When Specific Performance of Personal Service Contracts Is the Right Remedy

D. A. Jeremy Telman[*]

ABSTRACT: This brief response to The Case for Specific Performance of Personal Service Contracts *by Kimbery Krawiec and Nathan Oman builds on their suggestions for a limited expansion of the availability of the specific performance remedy in contracts for personal services. The response quickly reviews Professor Krawiec and Oman's arguments and registers some skepticism as to the likelihood that parties would agree to specific performance as a remedy in the situations they discuss. They make the excellent point that a positive injunction can be a tool to bring about settlement. In addition, specific performance should also be available where the court can be confident that: (1) the party subject to such an order will perform to the best of their ability and (2) the party that has to pay for such performance will not, if forced to pay, interfere with optimal performance.*

INTRODUCTION

In *The Case for Specific Performance of Personal Service Contracts*,[1] Kimberly Krawiec and Nathan Oman make a compelling case for a limited expansion of the availability of specific performance as a remedy for breach of a contract for personal services. They illustrate the usefulness and narrow scope of their proposed expansion of the availability of the remedy with three examples: the coach, the specialized teacher, and the pop star. In the first Part of this

[*] Professor of Law, Oklahoma City University College of Law. Thanks to Philip J. Novak and Caroline Rowland for their invaluable editorial assistance.

1. *See generally* Kimberly D. Krawiec & Nathan B. Oman, *The Case for Specific Performance of Personal Service Contracts*, 110 IOWA L. REV. 751 (2025).

Response, I summarize Krawiec and Oman's convincing arguments for a careful expansion of the specific performance remedy. I quibble at the margins of their assessments of some of the traditional arguments against orders of specific performance, and I draw on the literature on relational contracts[2] to expand on their arguments in some areas and restrict them in others.

In the second Part, I offer two critical comments on their suggestions for reform. First, I do not think specific performance can be profitably applied in some situations where they think it should apply. Second, I think their examples help us think systematically about better ways to identify circumstances in which it is proper for courts to order the specific performance of a contract for personal services. In short, I applaud their advocacy for the specific performance remedy as a tool for encouraging the parties to negotiate a reasonable settlement. However, as a result of my slight differences with Krawiec and Oman about courts' abilities to monitor and enforce orders of specific performance, I offer a slightly different assessment of the situations in which that remedy might be effective. In addition to being a tool to bring about settlement, specific performance should also be available where the court can be confident that: (1) the party subject to such an order will perform to the best of their ability and (2) the party that has to pay for such performance will not, if forced to pay, interfere with optimal performance.

I. SPECIFIC PERFORMANCE, SLIGHTLY EXPANDED

Krawiec and Oman have each established themselves as, careful contracts scholars, willing to challenge established positions and to take on non-traditional subjects. Professor Krawiec, in addition to a wealth of scholarship on other topics, has concerned herself, at least since 2009, with exchanges in taboo areas at the fringes of legality.[3] Professor Oman has challenged doctrinal orthodoxy previously in the realm of specific performance,[4] explored

2. *See, e.g.*, MELVIN A. EISENBERG, FOUNDATIONAL PRINCIPLES OF CONTRACT LAW 733 (2018) ("[R]elational-contract theory is based on a paradigm of a contractual transaction between actors who are in an ongoing and dynamic relationship."); IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 10 (1980) (contending that every contract is partially relational, in that it involves relations other than discrete exchange).

3. *See, e.g.*, Kieran Healy & Kimberly D. Krawiec, *Organ Entrepreneurs*, *in* THE CAMBRIDGE HANDBOOK OF LAW AND ENTREPRENEURSHIP IN THE UNITED STATES, 268, 268–82 (D. Gordon Smith, Brian Broughman & Christine Hurt eds., 2022) (exploring the role of entrepreneurs in the context of organ transplants as part of an inquiry into "the more general phenomenon of innovation in the shadow of the law"); Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 210, 254–57 (2009) (calling for an end to the prohibition on baby selling and other restrictions on the access of market suppliers to the market for newborns). Professor Krawiec explores work in the broad realm of "taboo trades" in her podcast, *Taboo Trades. Taboo Trades*, BUZZSPROUT (2024), https://www.buzzsprout.com/1227113 [https://perma.cc/8FXY-SXAH].

4. *See generally* Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020 (2009) [hereinafter Oman, *Specific Performance*] (arguing that, in most cases,

the taboo topic of kidney exchanges,[5] and defended the enforceability of boilerplate agreements entered into with only attenuated and imperfectly informed consent.[6] At the heart of his work is an attempt to reconcile normative and economic theories of contract.[7] Like many contracts professors, I pay careful attention to Professor Krawiec's and Professor Oman's interventions in the scholarly literature. They are willing to question legal rules whose widespread acceptance has become a barrier to doctrinal development. The Restatement's per se rule against ordering specific performance in contracts for personal services[8] is just such a barrier.

In order to situate their advocacy for an expanded specific performance remedy, Krawiec and Oman first have to identify a problem and address traditional justifications offered for courts' refusal to order the specific performance of personal service contracts. The problem, widely acknowledged, is that, as a general matter, money damages undercompensate, including in situations where specific performance seems applicable.[9] Negative injunctions, which prevent a departing employee from taking alternative employment, do not compensate the former employer for its loss.[10] In many situations, an order of specific performance is the best way to make the non-breaching party whole, in part because it opens the way for settlement talks and allows the parties to determine the value to them of performance.[11]

In situations where a departing employee values the new position above the cost of buying out their contract, there is the possibility that the parties, with the help of an order of specific performance, will agree to an efficient

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ordering the specific performance of a contract for personal services would not violate the Thirteenth Amendment).

5. *See generally* Nathan B. Oman, *Beyond Gift and Bargain: Some Suggestions for Increasing Kidney Exchanges*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 37 (promoting extended kidney exchanges in which willing donors with kidneys incompatible with their intended donee are connected with others to create a donation chain large enough to match every person needing a kidney with a willing donor).

