restitution after rescission should be limited to restoration of the price or the promisee’s other conferred benefits to the promisor.97

A. Election of Remedies: The Common Law and U.C.C. Compared

Brooks and Stremitzer appear to argue that U.S. law completely abolishes the election of remedies doctrine when they say “The United States allows for combined remedies.”98 Their support for this statement is comment 1 to U.C.C. 2-608, which states “The buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him.”99 Comparing the U.C.C. practice to the U.C.C.’s predecessor, the Uniform Sales Act, the authors conclude, “It is one of many ironies in this area that the U.C.C. would so expressly abandon the mutual exclusivity of these remedies.”100

In making the above claims about rescission and breach damages, and putting to the side for the moment their discussion of the U.C.C., Brooks and Stremitzer leave out that the common law election of remedies doctrine is alive and well in contracts for other than goods,101 which means that in part, the law does disallow rescission combined with breach damages. This omission severely undermines their unqualified claim that “The United States allows for combined remedies.”102 In particular, as will be shown, this common law rule blocks any attempt by a plaintiff to obtain a windfall by recovering, on the same set of facts, a judgment using two or more theories based simultaneously on contract rescission and contract enforcement.

1. Common Law Election of Remedies

A form of estoppel,103 and “sensitive to equitable principles,”104 the common law doctrine of election of remedies requires a party to select “[o]ne of two or more coexisting and inconsistent remedies which the law affords the same set of facts.”105 According to most courts, although the party may plead in the alternative and pursue all remedies, regardless of consistency, the plaintiff generally must decide between inconsistent remedies before receiving a final judgment.106 The election principle can apply in the same case or in successive actions.107

97 Id. at 693, 719.
98 Id. at 701 n.28.
99 Id.
100 Id.
101 Because the American economy is increasingly oriented to services and not the manufacture of goods, common law rescission is far more important than U.C.C. rescission.
102 Remedies, supra note 3, at 701 n.28.
105 Christensen v. Eggen, 577 N.W.2d 221, 224 (Minn. 1998).
In one application of this election theory, a party under the common law claiming breach of contract must decide whether to obtain expectation damages or rescission.\(^\text{108}\)

As a 2006 California Court of Appeals case stated, “An action for rescission and an action for breach of contract are alternative remedies. The election of one bars recovery under the other.”\(^\text{109}\) Another important point is the aggrieved party has the choice of rescission versus damages just for a material breach; a lesser partial breach can support only a damages remedy.\(^\text{110}\) Accordingly, the election doctrine is based on the logical notion that “prevents a plaintiff from ‘both repudiating [a] contract and then suing on it to gain the benefit of the [same] bargain.’”\(^\text{111}\)

Another policy for the election of remedies rule is to preserve fairness to defendants because the plaintiff is entitled only to complete relief to make it whole, and not double recovery, for a single wrong.\(^\text{112}\) Put more concretely, suppose that a buyer pays $1,000 in advance for items that are so defective when tendered that he rejects them. The plaintiff’s restitutionary remedy here would be a judgment for return of the price paid; his damages remedy is for the full market value of the items that the seller promised to deliver along with the buyer’s incidental outlays and consequential losses, if any, that the seller had reason to foresee at the time of the contract. The buyer, however, is not entitled to a judgment for both enforcement and avoidance costs in the same lawsuit. The reason is that the buyer would receive excessive reparations because he would have the benefit of full performance at no cost.\(^\text{113}\)

\(\text{\textsuperscript{108}}\) Purcell Enterprises v. Edward LeRoux Group, Inc., 896 F.2d 483, 488 (11th Cir. 1990) (“Generally, an election between inconsistent remedies is made after a verdict is entered but prior to the entry of judgment”). \(\text{\textsuperscript{109}}\) See also Seeking v. Jimmy GMC of Tucson, Inc., 638 P.2d 210, 215 n.2 (Ariz. 1981): “We observe that a plaintiff suing outside the U.C.C. for common law rescission and damages for breach of contract or warranty can be forced to choose either rescission or damages as a remedy.”


\(\text{\textsuperscript{112}}\) See Old Stone Corp. v. United States, 450 F.3d 1360, 1371 (Fed. Cir. 2006); 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:32 (4th ed. 2000).

\(\text{\textsuperscript{113}}\) 12-66 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1223 (Joseph Perillo ed., 2003).
Accordingly, courts in non-U.C.C. transactions have said that lost profits damages (as distinguished from restitutory recovery\textsuperscript{114}) are contractual, not consequential, and are “not recoverable in rescission.”\textsuperscript{115} Furthermore, as many courts observe, “Because a rescinded contract is void \textit{ab initio}, following a lawful rescission the “injured” party is precluded from recovering damages for breach just as though the contract had never been entered into by the parties.”\textsuperscript{116} These holdings exemplify the courts’ strong reliance on the logic of the common law election of remedies doctrine to preclude the buyer’s overcompensation with expectation damages when it pursues an action for rescission based on breach of contract.

2. \textit{U.C.C. Election of Remedies}

Undoubtedly, as Brooks and Stremitzer indicate, when it comes to the buyer’s remedy for a defective tender of goods, some decisions do rely upon U.C.C. § 2-608, comment 1, for the proposition that the U.C.C. rejects altogether the election of remedies doctrine. For example, the California Court of Appeals, relying on U.C.C. § 2-608, comment 1, observed that the award of lost profits and the restitution of sums the plaintiff paid “are not per se inconsistent.”\textsuperscript{117} Other courts adopt similar language.\textsuperscript{118} On the other hand, the status of the U.C.C. and the election of remedies doctrine is more nuanced than Brooks and Stremitzer have described. Four points about the U.C.C. and the decisions support this argument.

First, read in context, Comment 1 to U.C.C. § 2-608 does not totally abolish the election of remedies doctrine. As the Utah Supreme Court has commented, “The Uniform Commercial Code makes damages available in an action for rescission, \textbf{but it does not otherwise change the traditional theory of election of remedies.”}\textsuperscript{119} What the Utah court was referring to is the basic purpose of the election of remedies doctrine, i.e., avoiding excessive compensation to the plaintiff, remains in force in the U.C.C.\textsuperscript{120} Brooks and Stremitzer never mention this line of authority. Moreover, the authors, as with some

\textsuperscript{114} Harley-Davidson Motor Co., Inc. v. PowerSports, Inc., 319 F.3d 973, 988(7th Cir. 2003)(rescission and restorative damages are consistent and not subject to election); Boyle v. Odell, 605 A.2d 1260 , 1265 (Pa. Super. 1992)(“Restitution, unlike damages, is a remedy not inconsistent with rescission”).
\textsuperscript{116} Bergstrom v. Estate of DeVoe, 854 P.2d 860, 862 (Nev. 1993)(citing decisions from Kansas and Oklahoma). \textit{See also} Sharp Structural, Inc. v. Franklin Mfg., Inc., 283 Fed. Appx. 585, 589 (9th Cir. 2008) (stating it would be “clear error” for a jury to award both rescission and breach of contract damages).
\textsuperscript{119} Mecham v. Benson, 590 P.2d 304, 308 (Utah 1979)(emphasis supplied).
\textsuperscript{120} \textit{See also} U.C.C. §1-103 (unless displaced by the particular provisions of the U.C.C., the usual principles of law and equity are applicable).
courts, leave out a key portion of the same U.C.C. § 2-608 comment; the latter also says the following about election of remedies—“The prior basic policy is continued . . .” Additionally, Comment 1 to U.C.C. § 2-608 must be read in the context of the commentary to U.C.C. § 2-721, “Remedies for fraud.” The latter comment states explicitly that (1) the “[r]emedies for fraud coincide with the remedies for non-fraudulent breach,” and (2) rescission for breach of contract can bar other remedies “[w]hen the circumstances of the case makes the remedies incompatible.” For these reasons, case law properly identifies the “U.C.C. approach” to election of remedies as turning on the “facts of the case.” Therefore, notwithstanding any possible confusion in the comment to U.C.C. § 2-608, both U.C.C. § 2-608 and U.C.C. § 2-721 show that the U.C.C. captures the basic policy of the election of remedies doctrine in breach of contract cases to avoid excessive recovery for the plaintiff.

In the second point about the U.C.C. and the election of remedies, a number of cases have given little, if any, weight, to this U.C.C.§ 2-608 comment, recalling also that comments are not part of the U.C.C. and can have only persuasive weight. For example, a Florida Court of Appeals decision referenced the U.C.C. comment but still required a U.C.C. plaintiff to elect between revocation of acceptance and breach of contract damages before entry of judgment. In another case, a New Jersey appeals court in a U.C.C. case, without mentioning the U.C.C. comment, employed a traditional election of remedies methodology when it said, “However, once recovery is permitted.

Although U.C.C. § 2-703, strictly speaking, governs only the seller’s remedies for breach, the above U.C.C. comment covers the entire Article 2 in stating , “This article rejects any doctrine of election remedy . . . .” This U.C.C. comment about the relationship between the U.C.C. and the election of remedies, however, is confusing. The first sentence rejects the doctrine as a fundamental policy and states that remedies are always cumulative. The second sentence reverses course and states that a remedy can be “barred” as inconsistent based on the facts of the case. Ironically, this second sentence in comment 1 endorses the fundamental policy of the election doctrine that the first sentence purports to reject. Compare supra notes 106-07 and accompanying text.
either through rescission or by way of damages, the alternative remedy must be dropped.”126 In a third case, a New Mexico case acknowledged comment 1 to U.C.C. § 2-608, but also observed, “the non-alternative nature of the remedies does not entitle the buyer to inconsistent or double recoveries.”127 These cases all conflict with other decisions relying on U.C.C. § 2-608, comment 1 in categorically rejecting the election of remedies principle.

