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Beyond Ex Post Expediency—An Ex Ante View of Rescission and Restitution

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Beyond *Ex Post* Expediency—An *Ex Ante* View of Rescission and Restitution†

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Abstract

It is commonly held that if getting a contractual remedy was costless and fully compensatory, rescission followed by restitution would not exist as a remedy for breach of contract. This claim, we will demonstrate, is not correct. Rescission and restitution offer more than remedial convenience. Rational parties, we argue, would often desire a right of rescission followed by restitution even if damages were fully compensatory and costless to enforce. The mere presence of a threat to rescind, even if not carried out, exerts an effect on the behavior of parties. Parties can enlist this effect to increase the value of contracting.

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I. Introduction

Why provide a remedy in restitution for breach of contract? One might imagine that a remedy in restitution only makes sense in cases where contract remedies are inadequate, or wholly absent, such as in those situations where there is no remedy at law due to a failure of formation or some technical defect.[1] When something prevents an agreement from receiving adequate enforceability under contract law, restitution steps in and cleans up the mess, as it has for centuries. But what about those cases where contract provides a perfectly adequate remedy; what purpose—other than perhaps expediency, or worse, mischief—is served by allowing a party to rescind the agreement and turn to restitution *as if* the contract and an adequate remedy for its breach did not exist? Notwithstanding the transaction costs of pursuing the contract remedy, restitution here would seem dubious or, at best, duplicative.[2]

We will show, however, that there is a purpose, a heretofore unappreciated economic purpose, of rescission and restitution, which manifests even where contract remedies are fully compensatory and costless to enforce.[3] This is not to say that the economic argument we offer is the only or the essential function of rescission followed by restitution. In making our argument, we are fully cognizant of the fact that the remedy of rescission and restitution *also* often promotes the economy that previous commentators emphasized. Our principal aim is not to exclude other considerations, but rather to expand the scope of inquiry regarding rescission and restitution. Indeed, we believe that the remedy's long and pervasive existence—dating back to ancient Roman markets and likely earlier to the legal regimes of ancient Greece and Egypt—can best be understood only by appealing to its variable functions, including the one we identify.

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1. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 31–35 (2011) (providing remedies to a party who renders performance under an agreement that is ultimately unenforceable due to indefiniteness, lack of formality, illegality, inconsistency with public policy, incapacity of a party, or mistake, or due to some supervening condition or uncertainty of an obligation to perform nonetheless delivered under protest).

2. *Cf.* Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465, 1499 (1994) ("A party to a valid contract has no claim a priori to anything other than his contractual expectancy. If the enforcement remedies were fully effective and costless, rescission would not exist as a remedy for default.").

3. This is also the main thesis in the authors' Article, Richard R.W. Brooks & Alexander Stremitzer, *Remedies On and Off Contract*, 120 YALE L.J. 690 (2011).

Our argument begins with the well-known proposition that when promisors breach contracts, promisees normally prefer (legal costs aside) a remedy in contract to rescission and recovery of price paid. Normally, expectation damages, the conventional remedy for breach of contract, are greater than the contract price.[4] Hence, only in odd cases—cases of so-called *losing contracts*, where realized value of performance turns out to be less than the price—is the option to rescind and pursue restitution preferable to expectation damages.[5] In these cases, when the promisor breaches, the promisee gets a lucky break; the breach rescues her from the loss by giving her a right to rescind the contract and receive the price paid. But surely, it is commonly suggested, from an *ex ante* perspective, "rational parties would not bargain" for such a right.[6] Our argument departs from this conventional wisdom.

Rational parties, we argue, would often desire a right of rescission followed by restitution even if damages were fully compensatory and costless to enforce.[7] The mere threat that a promisee may rescind, even if the threat is not carried out, exerts an effect on the behavior of the promisor, encouraging her to reduce the risk of rescission by increasing the value of performance to the promisee. Parties may enlist this implied threat to increase the value of contracting.

