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ARTICLE: How Restitution and Unjust Enrichment Can Improve Your Corporate Claim

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SUMMARY:

... I. Introduction: The Exaggerated Demise of Unjust Enrichment ... The Third Restatement of Restitution and Unjust Enrichment appears to take the same perspective in its discussion of proprietary remedies, those remedies that are unique to restitution at law or in equity (e.g., reformation, replevin, ejectment, specific restitution, constructive trust, subrogation, and equitable lien). ... The perspective of unjust enrichment and a court in equity is distinctly ex post: what actually happened; how did the defendant actually benefit? Combined with rescission and/or specific restitution, this perspective for the measure of the defendant's benefit can produce a unique award for the plaintiff, especially for a plaintiff with a claim that experienced significant delay after the date of the unjust act and/or a plaintiff in which the key asset values fluctuate greater than normal. ... The terms "restitution," "unjust enrichment," and "profit" have very different meanings and applications; ... A key risk of choosing to file a claim as a tort and electing unjust enrichment (as opposed to filing a claim for unjust enrichment in equity or at law) is that a lesser measure of unjust enrichment will be awarded. ...

TEXT:

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I. Introduction: The Exaggerated Demise of Unjust Enrichment

Restitution is becoming a lost art, observes Professor Kull: "Confusion over the content of restitution carries significant adverse consequences. To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it." n1

[*267] The law of restitution and unjust enrichment is widely perceived as needlessly archaic, complex, and boring. If restitution and unjust enrichment were merely archaic, n2 they could be safely ignored. To be fair, they are complex and

can be confusing (although the legal community sometimes needs a little complexity, if only to help avoid the minimum wage). Nevertheless, some corporate litigators are applying this body of law to their clients' great advantage in complex litigation, regulatory litigation, and intellectual property.

This article will show that unjust enrichment offers alternative causes of action and alternative remedies. Unjust enrichment is not suited for all or even most corporate claims, and it can increase the unpredictability of the remedy; but to ignore unjust enrichment is to ignore the success of those who have applied the doctrine and the danger of being unprepared to defend against significant claims. As confusing and complex as it may be perceived, the doctrine is becoming even more relevant in corporate litigation today.

For example, federal agencies in the 1980s and 1990s developed the claim of unjust enrichment to seek redress for the violation of federal regulatory statutes. Agencies like the SEC, the Department of Energy, and the CFTC successfully established implied jurisdiction for claims of unjust enrichment in equity unless the agency's enabling statutes precluded relief in equity. In its report for the year 2003, the FTC reported that it had filed approximately 87 such claims, that it had been awarded about \$ 900 million from prior claims, and that the agency had determined to redeploy more of its resources from administrative hearings to civil litigation. n3 The [*268] FDA has not filed a large number of claims but recently negotiated a \$ 500 million settlement with Schering-Plough on a claim of unjust enrichment for that company's breach of the agency's manufacturing standards. n4

Restitution and unjust enrichment do not have to be boring. The spirit behind the law of unjust enrichment is to apply the law "outside of the box" and fill in the cracks where common civil law and statutes fail to achieve "justice." Sometimes this means that a party to complex litigation needs to employ the law of unjust enrichment to outwit a wrongdoer that has tried to outsmart the system which, according to Professor Andrew Kull, n5 can produce a "charming result." n6

A. Boring?

Judge Kozinski's opinion in *Kremen v. Network Solutions Inc.* n7 is an example of a non-boring discussion of remedies in equity and unjust enrichment. He recounts the struggles between Gary [*269] Kremen and Stephen Cohen who fought for control of a domain name in 1994, www.sex.com. Gary Kremen is an "internet entrepreneur" who contacted the domain name registrar Network Solutions and registered the new domain name for free.

At that time Stephen Cohen, an entrepreneur of a different stripe, was still serving his prison sentence for impersonating a bankruptcy lawyer. Upon his release, he maneuvered to gain control of Cohen's website. Cohen wrote to the registrar, representing that Kremen had decided not to use the website and that his company had agreed for ownership of the website to be transferred to Cohen. Without pursuing sufficient due diligence, Network Solutions transferred ownership of the site to Cohen who started up business operations. Kremen first sued Cohen for legal title to the website and monetary remedies and later filed a claim against Network Solutions for its role in the misappropriation of his website.

Cohen delayed Kremen's efforts to restore control of the website for a couple of years but eventually Kremen was able to corner Cohen in court with claims of conversion and constructive trust. The remedy provided for the website to be returned to Kremen as well as all of Cohen's consequential unjust enrichment. The jury awarded \$ 40 million of unjust enrichment and \$ 25 million of punitive damages. n8 Kremen regained control of the website, but Cohen had fled to Mexico with his money. Kremen then enlisted the aid of the court to enforce the judgment, convincing the court to issue an arrest warrant.

So in the first round, the remedies in equity, though well conceived, failed to produce any monetary compensation. Judge Kozinski described Kremen's subsequent self-help as follows:

Then things started getting really bizarre. Kremen put up a "wanted" poster on the sex.com site with a [*270] mug shot of Cohen, offering a \$ 50,000 reward to anyone who brought him to justice. Cohen's lawyers responded with a motion to vacate the arrest warrant. They reported that Cohen was under house arrest in Mexico and that gunfights between Mexican authorities and would-be bounty hunters seeking Kremen's reward money posed a threat to human life. The district court rejected this story as "implausible" and denied the motion. Cohen, so far as the record shows, remains at large. n9

Call the second round for Cohen on points; although this form of self-help is a remedy rarely recognized by courts in the Southwest, Cohen's invocation of "the Mexican authorities" frustrated Kremen's use of the arrest warrant and wanted poster.

In the third and latest round, Kremen filed a claim against the domain name registrar, Network Solutions, for conversion of Kremen's property interest in the website. The district court dismissed the claim, but the Ninth Circuit reversed:

The district court thought there were "methods better suited to regulate the vagaries of domain names" and left it "to the legislature to fashion an appropriate statutory scheme." The legislature, of course, is always free (within constitutional bounds) to refashion the system that courts come up with. But that doesn't mean we should throw up our hands and let private relations degenerate into a free-for-all in the meantime. We apply the common law until the legislature tells us otherwise. And the common law does not stand idle while people give away the property of others. n10

Score the third round for Kremen: catching up with Cohen is now the problem of Network Solutions which effectively has joint liability with Cohen.

[*271] Judge Kozinski's opinion is a good example of how a court acting in equity can work "outside the box." n11 The fact pattern in this case presents a typical defendant for these cases, a schemer who tries to out-manuever the system.

B. Needlessly Complex?

A large power company and a large railroad entered into a long-term contract for the shipment of coal to a power plant which provided for an inflation adjustment to the shipping fee. After about twenty years, the utility sued the railroad for unjust enrichment at law because the inflation provision was unfair, i.e., the railroad enjoyed too large a profit margin on the service. During the trial, the utility conceded that the railroad had not breached any of its contractual duties and that all rates being assessed complied with the contract. Even though the jury found that the utility had not suffered "a gross inequity as a result of unusual economic conditions," n12 they found that the railroad had been unjustly enriched by one hundred million dollars. n13 Furthermore, the trial court ordered that the contract be amended to provide for changes in shipping rates in the future to compensate the railroad only for changes in its costs of transporting coal above or below the base rates provided in the original contract. The trial court was reversed by the state court of appeals, and the state supreme court affirmed the reversal, confirming that enrichment per se is not unjust:

The fact that a party to a contract has made a profit is an insufficient ground on which to order restitution on [*272] a theory of unjust enrichment The doctrine does not operate to rescue a party from the consequences of a bad bargain, and the enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract. n14

This claim, rigorously litigated by two large corporations, should never have reached the jury, let alone two levels of appellate courts.

C. Archaic?

Unjust enrichment is becoming federalized because it is increasingly incorporated in federal statutes on intellectual property and due to the federal agencies' exploitation of implied statutory authority for claims of unjust enrichment. Even though most such statutes require remedies to be applied in light of traditional practice in equity, and implied statutory jurisdiction is specifically limited to traditional remedies in equity, the common law of state courts is increasingly overshadowed by federal case law. n15

State governments have not filed nearly as many claims for unjust enrichment as the federal agencies, but the states' claim for subrogation against the tobacco companies generated the largest settlement ever known. The tobacco settlement that evolved out of [*273] the State of Mississippi's claim in the Mississippi Chancery Court n16 suggests the need for a new "Carl Sagan" wing of the American Bar Association (ABA) Hall of Fame to commemorate cases with legal fees in the "billions." The plaintiffs avoided the problems of previous claims for product liability by asserting a claim for subrogation: that the states' Medicaid funds were forced to fund medical expenses that the tobacco companies should have paid. The claim mushroomed as almost all of the remaining states joined the action. The settlement provides more than \$ 200 billion to be paid out over a twenty-five year period. One of the law firms that originally represented the state of Mississippi and later represented other states is reputed to have accrued a fee in excess of \$ 800 million; all other Mississippi law firms accrued fees of an additional \$ 600 million. It seems unlikely that the tobacco companies, whose defense against claims of product liability had a very high success rate up until that date, would make such a settlement if they had doubts about whether unjust enrichment is a viable cause of action. Professor Rendleman, a skeptical observer of the plaintiffs' claim for restitution, admits "creativity counts, for the old paradigm 'tobacco companies win,' if it has not shifted, has at least twitched." n17

II. Which Unjust Enrichment?

"The law of restitution can be difficult and confusing because restitution may be identified by terms that refer to some particular form of restitution or some particular piece of remedial history So restitution today is a general term for diverse kinds of recoveries aimed at preventing unjust enrichment of the defendant and measured by the defendant's gains, but it has many specific forms, each of which must be addressed separately." n18

The doctrine of unjust enrichment today is not just another simple ancient Roman concept gone complicated, it is a legal [*274] concept that has grown into an essential body of law. n19 This Part will clarify the meaning of unjust enrichment in relation to restitution; identify six sources of jurisdiction for unjust enrichment; and identify a hybrid or non-traditional form of unjust enrichment, sometimes called equitable unjust enrichment.

A. Unjust Enrichment and Restitution

In the current draft of the Third Restatement of Restitution and Unjust Enrichment, the title of the Restatement has been changed to include both unjust enrichment and restitution. In section 1, the draft explains that the Restatement is being written in the belief that the two terms should be regarded as equivalent. n20 The Third Restatement of Restitution and Unjust Enrichment avoids any reference to the restitution that is associated with criminal issues. Criminal restitution is a remedy based on compensating damages that seeks to restore the plaintiff or victim to her ex ante position by awarding damages. This form of restitution is distinguished and excluded from the Third Restatement of Restitution and Unjust Enrichment and generally separated in the original Restatement of Restitution. n21

[*275] There remains a question about whether unjust enrichment is merely an equitable remedy or whether unjust

enrichment can also be a cause of action. The simple answer is to quote all major authorities n22 which affirm that unjust enrichment can be an independent cause of action. n23

On the other hand, the simple answer fails to note that there are exceptions when unjust enrichment only acts as a remedy and when the cause of action of unjust enrichment can result in a remedy greatly resembling the award of the plaintiff's damages rather than the defendant's profits. To explain these distinctions, some categorization of the different types of unjust enrichment needs to be made.

B. Six Sources of Jurisdiction For Unjust Enrichment

There are at least six different sources of jurisdiction for claims and/or remedies of unjust enrichment (excluding admiralty). There are three major sources: statutory, jurisdiction at law, n24 and jurisdiction in equity. Within each major source there is a distinct subset resulting from procedural doctrine or election. These include implied jurisdiction for statutory jurisdiction ("implied statutory jurisdiction"); ancillary jurisdiction in equity ("ancillary [*276] jurisdiction"); and the election of unjust enrichment as a remedy for most intentional torts ("elective unjust enrichment at law"). Traditionally, elective jurisdiction was executed by the plaintiff's waiving the remedy claim for an intentional tort and suing in assumpsit for unjust enrichment. For those jurisdictions that have abolished the forms of action, the plaintiff may now just plead for unjust enrichment for most claims for intentional torts. n25

1. Statutory Jurisdiction

Statutory jurisdiction can be explicit or implied. If the statute provides for remedies in equity, then the relevant court has jurisdiction for equitable remedies according to the current practices of courts in equity. n26 If a federal statute is silent on the issue of equitable remedies and such remedies are not contrary to the statutory scheme, then a federal district court has jurisdiction to award traditional remedies in equity, including unjust enrichment. n27

Explicit statutory jurisdiction can lead to claims for jurisdiction in equity or at law. n28 The appropriate jurisdiction [*277] depends on the facts of the case, the nature of the plaintiff's cause of action, and/or the remedy sought and related procedural issues such as a party's right to a jury trial. A plaintiff that wants to avoid unjust enrichment at law based on statutory jurisdiction can exclude any claim for damages (while maintaining a claim for restitution) and thereby avoid unjust enrichment at law. n29

As there is no implied statutory jurisdiction for unjust enrichment at law, the distinction between unjust enrichment at law and in equity can determine whether the plaintiff's claim for implied statutory jurisdiction for unjust enrichment should be dismissed. Disputes regarding this distinction have been prevalent in recent opinions from the Supreme Court and various appellate courts, especially relating to the Employee Retirement Income Security Act (ERISA). n30 Normally, implied statutory jurisdiction provides [*278] jurisdiction for both unjust enrichment in equity and ancillary unjust enrichment in equity because the "clean-up doctrine" is regarded as within traditional practice in equity. n31

According to the Supreme Court's opinion in Knudson, ERISA statutes restrict jurisdiction to traditional claims in equity, excluding ancillary unjust enrichment in equity. n32 These two sets of remedies in equity can be quite different. For example, it is increasingly common today to find case opinions that approve of some form of punitive damages possible for some claims in equity. n33 But it is largely acknowledged that traditional remedies in equity did not include punitive damages, n34 as demonstrated by case opinions cited from the English Chancery Court before 1789, which provide the current standard for traditional remedies in equity. n35

2. Unjust Enrichment at Law

A plaintiff can state a cause of action for unjust enrichment in either a court at law or a court in equity, and both jurisdictions also [*279] offer procedural options by which the plaintiff can pursue either jurisdiction without stating a claim that would otherwise qualify. Thus, a plaintiff with a cause of action for a tort can elect to "waive the tort" and sue

in assumpsit, n36 and a plaintiff that has already stated a cause of action in equity can petition for the court sitting in equity to adjudicate related claims for breach of contract, tort, or unjust enrichment at law that should otherwise be heard in a court at law. n37

Unjust enrichment is available as a remedy for an intentional tort claim by election. It accounts for a large share of case opinions, [*280] which apply substitute measures (savings or market-based fees) for calculating the defendant's unjust enrichment, especially in the area of trespass to property and conversion. n38 Similarly, a preliminary review of the case law leaves the impression that few claims for elective unjust enrichment at law have resulted in an award of the defendant's profits.