In a third point, the U.C.C. does indeed apply the usual election of remedies doctrine in distinct factual settings. First, several courts have ruled that the promisee may not obtain monetary redress on the same facts for both breach of warranty, which affirms the contract, and revocation of acceptance, which disaffirms the contract.128 Another election doctrine is found in U.C.C. § 2-608 itself; as Professor Allan Farnsworth puts it, a “binding” election must occur under U.C.C. § 2-608(a), “[w]hich states that a buyer that has chosen to treat a breach as partial and has accepted the good with knowledge of their nonconformity is generally deemed to be precluded from revoking acceptance.”129 Consistent with that concept, courts have admonished, “[a]cceptance damages are not applicable where acceptance has been revoked.”130 Yet again, another commentator observes, “There is still, in the general sense, some election of remedy under the Code,”131 citing the buyer’s “alternative remedies” under U.C.C. § 2-712, “Cover”; Buyer’s Procurement of Substitute Goods,” U.C.C. § 2-713, “Buyer’s Damages for Non-Delivery or Repudiation,” and U.C.C. § 2-714, “Buyer’s Damages for Breach in Regard to Accepted Goods.” Brooks and Stremitzer do not mention any of these contrary authorities in their discussion of U.C.C. election of remedies.

It should be conceded, however, that the U.C.C. is more generous than the common law on its idea of what makes the injured party whole. As will be discussed in subsection II.B below, the U.C.C. in delineating the revoking buyer’s remedies for breach allows recovery for damages based on the buyer’s covering on the market along with consequential and incidental damages. To this extent, election of remedies is less of a bar to damages as combined with rescission. The U.C.C. is also necessarily more generous in granting both rescission and damages because all UCC remedies are remedies “on the contract” unless disclaimed.132 Nevertheless, the fundamental principle of the election of remedies doctrine—to preclude double recovery for a single wrong133—is still “basic

129 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 8.19, p. 536 n.9 (3d ed. 2004).
132 See supra notes 30-31 and accompanying text.
133 Head & Seemann, Inc. v. Gregg, 311 N.W.2d 667, 669 (Wis. App. 1981), aff’d, 318 N.W.2d 381 (Wis. 1982).
policy” under the U.C.C. Further, the U.C.C. approach closely aligns with the overall objective of the U.C.C.’s remedial system. As stated in U.C.C. § 1-106(1), remedies are to be “liberally administered” but only so that “the aggrieved party may be put in as good a position as if the other party had fully performed.” Therefore, awarding the revoking plaintiff relief for his actual losses to make him whole, consistent with U.C.C. § 1-106(1), comports with both the election of remedies and the U.C.C. system of relief.

B. The U.C.C., Revocation of Acceptance, and Expectation Damages

In discussing the U.C.C.’s treatment of revocation of acceptance and monetary redress, the authors strongly object to the allowance of expectation damages. Brooks and Stremitzer rely upon U.C.C. § 2-711(2), which deals with the buyer’s remedies where the seller either fails to deliver or repudiates the contract. Next, they point to a casebook commentary which observes that U.C.C. § 2-721 allows both damages and lost profits when the buyer revokes. The authors further cite various several treatises and law review articles which Brooks and Stremitzer believe confirm that the U.C.C. permits revocation of acceptance and full expectation damages.

This section will show that the authors’ treatment of the U.C.C. on revocation and damages is incomplete. It will further establish that the U.C.C.’s approach on these combined remedies implements the U.C.C.’s salutary policy in Section 1-106 to make the buyer whole, but not any further, as against the seller’s unjustified breach.

The “Cover” Requirement. The U.C.C. in § 2-711(1) addresses the rejecting or revoking buyer’s remedies for money damages. U.C.C. § 2-711(1) provides that such a buyer may cancel the contract and recover the portion of the purchase price already paid. Additionally, the buyer under U.C.C. § 2-711(1)(a) may either “cover” and obtain damages pursuant to U.C.C. § 2-712 or recover damages for non-delivery as provided in U.C.C. 2-713. Either combination of remedies entitles the buyer to both restitution and damages. By contrast, the buyer’s alternative under U.C.C. §§ 2-714 & 2-715 is to accept the goods despite the non-conformity and to recover damages therefor, including for breach of warranty (U.C.C. § 2-714), and incidental and consequential damages.

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134 U.C.C. § 2-608 cmt. 1.
135 U.C.C. Article 1 has been revised in about half the states, which use parallel U.C.C. § 1-305.
136 Commentators have noted that the CISG also has a place for election of remedies, because the plaintiff “has the option to choose either avoidance or non-avoidance and thus the power to elect between the two distinct remedial schemes available under the Convention.” Harry M. Fiechtner, Remedies Under The New International Sales Convention: The Perspective From Article 2 of the U.C.C., 8 J.L. & Com. 53, 68 (1988). Brooks and Stremitzer do not mention this observation. Compare Remedies, supra note 3, at 701 n.28.
137 Remedies, supra note 3, at 701 n.28.
138 U.C.C. § 2-711 cmt. 1. Under U.C.C. § 2-720, unless a contrary intention clearly appears, an action for rescission may not be construed as a renunciation of any claim for damages.
139 Kashi v. Gratsos, 790 F.2d 1050, 1056 (2d Cir. 1986) (remedies are cumulative). See also U.C.C. § 2-712 cmt. 3 (“cover is not a mandatory remedy for the buyer”). If the buyer fails to meet the pre-requisites for cover under U.C.C. § 2-712, he will be restricted to U.C.C. § 2-713. See Martella v. Woods, 715 F.2d 410 (8th Cir. 1983)
140 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 55.6 (Joseph M. Perillo ed., 2003).
Accordingly, case law is clear that “Acceptance damages are not applicable where acceptance has been revoked,” which means a revoking buyer will not be entitled to the difference in value between what the buyer received against what had been warranted. In a similar principle, U.C.C. § 2-712 does not follow the benefit of the bargain compensation standard of U.C.C. § 2-713, i.e., the difference between the market price at the time when the buyer learned of the breach and the contract price along with incidental and consequential damages but minus the expenses the buyer saved as a result of the seller's breach. Put another way, the remedies of U.C.C. §§ 2-711 & 2-712 prevent the revoking buyer from being overcompensated for his loss. This policy partially resolves Brooks and Stremitzer's concern that the UCC is too generous with expectation damages for the revoking buyer.

In other principles regarding cover, case law recognizes that it is a mechanism that allows the buyer to avoid lost profits where the seller has failed to perform. In responding to the seller's breach, the buyer under U.C.C. § 2-712(1) may cover “by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.” This remedy accords with commercial reality “[b]ecause the buyer usually needs the goods he has bargained for, and he covers to realize one of the objects of the initial contract, namely to exchange money for goods.” The amount of cover damages as against the seller under U.C.C. § 2-712(2) will be based on the difference between the cost of cover and the contract price together with any incidental or consequential damages as defined in U.C.C. § 2-715, but minus the expenses the buyer has saved as a result of the breach.

144 See also Aubrey's R.V. Center, Inc. v. Tandy Corp., 731 P.2d 1124, 1131 (Wash. Ct. App. 1987)(citations omitted):

The objective behind awarding damages to a buyer who justifiably revokes acceptance is different [from breach of warranty]. [With revocation], the buyer is not merely seeking the benefit of his or her bargain. Rather, the buyer seeks to be restored to the position he or she would have been in if the contract had never been entered into. Thus, the objective of this remedy is primarily restitution.

Compare U.C.C. § 2-720 (action for rescission does not waive right to seek damages, nothing else appearing).

Therefore, in a codification of the rule that a buyer must mitigate damages, the U.C.C. limits the recovery of consequential damages (discussed below) to those amounts that the buyer could not have “obviated by cover.” Once again, the U.C.C. in the cover situation policy guards against overcompensation to the buyer.

**Consequential and Incidental Losses.** Still other U.C.C. policies limit the revoking buyer’s monetary recovery. The above referenced U.C.C. § 2-715 addresses consequential damages, even as they overlap to an extent with incidental damages (discussed below). Consequential losses resulting from the seller’s breach include “[a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.” The “reason to know” language concerning the buyer's particular requirements comes from the English decision of *Hadley v. Baxendale*, still the leading case in the United States on consequential damages, which category includes lost operating profits of business.

Another important point comes from comment 6 to U.C.C. § 2-715. This comment provides that if the seller knows that the buyer is in the business of reselling the goods, the seller is charged with knowledge that the buyer will be selling the goods in anticipation of a profit. Because U.C.C. § 2-715 imposes an objective rather than a subjective standard in determining whether the seller should have anticipated the buyer’s needs; the seller’s actual knowledge of the buyer's requirements is not required. What is required is that “To recover loss of profits plaintiff has the burden to show that he could not have covered.”

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148 U.C.C. § 2-712 cmt. 3; Sun-Maid Raisin Growers v. Victor Packing Co., 194 Cal. Rptr. 612 (Cal. App. 1983). See also Panhandle Agri-Service, Inc. v. Becker, 644 P.2d 413, 419 (Kan. 1982)(buyer’s failure to use the remedy of cover when reasonably available will preclude recovery of consequential damages, such as lost profits).

149 As the court observed in *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 508 (E.D.N.Y.1974),

While the distinction between the two is not an obvious one, the Code makes plain that incidental damages are normally incurred when a buyer (or seller) repudiates the contract or wrongfully rejects the goods, causing the other to incur such expenses as transporting, storing, or reselling the goods. On the other hand, consequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.


152 See also Canusa Corp. v. A & R Lobosco, Inc., 986 F. Supp. 723, 731 (E.D.N.Y. 1997)(“When the aggrieved buyer is in the business of reselling the breaching seller's goods, the buyer may recover the lost profits as consequential damages”) (citing cases); Larsen v. A.C. Carpenter, Inc., 620 F. Supp. 1084, 1131 (S.D.N.Y. 1985).


154 Kanzmeier v. McCoppin, 398 N.W.2d 826, 833 (Iowa 1987).
by Brooks and Stremitzer because the U.C.C. here goes no further than making the buyer whole as the consequence of the seller’s breach.

U.C.C. § 2-715(1) contains another compensation policy as it describes “incidental damages” from the seller’s breach to include, but not limited to, “[e]xpenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.” Examples of other compensable losses would be interest, finance charges, and extra overhead, labor and expenses. This redress to the buyer is eminently fair, and avoids the overcompensation as feared by Brooks and Stremitzer, because “there is no justice in such a case compelling the buyer to relinquish his actual damages as a condition of getting rid of an obnoxious and useless chattel.”