6. *See, e.g.*, Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much About Boilerplate and Other Puzzles*, 83 BROOK. L. REV. 215, 217 (2017) (contending that "theoretical approaches to contract law have dramatically overestimated the importance of voluntary consent in the normative defense of contract law"); Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 102–04 (2009) (articulating a pragmatic approach to general contract law, in which what matters is not consent but the ability to "facilitate transactional variation in the face of collective problems").

7. *See* NATHAN B. OMAN, THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW 1 (2016) (arguing that "well-functioning markets are morally desirable, and contract law should . . . support such markets").

8. *See* RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (AM. L. INST. 1981) ("A promise to render personal service will not be specifically enforced.").

9. Krawiec & Oman, *supra* note 1, at 759–60.

10. *See id.* at 761–65 (providing illustrations of how court orders preventing employees from working for a competitor do not fully capture the original employer's loss from breach).

11. *Id.* at 766–68.

breach.[12] The non-breaching party is made whole or can even negotiate a benefit. The breaching party can be made better off, as is their new employer.[13] Specific performance, Krawiec and Oman contend, better facilitates making parties whole in situations where damages undercompensate and can even make parties better off than they would have been had the contract been performed.

Given their willingness to push back against cozy assumptions of contract law and lore, it is not surprising that Krawiec and Oman attack with gusto doctrines that have grown unassailable through repetition rather than reason. Krawiec and Oman take on the main reasons given for the avoidance of specific performance as a remedy for personal service contracts: the Thirteenth Amendment's prohibition on involuntary servitude,[14] broader autonomy concerns, and the courts' inability to monitor and enforce positive injunctions.

Krawiec and Oman begin with low-hanging fruit. In refusing to order specific performance of contracts for personal service, courts and scholars often cite to the Thirteenth Amendment's broad prohibition on involuntary servitude.[15] In response to these rather highfalutin applications of lofty constitutional principles to mundane commercial disputes, Krawiec and Oman note that "there is something morally and constitutionally obtuse about equating the position of a [person]—possessed of substantial bargaining power—required to perform a limited contract of personal service with the position of someone condemned by birth to a life of vicious subordination and unrequited toil."[16]

This refutation would be convincing, even if we did not already have the benefit of Professor Oman's extended inquiry into the meaning of the Thirteenth Amendment, which demonstrated that an order of specific performance of personal services would almost never constitute the kind of "involuntary servitude" that the Thirteenth Amendment addresses.[17]

And yet this argument accomplishes relatively little, because there is no case in which a court has refused to order specific performance or in which an appellate court has overturned an order of specific performance based on

12. *See id.* at 768 (suggesting that a breaching party might negotiate rather than perform in situations "where breach presents an opportunity whose value exceeds that of performance to the breachee."). Krawiec and Oman's efficiency argument for specific performance only applies in situations where it leads to negotiation. In most other cases, specific performance is no more efficient than expectation damages, assuming that the parties actually perform as ordered.

13. *Id.* at 768–71.

14. U.S. CONST. amend. XIII.

15. *See* Oman, *Specific Performance*, *supra* note 4, at 2022 nn.5 & 7 (gathering examples from casebooks and treatises); *id.* at 2022 n.6 (gathering cases); *id.* at 2022 n.8 (gathering examples from legal scholarship).

16. Krawiec & Oman, *supra* note 1, at 756.

17. See Oman, *Specific Performance*, *supra* note 4, at 2098 (concluding "that the [Thirteenth Amendment] argument against specific performance cannot be sustained in any but the most extreme situations").

the Thirteenth Amendment alone. Rather, the Thirteenth Amendment provides one of multiple grounds on which courts refuse to consider specific performance. This opinion from a California appellate court typifies how courts approach the issue.

> There are a variety of reasons why courts are loathe to order specific performance of personal services contracts. Such an order would impose upon the court the prodigious if not impossible task of passing judgment on the quality of performance. . . . It would also run contrary to the Thirteenth Amendment's prohibition against involuntary servitude. . . . Courts wish to avoid the friction and social costs which result when the parties are reunited in a relationship that has already failed, especially where the services involve mutual confidence and the exercise of discretionary authority. . . . Finally, it is impractical to require judicial oversight of a contract which calls for special knowledge, skill, or ability.[18]

Given the well-established state-law grounds for refusing to grant specific performance, the doctrine of constitutional avoidance[19] precludes courts from reaching the Thirteenth Amendment issue. That said, there is still value in Krawiec and Oman's work in confronting the more intemperate rhetoric on the subject. As Professor Oman has previously noted, constitutional arguments can be conversation stoppers.[20]

They next address the autonomy arguments underlying the per se rule against specific performance of personal service contracts. They make two main points here: First, high money damages can impose a greater burden on autonomy than the requirement that one perform a short-term contract.[21] Second, because orders of specific performance can lead to negotiation, they can be autonomy-enhancing compared to an order to pay money damages.[22] Concerns about workplace domination are misplaced because low-wage workers are almost always at-will, and thus could not be subject to the remedy of specific performance in any case.[23]

There is the lingering problem of contract terms, such as non-compete provisions, that have a post-contractual afterlife, even if employment is at-will. While Krawiec and Oman's proposal will not exacerbate problems for at-

18. Woolley v. Embassy Suites, Inc., 278 Cal. Rptr. 719, 727 (Cal. Ct. App. 1991) (citations omitted).

19. *See, e.g.*, Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (noting the "deeply rooted" jurisprudential doctrine that courts ought not to weigh in on constitutional questions unless doing so is unavoidable); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (Brandeis, J., concurring) (1936) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

20. Oman, *Specific Performance*, *supra* note 4, 2026–30.

21. Krawiec & Oman, *supra* note 1, at 779–80.

22. *Id.* at 780–81.