To illustrate, take a seller of goods who knows that the buyer has a right to rescind the contract if the goods are defective. Because rescission is generally disfavored by the seller, she has incentive to reduce its incidence. The remedy of rescission is available only if the goods delivered are sufficiently defective (that is, the quality of the goods falls short of the level specified or implied in the contract so much so as to constitute total breach) or if the goods are wrongly not delivered at all.[8] The seller, of

4. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981) (noting that expectation damages, v, ordinarily exceed reliance damages, which include the price, p, and any incidental reliance, r, made on the contract). Hence the familiar chain of inequalities, that *ex ante* expectation is greater than reliance, which in turn is greater than restitution of benefits conferred to breacher: $v > p + r > p$. Note that if the price has not been paid up front this inequality would turn into $v - p > r > 0$.

5. *See* Kull, *supra* note 2, at 1469 ("[R]estitution as an alternative remedy for breach of contract becomes interesting chiefly in cases where the aggrieved party has made an unfavorable bargain, a contract that he has been performing (or would have been obliged to complete) at a loss.").

6. *Id.* at 1477.

7. Moreover, even in cases where parties would not voluntarily bargain for such a regime, we show that the availability of rescission might still be socially desirable.

8. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 37(1) (2011).

course, is not without some control over the quality of the goods she produces or whether she delivers the goods at all. Indeed, by investing in the quality of the goods, the seller can reduce the probability that the buyer will have the legal right to rescind. Our argument derives from this basic insight. Parties can enlist the threat of rescission to create efficient incentives to invest in quality. They may therefore rationally desire a right to rescission and restitution even if contract remedies are correctly and costlessly administered.

Part II briefly reviews the traditional arguments for and against granting rescission rights. These arguments are all grounded in distribution and *ex post* transaction cost considerations. In Part III, we make the case for efficiency and *ex ante* investment considerations. We argue that if parties can elect between rescission and expectation damages, they can tailor incentives to efficiently invest in quality. Part IV addresses the implications of our analysis for a troubling trend in modern contract law: There is a tendency to limit the availability of rescission, while, in cases where it is granted, to allow for generous ensuing remedies. Our analysis suggests that the trend should be moving in the opposite direction. In Part V, we argue that rejection and rescission are functionally equivalent and the ensuing remedy should be limited to restoration of price in both cases. Again, this is the exact opposite of many modern reformers' recommendations.

II. Rationale for Limiting Rescission Rights

Easy availability of rescission followed by restitution has been, for centuries, a source of great anxiety among legal authorities who fear it as a threat to commercial order and other normative values. Responding to these fears, authorities have limited the ease with which rescission may be elected. The arguments they allow for rescission and restitution, as an alternative to money damages or specific performance, are typically limited to fairness and expediency. The Restatement (Third) of Restitution & Unjust Enrichment summarizes the point well: "Unlike the case of rescission for fraud or mistake, the justification of rescission as an alternative remedy for breach is not the avoidance of unjust enrichment but a concern with fairness to the injured party combined with remedial economy."[9]

9. *Id.* § 54 cmt. e.

The arguments against rescission and restitution tend to receive more weight when contract remedies are available. Among these arguments is a long held concern that allowing the buyer to rescind a contract can lead to excessively harsh outcomes for the defendant. Basic fairness and morality, often discussed in terms of unjust forfeitures for defendants or unjust gains to strategic plaintiffs, inform much of the resistance to rescission and restitution. Efficiency arguments enter here too. We will address two of these arguments before presenting our own efficiency justification for liberal rescission rights.

First, rescission may lead to inefficient returns. Just because a promisee values goods less than the contract price for them doesn't mean that those goods aren't nonetheless most efficiently allocated to her. A tailored suit for a businesswoman may be worth less to her than the price she agreed to pay once she observes some shortcoming in the quality or design. Should she exercise her right of rescission and receive restitution, the suit itself may still be best allocated to her—assuming the suit's defect does not prevent its fashionable wear or other use. Rescission can interfere with goods being put to their most valued uses. Costless renegotiation, of course, would set things back on track. Following rescission and restitution, the promisee and promisor (the businesswoman and the tailor in the example above) would reach a new agreement for delivery of the goods if the former still valued them more than the opportunity costs to the latter of delivering them. But renegotiation is not costless and, indeed, is often prohibitively costly. So sometimes inefficient returns would stay that way. This cost of the rescission remedy would have to be weighed against the benefits we identified.

