

## LOST PROFIT OR LOST CHANCE: RECONSIDERING THE MEASURE OF RECOVERY FOR LOST PROFITS IN BREACH OF CONTRACT ACTIONS

*“Courts have in the past invented alternative methods of measuring damages. There is nothing to prevent them from adopting some new method” as long as it is “consistent with the generally approved purposes of giving a remedy in damages.”*<sup>1</sup>

### I. INTRODUCTION

Lost profits must be reasonably certain<sup>2</sup>—so concurred the majority of American courts adjudicating breach of contract actions throughout the twentieth century.<sup>3</sup> Over the last few decades several commentators have attacked the results of this standard, sometimes even mentioning the loss of chance remedy as an attractive alternative to the all-or-nothing rule that conventionally applies.<sup>4</sup> Yet none of these periodic critiques has led to a dynamic shift in the determination of contract damage awards; the inertia against change inherent in our legal system has been a formidable opposing force to the extension of this remedy outside of contest and prize scenarios.<sup>5</sup> Because the loss of chance remedy is already applied in those unique types of cases, opening this note with Corbin’s quote may be somewhat misleading. The “new method” this note advocates is, in reality, the application of a known and accepted remedy—loss of chance—to a different situation. It is not a radical departure from the conventional understanding and application of the law of contracts, but rather fits squarely within its traditional principles of compensation. For start-up companies and one-time-only event providers—the two plaintiffs who typically suffer from the results of the common all-or-nothing approach—results of this new application would be extraordinary.

Ultimately any argument addressing the issue of damages must justify the calculus it advocates. Therefore an articulation of the

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<sup>1</sup> ARTHUR L. CORBIN, 11 CORBIN ON CONTRACTS 232–33 (Joseph M. Perillo ed., rev. ed. 2005).

<sup>2</sup> *Mo. Retail Hardware Ass’n v. Planters’ Operating Co.*, 294 S.W. 755, 756 (Mo. Ct. App. 1927).

<sup>3</sup> *See infra* note 33.

<sup>4</sup> Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1056 (1998); Elmer J. Schaefer, *Uncertainty and the Law of Damages*, 19 WM. & MARY L. REV. 719, 738 (1978).

<sup>5</sup> The first clear use of the remedy in a breach of contract action is found in *Chaplin v. Hicks*, (1911) 2 K.B. 786. *See* discussion *infra* Part III.A. A different form of the remedy is used for tort claims, particularly in medical and malpractice actions. *See* Polly A. Lord, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1485–94 (1986).

underlying presupposition concerning the purpose of awarding contract damages is demanded. This is a subject of considerable debate.<sup>6</sup> No commentator doubts the occurrence of a legally cognizable wrong; but exactly what that wrong is, and how to calculate it, has been a subject of controversy. This note will assume, just as the majority of opinion does, that in most cases the goal of contract damages is restorative. In other words, the aggrieved party should be placed back in the position he would have been in had the contract not been breached. This restorative goal requires a recovery for the loss of any consequential damages that stem from the breach. It will argue, however, that in cases where the defendant's acts have caused lost profits, the only reasonably certain injury to a start-up company or one-time-only event provider is the loss of an *opportunity*, not the fruits of that opportunity. Thus the calculation of damages should not focus on what the plaintiff would have earned had the contract been performed, but rather on what the contract was worth at the time of breach. This shift is more equitable according to a fairness norm,<sup>7</sup> because it prevents the twin injustices of giving a plaintiff either more than he deserves when he meets the reasonable certainty requirement or less than he deserves when he fails to satisfy the standard.<sup>8</sup>

The remedy of lost chance furthers the restorative goal and, in light of the modern advances made in the field of statistics, would be relatively easy to apply. The lost chance remedy affirms that the harm done to the plaintiff is not the loss of profit or gain that he would have realized had the breaching party performed, but instead is the loss of the opportunity to carry out the contract itself. This chance or opportunity is

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<sup>6</sup> See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); CHARLES FRIED, *CONTRACT AS PROMISE* (1981); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 81 (3d ed. 1986) (“[T]he fundamental function of contract law (and recognized as such at least since Hobbes’s day) is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and make costly self-protective measures unnecessary.” (footnote omitted)); Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118 (Peter Benson ed., 2001); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 2, 46 *YALE L.J.* 373 (1937) (arguing that the goal of contract damages is the stabilization of social relationships); Note, *Damages Contingent Upon Chance*, 18 *RUTGERS L. REV.* 875 (1964).

<sup>7</sup> By this I simply mean that it awards to each party what is his right. See 1 HENRICI DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* [THE LAWS AND CUSTOMS OF ENGLAND] 13, 15, 17 (Sir Travers Twiss ed., William S. Hein & Co. 1990) (1569), reprinted in JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW?* 33–34 (1999); see also RANDY E. BARNETT, *PERSPECTIVES ON CONTRACT LAW* 3 (3d ed. 2005) (“Fairness to both parties argues against both *overcompensation* and *undercompensation*.”).

<sup>8</sup> See CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 119 (1935) (noting that the “all or nothing” rule results in either “overlavishness” or “niggardliness”).

what must be restored to the plaintiff, and its value as an asset provides the quantifiable amount of damages to which the plaintiff is entitled.