23. *Id.* at 754, 768–69, 779, 782.

will employees, it will not affect the status quo. Krawiec and Oman caution that their focus is on remedies. Substantively unfair contracts exist, but that is not their focus here. However, at least in the case of at-will employment, remedies, and substantive unfairness are intertwined. At-will employees who are terminated cannot seek specific performance and may have no legal remedy at all,[24] but they will still have obligations to their employer in the form of restrictive covenants and arbitration agreements. The latter bind employees whose legal claims may not even arise under the contract.[25] A few states have already implemented bans on non-compete agreements,[26] and the Federal Trade Commission ("FTC") attempted to promulgate a national rule to that effect.[27] Legal challenges followed immediately, and two federal courts have reached different conclusions about whether the rule shall be allowed to take effect.[28]

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24. *See* Rachel Arnow-Richman & J.H. Verkerke, *Deconstructing Employment Contract Law*, 75 FLA. L. REV. 897, 900–01 (2023) (highlighting the mismatch between the unilateral contract theory that informs many employment law legal opinions and the reality of employment agreements, which consist of mutual promises and contemplate a prolonged relationship of indefinite duration).

25. The Supreme Court first interpreted the Federal Arbitration Act (9 U.S.C. §§ 1–16 (1925)) to require arbitration of statutory claims in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–28, 638–40 (1985) (requiring arbitration in Japan of U.S. antitrust claims raised by a Puerto Rican car dealership). More recently, the Court enforced class-action waivers in arbitration agreements, even when such waivers create insuperable barriers to the vindication of the plaintiffs' statutory rights. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 232–33, 238–39 (2013). The Court first upheld required arbitration of statutory employment claims in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23, 26, 35 (1991). Since then, the courts greatly expanded the applicability of the Federal Arbitration Act ("FAA") to employment cases. *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 109, 113–19 (2001) (reading the FAA's exclusion of employment contract narrowly to exempt only transportation workers). Courts now routinely require employees to arbitrate their claims. *See* Alexander J.S. Colvin & Mark D. Gough, *Mandatory Employment Arbitration*, 19 ANN. REV. L. & SOC. SCI. 131, 132 (2023) (calling "mandatory arbitration . . . the single most important development in US employment law and dispute resolution in the past three decades[,]" with the consequence that most employees are effectively barred from the courts). By contrast, the Seventh Circuit recently held that an *employer* can evade its own mandatory arbitration obligations simply by refusing to pay arbitration fees, and no court can order the corporation to pay them. *Cf.* Wallrich v. Samsung Elecs. Am., Inc., 106 F.4th 609, 621–22 (7th Cir. 2024) (holding that consumers could not force the corporation to pay its arbitration fees and continue with arbitration but either pay the fees themselves or pursue claims in district court).

26. *See* CAL. BUS. & PROF. CODE § 16600 (West 2017 & Supp. 2024) (voiding all contracts "by which anyone is restrained from engaging in a lawful profession, trade, or business"); MINN. STAT. § 181.988 (2023) (purporting to make Minnesota's law on non-competes consistent with proposed federal regulations); OKLA. STAT. ANN. tit. 15, § 219A (West 2013) (prohibiting non-compete agreements in most situations "as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer").

27. FTC Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

28. *Compare* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. 24-1743, 2024 WL 3511630, slip op. at *8 (E.D. Pa. July 23, 2024) (denying the plaintiff's request for injunctive relief both because the plaintiff had failed to show that it would suffer irreparable harm and because the

My main concern with the specific performance remedy is what Krawiec and Oman call "monitoring concerns;"[29] that is, the challenges involved in judicial enforcement of positive injunctions. The monitoring concern is two-fold: parties forced to perform will do so half-heartedly or otherwise inadequately, and courts are not well-positioned to monitor or adjudicate the quality of performance.[30] Krawiec and Oman respond that courts are frequently called upon to monitor the quality of performance, at times through the doctrine of good faith.[31]

Their response does not satisfy me because monitoring is not cost-free, and parties that have already chosen to litigate their differences are far more likely to fall out than are parties that choose to renegotiate or settle in advance of adjudication. The problem that money damages fail to compensate for incomplete performance is exacerbated when the parties incur the costs of multiple rounds of litigation.[32] And then in case of allegation of incomplete performance, how does one determine the remedy for inadequate performance in cases, to use Krawiec and Oman's examples, like the coach, the teacher, or the pop star? Does one prove a coach's inadequate performance through the team's won-loss record? Does one prove a teacher's bad faith by the students' grades? Does a fan have a claim if that Bruce Springsteen performance leaves them with the impression that The Boss was just feeling "meh" about New Jersey that night?

Relational contract theory helps us understand why breaches of contract only rarely result in litigation. Contractual relations do not arise from discrete encounters but have durations and iterations. Exchange is just one component of the association.[33] Partners to transactions can renegotiate terms during performance of the contract and continue to work together.[34] If they cannot do so, they may prefer the option of severing ties rather than continuing to work with an obstreperous or unreliable partner.[35] Once the

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plaintiff was not likely to succeed on the merits) *with* Ryan LLC v. Fed. Trade Comm'n, No. 3:24-CV-00986, 2024 WL 3297524, at *10–12 (N.D. Tex. July 3, 2024) (preliminarily enjoining the FTC rule from taking effect as to the plaintiff and intervenors based on a finding that the plaintiff was substantially likely to succeed on the merits).

29. Krawiec & Oman, *supra* note 1, at 788–92.

30. *Id.* at 788.

31. *Id.* at 788–89.

32. Krawiec and Oman note that collecting damages may be more complicated than winning a judgment. *Id.* at 790–91. They also concede that most defendants pay their judgments. *Id.* at 791. Either way, an unsuccessful order of specific performance will compound problems in collecting judgments through delay caused by protracted litigation.

33. *See* EISENBERG, *supra*, note 2, at 736 (defining a relational contract as one that involves "not merely an exchange but also [creates] a relationship between the contracting parties").

34. The Uniform Commercial Code recognizes the willingness of parties to amend their agreement during performance by allowing for modifications without consideration. U.C.C. § 2-209(1) (AM. L. INST. & UNIF. L. COMM'N 1977).