Overall U.C.C Policy. U.C.C. §1-106 states the overarching policy for all remedies to be liberally construed so that the aggrieved party shall be put in as good a position as if the other party had performed, which means that damages are proper where consistent with actual losses. This doctrine applies equally to the revocation of acceptance remedy. Accordingly, a revoking buyer is permitted not only to avoid the obligation to pay the purchase price, but also to seek those damages that would be available to a non-accepting buyer, including reliance damages stemming from his incidental expenses and his consequential damages that were within the reasonable contemplation of the seller. As stated in Williston On Contracts, “This is a sensible result since, following the revocation, the buyer is in essentially the same position as if he or she had rejected initially.” These recoveries therefore are different from a windfall to the buyer, which are never permissible. Brooks and Stremitzer do not mention any of these policies in their critique of the U.C.C.

On a more fundamental level, the U.C.C. rules on revocation and monetary redress are fair to both buyers and sellers. The U.C.C. in §1-103 adopts the principles of law and equity where consistent with the Code; this standard is important because “A plaintiff electing rescission is entitled to those damages that are necessary to make him whole.” To this same end, courts have said: “In equity, the court makes the calculated adjustments necessary to do complete justice. If complete justice requires that damages be awarded with the rescission, the court will award them.” Where the law has a choice, it should always impose the loss upon the wrongdoer whose conduct has caused

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155 See also U.C.C. § 2-715 cmt. 1(listing non-exclusive).
160 See Admiral Financial Corp. v. United States, 378 F.3d 1336, 1345 (Fed. Cir. 2004)(restitution never permissible to bestow a windfall).
the harm rather than upon the innocent party. The U.C.C. makes this same choice in fully protecting the revoking buyer’s losses.

By contrast, Brooks and Stremitzer never cite the precedents (discussed above) that state “The only real reason to deny both rescission and damages is the danger of allowing recovery more than once for a single item of loss.” The authors further leave out the mandatory nature of U.C.C. § 1-106 and the logic of its command to award the revoking buyer his restitution interest, his reliance damages and his consequential losses, including lost profits, where they are attributable to the seller’s wrongful conduct. While the common law in denying profits for rescission places more emphasis on the logical inconsistency between affirming and disaffirming the same contract, the U.C.C. is not subject to this objection because revocation is always an “on-contract” U.C.C. remedy. As stated above, the contract contains this remedy as a matter of law, unless properly disclaimed. The U.C.C. also exemplifies the forward thinking policy that the law’s “constant tendency . . . is to find some way in which damages can be awarded where a wrong has been done.” Accordingly, Brooks and Stremitzer have not shown that the U.C.C.’s approach to rescission and damages is illogical, overly generous, or a threat to contractual stability.

C. Should the Contract Price Limit Restitution?: The Case of Boomer v. Muir

As part of their critique that the restitution after rescission is too generous under current legal doctrine, Brooks and Stremitzer contend that restitution can provoke “ex post inefficiency.” By this concept, the authors mean that after the parties make their investments and the value of the exchange is known, a payoff in restitution that would exceed the contract price incentivizes the injured party “[t]o search for, or even induce, a

163 See Amber Resources Co. v. United States, 73 Fed. Cl. 738, 747 (2006) (when given a choice on which of two parties should receive a windfall, “there is no reason” for a court to confer it upon the party in breach); Mayer v. Town of Hampton, 497 A.2d 1206, 1210 (N.H. 1985)(referring to the “obvious basis that it is better for unexpected loss to fall upon the intentional wrongdoer than upon the innocent victim”); EarthInfo, Inc. v. Hydrosphere Resource Consultants, Inc., 900 P.2d 113, 117 (Colo. 1995) (“It is a principle of the law of restitution that one should not gain by one’s own wrong.”).

164 Fousel v. Ted Walker Mobile Homes, Inc., 602 P.2d 507, 509 (Ariz. Ct. App. 1979) (citing DAN B. DOBBS, DOBBS ON REMEDIES 634 (1973)). See also Brandeis Machinery & Supply Co., LLC v. Capitol Crane Rental, Inc., 765 N.E.2d 173, 177 (Ind. Ct. App. 2002) (one of the broad remedial goals of the U.C.C. is that the aggrieved party be put in as good a position as if the other party had fully performed, but not in a better position).

165 See supra note 30 and accompanying text.

166 Id.

cause for rescission.**168 As support, the authors reference what they deem the “most infamous example” of this scenario, the well-known case of Boomer v. Muir,169 where a subcontractor obtained a judgment in restitution for its incurred costs resulting from the prime contractor’s prevention of the subcontractor’s performance on a hydroelectric dam project.

The gist of Brooks and Stremitzer’s problem with the Boomer case is that the contract price was $300,000, and the prime already had paid the subcontractor $280,000, but the California Court of Appeals nevertheless authorized the plaintiff subcontractor another $258,000. Brooks and Stremitzer opine, “Hence, Boomer’s expectation damages were $20,000, which the court disregarded when it ordered Muir to pay him $258,000 in restitution.”170 The authors further argue that only after the subcontractor realized that it was in a losing contract did it bring the action of rescission and restitution instead of enforcing the contract. Thus, the authors are particularly critical of the Boomer court’s ruling that restitution following rescission should not be limited by the contract price.171

As will be shown, Brooks and Stremitzer have misconstrued the facts of this prominent case because no evidence existed that the subcontractor in Boomer acted opportunistically in searching for an excuse to exit the contract or that it had any inkling at the time of the events that a quasi-contractual recovery could exceed a contractual recovery. Instead, Boomer’s enforcement of quantum meruit with recovery above the contract price has a sound legal, normative and economic grounding.


In Boomer, R.C. Storrie & Co. (Storrie), a partnership of Robert B. Muir and Robert C. Storrie, had a general contract with the Feather River Power Company to build a hydroelectric dam in California. In a subcontract with H.H. Boomer, with a completion date of December 1, 1927, defendant Storrie’s obligation was to deliver to the dam site all the cement, gravel, sand, steel and other metal work which was to become a permanent part of the dam. Boomer’s obligation was to furnish all other materials, labor, and equipment. The contract’s firm fixed price was $300,000. Soon after contract execution, the parties experienced continuing performance disputes regarding the defendant Storrie’s failure to furnish compressed air, to deliver materials, to maintain roads, and to conveniently locate a quarry. Boomer continually sought to make the arrangement succeed as the parties renegotiated important contract terms.172 After eighteen months on the job, Boomer finally left the site even though the dam was 95% complete. Boomer quit the contract in frustration because Storrie had persistently prevented Boomer’s performance, which hindrances caused Boomer to incur significant delays and increased costs. The evidence specifically showed that as late as

168 Remedies, supra note 3, at 716 n.70.
170 Remedies, supra note 3, at 716 n.70.
171 Id. at 719 n.83, citing Boomer, 24 P.2d at 577.
172 Boomer, 24 P.2d at 572 (Storrie increased the subcontractor’s price and the amounts of retainage and Boomer agreed to meet new periodic targets for pouring cement).
approximately two weeks before Boomer left the site, Boomer reaffirmed to Storrie the willingness to complete performance, but to no avail.\textsuperscript{173}

The contract entitled Boomer to receive monthly progress payments for satisfactory work based on a schedule of unit prices. The agreement also entitled Storrie to withhold ten percent of the progress payments for those months where Boomer failed to place a minimum amount of material in the dam. When Boomer finally felt compelled to cease performance after the year and a half of trying to work with the prime, Storrie had paid Boomer all but $20,000 of the $300,000 contract price.

Boomer then filed an action in a California court for rescission and restitution for the value of its partial performance.\textsuperscript{174} The court found that Storrie had committed an unexcused material breach by failing to provide the requisite materials and the other items that Boomer justifiably had ceased performance. The evidence also showed that the prime contractor’s defaults delayed Boomer’s operations and had made performance more expensive. The court made no finding that Boomer had worked inefficiently or had underbid the job so that it would inevitably be in a loss status. The court also made no finding that the contract contained what is commonly called a “No Damages for Delay” clause, which typically provides that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the owner of a construction project.\textsuperscript{175}

Ultimately, the trial court granted Boomer a judgment in rescission and restitution for an additional $258,000 for the market value of its extra labor and materials, which was the difference between Boomer’s costs attributable to Storrie’s delays and other interferences and what Storrie had already paid this subcontractor. Storrie then appealed.

Citing numerous cases throughout its opinion, the California Court of Appeals began by citing the “well settled” rule that a contractor in Boomer’s position has a choice of three remedies: (1) action in rescission and “quantum meruit,” which is a judicially implied in law contract\textsuperscript{176} (2) an action for enforcement of the contract and a remedy in damages for the delays and expense; or (3) an action for repudiation that puts the contract to an end and allows a remedy for the

\begin{footnotes}
\textsuperscript{173} Shortly before terminating performance, Boomer sent Storrie the following telegram on November 27, 1927: “I am prepared to complete my contract on time. Ran out of material last night. Do you want me to hold crew here to put through the three unfinished slabs of the third section? This extra cost must be paid by you. I await your answer today.” After waiting unsuccessfully on Storrie’s response from December 3-15, 1927, Boomer left the site. \textit{Boomer}, 24 P.2d at 573.

\textsuperscript{174} Boomer originally pled two theories in its complaint, rescission and restitution and enforcement of a mechanic’s lien upon the dam. Upon the defendant’s motion, which the court granted, Boomer elected its remedy in rescission and restitution and dropped the count for the mechanic’s lien. \textit{Boomer}, 24 P.2d at 572, 579.


\textsuperscript{176} See Lumbermen’s Mut. Cas. Co. v. United States, 654 F.3d 1305, 1317 n.9 (Fed. Cir. 2011)(recovery in quantum meruit is an implied in law contract); Newbery Corp. v. Fireman’s Fund Ins. Co., 95 F.3d 1392 (9th Cir. 1996) (\textit{quantum meruit} rests on the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice); Campbell v. Nw. Nat’l Life Ins. Co., 573 S.W.2d 496, 498 (Tex. 1978)(“Quantum meruit is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted”).
\end{footnotes}
unrealized profits. Therefore, Boomer’s choice of rescission and quantum meruit was proper.