## II. THE HISTORICAL CONTEXT FOR REASONABLE CERTAINTY

### A. *The Classical Period*

At one time the subject of damages for breach of contract was within the distinct province of the jury.<sup>9</sup> The requirement of reasonable certainty developed in the eighteenth century as American judges attempted to control the amount of money awarded by juries in breach of contract actions.<sup>10</sup> Professor McCormick notes that the certainty requirement is a “by-product of the jury system” that springs “from the lack of confidence of American judges in the discretion of juries.”<sup>11</sup> Although this requirement served a valid purpose (preventing overcompensation to the plaintiff), its extreme all-or-nothing character also served to create severe problems for parties contracting as or with start-up companies and one-time-only event providers. Because the amount of damages awarded rarely compensated accurately for what was due (in other words, accurately restored to the plaintiff what he lost), the costs of a lawsuit to both plaintiffs and defendants were inefficient—the costs to the plaintiff in bringing the suit typically being much greater than the potential recovery, and the costs to the defendant typically being much less than the cost of performing the contract. These inefficiencies in turn distorted the incentives for investing in and contracting with new ventures.<sup>12</sup>

Economic theory holds that human beings are by nature creatures controlled by incentives.<sup>13</sup> As a fundamental tenet of economics’ implicit anthropology, this presupposition has proven quite robust. In modeling aggregate human behavior there are few, if any, considerations that are more useful. Yet over the past two hundred years, courts have practically ignored this empirically validated theory by limiting the award of damages for lost profits in contract actions to cases where the damages are reasonably certain. This failure to account accurately for damages in breach of contract cases creates a perverse incentive for one party to intentionally breach a contract when it is in her interest to do so

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<sup>9</sup> See *id.* at 21–26.

<sup>10</sup> E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1210 (1970).

<sup>11</sup> MCCORMICK, *supra* note 8, at 101.

<sup>12</sup> According to Professor Posner, this problem strikes at the fundamental purpose of contract law. See POSNER, *supra* note 6, at 81.

<sup>13</sup> Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 107 (2000); see ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 3–7 (5th ed. 2001) (discussing how trade-offs and limits influence human behavior).

(i.e., when she knows that the opposite party will be unable to show with reasonable certainty what her profits might have been).<sup>14</sup> Additionally, it disinclines the other party from entering into a contract when he is at risk for such a breach unless he can afford to insure himself. Though courts have toyed with adopting a different calculation that would force the breaching party to bear some of the injured party's costs,<sup>15</sup> thereby removing the perverse incentive to breach and promoting fairer results when this scenario arises, they have yet to make a substantial change. As things currently stand, the incentive for breach is potentially quite strong for parties who contract with start-up companies and one-time-only event providers.

The reported record of recovery for start-up companies and providers of one-time-only events is bleak. Historically it is more likely for such plaintiffs to become another Google than to recover lost profits from a defendant's breach of contract.<sup>16</sup> The cases that follow provide a representative sample of the same pattern: an entrepreneur signs a contract that it hopes will yield the opportunity for a high return, but that is also subject to a great deal of risk which may lead to no return. The defendant, who is risking comparatively little, willfully breaches the contract. The plaintiff brings suit and puts on the most extensive evidence that the economists of the day can produce in order to show with reasonable certainty what the profits would have been. The court thoughtfully considers the expert's testimony but concludes that ultimately the projected figures are too uncertain to allow the matter to go to the jury. The plaintiff, therefore, recovers none of the profits that it sought to establish.

*Chicago Coliseum Club v. Dempsey*<sup>17</sup> is perhaps the best known example of the general inability to recover damages for lost profits. Jack Dempsey, the world heavyweight boxing champion, had agreed to fight Harry Wills, an up-and-coming contender.<sup>18</sup> The Chicago Coliseum Club, as the event provider, had agreed to pay Dempsey at least \$800,000 for participating in the fight, with the potential for a bonus if the match

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<sup>14</sup> This distortion violates a Kaldor-Hicks theory of efficiency, which holds that a transaction is efficient if those who gain do so to a greater overall degree than those who lose, so that those who gain could in theory compensate those who lose. For a discussion of the Kaldor-Hicks theory of efficiency, see POSNER, *supra* note 6, at 13.

<sup>15</sup> See discussion *infra* Part II.B.

<sup>16</sup> See generally Todd R. Smyth, Annotation, *Recovery of Anticipated Lost Profits of New Business: Post-1965 Cases*, 55 A.L.R.4TH 507 (2005).

<sup>17</sup> 265 Ill. App. 542 (1932). The story behind the case is quite interesting, especially when understood in the context of the racial tension of the time. See RANDY E. BARNETT, *CONTRACTS* 111–15 (3d ed. 2003).

<sup>18</sup> BARNETT, *supra* note 17, at 111.

were exceptionally lucrative.<sup>19</sup> Dempsey also agreed not to engage in any other boxing matches before the Wills bout.<sup>20</sup> The Club had already secured the promise of Wills, and had decided to hire an experienced marketing expert to promote the fight.<sup>21</sup> Shortly thereafter the Club notified Dempsey of its intention to send insurance representatives to his training facility for a physical examination.<sup>22</sup> His subsequent caustic repudiation was not only a classic example of anticipatory breach, but also led directly to a suit for the recovery of lost profits by the Club.<sup>23</sup>

It is hard to imagine a scenario that could more evoke a court's sympathy to a plaintiff's case than one in which the defendant is an arrogant celebrity who breaches his contract by sending a rude telegram from across the continental divide. Yet the trial court barred the expert testimony the Club sought to introduce with no reservations, and the appellate court had no qualms in sustaining the lower court's determination and awarding only nominal damages. In the words of the court, "[I]t would be impossible to produce evidence of a probative character sufficient to establish any amount which could be reasonably ascertainable by reason of the character of the undertaking. . . . [T]he damages, if any, are purely speculative."<sup>24</sup>

Decided in 1932, *Dempsey* is an example of the jurisprudential understanding of contract damages in the classical period. It clearly affirms the supremacy of the reasonable certainty requirement in limiting contract damage awards, and supports Professor McCormick's assertion that the requirement of reasonable certainty is "probably the most distinctive contribution of the American courts to the common law of damages."<sup>25</sup> For purposes of this note, *Dempsey* clearly exemplifies the two fundamental problems with the current application of the reasonable certainty requirement: the perverse incentive to breach, and the inequity of allowing the perpetrator of a wrong to escape liability. It is time to rethink the approach to contract damages when the law provides no meaningful disincentives for conduct like that of Jack Dempsey.

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<sup>19</sup> *Dempsey*, 265 Ill. App. at 545.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 546.

<sup>22</sup> *Id.* at 547.