In modern case law there is little to no justification for any reluctance to award the defendant's profits for either unjust enrichment at law or elective unjust enrichment at law or to distinguish between the two sources of jurisdiction for the remedy. However, there may be two factors that have effectively impeded a court's tendency to award the defendant's profits for elective jurisdiction. First, the nature of the cases for which the defendant elects unjust enrichment at law may be perceived as weaker cases. The plaintiff's case may lack evidence of causation between the tortious act and the tortfeasor's profits. Or, it may fail to provide any substantial evidence of how the defendant's revenues or profits can be distinguished between those related to the tort and those not related. Given that the measurement of unjust enrichment at law ranges from the defendant's profits to quantum meruit, these claims by their nature may have a greater tendency to be viewed as warranting less vigorous measures of unjust enrichment and/or a measure of a reasonable royalty that avoids issues of attribution and allocation. n39

The second factor relates to a hangover effect from several Nineteenth-Century opinions. In his article *The Concept of Benefit in the Law of Quasi-Contract*, n40 Timothy Sullivan relates the [*281] development of elective unjust enrichment at law back to the oldest known case in England in 1705. n41 He traces some of the American courts' resistance to the election in the major cases of *Jones v. Hoar*, n42 *Sandeen v. Kansas City, St. Joseph & Council Bluffs Railway Co.*, n43 and *Phillips v. Homfray*. n44 Even the U.S. Supreme Court has handed down a questionable opinion in *Schillinger v. United States* that the plaintiff patent holder had failed to state a material benefit when he claimed that the government had saved expenses when it violated the plaintiff's patent without compensation. n45 All of these opinions, except *Schillinger*, n46 have been discredited and are now mostly ignored, but they have left a legacy of case law that denied relief or awarded lesser measures of unjust enrichment in a disproportionate number of cases. This observation will be explored further in later Parts on measures of unjust enrichment and the comparison of different options for pursuing or defending unjust enrichment claims. n47

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3. Unjust Enrichment in Equity

Unjust enrichment in equity generally allows the plaintiff to seek ancillary jurisdiction for remedies at law (including damages or unjust enrichment at law) in cases that are significantly related to a claim for injunctive relief. n48 Thus, subject to the requirements of the "clean-up doctrine," a court in equity can choose to undertake jurisdiction to adjudicate both the injunction and the ancillary issues that would normally be resolved by a court at law.

Case opinions based on ancillary jurisdiction in equity need to be distinguished from case opinions in equity to determine their precedential value. In ancillary jurisdiction, a court in equity can award compensatory damages to the plaintiff, but such an award does not make damages a remedy in equity. Therefore, unless the case opinion for ancillary jurisdiction discusses the underlying "clean-up doctrine" n49 and identifies the remedy as damages, unjust [*283] enrichment at law or in equity, that opinion holds little value as a precedent for unjust enrichment. (Viewed cynically, the clean-up doctrine precludes the need to distinguish between remedies in equity and remedies at law, saving a busy court the trouble required to make such thorny distinctions.)

The recent trend appears to be towards restricting ancillary jurisdiction by examining the legitimacy of a plaintiff's

plea for injunctive relief, questioning the relative importance of the injunctive relief to the overall litigation. District courts are being required to challenge the parties' use of labels to determine a legitimate claim in equity. n50 If a party's right to a jury trial is at issue, the possibility of ancillary jurisdiction in equity is not allowed to preclude a jury trial, i.e., the "clean up doctrine" cannot be applied to preclude a jury trial. n51

[*284] Given the distinctions between the six different sources of jurisdiction for unjust enrichment, comparisons between cases with different sources of jurisdiction may require adjustments or additional explanation. A case based on explicit statutory unjust enrichment may rely on the specific provisions of the statutes. Cases based on implied statutory unjust enrichment are restricted to the state of practice in equity in 1789, which can differ markedly from the state of practice in equity today (for example, consider the evolving availability of punitive damages n52).

Normally, cases of unjust enrichment at law and elective unjust enrichment at law are perceived as fairly comparable. In the days of pleading the forms, the first would be considered a claim in assumpsit n53 and the second was "waiving the tort and pleading in assumpsit." Subsequent analysis in this article suggests that while the two are similar in theory, the actual measures applied to the two groups of cases suggest that courts have discounted elective claims, i.e., applied lesser measures of unjust enrichment as compared to unjust enrichment at law. Palmer made much the same observation in comparing a claim for unjust enrichment at law and in equity: in theory, they should both result in an award of the defendant's profits, but it appears in fact that it is more likely to gain this maximal measure in equity. n54

[*285] At the same time, the actual measurement of the defendant's profits can generally be compared among and between the categories as most explicit statutes normally instruct a court to apply the rules of equity for such measurement. Federal agencies, however, have repeatedly asserted the misnomer that their claims for unjust enrichment, based on traditional rules of equity, should be measured to allow for unjust enrichment to include the defendant's revenues without counter-restitution for the defendant's legitimate and related expenses. To date, their apparent success seems more related to the weak standard of practice in unjust enrichment and the high frequency with which they assert their claim rather than any solid support in traditional equity.

The measurement of unjust enrichment should be fairly comparable between cases founded in explicit statutory jurisdiction, implied statutory jurisdiction, and jurisdiction in equity but many significant inconsistencies can be easily found. The measurement of unjust enrichment for a claim of a federal agency under implied statutory jurisdiction does not generally resemble how the same court in the same year would measure unjust enrichment under explicit statutory jurisdiction, nor under jurisdiction in equity in general. n55 Other than this general warning, any further analysis of this thesis is beyond the scope of this article.

C. Equitable Unjust Enrichment

In a legal system that can award a different remedy depending on whether a claim is considered appropriate for jurisdiction at law and/or in equity, n56 the widespread use of the term [*286] "equitable" can confuse more often than it clarifies. n57 Most of the time, it is used harmlessly in a manner suggested by Professor Palmer to describe a general perspective or approach. n58 Other times, [*287] it appears that the term is used when one is uncertain of which jurisdiction is appropriate for the claim such that the author "splits the difference" and refers to the claim as equitable. Finally, there is a third group that states that even though the plaintiff has filed a cause of action that should be considered a claim at law, certain doctrines normally restricted to a court in equity should be applied. n59 Within the last group, there is even some suggestion that the merger of courts at law and courts in equity would justify the application of defenses in equity for some or all proceedings at law. For example, Judge Posner stated that merger of the courts may warrant the application of equitable defenses to purely "legal" claims. n60 Most of this commentary, so far, is isolated and relates mainly to claims for unjust enrichment.

Claims for unjust enrichment have long been granted jurisdiction in courts at law and in equity strictly on the basis of a request to the court to right a wrong or apply justice where there would otherwise be none. Historically, the cause

of action might be [*288] called "natural justice" or just "justice." n61 It is therefore not unusual for a cause of action to justify jurisdiction in both courts. n62

III. Distinguishing Unjust Enrichment at Law From Unjust Enrichment in Equity

"There are recurring situations in which modern U.S. courts debate whether a claim in restitution is legal or equitable, either for purposes of determining the right to a jury trial or in applying statutes that refer to "equitable relief." Many decisions give an uninformed answer, interpreting the Mansfieldian proposition about the equitable basis of legal liability to conclude that what is essentially a common-courts claim in Equity rather than Law. The Comment will make it clear that modern Restitution is an amalgam of legal and equitable elements; that their source can be historically distinguished if need be; and that Lord Mansfield was a judge in the law courts." n63

As a result of the Supreme Court's opinion in *Knudson*, the Second and Fifth Circuits n64 have had to revise their perspectives and now enforce the view that unjust enrichment is not strictly a remedy in equity but also at law. On the other hand, it is not always easy to distinguish the two because of the overlapping jurisdiction for claims of unjust enrichment that has proceeded for more than two centuries. Together, the Court's opinions in *Grupo Mexicano*, *Tull*, and *Chauffeurs* stand for the proposition that gaining jurisdiction in equity will no longer be a simple matter of artful pleading and the sprinkling of magic words like "restitution," "injunction," and "accounting."

[*289]

A. Overlapping Jurisdiction and Adequate Protection

A recent article by Daniel M. Klerman describes the competition for jurisdiction between courts at law and the chancery courts in England before 1800. n65 He shows that the competition was due to the fact that most judges of either type of court derived much of their income from court filing fees and that England did not have effective appellate procedures. n66 As a result of these early incentives, among other causes, jurisdiction for some claims overlapped between the two courts, a condition which persists to this day. Today, it is also not unusual for a plaintiff with a claim for intentional commercial torts or torts against property to have to choose between filing the claim as a tort or a cause in action for unjust enrichment at law or in equity.

In the early seventeenth century, King James I tried to resolve the competitive rivalry that had reached the point of both courts sometimes rendering contradictory rulings on the same [*290] claim. n67 Upon the recommendation of Sir Francis Bacon, Attorney General, it was decreed that the courts in equity should not grant jurisdiction when the plaintiff has an adequate remedy at law, confirming the tradition that a court in equity is supplementary to that of a court in law, granting jurisdiction only when required. n68 At the time, the competition between the courts was symbolic of the power struggle between Parliament and the monarchy: Parliament supported courts at law and James I supported courts in equity. n69 From this perspective, the Crown's interest prevailed because it was decided that while jurisdiction in equity should be subject to the existence of an adequate remedy in a court at law, it was left to the courts in equity, unrestrained by effective appellate procedure until after 1800, to judge the adequacy of the court at law remedy. n70

Professor Laycock has shown, however, that as applied in American courts in the twentieth century, the adequate protection doctrine has been used as an excuse for courts in equity to avoid jurisdiction. Laycock concludes that the real reasons for denying [*291] jurisdiction relates more to jurisprudential politics than the adequacy of remedies at law:

These real reasons for denying equitable remedies are not derived from the adequacy of the legal remedy or from any general preference for damages. Some of the reasons are based on the cost of the equitable remedy in particular

circumstances; others apply equally to legal remedies in similar cases. Sometimes there are good reasons to deny legal relief and grant equitable relief instead. But there is no general presumption against equitable remedies. n71

Laycock does not prove that the inadequate remedy doctrine should be abandoned, only that it is applied inconsistently and frequently on a sub rosa basis. It seems reasonable to surmise that the practice of the doctrine in English courts before 1800 was even more arbitrary and inappropriate than that described by Professor Laycock, but the principle survives both periods.

Even though the principle remains vital, there are many exceptions. Some substantive claims are exempt from the adequacy doctrine because they were created by courts in equity such as claims for breaches of fiduciary duty. n72 Both *Dobbs* n73 and *Palmer* n74 provide [*292] exceptions to the rule. n75 They explain, for example, that a plaintiff with a claim for unjust enrichment against an insolvent defendant does not have an adequate remedy at law because restitution at law cannot offer the seniority protections against an insolvent defendant that can be enjoyed by a constructive trust awarded as restitution in equity. The Third Restatement of Restitution and Unjust Enrichment appears to take the same perspective in its discussion of proprietary remedies, those remedies that are unique to restitution at law or in equity (e.g., reformation, replevin, ejectment, specific restitution, constructive trust, subrogation, and equitable lien). Section 4 provides: "In a simple two-party contest between claimant and defendant, the proprietary remedy is available wherever it affords fuller and more expeditious relief than a money judgment." n76

In theory, a party favoring jurisdiction in equity could argue that any advantage to jurisdiction in equity over jurisdiction at law would make the legal remedy inadequate. For example, Part V n77 includes more than ten tactical advantages that a plaintiff might enjoy from jurisdiction in equity, and Part IX n78 includes a number of strategic advantages, depending on the plaintiff's case facts. Other than advantages like seniority, there is little case law on whether [*293] some of the more obscure advantages would be sufficient to make a remedy at law inadequate.