The Boomer court explained that where the plaintiff rescinds the contract as a remedy for breach, such as where the defendant has prevented the plaintiff’s performance, the plaintiff may file an action in quantum meruit to recover the reasonable value of what it had provided in performing under the contract. The court observed that the quantum meruit remedy is of “equitable origin,” and subject to considerations of “natural justice.” Next, the Boomer court relied on the nature of rescission as extinguishing ab initio all contract obligations, including the price. The court also noted that the contract price is set “on condition that the entire contract be performed” and, therefore, the contract price should not control in partial performance cases involving restitution. Along the same lines, in answer to Storrie’s claim that Boomer’s recovery would exceed the $300,000 contract price ($280,000 + $258,000), the court drew upon the equitable nature of quantum meruit. The Boomer court observed that the subcontractor deserved this relief because it had acted in good faith and had incurred the extra expenses. Accordingly, the court observed, “Where the defendant undertakes to limit the plaintiff’s recovery by treating the contract price as a limitation upon such recovery, he [by his wrong] is asserting a right under the very contract which he himself has discharged.”

Given that the contract and its price limitation no longer existed in the eyes of the law, Boomer under the particular facts could properly enforce its equitable claim (which was adequately documented) and against which Storrie lacked a meritorious defense.

2. Boomer v. Muir: Analysis

As the Boomer court indicated, redress above the contract price is proper where the partially performing party, faced with the obstructions of the breaching party, never agreed to exchange his partial performance and extra costs in return for a cap on the original contract price. The plaintiff’s right to quantum meruit exists not because of the contract the parties once had, but because there is no longer a contract. What must always be kept in mind is that “In its very nature rescission implies the extinction of the contract, and, once accomplished, neither party can base any right of recovery upon it.” Accordingly, Boomer exemplifies the “overwhelming weight of authority” that allows a partially performing plaintiff’s restitutionary recovery to exceed the contract rate or price (even as the contract price can be evidence of the reasonable value).

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177 Boomer, 24 P.2d at 577 (quoting City of Philadelphia v. Tripple, 79 A. 703 (Pa. 1911)).
178 James v. Hogan, 47 N.W.2d 847, 852 (Neb. 1951). See also Sneed v. State ex rel. Dept. of Transp., 683 P.2d 525, 528 Okl. 1983)(“The law requires that every right acquired under a contract be absolutely surrendered as a condition precedent to its avoidance.”); Murdock-Bryant Const., Inc. v. Pearson, 703 P.2d 1197, 1202 (Ariz. 1985) (remedy is imposed for the purpose of for the purpose of “bringing about justice without reference to the intentions of the parties.”).
179 James v. Hogan, 47 N.W.2d 847, 852 (Neb. 1951).
180 Joseph M. Perillo, Restitution in the Second Restatement of Contracts, 81 Colum. L. Rev. 37, 42 (1981). Cases are numerous in this regard. E.g., United States for Use of C.J.C., Inc. v. Western States Rentals, 834 F.2d 1533, 1539 (10th Cir. 1987); United States for Use of Bldg. Rentals Corp. v. Western Building Rentals, 498 F.2d 335 (9th Cir. 1974); United States v. Algernon Blair, Inc., 479 F.2d 638, 641(4th Cir.)
remedy combines elements of preventing both the defendant’s unjust enrichment and the plaintiff’s unjust impoverishment. Boomer further satisfied the requirement that the plaintiff has conferred a benefit upon the defendant, because the benefit here was the value of Boomer’s services that Storrie solicited by the contract. Brooks and Stremitzer


See also Fairbanks North Star Borough v. Tundra Tours, Inc., 719 P.2d 1020, 1029 n.15 (Alaska 1986) (stating measure of recovery on quantum meruit is the reasonable value of the service rendered to the benefited defendant, and not the value of the actual benefit realized and retained by the recipient); Lindquist Ford, Inc. v. Middleton Motors, Inc., 557 F.3d 469, 477 (7th Cir. 2009) (“Under quantum meruit, damages are ‘measured by the reasonable value of the plaintiff’s services,’ calculated at ‘the customary rate of pay for such work in the community at the time the work was performed.’”).

181 Busch v. Model Corp., 708 N.W.2d 546, 552 (Minn. Ct. App 2006)(“For purposes of quantum meruit, determination of the ‘reasonable value’ for a partially completed project can be based on the contract price, even though recovery is sought in equity.”); Mills Realty, Inc. v. Wolff, 910 S.W.2d 320 (Mo. App. 1995)(plaintiff may rely on the contract as prima facie evidence of the reasonable value of services provided.”); City of Damascus v. Bivens, 726 S.W.2d 677, 679 (Ark. 1987)(“The contract price is some evidence of the value of the benefit conferred.”). Further, “As the best means of restoring the status quo ante, cost of performance is often used as the basis for determining the amount of quantum meruit recovery, in the absence of ‘any challenging evidence.’” Acme Process Equipment Co. v. United States, 347 F.2d 509, 530 (Ct. Cl. 1965), rev’d on other grounds, 385 U.S. 138 (1966).

182 United States v. Algeron Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973). See also W.F. Magann Corp. v. Diamond Mfg. Co., Inc., 775 F.2d 1202, 1208 (4th Cir. 1985) (underlying purposes of quantum meruit are to prevent the breaching party from being unjustly enriched and to restore the aggrieved party to the position it occupied before entering the contract).

183 See W.F. Magann Corp. v. Diamond Mfg. Co., Inc., 775 F.2d 1202, 1208 (4th Cir. 1985) (“a threshold requirement for recovering quantum meruit damages is that the defendant receive the benefit of the plaintiff's performance.”); RESTATEMENT (SECOND) OF CONTRACTS § 370(1981) (stating requirement for a benefit to be conferred). But see Lindquist Ford, Inc. v. Middleton Motors, Inc., 557 F.3d 469, 477 (7th Cir. 2009); Ramsey v Ellis, 484 N.W.2d 331 (Wis. 1992) (“[a] plaintiff can recover under quantum meruit even if he confers no benefit on the defendant.”).

184 See City of Philadelphia v. Trippe, 79 A. 703 (Pa. 1911) (sufficient “benefit” existed where the promisor “[e]xpend[ed] the money in good faith and in the course of attempted performance. This is sufficient to give him an equitable claim for reimbursement”); Murdock-Bryant Const., Inc. v. Pearson, 703 P.2d 1197, 1205 (Ariz. 1985): “What is important is that it be shown that it was not intended or expected that the services be rendered or the benefit conferred gratuitously, and that the benefit was not “conferring officiously”); Lindquist Ford, Inc. v. Middleton Motors, Inc., 557 F.3d 469, 478 (7th Cir. 2009) (“to recover under quantum meruit, the plaintiff must prove that the defendant requested the [plaintiff's] services” and “the plaintiff expected reasonable compensation” for the services”); United States for use of Wallace v. Flintco Inc., 143 F.3d 955, 965 n.9 (5th Cir. 1998)(where general contractor actively interferes with its subcontractor's performance, the subcontractor may “treat the contract as rescinded and recover under quantum meruit the full value of the work done.”); GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.8, pp. 45-46; §4.2, p. 370 (1978 & Supp.)(making the specific characterization noted in the text).

The authorities have posed several other tests for this element. In one version, regarding this benefit to the defendant, the award “may as justice requires be measured by either (a) the reasonable value to the other party of what he received or (b) the extent to which the [defendant’s] property has been increased in value or his other interests advanced.” RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981) (quoted in Bernstein v. Nemeyer, 570 A.2d 164, 169 (Conn. 1990)). Another popular standard for measuring the value of the supplier’s services is the amount for which the services and materials supplied could have been purchased from one in the supplier's position at the time and place the services were
devote no analysis to the *Boomer* court’s use of the above well-settled legal doctrines, especially regarding the nature of quantum meruit. The authors also overlook the line of authority implicitly adverted to in *Boomer* endorsing the use of equitable estoppel against the wrongdoer’s attempt to limit the valuation of the injured party’s loss.\textsuperscript{185}

Perhaps the authors’ most serious error is that they have greatly confused matters by implying that Boomer received a windfall because Boomer’s “expectation damages” would have been the remaining $20,000 on the contract price of $300,000 had Boomer brought an action in damages to enforce the contract.\textsuperscript{186} Under established principles, the contract price is never a cap on breach damages because the plaintiff always has the right to recover for those losses fairly anticipated under the contract and the losses that might naturally flow from the breach.\textsuperscript{187} As another commentator observes:

The error, often committed in cases involving an injured supplier, is asking whether restitution may be awarded in excess of the contract price. This question seems to assume, uncritically, that the unpaid portion of the contract price is synonymous with the expectation interest of the injured supplier—an assumption that often is incorrect.

\ldots

The material breach leading to [contract] cancellation very often consists, at least in part, of the owner's (or general contractor's) breach of these obligations. When that occurs, the contractor (or subcontractor) may be palpably injured by delays in rendered. United States for Use of Bldg. Rentals Corp. v. Western Cas. & Sur. Co., 498 F.2d 335, 338 (9th Cir. 1974); Scaduto v. Orlando, 381 F.2d 587, 595 (2d Cir. 1967)(citing cases). Any of these tests supports the result in *Boomer*.

\textsuperscript{184} United States v. Algernon Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973). See also W.F. Magann Corp. v. Diamond Mfg. Co., Inc., 775 F.2d 1202, 1208 (4th Cir. 1985) (underlying purposes of quantum meruit are to prevent the breaching party from being unjustly enriched and to restore the aggrieved party to the position it occupied before entering the contract).

\textsuperscript{185} See McLaughlin v. Shamaly, 26 N.W.2d 733, 734 (Mich. 1947) (“defendant being estopped to deny the benefit”). In *United States v. Behan*, 110 U.S 338, 345-46 (1881), the Court expressly adopted the estoppel principle, *id.* at 346-47, and further commented:

It does not lie ... in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand ... unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purposes of carrying out the contract.