Second, the off-contract remedy may encourage inefficient expenditures by some parties looking for a contractual out as well as by other parties seeking to prevent that kind of opportunism. Andrew Kull put the matter aptly when he observed that "[a]ny expenditure by the parties that is directed toward facilitating or avoiding reallocation of their existing contractual expectancies constitutes dead-weight loss."[10] These expenditures may not prevent the goods from being put to their efficient uses (which is the first problem described above), yet they constitute a wasteful and inefficient use of resources notwithstanding the final allocation of the goods. To elect rescission a promisee must show a material breach, which constrains strategic invocation of the off-contract remedy as well as the defensive anticipatory responses to such opportunistic

10. *See* Kull, *supra* note 2, at 1506.

behavior. Yet, even so, there remains room for strategic behavior by the parties, leading to wasteful expenditures. This second type of *ex post* inefficiency, like the first, must be weighed against the *ex ante* benefits we have identified with rescission and restitution. We have presented this argument more formally in other settings and we reiterate its essential structure in the next Section.[11]

III. An Ex Ante *View of Rescission*

Our argument is relatively straightforward.[12] Rescission followed by restitution is often undesirable for the seller, especially if the goods' resale value is low. Foreseeing the possibility of rescission by counterparties, sellers will therefore invest to enhance the quality of performance, thereby reducing the likelihood that the rescission right is triggered. Through its effect on quality, the option to rescind and receive restitution may be enlisted by parties to promote efficient contracting. The old concern about the stability of contracting is not entirely unfounded, but the problem is not primarily due to the ease with which parties are able to rescind following breach; rather, it is the remedy that follows rescission. Hence, the final point of our argument: The remedy in *restitution* following rescission should be limited to restoration of price or other conferred benefits to the promisor under the contract. We now present this argument in more detail.

A legal regime that always granted the remedy of rescission and restitution to both parties would effectively not enforce contracts at all. After investments are made, the distribution of surplus between the parties becomes a zero-sum game. This implies that, whenever one party prefers to carry out the terms of the contract over rescinding the contract and determining the terms of trade in free renegotiations, the other party automatically prefers the opposite. Hence, contracts would always be rescinded and subsequently renegotiated. Anticipating renegotiation after relationship-specific investments are sunk, the seller underinvests, as she knows that the buyer would capture part of the surplus generated by her investment. This is the famous hold-up problem.[13]

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11. *See* Brooks & Stremitzer, *supra* note 3; Richard R.W. Brooks & Alexander Stremitzer, *On and Off Contract Remedies Inducing Cooperative Investments* (Yale L. & Econ. Research Paper No. 396, 2009), *available at* http://ssrn.com/abstract =1524327.

12. The following discussion in this section appeared in substantial part in Brooks & Stremitzer, *supra* note 3, at 693, 708–10, 712–14, and is printed with permission of the *Yale Law Journal*.

13. *See, e.g.*, OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM:

Yet, the legal right to rescind is not available when tender conforms to the contract. A regime which allows the buyer to elect rescission only if the right is triggered by nonconforming delivery cannot only overcome the hold-up problem that arises if rescission rights were always available, it can also allow contracting parties to set optimal incentives for quality investments. Indeed, it can be shown that for every possible quality level, it is possible to choose a price such that incentives to invest in quality are optimal.

This claim is a strong one which is not obviously true. We formally demonstrate its validity elsewhere.[14] The basic intuition, however, is easy to explain. Whenever, according to the background legal regime to a particular contract, it is possible for the buyer to elect between rescission followed by restitution and expectation damages, the seller's payoff from the contract depends on whether her tender exceeds the contractually required quality level. If the tender falls short of required quality, the seller sometimes decides not to deliver at all and pays damages for total breach of contract. In other cases the seller decides to deliver and the buyer accepts delivery but asks for damages for partial breach. Still in other cases the buyer rescinds the contract and asks for restitution. However, if the tender meets the required quality, the seller gets price minus cost. It is possible to think of this payoff as a quality premium. The higher this premium, the more attractive it will be for the seller to meet the quality requirement. Typically the seller is not in perfect control of the quality level she produces. By investing more, she can, however, increase the probability of producing high quality. Parties recognize that, at very low prices, investment in quality will be too small, while at very high prices, investment in quality will be too great. Somewhere in between, however, they can always choose an intermediate price for which incentives are just right.

