

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1993

Obligation or Restitution for Best Efforts

Saul Levmore

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Saul Levmore, "Obligation or Restitution for Best Efforts," 67 Southern California Law Review 1411 (1993).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

OBLIGATION OR RESTITUTION FOR BEST EFFORTS

SAUL LEVMORE*

I. INTRODUCTION

One sign of the survival of contract law, despite the premature announcement of its death, is the difficulty that the “relational contract” idea has encountered in establishing precedential roots where no breach of an explicit contract term has occurred.¹ Imagine, for example, that *A* purchases a fire insurance policy from *A*’s long-time insurer, *B*. In the middle of the policy’s term *A* learns of the availability of a new smoke detector. If *A* purchases the detector and its cost exceeds the (expected value of the) benefit, or windfall, to *B*, can *A* collect that cost or even that windfall from *B*? If *A* does not purchase the detector, can *B* later claim that it need not pay for a loss sustained by *A* in cases where *B* can show that the new detector would have prevented the loss? The doctrinal claim might be that the insured was negligent (in a thought-out, non-accidental way²) when it failed to invest in the available precaution or, using the language of (relational)

* Brokaw Professor of Law and Barron F. Black Research Professor of Law, University of Virginia. I am grateful for suggestions received from participants at a University of Arizona faculty workshop and from Kenneth Abraham, Barry Adler, Chris Akin, Richard Epstein, Clay Gillette, Robert Scott, Rip Verkerke, and Steve Walt.

1. For the classic descriptions and application of the relational contract idea, see Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (1985). The central theme of the relational contract idea is that there is something unique about long-term contracts where parties cannot cheaply identify and specify their concerns and expectations. Much of the literature suggests that we think of such parties as implicitly agreeing to engage in joint profit maximization.

2. Insurance is normally written to cover accidental losses. *State Farm Fire & Casualty Co. v. Ulteig*, 367 S.W.2d 898 (Tex. Civ. App. 1963) (evidence that the insured was a heavy drinker and smoker who was inclined to fall asleep in bed while smoking was used to rebut insurer’s arson defense and obtain coverage); *Peterson v. Western Casualty & Sur. Co.*, 93 N.W.2d 433 (Wis. 1958) (holding that an insured was covered even though grossly negligent when his auto struck a police officer as insured attempted to avoid arrest). See generally 46 C.J.S. INSURANCE § 883 (1993) (noting that policies cover “accidental” injuries caused by the insured’s negligence unless expressly excluded).

contract, that the insured failed to use its "best efforts" to prevent losses.³

If the relational component of this kind of problem is stressed, recovery (or freedom from liability) may sometimes seem even *less* likely the more there is a long-term relationship. Imagine, for example, that students meet in mid-semester with their college's president and demand that the institution employ an additional security guard. The students are prepared to (try and) show two things; first, that the cost of a guard, who will patrol a library and locker areas, is much less than the expected gain from reduced theft of students' property, and second, that the crime problem is worse than the students had anticipated when first enrolling in the college. It goes almost without saying that if the president chooses not to comply with the students' request, the president risks only damage to the college's reputation in a potential lawsuit.⁴

These cases can be described as concerned with the possible legal obligation of a contractual party to take unanticipated cost-benefit-justified steps. Tort law is far more comfortable with aggressive legal intervention⁵ intended to encourage or even to force efficient, accident preventing, behavior. And such intervention extends to situations where the parties are not strangers. Indeed, the most important

3. See E. ALLAN FARNSWORTH, *CONTRACTS* 529-31 & n.16 (1982); Goetz & Scott, *supra* note 1, at 1111-30.

The term "best efforts" may be more confusing than familiar because a doctrinal response to the example in the text is that since U.C.C. § 2-306 requires "best efforts" of parties to an exclusive dealing contract, it may by implication require no such thing of parties to other contracts. This negative implication of the Uniform Commercial Code, if it is that, suggests that we might better ask, first, when the law's default rule requires socially efficient or joint profit maximizing behavior and, second, as this Article proceeds to ask, why tort law seems to promote efficient precaution-taking more than contract law. But because the literature incorporates the joint maximization idea into the best efforts language, I proceed for the most part with the doctrinal assumption that courts might intervene in non-exclusive-dealing contracts by incorporating a best efforts requirement into the general duty of good faith. See ALAN SCHWARTZ & ROBERT SCOTT, *COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES* 77-83 (2d ed. 1991). In any event, some of the examples used in this Article can easily be described as part of exclusive dealing arrangements, while others do not involve "goods" and, therefore, Article 2 of the Uniform Commercial Code.

4. I do not mean to hint that this reputational interest should be understood as the foundation of an adequate incentive scheme. Much of tort law is about defendants who suffer reputational losses when their actions or products injure others, but the law has come to think that these reputational interests are insufficient to promote the social welfare.

5. I am not unaware that this expression (and many more to follow) can be criticized as assuming some clear baseline from which "interventions" can be measured. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (criticizing the tendency in constitutional law to take the status quo as the baseline for distinguishing between action and inaction and neutrality and

symptom leading up to the prediction of the death of contract was the development of products liability law, where the parties had established at least a passing contractual acquaintance but where judges intervened as aggressively as in any area of tort law. Put differently, one who observed the growth of products liability law (or what we might call its migration from contract to tort in terms of judicial attitude) might have predicted the coming of detailed legal intervention, if only in the form of a default provision requiring the best efforts of contractual parties, in the fire insurance and college security cases sketched above. But this prediction would have been wrong because the very same courts that regularly undertake complex cost-benefit determinations in tort law have not similarly intervened in most contractual settings. One of the aims of this Article is to understand why recovery (or other assertive legal intervention) remains unlikely in these relational contract cases.⁶ A complementary goal is to understand the scope of the set of claims where recovery (or similar legal intervention) is plausible.

Part II below begins with a case, or area of contract law, where there has been tort-like judicial intervention. I aim to illuminate the evolution of some common law and, more specifically, to understand better the standard disinclination to force extracontractual obligations on parties. Some of these interventions, uncommon as they may be, take the form of recoveries in restitution and I suggest in Part III that restitution has offered a convenient compromise, and even a stable evolutionary equilibrium, between tort and contract. I consider also (but lightly suspend) the possibility that courts have in fact reached efficient results in apparently inconsistent cases.

partisanship). On the other hand, I think that most readers will share my sense of the existence of levels of intervention on the part of courts. One technical way to frame these observations would be to rely on the administrative costs of judicial intervention, because an important aspect of interventionism, at least for the purpose of this Article, is the extent to which courts will engage in cost-benefit comparisons, and similar valuation tasks, in different areas of law.

6. Readers who are uncomfortable with the relational contract label, perhaps because of some difficulty in defining when a relationship becomes relational, can ignore the term as used in the text and simply compare the inclination of courts to "intervene," *see supra* note 5, in tort and in contract.

II. GETTING TO BEST EFFORTS

A. THE UNIVERSE OF BEST EFFORTS PRECAUTIONS

In *Leebov v. United States Fidelity & Guaranty Co.*,⁷ a builder excavating a project site sacrificed his own (apparently uninsured) trucks by driving them into position as retaining barriers, in order to prevent landslide damage to neighboring property. The builder sought recovery from his liability insurer for the value of these trucks; the insurer had benefitted in the sense that damage done to the neighboring property would have triggered a claim under the liability insurance policy. The builder prevailed in court, and in large part the aim of this Article is to explore victories of this kind, and to distinguish these successful claims from many other situations in which parties are instead left to their own devices to encourage effort by one another.⁸

I will refer to the recovery in *Leebov* as in the restitution rather than the damages family of remedies. If the builder had not sacrificed his trucks and a court had then ruled that because of this failure by the insured to take a precaution the insurer need not reimburse the insured-builder for liability payments to third-party neighbors, such a remedy would better be described as damages, with the "wrongdoer" paying for the loss his action or inaction caused. Of course, the recovery in *Leebov* is really one of reimbursement or compensation, for it is certainly not disgorgement, and throughout this Article the restitution label will refer to the compensatory form of that remedy.⁹ In any

7. 165 A.2d 82 (Pa. 1960).

8. *Leebov* and many of the other cases discussed presently may be thought ill-suited for the sort of general analysis attempted here because insurance cases might be regarded as arising out of a jurisprudence too idiosyncratic to be cross-pollinated with other contractual claims. Insurance cases may seem peculiar because specific (and rather uniform) standard-form contractual provisions in insurance policies may evolve into a life-form like no other. 45 C.J.S. INSURANCE § 361 (1993) (continued use of clauses that have been previously interpreted will be considered an adoption of that interpretation). It is also the case that these insurance provisions are traditionally interpreted in a manner that resolves ambiguities against the insurer, and this feature may make generalization difficult. *Id.* at § 368 (policy should be construed generally in favor of the insured). On the other hand, there are at least three aspects of insurance cases that make them ideal vehicles for exploring contractual claims of the kind sketched above. First, parties to these contracts are often sophisticated. Second, there is little danger that liability will deter contract formation because parties can alter their initial terms and prices to reflect potential liability. Finally, because claims of the kind discussed in this Article succeed with relative infrequency, it may in fact be useful to look for evolutionary clues precisely where courts are most likely to grant such claims.

9. Thus, the title of this Article might well have been "Obligation or Reimbursement for Best Efforts." In other areas, such as in takings law, compensation is more in the damage family. Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 Wis. L. Rev. 483, 496-99 (1990). Note also that restitution is sometimes the

event, inasmuch as it is inconceivable that a precaution-taker, such as the insured-builder in *Leebov*, be able to extract the gain accruing to the insurer, the question to explore is when compensatory restitution is available. This is, of course, the principal question common to this case and the preceding hypotheticals.

In two diametrically opposed situations the rule in these cases does not much matter. If the parties can anticipate the sort of precaution or efficient behavior or "joint wealth maximizing" step that may become possible for a party to take, then the original bargain can simply allocate the risk or responsibility as the parties see fit. Smoke alarms may reduce the losses under a fire insurance policy just as advertising expenditures may increase the revenues enjoyed by a franchisee, but inasmuch as these are well known investment possibilities, parties are likely to assign responsibility and even specify levels of expenditure in their initial insurance or franchise contracts. The interesting and controversial cases are therefore those where such efficient steps are impossible or expensive to anticipate and allocate.¹⁰

The second subset of cases to set aside concerns precautions requiring either heroic ability to think rationally in an emergency or simply such a level of ingenuity that legal and contractual incentives are unlikely to be of much use. *Leebov* itself is probably not such a case, but it is at least possible that the builder in that case needed to act with such speed and imagination that the judicial decision following the event is either of no precedential importance or can be understood as an empathetic gesture in favor of heroic sacrifices. There are, in any event, many situations where unanticipated precautions (or similar steps) are desirable and where the best-situated actor has some

lesser of unjust enrichment (in the disgorgement sense) and provider's costs, which reduces in these cases to provider's costs. See Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 71 (1985) [hereinafter Levmore, *Explaining Restitution*].