*Compare Boomer*, 24 P.2d at 575 (citing *Behan*); *id.* at 576 (noting Storrie had acted “wrongfully”).

\textsuperscript{186} Remedies, *supra* note 3, at 716, n.70.

the job, having to work around other contractors, or other difficulties. Under standard principles of contract damages, the owner or general contractor owes compensatory damages to the subcontractors for those injuries, separate and apart from the unpaid contract price. Whether those damages are characterized as “consequential” or “incidental damages,” or as a loss in value of the primary performance owed by the party in breach, they demonstrate that the unpaid contract price is but one component of the victim’s expectation interest.\textsuperscript{188}

Accordingly, Brooks and Stremitzer have failed to consider that it is only when the supplier’s entire loss consists of the unpaid portion of the purchase price will restitution equal the supplier’s expectation interest.\textsuperscript{189}

The above analysis shows that the Boomer court’s allowance of quantum meruit recovery above the contract price stands on firm legal grounding. It also has persuasive normative force. As one commentary on Boomer observes,

\begin{quote}

The proposition, announced and followed in the cases considered, that a defendant who interferes with and prevents good faith performance by the plaintiff cannot use the contract to limit plaintiff’s recovery, is sound. When the rule is otherwise, the defendant is allowed to preserve the terms of a hard bargain which he himself failed to keep and to use them to prevent a plaintiff who made a good faith effort to perform from being restored to the position he occupied before entering performance. Such a rule rewards the defendant who did not observe the contract by giving the benefit of the effort and expenditures above the contract price at the expense of a plaintiff who made a bona fide attempt to perform. A rule which rewards the party who breached the contract at the expense of the party who made a bona fide attempt to perform a bad bargain is unfair and contrary to concepts of justice.\textsuperscript{190}
\end{quote}


\textsuperscript{189} Id. See also id. at 24, 25 (citing for this proposition \textit{United States ex rel. Citizens National Bank v. Stringfellow}, 414 F.2d 696 (5th Cir. 1969); \textit{United States ex rel. Susi Contracting Co. v. Zara Contracting Co.}, 146 F.2d 606, 607-08, 611-12 (2d Cir. 1944); \textit{United States ex rel. Wander v. Brotherton}, 106 F. Supp. 353, 354 (S.D.N.Y. 1952), and \textit{City of Portland ex rel. Donohue & Fleskes Corp. v. Hoffman Constr. Co.}, 596 P.2d 1305, 1313 & n.7, 1313-14 n.9 (Or. 1979)).

\textsuperscript{190} Austin C. Wilson, Comment, \textit{The Contract Price As A Limit On A Quantum Meruit Recovery}, 27 Tex. L. Rev. 44, 52 (1948)(emphasis supplied). See also GEORGE E. PALMER, THE LAW OF RESTITUTION § 4.4, pp. 269-73, 392(1978 & Supp.) (“it would be a gross miscarriage of justice to award this same prospective gain to the defendant, though deduction from the plaintiff’s recovery, when the defendant is the party guilty of a breach of contract”); id. at 269-73 (wrongdoer must accept the consequences of his actions); Bernard E. Gegan, \textit{In Defense of Restitution: A Comment on Mather, Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller}, 57 S. Cal. L. Rev. 723, 728 (1984) (breaching party should be precluded from seeking the protection of the contract). Case law sounds these same themes. E.g., Schwansnick v. Blandin, 65 F.2d 354, 359 (2d Cir. 1933) (“Justice demands no more that that the promisor shall not profit at the promisee's expense.”); Johnston v. Star Bucket Pump Co., 202 S.W. 1143, 1153 (Mo. 1918) (“To permit him to use his breached contract to limit a recovery against him would be to pay to him a premium for his own wrong. The law does not contemplate such”); City of Philadelphia v. Tripple, 79 A. 703 (Pa. 1911) (“The owner, on the other hand, has deprived
Lastly, regarding the economic aspects of the remedy, granting the injured party restitution above the contract price creates three related incentives for both parties. First, the promisee understands that the promisor strongly desires contract completion and, therefore, could be tempted to hold up performance by seeking unjustified price or performance concessions from the promisor. The possibility that the promisor could obtain a remedy above the contract price tends to discourage such opportunistic behavior that would otherwise result in an unfair advantage to the promisee. Second, the possibility of a restitutionary remedy discourages “inefficient” breaches, i.e., where an breaching party causes harm to the injured party without being forced to pay a properly-calibrated amount of damages and where the external, social harm outweighs the breaching party’s private benefits. This specter of a restitutionary remedy is both an expensive negative sanction that deters breach and a positive enticement for the promisor to enforce any benefits it negotiated with the original contract. Third, the restitutionary remedy encourages efficient contracting that might otherwise occur by allowing the parties to take advantage of asymmetries of information. More specifically, the promisor usually knows the quality of the goods or services better than the recipient and, therefore, the promisor is better able to calculate the odds that it will do good enough work that would increase its business reputation or the incidence of buyer reciprocity. Other commentators agree that a “[f]ault-based economic theory offers a satisfactory explanation of Boozer” because of the inequity of forcing the faultless promisor to pay for unanticipated costs above the contract’s firm fixed price that the promisee has directly caused by its material breach.

Although commentary is divided on the Boozer result and reasoning, the facts in Boozer demonstrate the subcontractor’s consistent good faith performance and the prime

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The commentators opposing Boozer are mainly concerned that (1) rescission is a fiction because the case is really about breach of contract and courts cannot ignore the contract’s allocation of risks and benefits for measuring the supplier’s recovery, and (2) restitution here was supra-compensatory and therefore punitive. See Andrew Kull, Disgorgement For Breach, The “Restitution Interest,” And The Restatement Of Contracts, 79 Tex. L. Rev. 2021, 2024 & nn. 48–49 (2001); Andrew Kull, Restitution as a Remedy for Breach of Contract, 67 S. Cal. L. Rev. 1465, 1471-76 (1994); Joseph M. Perillo, Restitution in the Second Restatement of Contracts, 81 Colum. L. Rev. 37, 44–45 (1981). My first response is that it can be argued that the debate misses the point on whether Boozer is a proper example of rescission versus
contractor’s obstruction of those efforts. Contrary to the impression left by Brooks and Stremitzer, no evidence existed of subcontractor opportunism or machinations to escape performance. The *Boomer* decision has been good law in California for nearly eighty years without criticism from any California court or indeed from any other court in the United States. The likely reason is the case’s sound legal, normative and economic foundations that promote both sides’ good faith performance to the ultimate benefit of the contracting system. Accordingly, the authors have not proven their argument that the plaintiff’s recovery in restitution exceeding the contract price creates a possible windfall for partially performing promisors or inherently incentivizes opportunistic rescission.

D. Restitution, Reliance and Disgorgement

After considering the various avenues of relief potentially available to the rescinding buyer—reliance, restoration, disgorgement and specific performance—Brooks and Stremitzer state that “the remedy in restitution following rescission should be limited to restoration of the price or other conferred benefits to the promisor under the contract.”¹⁹⁴ The most intriguing aspects of their analysis are their (equivocal) rejection of reliance damages and their failure to address disgorgement in any substantial fashion.

1. Reliance Damages in Restitution.

breach of contract. Irrespective of the theoretical underpinnings of the remedies, the judicial task is to provide the injured party a fair remedy and “[n]ot to quibble about the analytical construct.” *See* First Annapolis Bancorp, Inc. v. United States, 89 Fed. Cl. 765, 799 (2009) (similar point about whether restitution focuses on the detriment to the injured party or the gain to the breaching party). The *Boomer* court properly did not get bogged down in this detail. Moreover, even if the case is really about breach of contract, the facts show that the court properly awarded Boomer its expectation interest. *See supra* note 188 and accompanying text.

Nevertheless, the answer to these opponents is that judicially allocating the contractual risk of non-performance to one party or the other in forging a remedy for rescission and restitution is no longer relevant; *quantum meruit* to support restitution is not based on the intentions of the parties. *See supra* note 170. The plaintiff experiencing a material breach has an undoubted right to avoid the transaction and, necessarily, the rescinded contract which, as courts have repeatedly observed, is annihilated for all purposes. *See supra* note 16. Moreover, in *quantum meruit*, the plaintiff is simply seeking relief for the market value of the requested services (along with its reasonable incidental expenses and minus payments previously received) which were a benefit to the defendant. This rule is fair to both sides in that the contractor’s “extravagances” or “unnecessary services,” *see* Behan, 110 U.S. at 345-46, will make it improper for the courts to rely upon the contractor’s costs as evidence of the work’s value to the owner. Thus, placing the parties in the status quo ante and transitioning them to *quantum meruit* is a neutral default position that achieves the corrective justice goal of restitution. *Compare* Eyal Zamir, *The Missing Interest: Restoration Of The Contractual Equivalence*, 93 Va. L. Rev. 59, 108 (2007) (“The basic idea underlying corrective justice is that people have a duty to remedy wrongful losses they inflict on others”).

Ironically, Brooks and Stremitzer do not question the remedy of *quantum meruit* and freely accept the prevailing definition of rescission as “eliminating all obligations under the contract” and that rescission “annihilates the contract.” *See* Remedies, *supra* note 3, at 692. These positions should have led to the authors’ support of *Boomer*.

¹⁹⁴ Remedies, *supra* note 3, at 692-93. *See also id.* at 719 (promisees should be prohibited from recovering any sums beyond the purchase price); *id.* at 725 (“restitution should come at a price”).
The authors acknowledge that accepted legal doctrine reimburses the rescinding buyer’s expenditures made in reliance on the contract. Some common examples of reliance costs are the buyer’s expenses in transporting defective goods back to the seller or for repairing the buyer’s other property injured by the seller’s defective goods. While they question how the rationale supporting this recovery can be consistent with contract doctrine if the contract has been abrogated, Brooks and Stremitzer do not tarry on the legal point. Their rationale for not arguing the point further is because “reliance is available both on and off the contract” and has “long been granted under restitution.” Notably, they also fail to mention the moral aspects of placing the economic burden of reliance expenditures not on the breaching party, but on the injured party.