<sup>23</sup> *Id.* Dempsey's repudiation took the form of a telegram, as follows: "President Chicago Coliseum Club Chgo Entirely too busy training for my coming Tunney match to waste time on insurance representatives stop as you have no contract suggest you stop kidding yourself and me also Jack Dempsey." *Id.*

<sup>24</sup> *Id.* at 549.

<sup>25</sup> MCCORMICK, *supra* note 8, at 124.

Almost as famous as *Dempsey* is the case of *Kenford Co. v. County of Erie*.<sup>26</sup> The fact pattern in *Kenford* is similar to that in *Dempsey* until the parties reach the courthouse. While the trial court in *Dempsey* refused to hear the expert testimony, the *Kenford* trial court not only allowed it in, but ruled in the plaintiff's favor because of it.<sup>27</sup> The Kenford Company (Kenford) and Dome Stadium, Inc. (DSI) entered into a contract with the County of Erie (County) in which the County agreed to construct a new domed stadium while Kenford and DSI agreed to lease the stadium at a price to be determined after the County had obtained a cost estimate.<sup>28</sup> Under the terms of the agreement, the County was to begin construction of the stadium within twelve months of the contract date. When the County failed to begin construction, Kenford and DSI brought suit for lost profits. A jury trial, which was limited to the issue of damages, resulted in a multimillion dollar verdict against the County including damages for loss of future profits. The appellate division, however, reversed that portion of the award attributable to loss of profits on account of its speculative nature.<sup>29</sup> The court of appeals affirmed, even after explicitly noting that Kenford and DSI's

quantity of proof is massive and, unquestionably, represents business and industry's most advanced and sophisticated method for predicting the probable results of contemplated projects. Indeed, it is difficult to conclude what additional relevant proof could have been submitted by DSI in support of its attempt to establish, with reasonable certainty, loss of prospective profits.<sup>30</sup>

Fifty years separate *Kenford* and *Dempsey*. Despite the court of appeals' failure to ultimately accept the expert's calculations, it recognized the significant gains made in the fields of statistics and probability. The court's attitude of openness towards this testimony is indicative of a shift away from rigid adherence to the reasonable certainty requirement. However, the court of appeals also recognized that any calculation of projected profits, no matter how sophisticated, was not sufficiently certain when based on assumptions not yet realized.<sup>31</sup>

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<sup>26</sup> 493 N.E.2d 234 (N.Y. 1986).

<sup>27</sup> *Id.* at 235.

<sup>28</sup> *Id.* at 234-35.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 236.

<sup>31</sup> *Id.* ("We of course recognize that any projection cannot be absolute, nor is there any such requirement, but it is axiomatic that the degree of certainty is dependent upon known or unknown factors which form the basis of the ultimate conclusion."). Some commentators note that the reasonable certainty requirement is just a proxy for the judge's notion of the business's likelihood of success. *See Note, supra* note 6, at 878. Because this standard is subjective, the level of certainty required could range anywhere from 51% to 100%, depending on the judge.

Some have suggested that courts shy away from allowing expected profits for a start-up company or a single-event promoter in order to prevent excessive recoveries, and because of the difficulty inherent in determining what the profits might have been.<sup>32</sup> Unlike situations where the plaintiff is selling fungible goods for which a readily discernible market price exists, there is no market from which to derive the value of a start-up company's goods or services. In other words, the primary risk that start-up companies and one-time-only event providers take is different from that taken by standard goods vendors because it is not known what the public will pay for their product, or even if there will be a paying public. While this risk does diminish the value of contracts involving such parties, it does not mean that they are worth nothing.

### *B. The Modern Dilemma*

The current state of affairs among American courts for the recovery of lost profits could be described as moderately schizophrenic. The vast majority of courts cling to the reasonable certainty requirement despite its unsatisfactory results,<sup>33</sup> while a few have stretched beyond this limitation to award at least some damages when the defendant is directly responsible for the plaintiff's lost profits.<sup>34</sup> In either case, however, the result tends to be inaccurate because it either gives too much or too little to the plaintiff. Thus where the plaintiff is a start-up company or one-time-only event provider, it would seem that the time is ripe for courts to begin to employ the remedy of lost chances in breach of contract actions. However, as *Schonfeld v. Hilliard*<sup>35</sup> demonstrates,

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<sup>32</sup> Schaefer, *supra* note 4, at 739–40; Note, *supra* note 6, at 883–85.

<sup>33</sup> See *Lowe's Home Ctrs., Inc. v. Gen. Elec. Co.*, 381 F.3d 1091 (11th Cir. 2004) (applying Georgia law to conclude that lost profits from a commercial venture are generally not recoverable); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 299 F.3d 769 (9th Cir. 2002) (holding that in California evidence to establish lost profits cannot be speculative); *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, No. 03 Civ. 6731 (HB), 2005 WL 146807 (S.D.N.Y. Jan. 21, 2005) (affirming that lost profits are recoverable only if shown with reasonable certainty); *Kinesoft Dev. Corp. v. Softbank Holdings, Inc.*, 139 F. Supp. 2d 869 (N.D. Ill. 2001) (holding that a new business cannot recover lost profits); *Vescio v. Merchs. Bank*, 272 B.R. 413 (D. Vt. 2001) (finding that the plaintiff must show an established history of profits in order to recover lost profits); *PBM Prods., Inc. v. Mead Johnson & Co.*, 174 F. Supp. 2d 424 (E.D. Va. 2001) (holding that the "new business rule" requires that damages be certain); *W. Publ'g Co. v. Mindgames, Inc.*, 944 F. Supp. 754 (E.D. Wis. 1996) (holding that a short track record of profits precluded the recovery of lost profits).

<sup>34</sup> See, e.g., *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207 (10th Cir. 2000); *United States ex rel. CMC Steel Fabricators, Inc. v. Harrop Constr. Co.*, 131 F. Supp. 2d 882 (S.D. Tex. 2000) (allowing the recovery of damages that were shown with reasonable certainty); *Marathon Oil Co. v. Collins*, 744 N.E.2d 474 (Ind. Ct. App. 2001).