10. The parties may wish simply to agree that the better situated will take any and all efficient, or joint wealth maximizing, steps. This seems to be the natural limit of the Goetz & Scott analysis. See Goetz & Scott, *supra* note 1. At the same time, I do not mean to slight the trend in the contract literature toward thinking of parties as enjoying the savings offered by default rules, even where the parties can anticipate and specify fairly easily. From this perspective, the central question is why, where best efforts precautions are concerned, much of the law (and certainly most modern observers' reactions) takes for granted that the best default rule is a corner solution in which there is no obligation at all to take precautions that are joint wealth maximizing.

time in which to consider the profitability of acting. It is in these circumstances that the legal rule is important but, as we will see, unclear.¹¹

We are left then with cases where there is an unanticipated opportunity to expend resources in a way that is efficient but that will benefit a contractual acquaintance.¹² And the question is when the law will provide a remedy to encourage such a best efforts expenditure.¹³

This question may be refined by concentrating on precautions aimed to prevent the loss of property, because in an interesting way the law may be well settled where there is a threat of serious personal injury. In the first place, as already suggested, the law of products liability imposes a standard of negligence, or something akin to it (in the form of "strict liability" for defective products), on manufacturers and sometimes on other parties involved in the production, distribution, and sale of goods, where the defect causes personal injury.¹⁴ Second, the law has evolved in the direction of imposing a duty to rescue, persons but not property, on a party who can be said to have a "special relationship" to the one in need of rescue. This is not the place to explore the subject of rescue, or even the question of compensation for the costs of rescue, but I think it fair to say that one attribute of these special relationships where the duty to rescue may be imposed is that the potential rescuer knows that he or she is uniquely situated to save the day.¹⁵ The same can be said of many contractual (and not-so-

11. The problem does not disappear if the parties have time to bargain because their bargain depends on the background rule.

12. Where the beneficiary has no preexisting contractual relationship, there is also a contract-tort distinction, but it is one that has already been explained in the literature. See, e.g., Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986) [hereinafter Levmore, *Waiting for Rescue*]. By "contractual acquaintance" I refer to a party with whom one deals. Contractual "adversary" seems inappropriate because the point of the relational contract literature is that there is a kind of integration going on, and contractual "partner" is misleading because there is generally no sharing of the unanticipated gains from trade or cooperation.

13. The nature of this remedy is explored *infra*, part II.B.

14. The distinction between injury to person and property, either as a matter of triggering paternalism or assuming market failure, is familiar. Seeley v. White Motor Co., 403 P.2d 145, 149 (Cal. 1965) ("[S]trict liability [is] . . . designed . . . to govern the distinct problem of physical injuries."); Chrysler Corp. v. Taylor, 234 S.E.2d 123 (Ga. Ct. App. 1977) (limiting the purchaser of a defective car to a warranty action when suing for pure economic loss). But see *infra* part III.C for a different distinction between tort and contract.

15. For example, *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), found that a psychologist had a duty to protect a stranger from harm by the psychologist's patient because the

contractual) relationships. Indeed, one plausible description of products liability law is that the manufacturer of a defective product is held responsible for failing to take the affirmative steps necessary to “rescue” the victim, whether or not the victim is the purchaser of the product, precisely because the manufacturer is the least-cost-avoider, or is best-situated to effect the necessary rescue. In any event, whether or not the strong distinction in products liability law (and even in rescue law) between personal injury and other damages is defensible, there is little point in denying its existence.¹⁶ The *Leebov* puzzle of when and why contractual parties are pushed to their best efforts, an expression that we might take to reflect an expectation that all reasonably perceived joint wealth maximizing steps will be taken in the absence of contrary evidence about the parties’ expectations, is either best limited to property cases or requires cautious maneuvering when drawing on examples involving personal injury.

By immediately throwing some caution to the wind, however, we can compare a precaution-taker’s ability to pass on costs in the world of products liability, on the one hand, and in the realm of *Leebov* and the best efforts idea on the other. If we remove the veil between personal injury and other cases, there is at least one reason we might expect recovery from manufacturers more often than from other contractual acquaintances. We might be disinclined to force best efforts on those contractual acquaintances who can not, earlier in time, set prices in a way that takes into account subsequent unanticipated best efforts expenditures. In contrast, and at least in theory, the maker of a product is asked to make the product nondefective given the technology available at the time of production.¹⁷ Safety costs, but not future state-of-the-art costs, are thus reflected in the price of the product.

But this comparison between upfront investments in safety in the manufacture of products and ongoing, unanticipated investments (by college presidents considering security measures, for instance) is

psychologist was uniquely situated (even though not in privity) to prevent the harm. See generally Levmore, *Waiting for Rescue*, *supra* note 12, at 933-37 (linking the “special relationship” doctrine to situations where there is a single least-cost-avoider).

16. Such a denial would need to build on the evolution of products liability law in the direction of holding manufacturers liable for damage their products cause to “other property,” despite attempts to exclude such liability through explicit contractual terms. I return to this development below, see *infra* text accompanying notes 83-88, as a means of emphasizing the characteristics of the restitution remedy described in this Article.

17. See, e.g., *Bruce v. Martin Marietta Corp.*, 544 F.2d 442, 447 (10th Cir. 1976) (noting that an ordinary consumer would “not expect a Model T to have the safety features which are incorporated in automobiles made today”).

slightly more complicated. I have suggested thus far that there may be more intervention in products liability law than in best-efforts-precautions-for-property cases not only because personal injury is qualitatively, quantitatively, or empathetically different, but also because in the products liability setting the costs imposed by the law can more easily be passed on to the beneficiaries.¹⁸ In other words, it may be that the law is generally disinclined to impose responsibilities that would force the allocation of unanticipated costs. One way to ask whether this is truly a feature of products liability law is to ask why it is that we do not require manufacturers to improve products, at no additional cost to the consumer,¹⁹ as new safety steps become possible and seemingly efficient over the life of a product. It is, after all, plausible that a manufacturer is best informed about new safety features and perhaps best situated to retrofit or upgrade a product. If one takes the rhetoric of products liability law or least-cost-avoider analysis too seriously, there is reason to expect incorrectly that a manufacturer will be held responsible for future upgrades that efficiently promote safety.²⁰ There is, however, no doubt but that a manufacturer of shower doors, for example, need *not* install newly developed tempered glass in place of glass manufactured, sold, and installed decades earlier.²¹

There are two kinds of responses to this question. The simplest draws on the core of restitution law, or at least the heart of the reason why we do not give restitution to mistaken improvers and other claimants who provide advantages to others, and notes simply that such a rule would force expensive safety measures on consumers who might

18. Put differently, where the costs can be passed on there is no fear of an inefficient decrease in supply, or activity level.

19. We might also ask why there is not simply a disclosure requirement so that consumers could choose new safety technology at fairly low cost to manufacturers and sellers.

20. This can be seen as the equivalent of a joint wealth maximizing, or best efforts, precaution. Observers of tort law and asbestos problems are familiar with the New Jersey Supreme Court's singular effort to burden and encourage the manufacturer in just this way. *Beshada v. Johns-Manville*, 447 A.2d 539 (N.J. 1982).

21. See, e.g., *Singleton v. International Harvester Co.*, 685 F.2d 112 (4th Cir. 1981) (holding a manufacturer not liable for failing to install a roll-over protective structure on a 1948 tractor); *Mondshour v. General Motors Corp.*, 298 F. Supp. 111 (D. Md. 1969) (holding that manufacturer owed no duty to plaintiff when a 1965 accident may have been caused by a failure to install a right rearview mirror on a bus made in 1948).

only be able to respond by declining to purchase the items in question.²² Tempered glass and airbags may seem justified in the cost-benefit calculations advanced by such diverse players as academics, government agencies, and plaintiffs' lawyers, but rational, real consumers who face budget constraints often decline to make seemingly wise investments in safety. This question of willingness to pay is easily ignored when small expenditures are involved, and therefore forced on many consumers, but if products liability were extended to all "efficient" safety steps that came to light in the life of a product, the enormous increase in product prices would be politically and judicially impossible to gloss over. Automobile prices, for example, might easily double in a legal regime of the kind just described, and it is difficult to imagine legislators surviving the crisis of dislocation that would follow.

Whether price increases of the kind just sketched are better described as incorporating the present value of all future cost-justified safety precautions or as reflecting the enormous and undiversifiable risk associated with unknown future technologies, there is a straightforward analogy to the world of best efforts. If colleges and various other contracting parties could be forced to take "efficient" (that is, "best efforts") precautions in mid-contract, they too would need to charge more at the outset. This premium would normally be far less than the corresponding (hypothetical) one appropriate to manufacturers, if only because the life of a product is often far longer than the term of a contract, however relational it is deemed to be. Nevertheless, the comparison may be instructive. We might therefore simply explain the general judicial disinclination to require best efforts precautions as very much like the disinclination to expand products liability to include "defects" found long after purchase and based on technology that was unavailable earlier. In both settings the law can be described as disinclined to force the uncertainty of an unknown future into current prices.²³ Put in less positive and less conservative terms, a plaintiff or judge seeking to expand the obligations of contractual acquaintances might reason that the magnitude of the price

22. Levmore, *Explaining Restitution*, *supra* note 9, at 74-79 (Restitution law can be understood as declining to imply bargains where, among other things, it is plausible that the recipient faces a budget constraint, or suffers a "wealth dependency problem," and might choose not to purchase something even at a price less than its fair market value.).

23. I put this in terms of uncertainty rather than higher prices because in some cases prices will be lower rather than higher. In the insurance context, for instance, it is the insured who will most often be in the position to take precautions, so that aggressive judicial intervention will mean lower insurance premiums (because there will be fewer losses to pay).

increases following such an expansion would be smaller and therefore less disruptive than those which would come on the heels of an expansion of products liability law in the manner just described. The scope of current products liability law might in this manner *not* constrain the expansion of a best efforts obligation or, perhaps more accurately, the acceleration of the death of contract.

An alternative and perhaps better explanation of why products liability law does not require ongoing improvements to be provided by the original manufacturer or retailer is that such a lifetime warranty would remove the consumer's ability to choose among options at later stages. If the manufacturer of the first automobile a consumer purchased were responsible soon thereafter for the installation of a brake light visible in the rear window, and then several years later for dual air bags, and so forth, as a practical matter the consumer would be locked into this major purchase for a long period of time and into attributes that had not been subject to comparison at the outset. It is easy to see why even a consumer who is willing to pay for all cost-justified safety features as they become available might prefer to pay less in the first place and then to choose again among competing models when new safety features are required (or simply become available). In the case of automobiles, the easy way to do this is either to lease one's vehicle for a relatively short term or to buy and sell with the hope that new features will not so dramatically reduce the price of used vehicles. But even in the case of goods sold in thinner markets, such as shower-stall doors, it is likely that most consumers would prefer to choose more freely among suppliers of new features and later models.²⁴

24. And disclosure costs may explain why we do not require information to be transmitted from the manufacturer to the consumer. Alternatively, the law may adopt an all-or-nothing posture (requiring safety features or not, but not requiring ongoing disclosure) simply because of a sense that consumers will not act upon the information they are offered (at some cost to the discloser). Anecdotal evidence suggests, for example, that relatively few consumers installed seatbelts on cars not equipped with that safety feature, even when such retrofitting was fairly easy. Whether such behavior has more to do with a disinclination to process information of a certain kind or with a more measured unwillingness to spend money on the safety feature, it may explain why ongoing disclosure of cost-benefit "justified" improvements is not often itself cost justified.

