The Compensatory Disgorgement Alternative to Restatement Third's New Remedy for Breach of Contract

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THE COMPENSATORY DISGORGEMENT
ALTERNATIVE TO RESTATEMENT
THIRD'S NEW REMEDY FOR
BREACH OF CONTRACT

Roy Ryden Anderson*

ABSTRACT

Homeowners have carefully vetted potential applicants to lease their home while homeowners are in Europe for a year. As the selected lessee is well aware, he would not have been chosen unless he agreed not to sublet the premises. The lease agreement conspicuously states the sublease prohibition. Lessee, nevertheless, profitably sublets the property, but the breach is not discovered by homeowners until after the lease has expired.

Contractor agrees to use specified materials in building a home. He instead uses cheaper materials, resulting in significant savings in his building costs. The value of the home, however, is not affected by the substitution. The cost to replace the substituted materials with those specified by the contract will greatly exceed the value of the completed home.

As part of his contract of employment, an employee agrees never to divulge employer's methods of doing business or matters pertaining to employer's personal affairs. None of employer's methods are unusual and none constitute trade secrets, but employer, a well-known celebrity, highly values his privacy. After leaving his employment, employee publishes a very profitable book about employer's business methods and personal habits.

Despite the disparate facts in the above situations, they all have one thing in common: in none of them is an action for breach of contract likely to result in an award of damages that will adequately protect the contract right that has been violated. In each case, the promisee will probably be unable to prove actual damages with reasonable certainty because contract law typically deems intrinsic and other non-pecuniary losses to be too speculative and conjectural to support damage awards. Contract provisions that seek to protect these kinds of rights, regardless of their importance to the promisee, are thereby rendered practically meaningless. The denial of damages for their violation becomes particularly disturbing where the default-

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ing promisor is allowed not only to breach with impunity, but also to
garner significant profits from the breach. Contract law’s historical inability to recognize and evaluate non-pecuniary contract rights therefore represents a significant gap in its panorama of applicable damage remedies.

For over a half-century, leading scholars have maintained that contract law should fill this gap by providing promisees some type of a disgorgement restitution remedy that would allow a recovery of all or part of the profit that the breaching party has earned from the breach. In support of their arguments, they all reference the same handful of cases involving specifically identifiable fact patterns for which the courts have used various theories to award the promisee profits attributable to the breach. These theories, however, typically do not focus on, and the courts invoking them make no mention of, either restitution or disgorgement. Avowed disgorgement for breach cases are few and far between.

Restatement (Third) of Restitution and Unjust Enrichment § 39 proposes a disgorgement remedy for breach of contract that is expressly intended to apply not only in the aforementioned situations involving non-pecuniary contract rights, but also in any other situation where the promisor deliberately (and profitably) breaches but leaves the promisee with no adequate damage remedy. This article argues that the remedy is woefully designed for its task because it is framed by restitution principles, rather than those of contract law. Its application is limited exclusively to deliberate breaches, and, therefore, it contravenes the bulk of the cases noted above that have been identified by scholars as precedent for a disgorgement remedy for breach. Section 39, however, disingenuously uses these cases as precedent for its rule, enshrines them as illustrations of its application, but then reverses the results in most of them. The proposed remedy, therefore, will do little to close the aforementioned gap in contract law’s current remedy scheme. Further, when the remedy does apply, it is purely punitive because it would take from the breaching party all of the identifiable profits, regardless of whether they are directly attributable to the breach, and even though they clearly exceed the value to the promisee of the contract right that has been infringed. The provision thereby undermines two benchmark contract law principles—that innocence or willfulness of the breaching party is generally irrelevant to a promisee’s recovery for breach and that damages for breach may not exceed the value of the promisee’s lost expectancy.

This article demonstrates that virtually all of the cases used by the new Restatement to support its new disgorgement remedy can be better understood and justified as compensatory awards that make use of all or part of the breaching promisor’s profits to make the plaintiff promisee whole for non-pecuniary losses—as compensation-based rather than restitution-based judgments. Since the profits earned by the breaching parties establish that the otherwise non-pecuniary contract right of the promisees did indeed have a monetary value, the requirement of proving damages with reasonable certainty—which cannot be accomplished for purely non-pecuniary
contract rights—should then no longer act to bar recovery of compensatory damages. Precedent for taking profits from the promisor as a measurement of damages caused by the breach abounds in this country from decades of cases that have estimated reasonable royalties for patent infringements and also from Great Britain in all sorts of cases, where so-called “Wrotham Park” damages are used to measure the value of non-pecuniary contract rights. This article, however, rejects the patent law and British approaches of measuring compensation on the basis of the amount the parties would have negotiated to allow the promisor to buy out of the contract (an ex ante settlement price) in favor of basing compensatory damages on a fact-intensive inquiry that would focus on the subjective value to the promisee of the contract right that has been infringed.

Part II below briefly examines the historical structure of contract remedies and affirms that neither the common law of contract nor the Restatement (Second) of Contracts provides a disgorgement remedy for breach. Part III summarizes both the types of cases that have, using various theories, rendered judgments awarding profits from breach and the scholarly writings that have called for a disgorgement remedy (of some sort) for breach of contract. Part IV examines the requirements in § 39 that define the scope of the proposed remedy, requirements that are as familiar to the law of restitution as they are foreign to the law of contract. Part V examines the § 39 illustrations and the court decisions upon which they are based and demonstrates that most of these decisions do not support § 39’s criteria for a disgorgement remedy. The article groups these cases into categories based on theories that support a compensation-based recovery rather than the restitution-based recovery proffered by § 39. It suggests that this compensatory approach operates well within contract law’s current rule structure and is thus preferable to the iconoclastic approach proposed by § 39. Part VI then suggests how a compensation-based remedy should be structured so as to comply with contract law’s primary remedy goal of allowing a recovery that will best approximate the monetary position the promisee would have occupied had the contract been performed, without penalizing the breaching party or otherwise allowing for windfall damages.

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I. PREFACE

"Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract... The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else... But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can."

Oliver Wendell Holmes, Jr.†

It is remarkable that such a fundamentally jaundiced and counterintuitive outlook as this “Holmesian paradox” had, and continues to have, so dramatic an effect on the basic structure of contract remedies. Holmes’s view came to represent the fundamental core of compensation theory for breach of contract, a theory that both establishes the primary goal for contract remedies and limits them entirely to that purpose. It demands that contract remedies focus exclusively on the promisee’s loss to the exclusion of the promisor’s gain, even if the gain is directly attributable to the breach. In contrast with most other legal systems, it rejects both specific performance and injunction as primary remedies for breach. It substitutes instead the remedy of damages—a remedy intended to give the promisee the monetary equivalent of the promisor’s performance. All of these principles found their way into both the origi-

† The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897).
1. This is the label used by the new Restatement of Restitution for Holmes’s concept of the relationship between contract law and morality. Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. a (2012). It is more commonly called Holmes’s “bad man” theory of law. See Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459, 461 (1897) (discussing what legal duty means to a “bad man”).
2. See also Holmes, supra note 1, at 462 (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.”); Oliver Wendell Holmes, The Common Law 301 (1881) (“The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass.”).
3. Holmes’s theory, however, assumed that damages would compensate the promisee: “If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.” Holmes, supra note 1, at 462.
4. Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. a (2011)
5. Id.
6. Id.
nal *Restatement of Contracts* and its successor, documents that were respectively penned primarily by two of this country's premier authorities, Samuel Williston and Allan Farnsworth, whose philosophical views on much of contract law differed dramatically from each other.\(^7\)

In time, some economists saw these principles as providing fertile ground for a truly unrelated idea, the now rather infamous theory of "efficient breach"—a self-indulgent proclamation that is noxious to even neoclassical contract law.\(^8\) The theory is that a promisor should not only be allowed the option to breach and pay damages but, in fact, be encouraged to do so when she perceives it to be advantageous.\(^9\) The heretical supposition of an efficient breach is that the compensated promisee will be indifferent to the breach, the breaching promisor will be most pleased with herself, and the rest of us will somehow benefit (but quite indirectly) by having the performance of the breached contract wind up with someone who, by paying more for it, has obviously demonstrated that she values the performance more than does the promisee.\(^{10}\)

In his well-known illustration of this simple paradigm, Judge Richard Posner, perhaps its foremost proponent, ends with the conclusion that the breach is efficient because, assuming the promisee will be compensated with expectancy damages, society as a whole benefits when a contract performance moves "from a lower valued to a higher valued use."\(^{11}\)

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7. See generally *Restatement of Contracts* (1932); *Restatement (Second) of Contracts* (1981).
10. In 1972, Richard A. Posner published *Economic Analysis of Law*, an extraordinary book that, to varying degrees, shaped the way a generation of law teachers approached and analyzed legal issues. Early in the book Posner stated his theory of efficient breach as follows:

[I]n some cases a party [to a contract] would be tempted to breach the contract simply because his profit from breach would exceed his expected profit from completion of the contract. If his profit from breach would also exceed the expected profit to the other party from completion of the contract, and if damages are limited to loss of expected profit, there will be an incentive to commit a breach. There should be.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 57 (1972) (emphasis added).

In his brilliant review of the book, Arthur Allen Leff professed, in his inimitable way, deep concern with addressing legal problems primarily from an economic perspective, and urged extreme caution because "lives can be lashed to pieces as a new distributional curve flails about, desperately seeking a new equilibrium." Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 469 (1974). Leff, however, ultimately found solace with the following:

Thus, though one can graph (non-interpersonally comparable) marginal utilities for money which are the very picture of geometric nymphomania, we still preserve our right to say to those whose personalities generate such curves, "You swine," or "When did you first notice this anal compulsion overwhelming you?" or even "Beware the masses." And indeed "the law," even "the common law," has on impulses like those often said, even against efficiency—"Sorry buddy, you lose."

Id. at 481 (emphasis omitted); see also supra note 9.

11. Posner's illustration was as follows:
This article is about a "disgorgement" restitution remedy for contract law proposed by § 39 of the Restatement (Third) of Restitution and Unjust Enrichment. The proposed remedy fundamentally clashes with the theory of efficient breach because, in most cases, the disgorgement would take away all of the breaching promisor's profit attributable to the breach. There is little likelihood, however, that this tension will concern courts in their examination of the new remedy. In the forty-plus years since it first slithered into view, the efficient breach paradigm has been almost exclusively a creature of the academic literature and the law school classroom. Lawyers and judges on the firing line have mostly either rejected the theory or ignored it. It has had little demonstrable impact on real world legal arguments and judicial decisions because the idea is based on so many unrealistic and unprovable assumptions that run counter to the workaday world, to life experience, and to the natural intuition of fair-minded people. It is not that the theory presents inherent complexities that are difficult for busy lawyers and judges to grapple with. Actually, the idea is rather simplistic. But, it requires that the be-

I sign a contract to deliver 100,000 custom-ground widgets at $.10 apiece to A, for use in his boiler factory. After I have delivered 10,000, B comes to me, explains that he desperately needs [widgets immediately], and offers me $.15 apiece for 25,000 widgets. I sell him the widgets and as a result do not complete timely delivery to A, who sustains $1000 in damages from my breach. Having obtained an additional profit of $1250 on the sale to B, I am better off even after reimbursing A for his loss. Society is also better off. Since B was willing to pay me $.15 per widget, it must mean that each widget was worth at least $.15 to him. But it was worth only $.14 to A — $.10, what he paid, plus $.04 ($1000 divided by 25,000), his expected profit. Thus the breach resulted in a transfer of the 25,000 widgets from a lower valued to a higher valued use.


13. The commentary for the provision candidly acknowledges that "[t]he rationale of the disgorgement liability in restitution, in a contractual context or any other, is inherently at odds with the idea of efficient-breach in its usual connotation." Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. h (2011). The tension here is not caused by the availability of the remedy itself, because the efficient breach theory assumes compensation can be made to the promisee. Id. The disgorgement remedy would apply only when other contract remedies do not protect the promisee's contractual entitlement. Id. The conflict is caused by the fact that in most cases disgorgement would be of the full profit earned from breach even when the measurement ostensibly overcompensates the promisee. Andrew Kull, Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts, 79 Tex. L. Rev. 2021, 2051 (2001). As explained below, this article takes the position that § 39 goes too far in this regard and that the proper measurement for disgorgement should be limited by the amount reasonably necessary to compensate the promisee. Coincidentally, this view would bring § 39 more in line with efficient-breach theory. See id. at 2052–53.

14. Andrew Kull, the Reporter for Restatement (Third), correctly labels efficient breach a "hypothetical" and an "academic artifact" that is "as familiar in the classroom as it is difficult to find in real life." Kull, supra note 13, at 2051.


16. See Warhol, supra note 15, at 352–53

17. Id. at 321–22.
liever accept several inherently implausible assumptions, including (at a minimum) that the breaching promisor: (1) knows before he breaches that the promisee does not value performance more than the monetary amount that the law will allow in substitution; (2) will not make self-serving rationalizations in that regard; and (3) will voluntarily pay a compensatory amount so the promisee will not incur psychological and social costs, as well as non-refundable expenses that would be incurred to coerce the payment. For any one of these to prove true would be serendipitous; for all of them to do so would be incredible, unless the promisor actually negotiates an arm’s-length buyout of the contract. The theory, however, then caves in on itself because it does not encourage a buyout to protect the contractual entitlement of the promisee, but rather a breach in the interest of some “greater good.”

II. THE ABSENCE OF A DISGORGEMENT REMEDY IN THE SECOND RESTATEMENT OF CONTRACTS

Several decades ago, scholars began to separate restitution remedies arising from a contract setting into two distinct categories: (1) those that are intended merely to return the plaintiff to the status quo (the position occupied at the time of the contract); and (2) those that are intended to deprive the defendant of an unjust enrichment. The former function as restoration restitution because they return to the plaintiff the value of the

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18. *Id.* at 343.
20. Unsurprisingly, most dispassionate contracts scholars have rejected the theory out of hand. See Macneil, *supra* note 19, at 960 (criticizing the theory of efficient breach for its failure to account for transaction costs, such as those of litigation and settlement, as well as relational costs such as injury to reputation, and concluding that, since these types of costs will not be recoverable as damages payable by the breaching promisor “the likelihood of his making inefficient decisions is increased”); Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 *VA. L. REV.* 1443, 1448–64, 1478 (1980) (demonstrating that the theory encourages inefficient opportunistic breaches because it does not account for transactions costs, including those of litigation and settlement); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 *J. LEGAL STUD.* 1 (1989); see also *Restatement (Second) of Contracts*, ch. 16, intro. note (1981) (“The analysis of breach of contract in purely economic terms assumes an ability to measure value with certainty that is not often possible in the judicial process. The analysis also ignores the ‘transaction costs’ inherent in the bargaining process and in the resolution of disputes, a defect that is especially significant where the amount in controversy is small.”); cf. Delong, *The Efficiency of a Disgorgement as a Remedy for Breach of Contract*, 22 *IND. L. REV.* 737, 742–45 (1989) (suggesting that a general disgorgement remedy for breach of contract will often operate inefficiently because of contract-renegotiation costs that would be necessary for the promisor to buy out of the contract with the promisee).
performance she had given the defendant prior to his breach. The latter perform a disgorgement function because they are unconcerned with the plaintiff's loss but are intended instead to nullify the defendant’s unjust enrichment, which is the essential purpose of the law of restitution. As a general proposition, contract law embraces restoration, but ignores disgorgement.

Tort law has for centuries recognized a disgorgement remedy for conversion and, to a lesser extent, for trespass. Where the wrongdoer has misappropriated the plaintiff’s property and has resold it or used it to save costs, the plaintiff may, as the saying goes, “waive the tort and sue in assumpsit.” Assumpsit, in this context, is the restitution remedy of quasi-contract or quantum meruit. The intent is to disgorge the defendant’s unjust enrichment, and the remedy is particularly advantageous to


22. Anderson, supra note 21, at 33.

23. As did its predecessor; Restatement (Third) § 1 succinctly provides: “A person who is unjustly enriched at the expense of another is subject to liability in restitution.”


25. The waiver of tort theory was first recognized for the tort of conversion in Lamine v. Dorrell, 92 Eng. Rep. 303 (1705). It has since been applied in countless conversion cases and in a burgeoning number of trespass cases. The theory has been extended occasionally to fraud cases where the plaintiff has no provable actual damages. These three categories of torts largely cover the field. See Ward v. Taggart, 336 P.2d 534 (Cal. 1959) (waiver of tort of fraud); Harper v. Adametz, 113 A.2d 136 (Conn. 1955) (waiver of tort of fraud); cf. Hart v. E.P. Dutton & Co., 197 Misc. 274, 93 N.Y.S.2d 871 (1949) (refusing to extend the waiver theory to defamation action). As succinctly put by Dan Dobbs, “[t]he waiver of tort idea has not been extended very far.” D. Dobbs, The Law of Remedies, § 4.2(3), 585 (2d ed. 1993).

26. See Restatement (First) of Restitution § 129 (1937). But see Raven Red Ash Co. v. Bull, 39 S.E.2d 231, 228–39 (Va. 1966). The traditional rule is that the tort-waiver theory does not extend to trespass or other invasion of an interest in reality because restitution was thought to be an inappropriate remedy for dealing with issues of title. The original Restatement of Restitution § 129(2) (1937) succinctly provided: “[a] person who has trespassed upon the land of another is not thereby under a duty of restitution to the other for the value of its use . . . .” However, a growing number of courts have applied the theory to trespass cases. See, e.g., Raven, 39 S.E.2d 231 (Va. 1946) (finding the old rule illogical). A leading case disgorging profits resulting from trespass under the tort waiver theory is Edwards v. Lee's Adm't, 96 S.W.2d 1028 (Ky. 1936). But see Triple Elkhorn Mining Co. v. Anderson, 646 S.W.2d 725, 726 (Ky. 1983) (in which the Kentucky court labeled its decision in the Edwards case “sui generis and peculiar on its facts” and suggested that the tort waiver rule for trespass cases should not apply where, unlike in Edwards, a fair estimate of the plaintiff’s damages could be made); see also D. Dobbs, supra note 25, § 5.8(2), 790–92 (finding the tort waiver for trespass cases “peculiar” and expressing favor for the traditional rule barring restitution). Restatement (Third) § 40, however, rejects the traditional rule. See Restatement (Third) of Restitution & Unjust Enrichment §§ 40 cmt. c, illus. 4i & 5 cmt. f, illus. 13, 15 (each of which are based upon Edwards v. Lee’s Adm’t and allow disgorgement of all profits that result directly from the trespass).

27. Waiving the tort is a fiction because the tortious wrong’s existence is what justifies the plaintiff’s recovery. Without the tort, there could be no recovery. See W. Nat. Bank of Casper v. Harrison, 577 P.2d 635, 641 (Wyo. 1978) (noting that in these cases “conversion never really loses its identity as a tort because if it did, there would be no real basis for the eventual relief afforded”).

28. The action recognized in Lamine v. Dorrell, 92 Eng. Rep. 303 (1705), was in assumpsit for money had and received, a version of a count in quantum meruit.
the plaintiff where the defendant's profit from using the property exceeds
the plaintiff's loss.\textsuperscript{29}

In stark contrast, our courts have repeatedly rejected the waiver con-
cept for actions based on breach of contract.\textsuperscript{30} The oft-stated rule is that,
where a legally enforceable contract exists between the parties litigant, an
action in restitution may not be had to disgorge the defendant's gains,
even those directly attributable to the breach.\textsuperscript{31} The plaintiff, instead, is
restricted to damages for breach, the notion being that disgorging the de-
fendant's gains in excess of the plaintiff's loss would redistribute the risks
the contract has allocated and, in effect, rewrite the agreement.\textsuperscript{32} Al-
though most courts have enforced this prohibition absolutely, many
others have limited its application to situations where the plaintiff does
have an adequate damage remedy for breach.\textsuperscript{33}

The new \textit{Restatement of Restitution} affirms the quasi-contract ban,\textsuperscript{34}
but cautions that the prohibition applies "only so long as the reference to
contract is appropriately restricted to valid and enforceable obliga-
tions."\textsuperscript{35} Section 39 would provide a "limited exception" to this restric-
tion with a disgorgement remedy for "cases of profitable and
opportunistic breach."\textsuperscript{36} A significant impediment to the remedy's ac-
teptance undoubtedly will be its candid disavowal of any intent to limit

\textsuperscript{29} See id.
\textsuperscript{30} \textit{Restatement (Third) of Restitution & Unjust Enrichment} § 2 ch. 1, reporters
note (2011).
\textsuperscript{31} See id. The Reporter's Note to \textit{Restatement (Third)} § 2 refers to \textit{Cty. Comm'r
of Caroline Cty. v. J. Roland Dashiell & Sons, Inc.}, 747 A.2d 600 (Md. 2000), which collects
cases on both sides from both state and federal courts. See Reporter's Note c.
\textsuperscript{32} \textit{Cty. Comm'r's of Caroline Cty.}, 747 A.2d 600, 607 (Md. 2000) ("The general rule is
that no quasi-contractual claim can arise when a contract exists between the parties con-
cerning the same subject matter on which the quasi-contractual claim rests. (Citations
omitted.) The reason for this rule is not difficult to discern. When parties enter into a
contract they assume certain risks with an expectation of a return. Sometimes, their expec-
tations are not realized, but they discover that under the contract they have assumed the
risk of having those expectations defeated. As a result, they have no remedy under the
contract for restoring their expectations. In desperation, they turn to quasi-contract for
recovery. This the law will not allow.") (quoting \textit{Mass Transit Admin. v. Granite Constr.
Mitsubishi Int'l Corp.}, 432 N.E.2d 999, 1002 (Ill. App. 3d 1982); \textit{see also Indus. Lift Truck
Serv. Corp.}, 432 N.E.2d at 1002 (noting that parties entering into a contract "assume cer-
tain risks with the expectation of a [beneficial] return"; however, when such expectations
are not realized, they may not "turn to quasi-contract theory for recovery").
\textsuperscript{33} See \textit{Gadsby v. Norwalk Furniture Corp.}, 71 F.3d 1324, 1333 (7th Cir. 1995)
("Restitution is unavailable where an express contract governs the parties' relationship
and where there is an adequate remedy at law.").
\textsuperscript{34} \textit{Restatement (Third) of Restitution & Unjust Enrichment} § 2 (2) (2011).
("A valid contract defines the obligations of the parties as to matters within its scope,
displacing to that extent any inquiry into unjust enrichment.").
\textsuperscript{35} \textit{Id.} at reporter's note c. The meaning here is that the limitation does not apply to
failed contracts, those that are unenforceable under a statute of frauds or because of mu-
tual mistake, fraud, impossibility, or other invalidating cause. See, \textit{e.g.}, \textit{Restatement
(Second) of Contracts} §§ 375-377 (1981). Contract law does allow a quasi-contract ac-
tion in such situations. \textit{See id.}
\textsuperscript{36} \textit{Restatement (Third) of Restitution & Unjust Enrichment} § 2 cmt. c.
the recovery to the harm caused to the plaintiff. This article seeks to demonstrate that the remedy would garner greater acceptance if it had been formulated as one intended to compensate the plaintiff for an otherwise unprovable loss rather than as some new-fangled remedy intended to disgorge the defendant's gains from breach—as compensatory in nature, but with disgorgement wholly or partially being only an unintended concomitant.