<sup>35</sup> 218 F.3d 164 (2d Cir. 2000).

courts remain disinclined to employ an alternative remedy unless it is clear that the amount awarded fits the loss sustained.

Schonfeld and Hilliard were both shareholders of the International News Network (INN), a closely held cable television corporation. In March of 1994, INN contracted with the BBC for the exclusive right to broadcast its programming in the United States beginning in February of the next year.<sup>36</sup> As the parties planned the launch of the BBC in the United States, Cox Cable Communications approached INN about purchasing INN's contract rights to the BBC programming for \$1.7 million with an equity interest of 5%.<sup>37</sup> Although interested at first, INN and Cox never completed the transaction. Instead, INN entered into another agreement with the BBC to begin the immediate broadcast of the programming contingent upon INN making timely payments.<sup>38</sup> Hilliard made repeated oral promises to Schonfeld that he would provide the funding for these payments. Despite these assurances, however, Hilliard never provided any money. Upon default the BBC gratuitously released INN from the contract without bringing suit in exchange for a complete dissolution of the agreement. Shortly after the deal fell through, Schonfeld sued Hilliard claiming that his oral promises to provide the funding for the BBC programming were fraudulent.<sup>39</sup> He sought damages for, among other things, the profits that would have accrued had the underlying contract with the BBC not been breached.

At trial Schonfeld attempted to recover his claim to INN's lost profits by using expert testimony to show that damages from lost profits were between \$112 and \$269 million.<sup>40</sup> In addition, Schonfeld argued in the alternative for "lost asset" damages, a claim he based on the Cox's \$1.7 million offer to purchase the rights to the contract with the BBC.<sup>41</sup> The trial court dismissed all of his claims after finding that he had not proven any damages with reasonable certainty. Specifically, the court described Schonfeld's "lost asset" theory as a "back door" attempt to recover the same lost profits that the court had already determined were too speculative to consider.<sup>42</sup>

The U.S. Court of Appeals for the Second Circuit agreed with the district court's determination that the expert testimony concerning the loss of profits was insufficient to meet the requirement of reasonable certainty. But it overturned the district court's interpretation of

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<sup>36</sup> *Id.* at 169.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 170. In reality, the contractual relationship was more complex and developed into the basic agreement mentioned above. *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 171.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



Schonfeld's alternative "lost asset" theory of recovery. Holding that the exclusive right to broadcast the BBC programming in the United States was a tangible asset with an ascertainable value and that the loss of this asset was directly attributable to Hilliard's misconduct, it remanded the case for further proceedings.<sup>43</sup>

The Second Circuit's approach in *Schonfeld* is intriguing. While the court affirmed the all-or-nothing rule's application to a claim for lost profits that stem from the breach of a contract, it found it inappropriate with regard to the loss of the contract itself. But as the district court pointed out, because INN's only real asset was the contract with the BBC, the two claims were seeking practically the same thing. The Second Circuit appeared to take away with its right hand what it replaced with its left.

As its opinion makes clear, however, the Second Circuit was not providing recovery on the basis of some different breach, but rather was implementing a different measure of damages for the same breach. In recognizing that Schonfeld's loss of the rights to a contract that had as of yet not produced any profits was worth something for which he was entitled to compensation, the court implemented the loss of chance remedy. The court said as much itself (presumably without realizing it) when it stated that the "value of an income-producing asset . . . represents what a buyer is willing to pay for *the chance* to earn the speculative profits."<sup>44</sup> Thus what the court awarded under a "lost asset" theory was nothing more than the loss of chance remedy in disguise.

In reaching its decision, the court stated that the reason the value of an income-producing asset met the reasonable certainty requirement while the loss of profits calculations did not was because the asset's value was determined at a single point in time and therefore was not subject to all of the variables that made the extended profit calculations too speculative.<sup>45</sup> This is not completely accurate. As Hilliard had been quick to point out, the value of the contract was speculative for the same reasons that Schonfeld's attempt to prove lost profits was speculative. What the court implicitly affirmed, and what the loss of chance remedy explicitly approves, is that the opportunity itself has value, which when quantified monetarily (as an asset or otherwise) contains the appropriate discount for the speculative nature of the profits.

This bears itself out nicely in the case. Consider the discrepancy in value between the \$112 to \$269 million of projected profits Schonfeld's expert claimed the contract would have generated and the \$1.7 million Cox was willing to pay for the rights to the contract. It is obvious that

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<sup>43</sup> *Id.* at 183.

<sup>44</sup> *Id.* at 177.

<sup>45</sup> *Id.*

Cox had discounted the value of the chance to provide the BBC's programming in consideration of the speculative nature of the future profits. Although seemingly schizophrenic, the final outcome in *Schonfeld* is perfectly rational.

The Second Circuit's reasoning appears convoluted because it gives the impression that it is compensating for an asset that is completely distinct from the lost profits. In fact it is simply treating the contract as it should be treated in this context: as an asset with a market value.<sup>46</sup> Contracts are used as assets in much the same way as any other form of capital.<sup>47</sup> A contract's value as an asset comes from its ability to constrain the actions of another in the future. The prime difference between the value of a contract and more conventional assets is that the contract's value is typically subject to a great deal more risk.<sup>48</sup> When someone buys a piece of machinery for a factory, the value of that asset to its purchaser is subject to a slight degree of risk because the seller may not deliver the machine or it may not function properly or it may break down unexpectedly.<sup>49</sup> The price of the asset reflects this risk. If, for example, less risk were involved as a result of an extended warranty, then the asset would cost more.<sup>50</sup>

Courts intuitively sense that the value of a contractual right is much less than the hypothetical or potential value of the profits that may come from it—hence their reluctance to allow recovery on the basis of these projections. It is the same reluctance that would attend an argument asserting that the value of the right to use a factory was equal to the anticipated profits for the subsequent year. The two are simply not the same. It is unfortunate, but quite understandable, that the result of this intuition is typically a complete denial of any recovery. As a

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<sup>46</sup> See *infra* notes 94–97 and accompanying text. Professor Eisenberg draws the same conclusion. See Eisenberg, *supra* note 4, at 1062 (“The damages the promisee suffers . . . are not his lost profits as such, but the loss of the value of an asset that consists of the promisee’s right to earn profits under the contract.”).