Based on the conclusion that the party otherwise lacked an adequate remedy, a court sitting in equity has the power to order injunctive relief, which includes the authority to order a party to change or transfer title to an asset (supported by the court's authority to jail disobedient parties). n79 By comparison, a court at law has the authority to order the sheriff to seize assets of either party and sell them for monetary relief or, for some claims like ejectment or replevin, to seize the asset and deliver it to an individual who maintained legal title. n80 Generally, a court at law could provide specific restitution to a party that retained title to the asset while a court in equity could restore legal title to a party with a rightful claim. n81

[*294]

B. Principal Distinctions

Recent Supreme Court cases regarding claims for unjust enrichment emphasize the differences between unjust enrichment at law and unjust enrichment in equity. Unjust enrichment in equity is largely based on specific restitution (except for ejectment and replevin, which are awarded by courts at law) and tracing assets and cash flow generated by each specific asset. Unjust enrichment in equity requires identifiable assets or specific and segregated accounts of cash to which the plaintiff claims ownership in equity but lacks title. Unjust enrichment at law consists of a broad range of causes of action and measures of unjust enrichment, including the value of the plaintiff's services in a claim of quantum meruit, an attributed fair market rent for misappropriated but returned personal property, or the defendant's profits.

This has led to a principal distinction that a court at law offers monetary remedies while a court in equity provides specific restitution of an identifiable asset or segregated fund of money n82 (including assets subsequently generated by the identified assets). n83 [*295] Thus a court at law awarded monetary damages, n84 while a court in equity awarded rescission, equitable liens, and constructive trusts (in addition to injunctive relief and reformation).

Dobbs has instructed that the key to a constructive trust is the defendant's assets, not the defendant's liability. n85

With the exception of possible claims under fiduciary duty, claims in equity are not concerned with personal liability. A constructive trust without res does not operate. Courts at law adjudicate personal liability. n86

[*296] A fourth factor relates to punitive damages. Either in the form of exemplary damages n87 or statutory penalties, n88 punitive damages were not traditionally adjudicated in a court in equity. According to the literal language of some opinions, it appears unlikely that a court in equity could award punitive damages in a case relating to ancillary jurisdiction in equity. n89 The Supreme Court's opinion in Tull n90 and the Seventh Circuit's advice in Securities & Exchange Commission v. Lipson n91 also make it clear [*297] that there is no implied statutory jurisdiction for claims of unjust enrichment that include statutory penalties.

The issue of punitive damages offers a good example of the possible distinctions for unjust enrichment by source of jurisdiction. Traditionally, a court in equity did not grant punitive damages or enforce statutory penalties. Today, many state courts allow some form of punitive damages to be awarded by a court in equity. n92

In most cases, punitive damages can be awarded for a claim of unjust enrichment at law (including elective damages) and, in some cases, there can be explicit statutory authority for these damages. Claims that include punitive damages, are incompatible with implied statutory jurisdiction in equity for unjust enrichment, because punitive damages are not a traditional remedy in equity. Implied statutory jurisdiction for ancillary jurisdiction in equity is not clear, but it is likely that the strong tradition in equity against punitive damages would obtain. However, the holding in Tull does not seem absolute; the relative size of the penalty was in issue, not the existence of any penalty at all. n93

This analysis would be incomplete without speculating about how the perception of "equitable jurisdiction" might further confuse the picture. It would not be surprising if a court at law rejected awarding punitive damages because punitive damages are contrary to "equitable principles." Even in a state that does not grant jurisdiction for awarding punitive damages in equity, this conclusion would be wrong in detail but consistent with the current practice. Some might argue that if a court at law can apply the doctrine of unclean hands, it would be equally reasonable to borrow the tradition in equity against punitive damages.

C. Misleading Labels and Rules of Thumb

1. Restitution

The distinctions between a cause of action at law and a cause of action in equity have been illuminated by recent opinions of the Supreme Court and the federal appeals courts regarding jurisdiction [*298] for ERISA claims, n94 as well as many earlier opinions regarding a party's right to a jury trial under the Seventh Amendment. In the process, some commonly held rules of thumb have been exposed as unreliable. Equally important is the fact that many of these opinions have challenged a party's usage of certain terms or labels that have traditionally led to jurisdiction in equity or at law by rote. n95 The Supreme Court warned:

Second, petitioners argue that their suit is authorized by § 502(a)(3)(B) because they seek restitution, which they characterize as a form of equitable relief. However, not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. n96

2. Accounting

The paradigm for a remedy in equity, for many corporate claims, is for the plaintiff to seek injunctive relief as well as an accounting of the defendant's profits. This model is increasingly being challenged on two fronts: challenges to the

need for injunctive relief and to the need for an accounting, if any, to be undertaken by a court in equity. Requests for injunctive relief are now scrutinized to determine if the injunctive relief is an essential or significant issue in the claim or merely an artful device in pleading for jurisdiction in equity. n97

[*299] Similarly, there is a long history of opinions that have held that an accounting can be conducted by a court at law and that an accounting in equity was frequently conducted in a court in equity as an ancillary remedy for a claim that otherwise enjoyed jurisdiction in equity. n98 Courts in equity developed the practice of ordering an accounting to trace the proceeds of identifiable assets or segregated funds as an ancillary remedy to the plaintiff's injunctive relief under the clean-up doctrine. n99 Particularly for copyright and patent claims, [*300] an accounting was awarded in equity as a proxy for the plaintiff's damages. n100

Even though courts both at law and in equity provided jurisdiction for some form of accounting, courts in equity originally [*301] undertook the majority of such cases because they were better staffed to adjudicate cases of great complexity. One authority suggests that the courts in equity were better staffed to adjudicate complex cases because courts in equity were traditionally allowed to employ masters with limited powers to conduct ancillary investigations. n101 The Supreme Court addressed this issue in *Dairy Queen*, warning that in most cases complexity no longer justifies jurisdiction in equity nor is accounting necessarily an inadequate remedy at law:

The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres*, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them. In view of the powers given to District Courts by Federal Rule of Civil Procedure 53 (b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. But be that as it may, this is certainly not such a case. n102

[*302]

3. Profits

Most authorities assert that the profits can be awarded in either jurisdiction. n103 A court of law provides jurisdiction for a [*303] claim of assumpsit, quasi-contract, money had and received, and even unjust enrichment as a cause of action. n104 A court in equity will grant a constructive trust or other injunctive relief, in addition to an accounting, for the defendant's profits as the remedy of unjust enrichment and/or as a remedy for a cause of action for unjust enrichment.

Claiming jurisdiction on the basis that one is seeking the remedy of the defendant's profits is unreliable for four reasons. First, a claim for the defendant's profits alone does not warrant jurisdiction in equity. n105 The defendant's profits are awarded in both jurisdictions. n106 Although it is largely true that a plaintiff is more likely to be awarded the defendant's profits in a court in equity, some courts have awarded the defendant's profits while sitting as a court at law.

Second, it has already been established that the remedy of accounting for profits is not exclusive for jurisdiction in equity and that the remedy is merely provided in ancillary unjust enrichment in equity. If an accounting of the defendant's profits is a remedy suitable for a court at law, the remedy of awarding the defendant's profits must also be suitable.

[*304] Third, the defendant's profits are often used as a proxy for the plaintiff's damages for lost profits. n107 Courts sitting at law have awarded the defendant's profits as a proxy. Conversely, there is substantial evidence that

courts in equity originally awarded the defendant's profits instead of the plaintiff's damages. Such interchangeability does not lend itself to claims of exclusivity for profits in either jurisdiction. n108

[*305] As further detailed in Part IX, below, the key problem for a plaintiff seeking the defendant's profits in a court at law is that so many other measures of the defendant's unjust enrichment are available - e.g., savings, use value, and the equivalent of a reasonable royalty - that even a judge, let alone a jury, can be easily confused by the variety, especially since the case law and other authorities provide a minimal amount of guidance as to how the measure of unjust enrichment should be chosen for a particular case. There is very little case law about substitute measures of unjust enrichment for constructive trusts because a constructive trust is largely administered by motion practice with few opinions, so there are few opinions discussing the availability of substitute measures for the defendant's profits.

IV. How Restitution Can Enrich Your Case Tactically

Equity is a system for the correction of the defects in the law. n109

Unjust enrichment in equity was originally developed by courts in equity to provide the plaintiff with alternative causes of action and remedies. Unjust enrichment at law was developed by courts at law to compete with courts in equity and also to offer the plaintiff alternatives to standard common law causes of action and remedies. Accordingly, one of the principal attractions of unjust enrichment is that it can generally be pled in the alternative and thereby provide an option later in the case. n110

This Part will discuss the tactical advantages of unjust enrichment, which are grouped into the following categories: Liability, Proprietary Remedies, Benefit, Seniority, Burden of Proof, [*306] Procedure, and Disadvantages. Strategic advantages will be developed in the remainder of the article and summarized in Part IX.

Liability. A claim for unjust enrichment can sometimes be the only source of liability. n111 This category includes four of the six sources of jurisdiction, excluding elective unjust enrichment at law and ancillary unjust enrichment in equity.

It is widely held that claims for tax refunds from states must be made as action for money had and received. n112 Claims for unjust enrichment at law can also allow for suits to be made against state governments for unjust acts. n113 A wide variety of claims can be remedied with unjust enrichment including claims based on transfers initiated by the plaintiff (mistake) and various orphan claims based on "natural justice."

Survivability. Claims for unjust enrichment can survive the death of the tortfeasor. n114 In the eighteenth century, it was [*307] commonly held that a plaintiff's claim for a tort ended upon the death of the tortfeasor. Even then, however, a plaintiff was free to claim unjust enrichment at law against the tortfeasor's estate for misappropriated assets. Since then, most states have reversed their opposition to claims against a tortfeasor's estate and survival is the majority rule under the Second Restatement of Torts. n115

Survival of claims, however, does not necessarily apply equally across all sources of jurisdiction for unjust enrichment. A recent opinion by the federal district court of Washington, D.C. held that the FTC's claim under implied unjust enrichment survived the defendant's death and granted a temporary injunction against the estate. The FTC filed its claim under the ECOA statute, n116 claiming that the deceased was a key officer and part owner of a bank that failed to properly inform borrowers or rejected loan applicants of their rights under the ECOA. The court held that "permitting the beneficiaries of the Nash Estate to retain the profits of Nash's allegedly illegal activity would 'utterly frustrate' the purposes of the ECOA." n117 This justification, largely irrelevant for the purposes of determining implied jurisdiction for the FTC's claim, suggests that [*308] the court's jurisdiction somehow expands to meet the legitimate needs of federal agencies.

As a claim for implied statutory unjust enrichment, the FTC would be entitled to jurisdiction for such a claim only as a claim of unjust enrichment in equity. The FTC cannot bring an injunction against the deceased person, so it would not be entitled to ancillary unjust enrichment in equity. Finally, the FTC was not able to distinguish any assets, any isolated accounts of cash, or really any tangible benefits for the violation of the statute except the ipse dixit statement that the defendants must have benefited from the statutory violation. This should exclude the FTC's claim from unjust enrichment in equity. The FTC's claim is clearly one for money that had been received, if any, which is a claim for unjust enrichment at law - a claim for which there is no implied statutory jurisdiction.

Statute of Limitations. The statute of limitations for tort actions is frequently shorter than that for contract. For some varieties of intentional torts against property, the plaintiff can waive the tort and sue in assumpsit, thereby gaining the statute period for quasi contracts. n118 Some jurisdictions do not follow this pattern however. n119 The Seventh Circuit provided an unusually frank opinion on this anomaly by admitting that "it is an historical accident that 'unjust enrichment' is treated as part of contract" and that "still, the form of action from which unjust enrichment [*309] descended has no logical relation to the period of limitations." n120 Be it illogical or accidental, the Seventh Circuit upheld the practice as accepted common law.

Ordinarily, the defense of limitations is made in a court at law while the defense of laches is applied in a court in equity. According to the First Restatement of Restitution section 148, Laches and Statutes of Limitations, there is a significant relationship between the two types of defenses. n121 Connecticut state courts hold to the doctrine that statutes of limitation are not binding on courts in equity and that the court is free to ignore such statutes in determining laches. n122

Claims Against Third Parties. A claim of unjust enrichment may be made against someone who has committed no unjust act but is a beneficiary of a third party's unjust act. n123 This [*310] explains why many authorities define unjust enrichment as the unjust retention of a benefit. The most prevalent example would be an innocent holder of stolen goods. n124 Comment g of section 13, Fraud and Misrepresentation, of the Third Restatement of Restitution and Unjust Enrichment quotes Lord Wilmut who declared, "let the hand receiving [the money] be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it." n125 Normally, claims against third parties will be at law unless the plaintiff seeks specific assets from the defendant. Claims against third parties, however, would not normally seem well suited for ancillary jurisdiction, as there is no injunctive relief to base the jurisdiction in equity.