35. *See* Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 468 ("Potential disputes are suppressed, ignored, or compromised in the service of keeping the relationship alive.").

parties have reached the point of litigation, their relationship is broken in a way that an order of specific performance is unlikely to repair. As a result, in almost all instances, such an order would only kick the can down the road. The parties will likely fall out again, the court will have to step in again, and as ordering the parties to perform did not work, the court will have to fashion a more traditional, damages-based remedy after having expended further judicial resources on failed attempts to monitor and enforce its order of specific performance.

Krawiec and Oman respond that courts have gotten far better at monitoring contractual performance,[36] but there remains the concern that their specific performance remedy for a lawsuit may involve prolonged, expensive monitoring followed by another lawsuit that will either restart the cycle or return us to our wonted remedy of money damages, warts and all. In sum, Krawiec and Oman's dismissal of monitoring concerns seems overly hasty.

II. SPECIFIC PERFORMANCE, SLIGHTLY DIFFERENTLY EXPANDED

Krawiec and Oman propose that we abandon the per se rule against orders of specific performance of contracts for personal services. I agree that we should abandon the per se rule. However, I think, with the help of the Krawiec and Oman's analysis, we can better specify when orders of specific performance should be available. Krawiec and Oman would not replace a per se rule against specific performance with a per se rule in favor of it. It would remain an extraordinary remedy, to be awarded in the court's discretion[37] and premised on a finding that money damages will not make the non-breaching party whole.[38] Specific performance should only be available when the parties agree *ex ante* that the remedy should be available,[39] and only in contracts where the parties have relatively equal bargaining power, with representation by legal counsel or specialized agents as one indicator of such equality.[40]

My alternative to the per-se prohibition on specific performance of personal service contracts would permit courts, in their discretion, to order specific performance where they can be confident that either: the order will result in settlement, or the party to perform would welcome the opportunity to do so, and the party to pay for such performance would not hinder such performance. Applying this more streamlined approach, I am skeptical about the applicability of the remedy to the scenarios that Krawiec and Oman propose.

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36. *See* Krawiec & Oman, *supra* note 1, at 790 (proposing that more complex monitoring assignments can be turned over to a special master whose expenses could be charged to the breaching party).

37. *Id.* at 757.

38. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. L. INST. 1981)).

39. *Id.* at 758, 792. For the practical reasons explained below, this requirement seems likely to bar orders of specific performance as effectively as the per se rule.

40. *Id.*

As mentioned above, Krawiec and Oman note that most employment agreements are at-will, and thus, orders of specific performance are unlikely to arise.[41] In any case, no order of specific performance of personal service may exceed one year in duration.[42] They illustrate their concept with three archetypes: the coach, the teacher, and the pop star.[43]

Krawiec and Oman first address the instance of the successful college football coach who leaves before the end of his contractual term for a more lucrative and high-profile position.[44] In the actual case on which their hypo is based, *Vanderbilt University v. DiNardo*[45] the aggrieved university sought liquidated damages under the contract, and the parties eventually settled.[46] Krawiec and Oman think specific performance should be available here, but that seems unlikely.

A law and economics perspective on damages, as Krawiec and Oman note,[47] tells us that parties will often treat the right to breach as an option, and they may use mechanisms such as liquidated damages provisions to price that option.[48] A law and economics perspective also criticizes courts for substituting default contracts remedies that do no appropriately price the option for the bespoke remedies negotiated by sophisticated parties.[49] It may be that parties, cognizant of courts' unwillingness to order specific performance of a contract for personal services, do not bother to specify a preferred remedy that they know the courts won't enforce. More likely, however, sophisticated parties do not choose that remedy, both because they cannot envision a future in which they would want to comply with such an order and because such an order would not be efficient. By Krawiec and Oman's reasoning, the efficiency advantages of specific performance derive from its facilitation of settlement negotiations.[50] The parties prefer to price the option in advance and avoid the costs and uncertainty of post-litigation settlement negotiations.

Krawiec and Oman state that they want parties to be able to stipulate to specific performance *ex ante*. In *DiNardo*, the parties did not do so, and I believe they would not, even if they were confident that a court would enforce the provision. DiNardo's contract with Vanderbilt included language about

41. *Id.* at 754.

42. *Id.* at 758, 792.

43. *Id.* at 793–94, 798, 800.

44. *Id.* at 793–94.

45. Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 751, 753–55 (6th Cir. 1999).

46. Krawiec & Oman, *supra* note 1, at 794.

47. *Id.* at 766–67.

48. *See* VICTOR P. GOLDBERG, RETHINKING CONTRACT LAW AND CONTRACT DESIGN 16–17 (2015) [hereinafter RETHINKING CONTRACT LAW] (describing breach as an option the price of which is set by available remedies for breach); VICTOR P. GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES xiv–xv, 2–163 (2019) (applying the option theory in a discussion of the caselaw on direct damages, in which default rules sometimes value the option irrationally).

49. *See* RETHINKING CONTRACT LAW, *supra* note 48, at 1–2.

50. Krawiec & Oman, *supra* note 1, at 766–68.

the importance to the University of stability in their football program.[51] The court took that language seriously when it was likely boilerplate to which neither was committed. It is hard to square that language with the conduct of other schools when the sneaker is on the other foot. In many cases, the university sacks the coach before the end of the contractual term, and the university pays outrageous liquidated damages. Often the coach has no duty to mitigate. Stability is a goal; winning is a more important one.

For example, late in 2023, Texas A&M University announced that it would be paying its departing coach, Jimbo Fisher, $75 million for *not* coaching its football team through 2031.[52] His contract was "guaranteed," likely meaning that he had no duty to mitigate damages. This seems to be a fairly common characteristic of college coaching contracts.[53] Sometimes contracts expressly state that a coach has no duty to mitigate damages in case of a no-cause termination;[54] sometimes the contracts provide for a lump sum "buyout" of the coach's contract, which has the same effect.[55] Other contracts specify that the terminated coach does have a duty to mitigate damages.[56] The variation suggests that universities and coaches are able to negotiate over the price of the option to terminate with sufficient precision that they would be unlikely to agree to a specific performance provisions. Such a provision would only come into play after litigation, which is not only costly but creates the very uncertainly that the stability provision in the Vanderbilt contract purports to avoid. While the negotiations that would inevitably follow an order of specific performance might result in a more efficient pricing of the option to breach, such benefits are almost certainly outweighed by the advantages of stipulating to money damages in advance.