The proposed remedy is not “new” because of a dearth of caselaw to support at least some version of it, but because the common law of contract, particularly as reflected by Restatement (Second) of Contracts, contains nothing that resembles a disgorgement remedy for breach. Andrew Kull affirmed this vital point with a painstaking analysis of both the original and current Restatements. There is no need to summarize his analysis here, only to highlight his conclusions. The Restatement provides that contract remedies are intended to protect three distinct interests of the promisee: the “expectation interest,” the “reliance interest,” and the “restitution interest.” These interests are not inherently distinct, but will often overlap. Therefore, they are listed by the Restatement in a descending order of their importance in terms of the measure of recov-

37. See Restatement (Second) of Contracts, Ch. 16, topics intro. note (1981). As discussed in Part I, Holmesian theory regarding the consequence of breach is the foundation of the remedy scheme formulated in Restatement (Second) of Contracts: “The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from the breach.” Id. Here, the reporter for the Restatement, Allan Farnsworth, echoed his classic article on contract remedies, in which he said that the fundamental goal of contract remedies “is not directed at compulsion of promisors to prevent breach; rather, it is aimed at relief to promisees to redress breach.” Allan Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145, 1147 (1970) (emphasis omitted).


40. Kull, supra note 13, at 2029–44. Kull emphasized that the first Restatement of Contracts was published five years before the original Restatement of Restitution. Id. at 2032. When the second Restatement of Contracts came along decades later, it understandably defined the promisee’s restitution interest to account for the disgorgement principle embodied in the Restatement of Restitution. Id. at 2039. The restitution interest was stated as the promisee’s interest in having the “benefit” earned from breach restored to her. Id. at 2040. This apparent change in focus, however, was pure semantics. Id. The second Restatement’s restitution remedies do not extend to disgorgement any more than did the original Restatement’s. Id. at 2039. They are designed only to return the promisee to the status quo—to protect the restoration interest. Id. at 2041.

41. Restatement (Second) of Contracts § 344 (1981) provides:

§ 344. Purposes of Remedies

Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:

(a) his “expectation interest,” which is his interest 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,

(b) his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or

(c) his “restitution interest,” which is his interest in having restored to him any benefit that he has conferred on the other party.”

42. See id. at § 344 cmt. a.
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erly they will allow. 43 Thus, the reliance interest is a subset of the expectation interest, and the restitution interest is a subset of the reliance interest. 44 This relationship is true for the reliance interest because of the longstanding rule, meticulously followed by the courts, that a plaintiff’s recovery of reliance “damages”45 may not exceed expectancy damages.46

The same is generally true for the promisee’s restitution interest, but with a major exception.47 The only restitution remedy for breach recognized by the Restatement is the promisee’s right in response to a material breach to treat the contract as rescinded and to recover in restitution.48 The measure of recovery is the reasonable value of the promisee’s performance received by the promisor prior to breach, a measure that is intended to restore the promisee to his pre-contract position rather than to disgorge the promisor’s gains.49 In this narrow sense of returning the promisee to the status quo ante, the restitution interest is conceptually a subset of the reliance interest.50 It is this limited concept of the restitution interest that Lon Fuller identified in his foundational article51 and, as Kull carefully demonstrated, is the concept incorporated into the remedy scheme of Restatement (Second) of Contracts.52

Actually, in most cases, the restitution interest will be identical to the reliance interest. The two will deviate only where the promisee has incurred reliance expenses that are not a part of the performance received

43. See id.
44. See id.
45. See Restatement (Third) of Restitution & Unjust Enrichment § 38, reporter’s note. The phrase “reliance damages” is something of a misnomer because these “damages” are, by definition, not caused by the breach. Instead, they are the promisee’s expenses of performance that would have been incurred regardless of the breach. See id. § 38 (2)(a). The phrase is, however, common usage and has always been found unobjectionable. See id. § 38 cmt. a.
46. This principle is affirmed by Restatement (Second) of Contracts § 349 (1981), which deducts from a reliance-based recovery “any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.” A leading case on point is L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1949).
47. Restatement (Second) of Contracts § 373 (1981).
48. Id.
49. For example, in applying this principle in the widely cited case, United States v. Algernon Blair, Inc., 479 F.2d 638, 641–43 (4th Cir. 1973), the trial court had measured the plaintiff’s restitution recovery by the contract rate for its performance prior to the breach. The Fourth Circuit found this measurement improper and remanded for a determination measured by the reasonable value of the plaintiff’s performance. Id.; see also Acme Process Equip. Co. v. United States, 347 F.2d 509, 530 rev’d on other grounds, 385 U.S. 138 (1966) (“It is clear, however, that restitution is permitted as an alternative remedy for breach of contract in an effort to restore the innocent party to its pre-contract status quo, and not to prevent the unjust enrichment of the breaching party.”) (emphasis added).
51. Id.
52. Kull, supra note 13, at 2038–44. Indeed, Restatement (Second) of Contracts § 370 leads off the document’s restitution provisions with the general observation that “[a] party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.” (emphasis added). Restatement (Second) of Contracts § 370 (1981).
by the breacher. It is here that the restoration interest slips its leash as a subset of the reliance interest, because, under the prevailing contract rule, the amount of a recovery based on restitution may greatly exceed that of both the expectancy and the reliance interests.\textsuperscript{53} However, the only category of cases in which this will occur is that of the "losing contract," where the breach actually saves the promisee from losses that would have been incurred had his performance not been excused by the breach.\textsuperscript{54}

There is an overlapping category of cases where the promisee is allowed to recover restitution of monetary payments made to the breacher even though the recovery exceeds the promisee's provable lost expectation.\textsuperscript{55} Obviously these too are "losing contracts" for the promisee,\textsuperscript{56} but the difference here is that the recovery precisely equals her reliance damages.\textsuperscript{57} The payment refund cases, though labeled as restitution recoveries, do represent a jarring exception to the otherwise universal rule that reliance damages may not exceed the lost expectation.\textsuperscript{58} These cases also conflict with Lon Fuller's hierarchy of contract remedial interests—in particular Fuller's assertion that the restitution interest, by definition, could never exceed the reliance interest.\textsuperscript{59} This conflict, however, is anomalous and is not intended to extend the \textit{Restatement}'s limited con-

\textsuperscript{53} See \textit{Restatement (Second) of Contracts} § 344 cmt. d (1981) ("Occasionally a party chooses the restitution interest even though the contract is enforceable because it will give a larger recovery than will enforcement based on either the expectation or reliance interest. These rare instances are dealt with in § 373."). "The right of the injured party under a losing contract to a greater amount in restitution than he could have recovered in damages has engendered much controversy. The rules stated in this Section give him that right." \textit{Id.} § 373 cmt. d.

\textsuperscript{54} The widely cited and perhaps most egregious reported decision on point is \textit{Boomer v. Muir}, 24 P.2d 570 (Cal. 1933), in which the plaintiff, a building subcontractor, recovered $250,000 as the value of his performance when the full remaining unpaid contract price (the maximum lost expectation) was only $20,000. The cases in this category have long been criticized by courts and commentators. \textit{See generally E. Allan Farnsworth, Contracts} § 12.20 (3d ed. 2004); Kull, \textit{supra} note 13, at 2041 n.49.

\textsuperscript{55} The leading case is \textit{Bush v. Canfield}, 2 Conn. 485, 487 (Conn. 1818) (plaintiff allowed restitution of $5,000 advance payment for flour even though lost expectation damages were only $2,000, measured by the difference between the applicable market price of $11,000 and the unpaid contract price of $9,000).

\textsuperscript{56} These refund cases are even rarer than the other losing-contract cases. Although it is uncommon for a promisor to breach any contract that is a loser for the promisee, absent extraordinary circumstances, no informed promisor will willingly withhold a performance where he is to receive payment for more than his performance is worth—unless, of course, he anticipates that the promisee will not pay for that performance. \textit{Id.} at 491. For example, the seller's conduct in \textit{Bush v. Canfield} makes sense (particularly since the seller had already received a $5,000 payment) only if the seller was unable to acquire the flour in time to make the required tender—a most curious circumstance where the market was declining because of an excess supply of flour. \textit{Id.}

\textsuperscript{57} By definition, payment to the promisor constitutes reliance. \textit{Restatement (Second) of Contracts} § 344 cmt. a (1981).

\textsuperscript{58} Bausch & Lamb, Inc. v. Bressler, 977 F.2d 720, 729 (2d Cir. 1992).

\textsuperscript{59} See the discussion at \textit{supra} note 50. Fuller said that "the restitution interest is merely a special case of the reliance interest; all of the cases coming under the restitution interest will be covered by the reliance interest, and the reliance interest will be broader than the restitution interest only to the extent that it includes cases where the plaintiff has relied on the defendant's promise without enriching the defendant." Fuller & Perdue, \textit{supra} note 50, at 55.
cept of the restitution interest to include disgorgement. In this situation, it is merely a derivative of protecting the promisee's restoration interest.\(^\text{60}\)

In sum, whether it is classified in terms of restitution's "unjust enrichment" or more broadly in terms of reliance's "status quo," each and every restitution remedy in the *Restatement (Second) of Contracts* bases recovery on the value of the promisee's performance that has been received by the breaching party. As restitution remedies, they are "restoration" restitution rather than "disgorgement" restitution.\(^\text{61}\) As such, they fall into but two general categories.\(^\text{62}\) In the first, restitution is allowed as an alternative remedy for a material breach. As previously noted, the promisee's recovery is measured by the value of her performance even where that value exceeds expectancy damages.\(^\text{63}\) In the second, restitution is allowed where the contract is unenforceable because of a contract defense, such as the statute of frauds, mutual mistake, unanticipated circumstances, or other invalidating cause.\(^\text{64}\) Once again, the measure of recovery is the value of the claimant's performance in the hands of the breaching party.\(^\text{65}\) There is therefore nothing to be found in the remedial scheme of *Restatement (Second) of Contracts* that supports a "disgorgement" restitution remedy as proposed by § 39 of the new *Restatement of Restitution*.

### III. THE DISGORGEMENT INTEREST IN THE COMMON LAW OF CONTRACT AND IN THE LAW REVIEWS

Over a half century ago, Jack Dawson wrote for a symposium on contract remedies a short article succinctly titled "Restitution or Damages?"\(^\text{66}\) He found little law to support a disgorgement remedy for breach of contract: "We can be quite sure that a . . . claim [to disgorge profits] presented at law in an action framed as a damage action would ordinarily receive a very short answer: damages are to cover the promisee's loss, not the defaulter's gain."\(^\text{67}\) Although the rapidly developing enrichment in the law of remedies, particularly restitution, gave him hope for the emer-

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\(^{60}\) Kull, *supra* note 13, at 2042–44.

\(^{61}\) The *Restatement's* definition of the "restitution interest" is not expressed in terms of "unjust enrichment" but in terms of the promisee "having restored to him any benefit that he has conferred on the other party." *Restatement (Second) of Contracts* § 344 (c) (1981).

\(^{62}\) A closely related category is for contracts implied-in-fact. See, e.g., Maglica v. Maglica, 78 Cal. Rptr.2d 101, 109 n.14 (Cal. Ct. App. 4th 2005). In these cases, where the evidence does not otherwise establish a price, the promisee is allowed to recover the reasonable value of her performance. *Id.* at 104. Here, however, the remedial goal is to honor the promisee's expectancy interest. These cases deserve mention here because they often say that recovery is in restitution for the quantum meruit value of the goods or services received. See *id.* at 109 n.14. ("Because an implied-in-fact contract can be found where there is no expression of agreement in words, the line between an implied-in-fact contract and recovery in quantum meruit — where there may be no agreement at all — is fuzzy indeed.").

\(^{63}\) See Bush v. Canfield, 2 Conn. 485, 487 (Conn. 1818).

\(^{64}\) See *Restatement (Second) of Contracts* §§ 375–377

\(^{65}\) See *id*.

\(^{66}\) John P. Dawson, *Restitution or Damages?*, 20 Ohio St. L.J. 175 (1959).

\(^{67}\) *Id.* at 186.
gence of a general disgorgement remedy for breach, he conceded that:

On the whole, however, the recapture of profit made through breach of contract, unaggravated by violation of 'fiduciary' or 'confidential' obligations, has been brushed aside as an objective of our remedial system, unless the gain can be somehow conceived as a performance or the product of some performance [rendered by the promisee].

Even so, he concluded optimistically:

For when a purpose so broad and attractive as the prevention of gains through another's loss is projected on a legal system, it will surely be refracted like light in a prism. If we study the angles of refraction closely they fall into patterns we can well understand.

And that is just what happened. The refractions began to radiate as courts, in an increasing number of identifiable categories of cases, allowed promisees to recover a breaching promisor's profits where the disgorgement was found to be especially compelling. In turn, beginning with Daniel Friedmann's 1980 article, Dawson's call for a disgorgement remedy in contract began to garner significant attention in the law reviews. Using the developing caselaw scholars formulated various general theories to identify the remedy's boundaries. Friedmann painted with broad strokes. He argued that the principle allowing the injured party to waive the tort of conversion and to sue instead in restitution should apply similarly to breaches of contract. In Friedmann's view, for most contracts the promise to perform becomes a property or "quasi-property" right of the promisee.

68. Dawson emphasized two categories of cases. See generally id. In the first, disgorgement of profits—"preventing gain through breach"—influenced the court's choice of the larger of two available damage measurements of the promisee's expectancy interest. Id. at 188. He emphasized, in particular, Groves v. John Wunder Co., 286 N.W. 235 (Minn. 1939), in which the court chose to award damages based on the cost of restoring the realty rather than on the basis of the comparatively slight diminished value of the land. Dawson, supra note 66, at 188 n.28. Other commentators have emphasized the breach's willfulness as the justification for a higher damage award. See Patricia Marschall, Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract, 24 ARIZ. L. REV. 733, 741–56 (1982); Timothy J. Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN. L. REV. 521, 571 (1981). This refinement of Dawson's point is appropriate; it is the breach's willfulness that justifies preventing the "gain through breach." See Marschall, supra, at 742. The higher damage award would be less compelling if the promisor's motives in breaching were not opportunistic. Muris, supra, at 571.

In Dawson's second category, the courts awarded disgorgement of profits as a "substitute measure" of expectation damages. Dawson, supra note 66, at 188. In this category were cases in which the promisor had violated exclusive territorial rights granted to the promisee by the contract, but the promisee was unable to prove damages with reasonable certainty. Dawson, supra note 66, at 188–89.

69. Dawson, supra note 66, at 189.

70. Id. at 192.

71. Daniel Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 COLUM. L. REV. 504 (1980).

72. Much of the important literature, both from the United States and Commonwealth jurisdictions, is collected in Restatement (Third) § 39, reporter's note a.

73. Friedmann, supra note 71, at 504.

74. Id. at 507–08.
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appropriates that property interest just as in the case of a conversion of tangible property and, as with the tort, the promisee should be entitled to waive the breach and recover the promisor’s ill-gotten gains.\textsuperscript{75}

In his 1985 article, Allan Farnsworth questioned Friedman’s approach, arguing that his analogy of contract rights to tangible property was unpersuasive.\textsuperscript{76} In particular, Farnsworth suggested that to extend the tort-waiver principle to the appropriation through breach of the promisee’s right to performance would extend the disgorgement remedy too broadly, with “little guidance” for separating out cases in which the remedy was not warranted.\textsuperscript{77} In Farnsworth’s view, all of the persuasive cases relied on by proponents of a disgorgement remedy for breach could be grouped broadly into two categories: those involving breaches by “fiduciary” promisors, and those in which a seller of land or goods had profitably resold property after a legally recognized interest in it had passed to the purchaser.\textsuperscript{78} In the first category, strong policy reasons favor disgorgement.\textsuperscript{79} In the second, the buyer’s property interest\textsuperscript{80} justifies disgorgement just as in the tort-waiver cases for conversion and trespass.\textsuperscript{81}

Farnsworth favored extending the disgorgement remedy beyond these categories to only “a limited class of cases,” those involving what he labeled “abuse of contract.”\textsuperscript{82} He said that abuse of contract exists if the promisor realized a gain from the breach but the promisee is “left with a defective performance and no opportunity to use [his own] performance to attempt to obtain a substitute.”\textsuperscript{83} He gave two primary examples of the

\begin{itemize}
\item \textsuperscript{75} Friedmann’s view would allow disgorgement for most opportunistic breaches. But not all—only for those in which the promisee is entitled to the promisor’s performance in such a way that the breach leaves the promisee “deprived of an interest that ‘belonged’ to him[,]” \textit{id.} at 515. For example, his theory would not apply to contracts to lend money because the money used by the promisor to garner the gain could “not be ‘identified’ as the very sum to which [the promisee] was entitled[. . .]” \textit{id.} at 521. Nor would it apply to disgorge a higher salary taken by an employee in breach of an employment contract because, for policy reasons, the law does not consider an employer’s right to the labor of his employee to be a property right. \textit{id.} at 520–21. In a subsequent article, Friedmann refined his appropriation theory, suggesting that disgorgement should apply only to gains (or savings) that were directly attributable to the breach. Daniel Friedmann, \textit{Restitution for Wrongs: The Measure of Recovery}, 79 TEX. L. REV. 1879, 1899–1904, 1917–23 (2001). His analysis in this regard dovetailed with that of Allan Farnsworth. Allan Farnsworth, \textit{Your Loss or My Gain? – The Dilemma of the Disgorgement Principle in Breach of Contract}, 94 YALE L.J. 1339, 1343–50 (1985).
\item \textsuperscript{76} Farnsworth, \textit{supra} note 75, at 1363 n.93.
\item \textsuperscript{77} \textit{id.} Farnsworth noted that Friedmann readily conceded that his approach failed to provide a means for determining when contract rights should be treated as property for purposes of a disgorgement remedy.
\item \textsuperscript{78} \textit{id.} at 1355.
\item \textsuperscript{79} \textit{id.} at 1357 n.69.
\item \textsuperscript{80} In the case of sales of goods, for example, \textit{Uniform Commercial Code} [U.C.C.] § 2-501 provides that, upon identification of the goods to the contract, the buyer at a minimum acquires a “special property” interest. In some situations identification may result in the buyer acquiring full title to the goods. \textit{See} U.C.C. § 2-401(3)(b).
\item \textsuperscript{81} \textit{See} discussion in \textit{supra} notes 26–27.
\item \textsuperscript{82} Farnsworth, \textit{supra} note 75, at 1382, 1392.
\item \textsuperscript{83} \textit{id.} at 1384.
\end{itemize}
types of cases he had in mind. The first was those involving a “skimped performance,” which he said presented a most compelling example of the need for a disgorgement remedy for breach. In skimped performance cases, the promisor breaches by rendering a cheaper (and usually inferior) performance under circumstances in which the promisee can demonstrate no expectancy damages. The prototypical case example involves a construction contract in which the contractor has deviated from the contract specifications by installing less expensive plumbing pipe. The deviation caused no diminution in the structure’s value, and the cost of tearing it down and installing the correct pipe would have been grossly excessive.

Farnsworth’s second example was cases in which the promisor’s performance has become impossible because of time’s passage but, meanwhile, the promisor has profited from his breach. The situation can arise in myriad contexts. The promisor, for example, may have wrongfully delayed tendering goods and used the goods during the delay to earn a profit. Or a lessee may have profitably subleased the premises in violation of the lease terms, but the default is not discovered until after the lease has expired. In both these situations, the promisee may have suffered no provable damages—the value of the goods received by the buyer being as warranted (and the buyer having suffered no provable damages from the delay), the lessor having been paid the full rental by the lessee.

Farnsworth emphasized that, in abuse of contract situations, disgorgement is appropriate regardless of the enriched promisor’s motivation. It matters not whether her breach was innocent, willful, or somewhere in between; an innocent breaching party would be just as liable as a willful

84. Farnsworth did include as a third example cases in which disgorgement is properly an “indirect solution.” Id. at 1375 n.137. In these cases the gain of the breaching promisor is used by the courts as a rough measure of the promisee’s expectancy damages. Id. Although the award results in disgorgement of the promisor’s gain, the intent is not to protect the restitutionary interest. Id. at 1376. The disgorgement is but an “indirect” consequence of protecting the promisee’s lost expectation. Id. As noted above, this is one of the categories identified by Dawson in his 1959 article. See Dawson, supra note 66, at 188.

85. This example had also been identified by Friedmann in his 1980 article. See Friedmann, supra note 71, at 522–25. The apt phrase “skimped performance” was later used to describe this type of case by Lord Wolff in Attorney General v. Blake, [1998] Ch. 439 (Eng. C.A. 1997), appeal dismissed, [2001] 1 A.C. 268, (2000) 4 All E.R. 385 (H.L. 2000). It is now commonly used in discussions of the disgorgement remedy.

86. Friedmann, supra note 71, at 522–25.

87. This example is based on the facts outlined in the famous case Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921).

88. Id. at 891.

89. Farnsworth, supra note 75, at 1385.

90. This example was also given by Friedmann in his earlier article. Friedmann, supra note 71, at 518.

91. This example appears in Restatement (Third) § 39, illus. 8 and is based on Long Building, Inc. v. Buffalo Anthracite Coal Co., 74 N.Y.S.2d 281 (N.Y. Sup. Ct. 1947).

92. Farnsworth, supra note 75, at 1391–92 (“Any extension of the disgorgement principle should be without regard to the character of the breach.”) In Farnsworth’s opinion willfulness was too mercurial a concept with which to burden the courts in determining whether disgorgement was the appropriate remedy. The line between “will not” and “cannot” perform is significantly fact-specific and will often be confounded by self-serving at-
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one. Conversely, the measurement of the amount to be disgorged would be limited by a "strict requirement of cause in fact."93 Causation was a cornerstone of Farnsworth's proposal. Disgorgement would be allowed for only the amount of gain or savings directly attributable to the breach. In this regard, willful and innocent breaching parties would be given the same credits and offsets for benefits and savings.94 All promisors would be credited with a deduction for any portion of the profit directly attributable to her individual industry and initiative,95 and the promisee would not be entitled to gains resulting from remote causes.96

Further, apparently to reduce the disgorgement amount to its absolute minimum, Farnsworth used a variation of the causation principle to argue that the amount disgorged should not be the entire gain, but only the "saving of the cost of other means." "Other means" could take one of two forms—"saving of the cost of substitution" or "saving of the cost of modification." The idea, oddly enough, was that the promisor should be given the benefit of opportunities that were potentially available to him.