Non-Dischargeable in Bankruptcy. Restitution ordered pursuant to disgorgement orders has been held to be non-dischargeable in bankruptcy. n126 One reason for not allowing the [*311] discharge in bankruptcy of an award of restitution arises when the award includes a penalty. n127 (In other cases, however, dischargeability is controlled by the Bankruptcy Code. n128) For claims that assert non-dischargeability on the basis of penalty, the defendant should insist that the claim be consistent with the original litigation that won the award of unjust enrichment. According to the Supreme Court holdings in Tull and Feltner, federal agencies, for example, lack implied statutory jurisdiction for penalty awards. n129 It would be inconsistent for an agency to secure implied jurisdiction for unjust enrichment in equity and then, at the subsequent bankruptcy hearing, claim that the award was a penalty.

Contributory Liability. The plaintiff can sometimes avoid offsets to her claim for contributory liability. In Weiss v. Lehman, the court denied the plaintiffs' claims at law (due to the plaintiffs' own "imprudence and greed") but granted the claim for unjust enrichment in equity (breach of fiduciary duty): "Plaintiffs are indeed fortunate to obtain any recovery. I have ruled in their favor on the equitable claims because I found it would be unconscionable for the Lehman and Alpert defendants to benefit by their clear breach of fiduciary duty." n130

[*312] **Not Damages.** One of the most successful American advertising campaigns positioned 7 Up as the "Un-Cola," a distinct alternative to Coca-Cola or Pepsi-Cola. In a similar manner, courts sometimes recognize restitution or unjust enrichment as the "Un-Damages Remedy." Especially in relation to statutory or contractual language, exceptions or loopholes that do not apply to other remedies are discovered for restitution.

For example, implied statutory jurisdiction was developed by three key Supreme Court decisions which inferred jurisdiction because unjust enrichment in equity is distinguishable from damages. n131 The Fifth Circuit applied this doctrine in an unusual manner to support collection efforts for disgorgement orders, holding that imprisonment for failure to disgorge unjust enrichment is permissible because disgorgement "is not a remedy at law; rather disgorgement is equitable in nature, constituting "an injunction in the public interest." n132

[*313] Various courts have held that a claim for unjust enrichment is not the same as a penalty or an award of punitive damages, e.g., affirming an insurance company's liability under an errors and omissions policy and affirming the right of a contractual party to seek unjust enrichment despite the fact that the contract precludes suits for damages or penalties. n133 However, this distinction can also cut in the other direction. It was recently held that insurance policies that require the insurer to defend lawsuits for damages do not necessarily cover lawsuits for equitable relief. n134 Hence, a claim for equitable relief could exclude policy coverage for the errors and omissions of corporate officers or directors or other likely fiduciaries. In the future, drafters of applicable contracts and indemnification agreements might be wise to specifically include unjust enrichment as a form of damage or remedy to hedge against any further growth of this trend.

Most examples relate to esoteric statutes that fail to adequately include claims for restitution as claims for damages. [*314] Thus, a New Jersey state court recently held that a certain state statute that precluded prejudgment interest on torts did not apply to the plaintiff's claim for unjust enrichment. n135

A. Proprietary Remedies

Specific Restitution. Specific restitution allows the plaintiff to recover an asset and/or recover legal title to the asset. Where the plaintiff does not retain legal title to the asset, the unique powers of a court in equity n136 are required to restore title by way of constructive trust, rescission or even injunctive relief. A court at law would generally be considered inadequate to accomplish the same outcome. n137

[*315] Restitution in equity of an asset is generally accompanied by complete or full restitution to restore both parties to their ex ante position. n138 The innocent or non-willful defendant is assessed at most a market rent or market rate of return for the use of an asset or business operation. The willful defendant may have to disgorge all profits, rents, or gains attributable to the asset.

It may be possible to accomplish specific restitution in a court at law (legal rescission), but given a court at law's emphasis on monetary remedies, specific restitution is less likely. Tracing and constructive trusts may be better suited.

A critical trade-off underlies the choice between specific restitution and remedies for a claim in tort. If the plaintiff seeks the value of the asset misappropriated, she is generally entitled to the fair market value of the asset on the day of the tort plus prejudgment interest, if applicable. However, as demonstrated in the case of *Kremen v. Cohen*, n139 if the same plaintiff seeks specific restitution of the asset, she is entitled to the return of the asset plus the income benefits produced by that asset since its transfer to the defendant. n140 In effect, the plaintiff would gain the defendant's consequential profits at the expense of prejudgment interest.

Rescission. Rescission can offer some unique characteristics and advantages and is recognized by courts at law n141 and courts in [*316] equity. First, the plaintiff who claims the remedy of rescission can base the remedy on a claim as simple as "innocent misrepresentation" n142 and may not need to prove damages to the plaintiff or benefit to the defendant. n143 But one of rescission's most unusual advantages owes to the doctrine that the plaintiff can avoid responsibility for intervening events: the plaintiff can avoid responsibility for explaining the impact of intervening events and can avoid the impact of intervening events on her actual damages.

Intervening or contributing factors that damaged the plaintiff or the value of the transaction subsequent to the transaction are not considered relevant, allowing "the plaintiff to shift a market loss to the defendant in circumstances

where the defendant's misrepresentation, not being the legal cause of the plaintiff's injury, would not support a claim for damages in deceit." n144

[*317] The impact of intervening events can arise during consideration of attributing or allocating the established benefit. If so, the issue of intervening events effectively adds to the defendant's burden of proof. Merely shifting this burden may be inadequate:

Professor Todd's analysis assumed that plaintiff had six competitors, presumably including the defendants. In light of the October 1988 trade article listing some eleven other companies selling computer aided cost estimating programs, the Court infers that the number of competitors has increased. Unfortunately, the defendants have not offered any evidence indicating when these competitors entered the market, or what their sales or relative market shares are. Despite the absence of such information, the defendants essentially ask this Court to speculate that plaintiff suffered no damage to the market value of its program resulting from defendants' infringement. Rather than doing so, the Court finds that a modest diminution of plaintiff's lost sales is necessary to account for these factors. In light of these factors and the substantial margin of error in plaintiff's calculation of its lost sales, the Court holds that plaintiff has proven that it **[*318]** has lost thirty-five sales during the period of and as a result of the defendants' infringement. n145

Constructive Trust. The remedy in equity of constructive trust is the most rigorous remedy available to a claim for unjust enrichment. n146 It combines the advantages of tracing methodology and seniority. The remedy attributes the defendant as a trustee as of the date of her unjust acts and holds her to the standard of fiduciary duty. The trust starts with an individual asset or a segregated account of cash and then traces all of the proceeds of those assets for sales proceeds, gains on sale, and operating profits. All assets in the trust are deemed to be separate from the assets and other liabilities of the defendant, ensuring the seniority of the defendant's claim as to the assets and/or their proceeds. There is little case law on the actual operation of the constructive trust on such issues of measuring profits and allowable offsets, which is apparently accomplished through motion practice.

[*319]

B. Benefit n147

Ex Post Perspective. Much of corporate litigation for consequential damages is based on an ex ante perspective for lost profits, i.e., what was reasonable to expect at the time of the tort or misdeed. Frequently, fair market value is determined in the same time frame. Not only are these hypothetical analyses expensive and difficult to prove, but they are also upsetting to a client who knows his lost profit, which is frequently larger than reasonable expectations. It is not uncommon for a court to adopt the remedy of unjust enrichment as a proxy or an easier alternative remedy. n148

The perspective of unjust enrichment and a court in equity is distinctly ex post: what actually happened; how did the defendant actually benefit? n149 Combined with rescission and/or specific restitution, this perspective for the measure of the defendant's benefit can produce a unique award for the plaintiff, especially for a plaintiff with a claim that experienced significant delay after the date of the unjust act and/or a plaintiff in which the key asset values fluctuate greater than normal.

Liability Period. To calculate the plaintiff's lost profits or the value of a damaged or misappropriated asset, the reference date can vary widely; but in the case of a tort, the reference date is generally the date of the tort for valuation and the date of the filing for damages or lost profits. n150 In relation to an "innocent" or non-willful defendant, this standard may apply. n151 Against a willful defendant, gains on the resale of an asset can be assessed for an extended period of time depending on whether the gain is due solely **[*320]** to the passage of time or whether the gain may be attributable to separate contributions of the defendant. n152 Against a willful defendant, unjust enrichment as measured by the defendant's operating profits is generally calculated up to the date of trial and future benefits are not necessarily

precluded. n153 The date of calculation for the defendant's unjust enrichment can vary from the date of the wrong and can allow the plaintiff to realize the market value of a misappropriated asset on a date close to the trial. n154 Traditionally, one of the advantages of electing unjust enrichment for a claim in tort was that the plaintiff was generally entitled to the willful defendant's sales proceeds for converted property. n155

Seniority. The seniority of a plaintiff's claim against a defendant's estate or in competition with creditors is not a result, but a policy objective of unjust enrichment. To promote this policy, various courts and authorities have stated that ensuring such seniority is a legitimate factor to find a remedy at law otherwise inadequate compared to the protection offered by remedies in equity. n156

The policy behind seniority is to preserve the plaintiff's asset or segregated fund as though it were in an escrow account with the defendant enlisted as the constructive trustee. In the form of a constructive trust or equitable lien, a claim for unjust enrichment can achieve seniority to most other creditors, including secured lenders, n157 life insurance policies, n158 tax liens, n159 and even [*321] homestead provisions. n160 A constructive trust can even "prime" or supersede statutes of descent. n161 Professor Kull claims that the only real advantage of a constructive trust occurs when the defendant is on the verge of bankruptcy. n162 The enforceability of a lien or [*322] constructive trust has also been sometimes further promoted by enforcement actions of the court. n163

[*323] Both Dobbs n164 and the Third Restatement n165 agree that there is a limit to the protection privilege of seniority for the recipient of an award of unjust enrichment in the form of a constructive trust or lien in equity. Both authorities have stated that in relation to other creditors in the setting of the defendant's bankruptcy or the proceeds of a life insurance policy, the seniority or protection should not exceed the plaintiff's damages or loss. n166

Burden of Proof. The plaintiff must establish the defendant's relevant revenues. After the related revenues are established, the burden shifts to the defendant to establish applicable expenses to offset the revenues. n167 In addition, the defendant must [*324] bear the burden of proof to establish any related revenues that should be apportioned or excluded. Frequently, courts have held that this burden may not just be shifted back to the plaintiff but must be proven. n168 Even though the plaintiff bears the initial burden of proof, most courts sanction a defendant that fails to cooperate with the plaintiff's discovery. The mild version of the sanction is for the court to lower the standard of proof required for the plaintiff to establish the defendant's revenues. n169 The harsher version of a [*325] sanction is to deny the defendant any offsets and award the defendant's estimated revenues rather than its profits. n170

Discovery for the plaintiff can be easy; it can be somewhat riskier for the defendant. Three policy doctrines apply in this issue. First, courts hold that for issues of measuring unjust enrichment, the party with the relevant data must produce the data. n171 Second, a defendant should not be allowed to defend itself by stonewalling and refusing to produce key documents and data. The sanctions for stonewalling can be severe. n172 Third, to the extent that confusion or uncertainty remains about how to allocate or attribute a benefit that has been reasonably established, the defendant must bear that final burden of proof. n173

[*326] Offsets by attribution include revenues unrelated to the plaintiff's cause of action and revenues related to the defendant's capital and ingenuity. If the defendant fails to produce evidence after the plaintiff has met her burden of proof, the plaintiff's case improves because many courts will follow the standard doctrine and assess the defendant's total revenues in the absence of proof of appropriate offsets. A dynamic can evolve during the motion practice for the defendant to produce such evidence fully and completely to avoid being precluded at trial from establishing offsets.

In some claims for unjust enrichment, particularly breach of fiduciary duty n174 (other than for disgorgement of legal fees), n175 [*327] misappropriation of trademarks (mixed), n176 conversion, n177 misrepresentation, n178 or fraud, n179 the plaintiff may not be required to [*328] produce evidence of damages in fact or causation showing how the defendant's acts impaired the plaintiff.

The defendant's burden of proof and the extreme consequences that can result from a defendant's failure to produce

adequate evidence provide the plaintiff with some opportunities to dramatically improve her claim in the discovery process. The plaintiff's goal is to achieve an order from the court to preclude the defendant from introducing certain evidence that the defendant failed to produce in response to the plaintiff's documented discovery requests.

The California trial court in the case of *A & M Records, Inc. v. Heilman* provides an interesting example. In that case, the defendant had also been indicted under a criminal charge. The trial court agreed with the defendant's position that the Fifth Amendment protected the defendant from having to produce various documents in the civil case that could be used against him in the criminal case. On the other hand, the trial court also ruled later that the defendant [*329] could not suddenly introduce that evidence at the trial for the civil claim. n180

C. Procedural Issues

Jurisdiction. On occasion, a claim for unjust enrichment bypasses the requirement for a minimum claim to establish jurisdiction. n181

Statute of Frauds. A constructive trust on the basis of promissory estoppel can sometimes overcome the limitations of the Statute of Frauds. n182 The Second Circuit explains that the doctrine of promissory estoppel can be either legal or equitable:

Thus, the protean doctrine of "promissory estoppel" eludes classification as either entirely legal or entirely equitable, and the historical evidence is equivocal. It is clear, however, that both law and equity exert gravitational pulls on the doctrine, and its application in any particular case depends on the context in which it appears. For example, where a plaintiff sues for contract damages and uses detrimental reliance as a substitute for consideration, the analogy to actions in assumpsit (law) is compelling. By contrast, when the plaintiff uses promissory estoppel to avoid a draconian application of the Statute of Frauds, the pull of equity becomes irresistible. n183

[*330] **Economic Loss Doctrine.** Florida's economic loss doctrine generally provides that, absent injury to person or property, purely economic damages cannot be recovered in a tort action. But this doctrine is inapplicable to claims for unjust enrichment, because such a claim is based in quasi contract, not tort. n184

D. Disadvantages

The only disadvantage that applies to all sources of unjust enrichment is the risk or uncertainty of the outcome for the claim. Unjust enrichment is less predictable because the individual judge presiding can have a greater impact on the proceeding. State law on punitive damages is increasingly tolerated by state common law for actions in equity, so the distinction for punitive damages between actions at law and in equity is narrowing. n185

The distinction between the two jurisdictions largely remains on the issue of jury trials, as adjudication in equity is conducted without juries. n186 After reviewing a couple of jury instructions for unjust enrichment at law, however, a jury enthusiast might reconsider the advantage of a jury trial. Unjust enrichment at law is sometimes burdened with a wide range of alternative measures for unjust enrichment that can produce a similarly wide range of awards. Unless the jury instructions are carefully crafted, the list of factors and alternatives to consider would seem overwhelming and confusing.