The coaches use their bargaining power to get something much better than specific performance. Recently, there have been reports that some coaches who choose to terminate can negotiate to have their new institutions

51. *Id.* at 795–96 (citing Vanderbilt Univ. v. Dinardo, 174 F.3d 751, 756 (6th Cir. 1999)).

52. Doug Lederman, *Texas A&M to Pay Record $75 Million to Buy Out Coach*, INSIDE HIGHER ED (Nov. 13, 2023), https://www.insidehighered.com/news/quick-takes/2023/11/13/texas-am-pays-record-75m-buy-out-football-coachs-contract (on file with the *Iowa Law Review*).

53. *See, e.g.*, RETHINKING CONTRACT LAW, *supra* note 48, at 16 (providing examples of coaches' contracts in which they are not required to pay damages); Martin J. Greenberg & Steven D. Gruber, *You Get Hired to Get Fired*, 24 MARQ. SPORTS L. REV. 141, 150 (2013) (providing samples of contractual language freeing college coaches of the obligation to mitigate damages). In one empirical study, only one-third of the coaching contracts in the sample imposed on a coach the duty to mitigate damages. Randall S. Thomas & R. Lawrence Van Horn, *College Football Coaches' Pay and Contracts: Are They Overpaid and Unduly Privileged?*, 91 IND. L.J. 189, 235 n.213 (2016).

54. *See* Martin J. Greenberg & Djenane Paul, *Coaches' Contracts: Terminating a Coach Without Cause and the Obligation to Mitigate Damages*, 23 MARQ. SPORTS L. REV. 339, 358–60 (2013) (providing examples from coaching contracts of language excusing the duty to mitigate damages).

55. *See id.* at 359–60 (providing examples of coaching contracts that characterize payments as buyouts).

56. *See id.* at 370–71 (providing examples of coaching contracts that establish an affirmative obligation to mitigate).

pay for harms caused to the prior employer.[57] Universities also would not benefit from a court order requiring that a coach remain at their post until the end of the contract term. Such a coach will have a hard time motivating players to perform in a program to which they know that the coach is not really committed. Underclassmen will enter the transfer portal rather than wait around to see what mystery coach takes over. The team will have a hard time recruiting new players given the uncertainty about the stability of the coaching staff. Even if such an order made sense, how would a court measure whether the coach was performing their duties in good faith?

Krawiec and Oman suggest that various statistical metrics could be used to establish whether a coach were shirking their responsibilities.[58] But the metrics they offer measure outcomes, not quality of performance, and innumerable variables makes those metrics a very poor indicator of the coach's good faith effort. Take Coach DiNardo as an example. In his four years at Vanderbilt, he amassed a record of 19 wins against 25 losses. In conference games his record was 9-22.[59] These numbers are not impressive without context, but Louisiana State University ("LSU") clearly saw great potential. At LSU, Coach DiNardo led the team to three successful seasons, culminating in victories in bowl games, followed by two losing seasons. Coach DiNardo was fired before he completed his fifth season at LSU.[60] Three years

57. *See, e.g.*, James Parks, *Kalen DeBoer Tells Washington He's Taking the Alabama Head Coach Job*, SPORTS ILLUSTRATED (Jan. 12, 2024), https://www.si.com/fannation/college/cfb-hq/ncaa-football/kalen-deboer-alabama-football-job-leaves-washington [https://perma.cc/CFY6-MEMK] (reporting that the University of Alabama would pay $12 million to the University of Washington as required under Coach DeBoer's contract with the latter); Steve Berkowitz, *Schools Set to Pay at Least $200 Million in Buyouts to Hire and Fire College Football Coaches*, USA TODAY (Jan. 18, 2024, 6:39 AM), https://www.usatoday.com/story/sports/ncaaf/2024/01/18/college-football-coaches-buyouts-schools-200-million/72174164007 (on file with the *Iowa Law Review*) (tabulating that universities would incur costs of "$32.4 million to cover amounts newly hired head and assistant coaches owe[d] [to] previous employer[s]").

58. *See* Krawiec & Oman, *supra* note 1, at 797 & n.181.

59. *Vanderbilt Commodores School History*, SPORTS REFERENCE (2024), https://www.sports-reference.com/cfb/schools/vanderbilt/index.html (on file with the *Iowa Law Review*); *1991–92 Football Schedule*, VAND. COMMODORES (2024), https://vucommodores.com/sports/football/schedule/season/1991-92 [https://perma.cc/3TA6-BLVW]; *1992–93 Football Schedule*, VAND. COMMODORES (2024), https://vucommodores.com/sports/football/schedule/season/1992-93 [https://perma.cc/7VZN-5UN8]; *1993–94 Football Schedule*, VAND. COMMODORES (2024), https://vucommodores.com/sports/football/schedule/season/1993-94 [https://perma.cc/GAG6-ESMR]; *1994–95 Football Schedule*, VAND. COMMODORES (2024), https://vucommodores.com/sports/football/schedule/season/1994-95 [https://perma.cc/9TJM-3WXM]. Vanderbilt plays in the Southeastern Conference ("SEC"), and conference games are important to recruiting, post-season metrics, and rivalries. *Vanderbilt Commodores*, SEC SPORTS, https://www.secsports.com/school/vanderbilt-university [https://perma.cc/ES4Y-Y4BG]; *see Understanding NCAA Football: Conferences and How the Season Works*, ULTIMATE LINEUP (Aug. 26, 2024), https://www.theultimatelineup.com/understanding-ncaa-football-conferences-and-how-the-season-works [https://perma.cc/RT9A-MTV5] ("Conference games are the core of the schedule, determining standings and eligibility for conference championships.").