<sup>47</sup> Promissory notes, bonds, and bundles of consumer debt instruments are traded everyday by investors. For a number of examples, see generally Viva Hammer & Ann Singer, *Insurance Derivatives: A Tax Angle*, in TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS 263, 299 (Louis S. Freeman ed., 2004).

<sup>48</sup> Or sometimes less. Consider again the loan contracts mentioned in *Schonfeld*, 218 F.3d at 177. Credit agencies provide ratings to banks and other lending institutions on the basis of the borrower’s financial status and history. These ratings in turn dictate the amount of interest that the lending institution charges to the borrower as essentially a risk premium. Contracts for loans made to borrowers with excellent credit ratings are not typically subject to much risk at all. See Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 619 (1999).

<sup>49</sup> See generally Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 J.L. & COM. 99, 114–19 (1997).

<sup>50</sup> *Id.* at 116–17.

resolution for the tension between the demonstrable reality of a contract's value and this intuitive bar to recovery, the loss of chance remedy allows a court accurately to predict the value of a contract as an asset and permit a recovery for the true value of the plaintiff's loss, not the fanciful dreams he had hoped that the asset would produce.

### III. THE LOST CHANCE REMEDY

#### A. *Origins*

The first and best known case to apply the lost chance remedy is *Chaplin v. Hicks*,<sup>51</sup> an English case in which the plaintiff was selected as one of fifty finalists in a beauty contest of over six thousand applicants.<sup>52</sup> Upon selection, the director of the competition scheduled an interview with the plaintiff but failed to give her timely notice of it. As a result, she was unable to attend.<sup>53</sup> The director subsequently eliminated the plaintiff from the competition, and she brought suit for breach of contract. Despite her inability to prove with reasonable certainty that she would have won the contest had she remained a contestant, the court awarded her damages based on her unadjusted numerical possibility of winning.<sup>54</sup>

Courts in the United States have intermittently followed the *Chaplin* analysis but typically only when the plaintiff has suffered a similar injustice, such as the loss of the chance to win a magazine subscription contest,<sup>55</sup> a hog showing contest,<sup>56</sup> or an encyclopedia puzzle contest.<sup>57</sup> Within the narrow realm of breaches of contract that occur in potential prize winning contests, the remedy of lost chance is a commonplace alternative. Outside this situation, however, the remedy is seldom considered.

The first American case to apply the loss of chance remedy to a scenario other than contests was *Taylor v. Bradley*,<sup>58</sup> an 1868 decision by the Court of Appeals of New York. Taylor was a farmer who had entered into a contract to farm land for three years with Bradley, who was only a prospective purchaser of the parcel of farmland which Taylor would farm pursuant to the contract.<sup>59</sup> Bradley decided not to purchase the farmland

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<sup>51</sup> (1911) 2 K.B. 786.

<sup>52</sup> *Id.* at 787.

<sup>53</sup> *Id.* at 788.

<sup>54</sup> *Id.*

<sup>55</sup> *Wachtel v. Nat'l Alfalfa Journal Co.*, 176 N.W. 801 (Iowa 1920).

<sup>56</sup> *Kansas City, M. & O. Ry. Co. v. Bell*, 197 S.W. 322 (Tex. Civ. App. 1917).

<sup>57</sup> *Mange v. Unicorn Press, Inc.*, 129 F. Supp. 727 (S.D.N.Y. 1955).

<sup>58</sup> 39 N.Y. 129 (1868).

<sup>59</sup> *Id.* at 129-30.

and was therefore unable to keep his contractual obligations to Taylor.<sup>60</sup> Taylor sued for breach of contract, but because the only consideration he received for the contract was the opportunity to farm the land, he was unable to identify any damages other than loss of potential profits. In finding for Taylor (and reversing the trial court), the Court of Appeals determined that justice required Taylor receive the value of his contract—the value of the opportunity to farm the land.<sup>61</sup>

*Taylor* is something of an anomaly in the history of cases dealing with contract damages awards. Since it was decided in 1858, almost no other courts, including those in New York, have followed it. Yet it clearly states the principle on which the loss of chance remedy is based: the plaintiff has lost an opportunity, and that opportunity has value that deserves compensation.

Despite the initial lackluster response generated by *Taylor*, the U.S. Supreme Court took note of the case seventy years later in *Story Parchment Co. v. Paterson Parchment Paper Co.*<sup>62</sup> The Court was trying to determine the proper amount of damages due under the Sherman Antitrust Act for an alleged conspiracy by Paterson to monopolize the interstate market for vegetable parchment.<sup>63</sup> The district court accepted a jury verdict for \$65,000 based on lost profits which the circuit court reversed.<sup>64</sup> Reinstating the jury's award, the Court affirmed the approach in *Taylor* on two primary grounds. First, the Court trumpeted the merits of excluding an all-or-nothing type of recovery and, second, it applauded preventing a wrongdoer from profiting from his actions.<sup>65</sup>

### B. Contemporary Status

With the Supreme Court's endorsement, it might have seemed that the lost chance remedy was finally ascending and superceding the requirement of reasonable certainty in those cases where the plaintiff was unable to prove lost profits. Unfortunately this was not the case. *Story* was decided under federal statutory law, and despite its reliance on *Taylor*, a pure breach of contract action, few courts adopted the alternative measure of recovery for determining contract damage

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<sup>60</sup> *Id.* at 130.

<sup>61</sup> *Id.* at 143–44.

[T]he plaintiff is entitled to the value of his contract. He was entitled to its performance; it is broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? . . . His damages are what he lost by being deprived of his chance of profit.

*Id.* at 144.