Instead, Brooks and Stremitzer question the availability of reliance losses on economic grounds. The authors first state that the possibility of the buyer’s award of reliance and restoration should deter the seller’s breach of contract. On the other hand, Brooks and Stremitzer claim “it is clear” that the buyer has a greater monetary incentive to disaffirm if he rescinds and gets both restoration of the purchase price and his reliance expenses as opposed to recouping just the purchase price. Often times, they note, there will be no reliance expenses where the buyer has not made any investments except for the purchase price, which would lower the buyer’s incentive to rescind. Therefore, the authors are equivocal on the validity of reliance losses in restitution, stating that this area “would be a fruitful avenue of future research.” They also seem unaware that their ambiguous analysis of reliance losses contradicts their repeated assertion that restoration of the price and any other benefits provided to the seller should be the buyer’s sole recourse in restitution.

Some background on reliance damages is needed for a response to the authors’ critique on this subject. Brooks and Stremitzer correctly indicate that an established principle of the remedy of rescission is to restore the injured party by requiring the breaching party to compensate the injured party’s reliance damages. What they do not mention is that these damages encompass those foreseeable, actual expenditures made in preparation or in performance of the contract with no requirement that the breach itself caused the losses or that they have benefited the breaching party. Courts also hold...
that rescission and these restorative damages are consistent remedies that reinstate the injured party to its pre-contract position. In this way, reliance costs do not represent the plaintiff’s loss of the benefit of the bargain in the sense of expectation damages. When a plaintiff does receive a recovery in reliance, a court awards only the net reliance loss such that if the plaintiff had reaped a benefit from those expenditures, the defendant will receive a credit. In essence, courts award these damages to the plaintiff “[f]or the purpose of undoing the harm which his reliance on the defendant’s promise has caused him.”

While they criticize the doctrinal basis for reliance damages, they do not consider any of its precepts that show the consistency with notions of restitution. Brooks and Stremitzer also overlook that reliance expenses are awardable in rescission cases not as a matter of contract but as a matter of equitable jurisdiction. Courts have stated, “Complete and full justice is a fundamental doctrine of equity jurisprudence, and if damages as well as rescission are essential to accomplish full justice, they will both be allowed.” In this manner, the law allows trial courts broad discretion to fashion flexible equitable remedies on a case by case basis to make the injured party whole. This principle has particular resonance with rescission and restitution being a “flexible, equitable remedy.”

More fundamentally, conspicuously absent from Brooks and Stremitzer’s analysis is any mention of the moral imperative for reimbursing reliance damages. The moral problem arises because “Reliance losses are generally valueless to the promisee. With these reliance losses, the promisee is in a worse position than he would have been in had his expectations merely been thwarted. He has lost both his hoped-for performance and suffered a decrease in assets.” Accordingly, by restoring this equilibrium, the reliance remedy helps to achieve corrective justice between the parties, which is the very aim of rescission and restitution. In diverse areas, moreover, given the choice, the law places

203 Head & Seemann, Inc. v. Gregg, 311 N.W.2d 667, 672-73 (Wis. Ct. App. 1981), aff’d, 318 N.W.2d 381 (Wis. 1982).
204 2 DAN B. DOBBS, LAW OF REMEDIES § 12.3(1) (2d ed. 1993).
206 Holland v. Western Bank & Trust Co., 118 S.W. 218, 218 (Tex. Civ. App. 1909); Head & Seemann, Inc. v. Gregg, 311 N.W.2d 667, 672 (Wis. Ct. App. 1981), aff’d, 318 N.W.2d 381 (Wis. 1982). See also Maruca v. Phillips, 90 A.2d 159, 161 (Conn. 1952)(“The governing motive of equity in the administration of its remedial system is to grant full relief”); Sidney Stevens Implement Co. v. Hintze, 67 P.2d 632, 637 (Utah 1937): “Where necessary to effect complete justice, equity will award to party not in default his expenses necessarily incident to contract.”
207 See Umphres v. J.R. Mayer Enterprises, Inc., 889 S.W.2d 86, 91 (Mo. Ct. App. 1994)(stating the equitable policy); see also California Federal Bank v. United States, 395 F.3d 1263, 1267 (Fed. Cir. 2005) (“contract remedies are designed to make the non-breaching party whole.”).
210 “Corrective justice” remedies the wrong that the plaintiff has suffered at the hands of the defendant. Ernest J. Weinrib, Punishment And Disgorgement As Contract Remedies, 78 Chi.-Kent L. Rev. 55, 55 (2003). See also In re DeRosa, 98 B.R. 644, 648 (Bankr. D.R.I. 1989)(purpose of rescission is to “restore both parties to their former position as far as possible” and to “bring about substantial justice by adjusting the equities between the parties.”); Bernstein v. Nemeyer, 570 A.2d 164, 169 (Conn. 1990) (“The award of
liability for loss upon the wrongdoer and not his innocent victim. The concept has equal relevance in contract disputes, including recovery in restitution following a rescission for breach. The reason is that many jurisdictions in the United States have called the contract breaker a “wrongdoer” and the other party the “victim.” Forcing the buyer to bear the expense inflicted by a seller’s unexcused breach of contract undermines this general tenet of American jurisprudence regarding liability for wrongdoing.

2. Disgorgement in Restitution

Brooks and Stremitzer mention several times that disgorgement of the wrongdoer’s profits made as a consequence of the breach is a possible remedy in restitution. For example, the authors observe that “[i]f the promisor exploited to great gain the monies briefly held as a consequence of the contract, restitution may call for disgorgement as a means of returning that party to the status quo ante.” Oddly, however, while Brooks and Stremitzer devote significant attention to the economic aspects of expectation and reliance damages for restitution, the authors do not explain why they would reject disgorgement as a form of restitutionary relief. This oversight is especially puzzling because disgorgement has attracted significant recent discussion in the restitution literature, as evidenced by the authors’ citation of several of the most prominent pieces, as well in a full-length article that Professor Brooks himself has written endorsing disgorgement.

The first response to Brooks and Stremitzer’s position on disgorgement is that by rejecting this remedy in rescission cases, and by endorsing only restoration of the purchase price and other benefits conferred upon the defendant, the authors fall into the error of establishing a one size fits all restitution formula. Courts have specifically rejected this type of thinking in rescission actions, based on its quintessentially

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211 Cf. Wild West Radio, Inc. v. Industrial Claim Appeals Office of the State of Colorado, 886 P.2d 304, (Colo. Ct. App. 1994): “In every legal loss-distribution mechanism, there are two things to be accomplished: first, to make the victim whole, and second, to see to it as far as possible that the ultimate loss falls on the actual wrongdoer, as a matter of simple ethics and as a deterrent to harmful conduct;” Vertentes v. Barletta Co., Inc., 466 N.E.2d 500, 506 (Mass. 1984)(Abrams, J., concurring)(citing the “moral idea” that the ultimate loss from wrongdoing should fall upon the wrongdoer).

212 See Steven W. Feldman, Autonomy and Accountability in the Law of Contracts: A Response to Professor Shiffrin, 58 Drake L. Rev. 177, 184 nn. 27-28 (2009)(citing results of a Westlaw search showing that forty six states, ten federal circuits and the United States Supreme Court have used the term “wrongdoer” to describe the breaching party and that twenty states, seven federal circuits and the U.S. Supreme Court have used the term “victim” to describe the injured party).

213 Id. at 700 n.26 (citing E. Allan Farnsworth, Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract, 94 Yale L.J. 1339 (1985); Daniel Friedmann, Restitution for Wrongs: The Measure of Recovery, 79 Tex. L. Rev. 1879 (2001)).

214 Richard R.W. Brooks, Essay, The Efficient Performance Hypothesis, 116 Yale L.J. 568 (2006)(arguing that a promisee should be given the choice between requiring the promisor to perform or disgorging the promisor of his benefit from the breach).
In a basic principle of equitable authority, “[t]he decision to award a remedy for rescission for breach of contract always depends upon a showing of what justice requires in the particular circumstances, and thus necessarily rests in the discretion of the trial court.”

The second response is that emerging case law unmentioned by Brooks and Stremitzer supports disgorgement in rescission and restitution actions. While the general rule is that a mere breach of contract will not make a defendant liable for return of the profits it achieves as a consequence of the breach, except where the parties have a confidential or fiduciary relationship, it is also true that in certain circumstances, an injured party in a rescission action may recover profits obtained by the breaching party under a remedy of disgorgement. While the body of law is limited on this subject, the leading case is the Colorado Supreme Court’s decision in *EarthInfo, Inc. v. Hydrosphere Res. Consultants Inc.* In *EarthInfo*, the parties had a contract to exploit information collected by governmental agencies. The payment terms were for fixed fees and royalties. The trial court found that EarthInfo had breached the contract by wrongfully withholding royalty payments on derivative products. Further, the breach was substantial, damages would be inadequate, and rescission was appropriate. The trial court therefore required EarthInfo to pay the net profits it had realized from the date it stopped making royalty payments until the rescission date.

The Colorado appellate court upheld the disgorgement of profits, and stated the applicable standard:

[T]he [trial] court must resort to general considerations of fairness, taking into account the nature of the defendant's wrong, the relative extent of his or her contribution, and the feasibility of separating this from the contribution traceable to the plaintiff's interest. Thus, the more culpable the defendant's behavior, and the more direct the connection between the profits and the wrongdoing, the more likely that the plaintiff can recover all defendant's profits. The trial court must ultimately decide whether the whole circumstances of a case point to the conclusion that the defendant's retention of any profit is unjust.

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217 Anderson v. Doms, 75 P.3d 925, 929 (Utah. App. 2003)(rejecting notion that any “one precise formula that applies to all rescission cases”).


219 Watson v. Cal-Three, LLC, 254 P.3d 1189, 1194, 1195 (Colo. App. 2011). See also Burger King Corp. v. Mason, 710 F.2d 1480, 1494 (11th Cir. 1983)("disgorgement of profits earned is not the remedy for breach of contract").