E. Windfalls

Although not necessarily a disadvantage, the issue of "windfalls" warrants a cautionary note. Occasionally, the remedy of restitution or unjust enrichment can result in an outcome well outside most rational expectations. Especially in light of the fact that a plea for an equitable monetary remedy is frequently a choice or option picked by the plaintiff, it seems

difficult to deny the existence of some significant expectations.

[*331] On the other hand, concern is frequently expressed about the appearance that the court may be granting a party an unjustified windfall. Until recently, case opinions acknowledged the general proposition that, even if it resulted in a windfall for the plaintiff, it was more important to order the defendant to disgorge her unjust enrichment. n187 More recently, there may be a trend in such areas as the Lanham Act, perhaps in reaction, that is beginning to question the need for the deterrence role of disgorging the defendant's applicable profits. n188

Notwithstanding the size of an equitable monetary award, any expectations of windfalls based on the literal application of equitable claims and remedies risk disappointment. The aura of unjust enrichment frequently allows the judge and/or jury to exercise great discretion in making justice. The safer expectation is that most issues and principles in claims or remedies in equity will be considered and treated with a wider degree of latitude than normal. The unusually large amount of judicial discretion combined with an area of the law that is not well understood nor well practiced can only accentuate the variance of outcomes and should discourage the expectation of windfalls.

[*332]

V. The Aura of Unjust Enrichment Is Equitable

"The public would be astonished if it was thought that judges did not conceive it as their prime duty to do practical justice whenever possible." n189

It should come as no surprise that the actual remedies awarded for unjust enrichment cannot be predicted or fully explained. This variability or unpredictability may be somewhat entertaining to spectators, but it can be troubling to the litigator on the scene and must be regarded as a major risk factor by any party who considers unjust enrichment. Much of this variability is due to systemic factors in unjust enrichment or the "equitable aura." This equitable aura may also catalyze the human element of our court system and therefore some individual judges may be more apt to show individual traits.

The aura of unjust enrichment appears to impact cases for unjust enrichment in equity as well as at law, as the distribution of cases in this Part is evenly split between the two sources of jurisdiction. Even in relation to claims of unjust enrichment, most courts sitting at law do not exercise the authority and latitude historically reserved for courts in equity. On the other hand, an action for money had and received, quasi-contract or other assumpsit-like claims is widely acknowledged as a cause of action most resembling a bill in equity. n190

The legal community's inexperience and misconceptions about unjust enrichment are probably one of the leading sources of variability. Other than the opinions already quoted from most authorities, no definitive support can empirically prove such a statement. Four anecdotal examples of varying significance are:

1. In her dissent in Knudson, Justice Ginsburg argued that the action should be considered a cause of action in equity but quoted Lord Mansfield from *Moses v. McFerlan* to support her position. n191 As is pointed **[*333]** out in the Third Restatement of Restitution and Unjust Enrichment, Lord Mansfield presided over a court at law and the case of *Moses v. McFerlan* related to a cause in action at law. n192

2. In one recent case, the opinion analyzed the plaintiff's claim for unjust enrichment with the remedy of a constructive trust by discussing unjust enrichment as a form of quasi-contract and cited the elements for quasi-contract with a case related to a claim for quantum meruit. The opinion ignored the fact that constructive trust is not a remedy for unjust enrichment at law (quasi-contract) and that the elements for quantum meruit (implied contract in fact) can differ from quasi-contract (implied contract in law). n193

3. Federal agencies assert in their claims for implied statutory unjust enrichment that a court must order the defendant to disgorge its revenues, a time-honored remedy in equity. Though frequently successful, the FTC claims are supported by precedents that awarded restitution of the defendant's profits and can cite no precedent for such a remedy as the term "disgorgement" was not actively used before 1960. n194

[*334] 4. Professor Rendleman recounts a seminar about the "Great Mississippi Tobacco Settlement that featured some of the key litigators to that case but also referred to the plaintiffs' claim for equitable subrogation as a tort. n195

Comparing the organization and development of the body of the law of restitution to that of torts or contract, Andrew Kull laments the relative immaturity or stunted development of restitution. n196

A. Authority

The judge's role in a proceeding in equity allows for a great deal more discretion and authority than when she sits at law. Kevin Kennedy's article traces the historical context for his assertion that a court in equity has more authority than the court at law. n197 Courts in equity developed their authority to supplement courts at law "in a broad jurisprudential sense, equity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of [*335] strict legal rules." n198 Among others, the state supreme courts of Utah n199 and New Mexico n200 agree.

Professor Dobbs observes that there are three key components to the authority of a court in equity: 1) equity's interest in moral conscience; 2) equity's mandate to ignore formalities of title and/or to assign the defendant's liability by calling him a constructive trustee; and 3) equity's power to act against the person rather than the property of the defendant, including the power to hold a party in contempt. n201

B. In Pursuit of Natural Justice

The mandate for a court in equity emphasizes the high priorities of moral conscience and public policy. In the process of supplementing or even overruling the common law system, a court sitting in equity may sometimes need an alternate pole to orient its compass. Originally, of course, the Chancellor of the Exchequer, who was in charge of England's courts in equity, was appointed from the clergy.

A note in the 1903 Harvard Law Review describes these moral priorities at the beginning of the twentieth century:

Equitable remedies being extraordinary, they may, at the chancellor's discretion, be refused or given in order to do equity. And equity is viewed in this connection in a large sense; it is not only what is just and right as between plaintiff and defendant, but also what, according to a sound public policy, is just and right as regards the interests of the public. n202

[*336] It was not coincidental that the same note criticized a Seventh Circuit opinion that debated whether the court should grant jurisdiction to a plaintiff seeking redress for the violation of his patent of a device related to gambling machines. n203 In that case, the court decided to "hold its nose" and grant jurisdiction to such an immoral device. n204 A similar issue was raised more recently by the Second Circuit about the patent for a device that is largely used for the consumption of marijuana. That court also chose to hold its nose and enforced the plaintiff's patent. n205

The Texas Supreme Court has a well-known statement about unjust enrichment and courts in equity, that "in order to satisfy the demands of justice, courts of equity will indulge in presumptions and even pure fiction." n206 Recently, courts in California and Nebraska have followed that doctrine to support their belief in the importance of family relationships. Despite significant proof that the plaintiff's husband was not the biological father of her child, the court applied the "conclusive presumption" that a woman's husband was the father of her child and therefore rejected the

claim of the mother against a second man in a paternity suit:

[*337]

A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved and upon which liability for continued responsibility to the child might be predicated. This social relationship is much more important, to the child at least, than a biological relationship of actual paternity. n207

The Nebraska Supreme Court faced the same kind of problem from a different perspective. After twelve years of providing child support, the putative father discovered that the child's mother had deceived him into paying child support. The district court, acting as a court at law, ruled for the mother but was reversed by the court of appeals which was reversed in turn by the state supreme court:

Moreover, a tort or assumpsit claim that seeks to recover for the creation of a parent-child relationship has the effect of saying "I wish you had never been born" to a child who, before the revelation of biological fatherhood, was under the impression that he or she had a father who loved him or her We decline to allow a party to use a tort or assumpsit claim as a means for sending or reinforcing this message. n208

In another case, the supreme courts of Wisconsin and the United States held that the equities of a situation sometimes demand that a contract, admittedly illegal and unenforceable, be enforced. A bank in Wisconsin foreclosed on a loan to a local dairy and began to operate the dairy, albeit illegally, under direct management. While managing the dairy, the bank agreed to hold some of the dairy's cash [*338] flow in escrow for dairy farmers who delivered their milk for processing into butter. Then the bank declared bankruptcy and the dairy farmers sued to enforce their agreement which the trial court found illegal and therefore unenforceable. The Supreme Court of Wisconsin reversed and the U.S. Supreme Court affirmed that reversal:

As the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation. n209

In *Pope v. Garrett*, the Texas Supreme Court met the demands of justice in a dispute between eight heirs. Before she died, the testator wanted to make a new will in favor of someone outside her family but a couple of her natural heirs prevented the woman from amending her will before she died. The court held that the natural heirs who received a share of the estate, even those who had no knowledge of the misconduct of other heirs, must disgorge their inheritance. n210

The City of Chicago filed a class action claim for the people of Chicago, alleging unjust enrichment and requesting that the court grant a constructive trust. The defendant owned a landmark building on an otherwise desirable downtown location. To secure the city's permission to build on the location, the City was misled to believe that the defendant would move and reconstruct the building on a less valuable plot. After securing the approval, the defendant demolished the building without any attempt to save any of the building. Eventually, the state court of appeals reversed the trial court and found the defendant liable for fraud or constructive fraud. While the case was remanded to the trial court, the court of appeals suggested that the unjust enrichment be calculated as the amount of money that [*339] the defendant saved by not having to fulfill his promises to restore the landmark building, estimated to cost about \$ 250,000 and to be paid to the city of Chicago. The defendant may have gotten off cheap; the court could have awarded the city the profit that the defendant gained in the value of the land from clearing the building. n211

C. Equitable Discretion and Adequate Remedy

Dobbs emphasizes the fact that a court in equity's relief is meant to be extraordinary and not a matter of right of the parties for litigation:

Few American citizens, however, would think of themselves in court as humble petitioners, on their knees before the judge who may deny relief on grounds that cannot be stated as principles or applied even-handedly to all suitors. n212

The counterpoint to denying jurisdiction to a court in equity on the basis of natural justice is that a court in equity is expected to avoid interfering in policy matters or other bodies of substantive [*340] law. n213 Thus the District Court of Maine denied jurisdiction to a plaintiff because even though the plaintiff had stated a claim for unjust enrichment, such litigation would interfere with anti-trust and consumer protection law. n214

D. Exercising Authority or Seeking Compromise

Combining the equity court's authority, latitude and equitable discretion has lead to two types of opinions that are important to consider in understanding the variance of opinions on remedies. First, there is the kind of opinion in which the Court appears somewhat eager to wield its authority. Professor Rendleman provides an example in his discussion of the equitable discretion claimed by a New Mexico court in *Navajo Academy v. Navajo United Methodist Mission School*:

The Academy was operating a school for Navajo youngsters on the Mission School's property, but the [*341] relationship deteriorated. After the Academy's lease of Mission School's facilities expired and renewal negotiations failed, the Mission School sued in magistrate's court to evict the Academy. The Academy reacted with an action in district court seeking a "declaration that it was entitled to continued occupancy of the property under a "constructive' long-term lease." The district judge, although not finding a lease, thought it "impractical" for the Academy with its 250 students to vacate the premises and granted it three years to leave. The New Mexico Supreme Court held that "given the trial court's findings and the unusual circumstances of this case, the court did not abuse its equitable discretion as a court of equity in permitting the [Academy] to remain on the property for three years following termination of the lease." n215

On the other hand, there are also courts that seem somewhat timid in their reluctance to fully apply the principles of equity. For example, the author reviewed more than 100 cases in which the plaintiff failed to meet her burden of proof to substantiate costs or expenses for offset. In about half of the cases, the judge awarded the defendant's revenues to the plaintiff as provided in the First Restatement of Restitution, the Third Restatement of Restitution and Unjust Enrichment, and most relevant federal statutes and most case law. In the other half of the cases, the court relented for the defendant and made an assumption or relied on weak evidence to attribute an expense or cost margin. About half the time, the courts choose not to exercise their authority to deny the defendant any offsets.

Another example demonstrates some courts' tendency to cushion or compromise the practices of equity litigation. In a previous unpublished article, the author examined the determinants of reasonable royalties that had been awarded between 1973 and 1998. The three statistically significant independent variables included each of the two parties' profitability and the mid-point [*342] between the positions taken by the two parties. On average for that sample, the reasonable royalty amounted to 43.5% of the sum of the plaintiff's and defendant's proposed reasonable royalty. The court's determination of a reasonable royalty may frequently amount to just splitting the difference between the plaintiff and the defendant. n216

Any attempt to deduce a hidden motive or intent of a judgment or case opinion is certainly suspect and therefore the

following "evidence" can only be seen as circumstantial. However, it does appear that some opinions are so seemingly weak on the particular facts that they are really part of an attempt to appease both sides of any issue.