FIRMS, MARKETS, RELATIONAL CONTRACTING 61–67 (1985); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); Paul A. Grout, *Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach*, 52 ECONOMETRICA 449 (1984); Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755 (1988); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979).

14. *See* Richard R.W. Brooks & Alexander Stremitzer, *On and Off Contract Remedies Inducing Cooperative Investments* (Yale L. & Econ. Research Paper No. 396, 2009), *available at* http://ssrn.com/abstract=1524327.

It is useful to contrast this result with a background legal regime where expectation damages are the only available remedy. Here incentives to invest in quality are determined by the size of the damage payment to the buyer, which is based on the contractually stipulated or implied quality level. Investment will generally be insufficient unless the parties set the required quality level very high. Indeed, they would have to set quality at the highest possible level, which is why such contracts are often referred to as Cadillac contracts.[15] A real-world example of such Cadillac contracts is the kind of contract offered by moving companies.[16] Such contracts usually promise to deliver all the client's belongings intact. This is as valuable as the company's performance can be because, most of the time, the company falls short of its promise and has to compensate its client. However, we do not generally observe contracts that are breached so often. One might be concerned about the transaction costs involved in assessing and haggling about damages. Moreover, a contract that, by design, is breached almost all of the time is at odds with the very idea of a contract as a promise. For these reasons, and perhaps others,[17] Cadillac contracts, specifying the highest possible quality, are rarely observed in practice. This leaves us with the conclusion that, whenever the only available remedy is expectation damages, the seller has incentives to invest in quality, but her investment will generally not be fully adequate to ensure the socially efficient outcome.

By adding rescission to this legal regime, parties can create optimal investment incentives without having to stipulate unusually high quality levels that are breached most of the time. When rescission becomes an available option, price, in addition to quality, plays a role. With the rescission option, there are two levers for adjusting incentives: the quality threshold and price.[18] However, it is important to keep in mind that, when price acts as a lever to adjust incentives, it is not available as a tool to distribute the surplus among the parties (that is the role of the price in the case where only expectation damages were available as a remedy). To achieve the distribution of surplus that reflects the parties' respective

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15. Brooks & Stremitzer, *supra* note 3, at 707; Alexander Stremitzer, *Standard Breach Remedies, Quality Thresholds, and Cooperative Investments*, J.L. ECON. & ORG. (forthcoming 2012).

16. This example is due to Aaron S. Edlin, *Cadillac Contracts and Up-Front Payments: Efficient Investment Under Expectation Damages*, 12 J.L. ECON. & ORG. 98 (1996).

17. Setting abnormally high quality requirements may be perceived as unfair and may lead to negative reciprocity on the part of producers.

18. Formally speaking, our result implies that only price is needed; for every quality threshold there exists a price that sets efficient incentives.

bargaining power, the parties therefore have to rely on up-front payments. These payments are independent of what otherwise happens in the contractual relationship. If, for example, the price required to induce optimal investment is very low, the seller would be willing to accept the contract only if the buyer makes an "unrefundable down payment" or pays some money as a "flat-cost reimbursement." On the other hand, if the price needs to be very high, the buyer will accept the contract only if he receives some up-front payment in money or in kind from the seller. This could, for example, consist of extra services that the seller performs free of charge.

Our result applies to a wide range of contracts. It can be put to effect in construction contracts where, for example, the owner of a large suspension bridge wants to incentivize the contractor to invest in innovative dampers to reduce the vibration of the cables.[19] It can be used in production contracts, such as where a patron wants to incentivize his tailor to employ care in designing his bespoke suit or where a car manufacturer who has outsourced the development of a new motor wants to create incentives for the engineering firm to invest efficiently in the motor design. The mechanism can also be used in lease contracts by a tenant who wants to create incentives for the landlord to invest efficiently into the maintenance of the apartment. In principle, it can also be used in insurance contracts: A policyholder could make the insurer invest efficiently in the quality of its claims handling, or an insurer could make a policyholder invest efficiently in providing accurate information about underlying risks.