93. Id. at 1342.
94. In this regard, Farnsworth deviated from the customary restitution principle that "fault may be relevant to the measure of unjust enrichment and other features of restitutionary remedies." Restatement (Third) § 1 cmt. f.; cf. id. § 49(3) (listing four different ways for measuring unjust enrichment with § 51, adding rules designed to disgorge profits or other secondary benefits of "conscious wrongdoers"). The courts often use similar principles to limit damage recoveries in restitution-like cases, reaching results that are indistinguishable from disgorgement. In trespass cases, for example, where the defendant has wrongfully removed gravel, coal, oil, gas, or other minerals from property owned by the plaintiff, the wrong may have caused little if any decrease in the market value of the realty. The plaintiff then sues for damages for the tort of trespass. An action in restitution is not available because of the traditional rule discussed above. See supra note 27. Trespass damages are allowed for the value of the property wrongfully taken, with the measurement of that value dependent on the willfulness of the defendant's wrong. If the trespass was innocent, the plaintiff's recovery is limited to a reasonable royalty that the plaintiff could have received had she leased the mineral rights. This measure allows the defendant to retain any profits resulting from a sale of the minerals. In cases in which the plaintiff was capable of extracting the minerals herself, damages are measured by the value of the minerals less the costs of extraction. This measurement takes the profits from the defendant, awards them to the plaintiff, but allows the defendant a deduction for the reasonable cost of extraction. See Kroulik v. Knuppel, 634 P.2d 1027 (Colo. App. 1981) (discussing these measurements in action by owner who acquired title by adverse possession against owner of record; damages measured by reasonable royalty); see also Young v. Ethel Corp., 581 F.2d 715 (8th Cir. 1978); Alaska Placer Co. v. Lee, 553 P.2d 54 (Alaska 1976) (royalty or market value less production costs); Hunt v. HNG Oil Co., 791 S.W.2d 191 (Tex. App.—Corpus Christi May 3, 1990, writ denied) (value of minerals less production costs). Where the trespass was willful, however, some courts have adopted a punitive measure of the value of the minerals at the surface with no deduction for their extraction costs. See Payne v. Consolidation Coal Co., 607 F. Supp. 378 (W.D. Va. 1985) (good faith trespasser liable for compensatory damages only; bad faith trespasser liable for higher measure based on market value at time trespasser uses or sells property wrongfully taken). Restatement (Third) § 39 illus. 2 takes a similar fact situation and treats it in a disgorgement context. The illustration is based on Laurin v. DeCarolis Construction Co., 363 N.E.2d 675 (Mass. 1977).
95. Farnsworth, supra note 75, at 1347-49.
96. So, for example, the promisee would not be allowed to trace the promisor's ill-gotten gains into still more profitable ventures. Id. at 1349-50.
had he more appropriately chosen one of them rather than to breach. To illustrate, assume in the skimped-services paradigm that, instead of breaching, the promisor had negotiated a settlement in which the promisee agreed to accept the substitute performance in exchange for the promisor’s sharing some of the savings with him. The amount the promisee theoretically would have agreed to accept would represent the “saving of the cost of modification” and, correspondingly, the amount that should be disgorged. Or, using the delayed-performance paradigm, assume that the promisor could have purchased identical goods in substitution for those contracted for and still have earned the profit. The amount that the promisor could theoretically have paid for the substitute goods would represent the “saving of the cost of substitution” and, correspondingly, the amount that should be disgorged.97

The next noteworthy foray in the law reviews was by Andrew Kull, the Reporter for the new Restatement of Restitution, writing over a decade before the Restatement was published.98 As discussed above, a good portion of the article was devoted to demonstrating the absence of a disgorgement remedy for breach in the Restatement (Second) of Contracts (as well as in the common law).99 Like Farnsworth, Kull opined that disgorgement for breach should be allowed in only “a limited class of cases”100: those involving instances of profitable and opportunistic breach as he defined those terms.101 He said that his concept of “opportunistic breach” and Farnsworth’s concept of “abuse of contract” frequently would capture the same disgorgement cases, and he concluded his article by calling for the narrow disgorgement remedy, “whatever its ultimate contours, that Professor Farnsworth has long recommended.”102

97. In his 2001 article, Friedmann seconded Farnsworth’s position requiring a “causal connection between the interest appropriated from the plaintiff (or the breach of duty owed to him) and the accrued profits.” Friedmann, supra note 75, at 1924. Friedmann agreed with many of Farnsworth’s examples of how the causation requirement should be applied.
99. As discussed supra in Part II, Kull demonstrated that the Restatement of Contract’s restitution interest deals entirely with restoration and that, therefore, it was in effect redundant with the reliance interest. He suggested that the Restatement’s reference to the restitution interest could be eliminated entirely and replaced by the disgorgement interest. Id. at 2053.
100. Id. at 2044.
101. Kull said that “a breach is ‘profitable’ if the defendant’s liability for contract damages is less than the cost of the defaulted performance; it is ‘opportunistic’ if the defendant, by electing to breach, is attempting to improve on the terms of contractual exchange, managing either to give less or to take more than the parties had agreed.” Id. at 2021 n.1.
102. Id. at 2053. A bane of all Reporters, whether of a restatement, uniform law, or other piece of legislative material, is that their publicly stated opinions are too often taken as gospel of the true meaning of the final product. Familiarity with the drafting process, however, should quickly disabuse one of the notion. This article will attempt to keep separate Professor Kull’s academic writings and the text and commentary of the new Restatement. The obvious exception will be the Restatement’s “Reporter’s Notes,” which can be taken as statements of the Reporter’s observations. But in particular, his qualifier “whatever its ultimate contours” in his 2001 article suggests that he may not have finished thinking about the disgorgement remedy in § 39 of Restatement (Third), which was published more than a decade later. Also, although Kull did not emphasize the point in his
However, in his 2007 article, Melvin Eisenberg took a position discordant with the harmony between Farnsworth and Kull. He expressed disappointment (as had Kull) that the *Restatement of Contracts* had not expressly provided for protecting the disgorgement interest. He pointed to “more than a dozen” American appellate-level cases that had awarded disgorgement for breach, as well as cases from the high courts of Commonwealth countries. He argued that the smattering of American cases that have refused to allow the disgorgement remedy were wrongly decided. Although he conceded that the relevant case law did not support a general disgorgement remedy for breach of contract, he concluded that there was also insufficient case law to justify the *Restatement’s* categorical disregard of the remedy.

In Eisenberg’s view, a restoration remedy for breach should be much broader than that contemplated by Farnsworth. He noted that, because of the well-documented deficiencies in the rules for recovering expectation damages, protecting the expectation interest will often fail to provide proper incentives for performance and “to effectuate contracts.” In these cases, promisors will be encouraged to breach in order to take advantage of more lucrative post-contract opportunities, because the rules allow them to under-compensate the promisee and garner the resulting benefit. He concluded that recognition of the promisee’s disgorgement interest would deter these opportunistic breaches and stabilize contract expectations.

article, unlike Farnsworth’s “abuse of contract” notion, his concept of “opportunistic breach” required an intentional breach. See id. at 2021 n.1 (emphasizing that an opportunistic breach does not include all profitable breaches but only those where “the defendant, by electing to breach, is attempting to improve on the terms of the contractual exchange [...]” (emphasis added)). This difference of opinion became especially significant in framing *Restatement (Third)*’s “ultimate contours” for its disgorgement remedy. The *Restatement* resolves the conflict in Kull’s favor. Before the *Restatement*, however, Kull’s article stood alone in limiting the remedy to cases of intentional (“deliberate”) breach.


104. *Id.* at 564–66. Eisenberg said that there was ample caselaw existing when the second *Restatement* was published to support including the disgorgement interest within its provisions. Allan Farnsworth, the Reporter for the greater portion of the *Restatement*, had previously reached a contrary conclusion. Farnsworth, *supra* note 75, at 1369. He said that statements in the available cases supporting disgorgement were “widely scattered, do not cite each other, and show no coherent pattern.” *Id.*

105. In this regard he echoed Professor Dawson’s earlier optimism. See Dawson, *supra* note 66, at 192; see also 1 George E. Palmer, *The Law of Restitution* 438 (1978) (“Although the issue [of a disgorgement remedy for breach] has gone largely unexplored ... it cannot be wholly rejected.”).

106. Eisenberg had particular difficulty with Farnsworth’s causation arguments for limiting a disgorgement remedy, finding them “flawed.” Eisenberg, *supra* note 103, at 566–70. This writer shares those reservations. Farnsworth’s arguments can largely be resolved by apportioning the amount of disgorgement rather than by denying it altogether.


As Eisenberg was well aware, these arguments were not new. The inadequacies of expectancy damages to provide full compensation has always been a staple in the call for a disgorgement remedy in contract law. Indeed, most of Eisenberg's examples of the types of cases to which disgorgement should extend were those previously pointed to by other scholars and are the same types that are used as illustrations in § 39 of the new Restatement.

Eisenberg argued, however, that the disgorgement remedy should be extended even further than others had previously suggested. He maintained that disgorgement is "almost always appropriate" where it has been bargained for—in the sense that the promisee has "paid" for the disgorgement. A clear example of what Eisenberg had in mind would require but a slight variation in the facts of the well-known case Peevyhouse v. Garland Coal Co. Garland had breached a covenant to restore the Peevyhouses' property after conducting a strip-mining operation. In return for conveyance of the mineral lease, Garland agreed to pay the Peevyhouses a royalty on the mined coal. The Peevyhouses insisted that the restoration covenant be included in the lease. Garland did not restore the land as promised, leaving a diminution in its value of only $300. It would have cost the Peevyhouses $29,000 to have the restoration work done by a third party. The court limited the damage recovery to the diminution in the value of the land. If, however, we add to these facts that Garland had agreed during negotiations to include the covenant, but only in exchange for a reduction in its royalty payment, it becomes clear that the Peevyhouses had "paid" for the restoration covenant by agreeing to accept the reduction. Eisenberg said that in these circumstances Garland Coal "should at least be required to disgorge the expected cost of restoration at the time the contract was made," regardless of whether Garland's failure to restore resulted in any diminished value of the realty.

Had Eisenberg's variation represented the actual facts, the Peevyhouses should, and probably would, have been awarded the reasonable cost of restoration. Few, however, would consider this a disgorge-
ment of Garland's savings because the cost of restoration would be the proper measurement of the Peevyhouses' expectation damages.\footnote{113} If disgorgement were the goal, the Peevyhouses' recovery would not be based on what it would have cost them to have the land restored, but on what it would have cost Garland—its savings—to perform the work. The latter sum would presumably be the lesser, because it would not include the profit for the work reflected in the market price that the Peevyhouses would have had to pay. Disgorgement would actually undercompensate the Peevyhouses.

Eisenberg then extended his analysis. He abandoned his \textit{Peevyhouse} variation and returned to the actual facts of the case. He suggested that even without an express agreement, in many contracts the promisee can be said to have "implicitly" paid for the right of disgorgement. The promisee does this, in Eisenberg's view, because both parties at the time of contracting know that, between the time of the contract and its performance, a third party "overbidder" may come along to offer the promisor a higher price. An "economically rational" seller thus will price the performance to the buyer at a premium\footnote{114} to include the value of the seller's assuming the risk that an overbidder will emerge. In turn, the buyer, knowingly or not, will pay this premium, thereby implicitly paying for the right to disgorge the seller's profits if he subsequently deals with the overbidder.

Eisenberg's suppositions ask a good deal of sophistication of "economically rational" sellers. Sellers typically charge as much as they think the market will bear or, in negotiated transactions, as much as the particular buyer will pay. Buyers pay as little as they think the seller will accept, and no more than the performance is worth to them. Somewhere in this muddle of day-to-day trading there may—or may not—be an implicit charge by the seller to guard against the likelihood of a better deal coming along.\footnote{115} Sellers, however, are unlikely to factor this probability into the

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113. Eisenberg clearly recognizes that in these situations the expectation interest performs the function of disgorgement. Eisenberg, \textit{supra} note 103, at 582. He also emphasizes that this is true in many different contexts, and he suggests that this is one reason why we do not see more disgorgement contract cases. \textit{Id.} at 597–98. What is not clear, then, is why a disgorgement remedy is necessary in his "implicit premium" cases, which would be better resolved by an award of expectation damages for the cost of restoration.

114. "The amount of this premium will be the expected value of an overbid, based roughly on a probability-weighted average of potential overbid prices." \textit{Id.} at 581.

115. Eisenberg does not explain why there could not just as well be an implicit discount to guarantee a quick sale because the seller needs money or simply wants to insure that the buyer does not take her business elsewhere. If the buyer then breached in order to purchase other property at less than the breached contract price, surely Eisenberg's theory would not extend to allow disgorgement of the buyer's savings based on an argument that the seller implicitly "paid" for the right. In contrast, Steve Thel and Peter Siegelman maintain that there are indeed "promisees who bargain for nothing more than the benefit of their bargains [and who] will not want to pay a premium for the right to receive more than expectation in case of any breach, willful or otherwise." Steve Thel & Peter Siegelman, \textit{Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine}, \textit{107 Mich. L. Rev.} 1517, 1518 (2009). They suggest, however, that contracting parties would almost always agree \textit{ex ante} that certain types of particularly egregious breaches would be

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pricing unless the probability is high. If the seller believes that a better buyer will probably present herself in the short term, a rational seller either will not sell to the underbidding buyer or will, as Eisenberg suggests, charge a price near the price anticipated from the overbidder. In this circumstance, the buyer will pay no more than he values the goods, and he may or may not know that the seller has implicitly hiked the price. Either way, the buyer's assent to the price is based on his own value of the seller's performance. Certainly, as would anyone, the buyer would agree that he paid both for the seller's performance and, implicitly, for the seller's promise not to breach. That is what every contract entails. It stretches reasoning, however, to assume that the buyer would agree that he paid some implicit premium for that inherent contract right.

Eisenberg did not intend for his "implicit premium" theory to extend to all contracts. He would probably agree that his analysis does not work for goods and services that are available generally in the marketplace. Those are plentiful, and if an overbidder comes along the seller can accommodate her with an additional performance. Eisenberg's examples for "implicit premium" cases are confined to those in which the seller's agreed performance is in limited supply—the sale of land and the sale of antiques or other "differentiated" goods. Regardless, even granting the validity of his analysis, Eisenberg's theory goes as much to support a measurement of lost expectation damages as it does to support disgorgement. The relevance of the buyer's implicit payment should in this respect be treated no differently than the explicit payment in his Peevyhouse variation.

IV. THE ELEMENTS OF § 39

The disgorgement remedy in § 39 of Restatement (Third) of Restitution is best understood in context with the case law and academic literature capsulated in the discussion above. It is intended to fill a gap in the

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"out of bounds," and that with respect to those breaches promisors implicitly agree to an increased liability that may exceed the promisee's actual expectancy damages. Id. at 1519.

116. Here, "differentiated" goods apparently refers to goods not generally available in the marketplace, but not necessarily what he calls "unique" goods. Eisenberg, supra note 103, at 581 n.58.

117. The new Restatement of Restitution provides:
§ 39. Profit From Opportunistic Breach
(1) If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.
(2) A case in which damages afford inadequate protection to the promisee's contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.
(3) Breach of contract is profitable when it results in gains to the defendant (net of potential liability in damages) greater than the defendant would have realized from performance of the contract. Profits from breach
coverage of the remedies for breach as they are framed by Restatement (Second) of Contracts. Otherwise, its addition to the law of restitution is incidental. The remedy, therefore, is placed with other contract-related remedies in Chapter 4 of the new Restatement ("Restitution and Contract") instead of in Chapter 5 ("Restitution for Wrongs") with all other disgorgement remedies. For some reason, however, its drafters apparently lost sight of their objective, because they ultimately composed the remedy with myopic conformance to the Restatement's other disgorgement remedies, ones that are intended to respond to wrongs that are conceptually foreign to the wrong of breach of contract. The final product thus looks little like a contract remedy and much like an iconoclastic departure from the theoretical underpinnings of contract law. As such, it promises to be largely ignored by our courts. This may not be a bad thing because the proposed remedy, particularly by restricting its coverage to deliberate breaches, would actually overturn most of the well-reasoned contract case law that it cites in support of its cause.

As discussed above, prominent writers began decades ago to ferret out the cases that have allowed disgorgement as a remedy for breach of contract. The decisions in these cases were for the most part written narrowly and as sui generis. The academic literature, however, has used these cases to compose various overlapping theories to support a general disgorgement remedy for breach. The new Restatement borrows heavily from this literature. The commentary to § 39 emphasizes that its goal is to frame a rule that will identify . . . all of the relevant court decisions. But the provision proceeds cautiously with, as Farnsworth had put it, a "limited extension of the disgorgement principle." Regardless, whether the rule in § 39 is regarded as a contract rule, a restitution rule, or a hybrid of both, by giving the courts a carefully articulated general rule on which to peg their disgorgement decisions, § 39 proposes new law.

include saved expenditure and consequential gains that the defendant would not have realized but for the breach, as measured by the rules that apply in other cases of disgorgement (§ 51(5)).

118. Restatement (Third) § 39(1) acknowledges that "the rule of this section is an alternative to a remedy for damages."

119. Id. at cmt. a.

120. See also id. at cmt. d (noting that "a claimant under this section may recover the defendant's profits from breach, even if they exceed the provable loss to the claimant from the defendant's defaulted performance"). As will be developed below, it is on this important point that this article is in disagreement with § 39 on how a disgorgement remedy should be applied.

121. See Farnsworth, supra note 75, at 1382. Almost as an apology for even the slightest of intrusions on established law, the commentary to § 39 repeatedly emphasizes that the occasions for its application will be "rare." See, e.g., Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. a: "The restitution claim described in this section is infrequently available, because a breach of contract that satisfies the cumulative tests of § 39 is rare." And cmt. f, which is itself titled "The exceptional nature of the claim" and is devoted entirely to that subject, emphasizes that: "The cumulative requirements of § 39 will exclude the great majority of contractual defaults." Id. at cmt. f. Even the Reporter's Notes echo this refrain with the fear that "even a narrow disgorgement rule will be challenged as an innovation." Id. at reporter's note c.
The elements of § 39's disgorgement principle appear simple enough. There are but three. First, there must have been a "deliberate breach" by the promisor that, second, "results in a profit" to him but, third, leaves the promisee with no available damage remedy that will adequately protect his "contractual entitlement."

A. The Profit Element

The profit element would seem clear enough. In the obvious case, the promisor will "profit" if she breaches by giving the promised performance to a third party at a price higher than the price payable under the breached contract. The promisor will also "profit" from the breach if she breaches because the cost of her performance exceeds both the agreed return price and the provable damages she will have to pay for her breach.\(^\text{122}\) Further, § 39(3) specifies that: "Profits from breach include saved expenditure and consequential gains that the defendant would not have realized but for the breach . . ."\(^\text{123}\)

B. The Inadequate Protection Element

A promisee's entitlement under a contract is the performance of the promisor.\(^\text{124}\) Any breach by the promisor _ipso facto_ deprives the promisee of a "contractual entitlement." In most cases, however, the breach will not be one for which "the available damage remedy affords inadequate protection."\(^\text{125}\)

In general, the expectancy damages allowed by contract law are always inadequate.\(^\text{126}\) Damages are substitutionary relief and, as such, are not likely to be as satisfactory to the promisee as performance itself—the substitute rarely measures up to the original. More specifically, contract remedy rules prohibit the recovery of actual damages that were not within the contemplation of the parties at the time of the contract,\(^\text{127}\) damages that the promisee cannot prove with reasonable certainty,\(^\text{128}\) and damages that were reasonably avoidable by the promisee.\(^\text{129}\) Also, certain types of damages, such as those for mental suffering and for attorney fees, may not be awarded.\(^\text{130}\) The fact that these types of losses commonly occur and can be directly tied to the breach is irrelevant.\(^\text{131}\) Contract law does not regard their protection as part of the promisee's "contractual entitlement-
ment." The inadequacy of protection of the "contractual entitlement," then, means the entitlement normally protected by the rules of contract law, although the protection will almost always be inadequate in the broader sense.

Several of the illustrations provided in § 39 demonstrate this meaning. Illustration 17, for example, describes a situation in which an employee breaches an employment contract by taking a job that pays him an additional $5,000 each month. The employer then hires a replacement at a salary $2,000 per month higher than was paid the breaching employee. Since an award of $2,000 per month in damages will adequately protect the employer's contractual entitlement, disgorgement of the breaching employee's $5,000 per month profit is not permitted by § 39. This is so even though the services of the breaching employee may have had special value to the employer beyond the protection allowed by the damage award. As a policy matter, contract law does not award specific performance to protect any special interest an employer may have in the personal services of his employee.

Illustration 15 posits a situation where the seller breaches by selling contracted goods at double the contract price. The market price of the goods then declines so that at the time set for performance the market price exceeds that of the breached contract but is less than the price at which the seller sold the goods. Since damages based on market price will adequately protect the buyer's contractual entitlement, disgorgement of seller's profit would not be appropriate under § 39. Then, in nice juxtaposition with Illustration 17, Illustration 15 makes the qualification that disgorgement would be available if the contracted goods are unique or a specific performance remedy would otherwise be appropriate.

132. See Restatement (Third), comment c, which says that in this context the inadequacy of remedy is the same as would justify equitable relief. The comment, however, cautions that disgorgement here is a legal remedy: "Although the inquiry directed by this section into the adequacy of a damage remedy resembles the traditional threshold test for equitable jurisdiction, stated in terms of 'adequacy of remedy at law,' it would be erroneous and anachronistic to regard this newly-formulated rule as a species of equitable relief . . . ."
133. See, e.g., id. at cmt. i, illus. 17.
134. Id.
135. Id.
136. Id.
137. Id.
138. See Restatement (Second) of Contracts § 367(1) ("A promise to render personal service will not be specifically enforced"). However, an injunction may be available to prevent the employee from engaging employment elsewhere unless the injunction would coerce an undesirable personal relationship or would leave the employee without another viable means of earning a living. Restatement (Second) of Contracts § 367(2) (1981).
139. Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. h, illus. 15.
140. Id.
141. Illustration 14 echoes this qualification for a situation in which the buyer would have been entitled to specific performance because the buyer had a special interest in being the exclusive distributor of the breaching seller's goods. Negative covenant agreements, such as exclusive distributorships, are discussed below in Part V.D.
142. Id. at cmt. h, illus. 15.
Illustration 16 presents a hypothetical with exceptional facts that aptly demonstrate the broad range of situations where damages may be adequate within § 39's meaning. The seller agrees to sell the buyer 1000 widgets for $500. The seller's normal production costs are $250 per widget, but equipment problems have increased those costs to $350, thereby reducing seller's anticipated profit by $100 per widget. Rather than absorbing the full reduction, the seller acquires similar widgets from a third party for $300 each and tenders them to the buyer. The widgets are nonconforming and are worth $10 less than those promised by the seller. The buyer's recovery is limited to the $10 in damages. Although the seller clearly profited by acquiring the widgets rather than manufacturing them, disgorgement would not be proper because "there is no reason to conclude that Buyer's entitlement is inadequately protected by an ordinary damage remedy."

Finally, a breach by nonpayment of money is the quintessential situation in which damages will provide an adequate remedy. Illustration 12 involves a situation in which a buyer of goods delays payment of his seller's invoices and resells the goods he has not paid for in a profitable transaction. The seller's profits are not subject to disgorgement under § 39 because money damages will furnish an adequate remedy.