More generally, the discussion in the text focuses on the question of why we do not require the retrofitting of safety features, while the easier case for intervention (that is for upsetting the prevailing rule) is for disclosure by the better informed party. Disclosure might be thought of as a half-step, but it is one that unbundles information from the provision of the improvement itself. I have, however, concentrated on the improvement because the disclosure alternative does not cast much light on the question of encouraging precautions in the kinds of cases discussed in most of this Article.

This second view of the scope of products liability law suggests a stronger case for forcing best efforts precautions between contractual acquaintances. It is, after all, in the nature of most of these contract cases that one party has selected the other for a particular service so that there is every reason to think that the same party would be chosen to undertake the precaution in question, and indeed that often no other party will be in a position to take the given precaution. In *Leebov*, for instance, it is most unlikely that anyone but the insured could have taken the precaution necessary to prevent the threatening landslide. And in the introductory hypotheticals, the insured homeowner and the college administration must either themselves take the precautions in question or cooperate with some other party to such an extent that it is most unlikely that the solution to these problems can avoid these players. But this view of best efforts precautions simply delivers us to another element in the core of restitution law. Restitution is often unavailable even when the provider supplies the recipient with a good or service that we know the recipient was prepared to buy. A contrary rule²⁵ might discourage market transactions.²⁵ *Leebov* might simply be described as a case where restitution was granted because the recipient-insurer both unambiguously gained from the service provided and cannot be said to have preferred selecting another provider.²⁶ In contrast, when *A* purchases an automobile from *B*, *A* does not necessarily want to purchase future, but presently unknown, safety improvements from *B*.

In sum, the most arresting best efforts precaution cases will be those where the relationship between the parties is such that there is reason to think that the unanticipated precaution is one that is best provided by one of the parties, and not by some third party. A further

25. See Levmore, *Explaining Restitution*, *supra* note 9, at 79-82.

26. The idea is that not only is it the case that many recipients of unbargained-for "benefits" might face budget constraints and therefore genuinely prefer to do without these benefits (even at prices that seem objectively low), but also that the law might discourage providers from avoiding market transactions in order to prevent an inefficient thinning of markets. Put differently, even if the beneficiary were willing to pay for the good in question, this beneficiary (and the market as a whole) might gain from some comparison shopping and from a decision by the beneficiary to use a different provider. On the other hand, where there is reason to think that there is no wealth dependency, or budget constraint problem, as when there is external evidence that the beneficiary wanted or would have wanted that which was provided without a bargain, and where there is reason to think that the beneficiary would have chosen this very provider (as in many emergencies), restitution is normally available. See Levmore, *Explaining Restitution*, *supra* note 9. In contrast, mistaken improvers of property may ruin markets that may have prospered (because the recipient might well have chosen a different provider) and may provide improvements that are not wanted by their recipients, given their real budget constraints. *Id.*

constraint, as previously discussed, is that best efforts precautions are unlikely to be required where there will be a substantial price effect because we can not be sure that the recipient wants more safety or service at a higher price. Thus, in the case where students want their college to provide additional security, their case seems strengthened by the likelihood that they could not easily contract with a third party to provide this security without the institution's cooperation, but weakened by the fact that some students will not want (because, in some sense, they can not afford it) more security at a higher price.²⁷

Before turning to the possibility of aggressive judicial intervention in these cases, it is useful to survey the ground already covered. It is arguable that there is aggressive judicial intervention in *Leebov* but not in the college hypothetical because only in the latter case would a rule favoring recovery lead to price increases (which may not be preferred by all beneficiaries).²⁸ Yet this distinction is unsatisfying if left standing alone. In the first place, a good deal of law imposes standards of safety, and therefore price increases, that some consumers would prefer to do without. Second, there is more to the college hypothetical than a mere budget constraint. If, for example, students were to claim that funds spent on student activities should be redirected to the hiring of a security guard, courts would still be disinclined to intervene. There is more that could be said about this argument,²⁹ but it is useful at this point to think about the occasions

27. Put in reverse, we would hardly expect the college president to be able to collect additional charges in mid-semester from unwilling students in return for providing greater security.

28. The budget constraint idea is necessarily circular and therefore somewhat overstated in the text. In products liability law, for example, it may well be that some well-informed consumers do not wish to pay now for future safety precautions because of their budget constraints. However, it then must also be the case that some consumers would wish to forgo precautions that are within the *current* technology. Current law makes it difficult for these consumers to buy new goods and to waive or otherwise do without the manufacturers' liability. As a matter of positive theory, it is difficult to see why the law would be so accommodating about price increases reflecting future precautions but so insistent on forcing price increases to fund currently available precautions. I prefer, therefore, to explain the absence of responsibility for future precautions in terms of the choices available to consumers. See *supra* note 26 and accompanying text. And if one prefers this argument (choice rather than mere price increases), then the college hypothetical remains unexplained, for it seems most unlikely that students would or could choose a different provider for security services. The college example is a good deal like *Leebov*, and aggressive judicial intervention would seem likely in both, unless something else is at stake.

29. The easiest thing to say about the reshuffling of the college budget is that courts will hesitate to assess the costs and benefits of such a move. But this simply restates the question of why such timidity is not common in tort law. Still, the best explanation of the college security case is probably one that emphasizes either the collective action problem among students or

for aggressive judicial intervention by considering the various means of encouraging best efforts precautions.

B. FOUR STYLES OF INTERVENTION

1. *The Tort Remedy*

There are at least four potential judicial reactions to cases where encouraging best efforts precautions might seem efficient or otherwise desirable. First, courts could intercede in the manner most analogous to their tort law interventions by deeming it wrongful for a contractual acquaintance to have selfishly failed to take a cost-benefit justified precaution. In tort law, at least, the remedy for such wrongfulness is normally the obligation to pay all proximately caused damages. Analogously, in the case of the college's failure to hire a security guard, a finding of such a transgression, or wrongful omission, would presumably generate liability for all proximately caused thefts and, in the longer term, cause increased tuition (and fewer thefts). The causation requirement itself adds a major doctrinal hurdle (on top of the contract-tort or property-personal injury leap already imagined) because if a security guard, however efficient to employ, would not halve the number of thefts, then no plaintiff will be able to assert that the school's failure was more likely than not to have been the cause of a particular theft.³⁰

In *Leebov*, as in the smoke detector hypothetical, intervention in this first style would mean that the insured would not recover for the cost of the precaution that was taken. But had the insured not taken the required precaution, the insurer would not have been obligated to

what is almost the same thing, the fact that a best efforts obligation on the college would generate costs that would need to be passed on to all students, who would not uniformly benefit from the precaution.

30. We might assume either that students could satisfy the preponderance standard or that courts will help as they have in some other lost-chances settings or that the lost-chances problem is a serious one, and indeed may be the very reason why recovery is unavailable in cases such as those hypothetically arising out of the failure to employ an extra security guard. On the treatment of lost chances (with no claim likely to satisfy the preponderance-of-the-evidence standard with regard to causation), compare *Fennell v. Southern Md. Hosp. Ctr.*, 580 A.2d 206 (Md. 1990) (upholding traditional rules of causation by requiring plaintiff to show a lost chance of more than 50%) with *Pillsbury-Flood v. Portsmouth Hosp.*, 512 A.2d 1126 (N.H. 1986) (rejecting a relaxation of the causation requirement because causation is a matter of probability, not possibility) and *Herskovits v. Group Health Coop. of Puget Sound*, 664 P.2d 474 (Wash. 1983) (holding that a 14% reduction in chance of survival was enough to let a jury decide the issue of proximate cause). See generally Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691, 715-20 (1990) (analyzing alternative means of deterring negligent actors who inflict a relatively small probability of an injury on others).

reimburse the builder for liability to the third-party property owner or, in the smoke detector case, to compensate the homeowner for fire damage that would have been prevented in the presence of a smoke detector. When the effect of requiring best efforts precautions in the insurance cases is put this way it becomes apparent why this form of legal intervention is so unlikely and perhaps unwise. Homeowner's, and various other, insurance policies are normally written to cover "accidental" occurrences, however negligently caused.³¹ Insurers and most insureds have every reason to exclude coverage for losses arising out of criminal or "intentional" behavior by the insured, that is, for behavior that an honest insured can be fairly sure of avoiding without much of a chilling effect on productive behavior. But it is surely the case that most property owners prefer slightly higher premiums in return for coverage in the event that losses occur because the insureds, their guests, or agents fall asleep while smoking in bed, improperly clean a chimney, or injure someone while driving a bit fast. One can barely imagine a legislature's adding these events to the set of those already deemed uninsurable, but it is inconceivable that a court would push the market to such a forced equilibrium. The legislative (and judicial) judgment appears to be that deductibles, and other tools available to insurers, go far enough toward maintaining the system of social control that has evolved through common law and legislative decisions over the years.

In sum, this first suggestion of a judicial reaction to claims about best efforts precautions, that such precautions be fostered through tort-like remedies, may seem unlikely or unwise. In the case of insurance contracts, even though there is ambiguity about the parties' intentions with respect to the taking of best efforts precautions, or the

31. Had Leebov decided not to use his trucks as a retaining wall and had the rule been that a "nonaccidental" failure to take best efforts severed his contractual right to recovery from the insurer (unless the insurance policy unambiguously covered such failures), Leebov might have argued that his calculation was accidentally incorrect. More generally, a body of law might grow up rooted in the idea that there is a distinction between negligent smoking in bed (covered by insurance as a mere "lapse" in behavior) and the failure to purchase a cost-benefit justified smoke alarm (not covered, as more of a conscious decision pursued over time). The common sense version of this distinction is that best efforts precautions might be required only where a reasonable person might be thought likely to behave differently, that is less negligently, when forced to internalize the economic consequences of his actions. A factfinder might be much more inclined to believe that some decisions, especially those made in a business context, would be different if the decisionmakers were uninsured than it would be inclined to believe that homeowners would smoke differently if they were uninsured. My sense is that this distinction quickly collapses. For example, the decision to buy a car, or to let a teenager drive it, seems quite sensitive to the likelihood of tort liability.

allocation of the expense of such precautions, it is plain that the parties to these contracts do not intend to create circumstances in which mere negligence will cause coverage to vanish.³² And even in the case of other relationships, the tort-style remedy will often generate difficult causation problems. Still, I find the college hypothetical surprisingly, and even increasingly, difficult.³³ The apparent immunity from

32. For example, a typical homeowner's policy reads: "[W]e will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an accident and covered by this part of the policy." John C. Erb & Thomas D. Fazioli, *Automobile and Homeowner Liability Insurance Contracts*, in *LIABILITY INSURANCE* pt. 2S, § 2.78 (Ill. Inst. for CLE, 1989).

