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RESPONSE

Betrayal and Exploitation in Contract Law: A Comment on *Breach Is For Suckers*

*Steven W. Feldman**

INTRODUCTION

In their May 2010 article in the *Vanderbilt Law Review, Breach Is For Suckers*,[1] Tess Wilkinson-Ryan and David A. Hoffman report on a series of psychological experiments, addressing various breach scenarios that show contracting parties are unusually sensitive to fears of exploitation. One of the authors' key conclusions is that breach of contract is particularly offensive when the promisor

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1. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is For Suckers,* 63 VAND. L. REV. 1003 (2010).

"betray[s]" or "take[s] advantage of" the promisee, who then becomes a "regretful, embarrassed 'sucker[ ].' "[2] Describing their theory as a "novel lens," Wilkinson-Ryan and Hoffman state, "We propose that people often consider breach of contract to be a form of exploitation and a violation of the norm of reciprocity."[3]

The authors go beyond the realm of psychology and critique contract doctrine and its treatment of emotional distress damages. Their primary argument is that contract is missing a "psychologically realistic theory" insofar as "contract damages do not even attempt to address the subjective harm of breach."[4] They also cite the ordinary person's belief that "breaking promises is morally wrong no matter what the law says" and that "contract damages should reflect the ethical culpability of the breaching party."[5] Wilkinson-Ryan and Hoffman focus on opportunistic breach whereby the victim voluntarily participates in the transaction, the victim perceives inequity, and the victim believes that the breaching party intentionally has chosen to exploit the non-breaching party.[6]

While Wilkinson-Ryan and Hoffman pointedly criticize the law in this area, they do not analyze in any depth whether their assertions are consistent with the cases. Where the authors do address the relationship between contract law and psychology, I respectfully contend that it is incomplete. The authors' use of primary legal materials consists of scattered citations to five decisions, with the latest decided in 1971. Most importantly, their legal analysis omits the nuances in the case law on emotional distress damages.

Part I of this Response will detail how the courts treat the moral psychology of breach and Part II will address the state of contract emotional distress damages law in the United States. This Response will show that the decisions (1) present a sound theoretical framework for considering the psychological aspects of breach of contract and (2) support fair compensation for foreseeable and meritorious claims of significant emotional distress. In sum, the law already reflects the essential elements of Wilkinson-Ryan and Hoffman's proposed "sucker" theory of contract.

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2. *Id.* at 1005, 1015.
3. *Id.* at 1004; *see also id.* at 1017.
4. *Id.* at 1004, 1006 (internal citations omitted).
5. *Id.* at 1004, 1015 (internal citations omitted).
6. *Id.* at 1005, 1021.

I. THE COURTS AND THE MORAL PSYCHOLOGY OF BREACH

According to Wilkinson-Ryan and Hoffman, the law lacks a "psychologically realistic theory of breach."[7] They call it "The (Missing) Psychology of the Expectation Interest."[8] The courts, they indicate, "[o]ught to be more attentive to the 'real' (i.e., relationally infused) deal, and not simply to the 'paper' contracts before them."[9] The authors further argue that "jurists" have inappropriately "conflated" two forms of injury: "the psychological harm of breach" and "emotional damages."[10] Accordingly, Wilkinson-Ryan and Hoffman contend that contract law lacks a theoretical "framework"[11] for thinking about the psychological dimensions of breach of contract, which in turn has negative ramifications for practice and doctrine. These adverse consequences include, the authors posit, the inappropriate temptation that judges might believe lay intuitions about contractual breach, which are "[a]re erratic and unbounded 'heuristic errors that the law should reject or try to overcome.' "[12]

Contrary to Wilkinson-Ryan and Hoffman's thesis, this Response will show that courts analyzing breach of contract follow a sophisticated, scientifically sound view of the psychological and emotional processes of both the promisor and the promisee. Case law also has formulated realistic principles for identifying valid emotional distress claims. These insights stem from the nature of contracting and the parties' relations both before and after the breach.