<sup>62</sup> 282 U.S. 555 (1931).

<sup>63</sup> *Id.* at 559.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 562–63.

awards. Reasonable certainty remained the conventional criterion and continued to produce its unsatisfactory results, as it does to this day.

Since *Story* a few courts have applied the loss of chance remedy to breach of contract actions, including the courts in *Locke v. United States*<sup>66</sup> and *Miller v. Allstate Insurance Co.*<sup>67</sup> *Locke* resembles the prize and contest cases and offers a straightforward application of loss of chance to a breach of a requirements contract. The court's seemingly natural adoption of the remedy in this context perhaps elucidates part of the reason for its overall failure to win support in American courts.

Locke was one of four contractors on a list of providers that performed typewriter service repairs for the federal government.<sup>68</sup> All departments of the federal executive branch in the local area were required to use only the service providers on the list and no others.<sup>69</sup> Thus, for any particular job, Locke's statistical chance of getting a contract was one in four. (In reality, his chance was subject to many other contingencies, including his bid price, his rapport with the particular agency, and his availability.) Before Locke received any jobs, his name was improperly removed from the list.<sup>70</sup> He brought suit for damages, including the consequential damages of lost profits.<sup>71</sup>

In evaluating Locke's claim, the court recounted *Story* and affirmed the advantages of the loss of chance remedy over an all-or-nothing approach.<sup>72</sup> Relying on Professor McCormick, it concluded by stating that "where the value of a chance for profit is not outweighed by a countervailing risk of loss, and where it is fairly measurable by calculable odds and by evidence bearing specifically on the probabilities[,] the court should be allowed to value that lost opportunity."<sup>73</sup> The *Locke* court accepted the loss of chance remedy as a theory, but quickly limited its use only to those cases where an accurate assessment could be made of the value of the contract at the time of breach.<sup>74</sup> Although the court claimed to be applying the loss of chance remedy, its qualifying statements practically bound its use with a requirement of reasonable certainty.

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<sup>66</sup> 283 F.2d 521 (Ct. Cl. 1960).

<sup>67</sup> 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

<sup>68</sup> *Locke*, 283 F.2d at 522.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 523.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 524.

<sup>73</sup> *Id.* at 525.

<sup>74</sup> *Id.* at 524 ("If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery. The amount may be approximated if a reasonable basis of computation is afforded." (emphasis added) (citation omitted)).

The court's tentative implementation of the remedy is informative. It is reasonable to infer that the court imagined the facts in *Locke* were uniquely suited to permit the use of the loss of chance remedy,<sup>75</sup> but that typically the facts would be such as to render the remedy inapplicable. It is likely this inference, more than anything else, that has hindered the expansion of the loss of chance remedy.

By 1990, the ability to assess the value of any commodity, good, or service was extensive. The sciences of probability and statistics were fine-tuned instruments of calculation in the hands of experts who used them to price everything from oil futures to life insurance. This reality, coupled with a sympathetic plaintiff, led a Florida court to award damages under the loss of chance remedy in *Miller v. Allstate Insurance Co.*<sup>76</sup> Miller was in an automobile accident that she believed might have been caused by a faulty accelerator mechanism.<sup>77</sup> She released the car to her insurance company, Allstate, only after reaching an oral agreement which provided that Allstate would return the car to her for use in a products liability suit against the manufacturer.<sup>78</sup> Instead of returning the car, Allstate sold the car to a salvage yard where it was disassembled. Miller, in turn, brought suit for breach of their agreement. The district court directed a verdict for Allstate on the grounds that Florida does not recognize a cause of action for the breach of a contract to preserve evidence, and that Miller did not lose the opportunity to bring suit against the manufacturer.<sup>79</sup> In reversing the lower court's ruling, the appellate court noted the same benefits afforded by the loss of chance doctrine that the U.S. Supreme Court had noted in *Story*: preventing a wrongdoer from prospering by his conduct and providing an award of at least some amount to a plaintiff.<sup>80</sup>

In ruling for Miller, the court stated that "[i]t is now an accepted principle of contract law . . . that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain."<sup>81</sup> The court did not, however, provide any citations for this proposition other than a few law

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<sup>75</sup> On remand, the court directed the trial commissioner to determine the total amount of typewriter-repair business for which Locke would have been eligible, whether there were any material facts that would probably have kept him from receiving the business, and the average costs he would have incurred in doing the work. *Id.* at 525. The court's instructions indicate that it believed it could account for at least the most important variables that would have affected Locke's profits and hence compensate him for the *profits* he would have made as opposed to the *opportunity* he lost.

<sup>76</sup> 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

<sup>77</sup> *Id.* at 25.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 26.

<sup>80</sup> *Id.* at 29-30.

<sup>81</sup> *Id.* at 29.

review articles and some cases from the early twentieth century. Although this lack of support reveals the shaky ground of the court's assertion, it does not belie the correctness of its decision. Even so, the precedent in *Miller*, like *Taylor*, has not been followed by many courts and is one of the few clear victories for the loss of chance remedy nationwide. This is probably so because the court did not provide any reliable guidelines for its application in practice. One is left wondering how even the most sophisticated statistical analysis could provide an accurate value for the loss of the chance to bring a lawsuit. In addition, the particular facts of the case in *Miller* are certainly unusual and thus make it easily distinguishable from the majority of other situations where the remedy could be used.

### C. Restatement and Codification

In addition to the intermittent case law, the loss of chance remedy also finds support in the Restatement (Second) of Contracts (Restatement) and the Uniform Commercial Code (UCC). Section 348(3) of the Restatement states that “[i]f a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach.”<sup>82</sup> The official comment to this section of the Restatement makes it clear that this remedy is limited in its application to those promises that are aleatory in nature and does not apply where the injured party's performance is not based on some fortuitous event.<sup>83</sup> It also implies that its use is restricted to situations where the plaintiff has lost a chance of winning a prize or a contest.<sup>84</sup>

By limiting the loss of chance remedy's application to aleatory and prize winning scenarios, the drafters provided defendants seeking to escape liability with a persuasive argument. Indeed, it was precisely this argument on which Allstate relied in *Miller*.<sup>85</sup> As the court noted, however, the restriction of the Restatement has been questioned by commentators as a condition without justification.<sup>86</sup> It does not make sense to restrict its application to only aleatory contracts when the remedy could be applied in any situation where the plaintiff has lost an opportunity. In contrast to section 352 of the Restatement, which holds that new or unestablished businesses, like any other injured party, can

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<sup>82</sup> RESTATEMENT (SECOND) OF CONTRACTS § 348(3) (1981).