As a baseline for determining whether a remedy is inadequate for purposes of § 39, the commentary draws a parallel to the inadequacy situations that would have justified an award of specific performance or injunction had the situation been caught in time. These are situations that courts will find readily identifiable. The commentary says that the disgorgement remedy is designed to perform "the same contract-reinforcing objectives as [these] devices . . . at a different stage of contractual performance."

Indeed, disgorgement should in theory be even more readily available because it is awarded post breach and, thus, will not confront courts with common disincentives to awarding the equitable

143. Reporter's Note i to § 39 advises that the facts for Illustration 16 are taken from Kull, supra note 13, at 2051 n.75. The Reporter's Note says that § 39 applies only when the breaching party has been opportunistic. Conversely, in Illustration 16 "it is the party who seeks specific performance (or its monetary equivalent), not the party in breach, who is attempting to improve on the terms of the contractual exchange."
144. Id. at cmt. i, illus. 16.
145. Id.
146. Id.
147. Id.
148. Id.
149. The buyer's damages would be $10,000 as provided for in U.C.C. § 2-714(2). The seller's profit (based on the expenditure saved by the alternative method of performance) is $50,000.
150. The illustration also says that disgorgement is inappropriate because of the remoteness of the profit from the breach. Id.
151. The commentary to § 39 repeatedly emphasizes the similarity in the situations where the remedy of specific performance or injunction would be allowed and those that would justify § 39's disgorgement remedy. Comment c discusses this parallel in some detail, and the analogy is also made in comments a, b, and i.
152. Id. at cmt. b.
remedies, such as hardship to the promisor or potential difficulties for the court in supervising enforcement of the remedy. 153

Many courts and commentators have found a similarity between a disgorgement remedy and the equitable remedies of specific performance and injunction. 154 This is truly a curious and purely academic perspective. It is one thing to note that the situations justifying the remedies are similar and quite another to suggest that the remedies themselves are alike. A judgment for disgorgement is one of money and, unless the promised performance was for payment of an agreed price, it bears no resemblance at all to the repudiated performance. The Reporter's Note to § 39 thus goes much too far when it says that disgorgement is “the post-breach equivalent” of specific performance. 155 It is no more an equivalent than is any other monetary remedy. Like money damages, disgorgement is substitutionary relief and, like money damages, it acts as no more than a surrogate for the actual performance.

The failure of the disgorgement remedy to emulate other contract remedies does not, however, undermine its importance as fail-safe protection for contract entitlements when the other remedies cannot do the job. Disgorgement should be available ex-post in most cases in which the exceptional remedies of specific performance and injunction would have been given ex-ante 156 and, as discussed below, the amount disgorged should conform as closely as the facts will allow to the value of the contract entitlement it protects. It is unfortunate—bordering on the absurd—that § 39 would deny protection for many of these cases by giving primacy to the innocence of the breaching promisor over the harm caused to the remediless promisee.

C. THE DELIBERATE BREACH ELEMENT

The commentary to § 39 makes ascertaining the precise meaning intended for the “deliberate breach” requirement more difficult than it ought to be. “Deliberate” is not the customary label used by contract law to label a type of breach. In differentiating breaches, courts usually describe them with terms like “innocent” and “good faith” on the one hand, and “willful,” “intentional,” or “bad faith” on the other. 157 On occasion “deliberate” is used synonymously and interchangeably with “opportunis-

153. Id. at cmt. c.
154. See Restatement (Third) § 39, reporter’s note b, which contains a helpful collection of relevant authorities.
155. Id.
156. See Restatement (Third) § 39, comment c, which falsely promises: “If a court with the benefit of hindsight would have granted a remedy by injunction or specific performance, restitution by the rule of this section is appropriate after the fact.”
157. In the cases and literature, these variations at times mean the same thing or at other times they can mean a different thing in different contexts or even in the same context by different speakers. See, e.g., Robert A. Hillman, Contract Lore, 27 J. Corp. L. 505, 509 (2002) (using the terms “willfulness,” “deliberateness,” and “bad faith” interchangeably within the space of four sentences to describe the same type of breach). Professor Hillman’s usages are not exceptional.
tic” to describe a breach designed to further the self-interest of the breaching party at the other party’s expense.158 This usage is the one intended by § 39. It would have been helpful if somewhere the lengthy commentary to § 39 had just said that. The phrase “deliberate breach” appears only twice in the commentary.159 Otherwise, it is abandoned in favor of the phrase “opportunistic breach.”160 It is an unhappy and confusing curiosity that this critical requirement is not expressed in the text of § 39, that a misleading phrase is substituted for it, and that the commentary does not better clarify that “deliberate” and “opportunistic” are intended to be synonymous.161

The explanation for the phrasing is presumably to avoid redundancy with § 39’s inadequate remedy requirement. An “opportunistic breach” is defined as one not only intended to take advantage of a superior opportunity, such as engaging with a third party at a higher price, but also as one designed to take advantage of the promisee’s plight in not having

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159. Comment merely observes that disgorgement applies only to “deliberate breaches,” which it then distinguishes from unintentional breaches: “There are cases of unintentional breach [that are] outside the scope of this section.” This should not be taken to suggest that all intentional breaches are “deliberate” or “opportunistic” ones for purposes of § 39. See comment e, which emphasizes for § 39 purposes that a breach must be both “intentional and opportunistic.” The other reference to “deliberate breach” is in comment f, which describes how the elements in § 39 overlap. It says that a deliberate breach includes only opportunism that leaves the promisee with an inadequate remedy: “Even when breach is both profitable and deliberate – in the sense that it results from a conscious choice not to perform—there is no opportunism and no claim under this section if a damage remedy affords adequate protection to the promisee’s contractual entitlement . . . .” RESTATEMENT (THIRD) § 39 cmt. f.

160. As noted above at footnote 101, Professor Kull defined opportunistic breach as one where the promisor “by electing to breach, is attempting to improve on the terms of the contractual exchange, managing either to give less or to take more than the parties had agreed.” Judge Posner for the Seventh Circuit defined opportunistic breach as one where: “the promisor wants the benefit of the bargain without bearing the agreed-upon cost, and exploits the inadequacies of purely compensatory remedies (the major inadequacies being that pre- and post-judgment interest rates are frequently below market levels when the risk of nonpayment is taken into account and that the winning party cannot recover his attorney’s fees).” Patton v. Mid-Continent Sys., 841 F.2d 742, 751 (7th Cir. 1988).

161. The academic literature varies considerably in describing the types of breaches that should justify a disgorgement remedy. For example, in proposing a “workable rule” Farnsworth said that disgorgement should be limited to cases in which the breach constitutes “an abuse of contract.” Farnsworth, supra note 75, at 1384. He said that a breach was abusive when the promisor gains as a result of his breach and the promisee has no adequate remedy because he is “left with a defective performance and no opportunity to use [the promisor’s] return performance to attempt to obtain a substitute.” Id. He said, however, that his notion of abuse of contract differed from “opportunism,” which he defined as “self-interest seeking with guile.” Id. at 1393 n.158 (quoting Goetz & Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation, 69 VA. L. REV. 967, 982 n.38 (1983). Farnsworth also acknowledged that not all willful breaches are “opportunistic” because the latter would include only ones where the breacher is not prepared to pay damages for the injured party’s loss. Id.
access to an adequate damage remedy. Since vulnerability is implicit in § 39's meaning for "opportunistic breach," the first sentence in the text of § 39 could have been stated more simply without losing any of its meaning: "If a defaulting promisor commits an opportunistic breach, the promisee has a claim to restitution of the resulting profit realized by the promisor."

It is unclear whether the promisor need have actual knowledge of the promisee's vulnerability or possess intent to exploit it. Comment b equivocates on these issues, saying only that "there is no requirement . . . that the claimant prove the motivation of the breaching party." Is the intent here to eliminate the requirement entirely or merely to shift the burden of proof? Regardless, the outcomes of actual cases are unlikely to be affected. Deliberate conduct without motive, if humanly possible, is a pointless endeavor and, in the current context, inherently implausible. Once caught with ill-gotten gains from deliberate conduct, the recipient should have a near impossible task attempting to prove that his motivation was pure.

By both protecting the promisee's unliquidable "contractual entitlement" and frustrating the promisor's opportunistic behavior, § 39 is said "to reinforce the stability of the contract itself [by] enhancing the ability of the parties to negotiate for a contractual performance that may not be easily valued in money." To the extent that potential liability for damages will deter a breach in a particular case, expansion of that liability to protect otherwise unprovable losses of the promisee will correspondingly strengthen the deterrence and work to accomplish the "broader function of disgorgement" of encouraging a negotiated buyout or settlement. The commentary is emphatic, however, that there is no purpose in § 39 to punish the promisor. This makes the deliberate breach requirement all

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162. The phrase actually includes all three elements necessary for disgorgement because it assumes that the breach is profitable. See Reporter's Note b to § 39: "An 'opportunistic breach,' for purposes of this section, is one that meets the three tests stated in § 39(1): a breach that is profitable and deliberate, for which damages do not yield an adequate remedy."

163. "If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach."

164. See Restatement (Third) § 39 cmt. f: "Even when breach is both profitable and deliberate—in the sense that it results from a conscious choice not to perform—there is no opportunism and no claim under this section if a damage remedy affords adequate protection to the promisee's contractual entitlement . . . ." See also Restatement (Third), Reporter's Note I, which explains that Illustration 16 to § 39 is "designed to emphasize the point that a breach of contract may be deliberate and profitable without being opportunistic." Illustration 16 is discussed supra at note 142.

165. Id. at cmt. b.

166. Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. b.

167. Id.

168. The commentary acknowledges that punishment may be unavoidable but says in defense that "it applies only when a remedy in damages is inadequate to protect the promisee's entitlement." Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. e. This truly is disingenuous. "Punishment" in a remedial context is liability in excess
the more inexplicable. Protection of contractual entitlements would obviously be far better served by extending the disgorgement remedy to include innocent, negligent, or accidental breaches. 169

Further, only one contemplating a deliberate breach might regard a threat of disgorgement as an incentive to negotiate a settlement as contemplated by § 39. One who erroneously believes that his breach is justified will not be motivated to share ex ante the proceeds of his profitable breach, as he might be if disgorgement of profitable breaches were to extend to innocent wrongdoers.

Even where the promisor contemplates a deliberate breach, the laudable aspiration of a mutually beneficial settlement will often be undermined by more immediate practical concerns. Most obviously, the breacher in many cases will not be willing to risk the loss of a profitable opportunity while taking the time to negotiate with the promisee. The promisor will instead breach now and worry about the consequences after he has secured his position. Or the illicit opportunity may be so large or the breacher so greedy that he will be satisfied with taking his gain immediately and suffering consequences that will only come much later, if at all. Or the breacher may be rationally optimistic about his chances of success in the litigation game regardless of the substantive merits of his case. The good guys don't always win that game. Or, most understandably, a promisor may always breach now and attempt to negotiate a settlement later, a scenario that commonly ends the litigation game well before

of harm. Disgorgement punishes the promisor whenever the amount of the profit disgorged exceeds the value of the contractual entitlement being protected. When this occurs, however, § 39 says that it intends this only as a consequence of its primary purpose of preventing “unjust enrichment of the defendant at the expense of the plaintiff.” Id. at cmt. a; see also id. at cmt. e (“While the rule of this section is intended to make breach unprofitable, it does not seek to punish a breach of contract by requiring forfeiture of the defendant’s profit from the transaction as a whole.”). In Part VI below, this article argues that § 39 errs by not limiting the amount disgorged to a fair measure of the promisee’s loss. Doing so would better accomplish § 39’s avowed purpose of protecting contractual entitlements without punishing breaching promisors. Id.

169. As discussed above in Part III, none of the calls for a disgorgement remedy in the academic literature (not by Dawson, nor by Friedmann, nor by Farnsworth, nor by Eisenberg) would have conditioned its availability on the nature of the promisor’s breach. The exception was Professor Kull’s, although he did not belabor the point. He talked about “opportunistic” breaches, which he defined in part as those the promisor “elects” to do. Kull, supra note 13, at 2021 n.1. But he concluded his article by urging a “limited” disgorgement remedy like that requested earlier by Professor Farnsworth. Kull, supra note 13, at 2053. Farnsworth, even with his conservative view of the need for a disgorgement remedy for contract law, was abundantly clear that the remedy should apply regardless of the intent of the breaching promisor. Farnsworth conceded that at times contract cases do emphasize the willfulness of the breach, but he said that those cases go against the deep grain of the law of contract that “generally treats unwilling breaches in the same way as knowing breaches committed to realize gain.” Farnsworth, supra note 75, at 1391. He therefore concluded that “the concept of abuse of contract should not be limited to situations in which the breach is in some respect intentional . . . . Indeed, it would be hard to implement a distinction based on the character of the breach. Given the eagerness of contracting parties to find possible legal justification for nonperformance where this is to their advantage, having to decide whether, and perhaps to what extent, a breach was committed knowingly would place a heavy burden on courts. Any extension of the disgorgement principle should be without regard to the character of the breach.” Id. at 1391–92.
formal court proceedings. And in all cases a deliberate breacher who is burdened with some pesky moral inclination to do right is always free to rationalize momentarily that he can share with the promisee ex post a portion of his ill-gotten gains.

Setting aside for the moment the flawed aspiration of compromise and settlement, limiting disgorgement to deliberate breaches will still fail to protect contract entitlements and to preserve stability of relationships in many cases where a profitable breach leaves the promisee with an un-provable or unquantifiable loss. This becomes especially unfortunate in cases where the breach is actually deliberate but, given the inexactitude of the distinction between “deliberate” and “innocent,” the vagaries of circumstantial evidence, and the varying attitudes of juries, the aggrieved promisee simply cannot muster the required proof. Finding the borderline between intentional and innocent breach will often require a fact-intensive inquiry. Where that determination goes against the promisee she will in turn be left with no remedy and with no rational explanation for why the promisor should nevertheless profit from her loss. A law-choice to abandon all remedial protection for vulnerable promisees in favor of condoning enrichment of “innocent” breachers is bewildering. From any perspective that is unwarped by preconception, a choice in favor of a promisee who is otherwise left without remedy will always be rationally compelling regardless of whether the breacher intended to inflict the promisee’s plight, whether he accidentally did so, whether he tried to avoid it and failed, or even if he thought he had a right to do so.

The commentary and reporter’s notes for § 39 respond weakly to explain. We are repeatedly told that the provision has been drafted narrowly to ensure the rarity of the occasion for its implementation. The reporter’s note candidly concedes that the intent is to placate unidentified adversaries.\textsuperscript{170} The note maintains that, although there is general agreement among “observers” that a disgorgement remedy for breach is needed, there is “wide disagreement” about the situations to which the remedy should apply.\textsuperscript{171} Therefore, “the present section intentionally describes a conservative rule” but, even so, with the concern that “even a narrow disgorgement rule will be challenged as an innovation.”\textsuperscript{172} Without question, § 39 is innovative in formulating a general disgorgement remedy for contract law. But a widely supported innovation that represents a significant improvement in current law should cause concern only to the most fundamentalist voices of the law of contract and of restitution. It is unfortunate that § 39 opts for a halfway measure merely to stifle potential unwarranted controversy.

\textsuperscript{170} See generally \textit{Restatement (Third) of Restitution & Unjust Enrichment} § 39 cmt. g, which is devoted entirely to explaining the “exceptional nature of the claim.”

\textsuperscript{171} This statement is incorrect, however, with respect to the deliberate breach requirement. There has been no widespread support for the requirement either in the case law or in the academic literature. \textit{See infra} note 174. The cases are discussed below in Part V.

\textsuperscript{172} \textit{Restatement (Third) of Restitution & Unjust Enrichment} § 39, reporter’s note c.
The reporter's note concedes that the provision denies protection for meritorious cases, but rationalizes that "the benefits of giving § 39 a narrower, more recognizable scope makes this a price worth paying." This woeful assessment is highly questionable. The notes and commentary for § 39 offer but one salient substantive reason for excluding meritorious situations. We are told that symmetry must be maintained with the Restatement's disgorgement principles for wrongs other than breach of contract, particularly with the principle that "disgorgement remedies in restitution are principally addressed to instances of conscious wrongdoing."

Disgorgement for wrongs other than breach is governed by §§ 40–44. With the exception of § 43 addressing breaches by fiduciaries, these provisions apply only against "conscious wrongdoers." For example, the commentary to § 40, which promulgates the waiver option for the torts of conversion or trespass, says that while "a conscious wrongdoer may be liable to disgorge more than the value of what was taken or obtained . . . innocent trespassers and converters are liable in restitution for the value of what they have required . . . but not for consequential gains." So for innocent wrongs in these other situations, restitution is limited but not denied altogether. For example, an equitable lien may be acquired against an innocent trespasser or converter to secure a judgment in the amount of the injury actually caused, but recovery would not be allowed for "consequential gains." These types of restitution-based remedies are, therefore, readily distinguishable from § 39's disgorgement remedy for breach. They do bar disgorgement, but they do not relegate worthy restitution petitioners to the dustbin of failed claims.

173. Id. § 39, reporter's note f. The note does observe that it is easier to characterize a breacher's profits as unjust enrichment where the profits stem from a deliberate breach. Id. It also says that the requirement of deliberate breach confines the disgorgement remedy to the "strongest case" that would justify its implementation. Id. These observations surely support the wisdom of the provision, but they are not valid reasons to refuse granting the remedy in what some may consider to be less compelling cases.

174. See id. at cmt. a ("The claim described in this section is . . . identical in principle to the claims . . . authorizing a disgorgement remedy in cases of profitable torts and equitable wrongs . . . and it is properly understood and delimited by analogy to those claims.").

175. Id. at cmt. f.

176. Restatement (Third) § 40 addresses the torts of "trespass, conversion, and comparable wrongs"; § 41 addresses "misappropriation of financial assets"; § 42 addresses "interference with intellectual property and similar rights"; § 43 addresses breaches by fiduciaries; § 44 is a residual section that addresses "interference with other protected interests"; § 44(2) expressly excludes violation of "a duty imposed by contract" in deference to § 39.

177. See id. § 43 cmt. h ("Disgorgement liability [for breach of fiduciary duty] is not restricted to conscious wrongdoers.").

178. The matter is discussed in supra notes 25–33.

179. Restatement (Third) of Restitution & Unjust Enrichment § 40 cmt. b.

180. Id. § 50(5).

181. The reporters abound with cases applying these principles. See, e.g., Kroulik v. Knuppel, 634 P.2d 1027 (Colo. App. 1981) (addressing three potential measurements for plaintiff's recovery for the wrongful taking of gravel from plaintiff's land, two representing actual damages for an innocent trespass and the third being disgorgement of profits for conscious wrongdoing).
In marked contrast, § 39's disgorgement remedy is one of last resort. The remedy will apply only where the claimant has no other meaningful remedy—to situations where she cannot adequately quantify her actual loss in such a way that the current assortment of contract remedies can respond. In these cases there is always an unhappy choice in allocating the gain between two innocent parties. But it is not a difficult one. And in many situations the allocation to the promisee need not be all or nothing as § 39 would have it. The goals of maintaining symmetry with the general law of restitution and of protecting the promisee's contractual entitlement can, therefore, best be achieved by appropriately limiting the extent of the disgorgement rather than by denying it altogether.

V. THE § 39 ILLUSTRATIONS AND THE CASE LAW

The structure of § 39 is typical of Restatement provisions. Section 39 provides 17 illustrations of its application. Most are based on the holdings of actual cases. A few reverse the results of cases. And a few are hypotheticals. All of the latter two groups find some support in the literature discussed in Part III above. The illustrations are grouped into separate categories to support commentary that immediately precedes them. The commentary introduces principles and concepts that are necessary for proper application of § 39 but cautions that the illustrations themselves “are susceptible of various particularized explanations.” It also emphasizes that “the purpose of § 39 is to frame a rule that will identify” all of the principles that have been applied to award disgorgement for breach. As discussed below, however, this laudable and self-congratulatory assurance quickly proves to be false. In some of the cases upon which a particular illustration is based the court allowed disgorgement although the promisor's breach was not intentional, much less “opportunistic” in the § 39 sense. Section 39 would not support the results in these cases. In other cases, the courts allowed disgorgement, specifically stating that the reason for the breach was irrelevant. Section 39 would not agree with these cases. And in still others, although the breach was apparently deliberate, that fact was not determinative of the disgorgement decision. If bad conduct is evidenced by the record in these cases, it becomes a matter of convenience that courts will cite in support of the fairness of their decisions. Although § 39 would agree with the results in these cases, it would have the opinions written differently.

This incoherence is exposed by the section's first illustration. It poses a breach by a vendor of land, a pro-typical case for specific performance. In the illustration, however, specific performance is apparently no longer possible and, therefore, disgorgement of the seller's profit from a wrong-
ful conveyance to a third party is allowed. The Reporter’s Note says that the illustration is based on two Florida cases, Coppola Enterprises, Inc. v. Alfone and Gassner v. Lockett. In both of these cases the courts awarded disgorgement of the vendors’ profits without regard to damages measured by the actual market value of the property. In Coppola, the court made no reference to the property’s market value, but concluded instead that the vendor’s resale profit represented damages necessary to protect the buyer’s “benefit of the bargain.” In Gassner, the court reversed the trial court’s damage award and substituted an award of the seller’s profit, reasoning that the vendor should not have been allowed to benefit from his breach.

The irony is that in neither of these cases was the vendor’s breach deliberate and, therefore, in neither case could the court have based its holding on § 39 had the provision existed. In Gassner, the court noted that at the time of the transaction the deceased vendor had been “old, senile and extremely forgetful,” and it acknowledged that the trial record was devoid of evidence to suggest that he had acted in bad faith.

It is a nice question whether § 39 is meant to apply in situations where specific performance was a plausible remedy had the promisee pled for it. Section 39 does not speak to the issue but says only that “damages” must be inadequate. In the cases cited by the Reporter’s Note in support of Illustration 1, some courts emphasized that the vendor was no longer in a position to convey the property to the original vendee, but none of the cases addressed the converse situation.

Restatement (Third) Reporter’s Note d refers also to a contrasting case, Timko v. Useful Homes Corp., 114 N.J. Eq. 433 (N.J. Ch. 1933). But Timko was a decision in equity imposing a constructive trust. Id. By law, conscious wrongdoing was necessary for equity to entertain jurisdiction. Id. at 434. The defendant had acquired legal title to the property at issue from the previous owner with knowledge of the plaintiffs’ interest. Id. The court ruled that the defendant thereby held the property in trust for the benefit of the plaintiffs. Id. at 435. Upon sale of the property to a third party, the defendants therefore correspondingly held the proceeds in trust for the plaintiffs. Id. at 434–35. The Timko decision is one of innumerable cases that apply an “equitable conversion” theory whereby the vendee in a contract of sale becomes the equitable owner of the

184. It is a nice question whether § 39 is meant to apply in situations where specific performance was a plausible remedy had the promisee pled for it. Section 39 does not speak to the issue but says only that “damages” must be inadequate. In the cases cited by the Reporter’s Note in support of Illustration 1, some courts emphasized that the vendor was no longer in a position to convey the property to the original vendee, but none of the cases addressed the converse situation.