A. The Psychology of the Contract Breaker

Courts have addressed the moral psychology of the opportunistic contract breaker. The "repudiator"[13] of a binding promise is a "commercial sinner"[14] who bears all the "wrong and reproach that term implies."[15] This defaulting party is a "wrongdoer"[16] and a "transgressor"[17] who takes advantage of his "victim."[18] With an

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7. *Id.* at 1004; *see also id.* at 1013.
8. *Id.* at 1006.
9. *Id.* at 1010.
10. *Id.* at 1013.
11. *Id.*, at 1004
12. *Id.* at 1012.
13 Lynch v. United States, 292 U.S. 571, 580 (1934); Lagerloef Trading Co. v. Am. Paper Prods. Co. of Ind., 291 F. 947, 955 (7th Cir. 1923).
14 *Lagerloef*, 291 F. at 956.
15 *Lynch*, 292 U.S. at 580.
16 *E.g.*, Boyce v. Soundview Tech. Grp., Inc., 464 F.3d 376, 391–92 (2d Cir. 2006).
17 Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (Cardozo, J.).

opportunistic breach, the promisor has violated the universally-accepted implied covenant of good faith and fair dealing. This concept is a basis for breach of contract liability that protects the promisee's "right to receive the fruits of the contract"[19] and safeguards "community standards of decency, fairness, or reasonableness."[20] Good faith in this setting is a matter of contractual morality because a deliberate breach of the implied covenant denotes "moral obliquity"[21] and a "dishonest purpose, consciousness of wrong, or ill will in the nature of fraud."[22]

In addition to denouncing opportunistic breach in the above moral terms, courts frequently will award different amounts of damages consistent with their disapproval of this behavior. Where the promisor consciously disregards the norms of good faith, trust, and reciprocity, courts favor the increased availability of punitive damages, impose a relaxed standard for the foreseeability of damages, and recognize a minimal duty for mitigation of damages on the part of the promisee.[23] Also, judges tend to award extra-contractual damages

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18 *E.g.*, Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 479 (2006).

19 *E.g.*, Allworth v. Howard Univ., 890 A.2d 194, 201–02 (D.C. 2006); Dalton v. Educ. Testing Serv., 663 N.E.2d 289, 291 (N.Y. 1995).

20 Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 864 A.2d 387, 395 (N.J. 2005).

21 Kimmel v. W. Reserve Life Assur. Co., 678 F. Supp. 2d 783, 804 (N.D. Ind. 2010); *see also* Reed v. State Farm Mut. Auto Ins. Co., 857 So. 2d 1012, 1022 n.9 (La. 2003) (noting that concept of good faith and fair dealing represents a requirement for "moral and ethical" conduct).

22. Equip. & Sys. for Indus., Inc. v. Northmeadows Constr. Co., 798 N.E.2d 571, 575 (Mass. 2003); *see generally* Steven W. Feldman, *Autonomy and Accountability in the Law of Contracts: A Response to Professor Shiffrin*, 58 DRAKE L. REV. 177, 194–95 (2009) (analyzing implied covenant).

Wilkinson-Ryan and Hoffman contend that breach of contract is not a legal or moral wrong in the eyes of the law because "most judges follow" Oliver Wendell Holmes's 1897 observation that "the duty to keep a contract at common law means a prediction you must pay damages if you do not keep it,—and nothing else." Wilkinson-Ryan & Hoffman, *supra* note 1, at 1004 (quoting The Path of the Law, Address at the Dedication of the New Hall at Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 462 (1897)). Holmes's observation, however, has relatively few judicial adherents, mostly in dicta. *See* Feldman, *supra* note 22, at 196 n.88 (citing fifteen decisions). Indeed, Holmes himself later disavowed that a party has a legal right to breach a contract, calling "pay or perform" a technicality of the "old law." *See* Feldman, *supra* note 22, at 198–99 (citing Holmes's judicial opinions, correspondence, and commentaries). In any event, only one case denying relief for emotional distress has relied on the Holmes "pay or perform" dictum, and even that decision recognized the right for clear cases of foreseeable harm or where the breach accompanies bodily injury. Francis v. Lee Enters., 971 P.2d 707, 713, 716 (Haw. 1999).

