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THE TORT OF BAD FAITH BREACH OF CONTRACT: WHEN, IF AT ALL, SHOULD IT BE EXTENDED BEYOND INSURANCE TRANSACTIONS?

THOMAS A. DIAMOND*

I. INTRODUCTION

Implied as a matter of law within every contract is a covenant of good faith and fair dealing requiring that neither party do anything which will injure the right of the other to receive the benefits of the agreement. Through application of this covenant, a breach of contract may be found when a promisor, by his bad faith conduct, has jeopardized or destroyed a promisee’s opportunity to reap the expected benefit of the bargain, even though that conduct failed to violate expressed provisions of the agreement. In recent years, courts in several jurisdictions have given this implied covenant extra-contractual relevancy by holding the breach thereof to be tortious, thereby permitting the injured promisee remedial relief

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that would not have been available in an action founded on contract,4 including damages for mental suffering,5 economic


4. See text accompanying notes 34-37 infra.


Recovery for emotional distress arising from defendant's tortious conduct has been limited by policy considerations inherent in the various causal requirements for damages resulting from tortious conduct. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43, at 257 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 435(2) (1965); Green, Foreseeability in Negligence Law, 61 COLUM. L. REV. 1401 (1961). Traditionally, there has been a reluctance to permit recoveries for emotional distress absent physical injury or impact so as to protect against fictitious claims. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4, at 1031-32 (1956); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 89(b), at 319-22 (1935); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 328-29 (4th ed. 1971).


There is a split of authority as to whether substantial economic injury is itself a prerequisite to recovery for emotional distress, see Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 695-96, 271 N.W.2d 368, 378 (1978). See Delos v. Farmers Ins. Group, Inc., 93 Cal. App. 3d 642, 155 Cal. Rptr. 843 (1979), in which the court permitted the award of damages for emotional distress although the tort caused no independent economic or property injuries other than attorneys' fees to prosecute the claim. The court regarded the defendant's refusal to pay substantial insurance proceeds that were due under its policy with plaintiff as sufficient "to establish the genuineness of his claim for mental distress." Id. at 659, 155 Cal. Rptr. at 854.

Delos probably reflects the California position, considering the recent case of Molien v. Kaiser Foundation Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). In that case, plaintiff alleged the tort of negligent infliction of emotional dis-
losses not foreseeable at the time of execution of the contract, and punitive damages.

As fascinating as the remarkable growth of this fledgling

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7. Punitive damages are not an essential concomitant of defendant's tortious conduct. The bad faith required for breach of the covenant of good faith and fair dealing is not necessarily tantamount to the malevolent state of mind required for punitive damages.

The terms "good faith" and "bad faith," as used in this context . . . are not meant to connote the absence or presence of positive misconduct of a malicious or immoral nature — considerations which, as we shall indicate below, are more properly concerned in the determination of liability for punitive damages. Here we deal only with the question of breach of the implied covenant and the resultant liability for compensatory damages. As stated by the draftsmen of the Restatement of Contracts, "[t]he phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat in the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes [from consideration] a variety of types of conduct characterized [in other contexts] as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."


tort (whose name has yet to be agreed upon, but which will be referred to herein as the tort of bad faith breach of contract), is the fact that no court has expanded its ambit beyond insurance-related transactions, such as when an insurance company has unreasonably refused to pay insurance proceeds due the insured or unreasonably failed to settle third party claims against the insured. While a wealth of

8. Legal writers have used varying labels when reviewing the development of this new tort. One writer, obviously displeased with the courts' attempt to afford more protection to insureds, referred to it as the tort of the "Insurer's Mistaken Judgment." Others, attempting to describe the purpose of the tort, have referred to it as the "New Tort of Outrage," "Gruenberg-ian Tort," "Tort of Bad Faith," "Tortious Breach of Contract," and "Tortious Interference with a Protected Property Interest."


9. As stated, traditionally the implied covenant of good faith and fair dealing was utilized by the courts to find breach of contract from conduct that did not violate any express provision of the contract. See cases cited note 1 supra. Because breach of that implied covenant created contractual remedies only, there was no need to refer to it when the promisor's bad faith conduct constituted a breach of an express covenant. However, breach of the implied covenant of good faith, and therefore tort liability, need not be limited to cases in which the promisor's misconduct was only implicitly prohibited by the contract. The implied covenant of good faith is, after all, a representation that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. A wilful, unexcused refusal to perform express provisions of the contract manifestly meets that test. The courts which have imposed tort liability in first party insurance cases, in which the insurer unreasonably refuses to pay proceeds due the insured in violation of expressed contractual obligations, have recognized that breach of an express covenant will not immunize the promisor from tort liability. See cases cited note 10 infra. So, despite the statement in Crisci v. Security Ins. Co., 66 Cal. 2d 425, 430, 426 P.2d 173, 177, 58 Cal. Rptr. 13, 17 (1967), that "[i]iability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing," the cases and common sense have established that a bad faith breach of expressed contractual obligations is also a breach of the implied covenant of good faith and fair dealing. The tort may, therefore, be appropriately designated as the tort of bad faith breach of contract.


scholarly writing has been published discussing the propriety, parameters and consequences of the tort as it applies to insurance companies,\textsuperscript{12} there has been a dearth of analysis as to whether and when it should be expanded to encompass other bad faith breaches in other commercial contexts.\textsuperscript{13} Judicial discussion is almost as sparse.\textsuperscript{14} This article addresses that relatively untouched question. When, if at all, should the tort of bad faith breach of contract be extended beyond insurance transactions?

II. JUDICIAL HESITANCE AND PROFERRED RATIONALE

Few cases have confronted the foregoing question. In a recent California case, \textit{Wagner v. Benson},\textsuperscript{15} plaintiff had obtained financing from Lloyds Bank for investment in a cattle raising program. His visions of wealth dissipated with the decline in the value of cattle, resulting in the bank's foreclosing on the loan and selling Wagner's cattle. Wagner claimed that the bank had breached its covenant of good faith, and subjected itself to tort liability when it failed to advise him of the unworthiness of the investment. That creative argument failed. The court, however, rejected the idea that the tort was limited to insurance cases.


\textsuperscript{13} Because these articles have specifically directed their discussion to insurance cases, analysis of the tort's relevance to other commercial relationships has generally been lacking. One article did note that “[a] logical expansion of this new tort theory would extend it to other businesses which are governmentally regulated to a substantial degree,” and that “this new tort could have tremendous impact on the whole of contractual relationships.” Comment, \textit{The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.}, 13 TULSA L.J. 605, 624 (1978).

\textsuperscript{14} See cases cited notes 15 & 18 infra.