187. Coppola, 531 So.2d at 336; Gassner, 101 So.2d at 34.
188. Coppola, 531 So.2d at 353–37.
189. Gassner, 101 So.2d at 34.
190. It is as if § 39 begs criticism here by selecting from hundreds of available cases to support its premier illustration two decisions that so clearly contravene the provision’s deliberate breach requirement. One explanation for the choice of the Gassner case is that Dawson had used the case in his 1959 article to demonstrate a rare decision awarding disgorgement. See Dawson, supra note 66, at 187 n.27. Reporter’s Note d also refers to a later Florida intermediate appellate court decision, Seaside Cmty. Dev. Corp. v. Edwards, 573 So.2d 142 (Fla. App. 1991). See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39, reporter’s note d. As did Gassner, Seaside relied entirely on the Coppola case. See Seaside, 573 So.2d 142. As in Coppola, there was no allegation of a deliberate breach. The vendor’s defense was based on an erroneous, but apparently good faith, interpretation of the contract at issue.
191. Gassner, 101 So.2d at 33.
192. Coppola, 531 So.2d at 335. Restatement (Third) Reporter’s Note d refers also to a contrasting case, Timko v. Useful Homes Corp., 114 N.J. Eq. 433 (N.J. Ch. 1933). But Timko was a decision in equity imposing a constructive trust. Id. By law, conscious wrongdoing was necessary for equity to entertain jurisdiction. Id. at 434. The defendant had acquired legal title to the property at issue from the previous owner with knowledge of the plaintiffs’ interest. Id. The court ruled that the defendant thereby held the property in trust for the benefit of the plaintiffs. Id. at 435. Upon sale of the property to a third party, the defendants therefore correspondingly held the proceeds in trust for the plaintiffs. Id. at 434–35. The Timko decision is one of innumerable cases that apply an “equitable conversion” theory whereby the vendee in a contract of sale becomes the equitable owner of the
In sum, the relevant case law does not mandate or even support § 39's
deliberate breach requirement. That said, the case for disgorgement var-
iies with the facts. In some instances denial would be palpably unjust. In
others the case for disgorgement is strong but less compellingly so. In
these situations whether the remedy is allowed might be left to the discre-
tion of the court. The nature of the breach might then be a factor in de-
ciding whether to allow disgorgement or to limit its amount. For purposes
of making these kinds of decisions the discussion that follows slots the
§ 39 illustrations and the cases that precipitated them into definable (but
not discrete) categories.

A. Surrogate Damages Cases

These are the cases where traditional damage rules have failed but the
courts have fabricated a recovery measured by the defendant's gain from
the breach. Ostensibly they are simply expectancy damages cases. Profes-
sor Dawson, however, long ago identified these "substitute measure"193
cases as among the first to allow, albeit indirectly, a disgorgement remedy
for breach.194 Early examples were those involving tortious infringements
of intellectual property rights where the defendants had earned profits by
infringing the plaintiff's trademark, patent, or copyright. Most of these
old infringement cases would now be governed by federal and state stat-
utes.195 Today they continue to serve, however, as precedent for disgorge-
ment as a surrogate for estimating a plaintiff's damages in various types
of claims sounding in both tort and contract.

subject property at the time of the contract. This ownership interest entitles the vendee to
recover in equity the proceeds of any sale of the property by the vendor or by a third party
who has acquired it with knowledge of the plaintiff's interest. These cases rest on readily
distinguishable principles and, therefore, are poor representatives of the disgorgement
remedy formulated by § 39, which is intended to be remedy at law. See Restatement
(Third) of Restitution & Unjust Enrichment § 39 cmt. c ("[I]t would be erroneo-
and anachronistic to regard this newly-formulated rule as a species of equitable relief.").

193. See Dawson, supra note 66, at 188.
194. Dawson described the cases as ones in which the plaintiff could not meet the stan-
dards for proving damages with reasonable certainty "and the defaulter's profit has crept
in as a substitute measure." Id. at 188–89. He cited to several cases in which a plaintiff's
right to market exclusively in a defined territory had been infringed. Id. at 189. As dis-
cussed below in Part V.D., § 39 includes several illustrations involving breaches of various
types of negative covenants. Dawson's exclusive territory example is addressed by Illustra-
tion 14. See Restatement (Third) of Restitution & Unjust Enrichment § 39, re-
porter's note, illus. 14.
195. To cover gaps in the statutory coverage, § 42 provides that: "A person who obtains
a benefit by misappropriation or infringement of another's legally protected rights in any
idea, expression, information, image, or designation is liable in restitution to the holder of
such rights." Id. § 42. The commentary to this provision acknowledges the relationship
between money damages and restitution in the intellectual property cases: "To the extent
that the defendant's profits from infringement represent profits the plaintiff would other-
wise have earned, the calculation of 'infringer's profits' becomes an indirect mode of show-
ing 'plaintiff's damages,' and the same amount might be recovered under either
heading . . . ." Id. at cmt. d. The comment concedes that there will be overlaps between the
principles in § 42 and those in § 39: "In some other cases, the claim to profits derived from
misappropriation of a trade secret may be analyzed as a claim to profits from an opportu-
nistic breach of contract." Id. § 39 cmt. d., illus. 3.
Where the issue is not governed by statute, courts have used various methods to measure damages in trade secret cases, measurements that may focus on the defendant's profits, on the market value of the secret, on some version of a royalty, or even on the development costs of the secret. Illustration 3 to § 39 poses a situation in which a plaintiff has communicated confidential information regarding its pricing model to defendant, a potential customer, and defendant in return has promised not to disclose the information and not to use it in competition with plaintiff in bidding on certain leases. Defendant "deliberately" breaches the agreement by secretly and successfully bidding against plaintiff. The breach, however, causes no provable damages because plaintiff was only the third highest bidder and would not have been the winner even if defendant had not participated. The illustration nevertheless awards disgorgement of any profits earned by defendant from the leases.

Illustration 3 is based on *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, a case in which the court on similar facts awarded the plaintiff a constructive trust on the defendant's profits. The court said that the award was intended to serve a two-fold remedial purpose in that "it will force the transgressor to forfeit illegally-gotten gains, and provide compensation for the plaintiff's injury." Arguably, *Eden Hannon* and Illustration 3 do not fit the surrogate damages paradigm because the plaintiff would not have been the high bidder had the defendant not breached. The court, however, brushed this aside because the evidence showed that the seller did not always award the leases to the high bidder. The court also emphasized that the defendant's intent in breaching the agreement was irrelevant to its decision. Most contract-based claims for misappropriation of trade secrets arise from employment contracts where the defendant has allegedly transferred trade secrets of its former

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196. See Universal Comput. Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 539 (5th Cir. 1974) (noting that the methods used to calculate damages may include the value of the plaintiffs' lost profits, the defendant's actual profits from the use of the secret, the value that a reasonably prudent investor would have paid for the trade secret, the development costs the defendant avoided by the misappropriation, and a reasonable royalty). The courts consistently limit the recovery to net profits, reasoning that a damage measurement based upon gross revenues or gross profits would be punitive. See Univ. Gen. Hosp., LP v. Prexus Health Consultants, LLC, 403 S.W.3d 547, 551 (Tex. App.—Houston [14th Dist.] June 20, 2013); see also Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 565 (Tex. 1973).


198. The court noted that, since no specific trust res existed, the "constructive trust" was in essence a simple accounting for profits. Id. at 564. The court also affirmed the trial court's injunction prohibiting the defendant from future violations. Id. The case nicely satisfies the litmus test for applying disgorgement under § 39; i.e., whether specific performance or injunction would have been appropriate. Although the trial court did not find that the defendant had breached the agreement, it granted the plaintiff an injunction against future violations.

199. Id. at 564 (emphasis added).

200. See id.

201. See id. at 565.
employer to its new one. The court in *Eden Hannon* relied heavily on these cases. The court noted that direct evidence that an employee has actually disclosed the trade secret is usually hard to come by and that even an employee with good intentions would find it difficult to be effective for his new employer without using the former employer's trade secrets. The court therefore concluded that the former employer should be protected whether the secret is subsequently disclosed "either malevolently or benevolently." The court in *Eden Hannon* relied heavily on these cases. The court noted that direct evidence that an employee has actually disclosed the trade secret is usually hard to come by and that even an employee with good intentions would find it difficult to be effective for his new employer without using the former employer's trade secrets. The court therefore concluded that the former employer should be protected whether the secret is subsequently disclosed "either malevolently or benevolently.

The surrogate damages cases that Professor Dawson identified in his 1959 article were those involving sales made in breach of exclusive territory agreements. The plaintiff faces the obvious difficulty of proving that, had it not been for the defendant's intervention, she would have made the illicit sales and earned the profits herself. The court, however, gives the plaintiff the benefit of the doubt, accepts the profit earned by the defendant as evidence of the damages suffered by the plaintiff, and renders judgment accordingly. The reporters abound with these types of cases. *Unita Oil Refining Co. v. Ledford* is a typical case. The court reached its disgorgement verdict summarily, simply stating that profits from the promisor's illicit sales were relevant evidence "to make a reasonably accurate estimate of the profits the [promisee] had been prevented from making."

Although the surrogate damages cases are expectancy cases and are not guided by restitution principles, they do represent well-accepted authority for disgorging a breacher's gain when the promisee would otherwise be denied any remedy. It is therefore extraordinary that, although § 39 purports to rely on these cases, it formulates a rule that would reverse the result in a substantial percentage of them—all those not involving a deliberate breach. Conversely, the surrogate damages theory is of limited utility in support of a disgorgement remedy, because the courts have for the most part confined the theory to discrete types of cases, such as those involving infringements of intellectual property or breaches of trade secret and non-competition clauses. If the theory could be ap-

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202. *Id.* at 560.
203. *See id.* at 561.
204. *Id.* at 562. The court emphasized that the trial court had not been able to determine definitively whether the defendant had actually used the confidential information in violation of the agreement. *Id.* at 564. The court noted, however, that it was to protect against this eventuality that the plaintiff had also included the non-competition provision, which the defendant had definitely violated. *Id.*
206. *Id.* at 188-89.
207. *Id.* at 189.
209. *Uinta*, 244 P.2d at 884. The court only mentioned in passing that the promisor knew that it was selling to customers in the defendant's designated territory. *Id.*
210. *See Eisenberg, supra* note 103, at 577, suggesting that "the best way to ensure protection of the expectation interest may be to use disgorgement as a surrogate for expectation damages, just as reliance is sometimes used as a surrogate for expectation." *Id.*
plied to encompass the bulk of cases where actual damages are not provable, little need would remain for a separate disgorgement remedy for breach.211 There is little likelihood of that happening.

**B. “Paid-in-Advance” Cases**

Several of the illustrations for § 39 are based on the surrogate damages cases but change the courts’ reasoning so as to justify a disgorgement award.212 Illustration 6 takes a slightly different tack.213 It suggests a so-called “paid-in-advance” theory for disgorgement that was used by the court in *Y.J.D. Restaurant Supply Co., Inc. v. Dib*.214 In *Dib* the seller of a small business opened a storefront in breach of a covenant not to compete with the buyer of his former business within a five-block radius for a period of three years.215 The seller then sold the competing business to a third party who was presumably unaware of the seller’s wrongdoing.216 The original buyer sued the seller for damages and an injunction.217 The court granted the injunction but found that the buyer had failed to prove its actual damages with reasonable certainty.218 It nevertheless awarded the buyer the profits earned by the seller from the sale of the competing business.219 The court reasoned that it had broad discretion *in equity* to fashion its decree, relying on a long line of New York cases in which the courts in equity had disgorged profits gained from “willful and wrongful acts.”220 The case fits the § 39 paradigm perfectly, and few would argue with its result.221 The most persuasive reason given by the court to justify

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211. See id. at 597–98.
212. For example, the infringement and trade secret cases overlap with the broader disgorgement principle in § 42 for “restitution for wrongs.” The non-compete cases like the *Eden Hannon* case and Illustration 3 to § 39 are justified as either “negative covenant” cases (discussed below in Part V.C.) or as “paid-in-advance” cases as discussed in this section.
213. See id. § 39 cmt. d, illus. 6.
214. *Y.J.D. Rest. Supply Co. v. Dib*, 413 N.Y.S.2d 835 (N.Y. Sup. Ct. 1979). *Dib* is the rare case that does not use the profits garnered from breach of a covenant not to compete as the measure of the plaintiff’s damages. It is curious that the Restatement elects to enshrine a nondescript, decades-old, state trial court decision to illustrate disgorgement for this kind of breach. There is a plethora of more representative cases, many decided by federal courts and state courts of last resort, that reach the same result by awarding the defendant’s profits as surrogate damages.
216. Id. at 836.
217. Id.
218. Id.
219. Id.
220. Id.
221. The surrogate damages theory may not have been presented at trial. The court’s reasoning in *Dib* is dubious precedent. New York law generally requires fraud or breach of fiduciary duty in order to invoke equity. *Fur & Wool Trading Co., Ltd. v. Fox*, 156 N.E. 670 (N.Y. 1927) may have been the earliest case in which the New York Court of Appeals extended equity jurisdiction beyond fiduciary liability. The defendant was a conscious wrongdoer, a fence who had purchased the plaintiff’s property from a thief and then had resold it at a profit. See *Bradkin v. Leverton*, 257 N.E.2d 643 (N.Y. 1970) (refusing to extend *Fur & Wool* to other cases of unjust enrichment). All of the equity cases cited by the court in support of its decision involved conscious wrongdoing.
its disgorgement verdict was that the plaintiff had already purchased the goodwill of the business from the defendant. To allow the seller to keep the profit from the later sale of the illicit storefront would be tantamount to allowing him to sell the goodwill twice.222

Melvin Eisenberg’s variation of the facts in Peevyhouse v. Garland Coal & Mining Co.223 discussed above, aptly demonstrates the strength of the argument for disgorgement when the promissee can be said to have paid-in-advance for the breached performance.224 The variation has the Peevyhouses taking a reduced royalty payment for the lease in exchange for the defendant’s agreement to restore the property.225 The plaintiffs would then have demonstrably paid-in-advance for restoration—the reduction in the royalty having been given in exchange for the defendant’s restoration covenant.226 As Eisenberg correctly concludes, disgorgement of the defendant’s savings can then be justified as protection of the plaintiffs’ expectation interest.227 It is unlikely, however, that the defendant’s savings would compensate fully for the lost expectation, because the savings would not include the additional profit that a third party probably would charge the plaintiffs for a substitute performance.228 Regardless, the recovery is clearly appropriate whether the action is framed as one for expectation damages or for disgorgement. In neither case should it matter that the breach may not have been deliberate in the § 39 sense or even that the plaintiffs might prudently choose to pocket the money rather than to spend it on restoration.

Most courts would have no difficulty awarding restoration costs as expectancy damages in this kind of case.229 American Standard, Inc. v. Schectman,230 is an excellent case in point. Schectman involved the sale of a pig iron manufacturing plant and related machinery located on land owned by plaintiff.231 Defendant buyer breached a covenant in the contract of sale to grade and to otherwise prepare the property for a later sale by plaintiff.232 The court found that plaintiff had chosen during negotiations of the contract to take a reduced payment for the plant and machinery in exchange for the restoration covenant, and the court therefore

222. The court also emphasized that the competing business was ongoing and would remain in competition with the buyer. Dib, 413 N.Y.S.2d at 837.
223. See 382 P.2d 109, 211 (Okla. 1962).
224. See Eisenberg, supra note 103, at 595.
225. Id. at 595–96.
226. Id. at 595.
227. Id. at 596.
228. Professor Eisenberg says that disgorgement should be “at least . . . the expected cost of restoration at the time the contract was made.” Id. at 595. He does not explain his reasoning. See id. If the recovery is framed in terms of disgorgement the defendant’s savings are those costs that would have been incurred at the time restoration was due; i.e., the time of the breach. See id. at 596. If the recovery is for the lost expectancy, damages should be measured as with any other breach by the cost of a substitute performance at the time of the breach.
229. See Schectman, 439 N.Y.S.2d at 533–34.
230. Id. at 531.
231. Id.
232. Id. at 533–34.
awarded plaintiff damages measured by the full cost of restoration. The court emphasized that the award was appropriate even though the burden of restoration had proved to be much larger than anticipated by defendant and even though the cost of completion was greatly disproportionate to any end to be obtained by plaintiff. Defendant had assumed these risks as part of the agreed contract price. The court correctly framed its decision entirely in terms of plaintiff's lost expectancy with no mention of restitution or disgorgement.

Illustration 5 to § 39 is based upon Professor Eisenberg's variation of the Peevyhouse case, thereby making it a paid-in-advance case like Schectman. The illustration, of course, conditions the disgorgement on the promisor breach being "in deliberate disregard of his contractual obligations." From a contract compensation perspective, however, it is palpably wrong to say with one breath that a promisee has previously paid for a performance and to say with the next that the law will secure the right to that performance only against opportunistic infringers.

As with the surrogate damages cases, contract law has no need here for the aid of restitution principles, and § 39 appears as an unwelcome intermeddler in its attempt to draw these cases into its fold. Conversely, contract law has nothing to say regarding disgorgement if the promisee's expectancy is less than the promisor's gain. If we assume, for example, that in Schectman the property owner fortuitously could have mitigated damages by having the land restored by a third party at a price appreciably less than it would have cost the breaching promisor to perform, an expectancy damages recovery would be limited to the lower mitigation price. Any greater recovery would be left to the restitution principles in § 39 and might appropriately be confined to deliberate breaches.

When reasonably applicable, the paid-in-advance theory presents a particularly compelling reason for disgorgement. The theory itself, however, has no definable contours other than in situations in which the promise at issue was specifically factored as part of the price paid. In

233. A widely adopted contracts casebook advises that court records suggest that the reason Garland refused to restore the Peevyhouse property was because the coal reserves were much less than anticipated. L. Fuller & M. Eisenberg, Basic Contract Law 196–97 (4th ed. 1981). Schectman, however, should not be read as in disagreement with the result in Peevyhouse. There was apparently no evidence in Peevyhouse that would support a paid-in-advance theory. The dissent in Peevyhouse did emphasize that the plaintiffs would not have signed the lease without the covenant, but there was no suggestion that a lesser royalty was accepted in exchange for it. See id. at 115 (Irwin, J., dissenting). Also, we are told by Judith Maute that the Peevyhouses may have chosen not to accept an advance payment to cover the anticipated cost of restoration but insisted instead that Garland promise to restore the land. Judith L. Maute, Peevyhouse v. Garland Coal & Refining Co. Revisited: The Ballad of Willie and Lucille, 89 Nw. U. L. Rev. 1341, 1363 (1995). Evidence to that effect apparently was not presented at trial. See Peevyhouse, 382 P.2d at 111.


235. See id.


237. The matter is discussed below in Part VI.

238. See id.
the clearest case, as in the *Peevyhouse* variation, the price paid by the promisee and the performance refused by the promisor can be aligned tit-for-tat so as to be identifiable as agreed equivalents. Interpreted more broadly, the theory could logically be applied in any profitable breach case, because binding one's self to a contract in itself represents payment for all of the promisee's return performance. It is unlikely, however, that courts will be inclined to extend the paid-in-advance theory much beyond cases like *Schectman*, where the evidence shows a direct correlation between the price paid and the defaulted performance. And, when the theory is applied, the court will surely frame its analysis in terms of compensation for the plaintiff's lost expectancy rather than in terms of protecting his restitution interest.

C. **Two Types of “Skimped Performance” Cases: Compensation versus Disgorgement**

The surrogate damages and paid-in-advance cases demonstrate the strongest situations that justify disgorgement. A disgorgement remedy, however, is not needed for them because the courts treat the defendant's profit as a rough measurement of the plaintiff's expectation damages. “Skimped performance” cases involve a slight, but important, variation to the paid-in-advance cases. In them, the promisee's claim demonstrates that she has received less than she paid for, but unlike in the paid-in-advance cases a price paid cannot be tied directly to the promisor's underperformance.

Even Farnsworth, as a most conservative proponent, called skimped performance cases a “particularly important category” of his “abuse of contract” notion for disgorgement. He used as an example a construction contract in which a contractor builds with insufficient steel reinforcement but causes no actual damages because the owner sells the structure for as much as he would have received had it conformed to the contract specifications. He said that in this type of case “there is a strong moral argument for disgorgement.” Farnsworth's example was based on a New Zealand case, and there is also ample support for this view in the

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239. Cases like *Peevyhouse* would then become paid-in-advance situations without the factual variation suggested by Professor Eisenberg and Illustration 5 to § 39. The damage recovery would be the reasonable cost of restoration regardless of its disparity with the diminution in the property's value and regardless of whether there is any likelihood that the promisee would use the recovery to restore the property. The courts have had innumerable opportunities to proceed along those lines and have shown absolutely no inclination to do so. This matter is discussed further in context with the “skimped performance” cases in the next section, Part V.C.

240. Farnsworth, *supra* note 75, at 1385.

241. Farnsworth's example was based on *Samson & Samson Ltd. v. Proctor* [1975] 1 NZLR 655, 656 (SC) (NZ). The court awarded the owner a recovery measured by the amount saved by the builder in using less than sufficient steel. *Id.*

Somewhat surprisingly, courts in this country have yet to address a skimped performance breach in a disgorgement context. The three illustrations of skimped performance in § 39 are, therefore, based on a hypothetical and on two actual cases that denied recovery to the promisee because of a failure to prove actual damages. The § 39 illustrations reverse the results in both cases.

The two cases are City of New Orleans v. Firemen’s Charitable Ass’n and Coca-Cola Bottling Co. v. Coca-Cola Co. In Firemen’s, the promisor surreptitiously provided the city with less firemen, fire hoses, and pipe than called for by the contract, but when the contract term had expired the city had suffered no resulting damages. Similarly, in the Coca-Cola case, the promisor used a cheaper type of sweetener than that called for by the contract in making syrup for the promisees. The “defective” syrup, however, apparently proved to be just as tasty, and the promisees suffered no lost sales or other provable damages. Notwithstanding the absence of harm attributable to the breach, critics have rejected the results in both cases on the ground that it was palpably unjust to allow the promisors to retain the savings from their underperformances.

What goes largely unexplained is why these cases were unjustly decided other than, as Farnsworth saw it, on moral grounds. Are these cases somehow distinguishable from any other breach of contract case where a promisor profits from breach but causes no harm, other than in leaving a “stink in the nostrils” as suggested by Holmes?