<sup>83</sup> *Id.* § 348 cmt. d.

<sup>84</sup> *Id.* (“[H]e also has the alternative remedy of damages based on . . . what may be described as the value of his ‘chance of winning.’”); see also *id.* § 348 cmt. d, illus. 5 (using a horse race as an example of when the remedy could be applied).

<sup>85</sup> *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 29–30 (Fla. Dist. Ct. App. 1990).

<sup>86</sup> JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 580 (5th ed. 2003).

only recover lost profits if they can be proved with reasonable certainty,<sup>87</sup> the application of the loss of chance remedy under section 348 allows plaintiffs to recover the true value of what they have lost, rather than force them to suffer the result of a rule that probably undercompensates them. Moreover, it would prevent the breaching party from escaping liability and correct the perverse incentives created under section 352.

Section 2-715 of the UCC broadens the approach of the Restatement to provide consequential damages for “any loss . . . the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.”<sup>88</sup> The official comment specifically addresses any ambiguity in the code language for determining the damage amount by rejecting “any doctrine of certainty which requires almost mathematical precision in the proof of loss,” and asserting that “[l]oss may be determined in any manner which is reasonable under the circumstances.”<sup>89</sup> Any reasonable calculation would certainly include the loss of chance remedy. The drafters of the UCC obviously intended to reject an all-or-nothing rule and provide injured buyers with the certainty of at least some damage award in situations where there are no past performance reports to guide a court’s decision. Although the UCC provides a remedy when the plaintiff cannot prove damages with reasonable certainty, the remedy is usually unnecessary under the UCC because the UCC only applies to the sale of goods, and traditionally goods have a going market value that is easy to calculate.

#### IV. EXTENDING THE LOST CHANCE REMEDY

##### A. A Model Solution

In 1988, the Supreme Court decided *Basic Inc. v. Levinson*.<sup>90</sup> A true win for the small shareholder and an even playing field, the case was also a triumph for law and economics. In ruling for the defendant, the Court based its decision primarily on an economic argument that asserted that any false or misleading material statement, made openly by a representative of a company whose stock is traded publicly, has an effect on the market and price of that stock.<sup>91</sup> Thus, investors who buy or sell after a materially misleading public statement is made do not have to prove that their decisions were affected by the communication; it is presumed that they were. Known as the fraud-on-the-market theory, the holding was the result of economic logic too compelling to be denied.

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<sup>87</sup> RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981).

<sup>88</sup> U.C.C. § 2-715(2)(a) (2003).

<sup>89</sup> *Id.* § 2-715 cmt. 4.

<sup>90</sup> 485 U.S. 224 (1988).

<sup>91</sup> *Id.* at 241–42.



If the difficulty in assessing damages under a loss of chance theory is truly the prime hindrance to the remedy's application, *Basic* is illustrative of how practitioners can promote change. The difficulty lies in demonstrating to a court's satisfaction the soundness of economic arguments that purport to provide calculations designed to supply the market price of a contract for which there is no ready market. One could argue that the only reason Hilliard managed to recover against Schonfeld was because the market had already provided a convenient figure for the court to use as a guideline. Had Cox never made an offer to INN with a price tag, it would have been exceptionally difficult, but not impossible, for the court to affix a value to the contractual rights of INN.

There are two primary means by which a court can value a lost chance. The first is to take the expected profit calculations provided by the plaintiff, average them, reduce the average for the time value of money (including inflation), and then reduce that value for the risk of the enterprise.<sup>92</sup> The court would rely on the plaintiff for the initial anticipated profit calculation but would make the final determination of the amount to award on its own. This value reflects the value of the opportunity or chance to earn the profits.<sup>93</sup> The second option is to treat the contract as an asset just as the court in *Schonfeld* did. But without the aid of an offered price or a reasonably thick market, the court would have to look to other means to establish the asset's value.

The best method a court could use is the Capital Asset Pricing Model (CAPM). Outlined by Professor Melvin Eisenberg in his article, *Probability and Chance in Contract Law*, the CAPM is the conventional tool used by financial analysts to determine the value of an income-producing asset.<sup>94</sup> Eisenberg argues that a contract's value can and should be determined using this model because the requirement of reasonable certainty to obtain lost profits does not accurately restore the injured party.<sup>95</sup> The CAPM predicts the value of the contract at the time of the breach—in other words, it supplies a value where there is no current market. Professor Eisenberg calls this the “expected-value measure.”<sup>96</sup> Using current financial data, the CAPM accounts for the time value of money, the risk of unanticipated events that affect the entire market, and the unanticipated events that affect only the type of asset being evaluated. It then discounts the expected cash flow of the

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<sup>92</sup> This is the approach advocated by Professor Schaefer. See Schaefer, *supra* note 4, at 741.

<sup>93</sup> *Id.*

<sup>94</sup> Eisenberg, *supra* note 4, at 1061–64.

<sup>95</sup> *Id.* at 1063.

<sup>96</sup> *Id.* (emphasis omitted).

asset by these variables.<sup>97</sup> The final result is essentially a hypothetical prediction of what an investor would be willing to pay for the asset: the contract's market value. The value does not represent the hypothetical profitability of the asset but rather the value of the opportunity to make those profits. This is the value of the lost chance.