23. Feldman, *supra* note 22, at 211–14, 231–32 (citing decisions); *see also* Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517, 1518 (2009) ("[I]n reality, courts frequently award promisees more than their expectation when they find that a breach is willful, and thus act to deprive willful breachers of any gains from breach.").

in situations where they believe a contractual promise has not merely been broken, but betrayed.[24] Thus, the courts' condemnation of the opportunistic breacher is not empty rhetoric.

B. The Psychology of the Contract Victim

Courts often recognize that the victim of a breach of contract commonly experiences betrayal, frustration, or distress. For example, the Superior Court of Connecticut has stated, "To some extent, every breach of contract or economic deprivation will result in hurt feelings, disappointment, frustration, or betrayal."[25] Similarly, the United States District Court for the District of Maryland has stated, "The breach of a contract practically always causes mental vexation and feelings of disappointment in the plaintiff."[26] In a final example, the Supreme Court of Indiana has commented, "Breaches of contract 'will almost invariably be regarded by the complaining party as oppressive if not outright fraudulent.' "[27]

The injured promisee will naturally experience disappointment and distress. The reason is that upon entering a contract, "[e]ach party believes that the other party will not thwart the objective of the agreement."[28] Again, through long experience, courts commonly acknowledge the typical promisee's emotional reaction to breach.

C. Classification of Emotional Distress

Damages for emotional distress are not punitive but are compensatory because they redress the plaintiff's injury and do not punish or deter the defendant.[29] "Mental anguish" to support these compensatory damages deals with the more poignant and painful

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24. Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and The New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 901 ("Under the new fiduciary principle, heightened obligations and the potential for extracontractual damages arise when one contracting party is vulnerable or dependent. . . .") (analyzing decisions).

25. Gorcenski v. Home Selling Team, LLC, No. CV-075001872-S, 2007 WL 4754820, at *2 (Conn. Super. Ct. Dec. 20, 2007).

26. Richter v. N. Am. Van Lines, Inc., 110 F. Supp. 2d 406, 414 (D. Md. 2000) (quoting 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1076 (1964)).

27. Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975, 983 (Ind. 1993) (quoting Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 363 (Ind. 1982)).

28. *See* Emerson Radio Corp. v. Orion Sales, Inc., 80 F. Supp. 2d 307, 312 (D.N.J. 2000), *rev'd in part on other grounds*, 253 F.3d 159 (3d Cir. 2001). The authors accept this view of contract, *see* Wilkinson-Ryan & Hoffman, *supra* note 1, at 1016, but fail to correlate it with the case law.

29. 11-59 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 59.1 (Joseph M. Perillo ed., rev. ed. 1993) (courts "commonly assert" that these damages are compensatory and not punitive).

emotions. Judges look for a high degree of mental distress as opposed to the usual mental perturbation resulting from ordinary regret or annoyance. In considering contract claims for emotional distress, a court's controlling point is whether the proof shows grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation.[30]

This classification has a sound policy basis. Courts properly observe that not every occurrence of emotional distress after a breach deserves compensation because this prospect is a natural risk that promisees impliedly accept when they enter a contract.[31] It would be "destabilizing" to commerce and even "absurd" for the law to compensate routine instances of emotional hurt; the insignificant interferences must be left to other agencies of social control.[32] Consequently, the case law appreciates that the affronted promisee's worry and frustration will differ in degree and kind from contract to contract; it will depend on the particular urgencies, the nature of the breach, the parties' states of mind, and the other surrounding circumstances.[33]

For many courts, the most important guide for drawing the above distinctions is whether the agreement arose from a "commercial" or "personal" relationship.[34] In the commercial world, from which most contract litigation will result, experience shows that a breach typically does not cause as much resentment or other physical or mental discomfort as compared to torts and crimes.[35] In this realm of business transactions, where the pecuniary motive is dominant,[36] any distress generally is of the "transient and trivial"

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30. *See, e.g.*, Volkswagen of Am., Inc. v. Dillard, 579 So. 2d 1301, 1305–06 (Ala. 1991) (quoting BLACK'S LAW DICTIONARY 985–86 (6th ed. 1990)). The authors correctly observe that the distress must be "severe and expected," Wilkinson-Ryan & Hoffman, *supra* note 1, at 1008, but do not examine the nuances of this standard in the decisions.