Setting aside a purpose to punish, which § 39 explicitly disavows, and a policy-based argument for preserving stability of contract, which can always be trotted out to justify extending contract remedies, these are much weaker cases for disgorgement than are the surrogate damages and paid-in-advance situations. They cannot qualify as surrogate damage cases because the plaintiffs have suffered no actual damages of any kind. Nor are

244. In Coca-Cola Bottling Co. v. Coca-Cola Co., 988 F.2d 386 (3d Cir. 1993), the trial court did grant a disgorgement award, but the award was reversed on appeal on the ground that plaintiffs had abandoned their restitution claim at trial. Id. at 397, 413.
245. Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. d.
246. City of New Orleans v. Firemen’s Charitable Ass’n, 9 So. 486 (La. 1891). Restatement (Third) § 39, illus. 7 is based on the facts in this case but overturns its result in favor of disgorgement. Restatement (Third) of Restitution & Unjust Enrichment § 39, reporter’s note d.
247. 988 F.2d 386. Restatement (Third) § 39, illus. 9 is based on the facts in this case but overturns its result in favor of disgorgement. Restatement (Third) of Restitution & Unjust Enrichment § 39, reporter’s note d.
248. Firemen’s, 9 So. at 488.
249. Coca-Cola, 988 F.2d at 405–06.
250. Id. at 412.
251. The argument is that in both cases the plaintiffs had paid in advance for the contracted performance. See Eisenberg, supra note 103, at 593; Krull, supra note 13, at 2047–49; see also Att’y Gen. v. Blake, [1998] Ch. 439 at 294 (Eng. C.A. 1997), Ch. 439 at 294.
they paid-in-advance cases unless the evidence shows that the breaching promisor had factored the breached performance obligation into his contract negotiations and had priced the performance accordingly.

When a correlation between price and performance can be shown, however, the skimped performance has been paid for in advance. These cases then join the others among the strongest that should qualify for disgorgement. As Professor Kull conservatively put it, the promisee is then "merely asking for his money back"—in effect a refund to protect his "restoration interest." But a refund in these situations should be the minimum recovery. As in other paid-in-advance cases, disgorgement should be in an amount that will protect the promisee's expectancy interest. In Professor Eisenberg's Peevyhouse variation, for example, the recovery of the promisor's savings is justified as a rough approximation of the value of the restoration covenant that had been "purchased" by the promisees when they accepted a lesser royalty.

Conversely, Professor Kull goes too far if he is to be taken literally when he says that the paid-in-advance assumption is proper in all cases that are not ones "of mutual mistake or of discharge by supervening circumstances." But what of cases of minor mistakes, of supervening circumstances not sufficiently consequential to justify excused performance, or of major mistakes or supervening circumstances of which the breaching promisor has assumed the risk? The reporters abound with such cases. Many of them represent situations in which the promisor has breached because he had mistakenly calculated his cost of performance or because his initially accurate estimates were skewed by unanticipated events. The paid-in-advance assumption cannot reasonably be made for those situations. Peevyhouse, in fact, was just such a case. The trial record showed, not that the defendant had miscalculated the cost of restoration, but that the available mineable coal turned out to be much less than anticipated. The defendant then decided to cut its losses by not incurring the cost of restoration.

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253. See id. at 2048.
254. See Eisenberg, supra note 103, at 595.
255. Neither Firemen's nor Coca-Cola qualify as paid-in-advance cases because this kind of direct connection between the consideration paid and the performance received was not shown. See Eisenberg, supra note 103, at 595.
256. Kull's meaning here is better understood when he describes the assumption more narrowly, saying that the plaintiffs in these cases "can argue that they have already paid for the performance in question, so long as we assume that the defendants anticipated the cost of that performance and negotiated their contracts accordingly." See id. (emphasis added). Restatement (Third) § 39 cmt. g, similarly limits the paid-in-advance assumption: "Measuring damages by saved expenditure may be particularly suitable when the breach relates to specific aspects of the promised performance that have visibly entered into the calculation of the contract price, and when damages measured either by loss in value or cost of cure would not yield an effective remedy to the promisee." Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. g.
257. See id.
258. Id. at 114.
259. Fuller & Eisenberg, supra note 233, at 196-97.
260. See supra note 233.
plaintiffs had received a reduced royalty in exchange for the restoration covenant. *Peevyhouse*, therefore, was not a paid-in-advance case.\(^{261}\) It would take a change like that in Eisenberg's variation to make it one.

Taking the paid-in-advance assumption too far would posit in promisors an unearthly clairvoyance in anticipating costs and in pricing performances. All skimmed performance cases would then fall under the paid-in-advance umbrella, because whether the promisor has breached by rendering either a defective performance or no performance at all she has "skimmed" in a performance for which she has been paid. Where the breach leaves the promisee with an inadequate remedy the case then would become appropriate for disgorgement.\(^{262}\) On the other hand, in many cases it will indeed be readily apparent from the way negotiations unfolded or from the way the contract was structured that the cost of the skimmed performance was directly factored into the contract price.

It is here that we come to a fork in the analytical road. Those skimmed performance cases that can qualify under the surrogate damages or paid-in-advance approaches clearly may continue on as expectancy damages cases and be governed by contract, not restitution, principles. The unfortunate remainder will be diverted along the narrower restitution path to disgorgement. Illustrations 7 and 9 to § 39 are illustrative of the divide. Unlike Illustration 5's *Peevyhouse* variation, these use the unvarnished facts of the cases they represent, the aforementioned *Firefighter's* and *Coca-Cola* cases, respectively. The illustrations, however, reverse the results by allowing disgorgement. But the cases are distinguishable. *Firefighter's* qualifies as an expectancy damages case; *Coca-Cola* does not. In *Coca-Cola*, not only was there no showing that the plaintiffs had paid a premium for the sweetener called for by the contract, unlike in *Peevyhouse*, the plaintiffs suffered no loss of sales or other damages; this was no surrogate damages case.\(^{263}\) Nor was there any direct relationship between the contract price paid by the plaintiff and the savings to the promisor from the skimmed performance; this was no paid-in-advance case. The *Coca-Cola* situation must stand or fall purely on restitution principles.\(^{264}\)

The *Firemen's* case is different. If it were tried today rather than over 125 years ago when concepts of contract remedies and, even more so restitution ones, were largely undeveloped, the evidence and theory of recovery would probably be presented differently and the proper result would follow as a matter of course. *Firemen's* was clearly a paid-in-advance expectancy case. The contract specified with particularity the number of firemen, horses, hoses, and other fire-fighting equipment that was to be allocated by the defendant.\(^{265}\) The defendant supplied only 70 of

\(^{261}\) *See Peeveyhouse*, 382 P.2d at 115.

\(^{262}\) It is on this assumption that Professor Kull would reverse the results not only in *Firemen's* and *Coca-Cola*, but in *Peevyhouse* as well. Kull, *supra* note 13, at 2047-48.

\(^{263}\) *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 988 F.2d 386, 411-12 (3d Cir. 1993).

\(^{264}\) *Id.* at 410-11.

\(^{265}\) *City of New Orleans v. Firemen's Charitable Ass'n*, 9 So. 486, 486-87 (La. 1891).
the 124 firemen required and a correspondingly lesser number of the required fire-fighting accoutrement. The evidence showed almost to the dollar the savings to the defendant resulting from its skimped performance. Unlike in Peevyhouse or in Coca-Cola, the plaintiffs in Firemen's should have had no difficulty in showing that, had the contract called for the lesser numbers actually supplied, plaintiffs would have paid a correspondingly lower contract price. From an expectancy perspective the plaintiffs did not get the higher level of fire protection they had paid for. Conversely, the plaintiffs in Coca Cola did receive what they paid for (albeit in slightly different form), a syrup that would make a beverage that was satisfactory to their customers.

Illustration 13 to § 39 is similar to the Coca Cola case in this regard. It presents a hypothetical situation in which a contractor breaches by supplying granite for a house's foundations that has been quarried in New Hampshire rather than in Vermont as called for by the contract. The New Hampshire granite otherwise complies with contract specifications. The substituted granite does not diminish the value of the completed house, and it would cost a disproportionately large sum to remove the New Hampshire foundation and install a Vermont one. If we substitute plumbing pipe for granite, the illustration up to this point would be practically identical to the facts in Jacob & Youngs, Inc. v. Kent, a Cardozo decision that has been a staple in first-year contract law classes for almost a century. In the case, the plaintiff was denied any remedy. Illustration 13 posits that, unlike in Jacob & Youngs, the performance rendered by the contractor costs him less than that called for by the contract—New Hampshire granite is cheaper than Vermont granite. Regardless, as it must, the illustration says that disgorgement is not available to the owner under § 39 because the defendant's breach was unintentional. But it

266. Id. at 453.
267. Id.
268. It should not matter that the contract resulted from open bidding. Had the bid specification numbers been lower, the resulting bids would undoubtedly have been so as well. Professor Eisenberg says that a disgorgement of savings remedy in these cases "will give the promisor efficient incentives to perform and therefore will effectuate the contract" and that "in the absence of disgorgement the promisor will be unjustly enriched because she will have been paid for a performance that she did not render." Eisenberg, supra note 103, at 593. It is not clear whether Eisenberg would go as far as Professor Kull in treating skimped performance cases as paid-in-advance ones. In the footnote in which he uses the paid-in-advance analogy to critique the result in Firemen's, he merely notes the result in Coca-Cola. Id. at 593 n.89.
269. The same is true for Farnsworth's abuse of contract example that was based on New Zealand's Samson & Samson case. The plaintiff suffered no damages because he immediately resold the property at no loss in profit. See supra note 140. Farnsworth agreed that disgorgement of savings was proper, but based his conclusion on "a strong moral argument" rather than on a paid-in-advance theory. See id.
270. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 cmt. g, illus. 13.
271. Id. § 39 cmt. g, illus. 13.
273. Id.
274. Id.
then immediately attempts to transform this failed disgorgement situation into an expectancy damages case, saying that “principles of unjust enrichment reinforce the conclusion that saved expenditure makes an appropriate measure of contract damages in such a case.” It is unlikely that a court would buy in on this obfuscation. Illustration 13 is a no damage case just as was Jacob & Youngs v. Kent, and it is hard to imagine a court seeing it otherwise. The illustration’s misdirection, however, does once again highlight the unreasonable price exacted by § 39’s deliberate breach requirement.

D. Negative Covenant Cases

The “negative covenant” cases, as the phrase is used in § 39, are mirror images of skimped performance. The promisee has contracted for inaction rather than for action, but the promisor nevertheless acts in violation of her covenant. The promisor has promised not to do something, but he instead does it. As with skimped performance, breaches of negative covenants may represent a sub-category of the paid-in-advance cases. Similarly, violation of a negative covenant that has been paid for in advance represents the stronger case for disgorgement. A clear example is the Dib case, discussed above. The case involved a seller’s breach of a non-compete covenant that was part of the sale of a business. Although the court’s decision rested on equity principles, disgorgement of the seller’s profits could easily have been justified as either surrogate damages or as compensation for an entitlement that had been paid for in advance.

It was easy for the court in Dib to conclude that the promisee had paid in advance for the covenant. In the purchase of an ongoing business, an agreement by the seller not to compete is intended to protect the business’s goodwill that is being purchased by the buyer as a critical and inex-

275. See also Restatement (Third) § 39 cmts. a & d. Comment a says: “There are cases of unintentional breach of contract, outside the scope of this section, in which the measure of recovery applied in this section may furnish an appropriate measure of contract damages.” Comment d says much the same.

276. Restatement (Third) § 39, comment d is contradictory as to whether the negative covenant must be explicit in the contract. It begins in the affirmative: “In a final set of transactions, the existence of an explicit negative covenant points to the limited nature of rights granted to the paying party under the contract. The purposes of the limitation may be to enable the promisee to sell the rights reserved at an additional price to be negotiated in the future . . . or simply to protect the promisee against potential injuries that are difficult to quantify.” (emphasis added). The comment, however, identifies Illustration 9 (based on the Coca-Cola case) as an example. No negative covenant was specified in Illustration 9. One might be said to arise by implication from the fact that the parties failed to reach agreement on a modification of the contract that would have allowed the promisor to substitute an artificial sweetener in place of sugar. To infer a negative covenant in this way would, however, be most confusing because the inference would inextricably intertwine negative covenants with affirmative promises. It is axiomatic that every promise to do something carries with it the implication that the promisor will not do the polar opposite. To avoid this anomaly, for purposes of this article a negative covenant is an explicit provision.

277. The case is discussed above beginning at note 221.
tricable part of the business entity. It is not just that the buyer would not have done the deal without the inclusion of the goodwill;278 the deal would have appeared ridiculous without it. And in Dib the seller not only wrongly established a new business in competition with the plaintiff, he later profitably resold that business, in effect selling again the goodwill he had previously sold to the plaintiff.279

Non-compete and exclusive territory agreements are common examples of negative covenants.280 Illustration 14 allows disgorgement of profits for breach of a slightly different exclusivity covenant.281 It describes a sale of a farmer’s entire output of ordinary goods, carrots.282 It specifies that the buyer has an interest in being the exclusive distributor of the farmer’s carrots. The market price for carrots escalates substantially, and the buyer breaches by selling a portion of his crop to a third party. Although the buyer’s damages could readily be measured by the market price of the carrots, the remedy would clearly not protect the important exclusivity right for which the buyer had contracted.283

As discussed above, most of the cases dealing with breaches of exclusivity covenants award the profits as surrogate damages.284 In those cases, as well as the paid-in-advance ones, there is no need to talk about disgorgement or any other type of restitution remedy. Restatement (Third) nevertheless co-opts them as precedent for the rule in § 39 even though disgorgement was merely consequential to the courts’ goal of compensating the promisee. Ironically, § 39 then simultaneously rejects the result in all those that refute its deliberate breach requirement.285

There are, however, negative covenant cases that do award disgorgement in situations that do not qualify for surrogate damage or paid-in-advance treatment.286 Illustration 8 to § 39 provides a good example. It poses a simple case of a tenant having earned a profit from subletting the

278. Otherwise, as discussed above, every material breach would be of a performance that had been paid for in advance.
280. The concepts clearly overlap. Although exclusive territory covenants are a sub-set of non-compete agreements, the courts tend to address them separately.
281. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 cmt. h, illus. 14
282. Reporter’s Note h to § 39 advises that the illustration is based loosely on the well-known case Campbell Soup Co. v. Weitz, 172 F.2d 80 (3d Cir. 1948). Only the fact that carrots are involved would seem to make it so. Otherwise any of countless other reported decisions involving exclusive territory agreements would have done as well. Also, although the case was an appropriate one for an award of an injunction or, alternatively, disgorgement, the court’s decision had nothing to do with either remedy.
283. Cf. Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975) (granting specific performance under U.C.C. § 2-716 where the damage remedy was deemed inadequate because, although the contracted goods were readily replaceable, the type of contract, a long-term supply contract for propane, could not be duplicated).
284. See the discussion above in Part V.A.
285. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 cmt. f.
286. As Professor Eisenberg has noted, in many of these cases “the difference between using the disgorgement measure to protect the expectation interest and using it to protect the disgorgement interest is not very robust.” Eisenberg, supra note 103, at 588.
leased premises in violation of a provision in the contract.\textsuperscript{287} The landlord does not discover the violation until after the lease has expired.\textsuperscript{288} This is clearly a case where the promisee would have been entitled to an injunction had the breach been discovered earlier. Disgorgement thus acts in its stead to provide a remedy of last resort.\textsuperscript{289} Without some remedy to protect against breach, covenants of this type would be practically worthless, becoming nothing more than empty memorials to good intentions.

It is here that once again we encounter the divide that also separates the skimped performance cases.\textsuperscript{290} Where the negative covenant protects a right of the promisee that has pecuniary value, courts have fashioned a remedy that loosely complies with contract’s compensation principles, particularly with what is called “restoration” restitution. Disgorgement in cases like the sublease violation cannot represent surrogate damages because the landlord, having no possessory right in the leased premises, could not have earned the profits gained from the subletting. Further, there are no specific facts to show that the landlord had paid in advance for the right to prohibit subletting. Nevertheless, before the deal was finalized the landlord did have something of value that he could have been paid for had subletting specifically been made part of the bargaining process. His, then, is the paid-in-advance situation as it would appear in a mirror. The commentary to § 39 suggests that such a bargain is usually implicit.\textsuperscript{291} To avoid treating the breached covenant as a vacuous incantation, disgorgement would restore to the promisee a right that was wrongfully taken. Disgorgement acts, not to protect the promisee’s expectancy interest, but as a refund to return the promisee to the status quo ante. It protects the reliance interest just like the other restoration restitution remedies in Restatement (Second) of Contracts.

Principles along these lines framed the decision in Wrotham Park Es-
tate Co. v. Parkside Homes Ltd., an influential English case. Illustration 11 to § 39 is loosely based on the facts in the case. It would allow disgorgement of the additional profits earned by a vendee developer from building 120 homes in violation of a covenant with the vendor to build no more than 100. On these facts, it is fair to presume that the vendor could have bargained front-end for a higher price in return for allowing the vendee to build more homes. As with the no-sublet provision in Illustration 8, disgorgement of at least some of the profits earned by the developer is necessary as a remedy of last resort to protect the value of the covenant to the promisee.

It is where the entitlement protected by the covenant is not pecuniary that the promisee may be compelled to take a “disgorgement” restitution path such as provided for by § 39. Snepp v. United States and Attorney General v. Blake, two celebrated cases, one from the United States and one from England, are examples enshrined by Illustration 4 to § 39. The cases have an uncanny factual similarity. The defendants in both cases were agents for their respective country’s secret service. Both agents published books in violation of covenants in their contracts of employment that prohibited their publishing any information about their careers without first vetting the publications with their employers. It was uncontroverted, however, that neither of the books disclosed confidential or classified information. Both books proved profitable, and each country sued its agent to recover the profits earned from the books. The high courts of both countries ruled that disgorgement of the profits was the appropriate remedy for the breaches.

The similarity in the cases, however, ends there. The courts’ theories to support a disgorgement award differed significantly. In Snepp, a per curiam opinion, the Court did not treat the government’s claim as one for a simple breach of contract. Instead, in the teeth of a vigorous dissenting opinion from three justices, it concocted a fiduciary obligation running from the agent employee to the government employer. It then

292. Wrotham Park Estate Co. v. Parkside Homes Ltd. [1974] 2 All E.R. 32 (Ch. 1973). The case formulated what came to be known as “Wrotham Park damages,” a damage measurement that has subsequently been applied in English cases sounding both in contract and in tort. Illustration 11 would allow disgorgement but change the amount awarded. The matter is discussed below in Part VI.

293. The argument for disgorgement here is far more compelling than in a skimped performance case like Coca-Cola, where the breach either caused no damages or caused damages that were subsequently avoided at no additional cost to the plaintiffs.


296. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 cmt. d, illus. 4.


302. Snepp, 444 U.S. at at 507

303. Id.
imposed a constructive trust on the $60,000 Snepp received as an advance on his book *Decent Interval*. The opinion, therefore, is not direct authority for disgorgement as a remedy for breach of contract. The case, however, does suggest the necessity for such a remedy if for no reason other than to avoid further confounding the nature of fiduciary obligation. The government clearly suffered injury from Snepp's breach, but one that could not be quantified monetarily in a way that would support a compensatory damage award. Although the other dissenting justices took a rather jaundiced view of the idea, it would seem that the United States did have a substantial interest in reserving the right to right to determine whether specific information could be disclosed by its agents. If there was not some remedy for breach, little would be left legally to discourage the agents from making self-serving determinations when offered potentially lucrative incentives to publish their memoirs.

In contrast, *Attorney General v. Blake* was analyzed as a straightforward breach of contract case. The House of Lords affirmed a carefully reasoned opinion by Lord Woolf for the Court of Appeals in which he had trenchantly concluded:

If the court is unable to award restitutionary damages for breach of contract, then the law of contract is seriously defective. It means that in many situations the plaintiff is deprived of any effective remedy for breach of contract, because of a failure to attach a value to the plaintiff's legitimate interest in having the contract duly performed. . . . The difficult question is not whether restitutionary dam-

304. *Id.*

305. Professor Eisenberg takes a more optimistic view: "Moreover, although the Court's opinion was at least nominally based on Snepp's relationship of trust, it was also explicitly based on the Court's view that no remedy other than disgorgement would effectuate the contract. . . . In short, *Snepp* was at least as much a contract-law case as a fiduciary-duty case, and really more a contract-law case than a fiduciary-duty case." Eisenberg, *supra* note 103, at 589. Compare Farnsworth's interpretation of *Snepp*: "This generous notion of benefits is, however, limited to actions against fiduciaries, such as agents and trustees, whose breaches are seen as faithlessness. Had Frank's [*Snepp*] commitment been merely contractual, the government could not have recovered his profits." E.A. FARNSWORTH, *CHANGING YOUR MIND, THE LAW OF REGRETTED DECISIONS* 118 (1998).

306. The government did assert various types of non-pecuniary injuries. It argued, for example, that to allow an agent to breach the covenant with impunity would cause the United States to appear weak in the eyes of its enemies in the rough-and-tumble, cloak-and-dagger world of international espionage. *Snepp*, 444 U.S. at 514. Justice Stevens and the other dissenting justices found these assertions unpersuasive. *Id.* at 514–26 (Stevens, J., dissenting).

307. How far that right might legitimately extend before running afool of the First Amendment is an argument for another day. In his dissenting opinion Justice Stevens did raise the point in passing. *Id.* at 522.

308. Similarly, in the *Peevyhouse* case (discussed *supra* in Part V. B.), the judgment substantially undermined the value of restoration covenants in coal leases in Oklahoma and created strong incentives for coal companies to breach them with impunity. Shortly after the Peevyhouse decision, however, the Oklahoma legislature passed legislation that required lessors to obtain state approval of restoration plans for potential mining leases and to post performance bonds to guarantee that the restoration work would be performed. See FULLER & EISENBERG, *supra* note 242, at 238–39.

309. See Att'y Gen. v Blake [1998] Ch. 439 [457] (applauding the result in *Snepp* but rejecting its theory of breach of a fiduciary obligation).
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ages should ever be available for breach of contract, but in what circumstances they should be made available.\textsuperscript{310}

In granting its "restitutionary damages" award, the court was concerned entirely with protecting the government's non-pecuniary contract interest irrespective of the intent or motive of the breacher and irrespective of any special relationship between the parties.\textsuperscript{311}

Illustration 10 rounds out § 39's examples of negative covenant cases. The illustration confirms the holding in the Scottish case \textit{British Motor Trade Ass'n v. Gilbert},\textsuperscript{312} but on a different theory. Because of the illustration's nuanced complexities it is set out in full as follows:

"Attempting to stabilize the market for new automobiles at a time of postwar shortage, members of a dealers' trade association impose resale restrictions in their contracts with retail customers. (The restrictions in question are valid and enforceable under local law.) Dealer sells Customer a new automobile for £5000. Customer agrees not to resell the car within two years of purchase except to Dealer. Should Customer wish to sell during this period, Dealer agrees to repurchase the car from Customer at a scheduled percentage of its original price. The price at which the car may thereafter be resold by Dealer is limited to the repurchase price paid to Customer plus a 10 percent commission. One month after taking delivery of the car, Customer resells it on the black market for £10,000. The price fixed by the contract for repurchase of the car by Dealer is £4000; the damage to Dealer from Customer's breach cannot exceed £400 (Dealer's lost commission from a costless resale). Dealer may recover £6000 from Customer by the rule in this section."\textsuperscript{313}

In the case itself, the court treated the Trade Association's claim as one for expectancy damages, not disgorgement.\textsuperscript{314} The court's decision focused entirely on making the Association whole for the "special circumstances" that necessitated the covenant.\textsuperscript{315} As was then required by the

\textsuperscript{310} Id. at 456–57.