\textsuperscript{15} 101 Cal. App. 3d 27, 161 Cal. Rptr. 516 (1980).
In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement . . . . A breach of this duty may be a tort as well as a breach of the underlying contract . . . . However, not every breach of the covenant of good faith and fair dealing creates liability on tort. A bad faith cause of action sounding in tort has never been extended to contractual relationships other than in the insurance field . . . . This does not mean such claims are limited only to insurance transactions . . . .

Finding no conduct on the part of the bank that could even approach bad faith, the court found no need to consider when a bad faith breach of a commercial contract should be regarded as tortious.

Other courts have expressly rejected an expanded application of the tort of bad faith of contract. Judicial attempts to justify that rejection have been made, but none have been persuasive. One court countered arguments for expanding the tort to noninsurance transactions simply by noting the absence of precedent for expanded application. Steadfast adherence to this approach would, of course, have precluded the birth, not merely the expansion of this infant tort.

Others have suggested that although the tort is founded upon the breach of the covenant of good faith and fair dealing, which is implied as a matter of law in all contracts, it is tortious only in insurance cases because of the special fiduciary responsibilities the insurer owes the insured. However, assuming such a relationship exists, there is nothing in that

16. Id. at 33, 161 Cal. Rptr. at 520.
17. Id. at 34, 161 Cal. Rptr. at 520.
20. See note 1 supra.
22. A few courts have refused to apply the tort of bad faith breach of contract to
distinguishing characteristic which compels limitation of the tort to transactions involving a fiduciary relationship. Torts involving fraud, negligence or intentional infliction of emotional distress may stem from breach of contract, but their commission does not depend upon proof of a fiduciary relationship. Unless the presence of such a relationship is essential to satisfy the underlying policy behind the tort, there is no particular reason to impose it as a prerequisite to liability.

Another proffered rationale for limiting the tort to insurance contracts is that "insurance contracts continue to be contracts of adhesion, under which the insured is left little choice beyond electing among standardized provisions offered to him. . . ." Thus, since insurance contracts are not negotiated agreements, courts are justified in abandoning a strict contractual approach to the breach of such "agreements."
But adhesion contracts are hardly the exclusive domain of the insurance industry.\textsuperscript{26} If there is in fact a logical basis for limiting the tort's application to adhesion contracts,\textsuperscript{27} subjecting those who commit bad faith breaches of noninsurance adhesion contracts to tort sanctions would still seem appropriate.

Perhaps the most forthright, if not the most satisfying explanation for the disinclination to expand the tort was offered in \textit{Iron Mountain Security Storage v. American Specialty Foods, Inc.}\textsuperscript{28} There, a federal district court, after first stressing its generalized concern about imposing tort liability for breach of contract,\textsuperscript{29} noted that if the tort of the implied covenant of good faith and fair dealing were extended beyond insurance contracts, most contract violators would be subject to tort liability since "the violation of most contracts involves a breach of faith."\textsuperscript{30} Anything that common, the court seemed to imply, cannot be all that bad. But the court did not explain why such bad faith breaches, despite their frequency, should not be deemed social wrongs justifying tort liability.

While the rationales offered by courts for their refusal to expand the tort of bad faith breach of contract beyond insurance contracts are rather unpersuasive, attempts by plaintiffs to expand application of the tort have generally been unsuccessful. Further, efforts by litigants to impose tort liability upon those who breached contracts in bad faith, under alternative theories or labels, have generally fared with equal lack of success.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{27} See discussion in text accompanying notes 90-92 infra.
\item \textsuperscript{28} 457 F. Supp. 1158 (E.D. Pa. 1978).
\item \textsuperscript{29} "Most courts have been cautious about permitting tort recovery for contractual breaches and we are in full accord with this policy. . . ." \textit{Id.} at 1165, quoting Glazer v. Chandler, 414 Pa. 304, 308-09, 200 A.2d 416, 418 (1964).
\item \textsuperscript{30} \textit{Id.} at 1165 n.7, quoting Hoy v. Gronoble, 34 Pa. 9, 11 (1859).
\item \textsuperscript{31} The most common alternative approach has been to seek to have intentional breaches designated as a tortious interference with contractual relations. See generally Estes, \textit{Expanding Horizons in the Law of Torts — Tortious Interference}, 23 Drake L. REV. 341, 350-52 (1974). With near unanimity, courts have rebuked the approach, limiting that tort's application to third-party efforts. See, \textit{e.g.}, Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 999, 135 Cal. Rptr. 720, 726 (1977); Daly v. Nau, 167 Ind. App. 541, 549, 339 N.E.2d 71, 76 (1975); W. Prosser, \textit{Handbook of the Law of Torts} § 129, at 934 (4th ed. 1971); Harper, \textit{Interference with Contractual
III. THE UNDISCLOSED UNDERLYING RATIONALE

Placed in proper historical perspective, the unexplained judicial reluctance to impose tort liability upon those who, in bad faith, breach contractual obligations is not only understandable but reflects a perceived awareness of, and faithfulness to, one of the most poorly kept secrets in legal history: Bad faith breach of contract, if defined as an intentional breach motivated by crass economic self-interest, has been, despite a clamoring of moral credos to the contrary, a judicially accepted staple of our system of commercial law. While some have condemned the wilful contract breaker as a repulsive, evil aberration, woefully disrupting moral quietude, a close scrutiny of commercial law doctrine, and the briefest scrutiny of commercial practice, makes it transparently clear that our system not only sanctions such bad faith breaches, but, with limitations, actually encourages them.

The promisee seeking judicial redress for breach of contract has a rather paltry remedial arsenal at his disposal. He is generally limited to recovery of compensatory damages, and only for those economic injuries which were foreseeable conse-


32. "From antiquity the moral obligation to keep a promise had been a cardinal tenet of ethical philosophers, publicists, and philosophical jurists." Pound, Promise or Bargain?, 33 Tul. L. Rev. 455, 455 (1959). "Why should promises be enforced? The simplest answer is that of the new intuitionists, namely, that promises are sacred per se, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this." Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 571-72 (1933) [hereinafter cited as Cohen]. See generally H. Havighurst, The Nature of Private Contract 69-71 (1961); G. Paton, A Textbook of Jurisprudence 296 (1946); Birmingham, Breach of Contract, Damages Measures, and Economic Efficiency, 24 Rutgers L. Rev. 273, 281-84 (1970) [hereinafter cited as Birmingham]; Goetz & Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261, 1261 (1980). "Repudiators of fair and solemn and binding promises are commercial sinners. If they are unrepentant, courts should hold them to the full consequences of their sins." Lagerloef Trading Co. v. American Paper Prods. Co., 291 F. 947, 956 (7th Cir. 1923). "The faithful observance of contracts... is essential to the public welfare... Property rights, public and private morality, and liberty itself, are insecure, when the law encourages the nonobservance of contract obligations." Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 561 (6th Cir. 1909).