60. Under Coach DiNardo's leadership, LSU's football team was 7-4-1, 10-2, and 9-3 in his first three seasons, including a win in the Independence Bowl followed by one in the Peach Bowl. *LSU Fighting Tigers School History*, SPORTS REFERENCE (2024), https://www.sports-reference.com

later, he was hired to coach the Indiana University football team, which he did for three years.[61] Indiana University was Coach DiNardo's chance to revive his reputation as a coach, but the team's performance did not improve.[62] It would be folly to suggest that the various teams' win/loss records or bowl game appearances reflect one way or the other on the coach's commitment to his job.

Krawiec and Oman suggest that a court might assemble a panel of experts to assess a coach's performance.[63] That would likely be an expensive proposition. In any case, we would only get to the point if the coach had agreed in advance to a remedy of specific performance, and the possibility of having their work scrutinized by a bunch of retired coaches reduces greatly the likelihood that any coach would accept a contract provided for the possibility of specific performance as a remedy. Specific performance as a tool for negotiation seems misplaced here, as the parties seem well positioned to put a price on the option to breach *ex ante*.

There might be a possibility that universities could agree to specific performance as a remedy in their contracts with assistant coaches in high-profile sports or for head coaches in sports other than men's football and basketball. But here the danger of specific performance as a tool for exploitation by the performer looms large. A defensive coordinator for the college football team or a coach for a women's volleyball team may earn six-figure salaries and be advised by legal counsel, but that does not mean that they have the kind of bargaining power that will put them on an even playing field with their employer.

Krawiec and Oman's next example is a specialized teacher, but here they admit that it is hard to come up with a scenario in which a court would exercise its discretion to order a teacher to specifically perform.[64] They provide many reasons why specific performance would only in the most unusual circumstances apply to a teacher,[65] and I agree with their assessment. Building on what they have written, I would add the following: Because effective teaching is very hard to measure, there would be no way to know

/cfb/schools/louisiana-state/index.html (on file with the *Iowa Law Review*); Associated Press, *DiNardo Gets Sent Packing*, GADSDEN TIMES, Nov. 16, 1999, at B1.

61. The Associated Press, *Indiana Hires DiNardo as Coach*, N.Y. TIMES, Jan. 9, 2002, at D6.

62. The team's record during Coach DiNardo's tenure as coach was 8-27, with only one conference win per year. *Indiana Hoosiers School History*, SPORTS REFERENCE (2024), Indiansports-reference.com/cfb/schools/indiana/index.html (on file with the *Iowa Law Review*). But no Indiana University football coach has achieved an overall winning record since 1947, and the team's last win in a Bowl game was in the 1991 Copper Bowl. *Id.*; Pete Thamel, *New Indiana Coach Curt Cignetti Expects Big Things in Bloomington*, ESPN (Mar. 12, 2024, 8:00 AM), https://www.espn.com/college-football/story/_/id/39710229/new-indiana-coach-curt-cignetti-expects-big-things-bloomington [https://perma.cc/6Y2D-ZWA9].

63. Krawiec & Oman, *supra* note 1, at 797.

64. *See id.* at 799 (finding it unlikely that any court would address a case involving a specialized teacher with an order of specific performance but allowing that there may be exceptions).

65. *Id.* at 799–800.

whether the teacher, ordered to teach, was doing so to the best of their ability. Like college athletes who know that their coach does not want to work with them, students who know that a professor is only teaching them because a court ordered him to do so are likely to think that the teacher is not performing up to their potential. Nor is settlement likely here, as few teachers on any level have the liquidity to purchase their liberation from their teaching contracts.

Krawiec and Oman's most promising example is sui-generis pop stars for whom no substitute performance would be adequate. They provide the analogous example of Jack Dempsey's 1926 refusal to fight Harry Wills because, as he put it, in his charmingly pugilistic manner, "Entirely too busy training for my coming Tunney match to waste time on insurance representatives[.] . . . [A]s you have no contract suggest you stop kidding yourself and me also."[66] The plaintiff did have a contract.[67] However, specifying plaintiff's damages proved a challenge. The plaintiff, but for Mr. Dempsey's breach, would have made $1.6 million on the fight.[68] However, because the trial court excluded the plaintiff's damage estimate as speculative, a ruling affirmed on appeal, [69] the plaintiff recovered only some trifling expenses.[70] The case seems a perfect illustration of why expectation damages are under-compensatory.

Krawiec and Oman think specific performance would be a good remedy in this case, and I think they may be right because the criteria for specific performance are met: the party ordered to perform can be counted on to perform to the best of their ability, and the party to whom performance is due will do nothing to interfere with performance. If ordered to fight Mr. Wills, Mr. Dempsey would do so with his wonted determination, because his future boxing career depended on the defense of his heavyweight title, and the Chicago Coliseum would do everything in its power to promote the fight. However, it is also possible that the *Dempsey* court was overly hasty in finding damages too speculative. Would it not have been possible to determine, based on comparable boxing matches in comparable venues, the likely range of profits that the plaintiffs lost as a result of Mr. Dempsey's breach?[71] If the court

66. Chi. Coliseum Club v. Dempsey, 265 Ill. App. 542, 547 (Ill. Ap. Ct. 1932).

67. *See id.* ("We are unable to conceive upon what theory the defendant could contend that there was no contract . . . .").

68. *Id.* at 549.

69. *See id.* at 549–50 (affirming the trial court's determination that the testimony of the plaintiff's witness should be excluded because no testimony could be sufficiently probative as to the amount of lost profits to enable a factfinder to calculate damages with reasonable certainty).

70. *See id.* at 550–54 (allowing the plaintiff to recover only minimal costs incurred before Mr. Dempsey's breach).

71. *See* George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1267 (1994) (noting the view, articulated in John P. Dawson's casebook, that the court could have looked to gate receipts in the Dempsey-Tunney fights to confirm the plaintiff's account of its lost profits); Saul Levmore, *Stipulated Damages, Super-Strict Liability, and Mitigation in Contract Law*, 107 MICH. L. REV. 1365, 1372–73 (2009) (noting that while the court found the plaintiff's claim of

was correct that any such prediction of lost profits would be speculative, in cases like *Dempsey*, as in the case of the college coaches, if the parties can establish a range of likely profits, they may prefer a liquidated damages provision. Certainly, Jack Dempsey would not agree to be subject to an order of specific performance.