220 UDV North America Inc. v. Tequila Cuervo Rojena S.A., 275 F.3d 42 (5th Cir. 2001)(Table).


222 900 P.2d 113 (Colo. 1995).


In another prominent case, *Snepp v. United States*, 444 U.S. 507 (1980), a former CIA agent published a book about his work for the agency but breached his CIA contract without obtaining pre-clearance. Because the former agent’s breach of contract was also a breach of his fiduciary duty, the Court held him liable in restitution for all profits he realized on the book. See also *Gassner v. Lockett*, 101 So.2d 33 (Fla. 1958); *Foss v. Heineman*, 128 N.W. 881 (Wis. 1910)(cases upholding disgorgement relief in
The EarthInfo court’s result is supportable on several grounds. Consistent with the view that restitution is not punitive, disgorgement (an “equitable remedy”) does not punish the defendant. Instead, it requires him to “yield up gains that it cannot justly retain” and to restore the wrongdoer to the position he should have occupied but for the breach. Indeed, disgorgement in a broad sense is always the objective of restitution because the latter remedy takes from the defendant and gives to the plaintiff. Disgorgement also serves a deterrent function of discouraging opportunistic breach because disgorgement “gives teeth” to the long-standing case law principle of pacta sunt servanda, i.e., that promises are to be kept. Otherwise, to reject disgorgement on a wholesale basis undermines the contracting system because “[t]he anomalous result would be to legitimize a kind of private eminent domain (in favor of a wrongdoer) and to

breach of contract cases); 1 DAN B. DOBBS, LAW OF REMEDIES § 4.1(4) (2d ed. 1993) (“Courts will sometimes disgorge profits made by a defendant.”).

The law also recognizes disgorgement in that courts generally use the promisor's profits as the measure of relief when those profits tend to define the plaintiff's losses. See, e.g., Cincinnati Siemens-Lungren Gas Illuminating Co. v. W. Siemens-Lungren Co., 152 U.S. 200, 204-07 (1894); Murphy v. Lifschitz, 49 N.Y.S.2d 439, 441 (Sup. Ct. 1944), aff’d, 52 N.Y.S.2d 943 (App. Div. 1945), aff’d, 63 N.E.2d 26 (N.Y. 1945).

Melvin A. Eisenberg, The Disgorgement Interest in Contract Law, 105 Mich. L. Rev. 559, 561 n.3 (2006); Colleen P. Murphy, Misclassifying Monetary Restitution, 55 SMU L. Rev. 1577, 1625 (2002). See also Laurin v. DeCarolis Constr. Co., Inc., 363 N.E.2d 675, 679 (Mass. 1977) (disgorgement not punitive because the remedy “merely deprives the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make.”). Even if it could be said that disgorgement presents a windfall to the plaintiff, there is no unjust enrichment because it was the plaintiff’s funds that created the extra value. In any event, “Basic equitable principles necessitate that where one party must profit from a breach, it should be the non-breaching party.” Scott L. Watson, Note, Winstar Damages: Restitution Where Benefit Conferrer On The Defendant Is Greater Than Plaintiff’s Out-Of-Pocket Cost, 94 Nw. L. Rev. 305, 330 (1999).

subject the claimant to a forced exchange.”\textsuperscript{231} The utilitarian version of this observation is that “[a] promisor who wishes not to perform owes a moral duty of respect to the promisee to seek a mutual accommodation, rather than to unilaterally breach and thereby convert the promisee from a voluntary actor to an involuntary litigant.”\textsuperscript{232} In all these respects, the promisee bringing the lawsuit is ideally situated as society’s representative, similar to a private attorney general, to deprive the promisee of his ill-gotten gain and to uphold the legal and moral objective that promises are meant to be kept and not broken.\textsuperscript{233}

The nascent development of disgorgement as a restitutionary remedy, recognized by the \textit{Restatement (Third) Of Restitution and Unjust Enrichment},\textsuperscript{234} comports with fundamental rules of damages. The law recognizes that courts have flexibility as dictated by the interest of justice to apply these rules on damages, which are but “useful guides” that are “subject to modification and adjustment, just as were the antecedent rules they have modified and replaced.”\textsuperscript{235} Allowing disgorgement where justified is backed by established case law that “each case is sui generis” whereby the law upholds the animating principle that damage awards as a response to breach prevent similar harms in the future.\textsuperscript{236} This emerging acceptance of disgorgement as a remedy in rescission and restitution is just another example in the common law tradition. With their categorical rule that disgorgement should not be available in rescission cases, however, Brooks and

\textsuperscript{231} \textit{RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT} § 3 cmt. c (2011).
\textsuperscript{233} Brooks and Stremitzer acknowledge that plaintiffs that recover the purchase price in restitution are “typically entitled” to interest on the price for the time defendants held this money. Remedies, supra note 3, at 718 n.80. The longstanding policy for allowing a plaintiff prejudgment interest—generally a matter of statute— is that the defendant has harmed the plaintiff by depriving him of the opportunity to forego the use of these funds. See Scholz v. S.B. International, Inc. 40 S.W.3d 78, 82 (Tenn. Ct. App. 2000)(citing cases). Also, the general rule is that if a claim is liquidated, prejudgment interest follows as a matter of right, but if the claim is unliquidated, the allowance of is a matter of the trial court’s discretion. See Ventas, Inc. v. HCP, Inc., 647 F.3d 291, 328 (6th Cir. 2011). This well-established rule on pre-judgment interest is a first cousin of disgorgement because in both instances courts award the plaintiff a monetary recovery in excess of the purchase price.


\textsuperscript{235} Compare Sidney W. DeLong, \textit{The Efficiency of a Disgorgement as a Remedy for Breach of Contract}, 22 Ind. L. Rev. 737 (1989) (arguing that a broad disgorgement remedy undermines cost avoidance goals).


[E]quity has contrived its remedies ‘so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,’ and ‘has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirement of every case . . .

\textsuperscript{236} 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1002 at 33 (1964).
Stremitzer would hamstring this flexibility in the administration of remedies for breach of contract.

E. Restitution, Rational Choice Theory and Relational Contracting

While this Article is devoted primarily to the authors’ treatment of the legal aspects of rescission and restitution, some commentary is appropriate regarding the authors’ economic foundations for their reform proposals. In addressing the economic effects of rescission and restitution, Brooks and Stremitzer establish a model of contracting behavior that repeatedly reflects the perspective of “rational” buyers and sellers:

Rational parties, we argue, would often desire a right of rescission followed by restitution even if damages were fully compensatory and costless to enforce. The mere presence of a threat to rescind, even if not carried out, exerts an effect on the behavior of parties. Parties can enlist this effect to increase the value of contracting. To illustrate, consider the situation of a seller of goods who knows that the buyer has a right to rescind the contract if the goods are defective. Since rescission is generally disfavored by the seller, she will try to reduce its incidence. The seller knows that rescission occurs only when the contract price is more than the goods’ value, as measured by expectation damages. That is, the buyer will want to rescind only when the contract is a losing one: when the value that the buyer derives from the goods is less than the price that he paid for them. . . . By lowering the price, the seller can reduce the likelihood that the buyer will want to rescind the contract, and by investing in the quality of the goods, the seller can reduce the probability that the buyer will have the legal right to do so.237

The authors employ an array of equations to support these theories.238 Thus, by their repeated emphasis on rational actors, the authors implicitly but necessarily subscribe to the doctrine sometimes used in economics called “Rational Choice Theory.” The basic assumption of this school of thought is that actors are rational maximizers, i.e., persons will try to get the most out of their resources. This form of rational determinism posits that actors seek wealth/profit maximization and cost minimization. The defining features of this approach are that participants (1) maximize their utility (2) from a stable set of preferences and (3) accumulate an optimal amount of information and other inputs in a

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237 Remedies, supra note 3, at 699. For other references to the contracting choices the authors believe that rational parties will make, see id. (“The effect of rescission on quality investments may often be desired by “rational parties” as they strive to increase the value of their contracting relationship.”); id. at 700, n.23 (noting the sequence of decisions “rational” parties make on the equilibrium path); id. at 711 (describing decision by a “rational seller” in making investments as compared with the seller’s payoff); and id. at 711 (discussing the price levels that “rational parties should set”).

238 See, e.g., id. at 706, Figure 4 (“Seller’s Payoff as a Function of Produced Quality”); id. at 711 Figure 6 (“Seller’s Payoffs With Low Warranted Quality”); id. at 723 Figure 9 (“Effect of Renegotiation on Buyer’s Payoffs);and id. at 724 Figure 10 (“Seller’s Payoffs Under Cumulative Concurrence and Renegotiation”)
variety of markets. This heavy reliance on the hypothetical rational actor drives the authors’ (empirically unsupported) notions that highly liberalized rights of rescission and greatly restricted rights of restitution will motivate the seller to (1) reduce the likelihood of promisee rescission by investing to enhance the quality of performance and (2) minimize the buyer’s possible use of rescission by lowering prices.

Many commentators have extensively debunked the notion that contracting parties consistently proceed exclusively or even primarily on rational motivations and several writers go so far as to say that economic explanations of contract are a “failure.” Common observation tells us that contracts are not strictly formed or performed based on economic formulas, either explicitly or implicitly. While rational economic considerations clearly will play a role for most persons most of the time, parties generally make contracting decisions based on the transaction in context of the parties’ relationship and other surrounding circumstances. Indeed, parties will sometimes

Implicit in Rational Choice Theory are a number of key assumptions. Among these are: (1) objective criteria exist that enable one to differentiate rational from irrational; (2) the differences between organizational behavior and individual (consumer) behavior are negligible; (3) consumer behavior is predicated upon consciously considered factors; (4) consumer behavior is predicated solely upon rational considerations; (5) consumers make their choices from among a stable set of preferences; (6) consumers always seek to maximize utility (7) in maximizing utility, consumers consider the risks involved; (8) when not presumed, satisfaction can easily be assessed; and (9) information provision will translate into information impact.

Compare id. at 101-122 (strongly disputing these assumptions).

Remedies, supra note 3, at 693.