33. One conventional approach is to describe both the gap filling and social control functions of law as unnecessary when market pressures are present or simply when parties can take care of their own affairs. As noted earlier, *supra* note 4 and accompanying text, colleges might be seen as having a reputational interest in providing the package of services that students would have bargained for (with complete information) if only because future customers will shop for their education with some information about schools' abilities to satisfy past customers. This approach suggests that a good deal depends on the sort of example that is explored. A college that suddenly dropped five majors from its curricular offerings might be said to be protected against suit because of the idea that students have implicitly contracted for the faculty's judgment and reputation as to an appropriate education. In any event, damages will be impossible to measure and courts can be described as preferring to avoid the remedy of specific performance.

A more interesting case might be one where students could show that a sudden change in the market has made either a particular new course offering desirable or a new service, such as an additional placement counselor, cost effective. The cases are not quite the same because it is possible that courts will be less likely (because markets operate better) or more likely (because the net loss may be greater) to intervene where the project in question is less conspicuous to present and potential buyers. In either case, however, we do not expect recovery (or specific performance) in these cases. The underlying but perhaps superficial justification again appears to be that the school's reputational interest is sufficient to prevent market failure and, therefore, the need for suits. There are two problems with this view. First, it stands some of the relational contract literature on its head. A central claim of that literature is that long-term contractual relationships often encounter problems of opportunism that are difficult to solve with upfront contractual specificity. The suggestion is that the requirement that the parties deal in "good faith" and with their "best efforts" be understood to call for a kind of judicially enforced joint profit maximization, or insistence that each party take cost-benefit-justified steps. This call, or willingness to trust courts to determine whether efficient, selfless actions have taken place, is precisely the pattern associated earlier with tort law. The suggestion is not, it should be noted, extended to all contracts, presumably because the lower costs of specificity in short-term contracts, where future problems can more easily be foreseen at the time the contract is entered into, may make it less likely that the parties would be better off trusting their fates to judicial intervention. But the suggestion that we treat (or in fact do treat) these relational parties as pleading for best efforts supervision is plainly in spite of the fact that they have reputational interests that might be marred by opportunistic behavior. Put differently, the relational contract category assumes that the opportunism or planning problems associated with long-term contracts dominate the reputational interests associated with parties to these contracts. And returning to the cases of immediate concern here, it is difficult to argue that the college's reputational interest will (and ought to) encourage courts to avoid second guessing its cost-benefit decisions while these same courts enforce (or are at least asked to enforce) the joint maximization norm in other long-term relationships.

relational contract claims, at least where property rather than personal injuries are concerned, can not simply be tied to a conviction that reputational interests will encourage socially desirable behavior, for fraud and other conventional claims can succeed even when brought against defendants with strong reputational interests to protect. This immunity can also not be immediately linked to a claim that the students are the least-cost-avoiders, or somehow contributorily negligent in generating thefts, because the claim would hardly be more likely to succeed if it were about forcing the college to employ an additional placement counselor or adding a new set of courses in response to employment opportunities. A more likely explanatory variable is the familiar, almost dull, idea that the claim in question presents difficult valuation problems. Courts might gravitate toward a categorical denial of contract-based claims that rely on a kind of cost-benefit analysis because there is a good deal of work, and room for error, in deciding whether precautions that might have been taken would indeed have been efficient. Moreover, these valuation problems are often associated with monitoring and strategic behavior problems for the parties themselves. I return to this simple explanation below, but for the present it is useful simply to repeat the central puzzle, that however difficult these interventions, they are precisely the ones undertaken with regularity and apparent enthusiasm in tort law.

2. *The Restitution Remedy*

The college hypothetical has drawn our attention to the most tort-like form of judicial intervention, that the failure to take a selfless (but joint wealth maximizing) step to benefit a contractual acquaintance could lead to responsibility for the losses that follow. *Leebov*, in contrast, lures us to a second kind of aggressive intervention, that courts might encourage efficient behavior by allowing the precaution-taker compensation for the cost of efficient precautions. A purist might wish to add a small premium to ensure that the best-situated

A second problem with the claim that market pressure precludes the need for, or explains the lack of, aggressive judicial intervention is that there does not seem to be much of a link between the faith we might put in markets and the inclination to leave precaution-taking incentives to the market. Thus, there is surely more market pressure regarding personal safety in a college's parking lot, if only because information about assaults (and not about curricular offerings) is broadcast as a matter of general interest, but we would expect more aggressive judicial intervention in response to a claim that the college had taken insufficient safety precautions with respect to its parking facilities than we would expect with regard to claims about library thefts or curricular offerings.

party be not merely indifferent but rather positively encouraged to take these steps.³⁴

3. *No Remedy*

If one were to choose between these first two remedies, or forms of judicial intervention, a number of considerations would enter the calculus. Both the damages and compensation methods require that courts measure inputs and outputs,³⁵ the first generates more discontinuities and the second leads to more interventions. But this is not the place to review or explore this choice because my focus is on the fact that courts generally do neither. The third style of intervention is therefore, of course, not to intervene.³⁶ It is always the case that non-intervention has its own consequences, and in this case it will normally mean that some parties will expend resources in order to contract for specified precautions (because no default rule is supplied to require some or all such best efforts precautions), but many (and I suspect most) parties will be unable to contract inexpensively. Seemingly inefficient results with too few precautions will materialize, much as many products would arguably be manufactured to inefficiently unsafe specifications in a world where mere negligence or the presence of defects generated no tort liability. I prefer, however, to cast the problem in positive rather than normative terms and in this manner to avoid guessing whether modern products liability law is a good or bad thing.³⁷ The positive question, once again, is why the first two forms of judicial intervention are generally rejected (except in unusual cases like *Leebov*) in favor of the third, namely no aggressive intervention at all. There remains, after all, a strong division between contract law and tort law, at least where serious personal injury is not at issue.

34. It bears repeating that although the restitution label can suggest that the precaution-taker not merely be compensated but rather be permitted to extract the benefit provided another, I do not use the label to suggest such a radical disgorgement remedy. Valuation problems and budget constraints are severe enough where mere compensation is concerned, so that it is unlikely that we will wish to take seriously a remedy involving complete disgorgement. There is, moreover, the danger that precaution-takers will overinvest in order to profit from this sort of disgorgement claim.

35. The literature suggests that either regime can be used to effect similar results but that when administrative costs, including error costs, are taken into account, there is sometimes reason to prefer one system over another. See, e.g., A. MITCHELL POLINSKY & STEVEN SHAVELL, SHOULD LIABILITY BE BASED ON THE HARM TO THE VICTIM OR THE GAIN TO THE INJURER? (Stanford Law and Economics Working Paper No. 109, 1993).

36. See *supra* note 5 (defending intervention language).

37. Nor is there much to gain from distinguishing consumer transactions.

4. *The Dual Remedy*

If aggressive intervention in these best efforts precaution cases is to be undertaken, it need not be limited to the styles sketched thus far. The law could combine the first and second strategies into a fourth approach that both discouraged the failure to take efficient precautions (with a tort-like damage remedy) *and* compensated the precaution-taker for steps that were taken.³⁸ An advantage of this double-barreled approach is that it minimizes the need for upfront price adjustments in the face of uncertainty even while it offers a dramatic incentive for best efforts precautions. A disadvantage is the multiplication of claims and valuations to be carried out.³⁹

Unfortunately, it is difficult to point to judicial decisions (or even to contracts themselves) that plainly anticipate this pairing of remedies. *Leebov* itself might be an example of either this strategy or the second alone. We know that the builder was compensated for his sacrifices, but we do not know whether the same court would have allowed recovery under the liability-insurance policy if the precautionary sacrifice had not been undertaken.

III. THE RESTITUTION HALF-STEP

A. COMPENSATION FOR RESULTS

My guess is that the preceding section mischaracterizes or overstates the judicial intervention in *Leebov*. I suspect that however efficient or ingenious the builder's precaution had been in *ex ante* terms, if it had failed to prevent a damaging landslide there would have been no recovery for the unsuccessful precaution. Inasmuch as this idea, that courts might be inclined to award compensatory restitution only when there is an actual (*ex post*) benefit conferred, casts a variety of cases in a new light and helps explain the evolutionary split between contract and tort law, it is worth restating from several perspectives.

38. More generally it is possible that in some situations the best solution will be any weighted combination of the two remedies, so that we could compensate some percentage of the costs of precautions and penalize with some percentage of the losses caused by a failure to take precautions.

39. There may also be a danger in offering an enormous reward (or penalty) to one who satisfies or fails an *ex ante* unclear or uncertain standard. Such a discontinuity in returns can lead to inefficient overinvestment in precautions. In the present setting, however, there may be no such danger if courts are able to discern which precautions were inefficient, and if restitution is available only for efficient precautions.

An evolutionary perspective is perhaps most optimistic and novel. It is arguable that if courts had perceived a binary decision, intervening in the manner of tort law or giving the parties room to bargain (and to fail to reach bargains) in the manner of classical contract law, the death of contract would have come to pass. The "default" rule that materialized in products liability law,⁴⁰ that cost-benefit-justified steps (that is, best efforts precautions in the terms of this Article) are to be required of the least-cost-avoider, might have spread to all of contract law. On the other hand, courts might have developed an even sharper line between injury to persons and to property, or perhaps even between the categories of tort and contract, and maintained the notion that judicially imposed responsibility for best efforts precautions was to be associated with duties among strangers who could not bargain. Contractual acquaintances would have been left to their own bargains.⁴¹ It is easy to see why judges might have hesitated to slash ahead in either of these evolutionary paths. One path generates litigation, requires serious assessments of costs and benefits, and sacrifices many of the advantages of distinguishing contract from tort law and of encouraging private bargains. The other path puts great stress on either the tort-contract or person-property distinction and amounts to a default rule that forces numerous bargains and produces palpably inefficient results.⁴²

In contrast, the middle ground afforded by the restitution "half-step," in which compensation is awarded where there is *ex post* success, can be seen as the evolutionary path of least resistance. *Ex post* "justice" may not amount to *ex ante* efficiency, but it allows judges to do something for the most sympathetic plaintiffs, that is, for those who took precautions that not only seemed desirable *ex ante* but also produced tangible benefits. I label this remedy a half-step because it covers some of the ground in the direction of requiring or compensating best efforts precautions. But inasmuch as it does not compensate those who take best efforts precautions that happen to fail, it falls short of any one of the wealth maximizing methods described in Part

40. It is of course not much of a default rule because parties are (virtually) unable to opt out of the rule by bargain.

41. Products liability would be seen as involving parties who could not bargain or as regarding such serious personal injury that the cost of missed bargains is deemed too great to leave to contract.

42. For the idea behind this conjecture, see A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economies of Injunctive and Damage Remedies*, 32 *STAN. L. REV.* 1075 (1980).