Krawiec and Oman think courts ought to be empowered to order pop stars to specifically perform their contracts. I retain my skepticism that it is likely that any such pop star will agree in advance to specific performance as a potential remedy, and such *ex ante* agreement is one of Krawiec and Oman's pre-requisites to orders of specific performance of contracts for personal service. Setting that concern aside, unlike Jack Dempsey, it is not clear that a pop star would be motivated to give their best possible performance if ordered by a court to perform. Madonna, for example, has been sued three times during her current tour for starting performances late.[72] Upon starting one concert late, Madonna is alleged to have told her fans "I am sorry I am late . . . no, I am not sorry, it's who I am . . . I'm always late."[73] This is not merely megastar bluster; it is a legal argument. In her motion to dismiss one of the complaints relating to her tardiness, Madonna averred, "No reasonable concertgoer—and certainly no Madonna fan—would expect the headline act at a major arena concert to take the stage at the ticketed event time."[74] Ordered by a court to start her concerts on time, Madonna might just sing "Papa Don't Preach."

Despite my criticisms, I agree with Krawiec and Oman that we should consider an expanded specific performance remedy. I am especially sympathetic to their view that orders of specific performance can lead to settlement discussions. Consider *Fitzpatrick v. Michael*,[75] a case in which an elderly man reneged on a promise to leave his house and his cars to his live-in caregiver upon his death.[76] In consideration of that bounty, Ms. Fitzpatrick had agreed to be paid only eight dollars a week to serve as Mr. Michael's cook, maid, nurse, gardener, and chauffeur.[77] In March, 1939, Mr. Michael was so satisfied with the services she provided him that he took out an ad in the local newspaper praising her,[78] In April, he evicted her from his home, cut off her

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lost profits too speculative in *Dempsey*, the same court might have upheld an equally-speculative liquidated damages clause).

72. Conor Murray, *Madonna Sued Again for Late Concert Start—And 'Pornography,'* FORBES (May 31, 2024, 10:50 AM), https://www.forbes.com/sites/conormurray/2024/05/31/madonna-sued-again-for-late-concert-start-and-pornography (on file with *Iowa Law Review*).

73. *Id.*

74. *Id.*

75. *See* Fitzpatrick v. Michael, 9 A.2d 639, 639–40 (Md. 1939).

76. *See id.* at 640 (noting that, in exchange for taking "full charge of" defendant's home, nursing him, driving him around, providing company, and looking after his flowers, the plaintiff was to have $8 week plus board as long as defendant lived and then in his will he would leave her his home and furnishings "for the balance of her life, and . . . his automobiles . . . absolutely").

77. *Id.*

78. *Id.*

access even to collect her belongings, and then had her arrested for trespass when she tried to gain access to the house.[79] The court first noted that Ms. Fitzpatrick was entitled to a remedy,[80] but then it found that it could not fashion one for her, in part because of the statute of frauds,[81] and in part because it could not order specific performance of a service agreement.[82]

It would certainly not seem prudent for a court to order the defendant to allow Ms. Fitzpatrick to continue to be his caregiver. However, if the court had so ordered, the defendant almost certainly would have settled rather than continue to share living space with Ms. Fitzpatrick. Their relationship had been intimate. Ms. Fitzpatrick would, for example, apply hot water bottles to Mr. Michael's back and feet throughout the night to afford him some comfort from ailments that kept him bedridden for weeks at a time.[83]

Mr. Michael was a man of some means. He described himself as a "prominent business man."[84] He owned a house and multiple cars, at least one of which must have been in excellent working condition.[85] If Ms. Fitzpatrick was correct in her surmise that jealous relatives were behind Mr. Michael's sudden change of heart with respect to her,[86] those relatives might well have been willing to pay Ms. Fitzpatrick to settle her claims to assure themselves of the inheritance they sought. If so, Ms. Fitzpatrick might have received some reasonable approximation of the deferred wages she was owed plus some premium representing a portion of her interest in Mr. Michael's real property and chattels. Absent the power to order specific performance as a means of encouraging settlement, the court left Ms. Fitzpatrick with nothing but its sympathy.

Two hypothetical examples illustrate situations where, as in the *Dempsey* case, an order of specific performance would be efficacious even if it did not lead to settlement.[87] First, there is the case of a musician, "Harpo," who agrees

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79. *Id.* Ms. Fitzpatrick attributed his conduct to the influence of jealous relatives.

80. *See id.* at 641 ("There can be no possible doubt that upon those facts the plaintiff should be entitled to some relief against the defendant . . . .").

81. *See id.* (finding that, because the parties agreement related to an interest in land it needed to be evidenced in a writing and that, because the exception to the Statute of Frauds for part performance sounded in equity, plaintiff was left without a legal remedy).

82. *See id.* (regretting that, although plaintiff had "no adequate remedy at law[,] equity will not ordinarily specifically enforce a contract for personal service").

83. *Id.* at 640.

84. *Id.*

85. *See id.* (describing a road trip that Mr. Michael and Ms. Fitzpatrick took together just before he evicted her, in which she drove 4,400 miles).

86. The court references "distant relatives[] who did not visit [Mr. Michael]," and in some instances also "did not speak with him." *Id.* It is possible that some relatives emerged Field-of-Dreams style when they saw the newspaper advertisement that Mr. Michael had taken out praising Ms. Fitzpatrick and swooped in hoping to inherit. It is also possible that they intended only to protect him from someone they viewed as exercising undue influence.