E.g., Danielle Kie Hart, Contract Law Now—Reality Meets Legal Fictions, 41 U. Balt. L. Rev. 1, 47-59 (2011) (arguing individuals do not necessarily act rationally in the marketplace and contracts are not always the product of informed choice); Melvin A. Eisenberg, The Limits Of Cognition and the Limits of Contract, 47 Stan. L. Rev. 211, 213-225 (1995) (noting that while rational-actor psychology is the foundation of the standard economic model of choice, the empirical evidence shows that this model often diverges from the actual psychology of choice, because of the parties’ bounded rationality, irrational disposition and defective capabilities); Alan M. White, Behavior and Contract, 27 Law & Ineq. 135 (2009)(rational choice theory does not describe the real behavior of consumers and sellers); Jacob Jacoby, Is It Rational To Assume Consumer Rationality? Some Consumer Psychological Perspectives On Rational Choice Theory, 6 Roger Williams U. L. Rev. 81, 126 (2000)(“Rational Choice Theory is a simplistic theory having little correspondence with the real world of (individual) consumer behavior.”)(referencing the “extensive scholarly literature”).


reach their decisions on biased, incorrect, or missing information and emotive considerations can rule the day. The dollar value of and the need for the contract, the general state of the parties’ business, the need to uphold business reputations, and the nature and reliability of their prior course of dealing will commonly enter into the calculation regarding contract performance and the possibility of rescission. Because buyers and sellers commonly consider one particular agreement in the wider context of their general needs and objectives, their decisions on a single contract might not be tied to the advantages or disadvantages of an individual sale or purchase. As a motivator of a decision to rescind, the contract price can be more or less important to the parties depending on their individual business circumstances just as contract quality can be more or less important to the parties depending on the particular party’s definition of the value of the bargain. Brooks and Stremitzer’s narrow focus on individual transactions to the exclusion of the full context of the parties’ general needs and objectives is the major shortcoming in their economic analysis.243

Another school of thought has a superior, empirically-supported understanding of contracting behavior that does give proper weight to contracts in context. As Stewart Macaulay has argued in an influential series of articles,244 contracts are always more than the paper document and their terms and conditions. To business persons, reciting contract clauses to one another in an adversarial setting is seldom viewed as a reasonable way of solving a contract dispute or for deciding whether to stay in the relationship. Purchasing agents, sales personnel and other vendor and vendee employees frequently see the written contract as a formality created only to please the demands of lawyers. Most commercial contracts contain extensive boiler plate written in dense and technical language that is not meant to be read or well-understood by the buyer (or even the seller in many instances). Promisees and promisors frequently assume there are exceptions or qualifications to the written terms that are not worth the effort to spell out in advance. Indeed, business persons are rarely cognizant of key principles of contract law and most seldom face contract litigation.245 The reality is many reasons exist why the paper deal is often

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243 Contrary to Brooks and Stremitzer’s views, the Reporter for the Restatement (Third) of Restitution and Unjust Enrichment has argued in his academic writings that rational contracting parties would not agree ex ante to a right of rescission as a remedy for every material breach. Andrew Kull, Restitution as a Remedy for Breach of Contract, 67 S. Cal. L. Rev. 1465, 1501-1518 (1994). While they reject Kull’s analysis, see Remedies, supra note 3 at 696, n.11, 698, 700, n.24, Brooks and Stremitzer do not answer Kull’s critique in any meaningful way.


245 Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 29 Am. Soc. Rev. 55 (1963); see also Macaulay, 1985 Wis. L. Rev. at 466.
ignored or discounted and how it fails to capture the actuality of contractual decision making.

Except for one brief footnote allusion, Brooks and Stremitzer do not refer in any substantive detail to these real world aspects of contracting. Instead, the authors bank their theory on one size fits all theorizing that every party explicitly or implicitly subscribes to rational and even mechanical cost-benefit economic analyses as the moving force in performing or rescinding their agreements. By contrast, courts and commentators have observed that it is “extremely common” that contracts will have a “relational” aspect, i.e., they involve parties who are presently performing a long-term contract or have dealt with one another repeatedly in the past and are likely to do so in the future. Robert Gordon has aptly explained relational contracting as where

[P]arties treat their contracts more like marriages than like one-night stands. Obligations grow out of the commitment that they have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate. In bad times parties are expected to lend one another mutual support, rather than standing on their rights; each will treat the other's insistence on literal performance as willful obstructionism; if unexpected contingencies occur resulting in severe losses, the parties are to search for equitable ways of dividing the losses; and the sanction for egregiously bad behavior, is always, of course, refusal to deal again.

All these insights point to the empirically-confirmed view that contract performance will frequently rest more on relational norms than upon strict legal or economic considerations. These well-known and accepted principles of relational contracting are missing in Brooks and Stremitzer’s analysis.

246 See Remedies, supra note 3, at 14 (stating that rescission could be more likely with a plaintiff that has particular personal preferences in market values or where the plaintiff has lost confidence in the defendant and the transaction).
247 Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 29 Am. Soc. Rev. 55, 64 (1963). See also infra note 250 (citing cases).
248 As several commentators have pointed out, all contracts “tend to fall along a relational-discrete continuum” because some contracts have more relational elements than others. Thus, all contracts are relational because even one time contracts have relational elements. Danielle Kie Hart, Contract Law Now—Reality Meets Legal Fictions, 41 U. Balt. L. Rev. 1, 53 n.286 (2011)(citing authorities).

Furthermore, Professors Brooks and Stremitzer do not acknowledge that when parties encounter shortcomings in the contract language or problems with performance--even serious deficiencies--parties commonly do not seek to exit the contract or even modify their contracts formally. It also may occur that the contract contains boilerplate that the contract will be adjusted in light of a potential contract breach or continually changing circumstances. For example, federal government contracts will include such a term providing that if a described event occurs, such as a change in the designs, drawings, or specifications, the terms will be equitably adjusted.\footnote{251} Even absent such a clause, the likelihood of party flexibility during the course of performance and the frequent uncertainty or ambiguity of the contract itself will be a major buffer against the possibility of rescission.

Consistent with Gordon’s view of relational contracting, the critical point missed by Brooks and Stremitzer is that almost all parties when signing a contract honestly commit to performance and rarely think about the possibility of rescission. They each make the tacit assumption that even with a serious breach, both sides will proceed in good faith and will cooperate in resolving disputes short of contract cessation and possible litigation. As courts understand through long experience, the parties exhibit a “natural wariness” before entering an agreement, but upon making the contract, the parties expect a “cooperative enterprise” and higher levels of mutual trust.\footnote{252} The U.C.C. is in line with these practical insights into contract relations. As stated in U.C.C. § 2-609, comment 1, “[T]he essential purpose of a contract ... is actual performance and [parties] do not bargain merely for a promise, or for a promise plus the right to win a lawsuit.”\footnote{253} Accordingly, by giving the impression that many, if not all, parties in a contract dispute (1) understand and rely heavily on the written contract terms, (2) would often seek bargaining leverage based on the possibility of avoiding or seeking rescission, (3) would strongly base their purchasing or selling strategy on the relation between rescission and price and quality considerations, (4) place little importance on non-legal norms and informal practices in responding to breach, and (5) disregard the full context of their needs and objectives, Brooks and

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\footnote{251}{See, e.g., 48 C.F.R. § 52.243-1, Changes—Fixed Price.}

\footnote{252}{See Mkt. St. Assocs. Ltd. P’ship v. Frey, 941 F.2d 588, 594.-95 (7th Cir. 1991). See also Eyal Zamir, The Missing Interest: Restoration Of The Contractual Equivalence, 93 Va. L. Rev. 59, 131 n.191 (2007) (arguing that typically the parties’ actual intentions are to treat each other according to the prevailing norms of reasonableness, fairness, and cooperation, rather than according to the written text of the formal agreement, and that, for this reason, application of former norms is also efficient).}

\footnote{253}{See also Richard E. Speidel, Article 2 and Relational Sales Contracts, 26 Loy. L. A. L. Rev. 789 (1993) (arguing that the Uniform Commercial Code incorporates attributes of relational contract theory).}
Stremitzer’s empirically unsupported claims present an inaccurate and incomplete picture of the relational world of contract.

IV. CONCLUSION

Brooks and Stremitzer’s proposal for a more generous remedy in rescission and a more restricted follow-on remedy in restitution has numerous legal and economic shortcomings. As reflected in the U.C.C. and other federal and state policies, the authorities are much more liberal in allowing rescission than the authors’ descriptions. Perhaps more importantly, common mercantile practice favors buyer rescission on a no-questions asked basis under generous circumstances because many merchants are less interested in strictly enforcing individual contracts and more interested in maintaining good customer relations for future purchases. All told, the law in this area reflects a principle of fair redress, whereby the consistent thread is a liberal grant of rescission to achieve the ends of party good faith within the context of their bargain.

Brooks and Stremitzer’s analysis of restitution after rescission is similarly problematic. Regarding the election of remedies between rescission and damages, the authors fail to distinguish the election doctrine in the common law and U.C.C. settings. This Article has shown that each version in its own way protects against overcompensation to plaintiffs. As for the authors’ objection that the U.C.C. inappropriately allows expectation damages along with rescission, the U.C.C. and the case law support the opposite conclusion that these combined remedies make the injured party whole as against the seller’s wrongdoing. The next flaw in their argument is their (equivocal) rejection of reliance damages because under Brooks and Stremitzer’s analysis, the law should burden the innocent party with the loss created by the breaching party. Next, the authors’ failure to explain their opposition to disgorgement is puzzling, especially in view of the strong normative and legal support for this remedy in the proper circumstances. Lastly, the author’s treatment of the economic issues is unsatisfactory because Brooks and Stremitzer rely on the largely discredited Rational Choice Theory to the exclusion of relational contracting principles.

Ultimately, the author’s proposal to limit restitution after rescission to restoration of the contract price and other benefits conferred is faulty because the authors’ economic and legal premises for their solution lack merit. Brooks and Stremitzer have overlooked the well-established principles that rescission and restitution are equitable remedies that defy a one size fits all solution. Instead the law must avoid rigid formulas and remain free to fashion flexible remedies that meet the ends of justice on a case by case basis.