II.B. If the precedential message of *Leebov*, for example, is that compensation is available to the *successful* precaution-taker, then contractual acquaintances may in the future take best efforts precautions when the combination of occasional *ex post* compensation (as in *Leebov*) and reputational gain makes such precaution-taking seem worthwhile. Other best efforts precautions, however, will go untaken because what is best *ex ante* does not always materialize into *ex post*, palpable success.

More generally, I am suggesting that contract law has not been (and probably will not be) displaced by tort law because courts have found a middle ground of aggressive intervention where the *ex post* evidence of a best efforts precaution is fairly plain. This sort of intervention with an *ex post* perspective is attractive because the assessment of costs and benefits is simplified,⁴³ the most sympathetic cases can be treated generously, and the contract-tort distinction maintained.

Of course, *Leebov's* message could conceivably be taken to include the possibility that if the builder had not acted, then the insurer could have avoided covering the loss. Such a dual remedy, as described earlier,⁴⁴ would amount to a full-step, rather than a half-step, to best efforts and thus to tort-like intervention (and then some). Inasmuch as I think it most unlikely that the *Leebov* court contemplated such a remedy in the event of passivity on the builder's part, I set aside the dual remedy idea. I do, however, return shortly to the possibility that *Leebov* was more than a half-step.⁴⁵

43. The notion of favoring later-in-time decisionmaking moments is, of course, common in lawmaking. Thus, most of tort law awaits injuries (although it then asks whether defendant's behavior was reasonable from an *ex ante* perspective) instead of assessing behavior in a more *ex ante*, or injunctive, fashion. Similarly, admiralty law rewards salvors with the superior information available after the fact of salvage. The salvage award is perhaps the best example of an *ex post* scheme; recovery is available only if the salvage operation is successful and it is then multiplied (subject to the constraint imposed by the value of what has been saved) to create a sufficient *ex ante* incentive. See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 15-1 (1987).

44. See *supra* part II.B.4.

45. Other areas of contract law can also be understood as choosing to operate from something of an *ex post* vantage point. Remedies for breach of contract, ranging from damages to specific performance, are at least in some respects independent of the question of whether the breach was efficient, "negligent," or not in satisfaction of an implied best efforts requirement. For a comparison to tort law, see *supra* note 43.

The restitution half-step really comes in two versions, for it is possible that *ex post* success is rewarded even where an *ex ante* assessment suggests that the precaution was inefficient. Strict liability regimes, be they in contract or tort, can of course be efficient, and indeed are often in some sense equivalent to negligence-based schemes, but the observation is simply that while the

Cases like *Leebov* are few in number.⁴⁶ Precautions can often be anticipated, beneficiaries may often voluntarily reimburse contractual acquaintances who have taken precautions, and precaution-takers may decline to litigate because doctrinal categories appear to preclude recovery. Furthermore, potential precaution-takers may not use their best efforts, and therefore will not bring claims for compensation, because they perceive the legal rule as denying compensation, or at least compensation for *ex ante*-justified, but ultimately unsuccessful, precautions.⁴⁷ If this last category is small, then the problem explored here may be of theoretical interest but of modest practical importance. Of course, the same might be said of default rules in contract law more generally.

Consider however the important, high-stakes case of *McNeilab v. North River Insurance Co.*⁴⁸ The case arose out of a well-known tampering incident in which several capsules of Tylenol were poisoned with cyanide. Tylenol's maker reacted to these events by recalling the product, although the Food and Drug Administration had not required such a precaution, and then by claiming that these costs should be recoverable from its liability insurer. Recovery was denied in *McNeilab*, with the thoughtful court stressing, among other things,⁴⁹ that "recall insurance" had been available but was not purchased by this insured,⁵⁰ and that a large part of the recall effort was aimed not at reducing potential liability but rather at creating positive product and corporate images of independent value.⁵¹

restitution half-step does not share efficiency characteristics with much of contract law, it does share some of the *ex post* flavor of that law.

46. More accurately, cases not involving insurers are few in number. In the insurance cases, compensation for best efforts, if administered sensibly, will not make the product more expensive. The other possible remedies might, however, make the product more expensive in which case nonintervention can be explained as unwanted by the class of potential precaution takers. See *supra* note 23 and accompanying text.

47. This category includes college presidents in the earlier example, *supra* note 27, and others who can expect not to recover because many of the beneficiaries will not be unambiguously better off, if only because of their budget constraints.

48. 645 F. Supp. 525 (D.N.J. 1986), *aff'd*, 831 F.2d 287 (3d Cir. 1987).

49. The court also makes something of the fact that when negotiating its insurance premiums, the insured represented to its insurer that the Tylenol incident was closed and had involved seven deaths. *Id.* at 543. The idea of seeking recovery for the costs associated with recall seems to have arisen later in time. *Id.*

50. *Id.* at 528, 540, 542-43. Recall insurance can cover mandatory recalls but might also be written to cover voluntary recalls. See *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product Liability Considerations*, 39 Bus. Law. 757, 760-61 (1984) [hereinafter *Recalls*].

51. *Id.* at 527, 536, 557.

The first of these points relates to the question of whether the precaution at issue was one that the parties would have had trouble anticipating and allocating. The insurer's offer of recall insurance can be understood as an explicit agreement that the liability policy alone would not cover the cost of a recall. On the other hand, some reasons for recalling a product are unrelated to the possibility of liability. A drug might be recalled from the market because its labels do not meet some requirement of consumer law or because it is found to infringe on a trademark or patent. Inasmuch as recall insurance might cover all such recalls it is arguable that the availability of recall insurance is not the same as an explicit agreement that a liability insurance contract excludes coverage for the cost of a precautionary recall.⁵² Moreover, recall insurance itself may not solve the problem at hand. It is unlikely that recall insurance will cover the cost of any recall, because there is the moral hazard that original production will be sloppy and even the possibility that completely unnecessary recalls will be undertaken. Thus, if Tylenol's manufacturer had purchased recall insurance, the insurer might have objected to this particular recall as unnecessary inasmuch as it was not required by a government agency and was also of some value to the insured as an advertising technique to create goodwill.

On the other hand, inasmuch as the decision not to purchase recall insurance means that recovery for the (best efforts) costs of recall would (and should) be most unlikely when the recall is government-mandated, the insurer's best argument in *McNeilab* is probably that the benefit conferred by the recall would have had a modest upper limit because as more tainted capsules were discovered the likelihood that recall would have become required would rise.⁵³ It appears, then, that *McNeilab*'s reliance on the availability of (and failure to purchase) recall insurance as a reason to deny recovery for precaution-taking may have been judicious, albeit for reasons not immediately apparent, but there is at least a good argument for dismissing the availability (and nonpurchase) of recall insurance as a reason for deciding the case in the insurer's favor.

52. Similarly, there may be many reasons why a life insurer should not, or will not be made to, pay for an innovative medical procedure that succeeds in saving an insured's life, but it does not seem that one of these reasons is that the parties were aware that the insured could have purchased some health insurance policy that would have covered this medical procedure.

53. On the other hand, it is noteworthy that one reason the Food and Drug Administration did not encourage an early recall was because it feared copycat crimes. See *Recalls*, *supra* note 50, at 768 (speech by George S. Frazza, Johnson & Johnson's General Counsel).

The relevance of the goodwill (rather than liability-reducing) component of the recall effort is more straightforward. It is plain that if the restitution or compensation remedy is to be employed, it will not be too generous,⁵⁴ so that the most the insured might have expected in *McNeilab* would have been some fraction, albeit a substantial one, of the money spent on the recall effort. This division of costs returns us to a piece of conventional wisdom about the contract-tort distinction. It is possible that there is no recovery in *McNeilab* and other cases because courts decline to undertake the valuation tasks associated with unpackaging costs in order to ascertain those attributable to best efforts precautions. And it is almost surely the case that plaintiff's counsel in *McNeilab* should not have sought the entire costs of the recall effort, but should have forced the court's hand by asking for an amount that would have seemed to exclude expenditures made with future goodwill, rather than potential liability, in mind.⁵⁵

I think it likely that *McNeilab* is another case in which the restitution half-step is the true underlying remedy. The recall cost was reported to be \$100 million and it uncovered three cyanide-laced capsules. In complete ignorance of the (*ex ante*) expected value of the recall operation, we might imagine that at least half of the costs can be allocated to the recall rather than to the goodwill effort, and that perhaps two or even all three poisoned capsules would have caused serious injury or fatality.⁵⁶ The sad but cold *ex post* evidence is thus that the recall was probably inefficient. The liability costs that the insurer might have paid could hardly have been in excess of \$17 million per victim. More important, it is not at all clear that there would have been *any* liability, inasmuch as the case for holding the manufacturer liable for not anticipating the need for tamper-proof packaging seems fragile, at best.⁵⁷ The expected liability costs must therefore have been far below the recall costs. *McNeilab* may in this way reflect the same half-step remedy as *Leebov*. It simply happens that the facts

54. For a discussion of the danger of generous "carrots," see William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 91-93 (1978); Levmore, *Waiting for Rescue*, *supra* note 12, at 886-89.

55. I say "in mind" because if expenditures necessary (or cost-benefit justified) to reduce liability would otherwise be compensated, there is no reason to deny compensation simply because these expenditures had a side effect of producing valuable goodwill.

56. Some of the capsules might never have been ingested.

57. The court noted that the defendant denied liability and that there was no evidence that the tampering occurred while the capsules were in defendant's possession. *McNeilab*, 645 F. Supp. at 550.

were such that in *Leebov*, but not in *McNeilab*, hindsight made the precaution seem wise regardless of whether it was efficient *ex ante*.

Unfortunately, this view of the cases is not easily tested. My claim must be that the court might well have awarded compensation to the insured if the Tylenol recall had uncovered 100 tainted capsules, so that the *ex post* assessment proved the precaution to be most fortunate because the insurer was actually saved from liability exceeding the actual recall costs.⁵⁸ One might even take the court's reliance on the insured's failure to purchase recall insurance as a way of communicating that, under the facts before it, the recall precaution did not appear to have been a joint maximizing step. Recall insurance was necessary to cover such a wager gone bad; in contrast, had the recall been dramatically efficient, the same court might have stressed that, while recall insurance protects the insured, it is now the insurer that needed and received protection by the act of its contractual acquaintance, the insured.

Another impediment to testing the restitution half-step idea is that courts rarely indicate what they assume the result would be if the best efforts precaution were not taken. Decisions that appear to offer the *ex post* restitution remedy might, for example, really have in mind a dual remedy such that some penalty or tort-like damages would be assessed in the event of a failure to take the precaution. This is unlikely to be the case where liability insurance is at stake because, as discussed earlier,⁵⁹ we hesitate to deny insurance coverage when the insured acts in a way that is merely negligent. *McNeilab* itself, it should be noted, is most unusual in that the decision suggests that a failure to recall the drug might even have generated criminal responsibility.⁶⁰ I would not have thought that the facts lead to this conclusion, but the point is that the denial of restitution in the case might be

58. And even this assessment is based on the (somewhat counterfactual) assumption that the defendant would have faced or seriously feared liability for failing to market the drug in tamper-proof containers. Furthermore, there is still the point, raised earlier in the text, that 100 tainted capsules would never have found their way to do harm because after a few more poisoning incidents a recall effort would have been forced by the government—and the cost of this recall would then not be borne by the insurer because of the explicit decision by the insured not to purchase recall insurance. It is possible, however, that by the time a required recall could be accomplished a sufficient number of additional deaths would have occurred as to make the earlier, voluntary recall a good investment for the insurer.