31. *See* Hatfield v. Max Rouse & Sons Nw., 606 P.2d 944, 952 (Idaho 1980) ("Life in the competitive commercial world has at least equal capacity to bestow ruin as benefit, and it is presumed that those who enter this world do so willingly . . . .").

32. *See* Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145, 156 (La. App. 1961) (arguing against compensation for routine emotional damage); Gaglidari v. Denny's Rests., Inc., 815 P.2d 1362, 1373 (Wash. 1991) (same); *Gorcenski*, 2007 WL 4754820, at *2.

33. Stanback v. Stanback, 254 S.E.2d 611, 619 (N.C. 1979), *disapproved on other grounds*, Dickens v. Puryear, 276 S.E.2d 325, 332 (N.C. 1981) (quoting Stewart v. Rudner, 84 N.W.2d 816, 823 (Mich. 1957)).

34. *E.g.*, Erlich v. Menezes, 981 P.2d 978, 987–88 (Cal. 1999); Kewin v. Mass. Mut. Life Ins. Co., 295 N.W.2d 50, 53–54 (Mich. 1980).

35. Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985) (*citing* 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1077 (1964)).

36. *Stanback*, 254 S.E.2d at 618 (quoting Lamm v. Shingleton, 55 S.E.2d 810, 813 (N.C. 1949)).

variety.[37] With a "commercial" contract, courts observe, "The damage suffered upon the breach of the agreement is capable of adequate compensation by reference to the terms of the contract."[38] A good example of such a commercial agreement concerns an employer's breach of an employment contract. Most cases state that these contracts are not made primarily to secure the protection of the promisee's psychic interests and that pecuniary damages can be assessed with reasonable certainty.[39]

By contrast, in the "personal" contract setting, the promisee's mental concern, sensibilities, or solicitude are the prime considerations for the contract. An example of a personal contract where the natural and probable consequence of breach was to inflict mental anguish would be where a physician violated his agreement with a pregnant woman to perform a caesarean delivery and the child died stillborn as a result.[40] In such instances, the agreement itself places the promisor on notice that failure to perform would inevitably and necessarily produce mental suffering.[41] These considerations support the foreseeability of loss under standard expectation damages theory and lend objective assurance that the claim is worthy of redress and not feigned to increase the damages.

Thus, even as a contract can have both commercial and personal elements, and this distinction is not conclusive, the factor does serve as an important indicator for classifying the likely intensity of a promisee's reaction to breach.

D. Principles of Proof

While the line between significant and insignificant anguish in the decision to provide relief may appear difficult to draw in theory, courts in assessing the evidence have not experienced many obstacles to doing so in practice.[42] "Numerous commentators and courts have

37. *See* Maloney v. Home & Inv. Ctr., Inc., 994 P.2d 1124, 1136 (Mont. 2000) (stating that some degree of transient and trivial emotional distress is part of living and that only severe emotional distress is compensable).

38. Benkert v. Med. Protective Co., 842 F.2d 144, 147 (6th Cir. 1988) (quoting Michigan decisions).

39. *See, e.g.*, *Gaglidari*, 815 P.2d at 1370–71 ("The primary purpose in forming such contracts, however, is economic and not to secure the protection of personal interests. The psychic satisfaction of the employment is secondary.") (quoting Valentine v. Gen. Am. Credit. Inc., 362 N.W.2d 628, 631 (Mich. 1985)).

40. Stewart v. Rudner, 84 N.W.2d 816, 823 (Mich. 1957).

41. *Id.*

42. John D. McCamus, *Mechanisms for Restricting Recovery for Emotional Distress in Contract*, 42 LOY. L.A. L. REV. 51, 83 (2008).

observed that developments in science enable experts to adequately distinguish between trivial and non-trivial emotional distress. . . ."[43] Thus, the courts in staying sensitive to the psychological consequences of breach properly rely on medical science in considering proof of the promisee's emotional distress.