\textsuperscript{311} It is equally correct that one who would read either \textit{Snepp} or \textit{Blake} as resting in any sense on the deliberateness of the breach has misunderstood the fundamental basis of both cases. Lord Woolf addressed the matter directly, concluding that the mere fact that the "breach of contract is deliberate and cynical is not good ground for departing from the normal basis on which damages are awarded" and that "the defendant's motives will normally be irrelevant." \textit{Id.} at 458. The House of Lords specifically acquiesced in these observations. \textit{Att'y Gen. v. Blake} [2000] 4 All E.R. 385 [388].

\textsuperscript{312} \textit{British Motor Ass'n v. Gilbert} [1951] 2 All E.R. 64 (Ch.) (Eng.).

\textsuperscript{313} \textit{Restatement (Third) of Restitution & Unjust Enrichment} § 39 cmt. d, illus. 10.

\textsuperscript{314} The defendant had "not thought fit to appear" before the court, and we are not told at what price Gilbert resold the car. \textit{Gilbert} [1951] 2 All E.R. 64 (Ch.) (Eng.). The court presumed the resale price was approximately £2200, the price at which the car had been offered to a representative of the plaintiff shortly before it was sold to a third party. \textit{Id.} at 642–43.

\textsuperscript{315} The court estimated the car's 1951 value at the time of the breach to be £2100. No open market was available at the time of the breach and none would be until 1953 when governmental restrictions expired. The court arrived at the £2100 figure by taking the anticipated market value of the car in 1953 and discounting it by 7.5 percent. Damages were then calculated by deducting from that value the price for the car's repurchase as provided
British Sale of Goods Act, the court based damages on the car's market value. The court, however, used the inflated 1951 "black market" value to measure the damages even though the Association could not have made use of that market because it was obligated to resell the car at a price no greater than the amount at which it had repurchased it. The damage award therefore greatly exceeded the Association's actual pecuniary loss, the resale value of the car. The award did, however, nicely protect the Association's non-pecuniary contractual entitlement, which the court identified as an interest "of the general public . . . to prevent the inflation in the value of motor cars on the market owing to the limited supply" permitted by governmental regulations.

The Gilbert case aptly demonstrates that the necessity for a disgorgement remedy for breach of contract will vary inversely with the willingness of courts to award damages for infringements of non-pecuniary contract rights. When damages for breach are available they will apply and trump any remedy based on disgorgement. Once the court in Gilbert determined that the infringement had injured the Association, it turned its attention entirely to compensating the plaintiff for the injury. It showed no concern with disgorging the defendant's profits. The court's damage award was in fact less than the profit the court assumed the defendant had made from his wrongful sale of the car. The case, therefore, supports the rule in § 39 in neither theory nor result.

Contract law traditionally has not dealt well with situations in which the plaintiff's contract right is not readily susceptible to a plausible monetary equivalent to substitute as damages. Intrinsic value, a common damage measurement in tort, is largely foreign to contract remedies. Courts often deny damages for non-pecuniary contract losses because they regard them as speculative or because they are not provable with reasonable certainty. Also, non-pecuniary losses do not fit neatly within contract law's customary mathematical formulae for calculating damage recoveries. The court in Gilbert, therefore, was aided immeasurably by having an available "black market" against which to measure the value of the Association's non-pecuniary contract right. But the absence of such

by the contract of sale. This calculation actually produced damages of £100 less than would have a disgorgement remedy based on the price of £2200 that the court speculated the defendant had received for the car.

The court was well aware of this. "The price which is obtainable [by the Association] on the footing which I have mentioned is far beyond that which is the proper list price of the car as delivered by the manufacturer through dealers to an ordinary purchaser." Id. The Restatement's illustration illuminates these points by adding a provision that prohibited Dealer from earning more than £400 from the repurchased car's resale. See Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. d, illus. 10.

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317. Gilbert [1951] 2 All E.R. 64 (Ch.) (Eng.).

318. Id.

319. See supra note 314.

320. See Restatement (Second) Contracts § 352 cmt. a ("Courts have traditionally required greater certainty in the proof of damages for breach of contract than in the proof of damages for a tort.").

321. See Gilbert [1951] 2 All E.R. 64 (Ch.) (Eng.)
a market would not have undermined the court’s analysis and should not have prevented it from awarding compensatory damages. Courts commonly treat individual sales as presumptive of market value. If we assume that there was no actual black market price and that the defendant’s resale of the car was an isolated transaction, the price at which Gilbert wrongfully sold the car would have served as well as the black market price to provide a rough equivalent of the value of the Association’s contractual interest in preventing illicit sales. The difference between that amount and the price the Association would have paid the defendant for the car would then constitute its expectancy damages.

Similarly, for many infringements of non-pecuniary contract rights, the profit the promisor receives from the infringement provides an objective pecuniary value for what previously had been an inchoate, unquantifiable contract right. That value should suffice in most cases as a valid starting point for purposes of measuring the promisee’s compensatory damages resulting from the infringement. Grounds of uncertainty then should not act to bar a recovery of damages. Contract law does not require mathematical precision in calculating the amount of damages once the fact of loss can be shown with reasonable certainty.322 This is not to suggest that the defendant’s gain from breach will always closely approximate the value of the plaintiff’s non-pecuniary loss.323 But it will often provide a plausible estimate of that value and, as this article will address in the next section, it should suffice in most cases to provide the fact-finder with a reasonable baseline against which to estimate the amount of the plaintiff’s loss.324

322. See RESTATEMENT (SECOND) CONTRACTS § 352 cmt. a (“A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred.”). Where the promisee is able to secure a finding that the breach has in fact caused a loss, the promisee need only provide some reasonably certain basis for ascertaining its amount. Breach cases in which a remedy fails on uncertainty grounds are thus uncommon. See generally CHARLES MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 101-04 (1935) (suggesting over 80 years ago that the only types of cases in which the courts commonly deny damages on grounds of uncertainty are those involving lost profits from unestablished business ventures).

323. Further, as with any other breach, not all infringements of non-pecuniary interests cause loss. For example, the Coca Cola case, involving the wrongful substitution of artificial sweetener for sugar, and Illustration 13’s example of the wrongful use of New Hampshire granite, represent situations where compensatory damages would not be appropriate. These situations are discussed supra following note 268. In neither situation did the breach cause damages because the wrongful substitution proved to be just as beneficial to the promise as the promised performance. In these cases, any award other than nominal damages can be left to restitution. It is only here that § 39 should be regarded as providing new ground for contract remedies, and it is only here that a prerequisite of deliberate breach has coherence from a contract law perspective.

324. Robert Stevens takes this line of analysis several steps too far by suggesting that damages should be awarded for the right infringed “even where this causes no loss to the claimant and no gain to the defendant.” ROBERT STEVENS, TORTS AND RIGHTS 81 (Oxford U. Press 2007). Even conceding his point in theory, Professor Stevens’s approach requires disregard of the requirement that damages be proved with reasonable certainty and of the core principle that compensatory damages cannot be used to improve the position that the plaintiff would have occupied had the tort not occurred or had the contract been per-
This type of compensation analysis has long found support in the British decisions, such as *Gilbert, Attorney General v. Blake*, and *Wrotham Park*.\(^\text{325}\) In *Blake*, the House of Lords awarded all of the profits earned by the defendant from the wrongful publication of his book.\(^\text{326}\) The award was in restitution—an accounting for profits that the court curiously labeled “restitutionary damages.”\(^\text{327}\) In *Gilbert*, the award was for compensatory damages.\(^\text{328}\) The court’s decision shows that, when the amount awarded equals the profit illicitly earned, a compensation award becomes indistinguishable from one for disgorgement unless the court provides clarification in its analysis. Making the distinction in Great Britain is all the more complicated because, unlike *Restatement Third’s § 39*, the British courts allow for the illicit profits to be apportioned between the parties, thereby encouraging an interesting debate among British courts and scholars as to whether an award of partial profits such as that made in the *Wrotham Park* case is compensatory or restitutionary.\(^\text{329}\) In *World Wide Fund for Nature v. World Wide Wrestling Federation*, the court acknowledged that under British law the choice between awarding damages or restitution for infringements of non-pecuniary rights is largely conceptual, but emphasized that the guiding principle for both is “the need to compensate the claimant in circumstances where he cannot demonstrate iden-

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\(^\text{326}\) *Blake* [2001] 1 A.C. 268 [285] (HL)(Eng.).

\(^\text{327}\) *Id.* In his informative discussion in *World Wide Fund for Nature v. World Wrestling Federation Entertainment, Inc.*, [2007] EWCA (Civ) 286 [46], Lord Chadwick speculated that the reason the House of Lords opted for a disgorgement award rather than damages on the *Wrotham Park* basis was that the “concept of a notional bargain between the Crown (as employer) and a double agent [a Soviet spy] . . . was, perhaps, too bizarre to contemplate.” Indeed, Lord Nicholls for the House of Lords described Blake as a “notorious, self-confessed traitor,” who was convicted but had escaped prison and fled to Moscow. *Blake*, [2001] 1 A.C. 285 (HL)(Eng.).

\(^\text{328}\) *Gilbert* [1951] 2 All E.R. 64 (Ch.)(Eng.).

\(^\text{329}\) Andrew Burrows has provided a thoughtful discussion of the issue. Professor Burrows finds in favor of a restitution analysis because it can be used to explain all of the relevant British cases. He concludes that a compensation analysis for many of these cases is “plausible” but, for most, “strained.” *Id.* Andrew Burrows, *Are ‘Damages on the Wrotham Park Basis’ Compensatory, Restitutionary, or Neither?, in Current Themes in the Law of Contract Damages* 165, 185 (D. Saidov & R. Cunnington eds., 2008). Conversely, far from explaining all the cases, § 39 cannot account for many of them (those where the breach is not deliberate) and will overcompensate in those that it does (by disgorging all profits garnered directly from the breach). A compensatory approach, even a somewhat strained one, should always be preferable when the alternative is to deny protection to important non-pecuniary contract rights.
tifiable financial loss." That is precisely the principle that should guide our American courts. The punitive approach for deliberate breaches proposed by § 39 would not undermine the incentive to award compensatory damages in these cases because, by its terms, the provision does not apply where those damages adequately protect the promisee's expectation interest. In fact, were these situations left to the provision's own devices, its deliberate breach requirement would perversely require a reversal in most of them, leaving the aggrieved party without remedy. The Restatement's new provision is thus best regarded as just what the commentary to § 39 espouses it to be, an exceptional remedy for egregious cases of opportunistic breach, such as Blake and Snepp, where a compensatory analysis would stretch too far but nevertheless the harsher remedy of disgorgement is deemed necessary to protect the promisee's contractual entitlement.

VI. MEASUREMENTS OF RECOVERY

An award that disgorges all profits from breach is likely to be justified for most public interest cases like Gilbert, Blake, and Snepp whether the award is intended as compensatory or as disgorgement. The promisee's pro bono entitlement will usually be significantly more important and of greater intrinsic value than is the principal subject matter of the contract, like the car in Gilbert and the employment relationships in Blake and Snepp. A threat of liability that will be appreciably less than full disgorgement would not deter an opportunistic breach in these cases because the promisor could always breach, pay damages out of the profits, and pocket the remainder. Where the evidence suggests that the profits to be disgorged will not approximate the intrinsic value that the promisee places on the entitlement, the lack of a reasonable correlation between the promisor's loss and the promisee's gain will prevent using compensation as a realistic justification for disgorgement. Gilbert was exceptional in this regard because the Association's pecuniary interest in the car was established by the contract, and that value could be used for calculating damages by juxtaposing it with the black market price at which the court assumed the promisee sold the car.

330. World Wide Fund for Nature [2007] EWCA (Civ) 286 [59]. Lord Chadwick's decision provides a thorough analysis of the cases on both sides of the issue of whether a Wrotham Park award represents disgorgement (an account for profits) or compensatory damages. Id.

331. A move in this direction certainly would not be novel. Our federal patent law, 35 U.S.C. § 284, was amended in 1946 to do away with the disgorgement remedy for infringement so as to limit the claimant's recovery to actual damages. See Georgia-Pacific Corp. v. United States Plywood Corp., 318 F. Supp. 1116 (S.D.N.Y. 1970), modified and aff'd, 446 F.2d 195 (2d Cir. 1971). Where the patent holder is unable to prove damages, the court may award what it determines to be a reasonable royalty in order to prevent the infringer from sheltering behind the uncertainty of the injury he has caused. See Panduit Corp. v. Stahlin Bros. Fiber Works, Inc., 575 F.2d 1152 (6th Cir. 1978).

332. Gilbert [1951] 2 All E.R. 64 (Ch.) (Eng.).
When a reasonable correlation can be shown between the promisee’s loss and the promisor’s gain, a compensation analysis will always be preferable to a disgorgement approach such as that suggested by § 39. First, unlike disgorgement, compensation for breach is a concept that courts are accustomed to addressing. Disgorgement for breach, conversely, presents awkward issues. It unnecessarily tasks the court with determining the motivation for the breach, a customarily irrelevant issue, and requires it to grapple with the hoary problem of delineating the ever-shifting borderline between innocence and opportunism. Second, as § 39’s commentary concedes, the provision’s disgorgement remedy leaves meritorious claims unanswered. Third, a compensatory analysis is compatible with familiar Holmesian remedy theory—full compensation but not a cent more—and, incidentally, with the concept of efficient breach. Disgorgement ignores compensation in favor of punishment. It offers an iconoclastic contract remedy—one that is disproportionate to need and foreign in concept—to accomplish finer objectives that can be readily achieved using traditional contract remedy principles. Every reasonable effort, therefore, should be made to limit disgorgement’s work to those cases where a damage award cannot be rationally calculated by using all or some portion of the profits at issue as a plausible pecuniary index of the value of the promisee’s contract interest. For those who would cling tenaciously to tradition, the price of following to a limited extent tort’s lead in giving value to non-pecuniary contract interests is a comparatively small one to pay.

Notwithstanding the incoherent example of judicial activism that we dignify as “the economic loss rule,” courts, as they must, concede that some losses remain recoverable in both tort and contract. In such cases, it would be absurd to say that the measurement of the particular loss varies with the type of cause of action. Compensating for the claimant’s intrinsic value presents the identical calculus whether the wrongful infringement is actionable in tort, in contract, or in both. To its credit, tort law regularly protects intrinsic interests in tangible property, such as household goods, family heirlooms, pets, and even trees, as readily as it once did for intangible intellectual property. It begs no argument, certainly not an assertion that the value of the claim is too speculative, to observe that similar intrinsic losses commonly result from breaches of contract. And it should beg none that the loss in the contract action is identical to that in tort. An excellent recent example was presented to the Supreme Court of Texas in Gilbert Wheeler, Inc. v. Enbridge Pipelines, L.P. To its credit, the court did not flinch in holding that the jury could properly award the plaintiff a recovery for the intrinsic value of trees that were destroyed by the defendant in breach of a limited easement or right-of-way agreement. After observing that the court had commonly awarded damages in tort cases for

333. Id. § 39 at cmt. d.
334. 449 S.W.3d 474 (Tex. 2014).
335. Id.
an owner's intrinsic value in trees where the customary damage measures of cost of tree replacement or diminution in land value would either over- or under-compensate, the court trenchantly concluded with the observation that: "We see no reason to compensate a party differently because the wrongful conduct that caused the identical injury stems from breaching a contract rather than committing a tort."

This observation is both salable and practically unassailable and should apply whenever traditional contract rules leave the promisee without a reasonable remedy—and most particularly where the breach is profitable to the promisor. And in these situations, an argument for remedy that emphasizes compensating the injured party for the breach will always be more persuasive to a jurist wedded to traditional remedy rules than one based on the illicit gain of the wrongdoer.

A compensation approach for profitable breaches, however, means that full disgorgement will not always be the correct measure of recovery. Instead, it will allow courts to use all the customary tools of contract remedy law to craft a result that is compatible with the traditional goal of making the promisee whole without punishment of the promisor. A compensatory analysis is certainly correct in the two categories of breach that comprise the great bulk of the "disgorgement" cases that § 39 would either usurp and duplicate or, ironically, overturn: (1) the surrogate damages cases where the defendant's profit from breach is taken as a rough estimate of the plaintiff's lost expectation; and (2) the paid-in-advance cases, including those of skimped performance, where the defendant has in effect infringed upon the plaintiff's ownership of that performance. In these cases the courts seek to award damages that will approximate the promisee's loss. In the first category the profit substitutes for actual damages. In the second category the profit substitutes for what was in essence a property interest that was purchased by the promisee. Appropriate adjustments, therefore, must be made for factors such as causation, remoteness, and the promisee's ability to have avoided the loss, so that the amount disgorged from the promisor is roughly the equivalent of the loss

336. Id. at 479 (citing DeWitt Cty. Elec. Coop., Inc. v. Parks, 1 S.W.3d 96, 105 (Tex. 1999) ("[T]he measure of damages for breach of an easement that restricted a right to cut trees would be the same as the measure for negligently cutting trees.").

337. In a remedy context, punishment is a recovery that exceeds the promisee's loss. Although punishment in this sense will often be the result of a full disgorgement, the commentary to § 39 emphasizes that its purpose is to protect contract rights, not to punish wrongdoers. Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. e. Restitution is more concerned than is contract with the motives and intent of the wrongdoer, but it does not oppose contract's basic principle of limiting damages to the lost expectation. Indeed, in the one other situation in which these two areas of law collide, it is restitution that supports the compensation limitation. In the losing contract scenario that would produce negative expectancy damages, the traditional contract rule is that the recovery is not limited by the expectancy interest. Restatement (Third) states the opposite rule, limiting the recovery to the greater of the lost expectation or an allocable portion of the contract price. Compare Restatement (Second) of Contracts § 373 cmt. d, with Restatement (Third) of Contracts § 38(2)(b).
to the promisee. These are breach of contract cases, not restitution ones.

In turn, in two categories of cases a compensation analysis cannot produce a recovery, and any monetary award for breach must be left to restitution principles like those proposed by § 39: (1) in cases where the promisee’s loss cannot plausibly be estimated monetarily; and (2) in cases where a compensation calculation results in zero damages because the promisee’s expectation has not been compromised. As noted above, the Coca-Cola case and Illustration 13 to § 39 are examples of these no damage situations. The promisors profitably skimped in their performances, but the substituted performances fully protected the promisees’ expectations. In Coca-Cola, the promisee lost no resale profits from using the syrup made with the substitute sweetener, and in Illustration 13 the granite quarried in New Hampshire was just as good as Vermont granite. Had those substitutions been made subsequent to the breach, remedy law’s mitigation of damages principle would have barred recovery in both cases. Assume that the promisors had profitably breached in ways that caused provable damages but that the promisees fully mitigated the losses by, for example, purchasing at no extra cost a substitute sweetener in the one case and substitute New Hampshire granite in the other. In neither case would a damage recovery be allowed and, had the mitigating substitution not been made, the unreasonable failure to do so would have barred a recovery. In neither case would a court properly be concerned that the promisor had profited from the breach because the promisees’ contractual entitlements had been fully protected, albeit by the promisees themselves. Should disgorgement be awarded in either case simply because the mitigating substitute was supplied instead by the promisor before the breach rather than after? A positive answer must come from

338. Highlighting the punitive nature of disgorgement, Restatement (Third) does provide for these kinds of adjustments for consequential damages and for restitution remedies other than disgorgement. Restatement (Third) § 39, comment e provides that “In determining net profit the court may apply such tests of causation and remoteness, may make such apportionments, may recognize such credits or deductions, and may assign such evidentiary burdens, as reason and fairness dictate, consistent with the object of restitution as specified in subsection (4)” of negating the wrongdoer’s profit without, to the extent possible, imposing a penalty.

339. Whether the breach was willful, intentional, opportunistic, innocent, or some shade of any of these should be no more than a secondary factor in determining the appropriate amount of disgorgement. In his analysis of possible measures of recovery in disgorgement cases, Daniel Friedman criticizes the Restatement (Third)’s myopic view that “a conscious wrongdoer is the sole test for ... liability to disgorge profits.” Friedmann, supra note 71, at 1888. He notes that many courts have taken a broader view. See, e.g., Frank Music Corp. v. Metro-Golden-Mayer, Inc., 772 F.2d 505 (9th Cir. 1985) (allowing partial disgorgement of profits although infringement was not “conscious and deliberate” because defendant believed in good faith that its infringement was justified by a license that it held).

340. The cases are discussed above in Part V.C. See Coca-Cola Bottling Co. v. Coca-Cola Co., 988 F.2d 386 (3d Cir. 1993); Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. g, illus. 13.

341. Coca-Cola, 988 F.2d at 409; Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. g, illus. 13.
the law of restitution. Contract law would no longer have an interest in the matter.

Correspondingly, in other cases it will be readily apparent that the profits from breach greatly outweigh the value of the promisee's interest in the breached performance. Most proponents of a disgorgement remedy for breach acknowledge that taking all the promisor's profits is not justified in these situations. A compromise amount that is commonly suggested is an estimate of what the promisee would have charged and what the promisor would have paid to terminate the contract. Various descriptive phrases are used interchangeably to describe this amount, such as “the buyout amount,” “the release amount,” “the cost of modification,” and the like. The concept, however, has little utility other than as a conceptual justification for the amount estimated. The primary problem with a “cost of modification” measurement is its impracticability. Even its foremost American proponent, Allan Farnsworth, conceded that. It would be an obvious fabrication in innocent breach cases. A righteous breacher has no incentive to buy out of a contract when he believes he can get out for free, and a threat of even a full disgorgement will fall on deaf ears. And even in deliberate breach cases, deciding the buyout amount will always require a hypothetical construction of a bargain that did not occur. In any case in which the promisee values the performance at issue more than the profit that will be earned by the promisor, a buyout bargain would not be possible. In other cases, concocting a plausible

342. See Amec Dev. v. Jury’s Hotel [2001] 1 EGLR 81, 83 (describing the method as one of determining “the sum that would have been arrived at in negotiations between the parties had each been making reasonable use of their respective bargaining positions without holding out for unreasonable amounts”). Damages, measured by what it would have cost the promisor to buy out of the contract, were first used as a measure of compensatory damages in Wrotham Park. Wrotham Park Estate Co. v. Parkside Homes Ltd., [1974] 2 All E.R. 32 (Ch. 1973). “Wrotham Park damages” have been applied in both contract and tort cases. Leading cases include Experience Hendrix LLC v. PPX Enterprises, Inc. [2003] EWCA Civ. 323 and Jaggar v. Sawyer [1993] 1 EGLR 197. See generally Burrows, supra note 329. Illustration 11 to § 39 is based on the Wrotham Park case but rejects its measure of recovery in favor of full disgorgement. See Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. e, illus. 11. In his 1985 article, Allan Farnsworth argued in favor of limiting the amount of disgorgement to what he labeled “Gains in Terms of Saving the Cost of Modification.” Farnsworth, supra note 75, at 1387–91. He discussed the Wrotham Park case but conceded that no American case had applied such a measurement. Id. at 1367–68. Melvin Eisenberg rejects the “saving the cost of obtaining a release” measurement as unviable. Eisenberg, supra note 103, at 566–68.