Yet, the insurance contract serves to illustrate an important limitation of our argument. First, our result relies on the fact that the rescinding party can make its counterparty suffer in the case of rescission. This would be the case where a policyholder has an expensive house-insurance policy on which he has paid premiums for years, which he rescinds when the insurance company does not honor a claim for a stolen bicycle. On the other hand, there are some types of insurance, such as accident and life insurance, where the payout to the policyholder if the insured event occurs is a multiple of the sum of prior premium payments received by the

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19. Remember that the parties can structure the contract in a way such that the contractor gets a positive payoff if the dampers are able to reduce vibration below acceptable levels but makes the contractor lose his investment if the quality of the dampers is non-conforming and therefore allows the owner to rescind. Hence, the contract employs both carrot and sticks to achieve the desired investments in damper quality. For a case study of a real world project in which this problem played a role, see Alterbaum et al., *The Femern Fixed Link: A Case Study in the Optimization of Construction Contracts*, Yale School of Management Case No. 10-040 (forthcoming 2011), *available at* http://nexus.som.yale.edu/ffl.

policyholder. In these cases, the threat of rescission carries no bite since the insurer would be delighted to have the policyholder rescind and therefore forgo his claim. The second limitation of our result is that, while it is possible through rescission rights to create incentives to take care, this might expose the party that is rescinded against to the risk of being harshly punished if it turns out that it made a mistake. This would not be a problem if the party exposed to the risk of rescission were risk-neutral. Yet take the example of the holder of an insurance policy who faces the threat of rescission for inadvertently having misrepresented relevant facts at the time the insurance contract was concluded. Here, it is frequently the case that the policyholder is not risk-neutral, as risk aversion is one of the main motivations for purchasing insurance.[20]

Finally, in many situations there are already strong investment incentives due to market pressures. A company might invest in quality just to maintain a good reputation in the market. One might be concerned that creating extra incentives to invest in quality through the legal system might add to the incentives already present and at times could lead to overinvestment. This concern, however, is unfounded, as incentives do not add up in such an intuitive way. The reason the legal regime we describe induces efficiency is that it makes the investing party face an expected payoff function from the transaction, which is maximized at a socially optimal investment level. This implies that beyond that level, the extra cost from investing in quality exceeds the extra benefit. Therefore, if investment levels are positive for some exogenous reason, the legal regime only creates additional incentives to the extent they fall short of the optimal investment level. Of course, it may be the case that exogenous factors, like career concerns, by themselves prompt sellers to invest too much in quality.[21] In these cases, the legal regime we describe can do nothing to reduce these excessive incentives and at the very least does not make them worse.

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20. In addition, there could be interesting cross-subsidization effects if the fact of a nonconformity is only discovered in the unlikely case that the insured event occurs. Brian Barnes, Note, *Against Insurance Rescission*, 120 YALE L.J. 328 (2010). For other motives for purchasing insurance besides risk aversion, see Victor P. Goldberg, *The Devil Made Me Do It: The Corporate Purchase of Insurance*, 5 REV. L. & ECON. 543 (2009) (arguing that relative expertise in providing monitoring and screening services plays an important role).

21. *See* Bengt Holmström, *Managerial Incentive Problems: A Dynamic Perspective*, 66 REV. ECON. STUD. 169, 170 (1999) (describing the likelihood of this result in situations where a company or an employee is unknown and young and expects huge returns from establishing a good reputation early on—not unlike the law firm summer associate described in this text).

IV. The Threat to Contractual Stability

Modern reformers appear to embrace the idea of restricting access to rescission while allowing for generous ensuing remedies. We believe this perspective has it exactly backward. The cumulative availability of rescission and on-contract remedies, like expectation damages, threatens contractual stability, and the restriction of rescission in appropriate cases undermines *ex ante* quality investments.