33. "[I]t is an open secret that a contract breaker rarely stands to lose as much by his breach as he would by performance. And the more deliberate the breach, the more apt he is to gain." Mueller, Contract Remedies, Business Fact and Legal Fancy, 1967 Wis. L. Rev. 833, 835 (1967) [hereinafter cited as Mueller].
quences of breach at the time the contract was made. The more extensive proximate cause test employed for tort liability, the limits of which are primarily defined by the vague concept of remoteness viewed from the time of breach of duty rather than the time of commencement of the undertaking, is inapplicable. Neither damages for emotional distress nor punitive damages may be recovered. With minor exceptions, these limitations apply irrespective of whether the breach was intentional or innocent, in good faith or in bad faith.


An exception to this general rule is that contracts whose primary purpose is to assure the peace and tranquility of the promisee, such as funeral arrangement contracts, may subject the promisor to liability for emotional distress proximately caused by breach. See, e.g., Chelini v. Nieri, 32 Cal. 2d 480, 196 P.2d 915 (1948); Fitzsimmons v. Olinger Mortuary Ass’n, 91 Colo. 544, 17 P.2d 535 (1932); Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957) (contract to deliver baby by Caesarean-section operation).


38. As with any generalized statement, exceptions may be found. There is authority that the limitations of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) are inapplicable when defendant’s breach is in bad faith, allowing plaintiff to recover “even those [damages] which could not be foreseen at the time of the making of the contract.” Overstreet v. Merritt, 186 Cal. 494, 505, 200 P. 11, 16 (1921). See also, C. McCormick, Handbook on the Law of Damages § 141 (1935); Bauer, Consequential Damages in Contract, 80 U. Pa. L. Rev. 687, 699 (1932); Comment, The Inadequacy of Hadley v. Baxendale as a Rule for Determining Legal Cause, 26 U. Pitt. L. Rev. 795, 807 (1965).
Such a remedial system may provide ample incentive to breach a contract, at least when the profits to be gained or losses to be avoided by breach are greater than the limited liability imposed for breach. For example, assume that Seller, a manufacturer of widgets, has contracted to supply Buyer with all widgets Buyer may require for a specified period at a unit price of $1.00. Subsequent to formation of the contract, Seller has the opportunity to reallocate its resources, cease production of widgets and commence manufacturing wadgets, which have a market value of $2.00, without increasing production costs. If the market price for widgets is $1.30 per unit, resulting in damages to Buyer of at least $.30 per unit, Seller will be economically induced to breach its contract and reallocate its resources since the gains from breach, $1.00 per

With respect to those contracts in which breach may justify the award of damages for mental suffering because of the highly personal nature of the subject matter of the contract, see note 38 supra. Proof that the breach was wilful and in bad faith may be a prerequisite to the reward of such damages. See, 11 S. Williston, A Treatise on the Law of Contracts § 1341 (1960); Restatement of Contracts § 341 (1932). But see Allen v. Jones, 104 Cal. App. 3d 207, 211, 163 Cal. Rptr. 445, 448 (1980).

Some courts have allowed punitive damages for bad faith breach of contract by labeling such conduct as fraudulent, thereby permitting recovery on a tort theory, despite the fact that there was no proof of requisite fraudulent intent at the time of execution of the contract. See, e.g., Welborn v. Dixon, 70 S.C. 108, 115, 49 S.E. 232, 234 (1904).

But, as a general rule, fault is an irrelevant concern in measuring damages for breach so that "[i]f a contract is broken the measure of damages generally is the same, whatever the cause of the breach." Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903). See also Farnsworth, supra note 37, at 1147.

39. "[T]he measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages . . ." U.C.C. § 2-713.

40. Section 2-306 of the U.C.C. imposes, fittingly, good faith limits upon the buyer's power to modify requirements in a requirements contract and the seller's power to modify output in an output contract. The section is silent, however, as to seller's power to cease production in a requirements contract. While there is some authority that "there is no implied obligation to continue in business," so long as cessation is in good faith, Duboff v. Matam Corp., 272 App. Div. 502, 503, 71 N.Y.S.2d 134, 136 (1947), there is counter authority that it is purely a question of contractual interpretation and a contract could be construed as imposing an absolute duty to continue production irrespective of the reason for cessation. See Gutman v. Sal-Vio Masons, Inc., 72 Misc. 2d 729, 339 N.Y.S.2d 562 (1972), aff'd, 45 App. Div. 2d 988, 359 N.Y.S.2d 766 (1974). Even if the seller has the power to cease for good faith reasons, proof of unprofitability in continuation may not, of itself, establish the good faith necessary to excuse further performance. See Feld v. Henry S. Levy & Sons, Inc., 37 N.Y.2d 466, 335 N.E.2d 320, 373 N.Y.S.2d 102 (1975).
unit, will significantly exceed Buyer's legal damages.¹¹

Justification for a system which encourages breach is not to be readily found from examination of judicial decisions. In their zeal to deny that the law provides incentive to breach, the courts necessarily were compelled to avoid discussion of why the law provides such an incentive.⁴²

Despite judicial obfuscation, the reasons for these restrictive rules of damages are apparent and understandable. Notwithstanding judicial denials, intentional breaches of contract, rather than being scourges upon the citizenry are, within limits, perceived as in furtherance of social policy which must be encouraged, not inhibited. The social policy begins with a rec-

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¹¹ If special circumstances existed, of which Seller had reason to know at the time of execution of the contract, such as the fact that Buyer would be unable to procure widgets from an alternative source, Buyer's consequential damages might be sufficiently great to wipe out Seller's gains from breach. U.C.C. §§ 2-713, 2-715(2)(a).

⁴² One of the principal impediments to analysis of contract cases treating the question of punitive damages is the consistent absence, particularly in the early cases, of any meaningful judicial discussion of the philosophy of damage law. . . . Whatever the explanation, we must begin without any firm idea of why, beyond adherence to traditional English standards, American courts have held, as a general rule, that punitive damages should not be awarded for breach of contract.

Sullivan, supra note 37, at 221.