343. Although § 39 proclaims a purpose of removing breach incentives so as to encourage amicable renegotiation, it emphatically rejects a cost of modification measurement for disgorgement:

The purpose of the disgorgement remedy for breach of contract is to eliminate the possibility that an intentional and opportunistic breach will be more profitable to the performing party than negotiation with the party to whom performance is owed . . . . If the defendant’s liability in restitution were limited to the amount that might have been paid to obtain the necessary contractual modification in a voluntary transaction, there would be inadequate incentive to bargain over the entitlement in question.

Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. e.

344. Farnsworth, supra note 75, at 1391 (“It can be objected that measuring the gain in terms of saving the cost of modification would be excessively burdensome.”)
ble bargain amount will require a speculative retrospective that will typi-

cally involve consideration of extensive evidence from both sides. Breach

having already occurred, the time for arm’s-length bargaining will have

long since passed. The parties’ relationship will have become dramatically

different. Their exculpatory evidence at trial will have prejudiced a balanced perspective by having decided the issue of guilt

before turning to the question of estimating the recovery. The presenta-
tion of the core position of both parties ultimately will have been boring

and repetitive—that she, not he, was the superior bargainer, and that

she, not he, would have negotiated the far greater share of the profit pie.

It is thus disingenuous to seriously maintain that this sort of disharmony

could have helpfully guided the fact-finder in making a fair approxima-
tion of what would have been the result had the parties actually engaged

in arm’s-length bargaining.

The unworkability of the “cost of modification” approach is demon-

strated by the very case that first applied the concept, Wrotham Park

Co. Ltd. v. Parkside Homes Ltd. The defendant had breached a

restrictive covenant that prohibited development of certain land without

the owner’s approval. The owner conceded that it had incurred no pecu-
niar loss because the value of the land had not been diminished by the

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345. In his article on the guesswork involved in establishing damages based on a rea-

sonable royalty in patent infringement cases, David Taylor correctly observed: “Indeed,

while the hypothetical negotiation construct contemplates the patent owner and the in-

fringer negotiating over the value of patent rights, the assumption of liability purposeful-

ly increases the damage award above what an actual negotiation over patent rights would

contemplate.” David Taylor, Using Reasonable Royalties to Value Patented Technology, 49

GA. L. REV. 79, 158 (2014). Professor Taylor argues that this liability component is neces-

sary to avoid what he calls “double discounting”; i.e., to balance an assumption of discounts

that the parties probably would have negotiated when liability was uncertain. Id. In re-

jecting the hypothetically negotiated royalty approach in favor of basing reasonable roy-

alties on the basis of the patented technology, he also argues that: “The assessment of

compensatory damages implements a liability rule; any assessment of damages occurs after

a determination of liability for infringement. Determining reasonable royalties under the

hypothetical negotiation construct, however, applies a property rule-like analysis, despite

the fact that a person has unilaterally destroyed [the right to enforce the patent].” Id. at

155; see also Thomas F. Cotter, Four Principles for Calculating Reasonable Royalties in


generally id. at 143–50.

346. Melvin Eisenberg is absolutely right to conclude that “the amount that a promisee

would have required to give a release is not only unknown but in most cases unknowable.”

Eisenberg, supra note 103, at 568. On the other hand, unless his reference is to surrogate

damages and paid-in-advance cases, he is wrong when he maintains later in his article that

apportionment should not apply in most disgorgement for breach cases. Id. at 600. He says:

“[I]n general, there should be a heavy thumb on the scale against apportionment because

usually apportionment would either undercut disgorgement or be otherwise inappro-

priate.” Id. By definition, apportionment will always undercut disgorgement. But it is not

inappropriate to apportion disgorgement when the purpose is to accommodate contract

law’s primary goal of allowing a fair measure of recovery to the plaintiff without punishing

the defendant.


(Ch.)(Eng.).

348. As noted previously, although Illustration 11 to § 39 is based on the facts in

Wrotham Park, it rejects the court’s measure of recovery in favor of full disgorgement.
The court thought that the owner should nevertheless be granted some remedy, but that a full disgorgement of profits would be excessive. It ultimately settled on measuring damages based upon the price that would hypothetically have been agreed to by the parties had they engaged ex ante in a release bargain. The court then concluded (somehow) that the appropriate resulting price would have been £2,500, which represented 5% of the profit that the defendant conceded it had earned. Most extraordinarily, however, the court had prefaced its analysis by candidly admitting that the hypothetical bargain it was concocting was a pure fabrication. Its award did not in any way represent what might actually have occurred had the parties attempted to negotiate a release because: "On the facts of this particular case the plaintiffs, rightly conscious of their obligations towards existing residents would clearly not have granted any relaxation but for present purposes I must assume they could have been induced to do so."

Assuming nothing is lost in the translation to the American version of our common language, what Judge Brightman surely must have meant by this seemingly nonsensical observation was that he regretted that the parties had not negotiated a "relaxation" price, because he was now left with the unhappy task of picking a price out of thin air. If this is correct, then in cases where full disgorgement is deemed unfair, the high-sounding activity that has been subsequently described as determining "the cost of a hypothetical bargain" or "the cost of modification," or some such thing will usually be nothing more than coming up with a reasonable price

349. Wrotham Park [1974] 2 All E.R. 32 (Ch)(Eng.), 350. Id. 351. Id. 352. As authority for this approach, the court relied heavily on tortious invasion of property interest cases, particularly those of intellectual property. Compare id., with 35 U.S.C. § 284 (providing that damages for patent infringement shall be "adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer . . . "). A leading case is Georgia-Pacific Corp. v. United States Plywood Corp., 318 F. Supp. 1116 (S.D.N.Y. 1970), modified and aff'd, 446 F.2d 195 (2d Cir. 1971) (when market rates or other objective criteria are not available, court may award reasonable royalty based on hypothetical arms-length negotiation that might have occurred between the patent holder and the infringer immediately prior to the infringement). For an informative recent study of calculating reasonable royalties in patent infringement cases, see Taylor, supra note 345. To date, our courts have shown little inclination to extend these kinds of hypotheses beyond the infringement cases.

353. Wrotham Park [1974] 2 All E.R. 32 [815] (Ch)(Eng.). Indeed, the "covenantee" could not lawfully demand money for release of the covenant, which was for the benefit of the residents abutting the property at issue. Id. at 808. The justification for this sort of obfuscation, of course, is that it is a preferable alternative to that of leaving the promisee without remedy. As Judge Hand famously observed about the similar fiction of determining a reasonable negotiated royalty as a remedy in patent infringement cases: "The whole notion of a reasonable royalty is a device in aid of justice, by which that which is really incalculable shall be approximated, rather than that the patentee, who has suffered an indubitable wrong, shall be dismissed with empty hands." Cincinnati Car Co. v. N.Y. Rapid Transit Corp., 66 F.2d 592, 595 (2d Cir. 1933). And as Professor Taylor notes: "One of the primary benefits of the hypothetical negotiation construct is that it provides an easy way for a jury to conceptualize the legal question the court is asking it to decide." Taylor, supra note 345, at 122.
based on all the facts and circumstances.\textsuperscript{354} In this country's legal system, that sort of activity is familiar courtroom humdrum. Juries do it every day in tort actions all across the country as they place monetary valuations on pain and suffering, on arms and legs, on eyes and ears, and on all sorts of things that have no conceivable pecuniary value.\textsuperscript{355} Juries can even tell plaintiffs their future employment prospects, what kind of raises they will earn over their careers, how long those careers will last and, ultimately and unconscionably, when they will die.

Juries, in short, are uncannily good at resolving mysteries, even those with few clues. For them to decide how most breach profits would be apportioned should hardly be fantastic. Indeed, compared to unraveling the esoterica customarily encountered in evaluating personal injury awards, assessing the intrinsic value of contract rights should be comparatively simple, particularly when a relevant objective index of that value (the breacher's illicit profit) is readily at hand. For example, the jury verdict in the now rather infamous case \textit{Peevyhouse}\textsuperscript{356} could have been an exemplar for compensating the Peevyhouses for their non-pecuniary interest in their home. To reprise, the facts at trial showed that the disgorgement pie was approximately $29,000, the savings of the promisor in failing to perform the restoration covenant.\textsuperscript{357} The actual damages were a comparative pittance of $300 based on an objective market value, a sum most certainly inadequate to protect the intrinsic value of the property to the Peevyhouses.\textsuperscript{358} The farm in its restored state would have been worth $5,000 at most.\textsuperscript{359} On appeal, the court had before it three possible damage awards: (1) the $5,000 jury verdict; (2) the $29,000 cost of restoration; and (3) the $300 diminution in the value of the land.\textsuperscript{360} The court's ulti-
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mate choice of $300 has very few fans, and properly so.\textsuperscript{361} If the court had instead simply affirmed the jury award, \textit{Peevyhouse} probably would have assumed its rightful place in law lore as an innocuous little case with a decision that was, for the time, perhaps a little strange.

To illustrate, let us assume that the trial judge had instructed the jury that it could award damages measured by the cost of restoration only if it found that the plaintiffs would use the money to restore the land.\textsuperscript{362} During deliberations the jury quickly and unanimously rejected the notion.\textsuperscript{363}

\textsuperscript{361} It has become exceedingly unfashionable, even heretical, in contract law circles to suggest that the case was correctly decided. The drama here is attributable to the fact that, thanks to the remarkable scholarship of Judith Maute, the plight of Willie and Lucille Peevyhouse has become rather personalized in law school classrooms for almost a half century now. See Maute, \textit{supra} note 233. We think fondly of Willie and Lucille, and most of us wish they had gotten a better shake. Regardless, if the $5,000 jury award were taken off the table, the \textit{Peevyhouse} case probably would not come out any differently today than it did in the 1960s. To simplify a bit, the debate over whether the court got it right must ultimately rest on whether one believes that the Peevyhouses would have invested $29,000 into fixing their property, an amount that represented more than six times the value the property in a repaired condition. Today that would be a most difficult proposition to sell to any jury, just as it was a half century ago. As the court said in an English equivalent of \textit{Peevyhouse} in denying recovery for the cost of tearing out and rebuilding a swimming pool: “[the promisee’s] stated intention of rebuilding the pool would not persist for long after the litigation had been concluded.” Ruxley Elecs. & Constr. Ltd. v. Forsyth, [1995] 3 W.L.R. 118 (H.L. 1995). Melvin Eisenberg’s conclusion about the case reflects a popular view: “\textit{Peevyhouse} was incorrectly decided, because the court considered only the objective market value of the farm, not the subjective value of the farm to the Peevyhouses.” Eisenberg, \textit{supra} note 103, at 595. Every word of Professor Eisenberg’s statement is true, but only because the court overturned the $5,000 jury award, not because it failed to allow recovery of the full restoration costs. He is also right that: “Unless the court is convinced that the promisee would not [use the damage recovery to restore the property], damages should be measured in the normal way, that is, by the cost of completion.” \textit{Id.} As Professors Thel and Siegelman succinctly explained: “The diminution in market value will not fully compensate a promisee who places idiosyncratic value on the completed project. However, the award of the cost of correction will overcompensate the idiosyncratic value if the promisee values performance more than the market does but not as much as the cost of correction.” Thel & Siegelman, \textit{supra} note 115, at 1526 n.28. Clearly, there is ample room between these two extremes for a middle ground that would apportion the promisor’s gain to compensate for the promisee’s idiosyncratic value.

\textsuperscript{362} In the case itself, the trial court left the determination of the amount of damages largely to the jury’s discretion, allowing the jury to consider the cost of restoration in addition to “all of the evidence offered on behalf of either party.” \textit{Peevyhouse}, 382 P.2d at 111. A good jury issue, accompanied by an appropriate instruction, should not be difficult to formulate. For example, assume that the net profit subject to disgorgement is $1,000,000. The issue might be framed as follows: “Ladies and gentlemen of the jury, in compensation for the defendant’s breach of his contract with plaintiff, of the amount of $1,000,000 earned by defendant from his breach, what percentage or amount in dollars and cents do you find that plaintiff should receive, taking into account the relative bargaining positions of the parties at the time of the breach and all of the evidence that you have heard in favor of the plaintiff, including [list illustrative factors such as those pertaining to the value of the entitlement intrinsically to the plaintiff, the unavailability of any comparable substitute performance, and the willfulness of the defendant’s breach] and all of the evidence that you have heard in favor of the defendant, including [list illustrative factors, such as those pertaining to the innocence or good faith of the defendant’s breach, the degree to which the profits are the product of defendant’s own energy and initiative, the remoteness of the profits as they relate to the plaintiff’s contractual entitlement, and the likelihood that plaintiff could have found some comparable substitute for defendant’s performance].”

\textsuperscript{363} Despite plaintiffs’ professed love for their land, the jury surely noted that the plaintiffs had not asked for the remedy of specific performance to require that the defen-
But it then directed its attention to the $29,000 that the mining company had pocketed in leaving the Peevyhouses with a mess of a farm. Discussion followed, culminating in a decision that, given the benefit inuring to the mining company as a result of its breach, justice required that the company should pay the Peevyhouses an amount that would compensate them for their intrinsic loss attributable to the disfigurement that the mining company had left behind. Had the Oklahoma court then affirmed the $5,000 jury verdict as a compensatory award for that loss, the court’s decision might well be regarded today as a wise resolution to a vexing question, and one clearly preferable to the $300 and $29,000 alternatives. When there is such great disparity in results from applying two

364. Allowing for consideration of subjective value in awarding damages is not completely foreign to contract law. For example, Restatement (Second) of Contracts § 348(2) suggests a damages rule for breaches of construction contracts that allows flexibility to consider the subjective value that plaintiffs place in their property. For cases involving defective or unfinished construction where “the loss in value to the injured party is not proven with sufficient certainty” the promisee may recover damages based on either diminution in value or cost of repair, so long as the repair costs are not unreasonably disproportionate to the “probable loss in value to him.” Id. (emphasis added); see, e.g., Mathis v. Glover, 714 S.W.2d 222 (Mo. App. 1986) (affirming damages for the cost of tearing out and replacing major work in a home because, in contrast to commercial property, a home “has aesthetic value and must be constructed as the owner wants it, even though the finished dwelling may be just as good[ ]”). The Restatement of Torts has a similar rule for injuries to property. See Restatement (Second) of Torts § 929 cmt. b (1979) (cost of repairs that are disproportionate to diminution in value not recoverable “unless there is a reason personal to the owner for restoring the original condition”).

365. Contract law does acknowledge intrinsic value as an appropriate consideration in awarding expectation damages. See Restatement (Second) Contracts § 347(a) providing that “the injured party has a right to damages based on his expectation interest as measured by the loss in the value to him of the other party’s performance...” (emphasis added). The Restatement also provides for consideration of intrinsic value in allowing for expectancy damages greater than the injured party’s objectively quantifiable loss. See id. § 348 (allowing for recovery of expectancy damages measured by repair or restoration costs “if that cost is not clearly disproportionate to the probable loss in value to him[ ]” (emphasis added)). Awards based on intrinsic value will always be arguable. In the watershed Wrotham Park case, for example, the court allowed the estate that represented the interest of a number of homeowners a recovery of only 5% of the £50,000 earned by a developer who had intentionally breached a restrictive covenant in the belief that its legality was questionable. Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. [1974] 2 All E.R. 32 [816] (Ch.) (Eng.). The court may have been influenced by the fact that the plaintiffs did not pursue an interlocutory injunction to protect their interest but instead allowed construction to proceed while the litigation progressed. Id. at 810. In this country we have a smattering of comparable decisions, mostly infringement cases. Lawrence Friedman nicely juxtaposed two illustrative American cases that demonstrate disparate awards that can result: Sheldon v. Metro-Goldwyn Pictures Corp., 106 F. 2d 45 (2d Cir. 1939), aff’d, 309 U.S. 390 (1940), and Frank Music Corp. v. Metro-Goldwyn Mayer, Inc., 772 F.2d 505 (9th Cir. 1985). In Sheldon the court apportioned the defendant’s profits to award plaintiff only 20% of the almost $600,000 earned from a movie that had “deliberately” plagiarized substantial portions of plaintiff’s play. 106, F.2d at 55. Friedman suggests that the apportionment may have been overly kind to the defendant. Friedmann, supra note 71, at 1889. On the other hand, he says that the court in Frank Music may well have gone too far in favor of the plaintiff both in the disgorgement percentage it awarded for the primary profits earned from the illicit use of plaintiff’s music in a hotel’s stage production and also in awarding a percentage of secondary profits attributable to the production’s drawing customers for the hotel’s rooms and gaming tables. Id. at 1889–90.
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customarily available damage formulae and both results are clearly inaccurate estimates of the claimant's indisputable loss, our remedy regime is seriously flawed if it cannot allow the flexibility to make a more rational approximation of that loss. Choices of giving all or allowing nothing will in many cases understandably represent ridiculous alternatives, particularly where an estimate or apportionment of amount is clearly the better choice. And more often than not, to be approximately right is far better than to be absolutely wrong. In such cases, conceding imprecision in result is always a bargain price for averting manifest injustice.

VII. CONCLUSION

There is little support in the case law either in this country or in Great Britain for a disgorgement remedy for breach of contract similar to the one proposed by the new Restatement of Restitution. Few of the cases that § 39 uses to justify its criteria actually supports them. To account for this misdirection, the provision loosely interprets some of the cases, changes the result in others, and adopts a different theory to support the result in still others.

As some of our strongest academic writers have taught us over the past half-century, there are plenty of cases scattered here and there over time that have disgorged profits from breach to protect contract interests that otherwise would have had no adequate remedy. The courts in most of these cases, however, focused their attention on the plight of the promisee. They demonstrated only consequential concern with the profits garnered from breach by the promisor. In the surrogate damages cases, the profits served as a measurement of the promisee's loss. Disgorgement was incidental to compensating the promisee. In the paid-in-advance cases, the profits were the end result of tracing a contract interest that the promisee had previously purchased—a property-oriented analysis. Again, the disgorgement was incidental.

Restatement (Third) § 39 is a remedy for breach of contract glaringly clothed in restitution finery. By attempting to function while so restrained, it appears as bumbling to the mannered nature of contract remedy law as would a blue-collar worker going about his business in top hat, tie, and tails. As a contract remedy, it is placed as the final section of Chapter 4 of the new Restatement along with other contract-based restitution remedies. It should therefore relate with these remedies and behave accordingly. But it does not. As a sin-based, punishment-oriented, all-or-nothing remedy, it has little in common with any previously known remedy for breach, whether compensatory or restitutionary. Its kin are the other raucous disgorgement remedies, which are gathered immediately following § 39 in Chapter 5. A remedy that results in an award that exceeds a plaintiff's loss for the sole purpose of coercing conduct (here, a negotiated settlement agreement) is penal by any definition and, as such, is repugnant to contract law. By confining its availability to cases of deliberate breach—another concept that contract law prefers to ignore—§ 39
offers only minimal coverage of the compensation remedy gap. All the worse, the provision's refusal to allow for an apportionment of profits ignores basic contract remedy tenets pertaining to causation, remoteness, and avoidability of loss.366

This is not to say that § 39 does not have its place. It aspires to be a remedy for only rare cases where an adequate remedy is not otherwise available. These should be only those where disgorgement in whole or in part cannot reasonably be said to be compensatory in nature and, solely for this reason, a remedy to protect the contractual entitlement must be left to the muddier playing field of restitution. Farnsworth correctly identified "abuse of contract" breaches as the only ones that call for a disgorgement remedy such as that proposed by § 39. His primary examples were skimped performance cases and cases where the promisee's contract interest cannot be protected because of time's passage. A compensation approach cannot do the work in these situations. In both types of cases, the breach causes no loss to the promisee other than an unquantifiable loss of entitlement. In the skimped performance situation, the cheaper performance benefits the promisor while satisfying the promisee's expectancy interest. The Coca Cola case discussed above is a good example.367 In the time's passage situation, the promisor profits but again causes no damages, and the time for performance has passed. The breach of the sublease prohibition covenant discussed above is a good example.368 In both categories of Farnsworth’s abuse of contract, however, had the breach been caught in time the promisor would have been able to use the promised performance to obtain a reasonable substitute. But Farnsworth, contrary to § 39, would have allowed disgorgement in these cases regardless of the nature of the breach.

The true gap in contract's remedy structure is not for the lack of a disgorgement remedy, but because contract's remedy rules historically have not compensated for non-pecuniary losses. A sensible adjustment in the rules to allow for a compensation-based approach would be a much

366. As noted previously, Restatement (Third) specifically provides for apportionment in applying restitution remedies other than disgorgement. See supra note 331. Section 51(5)(d) also states certainty rules similar to those for damage awards. Restatement (Third) of Restitution & Unjust Enrichment § 51(5)(d). Once the plaintiff has provided evidence “permitting at least a reasonable approximation of the amount of the wrongful gain,” any “residual risk of uncertainty in calculating net profit is assigned to the defendant.” Id. Illustration 14 to § 51 is one of several examples provided to demonstrate how apportionment should work in these cases. Id. § 51 cmt. g, illus. 14. The illustration involves a copyright infringement by defendant (Studio) in producing a movie titled “Letty Lyton.” Making a proper apportionment of the profits directly attributable to the infringement is difficult. Ultimately, however: “Evidence presented at trial would support a range of answers between twenty-five percent of the total (according to Author’s expert) and nil (according to Studio’s expert). Weighing all the relevant evidence, the court concludes that the proportion of Studio’s profits attributable to the infringement is somewhere between zero and 10 percent; moreover, that the correct answer within these limits is impossible to determine. Because the risk of uncertainty in such an accounting is assigned to the wrongdoer, Author is entitled to 10 percent of the net profits . . . .”

367. See the discussion following note 247.

368. See the discussion following note 287.
preferable alternative to the punishment-based, full disgorgement remedy that is proffered by the new Restatement of Restitution. The compensation problem in non-pecuniary loss cases has never been one of proving causation, but rather with contract law's less rigid certainty principle. The breach has caused an obvious loss either by infringing on a promisee's contractual entitlement or by depriving her of it altogether, but courts typically have had at hand no pecuniary index against which to value the promisee's loss. When, however, the promisee profits directly from his violation of a contractual entitlement, that profit provides the needed pecuniary index against which to measure the promisee's loss much like our courts have long done for infringements of intellectual property. Great Britain's Wrotham Park approach unshackles contract law to this extent and points in the right direction for protecting the promisee's expectancy interest. Unfortunately, Wrotham Park provides a hobbled and controversial means for getting there. An apportionment of profits is the appropriate remedy, up to full disgorgement in extreme cases. But allowing juries to make the apportionment based upon the relevant facts and circumstances is a far preferable alternative to the British concoction of a hypothetical buyout price.

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