Either approach—a court-imposed deduction to the expected profits or the CAPM—would provide the plaintiff with roughly the same recovery because both use similar considerations and calculations to place a market value on the opportunity the contract afforded. The CAPM, however, is probably a better method overall because calculating value under the CAPM shifts the focus to the object that the remedy is actually compensating for. Focusing on the remedy as compensation for an asset that represents the chance to earn profits, rather than proving and then discounting profits, is more accurate and is also more likely to succeed as an alternative remedy.

The obvious result of using a value that discounts for risk is that it compensates a plaintiff for a much lower amount than an expected profit's value. This result thus affirms what courts have implicitly recognized in rejecting lost profit calculations: a lost profit's award may vastly overcompensate the plaintiff. At the same time, this result affirms what commentators have recognized as the problem with the reasonable certainty requirement: consistent undercompensation of the plaintiff. The lost chance remedy, resolving both concerns, supplies what is ultimately a more just remedy that better accords with the accepted restorative norm of contract damage awards: it puts the plaintiff back into the position he would have been in had the defendant performed.<sup>98</sup>

In *Schonfeld*, the court relied on *Kenford's* analysis of the reasonable certainty requirement to bar *Schonfeld's* lost profit claim.<sup>99</sup> But the *Schonfeld* court went on to note that in *Kenford* DSI had not raised a claim for "lost asset" damages, and thus, *Schonfeld's* claim under that theory was not barred under the precedent of *Kenford*.<sup>100</sup> Had DSI raised a claim under a lost asset or loss of chance theory, it might have successfully recouped the value of its lost opportunity to build and make profits on the stadium.

Supposing that *Kenford* and DSI made the claim for loss of chance damages as an alternative to lost profits, the court would have had a prime opportunity to apply the loss of chance remedy. Because there was no offer for the rights to the stadium before trial, and thus no objective price in the record for the court to utilize, it would have had to discern

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<sup>97</sup> *Id.*

<sup>98</sup> RESTATEMENT (SECOND) OF CONTRACTS § 331 (1981).

<sup>99</sup> *Schonfeld v. Hilliard*, 218 F.3d 164, 173–74 (2d Cir. 2000).

<sup>100</sup> *Id.* at 176.

the value of the contract at the time of the breach. This value would, in all likelihood, have been relatively easy to ascertain because of all the financial data that Kenford and DSI had already collected in their attempt to prove lost profits. Under the CAPM, all of the possible cash flows that the stadium might have produced would have been multiplied by their probabilities and the results summed. That cash flow would then have been discounted for the time value of money and the rate of risk for stadium revenues. The resulting number would have been multiplied by the rate of risk for unanticipated events in the market generally. This final value would have represented a hypothetical market value that an investor would be willing to pay for the right to build and operate the stadium—the value of the chance to make the hypothetical profits.

### *B. Potential Problem*

Although the CAPM presumes to make accurate predictions of the market value for contracts that have no going market, the most obvious argument against such predictions is that they are generalized for an anonymous contract and do not predict with real accuracy the actual value of any particular asset. Thus, the argument goes, the predictions may still be too uncertain to be of assistance in computing the actual value of the plaintiff's lost chance. This is a valid concern and needs to be addressed.

When the Supreme Court adopted the fraud-on-the-market theory in *Basic Inc. v. Levinson*, it limited its function to that of a rebuttable presumption.<sup>101</sup> Thus, the Court affirmed the validity of the economic theory in a generalized hypothetical context, but did not mandate the implementation of that theory upon every stock issuer who might make misleading statements regarding the status of merger negotiations to investors. Instead, if the issuer could show that the misleading statement was made in such a context that it had no effect on the market for the issuer's stock, the presumption would be rebutted and the plaintiff would still be forced to show the extent of its reliance damages without the benefit of the fraud-on-the-market theory.<sup>102</sup> Thus, if a situation arose in which a buyer of the issuer's stock heard a misleading statement concerning merger negotiations, but knew it to be false, he could not avail himself of the fraud-on-the-market theory. In essence, the Court constrained the use of the theory with a reality check.

The application of the lost chance remedy as calculated under the CAPM should be used in the same manner—that is, as a rebuttable presumption. In a situation where a start-up company's contract with

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<sup>101</sup> 485 U.S. 224, 245–46 (1988).

<sup>102</sup> *Id.*

another party for a crucial good or service is breached and leads to the loss of profits for the plaintiff's business, the defendant would be liable for the value of the contract at the time of breach. This value would presumably be equal to the value calculated under the CAPM. However, if the defendant can prove that this particular contract would have had no value to this particular plaintiff—say, because the plaintiff did not have the means to use the good or service—then the CAPM would not apply. Using the model in this manner would both prevent the court from being forced to ignore the reality of a contract's monetary value when attempting to provide the plaintiff with a remedy and preclude the plaintiff from opportunistically profiting from the favorable presumption.

#### V. CONCLUSION

The requirement of reasonable certainty was, in its historical context, an understandable response to a plaintiff who could not show with any reliable evidence what his lost profits from a new business might have been. If the aim of contract damages is to put the injured party back into the position it would have been in had the contract not been breached, then forcing an injured party to bear the loss of what it hoped for, but will never be sure of, is certainly a more reasonable alternative than rewarding its fanciful dreams with real gold. A business with a proven track record of profitability can realistically assert that, absent an extreme and unforeseen catastrophe, it expects the same returns at the time of the breach as it had in the past. Its *profits* are reasonably certain. But a new business can only be sure of its *opportunity*, and restitution for the loss of this opportunity is all that can be required of the breaching party to make the injured party whole.

Today courts (and practitioners) have the ability to accurately measure the value of a plaintiff's lost opportunity. Presented with this alternative, an alternative which works greater justice, the courts should take it. With the loss of chance remedy courts no longer face an all-or-nothing dilemma, but can force a breaching party to bear the true cost of its breach, and provide injured start-up companies and one-time-only event providers a more equitable restoration. The loss of chance remedy truly is "consistent with the generally approved purposes of giving a remedy in damages."<sup>103</sup>

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<sup>103</sup> CORBIN, *supra* note 1, at 233.