The prohibition against recovery for mental suffering in contract cases has been explained, although not satisfactorily. While it is apparent from an empirical standpoint that mental suffering is in fact "the natural result of a breach of contract," Jankowski v. Mazzotta, 7 Mich. App. 483, —, 152 N.W.2d 49, 51 (1967), recovery for that injury has been denied on the ground that it is too remote, Westwater v. Grace Church, 140 Cal. 339, 342, 73 P. 1055, 1056 (1903); Adams v. Brosius, 69 Or. 513, —, 139 P. 729, 731 (1914), or that it was not within the contemplation of the parties at the time of execution of the contract and, therefore, must be denied under the rule of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). Brunson v. Ranks Army Store, 161 Neb. 519, —, 73 N.W.2d 803, 807 (1955); Lamm v. Singleton, 231 N.C. 10, —, 55 S.E.2d 810, 813 (1949). The former rationale is conclusory, not explanatory. Mental suffering is remote only because it is so designated, not because it is distant in space, time or foreseeability. The latter rationale would be supportable if the rule of Hadley v. Baxendale were based on the theory that parties are liable only for damages to which they have tacitly agreed, irrespective of foreseeability. See, e.g., Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1903). It is tenable to conclude, in the absence of language to the contrary, that parties to commercial contracts did not intend to be liable for damages caused by emotional distress, no matter how foreseeable. But the tacit agreement theory has generally been repudiated. See, e.g., 5 A. CORBIN, CONTRACTS § 1010 (1960); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1357 (3d ed. 1961); Farnsworth, supra note 37, at 1208; Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1217-18 (1973). Since the rule of Hadley v. Baxendale is theoretically based on foreseeability, not agreement, the denial of foreseeable emotional distress damages cannot be justified by that rule.
ognition that if breaches are too harshly sanctioned, there will be deterrence not only of breach but of the execution of contracts. Therefore, damages must not be so oppressive as to discourage the formation of binding commercial agreements. But far more important is an awareness that intentional breaches of contract often promote the economic efficiency of society. To the extent the promisor’s pecuniary gains from breach exceed the promisee’s pecuniary injuries, the costs of production have been reduced. Were legal liability to exceed the promisee’s pecuniary injuries, an efficient reallocation of resources would be discouraged at societal expense.

It is in society’s interest that each individual reallocate his resources whenever it makes him better off without making some other unit worse off. Since reallocation through breach will not make the injured party worse off if his expectations are protected by preserving his planned allocation of resources, and will, by hypothesis, make the party in breach better off, it is in society’s interest that the contract be broken and the resources be reallocated.

The rules of contract damages were framed to incorporate this

43. “[I]f damages are awarded to secure expectation interest in order to encourage the making of contract promises, to introduce damage measuring law which goes beyond the value of expectations may introduce a deterrent to the very contract making behavior to be encouraged.” Hartzler, *The Business and Economic Functions of the Law of Contract Damages*, 6 Amer. Bus. L.J. 387, 392 (1968) [hereinafter cited as Hartzler]. Accord, Farnsworth, supra note 37, at 1208; Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 Yale L.J. 1261 (1980).


socio-economic premise.\textsuperscript{47} It is, therefore, by design and not by accident that our manufacturer of widgets has been deliberately encouraged to breach its contract so as to permit an efficient reallocation of society's resources.

As envisioned, our system not only encourages the economically efficient breach, it discourages the inefficient breach. If our manufacturer of widgets sought to avail itself of the increased market price for widgets by selling the contracted for goods to an alternative purchaser, its gain per widget would be at least equalled by buyer's losses in having to pay the increased market price from an alternative seller. There is, therefore, no socio-economic justification for breach. Seller's gains are at buyer's expense. The incentive to commit this inefficient breach is, theoretically, removed by our remedial system which will render seller liable to buyer for the difference between market price and contract price,\textsuperscript{48} thereby offsetting gains from breach by liability for breach.

From a theoretical perspective, it is evident why courts have been reluctant to make the bad faith breach of contract a separate tort. Despite its onerous appellation, the bad faith breach, if defined as an intentional, wilful, selfishly induced breach of contract, is often an anticipated, expected and encouraged reality of commercial life. Designating such conduct as tortious would significantly jeopardize that reality in measuring pecuniary damages by the tort standard of proximate cause rather than the far more restrictive contract standards,\textsuperscript{49} by allowing recovery for emotional distress, and by

\textsuperscript{47} Sometimes financial advantage lies in the breach rather than the performance of a contractual duty. Perhaps a man ought to keep his promises but our law of contract damages will occasionally make default the more attractive alternative. In general, when the law induces a breach, default rather than performance will produce the more efficient allocation of our community resources. The obligee may be disgruntled, the public indifferent, but the analyst will perceive a social end. The breaking point at which discouragement yields to encouragement (to breach) is clearly a function of the measure of contract damages.


\textsuperscript{48} U.C.C. §§ 2-712, 2-713.

\textsuperscript{49} 9 Ex. 341, 156 Eng. Rep. 145 (1854). Hadley v. Baxendale, of course, limits
subjecting the promisor to punitive sanctions. The disinclination of courts to extend the tort of bad faith breach of contract beyond the realm of insurance cases is, therefore, reflective of basic contract theory. If extended to typical commercial transactions to make breaches of contracts tortious when the breaches were intentional and motivated by economic self interest, the law of contracts would be revolutionized. Such an expansion could undermine the ancient precepts upon which the law of contracts stands by inhibiting economically efficient, socially beneficial breaches. Further, since conduct is generally classified as tortious only when it is sufficiently repugnant to be designated a societal wrong, it would be inappropriate to label an activity that is sanctioned, even encouraged, as tortious.

IV. THE UNFOUNDED PREMISE OF CONTRACT THEORY: DAMAGES DETER THE INEFFICIENT BREACH

The economic underpinnings supporting the system of limited liability for breach of contract rest upon one fundamental premise — the sine qua non of contract remedial law. The amount of pecuniary injuries that are compensable for breach. Denying recovery for actual pecuniary injuries sustained does not appear to comport with an economic efficiency analysis, since in fact the promisor's gains may exceed the promisee's actual injuries and still breach will be encouraged because the gains will exceed compensable injuries. The justification for the rule of Hadley v. Baxendale, however, is not that it promotes economic efficiency, but that it encourages entry into commercial transactions. See text accompanying notes 43 & 44 supra. By permitting the parties to know in advance the consequences of breach, Hadley reduces the uncertainty of contracting, thereby increasing the incentive for entering commercial transactions. See Farnsworth, supra note 37, at 1207; Hartzler, supra note 43, at 394; Speidel, supra note 44, at 1163.

If we may assume that the defaulting promisor is usually an entrepreneur, a businessman who has undertaken a risky enterprise, the law here manifests a policy to encourage the entrepreneur by reducing the extent of his risk below that amount of damage which, it might be plausibly argued, the promisee has actually been caused to suffer. Patterson, supra note 44, at 342.