A Fifth Circuit opinion on a trademark claim related to a hotel that continued to display a Holiday Inn sign on the building after the franchise agreement was terminated. n217 Liability was fairly assured. Yet the court accepted the hotel manager's testimony that the Holiday Inn sign only attracted transient traffic that amounted to about 30% of the hotel's business. The hotel is located in front of the entrance to Dallas Love Field, a commuter airport for intrastate traffic, but the manager claimed that 70% of his business came from his personal efforts to market the hotel to airport personnel for multiple night stays. The court attributed only 30% of the hotel's profits to the misappropriation of Holiday Inn's trademark but then tripled the award for the plaintiff. n218

That analysis is seriously flawed. First, there is no basis provided to support the belief that when the manager was promoting the hotel to airport personnel that he scrupulously avoided referring to the hotel as a Holiday Inn hotel and it seems likely that the plaintiff's brand image reinforced his marketing efforts. Second, hotels operate with a high degree of overhead and fixed costs. If any hotel were to lose thirty percent of its business, it could not make a profit. The hotel manager's testimony would have been considered inadequate to carry the defendant's burden of proof for apportionment or establishing expenses. In the end, the plaintiff was not necessarily treated unfairly but the case opinion serves as questionable precedent.

[*343] Similarly, the appellate court's opinion in *Edwards* seemingly sacrificed economic analysis for the sake of appearances. As affirmed by the state supreme court, the trial court held that the plaintiff was entitled to the portion of the cave operation's profits that was equal to the approximate share of square footage owned by each party. n219 The court explained that part of the reason that this was a fair allocation was that the court was excluding from consideration the profits of the hotel that was operated adjacent to the attraction site. Either the hotel profits were significant and applicable as indirect profits or they were not. As it stands, however, it is not known how the hotel profit issue changed the analysis. n220

E. Emotional Response

Finally the combination of authority, natural justice and equitable discretion are a breeding ground for emotional responses. Occasionally, such out of the ordinary responses are evidenced in the language of the opinion or strained process that produces an unusual ruling or remedy. Even the British are not immune. Consider the case of *George Blake* that was argued before the House of Lords in 2000 and resulted in a landmark decision that awarded unjust enrichment for the breach of contract. n221

Some defense lawyers might be pessimistic for the chances of a defendant that is described in the first sentence of the opinion as follows: "George Blake is a notorious, self-confessed traitor." On the other hand, attorneys familiar with the facts might think that Blake got off lightly because George Blake was the most deadly turncoat in the modern history of British intelligence. n222

[*344] Blake established his credentials with British intelligence during the Second World War in which his resourcefulness and courage in occupied Europe were highly regarded. Even at that time, however, he reported to the Soviet Union, the erstwhile ally of Great Britain. After the war, Blake rose in the ranks of British intelligence and continuously fed high-quality information to the Soviets, which directly led to the deaths of more than forty British agents and a series of public embarrassments at the hands of Soviet intelligence.

Blake's treason was discovered, and on May 3, 1961 he pleaded guilty to five counts of unlawfully communicating information contrary to the Official Secrets Act of 1911. He was sentenced to forty-two years' imprisonment but he escaped in 1966 and fled to the Soviet Union after serving only five years of his sentence. He wrote a book, entitled *No Other Choice*, about his experiences as a double agent which was published in London in 1990 and accumulated about two hundred thousand pounds in royalties. The British crown sued Blake and the publisher to deny Blake the royalties

from his memoirs.

It appears likely that Blake experienced some rough justice in the British legal system, especially at the appellate level where the judge remarked, "The ordinary member of the public would be shocked if the position was that the courts were powerless to prevent [Blake] profiting from his criminal conduct." n223 The trial judge dismissed the claim against Blake for breach of fiduciary duty which was affirmed by the court of appeals. However, the British government was allowed to amend its complaint and change its theory to a civil claim to enforce the criminal matter of treason. That claim was also rejected by the court of appeals but the appellate judge suggested that there might be a viable claim against Blake for breach of contract, which was the issue that finally prevailed in the House of Lords.

In arguing the case before the House of Lords, the pro bono counsel for Blake warned that the House of Lords was being led into making bad law in order to render an intuitively just decision to [*345] punish a traitor. n224 However, the majority opinion for that case, presented by Lord Nicholls, is a masterful discussion of the history of equity law and of how small a step it would be for the law to grant an equitable remedy for a breach of contract in a negative pledge case. n225

There are many examples of American cases in which the court's emotion is manifest in the case opinion (although they may only be exceptional opinions in which a court chooses to expose some emotion). n226 However typical, a sample of opinions reveals that these examples generally do not express outrage in reaction to case facts, but rather to the defendant's inappropriate behavior during the litigation. There are a number of cases in which elderly, infirmed widows have been cheated n227 and other cases in which good faith to the public has been shamelessly betrayed n228 but these case opinions are fairly calm and even require the plaintiff to make counter restitution to the defendant.

Some courts have tried to separate sanctions from the verdict. The Fifth Circuit remanded a case for the court to reconsider the verdict after admonishing the lower court that misbehavior by the defendant during the trial should primarily be addressed only with sanctions. This may be the exception rather than the rule. n229

[*346] In contrast, there is a Wyoming Supreme Court opinion in which the result n230 and the language appear extreme. The case relates to a rancher who converted a road grader. n231 In its opinion the Court goes to some length to explain the issues and describes restitution in terms reminiscent of Shakespeare: "Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to 'disgorge' his gains." n232 That emotional clue may help explain why that Court affirmed a decision that awarded about \$ 60,000 in attributed lost monthly rental fees as unjust enrichment for a misappropriated road grader that was worth no more than \$ 20,000 at the time of the tort (which was also returned in kind) and to which the trial court added another \$ 8,000 of damages awards for deferred maintenance. It is doubtful that many courts would have been so generous without some significant anger at the defendant. Regrettably, this case among two or three other cases with aggravated case facts n233 led other state courts to order the defendant to disgorge revenues rather than profits and the group of cases is now sometimes cited as justification for the extreme remedy.

The case of *Lucini Italia Co. v. Grappolini* n234 in the Northern District of Illinois provides another example. The court awarded the plaintiff (Lucini) damages based on sales projections for a new product line that indicated a leap from \$ 1.2 million in the first year to at least \$ 5 million in the fourth year:

[*347]

Lucini's extensive expenditures preparing its LEO products for market made good business sense to Lucini based on its sales forecasts for the products. On its grocery line of LEO products, Lucini conservatively forecast sales of at least \$ 1.2 million in its first full year; at least \$ 2.1 million in its second full year; at least \$ 2.5 million in its third full year, and at least \$ 5.0 million in its fourth full year... . Lucini anticipated profits of at least \$ 4.17 million on the grocery line over its first four years. n235

While the verdict may be reasonable, it seems unlikely that, absent the court's pique n236 with the defendant's refusal to produce financial statements, any district court in the Seventh Circuit would give the plaintiff such a "free pass" with such evidence. In addition to the lost profits of \$ 4,170,000, the trial judge awarded the plaintiff \$ 800,000 for development costs of the trade secret, \$ 1,000,000 for punitive damages, legal costs of \$ 736,311.54 for attorney's fees and computerized research in the amount of \$ 13,753.74. n237

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VI. An Amateur's Guide to Equitable Definitions and Semantics

"The terminology of restitution is abstruse and confusing and is no matter for amateurs." n238 "We are all amateurs; we don't live long enough to become anything else." n239

Unfortunately, there are few professionals in the terminology of restitution. Those of us who are amateurs can survive by keeping the following principles in mind:

(A) Do not accept generic labels at face value. The terms "restitution," "unjust enrichment," and "profit" have very different meanings and applications;

(B) Remedies of restitution or unjust enrichment are not the same as damages or penalties. Restrictions on damages or penalties therefore may not apply to unjust enrichment; and

(C) The term "benefit" is unique among remedies (see Part V).

The remainder of this Part offers examples of these principles.

A. Profits

It is not unusual for business damages, especially consequential damages, to be considered lost profits rather than lost value. Profits have been used as a somewhat misleading abbreviation for years and in many areas of the law. n240 The concept of profits is misleading because business value is a function of three main variables:

[*349] (1) Free cash flow; n241

(2) Expected growth in free cash flow; and

(3) Business risk.

Over short periods of time, the failure to account for capital expenditures (including increases in working capital) is a relatively minor timing issue as the termination of an infringing activity will recoup the working capital investment and any directly related capital expenditures n242 should provide depreciation charges that can be offset against related revenues. While growth rates (or changes to growth rates) and changes in business risk can be significant considerations, there are few cases that include those considerations in unjust enrichment calculations. n243

The term "profits," however, remains misleading and has caused considerable mischief. The concept of benefit better resembles the financial measure of "contribution," or operating income, or is sometimes comparable to "EBITDA" (Earnings Before Interest Taxes Depreciation and Amortization). The term "profits," however, tends to imply the amount of revenue remaining after all applicable expenses and expenditures, meaning a calculation according to Generally Accepted Accounting Principles (GAAP), which are generally irrelevant for calculating the remedy. n244 A further complication is the fact that accountants do not generally [*350] provide a line item in a company's income

statement or statement of cash flows that corresponds to either "benefit" or contribution.

To calculate the defendant's benefit in cases relating to copyrights and trademarks, however, the statute calls for the consideration of the defendant's profits. n245 Given that restriction, however, some opinions and articles confuse the many different definitions of profits. Sometimes a business's revenue or sales are deemed to be "gross profits" and many cases end up focusing more on what gross profits or operating profits actually are. Not every business uses these terms interchangeably, nor does every business account for its activities in the same manner, or even using the same definitions. n246 Importantly, businesses like wholesalers or brokers [*351] differ about whether to report their business operations in a "grossed up" manner or a net manner, i.e., reporting all revenues or just the net commissions.

At times the gain from re-selling an asset at issue can be confused with the defendant's business or operating profits. According to the First Restatement of Restitution, the defendant is entitled to keep either type of profit if he acted without knowledge or willfulness (except at times in breach of fiduciary duty). n247 Palmer agrees in theory but states that this rule is frequently breached with courts awarding resale profits. n248 Business or operating profits are considered consequential damages and the Third Restatement of Restitution an Unjust Enrichment explicitly provides that such profits are only appropriate in cases of disgorgement. n249

B. Damages vs. Restitution vs. Penalties

The fact that restitution is regarded as neither a form of damage nor a penalty may seem to be a relatively minor point. In some circumstances, however, restitution's resulting distinction can provide some useful loopholes for those in need. Originally, this distinction led to the development of implied statutory jurisdiction for federal agencies. In *Porter v. Warner Holding Co.*, n250 the Supreme Court considered a fairly small case in which the Price Administrator sought to enjoin the violation of the Emergency Price [*352] Control Act of 1942 in the form of excessive rents and to have the court award the defendant landlord's unjust enrichment. Section 205(a) of that Act provided jurisdiction for the Price Administrator to obtain injunctive relief and section 205(e) provided for penalty provisions. n251

By a vote of five to three, the Court made two key holdings. The Court first held:

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." n252

This doctrine was expanded in a subsequent case such that a district court is now presumed to have jurisdiction for the full range of equitable remedies unless the statute specifically excludes those remedies or the remedies are incompatible with the legislative purpose of the act. n253

The second holding was that the remedy of unjust enrichment does not conflict with the penalty provision of section 205(e), largely because such an equitable remedy is not a penalty as it merely [*353] restores the parties to their ex ante positions. n254 Ironically, this same distinction has been used to justify jurisdiction in actions against federal agencies under the Administrative Procedure Act, which waives sovereign immunity to plaintiffs that seek "relief other than money damages." n255

Similarly, income tax refunds are structured as claims for money had and received, a claim for unjust enrichment at law. Other claims against the federal government for unjust enrichment are generally exempt from suits for torts against the federal government. n256

Most of these exceptions or loopholes are extremely eclectic and frequently the result of inexact drafting of

government statutes. n257 Opinions confirming the distinction reflect the value to a plaintiff or defendant of looking for potential exceptions for restitution when statutes restrict their coverage to damages or penalties.

[*354] The applicability of the distinction between restitution and damages (or penalties) has not proven as significant in the area of private contracts in such issues as insurance coverage and indemnification agreements. There are a few case opinions that grant or deny the relevance of this distinction. n258

C. Expense vs. Expenditure: The Error in Sheldon

A strong example of the confusion possible in the analysis of remedies for unjust enrichment is found in the Second Circuit's opinion in *Sheldon v. Metro-Goldwyn Pictures Corp.*, n259 a highly regarded case in the area of limiting "benefit" to attributable profits. The Circuit's analysis states that comment d to section 158 of the First Restatement of Restitution shows that a willful tortfeasor, as constructive trustee, is often denied credit for his expenses:

No new light has come, and we now hold that the borrowing was a deliberate plagiarism. It follows that they can be credited only with such factors as they bought and paid for; the actors, the scenery, the producers, the directors and the general overhead... . Indeed a constructive trustee, who consciously misappropriates the property of another, is often refused allowance even of his actual expenses ... and although this harsh rule, which would charge the defendants with the whole gross receipts, has been softened, a plagiarist may not charge for his labor in exploiting what he has taken. A fortiori he should not be allowed for the currency which his reputation may have given to the combined product. n260

[*355] On the other hand, comment d to section 158, "improvements and additions," states the following:

The conscious wrongdoer is ordinarily not allowed compensation for an improvement or addition to the subject matter... . Where action is brought, not for specific restitution of land, but for restitution of the proceeds even the conscious wrongdoer would ordinarily be entitled to receive credit for the amount by which his improvements added to the sales value of the subject matter. The common law rules with reference to the conversion of chattels, however, made no allowance to the willful converter for additions made, while protecting the innocent converter

Where the conduct of the recipient was tortious although not intentionally wrongful, normally he would be entitled to restitution of his expenditures to the extent that they increased the value of the subject matter if this is land... .