The courts' concern to remedy the subjective harm of breach finds expression in other evidentiary principles. Under many decisions, physical symptoms are not required to support the plaintiff's mental symptoms,[44] although such evidence usually would assist the plaintiff. Expert testimony concerning the plaintiff's emotional distress, while frequently advisable, is not essential according to the majority rule.[45] The reason is that plaintiffs providing lay evidence alone could legitimately establish to the factfinder's satisfaction that the incident would naturally lead to the distress, such as with the defendant's malicious, willful, or intentional actions for the particular type of contract under the circumstances.[46] This lay evidence could be important if not decisive in providing relief. Accordingly, most courts in assessing these claims have no difficulty in relying upon lay intuitions about the consequences of breach because, contrary to Wilkinson-Ryan and Hoffman's argument, they do take seriously lay intuitions about the parties' real world experiences.

E. The Relationship of Cognition and Emotion in Breach

The authors declare that "[i]n the absence of a psychologically realistic theory of breach, jurists have conflated the psychological harm of breach with emotional damages."[47] What the authors mean is that courts have inappropriately merged the consequences of the promisee's cognitive appraisal of the breach with his affective reaction to the event. Wilkinson-Ryan and Hoffman are correct that the law does not distinguish the psychological and emotional aspects of human distress related to breach. Both cognitive and emotional connotations appear frequently in the interchangeable terms courts use for this

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43. Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 25 (1992) (discussing parallel issues in tort cases).

44. *E.g.*, Volkswagen of Am., Inc. v. Dillard, 579 So. 2d 1301, 1304 (Ala. 1991); Reis v. Hoots, 509 S.E.2d 198, 204 (N.C. App. 1998).

45. Univ. of S. Miss. v. Williams, 891 So. 2d 160, 172–73 (Miss. 2004); *cf.* Miller v. Willbanks, 8 S.W.3d 607, 612–13 (Tenn. 1999) (rule in tort cases).

46. *See* Gamble *ex rel.* Gamble v. Dollar Gen. Corp., 852 So. 2d 5, 11 (Miss. 2003), *cited in Univ. of S. Miss.*, 891 So. 2d at 173.

47. Wilkinson-Ryan & Hoffman, *supra* note 1, at 1013.

harm, such as "mental distress," "mental suffering," "mental humiliation," and "mental anguish."

However, the authors overlook that psychological and emotional reactions to breach are not severable, factually or legally. The law on emotional distress damages in contract matches the findings of prominent psychological theorists who have shown that cognition and emotion are interrelated and integrated. Regarding the cognitive—affective—behavioral process in mental functioning, the renowned psychologist and psychotherapist Dr. Albert Ellis explained:

> [H]uman thinking, emotion, and action are not really separate or disparate processes. . . they all significantly overlap and are rarely experienced in a pure state. Much of what we call emotion is nothing more nor less than a certain kind—a biased, prejudiced, or strongly evaluative kind—of thought. But emotions and behaviors significantly influence and affect thinking, just as thinking significantly influences what we call emotions and behaviors. . . . What we call feelings almost always have a pronounced evaluating or appraisal element.[48]

Consequently, given that psychological and emotional processes are ongoing, overlapping, and reinforcing, it is highly doubtful, as indicated by the authors, that plaintiffs (and judges or juries) can or should compartmentalize the psychological effect of breach versus the emotional harms that result from the consequences of nonperformance.

F. The Psychology of Breach and the Nature of Contract

Case law shows that the psychology of breach is rooted in the nature of contracting. Before entering an agreement, the parties exhibit a "natural wariness," but upon making the contract, the parties expect a "cooperative enterprise" and higher levels of mutual trust.[49] With all contracts, be they one-shot arrangements or longer term relational deals, "[the parties] create a mini-universe for themselves, in which each voluntarily chooses his contracting partner, in which each trusts the other's willingness to keep his word and honor his commitments, and in which they define their respective obligations, rewards, and risks."[50] When a party breaks that

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48. Albert Ellis, *Early Theories and Practices of Rational Emotive Behavior and How They Have Been Augmented And Revised During The Last Three Decades*, 21 J. RATIONAL-EMOTIVE & COGNITIVE-BEHAVIOR THERAPY 219, 221 (2003); *see also* Deidre L. Reis & Jeremy R. Gray, *Affect and Action Control*, *in* OXFORD HANDBOOK OF HUMAN ACTION 278 (Ezequiel Morsella et al. eds., Oxford University Press 2008) ("The existence of multi-level emotion cognition interactions suggests that these two systems are tightly integrated, and constantly interacting.").