50. See generally authorities cited notes 45-47 supra.

premise is that because the promisor must compensate the promisee for damages caused by breach of contract, the promisor will be encouraged to breach only when the breach is economically efficient, that is when the gains from breach exceed legal damages; and will be discouraged from breaching when breach is not economically efficient, that is, when gains from breach do not exceed legal damages. 52 To the extent that premise is honored, the system is in fact in furtherance of perceived goals — permitting a fair and efficient reallocation of resources while promoting stability and security in the market place 53 — since in the great majority of transactions gains from breach will not exceed the amount of legal liability. 54

Sadly, this sine qua non is among the missing premises of our times. Despite scholarly willingness to assume that the system works, 55 in practice promisors continually breach although the gains from breach are more than offset by the promisee’s legal damages. 56 What superficially appears to reflect either shortsightedness or economic masochism may be explained by a more mundane, if not equally crass, thesis. The promisor often finds breach attractive not because anticipated gains from the breach exceed anticipated losses, but because he expects never to pay for that liability. 57 Imbued with that disdainful premise, the promisor has no particular need to consider the extent of legal liability in determining whether breach is financially expedient. For example, one who contracts to sell goods at a specified price theoretically has no incentive to breach his contract when market price rises, since the gains derived by selling to an alternative purchaser at the higher rate will be offset by the promisee’s legal damages. 58

52. See authorities cited note 55 infra.
53. See note 68 infra.
54. Barton, supra note 47, at 278.
55. “Generally, breach will occur where the breaching party anticipates that paying compensation and allocating his resources to alternative uses will make him ‘better off’ than performing his obligation.” Goetz & Scott, supra note 45, at 558. See also Birmingham, supra note 32, at 284. See generally authorities cited notes 45-47 supra.
57. See text accompanying notes 78 & 79 infra; Mueller, supra note 33, at 835-36.
58. See text accompanying note 48 supra.
But if the seller never intends to compensate the promisee for his legal damages, this economic disincentive to breach evaporates.

The assumption made by many breaching promisors that damages need not be paid is often a rational one. If the promisor does not voluntarily compensate the promisee for his damages, litigation must be commenced and attorneys' fees incurred. Those fees will generally not be recoverable as an element of damages or costs against the promisor, irrespective of the latter's liability. In cases where the damages suffered are not substantial, the expenses of litigation often make a lawsuit financially unavailing, resulting in abandonment of the claim. In other cases, because protracted litigation is expensive and because trial invariably includes the risk of defeat, the promisee is often reluctantly willing to settle the case for an amount substantially less than actual damages. Moreover, if a lawsuit is commenced and pursued to completion, with ultimate judgment against the promisor, the promisor will face liability in the amount he should have voluntarily paid years before, subject only to an unimposing interest penalty running from the time payment should have been made.


60. Mueller, supra note 33, at 836. Farnsworth, after explaining the economic justice of our legal system, noted in passing that "[o]f course a legal system that falls as far short as does ours of recognizing the costs of litigation when awarding relief may, for that reason, fail to attain that goal in practice." Farnsworth, supra note 37, at 1147 n.11.

61. Take a seller who has agreed to deliver certain readily marketable goods at a price lower than the market at time of delivery. If he does not deliver, he can sell the goods elsewhere at the higher price. Buyer is then entitled, as damages, to the same differential as was realized by the seller, with perhaps a few dollars for the expense of repurchase in the market. Thus, the law says, buyer is made whole and seller is stripped of his ill-gotten gain. But when buyer's unrecoverable costs involved in accomplishing this end are considered (his lawyer's fees, his own lost time, the lost time of his employee-witnesses), it is a rare buyer who will bother to sue unless he wants to teach the seller a lesson or unless the amount involved is large. And in the latter case, a seller has better than an even chance of settling at a figure under his market gain as long as that figure will be over the net amount the buyer stands to realize from his suit. Mueller, supra note 33, at 835-36. See also H. Havighurst, supra note 32, at 73; E. Murphy & R. Speidel, supra note 56, at 10.

62. See Baum, Statutory Control of Damages in Commercial Transactions, 12 Hastings L.J. 191, 198-200 (1960); Comment, Prejudgment Interest: An Element of
— a punishment which, in this period of inflation, is an incentive.

Faced with these inoffensive prospects, a breach to achieve immediate gain at the risk of unlikely loss, is often the wisest financial alternative. Of course a continual pattern of breach with concomitant loss of goodwill may jeopardize the viability of one's enterprise. But occasional breaches, selectively inflicted upon innocuous promisees whose disappointment does not seriously threaten the continuation of the promisor's business, are encouraged by the present system, irrespective of whether the promisee's injury will exceed the promisor's gain. In a system in which a breach, coupled with a refusal to pay resulting damages, is often its own reward, it is not surprising that intentional breach often occurs. Defective products are sold, shoddy services are rendered, obligations both express and implied are ignored because the sanctions for such contractual breaches are, too often, only theoretical.

The system has been corrupted. The tail is wagging the dog, and in a most perverted way. A remedial system which was intended to deter intentional breaches, except in limited situations, has, by its very irrelevance, become the determinative element in inducing intentional breaches which serve no societal function and which are, therefore, in violation of moral and economic concepts of justice. The remedial scheme of contract law was premised on the promisor's recognition of the economic consequence of actually having to pay an injured promisee's damages. The reality is the promisor's recognition of the economic consequence of not actually hav-

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*Damages Not to Be Overlooked*, 8 Cum. L. Rev. 522 (1977), for a discussion of interest penalties in breach of contract cases.

63. The man who does not keep his promises is not exactly a pariah, but he loses much that the great majority of people find essential to an agreeable existence. Anyone who has a history of failing to keep his word is stamped as unworthy of trust, and his chance of future benefit through contract is diminished. H. Havighurst, *supra* note 32, at 71. See Mueller, *supra* note 33, at 836.

64. The encouragement, by absence of remedial sanctions, of intentional breaches resulting in gains exceeding the promisee's pecuniary injuries, does not constitute absolution of the immorality of breach. See note 32 *supra*. Rather, it reflects the view that the societal gains from such breaches exceed societal losses. Birmingham, *supra* note 32, at 281. Consequently, breaches which have no such economic justification are in contravention of both moral and economic justice.
ing to pay the promisee's damages. As long as this reality exists, the justice of the law of contract remedies is a fiction.