A defendant who was not more at fault than the claimant for the transaction by which the property was acquired would be entitled to compensation for any amount which he spent upon the property in ignorance that it would not inure to his benefit. n261

[*356] To make the matter even more clear, comments b and c of this section of the Restatement state that even an intentionally fraudulent defendant is entitled to compensation for payment of real estate taxes n262 and necessary repairs n263 except under extraordinary circumstances that "require the imposition of a penalty." n264 Therefore, even the intentional defendant is entitled to credit for his necessary expenses unless the court wishes to impose a penalty that case law and statutes forbid in unjust enrichment remedies. n265 By confusing operating expenses with expenditures for improvements, the Second Circuit strengthened the myth that revenue disgorgement is sometimes applicable as an equitable remedy.

The Second Circuit's analysis is not even a fair statement of the law relating to the reimbursement of disloyal trustees for reasonable expenses incurred. The Southern District of New York provided a more accurate summary with following statement:

It is true that a fiduciary may not be paid for services in whose discharge he has been disloyal; and at times, if his conduct has been willful and deliberate, he may even forfeit all compensation; but it is at least doubtful where in any circumstances he will lose his right to indemnity for any expenses which have actually benefited the beneficiary, though of course the beneficiary may set off against these any loss that he has suffered. n266

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D. Counter-Restitution

To warrant equity, a plaintiff needs to act equitably. All such maxims have their limitations and exceptions but the intent of this saying is important to understand in calculating remedies. Generally, if a plaintiff pleads for the court to grant an equitable remedy then the plaintiff needs to be prepared to treat the defendant equitably. Today, there is a large group of equitable remedies that require the plaintiff to make restitution to the defendant if the defendant is to make restitution to the plaintiff. The plaintiff must account for benefits that the plaintiff receives that are not included in the calculation of the defendant's benefit. In many jurisdictions, the plaintiff that makes a claim for mistaken improvements must be prepared to compensate the defendant for any real estate taxes or necessary repairs paid for by the willful defendant. n267 The plaintiff that claims equitable rescission must generally disgorge any payments received and any interest earned on the payments received from the defendant. n268

Rarely is an equitable remedy limited to disgorgement by one party or the other. Professor Kull's recent article *Restitution's Outlaws* n269 discusses some of the circumstances that preclude the [*358] defendant from making a claim for counter-restitution or exclude the counter-benefit from the calculation of benefit. Kull calls this group of defendants equity's "outlaws" who are being punished by being deprived of a counterclaim or counter remedy. n270

Conceptually, a defendant's expenses that are offset against his revenue to calculate the net benefit could be considered to be counter-restitution. Indeed, the issue of whether the defendant's expenditure benefited the plaintiff and/or inured to the defendant's advantage or benefit from his unjust act is a useful standard for evaluating the appropriateness of offsetting any particular expense. However, whether or not an expense can be offset against the defendant's revenues is within the court's discretion, n271 while denying counter-restitution is more a question of law and equitable tradition.

VII. Defining the Benefit

Measuring the defendant's benefit is unique among remedies as the measure is not necessarily tied to the concept of profit or fair market value. Because of these differences and the impact of certain ancillary rulings, one should normally expect the defendant's unjust enrichment to be greater than the plaintiff's lost profits in comparable circumstances, owing to the dynamics related to the defendant's burden of proof that have already been discussed above: 1) there is significant likelihood that the defendant cannot establish [*359] all of his related costs; and 2) the motion practice relating to fixed costs or overhead is a net advantage for the plaintiff. n272

The remainder of this Part will explain how the following issues also tend to favor measure of unjust enrichment over lost profits: 1) the ability of the plaintiff to "cherry pick" only the defendant's profitable operations and exclude distinguishable losing operations should lead to a substantial advantage; and 2) under certain circumstances, the ability to determine the subjective value of the benefit from the defendant's own economic situation.

The First Restatement of Restitution and the present draft of the Third Restatement of Restitution and Unjust Enrichment make it clear that a benefit is meant to include the value of a transfer to the defendant as it increases the defendant's net worth by increasing its assets, decreasing its liabilities, or providing services of subjective value to the defendant. n273 Dobbs offers the following list of ways that a benefit can be calculated: n274

[*360] (a) The increased assets in the hands of the defendant from the receipt of property; n275

(b) The market value of services or intangibles provided to the defendant, without regard to whether the defendant's assets were actually increased; that is, the amount which it would cost to obtain similar services, whether those services prove to be useful or not; n276

(c) The use value of any benefits received, as measured by (i) market indicators such as rental value or interest or (ii) actual gains to the defendant from using the benefits, such as the gains identified in item (e) below; n277

[*361] (d) The gains realized by the defendant upon sale or transfer of an asset received from the plaintiff; n278

(e) Collateral or secondary profits earned by the defendant by use of an asset received from the plaintiff, or, what is much the same thing, the savings effected by the use of the asset. n279

An aspect of a defendant's benefit that has not received much attention up to now has been the gains to the defendant's goodwill n280 or future benefits. n281 In his article, *Measuring the Gains of Trademark Infringement*, Dennis Corgill explores his hypothesis that current measurement of the benefits from trademark infringement ignores some of the larger consequences of the trademark infringement, which includes an acceleration or enhancement of the infringer's product life cycle, possibly even the infringer company's life cycle, that could not occur in the absence of the infringement. n282

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B. Benefit or Advantage Is a Net Concept

The simplest way to understand the literal meaning of the term "benefit" is to calculate the defendant's net worth before and after the act or with and without the unjust activity. Have the assets increased in number or in subjective value to the defendant without being offset by an equal increase in the defendant's expenses or liabilities? Alternatively, have the defendant's liabilities decreased without an offsetting decline in her assets? In either case, the defendant's net worth will have increased and the defendant will have benefited:

Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth... . A saved expenditure or a discharged obligation is no less beneficial to the recipient than a direct transfer. n283

Just as the defendant's net worth is a net or residual figure, so is the defendant's benefit or profit. Any calculation of benefit or profit must be a net or residual calculation in which the credits and debits are considered or the revenues and expenses are considered. As the Second Circuit points out, "profit" is not defined by statute, but the common usage of the term implies a net or residual calculation. n284

A large number of courts have held or opined that benefit or profits must be calculated on a net basis. n285 There is also substantial **[*363]** authority among scholars, case law and the Third Restatement of Restitution and Unjust Enrichment that the decision to disallow known, appropriate expenses is to exact a penalty on the defendant and that such penalties are not recognized or disallowed by either statute or case law. n286 A wide variety of courts, federal and state, in **[*364]** opinions on a variety of applications of unjust enrichment have opined or held to a similar conclusion. n287

Even when the Second Restatement of Agency specifically provides for the disgorgement of a defendant's revenues, most courts have chosen to disagree. The Second Restatement of Agency provides that a disloyal agent who profits improperly may not deduct the amount of any expenses that the agent incurred in acquiring the profit:

An agent who receives a bribe or otherwise profits improperly cannot, in an action by the principal to recover it or its value, deduct the amount of expense to which he has been put in acquiring it... . On the other hand, if an agent purchases for himself property [*365] which he should have purchased for the principal, the principal is entitled to get it only if he reimburses the agent for what he paid or should have paid. n288

This suggested rule or observation has been widely followed in bribery cases, particularly involving bribery of government officials. n289 Otherwise, most courts have chosen to allow offsets because revenue disgorgement appears too harsh and imposes a penalty rather than an equitable remedy:

But we think that save in exceptional cases such a rule is to [sic] harsh: it imposes a naked penalty, based more on retribution than on the equities of the situation. Stern though the law is in requiring an agent to repay secret profits, it is not so harsh as to say that a principal may recover more than the agent has profited. This is the reasoning of a number of cases which declare that the net rather than the gross profit realized by an agent should be the measure of recovery. That is the reasoning we think we should adopt here. n290

[*366] These decisions to provide counter restitution for breaches of fiduciary duty are significant because, as Dobbs points out, the policy concern for breaches of fiduciary duty are generally used to justify the most stringent measures of unjust enrichment. n291

C. Cherry-Picking the Defendant's Operations

There is strong support for the plaintiff to exclude discrete operations or discrete time periods in which operating losses would otherwise reduce the defendant's net unjust enrichment. n292 Thus, the plaintiff is free to exclude the losses of individual theaters in a chain of theaters or restaurants, n293 fiscal years that experienced losses, n294 and discrete product lines or groups that lost money. n295 There is not much explanation, except in the negative, that "the plaintiff is not an actual partner and does not have to take the bad with the good":

[*367]

Wolfe asserts error in the failure of the court to set off the losses against the profits. It is clear, however that in the making of an accounting an infringer is not permitted such a setoff. Mr. Justice Cardozo, in the case of a patent infringement, ... stated the principle as follows: ""The owner of the patent, in holding the infringers to an accounting, is not confined to all or nothing. There may be an acceptance of transactions resulting in a gain with a rejection of transactions resulting in a loss. Upon a statement of an account, a patentee is not looked upon as a "quasi-partner of the infringers,' under a duty to contribute to the cost of the infringing business as a whole... . He is the victim of a tort, free at his own election to adopt what will help and discard what will harm."" n296

The Second Circuit opinion in *Sheldon I* draws a useful distinction between losses that a plaintiff is free to exclude and those losses that the plaintiff is not free to exclude. The court held that operating losses for certain theaters and/or certain years could be excluded. Additionally, the court held that identifiable losses that are an inseparable part of the production process are on-going losses; like production waste, on-going losses are an ordinary cost of business and must be included. n297 In that case, the "waste" was the production cost of a movie that was not exhibited or distributed. n298 The Second Circuit held that the "dead-end films" were an indivisible and inevitable part of the production process:

The next objection is to the inclusion in the "overhead" of an allowance for continuities scrapped, and for completed

pictures never exhibited. The plaintiffs invoke the rule that an author, like a [*368] patentee, may select those infringements which prove profitable, and ignore the rest... . On the other hand there is in most industries a certain inevitable wastage, resulting from imperfect industrial technique and the like; and this, being a condition upon all production, is a part of the cost of production... . The charge for wasted pictures and "continuities" was of this kind; owing to the imperfect forecast of what would prove a good "continuity", a number of false starts were inevitable; sometimes even a complete picture would also turn out to be valueless. The plaintiffs answer that they were not in partnership with the defendants, whose failures should not be charged to them. But the infringing picture owed its success in part to the fact that it was only one of a large number produced that year. n299

This principle for measuring the defendant's benefit has not been substantiated with basic principals of law or fundamental precedent. Nor have any of the important opinions that address the principal cited the Restatement of Trusts. It may have been taken for granted or assumed that the Restatement of Trusts applied because § 213 Balancing Losses Against Profits appears to be the source in law. n300 If so, the Second Circuit's application of the principle to allow for total loss films would be incorrect as that section states that only losses and gains from the same breach of trust may be combined or offset; a gain from one breach may not be offset against [*369] a loss from a different breach and a gain from a breach may not be offset by a loss from non-breaching activities. n301 The losses from total loss films may not be offset because they were not the product of a breach of the defendant's duty.

D. Future Benefits

Courts in equity order injunctive relief to prevent damages in the future. This mutual exclusivity is supported in both theory n302 and fact. n303 In at least one unusual case, a court that denied [*370] injunctive relief acknowledged that the absence of such relief might justify the plaintiff's filing of a similar suit in the future for new damages. n304 Similarly, courts that include future damages or future unjust enrichment have refused to grant injunctive relief. n305

On the other hand, courts are hesitant about awarding future unjust enrichment and sometimes fail to understand the underlying financial mechanics. n306 The quote below describes a standard claim for future loss or future unjust enrichment. Apparently, the court approved of the analysis in the mistaken belief that there is no relationship between the net current value of damages and damages likely to occur in the future:

The discounted cash flow model Dr. Putnam presented allowed the jury to calculate the net current value of damages rather than damages likely to occur in the future. Dr. Putnam used the discounted cash flow method to determine the extent to which ABC Radio and Disney had been unjustly enriched. Dr. [*371] Putnam projected two revenue streams. One revenue stream was the future cash flows Radio Disney would have received if it had not misappropriated Radio AAHS's materials or breached the confidentiality agreement. The second revenue stream was Radio Disney's future cash flows with the benefit of the material Radio Disney misappropriated and used in violation of the confidentiality agreement. Dr. Putnam discounted both revenue streams to arrive at Radio Disney's present value had ABC Radio and Disney not misappropriated or breached the confidentiality agreement as well as Radio Disney's value due to its misappropriation and breach of the confidentiality agreement. The difference between the two values allegedly constitutes the amount ABC Radio and Disney were unjustly enriched. Future damages mean damages for future loss. In this case, the jury was properly instructed, and Dr. Putnam used future earnings to determine the current (as of October 24, 1996) value of the loss caused by the wrongful acts of ABC Radio and Disney. Therefore, the district court properly granted prejudgment interest on the value of the present loss. n307

[*372] In its opinion, the court relied mainly on the plaintiff's expert, who made a sophisticated analysis of how much value Disney gained by the time saved that otherwise would have been spent developing the data that Disney misappropriated from Children's Broadcasting Corporation:

Dr. Putnam provided dollar amounts to the jury of the increased value of ABC Radio and Disney based on three acceleration intervals - eleven months, twelve months, and twenty-four months - to which Dr. Putnam assigned the values of \$ 35 million, \$ 37 million, and \$ 54 million. n308

The opinion's clarity and the appropriateness of its analysis begin to fade, however, when the Court discusses the contested jury instruction on the damages issue. The jury instruction specified that "damages for breach of the contract must be limited to those suffered on or before October 24, 1996." n309 The plaintiff and the defendant were working together until about June or July of 1996, and the date of October 24, 1996 represents the last day of the ninety-day notification period of the termination of their agreement. The plaintiff filed its suit in September 1996. n310 Either from the point of view of the plaintiff or the defendant, little actual damages or benefits, respectively, had been realized by October 24, 1996.