59. See *supra* note 2 and accompanying text.

60. *McNeilab*, 645 F. Supp. at 551-52, 557.

rather simply understood as part of a scheme that contemplates aggressive intervention where best efforts are not undertaken.⁶¹

The restitution half-step idea may be brought into closer focus with the question of what the *McNeilab* court would have done if the insured had simply asked for a relatively small fraction of the recall costs. Put differently, a clever plaintiff, aware that a large recovery was most unlikely, might not only have explicitly excluded from its claim a portion of recall costs attributable to goodwill, but also might have pointed not to the cost of the recall but to the much smaller actual enrichment of the insurer. This is, in some sense, the core of the restitution idea,⁶² and in this context might have encouraged the court to use the safe, half-step remedy. Put this way, the restitution half-step idea comes very close to the notion of unambiguous benefit in restitution law: Given the added detail that the insured was the best-situated provider of the recall service, recovery in the amount of the actual benefit to the insurer seems almost obvious, except perhaps for the fact that a set of valuations is required of the court.⁶³

This suggested *ex post*, or half-step, perspective reveals, however, one difficulty with this fractional disgorgement claim. A claimant who has taken an *inefficient* precaution may seek compensation for the benefit bestowed on another. This problem is, however, neither solved by admitting only full recoveries nor avoided by granting such recoveries. An inefficiently expensive precaution will sometimes turn out well, and many inefficiently expensive precautions will produce some benefit. Students of the negligence-versus-strict-liability debate will recognize an important characteristic of this "problem." Granting restitution even where inefficient precautions have been taken will not generally lead to more inefficient precautions. In the present context this conclusion is fairly intuitive because the precaution-taker does not gain from taking these precautions unless there is an implicit dual remedy.⁶⁴ Still, I think it likely that courts will be most sympathetic to

61. It can not be seen as part of a scheme involving a dual remedy, promising some tort-like or criminal law-style intervention for the failure to take precautions along with some compensation for efficient precautions, because the denial of restitution in the case suggests then that the court viewed the precaution as inefficient—in which case the court would not have suggested that a failure to recall would have been criminally reprehensible.

62. A restitution remedy can be structured from an *ex ante* perspective, with recovery for expected benefits, but it is commonly *ex post*.

63. Levmore, *Explaining Restitution*, *supra* note 9, at 69-74.

64. In *McNeilab*, it should be remembered, there may have been a real disinclination to give restitutionary recovery because there was already a net benefit to the provider in the form of goodwill. In such a context the danger of promoting overinvestment in precautions may seem

the restitution half-step when the precaution that was taken (and that happened to turn out well) does in fact appear to have been efficient even in *ex ante* terms.⁶⁵

B. CAN THE HALF-STEP REMEDY BE EFFICIENT?

I have suggested thus far that compensation will often be available to contractual acquaintances who take efficient precautions that prove successful. Framed this way, the remedy is more sympathetic than efficient because precaution-taking is insufficiently encouraged with this restitutionary strategy. In particular, potential precaution-takers will know that compensation does not await them when their efficient precautions happen not to produce tangible results. Precaution-taking is therefore a losing proposition unless there is a premium above the compensatory level for successful precautions, the risk of tort-like damages for the failure to undertake a best efforts precaution, or sufficient reputational loss from the failure to take such precautions. The first of these possibilities is dangerous and in any event plainly not offered, and the second seems not to be contemplated by courts. As for the third, it is conceivable that a combination of some reputational concern with occasional, judicially required, compensation for precautionary costs produces an efficient incentive to expend best efforts, but such optimism seems unjustified. Many of the cases which come to mind involve insureds' taking precautions to benefit their insurers. Compensatory restitution is available in some of these cases (as in *Leebov*) but there is no reason to think that the likelihood of compensation is at all related to the probability that the insured will have opportunity to benefit from establishing a reputation for best efforts behavior.

more palpable. For another case that may reflect this theme, see *Bausch & Lomb v. Utica*, 625 A.2d 1021, 1025-26, 1036 (Md. 1993), where the court denied an action for recovery under a general liability policy after noting that Bausch & Lomb was aware of its own self-interest in enhancing the marketability of its property when it conducted a cleanup of a chemical that posed no significant threat of further pollution.

65. In *W.M. Schlosser Co. v. Insurance Co. of North America*, 600 A.2d 836 (Md. 1992), answer to certified question conformed to, 968 F.2d 1213 (4th Cir. 1992), a sloppy contractor took an extra emergency precaution when Hurricane Gloria was forecast. At the last minute the hurricane veered away, and the court then denied the contractor's claim for the cost of the *ex post* unnecessary precaution. But the court's review of the facts emphasizes the contractor's earlier sloppiness in excavating the site. This emphasis might be understood as a comment that in some sense the contractor's actions were *ex ante* inefficient and therefore recovery was to be denied.

Another problem with the half-step remedy brings us to the question of whether the rule in these settings much matters, or whether parties could not simply renegotiate once one party comprehended the value of a specific precaution. Manufacturers that are not responsible to upgrade products sold long ago can nevertheless advertise their willingness to modify such products for a fee; independent entrepreneurs in the aftermarket can do the same.⁶⁶ A strange and perhaps seriously troubling aspect about the restitution half-step idea is that it is subtle, or at least unstated, and sufficiently uncertain in a way that may well reduce the chances for successful renegotiation. In *Leebov*, for example, if the builder and insurer know that the former need not undertake the precaution in question in order to maintain his insurance coverage, then they can bargain for disclosure and precaution taking. And if they know that the law's default rule is to allow compensation for the builder's precaution-taking on "behalf of" the insurer, then they can act or bargain accordingly. But if they know that only *ex post* success will lead to legal intervention, then the mere probability of such success may well make it more difficult for them to reach a renegotiation.

Despite these normative problems associated with the restitution half-step idea—and notwithstanding the fact that the theory suggested here is very much a positive one, as it emphasizes that the restitution half-step reflects an evolutionary and even psychological, but probably inefficient, equilibrium—a case can be made for the proposition that the evidence supports the idea of efficiency in this corner of the common law. One route to this view relies on the familiar idea that judges may hesitate to undertake aggressive interventions because their valuations are prone to error. It is possible that the *ex post* compromise embodied in the restitution half-step remedy is efficient once one takes into account the desirability of reducing the error associated with misguided judicial intervention.⁶⁷ Put somewhat differently, courts may take *ex post* success to be a proxy for *ex ante* efficiency.

A more direct claim about the efficiency of the half-step remedy is that what appears to be *ex post* restitution in selected cases is in fact the product of an assessment of the *ex ante* desirability of precaution-taking. Under this view, compensation was awarded in *Leebov*

66. There are, of course, transaction costs associated with renegotiation, and it is precisely such costs that make default rules and most of contract law meaningful.

67. It is a kind of compromise in the presence of high transaction and factfinding costs. See Polinsky, *supra* note 42.

because the court thought that in cost-benefit terms the precaution was a good investment, but in *McNeilab* compensation was denied because the recall expenditure seemed excessive. Following this approach, it is accidental that the investment in *Leebov* saved the day and that the one in *McNeilab* is far better known for boosting a corporate image than for saving, at most, a very few lives.⁶⁸

We have, therefore, three views of the cases. The first is the suggestion of the restitution half-step, with recovery available for precautions that prove successful in *ex post* terms. It is easy to see why this strategy might be attractive to courts, but this attraction is hardly based on the remedy's efficiency characteristics. The second view is that courts seek to encourage *ex ante* efficient precautions, but that they economize on factfinding and error costs by using *ex post* success as a proxy for *ex ante* efficiency. And the third view is simply that courts seek to encourage *ex ante* efficient precautions, or best efforts. I will set aside the second of these alternatives because it is essentially an optimistic version of the first. It is difficult to think of a test that will distinguish between this optimistic view and the restitution half-step idea because whenever recovery seems tightly tied to *ex post* success, as the half-step idea suggests, it is also the case that we might think of judges as developing this connection as a cautious means of promoting efficient precautions. It is almost as a matter of taste that I prefer the first view to the second,⁶⁹ but there is in any event little to gain in the way of analysis by continuing to carry along both views.

A comparison of the two remaining views, the restitution half-step and the *ex ante* best efforts perspectives, brings us to a set of cases in which the insured takes a precaution to prevent environmental damage that will afflict third parties, such as the repair of leaking waste pipes, and then sues its liability insurer. The contractual defense has been that the liability-insurance policy specifically excludes damage to the insured's own property (which may or may not be covered by some other, first-party policy), and the repairs at issue in these circumstances are normally undertaken on the insured's

68. One suspects that the public recollection of the event would be quite different if the recall effort saved many more lives.

69. My taste is stimulated by the fact that in deciding mainstream torts cases, courts are accustomed to assessing *ex ante* reasonableness, or efficiency. Inasmuch as courts do not always link *ex post* failure (injury) with *ex ante* inefficiency (negligence), it is difficult to see why we should prefer the view that *ex post* success is taken as a proxy for *ex ante* efficiency.

own property. Courts finding in favor of the insureds have emphasized facts which suggest that damage to third parties was imminent⁷⁰ and, therefore, it might be added, safely distinguishable from the mass of expenditures taken by insureds, which could also be characterized as precautions benefitting insurers.

Roughly speaking, these cases are consistent with all of the views sketched above. The reported cases all deal with precautions that seem justifiable *ex ante* but they also involve precautions that proved successful *ex post*. There is, therefore, insufficient information with which to distinguish the importance of *ex post* success from that of the expected value of the precautionary expenditures. We might, at the very least, like to see some claims regarding a best efforts precaution which simply failed to produce tangible results, for such cases might cast light on the viability of the third view, that there can be recovery even without *ex post* success.⁷¹ Similarly, courts do not address the question of whether there would have been tort-like damages, such as the denial of recovery under the liability policy, had the best efforts precaution not been undertaken. Finally, in none of the reported cases does the precaution appear to have been inefficient. Indeed, it may be that the reason we find numerous illustrations of the half-step remedy in this particular area of law is that where there is at least some *ex post* success it is also the case that precautions are plainly cost effective.⁷² Assuming that it is difficult for the parties to specify in advance which precautions must be undertaken and which will be compensated, it is likely that in the future there will be more of these claims and, in turn, some will follow inefficient precautions.⁷³

70. Some courts have conveniently focused on the contamination of groundwater which may be beneath the insured's property but is said not to be owned by the insured and therefore not subject to a policy provision excluding damage to the insured's own property. See, e.g., *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1193 (9th Cir. 1986) ("all water in the state belongs to the public"); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987); *United States Aviex Co. v. Travelers Ins. Co.*, 336 N.W.2d 838 (Mich. Ct. App. 1983); *Upjohn Co. v. New Hampshire Ins. Co.*, No. 85-288651-CK (Mich. Ct. Cl. 1987), *aff'd*, 444 N.W.2d 813 (Mich. Ct. App. 1989). But see *Bausch & Lomb*, 625 A.2d 1021 (Md. Ct. App. 1993) (rejecting idea that State owned the water under plaintiff's land).