49. *See* Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 594–95 (7th Cir. 1991).

50. Erlich v. Menezes, 981 P.2d 978, 987 (Cal. 1999). The authors accept this view of contract, see Wilkinson-Ryan & Hoffman, *supra* note 1 at 1015–16, but do not correlate it with the case law.

commitment in an opportunistic way, courts have used language that the promisor "betrayed,"[51] took advantage of,"[52] or "suckered"[53] the promisee—the very same words Wilkinson-Ryan and Hoffman employ to characterize their "sucker" theory.

The law's sensitivity to these psychological impacts shows that courts fully understand why a promisee often feels demeaned, insulted, or embarrassed after the other party's opportunistic breach. Contrary to the authors' assertions, courts do acknowledge the "relationally infused deal" as they give significant weight to moral norms and reciprocity and the real world behavior of contracting parties.

II. DAMAGES FOR EMOTIONAL DISTRESS: REDRESSING THE SUBJECTIVE HARM OF BREACH

In their other centerpiece legal argument, Wilkinson-Ryan and Hoffman severely criticize the expectation damages remedy because it "[d]oes not even attempt to address the subjective harm of breach."[54] According to the authors, "emotional distress damages are generally unrecoverable" absent "exceptional circumstances" for "severe and expected losses" and "perhaps from a ruined wedding, vacation, or a funeral."[55] Thus, they contend that the law follows "inflexible limitation[s]" and that "subjective anticipation has little to do" with contract damages.[56] But, as discussed below, the authors' claims are unsupported.

While cases will indeed say that a "general rule" precludes emotional or mental distress damages for breach of contract,[57] the reality is this principle has become "unworkable" and "not sufficiently robust to be useful."[58] More accurately, courts have said, "[T]here is no general rule barring such items of [emotional] damage[s] in actions for

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51. Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC., 376 F. Supp. 2d 385, 408 n.136 (S.D.N.Y. 2005).

52. Sparks v. Baxter, 854 F.2d 110, 114 (5th Cir. 1988).

53. Burke v. Harman, 574 N.W.2d 156, 174 (Neb. App. 1998).

54. Wilkinson-Ryan & Hoffman, *supra* note 1, at 1006.

55. *Id.* at 1008.

56. *Id.*

57. *E.g.*, Bohac v. Dep't of Agric., 239 F.3d 1334, 1340 (Fed. Cir. 2001); Rubin v. Matthews Int'l Corp., 503 A.2d 694, 698 (Me. 1986).

58. Ronnie Cohen & Shannon O'Byrne, *Cry Me A River: Recovery of Mental Distress Damages In A Breach of Contract Action—A North American Perspective*, 42 AM. BUS. L.J. 97, 100–101 (2005) (analyzing decisions); *see also* Joseph P. Tomain, *Contract Compensation in Nonmarket Transactions*, 46 U. PITT. L. REV. 867, 893 (1985) (exceptions have "swallow[ed]" the rule).

breach of contract. It is all a question of the subject matter and background of the contract . . . ."[59] Put another way, case law provides, "[W]hen the nature of the contract is such that emotional distress is foreseeable, emotional damages will lie."[60] Accordingly, "[m]odern courts have . . . found emotional distress damages available for breaches of a truly wide range of contracts."[61]

Commentators have noted this trend. One authority finds twenty different recurring fact patterns, including a miscellaneous category, where courts have awarded relief in dozens of decisions. These categories are fact specific and include contract breaches regarding common carriers; economic loss; intellectual enjoyment; personal contracts; physical injury; willfulness; burial and funeral related services; cosmetic or plastic surgery; entertainment or recreation; installation, maintenance or repair of equipment and buildings; photography or film development; shipping or transportation; pest control services; travel agency services; vocational training; and construction of homes or other buildings, among others.[62] Similarly, the current edition of *Williston on Contracts* observes, "[N]umerous cases allow[ ] the recovery of emotional distress damages for breach of contract . . . ."[63] Accordingly, the law in granting a remedy goes well beyond the "exceptional circumstances" asserted by Wilkinson-Ryan and Hoffman.