V. THE SOLUTION: GREATER SANCTIONS FOR THE WILFUL INEFFICIENT BREACH

It would have been possible to have developed a contractual system of remedies that would have impeded, if not prevented, the present reality. Since contract remedies were intended to encourage only those breaches resulting in gains in excess of the promisee's losses, the courts could have expanded contract damages and penalties for breaches not meeting those criteria. The reasons courts chose not to expand the remedial scheme can only be conjectured. Perhaps, when viewed from the perspective that fault is, theoretically, an irrelevant element of contract law, a means for distinguishing between the tolerable and the intolerable intentional breach was not perceived. Perhaps because of steadfast judicial reluctance to admit that any intentional breaches were encouraged, the courts were unwilling to create a system which, in bifurcating remedies, admitted the sanctity of some intentional breaches.

The pubescent tort of bad faith breach of contract could very well provide a solution to the dilemma, while leaving contract remedies intact. Because tort law, unlike contract law, has fault as a component of its genetic ancestry, it has the power to condemn the faulty, socially repugnant breach, while leaving the justifiable intentional breach unscathed. Since the rules defining contract damages are themselves a reflection of perceived justice, a breach resulting in gains which exceed those damages is permitted, and even encouraged, in furtherance of recognized social policies. Consequently such breaches should not, and need not, be regarded as tortious. The producer of widgets who found that reallocating his resources to produce wadgets would result in profits in excess of the buyer's damages has engaged in no societal wrong. His deci-

65. "In its essential design . . . our system of remedies for breach of contract is one of strict liability and not of liability based on fault . . . ." Farnsworth, supra note 37, at 1147. See also Simpson, supra note 37, at 284.

66. See text accompanying note 42 supra.

67. See generally authorities cited in notes 45-47 supra. See also Hall, Interrelations of Criminal Law and Torts: II, 43 Colum. L. Rev. 967 (1943).
sion to breach was anticipated and intended by the framers of contract remedies. Conversely, a wilful breach, induced by anticipated gains that will not exceed the promisee’s compensable losses is an unjust one, inconsistent with the tenets of contract law, promoting no social goals and ripping the fabric of societal integrity and commercial stability. Consequently, it should be regarded as tortious.

Examples of such socially repugnant breaches which should be regarded as tortious, include those resulting when the promisor seeks to benefit from rising prices by selling promised goods to an alternative purchaser at the higher market price; when the promisor who, having been paid, deliberately sells defective goods; or, when the promisor, having innocently sold defective goods, refuses to honor his expressed obligation to repair them. In each of these situations, the breach is socially detrimental and unworthy. The gains from each breach will be equalled or exceeded by the promisee’s legal damages and the incentive for the breach will be the expectation that those damages will not be paid by the promisor.

Courts have justifiably been hesitant to make all wilful breaches of contract tortious. Such a rule could defeat, rather

68. In a developed economic order the claim to promised advantages is one of the most important of the individual interests that press for recognition. If it is a task of the legal order to secure reasonable individual expectations so far as they may be harmonized with the least friction and waste, in an economic order those arising from promises have a chief place. Credit is a principal form of wealth. It is a presupposition of the whole economic order that promises will be kept. Indeed, the matter goes deeper. The social order rests upon stability and predictability of conduct, of which keeping promises is a large item.


69. See text accompanying note 48 supra.

70. The buyer may be able to cancel the contract and recover money already paid as well as damages for nondelivery. U.C.C. § 2-711. If the buyer does not cancel, he is still entitled to damages equal to the difference in the value of the goods as represented and as delivered as well as incidental consequential damages. U.C.C. § 2-714.

71. Ordinarily, the seller does not undertake to cure defectively delivered merchandise although he may have the right to do so as an alternative to paying damages for breach of warranty. U.C.C. § 2-508. If, however, the seller does expressly contract to repair or replace defective goods, then failure to comply with that representation would itself constitute a breach of warranty. See Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(6)(B) (1976).
than promote, certain social policies. If, however, the bad faith breach is defined not as a wilful breach induced by economic self-interest, but as a wilful breach induced by the expectation of gains that will be equalled or exceeded by the promisee's contractual damages, the fundamentals of contract law are not only unimpeded, they are affirmatively advanced.

The proliferation of bad faith breaches of contract, as defined herein, necessarily is a consequence of the inability of the injured promisee to recover the damages to which he is entitled, inasmuch as the promisor can profit by breach only if he is not held accountable for those damages. By designating such breaches as tortious and subjecting one who commits a bad faith breach to tort liability, with tort guidelines for evaluating compensatory damages, including damages for emotional distress, punitive damages and attorneys' fees, the inclination to commit such bad faith breaches would be signif-

72. It is this reality which most forcefully explains the inclination of courts to impose tort liability in first-party insurance cases. See text accompanying notes 78 & 79 infra.

73. See note 7 supra.

74. See note 6 supra.

75. See note 5 supra.

76. The rule which precludes recovery of attorneys' fees in contract actions, see note 59 supra, is ordinarily equally applicable to tort actions. See generally C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 61 (1935); Comment, Recovery of Attorneys Fees From Third Party Tortfeasors, 66 CALIF. L. REV. 94, 95 (1978). A recognized exception has been that attorneys' fees incurred in a third-party action when prosecution or defense was necessitated by defendant's tortious conduct, may be recovered. Id. at 97; RESTATEMENT (SECOND) OF TORTS § 914 (1979); Annot. 45 A.L.R. 2d 1183 (1956).


If attorneys' fees are to be limited exclusively to third-party litigation expenses then, necessarily, the holding in Twentieth Century-Fox is correct. But if the theory behind the tort of bad faith breach of contract is to discourage those breaches motivated by the expectation that the promisee will not be able to afford legal redress, attorneys' fees are an essential element of damages. Even if plaintiff is unable to prove emotional distress or the right to punitive damages, see notes 5 & 7 supra, the allowance of attorneys' fees alone will be sufficient incentive to induce plaintiff to vindicate his rights and, therefore, to induce defendant not to make the bad faith breach.
icantly reduced. The plague of broken promises presently induced by the conviction that the promisee cannot afford to obtain vindication in a court of law could thereby be controlled.

VI. RECONCILIATION WITH INSURANCE CASES

An insurance company's wilful breach by unreasonably refusing to pay insurance proceeds due the insured is a classic example of a bad faith breach of contract as defined herein. The company does not breach because it has discovered an alternative allocation of resources, the gains of which exceed the promisee's expected losses. When the contractual obligation breached is one to pay money, damages for the breach must at least equal the money that has not been paid. The insurance company's breach results in a gain to the company only if it is not required to pay the damages caused by breach. Its gains are exclusively at the promisee's expense. By delaying payment, the company can hope for a settlement at a sum less than the contract required to be paid, or even total abandonment of claims. Its refusal to perform is a clear example of a bad faith breach; and perhaps, the most cogent explanation of why the tort of bad faith breach ever developed is that tort sanctions were essential to prevent such breaches by insurance companies.