The best way to see the trouble caused by cumulative concurrence—cumulative availability of rescission and contract remedies—is to consider the rationale of a buyer who can choose between expectation damages on the one hand and rescission followed by expectation damages on the other. It is obvious that the buyer cannot be worse off choosing expectation damages and rescission over expectation damages alone. In some instances, however, the buyer can extract rents from the seller in return for the willingness to renegotiate rescission. In such instances, the buyer will be better off. Hence cumulative availability of on-contract and off-contract remedies threatens the stability of contracting much more than if rescission and expectation damages are mutually exclusive. Moreover, cumulative concurrence makes providing incentives for optimal investment into quality much harder.

Therefore, if courts are concerned about stability and efficiency of contracting as well as the potentially desirable effects of redistribution from the seller to the buyer, they should treat rescission and expectation damages as mutually exclusive. The buyer should not be allowed to ask for damages beyond restitution if he has chosen to rescind. Rescission should come at a price.

V. The Right to Reject

As a matter of law, there are of course important distinctions between whether the goods are returned through rescission (annihilating the contract *ab initio*) or through rejection (preserving the contract) followed by recovery of price.[22] These distinctions, however, do not affect the economic character of the exchange. The goods are returned and the price is recovered in either case. Hence, economic arguments for rescission

22. For rejection, see U.C.C. § 2-601 (2003). For rescission, which is referred to as "revocation of acceptance" see U.C.C. § 2-608 (2003). We borrow here, from our prior article, Brooks & Stremitzer, *supra* note 3, at 720.

coming at a price also apply in cases of rejection, where it is generally accepted that expectation damages are still available after the price has been recovered. The inquiry here is not one regarding legal form. The question is about the economic effect of permissively allowing parties to return defective goods (through whatever legal device—rescission or rejection) and recoup damages on top of price.

It sometimes seems that reformers, such as the drafters of the Uniform Commercial Code who have made the ensuing remedy after rescission more generous, have based their argument on a doctrinal argument by analogy. Why, they ask, should the buyer be allowed to ask for expectation damages after *rejection* but not after *rescission*? But the argument also cuts the other way: If the buyer's remedy has traditionally been restricted to restoration of price after rescission, why should the same limitation not apply to the remedy after rejection, especially when, as we have identified, such a regime has very desirable welfare properties.

VI. Conclusion

We began with a simple question that heretofore seemed to have an obvious answer. Is rescission followed by restitution a sensible remedy for breach in a world where contract's enforcement remedies are perfectly compensatory and costless to bring about? The conventional answer is "No"—"[i]f the enforcement remedies were fully effective and costless, rescission would not exist as a remedy for default."[23] We reject this convention. The threat of rescission can encourage parties to invest in quality and thereby increase the value of their contractual exchange. This is something the parties would value even in the hypothetical world of fully effective and costless enforcement, as well as in our less perfect one.

There is a purpose to rescission followed by restitution that goes beyond remedial expediency and judicial economy. For this reason we would encourage courts to give greater countenance to rescission, awarding it more liberally than traditional arguments would suggest. At the same time, however, we would advocate limiting, in this context, the ensuing remedy in restitution. Our recommended combination of "*liberal access to rescission and a conservative ensuing remedy in restitution*," is quite the opposite of contemporary reform proposals. They would limit rescission more generally, and yet when allowing it, they would provide for generous

23. *See* Kull, *supra* note 2, at 1499.

ensuing remedies. From an economic perspective, that is exactly the wrong thing to do. No doubt, liberal access to rescission has its costs, such as encouraging inefficient returns and opportunistic avoidance to obligations, but its benefits should not be overlooked. These costs and benefits can be managed somewhat through the combined approach we advocate. By allowing greater recourse to rescission, courts can encourage efficient cooperative investments. By restricting the ensuing restitutionary remedy, courts can discourage the abuse of rescission.

A final point: nothing in our argument hinges on the goods being returned through rescission, as opposed to, say, rejection. Therefore, our efficiency perspective would recommend that the remedy following rejection should be a return of price paid, if any—and not expectation damages—in order to bolster cooperative investment. Additional considerations, legal and otherwise, of course may determine the practical implementation of these remedies. That is as it should be. As we said at the outset, our aim is to expand the scope of consideration of the doctrine, not limit it.