87. Both hypotheticals are derived from *Examples & Explanations*. *See generally* BRIAN A. BLUM, EXAMPLES & EXPLANATIONS (8th ed. 2021) (providing discussions of contract law concepts and accompanying examples).

to perform for "the going rate" in a piano bar, *Trés Trendi*. The proprietor learns that the going rate is too high and reneges.[88] Money damages won't make Harpo whole because his main motivation for taking the gig was not the pay but the opportunity to impress *Trés Trendi*'s clientele, which included influential patrons of the arts.[89] Even if a court can order that Harpo be awarded damages at the "going rate," Professor Blum notes that money damages will not make Harpo whole. His hopes for being discovered by a patron of the arts are too speculative to result in an award of money damages.[90] However, Professor Blum notes that an award of specific performance could be easily administered in this case.[91] Harpo is a willing performer, and *Trés Trendi* can be expected to comply with the order on pain of being held in contempt of court.[92] Krawiec and Oman would likely endorse this remedy as in line with cases ordering reinstatement of employees.[93]

Similarly, Professor Blum provides another example involving a young tenor hired to perform in a big-city opera house, the Megalopolitan. Upon breach, the young tenor is given the opportunity to earn the same amount to perform the same role on the same day at a smaller, up-state venue.[94] Performing at Glimmerglass is not the same as performing at the Met, so just as with Harpo, the young tenor may not be motivated primarily by the money or the role. He wants to perform at a particular venue for the benefits that performance in that space might have for his future career. If a court were to order specific performance of the contract at the Megalopolitan, there would be no question that the young tenor would perform to the best of his ability. The opera house would do nothing to undermine him, as it has its own reasons to hope that each of the performances it hosts is a success.

But courts should still be wary of orders of specific performance and deploy the remedy only when there is reason for great confidence that the parties will either perform in good faith or settle. *Brackenbury v. Hodgkin*[95] provides an object lesson in the risks of imposing specific performance on people who cannot be trusted to behave reasonably. Sarah Hodgkin offered the use of and possession of her home after her death to her daughter and son-in-law, the Brackenburys, in exchange for their agreement to move from Missouri to Maine so that they could live with and care for Sarah.[96] They

88. *Id.* at 747–48.

89. *Id.* at 758.

90. *Id.* at 758–59.

91. *See id.* at 758, 758 n.32 (noting that courts routinely order reinstatement of employees, and so an order of specific performance in this instance would violate no public policy against ordering people to perform contracts against their will).

92. *Id.* at 759.

93. Krawiec & Oman, *supra* note 1, at 792.

94. BLUM, *supra* note 87, at 804–05. Professor Blum uses this example to illustrate the doctrine of assignment. I have simplified the hypothetical to focus on the possibility of specific performance as a remedy.

95. Brackenbury v. Hodgkin, 102 A. 106, 106–07 (Me. 1917).

96. *Id.* at 107.

agreed and moved to Maine in April 1915, but the parties soon quarreled.[97] In November 1916, Sarah transferred the deed to her home to her son, Walter, who then sought to evict the Brackenburys from the premises.[98] The Brackenburys sought an equitable ruling ordering the re-conveyance of the deed back to Sarah and the declaration that Sarah held the property in trust for the Brackenburys in accordance with the contract.[99] The court granted the relief sought, effectively ordering the Brackenburys and Sarah Hodgkin to continue to live together indefinitely.[100]

The court might have thought that the parties would quickly come to an agreement. Sarah, perhaps with Walter's financial assistance, would buy out the Brackenburys' interest in the home, or she could pay them to stay elsewhere during Sarah's lifetime. Alternatively, the Brackenburys might find a comfortable place for Sarah to live out her life while they assume possession of the home. Instead, the three litigants continued to live together. The relationship remained less than harmonious and, based on the long-standing conflicts involving Sarah and her children, the court should have been wary of how the parties would conduct themselves if Sarah were ordered to perform the contract.

According to materials collected by Sarah's great grandson, Sarah made life difficult for the Brackenburys, complaining about Bertha Brackenbury's cooking, going to bed at 4:30 or 5:00 PM during the winter, and demanding that the house be quiet.[101] Things did not improve after the court's ruling. Mr. Brackenbury would amuse himself by reading the court's opinion aloud to Sarah.[102] If she asked for food to be passed to her at the dinner table, it was thrown at her, and at mealtimes, she was only allowed to eat with an old iron fork that had only two tines.[103]

Sarah had six children, all of whom lived nearby. None of her sons would live with Sarah, which is why she had to ask Bertha to come. The Brackenburys, familiar with Sarah's "'irascible personality,'" insisted on a written promise before they would come to Maine.[104] There were numerous other court cases involving the Hodgkins and the Brackenburys until Sarah died in 1921.[105] All were petty affairs, involving allegations sounding in tort, trespass, and conversion. In one lawsuit, Walter alleged that Bertha had threatened to shoot him. In another, two Hodgkin brothers fought until one

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.* at 108.

101. STEWART MACAULAY, WILLIAM WHITFORD, JONATHAN LIPSON, WENDY NETTER EPSTEIN & RACHEL REBOUCHÉ, CONTRACTS: LAW IN ACTION 351–52 (5th ed. 2024) (citing DOUGLAS I. HODGKIN, FRACTURED FAMILY: FIGHTING IN THE MAINE COURTS (2005)).

102. *Id.* at 351.

103. *Id.*

104. *Id.* (quoting HODGKIN, *supra* note 101, at 2).

105. *Id.* at 351–52.

hit the other in the face. Sarah attempted to leave the Brackenburys out of her will. They and a disinherited son contested the will successfully. The Brackenburys then sold the property and moved back to Missouri in 1922.[106]

The case is old, but the lesson is evergreen. Orders of specific performance of contracts for personal services should not be ruled out per se, but they should be made with great caution.

CONCLUSION

Professors Krawiec and Oman have raised important objections to the per se rule. None of the criticisms of specific performance as a remedy for breaches of contracts for personal services justify the per se rule. As they note, the universe of cases to which orders of specific performance might apply will remain small, but they are important cases. This comment builds on Krawiec and Oman's work to give courts some guidance in determining whether the specific performance remedy suits the situation. The remedy should be available in limited circumstances when the court can be very confident that either the order will facilitate settlement or that both parties will perform the contract in good faith.

106. *Id.* at 352.