Unless prevented by the courts, it is to the interest of a disability insurer to engage in protracted and unwarranted litigation.

A person who buys... insurance is a consumer and deserves legal protection which is realistic. If the law does not vindicate his reasonable consumer's expectations until only years after battling well-heeled corporate entities and then


only gives him policy proceeds (plus interest) from which he must deduct the contingent fee and gnawing expenses of litigation, then the insurance industry has every illicit incentive in the world to fight the Bad Fight and nothing to lose (but policy proceeds plus interest). In this context, compensatory and contract damages don't really compensate . . . . Reparation plus admonition are urgently required . . . .

There is no reason to limit this truth to insurance companies. The breach resulting in gains which depend upon the nonpayment of legal damages should be discouraged in all facets of commercial life. Tort sanctions for such socially unacceptable conduct are ample discouragement.

VII. PRAGMATIC CONCERNS ABOUT SUBJECTING THE WILFULLY INEFFICIENT BREACHER TO TORT LIABILITY

Judicial acceptance of the tort of bad faith breach of contract requires not only acknowledgement of its theoretical propriety but confidence in its practical application. If the potential benefits of tort liability are outweighed by its potential detriments then, of course, tort liability should be avoided.

A. Overkill: Will the Tort Substantially Deter Desired Conduct?

In this regard, two concerns must be overcome. First, the fear of tort liability must not be so great as to discourage the making of contracts that would have been entered in good faith. Second, the fear of tort liability must not be so great as to significantly discourage the breaking of contracts that would have been broken in good faith, that is when the gains from breach would have exceeded contract damages and, therefore, would have been in the social interest. If tort liability will significantly discourage either the making or breaking of such contracts, its imposition may do more harm than good.

Were tort liability imposed solely because an intentional breach in fact resulted in gains that were exceeded by the promisee's contract damages, the impact upon commercial

transactions would be severe. Often a party breaches reasonably believing the gains from breach will exceed the promisee's compensable pecuniary injuries. For example, Buyer, who promised to produce widgets for Seller and who breached his contract to produce more profitable wadgets may have had no reason to know, at the time production ceased, that alternative sources of widgets would become unavailable, or that the market value of widgets would skyrocket, causing its legal liability to exceed the gains from breach.\textsuperscript{80} If that conduct could result in tort liability, the "chilling effect" thereby engendered would deter the efficient allocation of resources. For those not so deterred, tort sanctions, despite lack of moral culpability, would follow.

If however, liability is imposed from a perspective of reasonable foresight, rather than hindsight, these concerns should be overcome. The promisor's breach should be found tortious only if it can be established that at the time of wilful breach the promisor could not have reasonably believed his gains would exceed the promisee's compensable pecuniary losses. By so limiting the tort, the chilling effect of potential liability would be minimized, and sanctions would be imposed only upon those who possessed the requisite moral culpability justifying their imposition.\textsuperscript{81}

There may be cases in which it cannot be established that reasonably expected gains from breach would be equalled or exceeded by expected damages. In such instances, tort liability should rightfully be denied. But there will be other cases where the promisor will be hard pressed to establish that he reasonably expected his gains to exceed his liability, as where he deliberately delivers defective goods,\textsuperscript{82} or deliberately ref-

\textsuperscript{80} U.C.C. §§ 2-712, 2-713.

\textsuperscript{81} Since the tort is founded upon breach of the implied covenant of good faith and fair dealing, unless the breach itself involved moral culpability, the requisite element of fault will be lacking, irrespective of the societal detriment caused by breach. It has been suggested herein that the breach must be wilful or deliberate for liability to be imposed. The courts may choose, however, to limit fault considerations solely to the issue of excuse, see note 96 infra, so that unless there was a reasonable justification for nonperformance, liability will ensue. That in fact is the standard that has been applied in first-party insurance cases, where tort liability ensues from the unreasonable refusal to pay insurance proceeds due the insured. See cases cited note 10 supra.

\textsuperscript{82} See note 70 supra.
uses to honor warranty obligations, or refuses to deliver contracted for goods so that they might be sold to an alternative purchaser at a higher market price. In these situations, when the promisor cannot establish the reasonableness of his position, tort liability would be appropriate.

B. Will the Tort Cause An Influx of Spurious or Otherwise Inappropriate Litigation?

The fear of spurious litigation has traditionally affected the development and shape of tort doctrine, and has occasionally been a relevant factor in refusing to impose tort liability upon one whose conduct otherwise seemed to justify tort sanctions. Designating the bad faith breach of contract as tortious may cause an influx of litigation. However, that influx will come almost exclusively from those who previously, although having valid contractual claims, could not afford to seek judicial redress. Those suffering violation of their contractural rights by bad faith breaches would have the incentive to seek that redress. But it will seldom be the case that a spurious action will be filed, since a prerequisite to tort liability will be proof of a wilful breach by the promisor.

Moreover, in the long run, the amount of increased litigation should be slight. If the sanctions imposed for bad faith breach are sufficient to induce commencement of litigation by the promisee, they are also sufficient to induce avoidance of the breach by the promisor. Those who previously were inclined to breach by the expectation of gains at the promisee's expense, will, by the spectre of tort liability, be inclined not to engage in that socially and economically detrimental conduct. To the extent the tort deters wrongful conduct, and it surely will, it will decrease the need for litigation.

83. See note 71 supra.
84. See note 48 supra.
86. See text accompanying note 81 supra.
VIII. CONCEIVABLE LIMITATIONS

A. Should the Tort be Limited to Those Who Obtained No Short-Term Profit From Breach?

Occasionally, the gains from the bad faith breach stem from the savings derived in refusal to perform. The promisor who refuses to deliver goods or perform services, not because he has a better offer, but because he has already been paid, is an example. The promisor who delivers inferior goods or services, knowing the breach will not be discovered, if ever, until after he has been compensated, is another. Such breaches are in bad faith because the gains derived from breach will be fully offset by the promisee's legal damages, which, of course, the promisor never expects to pay.