71. If this view seems accurate, we might then conclude that we have yet another area of judicial activity where contract is dead, and we might focus on other areas of the law where the tort-contract distinction seems robust.

72. This seems to describe the cases involving environmental cleanup costs, as discussed presently, *infra* notes 74-76 and accompanying text.

73. But not many of these claims will follow because the remedy simply compensates and therefore does not encourage inefficient precaution taking.

Returning to the possibility (however unlikely it may be) that the real underlying theory is not the half-step restitution idea but rather one of encouraging (*ex ante* efficient) best efforts, an interesting feature of some of these environmental cases is that the precaution was required by an exogenous party. In *Intel Corp. v. Hartford Accident and Indemnity Co.*,⁷⁴ for example, solvents leaked from underground storage tanks, and the insured entered into a consent decree with the Environmental Protection Agency ("EPA") regarding the extent of cleanup that would be undertaken. The court allowed recovery for at least a very large fraction of these costs⁷⁵ from the liability insurer. Other cases granting this kind of recovery have involved mandated repairs or cleanup operations by order of state agencies or the U.S. Coast Guard.⁷⁶ At one level, these cases are the most obvious candidates for restitution, or for what I have referred to more generally as aggressive intervention to encourage best efforts precautions, because the exogenous requirement and even specification of a precaution removes most of the valuation task (the cost-benefit but not the compensation calculation) and perhaps even defines the efficient solution. But at another level it is surprising that these cases would inspire more judicial intervention than most, because the presence of a non-judicial directive to take precautions means that aggressive judicial intervention is not needed. If courts generally fear that they might err when aggressively providing contract default rules, but the half-step or another remedy is sometimes the only way to push contractual acquaintances toward a cooperative solution, then one would think that the norm of nonintervention would resurface when an administrative agency or other external factor independently encouraged best efforts, or cooperative, precautions.⁷⁷

74. 692 F. Supp. 1171 (N.D. Cal. 1988).

75. The court said the trier of fact must separate precautions that prevented harm to third parties from precautions that only benefitted the insured's property. *Id.* at 1194. This involves a two-step process: If the costs are contemplated by the EPA's consent decree, then the insured recovers all these expenses due to the deference to EPA valuations. But if the precautions were undertaken by the insured without an EPA mandate, the trier of fact must perform the "delicate factual assessment" of separating the expenses that prevented harm to third parties from those that did not. *Id.* at 1194-95.

76. See, e.g., *Bankers Trust Co. v. Hartford Acc. & Indem. Co.*, 581 F. Supp. 371, 373 (S.D.N.Y. 1981) (requiring insurer to pay where Coast Guard identified source of pollution and ordered cleanup by insured); *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 388 S.E.2d 557 (N.C. 1990) (allowing recovery when the North Carolina Department of Human Resources issued the compliance order).

77. And it is not the case that this intervention occurs only where there is an exogenous directive, in which case courts can at least avoid the errors of cost-benefit calculations, because in some of these cases (like *Leebov* itself) there is no outside directive. See, e.g., *Compass Ins.*

From an efficiency perspective it is at least arguable that the presence of an exogenous directive to take precautions does not remove the need for a judicial remedy. It will often be the case that the insured has unique access to information about developing problems and the need for precautions. If a governmental directive to take a precaution were to trigger a denial of compensation for precaution-taking, then insureds would be further disinclined to share information with government agencies. In *Intel* itself there is reason to think that the court was concerned about this kind of moral hazard. The decision reports that Intel ceased manufacturing at the property in question in 1980, sought to sublet the property because its lease ran until 1984, and then “[s]upposedly at the request of a prospective sublessee . . . commissioned soil sampling and testing . . . in 1981.”⁷⁸ The skepticism, reflected in the use of the word “supposedly,” about when a party first knew of an environmental danger might generally be well founded, and suggests that reporting not be penalized more than necessary. Of course, this concern applies as much to a regime built around the restitution half-step. It may simply be unwise to withdraw any remedy because of the presence of a governmental directive, however duplicative such an incentive might first seem.

More important, the informational advantage often associated with the potential precaution-taker may explain why a compensation-based remedy is preferred over damages. The threat of damages for the failure to take a best efforts precaution will encourage the potential precaution-taker to be uninformed and to make it difficult for a claimant to argue that a reasonable person should or would have known of the need for precaution-taking. The promise of compensation for precaution-taking, however, may not offer as powerful an incentive, but in the end may be superior because it creates no moral hazard or disincentive to develop and share information. By way of further illustration, if the builder-insurer in *Leebov* had feared liability, that is, the denial of insurance coverage following a failure to prevent the loss with a best efforts precaution, the builder might have claimed to be far from the job site when the landslide threat began, or the builder might simply have avoided the site during bad weather.⁷⁹ The use of a restitutionary, or compensatory, remedy in the case may for this reason be the preferred alternative. The analysis is virtually

Co. v. Cravens, Dargan & Co., 748 P.2d 724 (Wyo. 1988) (state highway department recovers for cleanup of oil spill, including cleanup of its own property, with no exogenous directive).

78. *Intel*, 692 F. Supp. at 1172.

79. No court will undertake to measure and require heroic efforts. See *infra* note 94.

identical to that in the literature regarding the duty to rescue for the builder can, of course, be seen as one who is regarded as having a duty to rescue arising out of the contract. The law might use "carrots" for rescue rather than "sticks" for nonrescue, and these carrots will be modest so as to avoid moral hazard problems and incentives to overinvest in rescues.⁸⁰ Moreover, in the few areas where legal systems offer compensation to rescuers, there is reason to think that (*ex post*) success is a precondition to recovery. In admiralty law, for example, the rewards offered to salvors seem efficient; there is compensation plus a premium for success, and no recovery in the event of failure.⁸¹ It is easy to see why this sort of *ex post* system is administratively more efficient than one that sought to compensate all *ex ante* efficient rescue efforts.⁸² Acquaintances on land may one day be treated in similar fashion, but for now it appears that the most they can expect from courts for their best efforts precautions is compensation with no premium.

In the end, then, these environmental cases add something to the positive case regarding the restitution half-step remedy, although the courts insist that they are merely following the (sometimes ambiguous) contract. Courts can be described as compensating precaution-takers, or, as I have supposed, just efficient precaution-takers, when their actions prove successful. That such a remedy is likely to be an insufficient incentive for best efforts in most settings, or that it is an unnecessary incentive in others, appears to be a bit beside the point. The remedy may have some desirable effects in efficiency terms, especially if one stresses the costs of judicial error, but it is better described as one that allows courts to respond to the most tangible, sympathetic cases. In passing, it may also be a means of maintaining the distinction between contract and tort.

C. HALF-STEPS AND THE DEATH OF CONTRACT

I have suggested that the ability to compensate successful precaution-takers has enabled courts to maintain a distinction between contract and tort. There is less aggressive intervention in contract, but that is in part because courts have avoided a more complete contrast by engaging in some (*ex post*) intervention in contract.

80. Levmore, *Waiting for Rescue*, *supra* note 12, at 886-91.

81. Landes & Posner, *supra* note 54, at 100-105.

82. *See* Landes & Posner, *supra* note 54, at 104-05; Levmore, *Waiting for Rescue*, *supra* note 12, at 909-13; *supra* note 43.

This evolutionary view suggests that we cast a contrasting glance at an area where no restitution half-step is easily found. Consider again the fundamental battle for terrain between tort and contract. *A* manufactures and sells a good to *B*; *A* has been negligent in making the product but *A* has specifically indicated that it will not be liable for any direct or indirect losses. If the product's defect causes personal injury, *A*'s disclaimer does not, of course, generally prevent *B* from suing in tort.⁸³ This is, once again, the development that generated the announcement of the death of contract. But what if the defect causes the destruction of the product itself? Most courts have understood that if buyers are able to sue in tort in order to avoid explicit contractual exclusions of warranty liability on the part of sellers, then there will be nothing left to contract. Accordingly, the terrain of contract has been defended by some courts holding that tort suits can not succeed.⁸⁴ It may or may not be possible for sophisticated parties to agree in advance on a different rule, either that tort suits can be brought or that they can not be brought even where personal injury is concerned, but we need not explore this question here for the point is simply that there is an important boundary between contract and tort such that there is more aggressive intervention on one side of this boundary, however artificial it may seem.

My suggestion in this Article, it will be recalled, is that courts would be attracted to some compromise, or half-step, in order to ease the transition, or take some pressure away from the sometimes-artificial boundary, between contract and tort. For better or worse it will normally be the case that no such compromise is possible where defective products are concerned. It will infrequently be the case that buyers can invest in precautions, and even more rarely possible for such precautions to prove unambiguously wise *ex post*. With no restitution half-step on which to rest, courts may vacillate between the two extremes of tort law intervention and contract law passivity in the face of apparent inefficiency. They may try a succession of distinctions toward this end, or they may eventually put the matter to rest with a revolutionary leap toward tort or contract.

Viewed from this perspective, it is interesting to observe the evolution of doctrine concerning this question of tort liability in the

83. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 97, at 691-92 (5th ed. 1984).

84. Perhaps the most important illustration is *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1985) (reviewing treatment of the issue in state courts and then holding that there is no tort claim in admiralty when a product damages only itself).

presence of contractual waiver. One important development concerns cases where there is neither personal injury nor damage to the product itself but rather damage to "other property." Thus, *A*'s defective product may explode or leak, leading the purchaser, *B*, to sue in tort (because *A* has excluded contractual responsibility) for damage to other personal property. Even courts that have preserved the life of contract law by supporting the contractual exclusion of liability for damage done to the product itself have permitted tort suits for damage to "other property."⁸⁵ For these courts, other property is like personal injury. One way to think of this doctrinal distinction is as another attempt to find some compromise that will prevent the complete death of contract. In the absence of any potential for the restitution half-step, a more formalistic compromise is attempted.⁸⁶

It goes almost without saying that this kind of formalistic resting point down the slippery slope toward the complete death of contract is difficult to maintain. Consider, for example, *Four Corners Helicopters v. Turbomeca*,⁸⁷ where a helicopter crashed, taking along with it an air compressor worth less than one-tenth the value of the aircraft itself. Plaintiff claimed that the helicopter had been negligently made, and the court upheld a jury verdict for the value of the helicopter as well as the "other property." A court that follows this tack must then confront cases where the other property is of very small value. If *A* sells a defective, leaking mobile home, for example, one suspects that complete recovery may not suddenly be available simply because the leak damaged a tablecloth.⁸⁸ On the other hand, a court which allowed recovery for the other property but never for the product itself would likely find itself overrun by the judicial taste for progress, empathy, and anti-formalism. Put differently, the same forces that amputated

85. AMERICAN LAW OF PRODUCTS LIABILITY 3d § 60:51 (Timothy E. Travers et al. eds., 3d ed. 1991) (recovery available for damage to other property where damages are something more than the cost of the product itself).