The authors have bypassed yet another nuance in this area. While the decisions frequently (but not necessarily) involve a breach of contract that also amounts to a tort, such as fraud or assault, the distinction in the emotional distress cases between tort and contract doctrine is "often blurred."[64] As plaintiffs suffering emotional injury

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59. *See* Cabaness v. Thomas, 232 P.3d 486, 507 (Utah 2010) (quoting Sullivan v. O'Connor, 296 N.E.2d 183, 188–89 (Mass. 1973)); *see also* Stewart v. Rudner, 84 N.W.2d 816, 824 (Mich. 1957) (seriously doubting "if there now is any such [general rule]").

60. *See Cabaness*, 232 P.3d at 507 (quoting Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1200 (11th Cir. 2007)).

61. *Sheely*, 505 F.3d at 1201 n.28 (citing cases).

62. Gregory G. Sarno, Annotation, *Recoverability of compensatory damages for mental anguish or emotional distress for breach of service contract*, 54 A.L.R. 4th 901 (2010); Michael G. Walsh, Annotation, *Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract or warranty in connection with construction of home or other building.*, 7 A.L.R. 4th 1178 (2009); Thomas R. Trenkner, Annotation, *Recovery for mental anguish or emotional distress, absent physical injury, consequent upon breach of contract in connection with sale of real property.*, 61 A.L.R. 3d 922 (2009).

63. 24 RICHARD A. LORD, WILLISTON ON CONTRACTS § 64:7, at 74–75 (4th ed. 2002).

64. Rubin v. Matthews Int'l Corp., 503 A.2d 694, 697 n.3 (Me. 1986); *see also* DAN B. DOBBS, DOBBS HORNBOOK ON REMEDIES § 12.5(1) (2d ed. 1993); 11-59 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 59.1 (Joseph M. Perillo ed., rev. ed. 1993) ("In many cases . . . it is not possible to

increasingly plead alternative theories in tort and contract, courts have been quite creative in granting relief. The supporting "tort" can be as nominal as a willful or reprehensible breach.[65] This convergence of tort and contract doctrine further demonstrates how the law facilitates recovery for significant emotional distress proximately resulting from breach of contract.

The law on emotional distress appropriately remedies the moral harm of breach as it comports with standard expectation damages theory. The ordinary contract does not place the promisor on notice of potential liabilities for emotional injury or guarantee the promisee's emotional tranquility. For this reason, courts should and do deny breach claims for routine or idiosyncratic emotional distress. What the authors leave out, however, is that courts in "flexible" ways "[h]ave formulated a principle that has the potential of allowing recovery for mental anguish in a wider range of cases."[66]

CONCLUSION

The many cases referenced in this Response show that the law already reflects the essential elements of Wilkinson-Ryan and Hoffman's proposed "sucker" theory of contract. As with the subjects in the authors' experiments, the courts consider opportunistic breach of contract to be a form of exploitation and a violation of the norms of reciprocity and interpersonal trust. Wilkinson-Ryan and Hoffman's brief review of the decisions regarding a "ruined wedding, vacation, or funeral" also fails to describe the nuances of contemporary case law in which foreseeable claims for significant emotional distress enjoy significant judicial approval. Accordingly, rather than lacking a realistic theory of the injury caused by breach, the judicial system has come to realize "[t]hat the law protects interests of personality, as well as the physical integrity of the person, and that emotional damage is just as real (and as compensable) as physical damage . . . ."[67]

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determine whether the theory of the case held by either the plaintiff or the court was that the action was for a tort or for a breach of contract, or for both at once.").

65. *See* 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §12.17, at 293 (3d ed. 2004) (citing cases finding for plaintiff that the breach was "reprehensible" and "possibly amounting to a tort"); *see also* DOBBS, *supra* note 64, at 112 ("the largest current category of [tort] cases are . . . "bad faith" cases); *id.* at 110 ("Today courts are quite handy at finding a tort embedded in a contract setting . . . .").

66. Stanback v. Stanback, 254 S.E.2d 611, 618 (N.C. 1979); *see also* 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §12.17, at 292 (3d ed. 2004) (courts "have not applied [rule] inflexibly").

67. *Stanback,* 254 S.E.2d at 619 (quoting Stewart v. Rudner, 84 N.W.2d 816, 822 (1957)).