In other instances, the gains from breach stem from short-term profits derived in alternative performance, as where a seller has a prospective buyer willing to pay above contract price although not above market price. The seller wishes to increase his profits by selling at the higher price but he can, in the long run, benefit only if he refuses to pay damages since the promisee's damages will entirely consume his short-term profit.\(^8\)

A court could refuse to apply the tort of bad faith breach to the latter category, to those who breached, in part, because they had a better deal, even though their profit depended upon failure to pay the promisee for his legal damages. There seems to be a visceral reluctance to extend the tort to these individuals, but in fact there is nothing societally appealing about their conduct. They, too, have been motivated exclusively by greed, at the expense of the promisee, without correlative gain to society. Our initial inclination to reward them for their wrong stems from our constant subjection to such behavior. We have begun to be immunized by such conduct because it is so common and abundant. It is unacceptable, repugnant conduct but we accept it. The parties who enter a contract do so in part to protect themselves from changes in the market place.\(^8\)

\(^8\) The party who disregards his contractual

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87. U.C.C. §§ 2-712, 2-713.
88. See authorities cited note 68 supra. "There can be no doubt that from an empirical or historical point of view, the ability to rely on the promises of others adds to the confidence necessary for social intercourse and enterprise." M. COHEN & F.
commitment because of such changes in the market, deriving gains equalled or exceeded by the promisee's damages, has done his share to tear apart the framework of commercial stability and societal integrity by adding one more link to the chain of broken promises and broken trust — a societal ailment that has reached epidemic proportions. He should assume the consequence.

B. Consumer Transactions

The need for this tort is greatest in consumer transactions. The nonlegal sanctions for breach of contract, such as loss of goodwill, often significant in transactions among commercial enterprises of relatively equal bargaining power, are frequently absent in transactions with isolated consumers. Concerns about loss of goodwill may be minimal. Since damages suffered by the consumer as a result of breach are frequently not substantial, there is particular incentive to commit the bad faith breach because of the likelihood that the consumer will choose not to enforce his legal remedies, inasmuch as the expenses of litigation probably would exceed legal damages. For these reasons, a court may choose to initiate or limit extension of the tort to transactions in which a commercial en-

Cohen, Readings in Jurisprudence 190 (1951).


90. "To the extent that others are clamoring to deal with him, the debtor can afford a disruption of his relation with the creditor and can risk a diminution of his reputation for fair dealing." H. Havighurst, supra note 32, at 75.

91. When the party breaching the contract is a mass contractor and the other party is a consumer, the damages measures that the law currently provides are woefully insufficient. . . . In the first place, since the consumer in most situations knows that the most he can hope to collect still will not be sufficient to reimburse him for the expenses, inconveniences, and uncertainties of suing, most consumers will not sue. These consumers are thereby effectively denied any compensation, and the mass contractor is thereby let off without any punishment for what he has done. Even if the consumer does sue, what the law awards him is generally short both of what would really be necessary to compensate him for the harms he has suffered from the mass contractor's breach and of what would be necessary to deter the mass contractor from similar breaches in the future.

terprise has in bad faith, as defined herein, breached its contract to a consumer promisee.92

C. Special Circumstances — Defense of Privilege or Excuse

There may be occasions when, although the elements of the tort have been met, tort liability does not seem appropriate because of special circumstances. For those occasions, the courts should retain the power to exempt such conduct from liability. Consequently, a defense of privilege or excuse should be available.

A court may find, for example, that an intentional breach is privileged if it was induced, not by the prospect of short term gains at the promisee's expense but in the avoidance of significant economic detriment to the promisor. If, for reasons beyond the promisor's control, the cost of performance is greatly increased, but the defense of commercial impracticability93 is not available, a court may find that while the promisor has breached, and the avoided losses are exceeded by his legal liability, it is not the type of breach for which tort sanctions are appropriate.

The breach might also be privileged if it was induced not by financial motives but by overriding social or personal concerns. If a lessee breaches his year's lease by vacating prematurely because he finds the leased premises no longer suitable, the court may find his breach to be privileged, limiting the tort's coverage to those breaches motivated solely or primarily

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92. Further, to the extent that the generalized distrust and contempt with which consumers have viewed the business sector is based on accurate perceptions, a reduction in bad faith breaches in consumer transactions should also reduce consumer distrust and contempt, creating added policy reasons for invoking the tort in this context. See generally Jones & Boyer, supra note 89, at 357-64; Comment, Nontraditional Remedies for the Settlement of Consumer Disputes, 49 Temp. L.Q. 385, 385-86 (1976). "[In 1967] the National Advisory Commission on Civil Disorders . . . concluded that consumer grievances — real or imagined — were one of 12 major grievances that contributed to the sense of alienation, tension and frustration that made rioting and civil unrest a stark reality in our cities." Kass, S.2589 and the Uniform Consumer Credit Code: A Comparison of Consumer Protections, 37 Geo. Wash. L. Rev. 1131, 1131 (1969).

by economic considerations.

An area of special concern relates to the buyer who has received goods or services and then refuses to pay. Like the insurance company which refuses to pay proceeds, the buyer's breach would ordinarily be in bad faith, as his economic benefits are offset by the seller's legal damages. Will collection agencies now have an additional remedial weapon to collect debts by threatening tort liability for nonpayment, resulting in a tort which haunts the consuming public? Such a consequence can be avoided by applying the tort only against commercial enterprises, for the reasons noted above. Or a court may find that such a wilful refusal to pay is tortious unless the buyer can establish changed circumstances since the purchase, that have resulted in tightened economic conditions which, while not excusing breach, might excuse tort liability for the breach.

There will be other situations that justify the assertion of privilege. Rather than attempt to enumerate a predetermined list of such situations, the ultimate parameters of this defense should be developed by the judiciary as the facts of particular cases dictate.

IX. Conclusion

Justifiably, courts have been hesitant to extend the tort of bad faith breach of contract beyond insurance-related cases. Contract law is based in part upon the assumption that certain intentional breaches are to be encouraged. Permitting parties to breach their contracts promotes an efficient econ-

94. See note 77 supra.
95. See text accompanying notes 90-92 supra.
96. With the element of excuse as a defense, the tort becomes similar to that described in Cherberg v. Peoples Nat'l Bank, 88 Wash. 2d 595, 564 P.2d 1137 (1977). In that case, the court held that a wilful contract breaker may be found in violation of the tort of interference with contractual relations if the breach was unprivileged — a matter to be determined on a case by case basis, considering such factors as the nature of the breach, the character of the promisee's expectancy interest, the relationship between the parties, and the interest sought to be advanced by the promisor. Id. at 604-05, 564 P.2d at 1143-44. Aside from the fact that the labels differ — a matter of monumentally irrelevant concern — there is much similarity between the two torts. A refinement, if not a difference, is that as proposed in this article a breach would not be tortious as a bad faith breach of contract if it was economically efficient for the reasons discussed above. For a discussion of Cherberg, see Note, Intentional Interference With Business Expectancies, 1 Whittier L. Rev. 119 (1978).
omy, at least when the gains from breach exceed the expected pecuniary injuries of the promisee. By limiting the tort of bad faith breach of contract to those breaches which are economically inefficient, the courts will significantly promote contract theory by discouraging only those breaches which contract law has always intended to discourage. Commercial reality will approach, not flaunt, the theoretical premises of contract law.