86. There is no chance for the restitution half-step because the buyer is not normally in a position to know of or take precautions that will prevent damage to other property or to the product itself. Put differently, one reason that so many insurance cases figure in the body of this Article is that the restitution half-step requires circumstances where precaution-taking might easily be encouraged.

87. 979 F.2d 1434 (10th Cir. 1992).

88. Some courts have responded by excluding recovery for minimal or incidental damage to other property. See, e.g., *United States Steel Corp. v. Miller & Meier & Assocs., Architects & Planners, Inc.*, 902 F.2d 573 (7th Cir. 1990) (denying recovery for water damage to other property caused by rusting sheet metal); *Florida Power & Light Co. v. McGraw Edison Co.*, 696 F. Supp. 617 (S.D. Fla. 1988), *aff'd*, 875 F.2d 873 (11th Cir. 1989) (denying recovery when a transformer exploded and the resulting smoke blackened an adjacent wall). Of course, this doctrinal distinction may not be sustainable over time.

contract law by allowing tort suits for personal injury arising out of contracts for products, and then almost inevitably conquered "other property" cases as well, might be expected to destroy any remaining distinctions, or holdouts.

At the same time, there is reason to think that courts will find a place, or at least a set of implicit doctrines, to make a stand for the survival of contract. Our collective reaction to the hypothetical cases with which this Article began is that courts will not intervene everywhere and will not insist on best efforts in every relationship. The trick, then, is to see where courts might comfortably create distinctions between the urge to intervene and the older inclination to insist on private bargains. I have not tried to characterize the precise evolution of product liability and disclaimer law, but I have suggested that crude attempts to distinguish tort from contract, such as the move to permit tort suits where there is damage to "other property," might be analogous to the (more attractive) restitution remedy deployed in the cases discussed earlier in this Article.

D. HALF-STEP, *EX POST* SCHEMES MORE GENERALLY

Although I have described the restitution half-step idea as part of the evolutionary story of the tort-contract distinction, it is useful to note that there are other examples of *ex post* schemes that do not go as far as efficiency or other considerations might dictate. In much of tort law there is a sense that the *ex post* reality of an injury encourages the factfinder to conclude that there should be liability, even though the abstract negligence standard insists that it is *ex ante* behavior that ought to be scrutinized. One might view our disinclination to combat this potential bias (with such things as bifurcated trials) as a larger example of the appeal of "ex post justice." Alternatively, and perhaps more optimistically, we might simply recognize that tort law is uncertain as to the relative superiority of negligence or strict liability, and the inclination toward recovery where there is *ex post* injury might be seen as a move in the direction of a compromise between negligence and strict liability.

Outside of tort law there is the question of why we criminalize attempts. We could imagine a system that penalized completed crimes and sought to deter all criminal behavior with the threat of large punishments for "successful" crimes. And we could imagine a system that was more *ex ante* in design, penalizing all attempts equally. Ours is a mixed system in which greater penalties are imposed where there is

“bad luck,” but in which some *ex ante* perspective remains, so that drunk drivers and would-be murderers are punished even though their potential victims escape unscratched.⁸⁹

These and other examples⁹⁰ suggest that the restitution half-step idea may be a part of a larger story in which the law finds its way toward a balance among efficiency, administrative, moral, and other considerations. But because I have chosen to stress the relationship between this half-step, *ex post* idea and the tension between tort and contract, I leave for another day the question of where we can expect to find mixtures of *ex ante* and *ex post* tools.

IV. CONCLUSION

With the idea of the restitution half-step I have suggested that compensation will be available when courts can, with the perspective of hindsight, be virtually certain that a precaution generated unambiguous and tangible benefits to a contractual acquaintance.⁹¹ Courts might hesitate to use a damage remedy to encourage best efforts both because such a remedy might lead to fewer desirable precautions and because, when it will lead to more precautions, it will also raise initial contract prices in a manner that might not appeal to the apparent beneficiary. Thus, the now familiar college president who fails to provide a placement counselor or security guard need not fear a tort-style suit for damages because, among other things, the seemingly efficient precautions that would avoid such liability may not be within the budget of the beneficiaries who would in the end pay for these precautions. And the college president who undertakes these precautions will be unable to recover their cost from the beneficiaries because it is hard to imagine situations in which it will be perfectly clear that the precautions benefitted those sued for payment. Similarly, an insured who installs an efficient smoke detector or who undergoes a medical procedure that benefits a life insurer in statistical terms is most unlikely to gain compensation for the cost of the precaution.⁹² These examples of

89. See THOMAS NAGEL, MORTAL QUESTIONS 24-38 (1979).

90. See *infra* note 92.

91. I have also suggested that another requirement of the restitution half-step might be that the precaution itself was efficient. See *supra* text accompanying notes 65-68, 70-77.

92. In these cases it may be too difficult to prove *ex post* that the precaution truly succeeded. A slightly harder case would be one where the insurer offers the detector at the insurer's cost, in mid-contract, and says it will refuse to pay in the event of a fire unless this precaution is applied. Again, there are a number of ways to encourage the efficient precaution, including compensation and tort-like threats (no insurance coverage), but the interesting thing is that the law does nothing so aggressive but rather leaves the matter to private agreement.

judicial passivity certainly stand in contrast to interventions (and inevitable price increases) in tort law, so that one or the other of these areas would seem to be governed by an inefficient legal rule, and yet there does not seem to be any reason to expect change in either area. Moreover, these examples lead me to prefer the restitution half-step as a descriptive tool over the idea that courts (in *Leebov*, *McNeilab*, and many of the other cases discussed above) award compensation where they find *ex ante*-justified precautions. The *ex ante*, or efficiency, perspective makes the smoke detector and college security cases more difficult.

In the course of developing the idea of the restitution half-step, and its relationship to earlier work on restitution and rescue law, two other themes have emerged with regard to legal categories. The first is that contract law is hardly dead. Especially when one moves away from consumer transactions and the possibility of personal injury, judicial intervention is qualitatively different when judges deal with contractual acquaintances rather than strangers. It is possible to insist that the difference has more to do with the omission-commission distinction than with the tort-contract divide, but it is plain that there is at least something to the latter distinction. And as an evolutionary matter, I have suggested that because the restitution half-step does something for those claimants who are most sympathetic, it facilitates a plausible equilibrium in the development of law and legal categories. Other, larger areas of law, such as that dealing with the question of when a tort suit is possible despite careful waiver of contractual liability, may be in flux precisely because no attractive equilibrium, or resting spot, has been found.

The second subsidiary theme is that however useful the category of relational contract may be in understanding a variety of contract

It is tempting to insist that there is no recovery or other intervention in these cases because contracting is easy; the insured can offer a discount or straightforward payment in order to obtain the joint wealth maximizing precaution. The problem with succumbing to this temptation is that it makes much of contract law seem useless because it is always the case that if we assume low transaction costs then the parties can contract in a way that makes default rules seem unimportant.

Note that the insurer may not wish to pay for the medical procedure because insureds can be expected to undertake lifesaving steps on their own without the additional incentive of compensation. And a health insurer who has promised to cover procedure *X* may not want to pay for the substitute, less expensive procedure *Y* because sometimes the experiment will fail and the insured will then have higher medical expenses. The insurer prefers that it, and not the insured, control the rate at which new innovations are covered and encouraged.

law doctrines, such as substantial performance,⁹³ it seems fairly useless in understanding the treatment of unanticipated precautions, or best efforts requirements. Put differently, a party's breach, or announcement of anticipated breach, of contract is an important trigger; the event signals the onset of a behavioral and regulatory regime in which courts will require and compensate best efforts precautions (viewed from the efficiency-promoting, *ex ante* perspective).⁹⁴ But much earlier in time, when the question is simply whether unanticipated best efforts will be encouraged through aggressive legal intervention, courts are reluctant to intervene, and the restitution half-step seems to describe the limits of this intervention. This is not the place to explore this trigger in extended fashion, but rather to emphasize the nature of the intervention that can be expected in its absence.⁹⁵

I have suggested, perhaps too insistently, that the restitution half-step idea be linked to the difficulty courts face in drawing the line between contract and tort, or between encouraging private bargains and aggressively intervening where private arrangements seem to have fallen short of what is privately and socially desirable. Indeed, I have suggested that of the many partial answers to the question of why judges use their available tools with such different authority in contract and in tort cases, the most striking is the ability of one of these tools, the restitution half-step remedy, to deal with difficult cases. It is possible and even conventional, however, to explain much of the contract-tort division in terms of administrative and error costs. College presidents are left alone by the courts under this view because

93. See Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983).

94. More accurately, courts will look at incremental, rather than heroic, steps that might be undertaken post-breach to mitigate damages. A seller might be expected to find another buyer but it would be most surprising for a court to insist that the mitigator should have built a new factory in order to modify the goods in question. We might say that the duty to mitigate is, in fact, limited to low risk decisions. On the other hand, if a heroic mitigation step is undertaken, it has been suggested that courts will grant recovery (from the breaching party) where the heroic step appears *ex post* to have been wise. See Jeffrey G. MacIntosh & David C. Frydenlund, *An Investment Approach to a Theory of Contract Mitigation*, 37 U. TORONTO L.J. 113 (1987). This is one of several examples of a positive theory about a segment of contract law that resembles the restitution half-step idea advanced here.

Note also that post-breach (non-heroic) best efforts mitigation will be required (and compensated) even though the parties could have specified such mitigation steps in advance.

95. We might say that although courts can err, contracting parties agree that precautions are so regularly necessary post-breach, and strategic behavior such a problem at that time, that they "agree," at least hypothetically, to a different, tort-like regime. Contract law is most alive, which is to say most distinct from tort, in pre-breach arrangements between contractual acquaintances where there is no threat of personal injury.

markets work fairly well, and because even where they fail, courts may fail even more miserably. The installation of smoke detectors is also a matter for private arrangements under this account both because these arrangements are easily made and because the social cost of missing some desirable bargains is low both in relative and absolute terms. From this perspective the puzzle is not to explain non-intervention in contract cases but rather to explain those contract cases, such as *Leebov* and *Intel*, where there is aggressive intervention. The restitution half-step idea and the distinction based on the question of whether aggressive intervention will lead to higher prices (and therefore unwanted "benefits") are, however, just as important to this perspective as they are to one that is rooted in the fragility of the contract-tort distinction. In short, although I have described the judicial taste for *ex post* success as part of the story of the survival of contract, it is a phenomenon that is significant on its own. Restitutionary recoveries from contractual acquaintances are interesting and important whether they are understood as arising out of restitution's own foundations or as mediating the tension between restitution's more celebrated conceptual neighbors, tort and contract.