Inexplicably, the court ignores the fact that the expert's present value calculation is based mainly on future damages beyond [*373] the date specified. The present value represents the contemporaneous value of the future losses or benefits, almost all of which are expected to occur after October 24, 1996. According to the court's logic, Dr. Putnam's analysis could be adjusted to conform with a different deadline date merely by discounting or accreting his original number, i.e., if the deadline date were October 24, 1995 rather than 1996, Dr. Putnam's figures would just need to be discounted for an extra year to ensure that the calculation does not include any losses suffered after October 24, 1995.

Many of the case opinions that have awarded restitution of future or expected benefits have provided sufficient case facts to establish a seemingly significant statistical relationship between current operations and future operations. These plaintiffs have established that their operations are predictable because of low and statistically reliable turnover rates, or because their business is such that each customer or assignment lasts a number of years. Consider the following opinion from an unfair competition case relating to tax preparation services:

The Court's first Opinion and Order awarded damages based upon the Defendant's profits, necessarily finding that Defendants acted willfully and in bad faith. Specifically, the Court found that Defendants benefitted from their unfair practices by a relative 24% increase in returns, or 9,446 returns, in the areas subject to the NACRAL advertising campaign. The Court contemplated that Plaintiffs were not the only market competitors in the area, therefore, the entirety of Defendants' attributed profits could not be awarded to Plaintiffs because the award would thus involve a punitive element. The Court found Plaintiffs' market share in the affected areas to be approximately 18%. Accordingly, the Court calculated 18% of the 9,446 returns, or 1700 returns, multiplied by an average fee per client of \$ 83.22 to equal a presently measurable damage amount of \$ 141,174. In addition, the Court calculated future attributable profits over a six-year period, employing an equitable proxy of 43% to represent the [*374] percentage of clients actually retained for future business, or 731 clients, to find an additional \$ 365,003 of future profits denied to Plaintiffs by Defendants' unfair practices. The total award amount granted to Plaintiffs as measured by Defendants' profits was \$ 506,477. n311

Given that pleadings for appropriate injunctive relief frequently commit the action to a court in equity, plaintiffs in the future might want to reconsider injunctive relief under certain circumstances. In some cases, injunctive relief provides no meaningful remedy, such as in cases of trade secrets, which unrelated parties may be able to exploit regardless of a permanent injunction against the defendant. A claim for unjust enrichment at law without injunctive relief might be advantageous as it could yield an award for future unjust enrichment or it could result in punitive damages.

VIII. Alternative Measures of Unjust Enrichment

"Judges may be willing to expand substantive liabilities when they are limited to mild forms of restitution, but may desire to constrict those liabilities when large damages might result." n312

Measures of unjust enrichment, especially for unjust enrichment at law, can be numerous and can vary over a wide range. n313 Authorities on unjust enrichment have not fully developed an explanation or rationalization for how courts do or should choose between alternative measures of unjust enrichment. Some illustrations in the Third Restatement of Restitution and Unjust [*375] Enrichment, for example, offer no firm conclusion or answer for the amount of restitution that should be awarded under their own hypotheticals. n314 Whether this state of affairs is a reflection of the variability of awards in unjust enrichment, or whether the variability is the result of the absence of structured hierarchy of priorities, is unknown.

A. Contract Paradigm

Professor Kull describes the essential role of unjust enrichment in his model of the overall system of common law. His model postulates: (1) that restitution remedies noncontractual transfers and (2) that the objective of remedies in restitution is to attempt to attribute terms to the foregone contract based on the willfulness of the defendant and the degree of causation between the contract and the defendant's resulting operating performance. n315 This doctrine or paradigm rests on three key principles. First, because of the parties' freedom and judicial economy, and because "contract is incomparably superior to restitution as a means of regulating a given transaction, a claim in restitution, except against a wrongdoer, is inevitably a disfavoured recourse." n316 Second, from the perspective of noncontractual transfers, cases are distinguished between those in which a noncontractual transfer is initiated by the plaintiff (e.g. mistake) and those in which a noncontractual transfer is initiated by the defendant (wrongfully or otherwise). The goal of restitution is to resolve transfers initiated by the plaintiff and deter [*376] those initiated by the defendant, especially to deter wrongdoers who consciously bypass the opportunity to contract. n317

Third, the measure of restitution lies within the range of possible outcomes as if the foregone contract had actually been negotiated. The range of contract terms should vary from the fair market price or license fee at a minimum to the maximum at the highest terms at which the defendant would break even (i.e. no profit or benefit). Furthermore, the measure of liabilities is determined by the culpability of the party:

Whereas the innocent wrongdoer is made liable for the value of a license, as the best approximation of the bargain that would have been struck, the conscious wrongdoer (as punishment for bypassing a contract) is held to an imputed bargain that is the least advantageous that could have been struck, one in which he surrenders to the plaintiff all of the gains from trade. Such an award properly accrues to the plaintiff, not as exemplary damages but as compensation for the lost opportunity to bargain: the right to fix his own price for a license, or to refuse it altogether. The value of that opportunity is fixed at the highest figure implicit in the facts of the case - the defendant's profits ... n318

B. Income Approach to Measuring Unjust Enrichment

In the normal case of proving unjust enrichment, the plaintiff must first establish the defendant's revenues relating to the defendant's unjust activity. n319 Then the burden of proof shifts to the defendant to establish appropriate expenses to offset the revenues and to establish appropriate evidence justifying the apportionment or exclusion of all or part of the revenues initially proven by the [*377] plaintiff. While meeting the burden of proof for unjust enrichment differs from establishing the plaintiff's damages, the resulting analysis can end up at about the same place as a rigorous "but for" analysis if the defendant pursues a rigorous defense. Unjust enrichment is the difference between the actual and "but for" model as shown below:

Table 1: The Arithmetic of Unjust Enrichment

	Actual Defendant With Unjust Enrichment	"But For" Defendant Without Unjust Enrichment
Related and Attributable Revenues	R1	R2
Applicable Expenses and Expenditures	E1	E2
Profit	P1	P2

Given this simple model, the defendant's unjust enrichment is the difference between P1 and P2. The normal or standard process includes most or all of the following steps:

(A) The plaintiff has the burden of establishing the defendant's revenues related to the unjust acts. Conditioned on the good faith of the defendant to produce the relevant documents, the plaintiff cannot just blithely state the defendant's total revenues unless she has a prima facie claim that they are all related directly or indirectly to the unjust act. n320

(B) The defendant must then bear the burden of establishing which revenues, if any, should be excluded or allocated based on the defendant's efforts, skills, or assets.

(C) While the defendant has the burden of proof in regard to applicable expenses (including the issue of the deductibility, if any, of fixed costs or overhead), some courts hold that the defendant only needs to shift the burden of proof relating to attributable revenues and [*378] others hold that the defendant must bear the full burden.

Measuring unjust enrichment follows the "but-for" approach in most lost profit claims. A good example was provided by the Second Circuit regarding the paperback publishing rights to Tom Clancy's first book, *The Hunt for Red October*. The hardback publisher entered into a paperback publishing agreement in which the book was to be distributed starting in October of that year. n321 The paperback was distributed two weeks early, and the hardback publisher sued for breach of contract and infringement of the book's copyright. n322 The district court found the paperback publisher liable for both claims, but the court rejected the plaintiff's claim for the defendant's profits from the early sales of the paperbacks. n323 While the Second Circuit reversed on the issue of liability for copyright infringement, it approved the remedies approach, which granted the plaintiff lost profits and the defendant's profits based on the number of hardbacks that otherwise would have been sold if the paperbacks had not been available until October 1. The district court measured the defendant's unjust enrichment as the profit per paperback multiplied by the number of additional hardback copies that otherwise would have been sold. The plaintiff's claim for unjust enrichment was reduced by 99%. n324

The simplified model in Table 1 continues to apply under the following circumstances:

[*379] (A) The defendant's actual profits, P1, are negative. (The benefit would be the amount by which the defendant's losses would have been greater without the unjust act. n325)

(B) The defendant's related revenues are not ascertainable either for want of accounting data or because the defendant's revenues are the joint product of a number of necessary and independent factors in addition to the unjust act; and

(C) The defendant has generated no revenue, i.e., the defendant has not attempted to sell any product or service even partially related to the unjust act. n326

The case law underlying these assertions has been the result of courts improvising the remedies analysis for the

case facts and recognizing that a defendant's benefit can have a subjective value (as opposed to a market value). n327

An asset's subjective value may be best explained by analogy. Assume your neighbor steals a lemon from your kitchen in order to sell a glass of lemonade. The market value of the lemon at your local grocery store is fifteen cents, and your neighbor sells the glass of lemonade for a dollar, incurring additional expenses of ten cents. The market value of the lemon remains fifteen cents, but the subjective value of that lemon to your neighbor is ninety cents, the revenue from the lemonade less other expenses (which is also the unjust enrichment). The doctrine of unjust enrichment states that the [*380] defendant should disgorge the subjective value of the lemon to ensure deterrence. n328

If the restitution awarded were less than fifteen cents, such a remedy would be irrelevant because the remedy for tort would be greater. If restitution were greater than ninety cents, it would be punitive because it fails to provide counter-restitution for the defendant's reasonable expenses. n329 To the extent that restitution is not just a choice between fifteen cents or ninety cents (and that choice is not constrained by the lack of relevant evidence) but a continuous range between the two limits, restitution then becomes an issue of the amount of appropriate deterrence required for the case facts. n330

A number of different terms have been used for the measures that have evolved, including the savings approach, the use value approach or the comparable cost standard. n331 The actual application of these methods sometimes contradicts the name of the term or [*381] identified approach. To categorize them according to their substance, the following three categories are suggested:

(1) Savings. The defendant's savings are estimated from a comparison of the defendant's actual operating expenses with the operating expenses it would have incurred without the unjust act; n332

(2) Replacement Cost. This estimates what the defendant's cost would have been to otherwise obtain or build the asset or process without the asset that was involuntarily transferred; and

(3) Fair Market License. This is estimated by determining at what price or periodic fee the plaintiff and the defendant would have otherwise agreed to a voluntary transfer, assuming that both parties have full or perfect information.

Savings. In an attempt to measure part of the advantage or increased profits to the defendants, plaintiffs have been allowed to present evidence of the defendant's savings from abusing the plaintiff's patent, trademark, copyright, or trade secret. n333 One of the traditional methods of measuring savings is with the comparable cost method, which was developed largely in patent litigation. In *Gordon Form Lathe Co. v. Ford Motor Co.*, Gordon sued Ford for violating [*382] Gordon's patent for a lathing machine in the production of camshafts. n334 That opinion stated two key legal principals about the use of the method: (1) the plaintiff must bear the burden of establishing the appropriateness of the comparison standard; n335 and (2) the standard must be known to the public and in general use. n336 In situations where the plaintiff and the defendant have competing comparison standards, the defendant generally suffers the disadvantage from the ex post perspective allowed in unjust enrichment, the defendant must generally admit that she did not actually implement the product process offered in comparison. n337

The savings approach can prove to be a unique remedy especially in claims for the misappropriation of intellectual property, in particular, claims for trade secrets or confidential information. n338 [*383] Suppose that your client has a strong case for liability in a case of misappropriation or intangible property, but your client has suffered no out-of-pocket losses and lost profit forecasts would be speculative at best. A claim for unjust enrichment, applying the savings or replacement cost approach, allows the plaintiff to make a claim for the value of the intellectual property to the defendant. Furthermore, there should be no distinction between positive information and negative information, i.e., no difference whether the information shows what will work from what won't work. If it is reasonable to expect it to take two thousand experiments to develop the light bulb, each failure is a necessary step in the process of elimination and can represent savings to the putative developer. n339

Replacement Cost. The replacement cost method resembles the savings method except that it is more of an asset value approach. It measures the value of assets, especially intangible assets, by the costs that the defendant would incur to obtain that asset using legitimate means such as independent research or reverse engineering. If the savings method relates more to an operating income approach, the replacement cost method compares alternative capital expenditures to obtain the same asset. Thus the famous case of *Olwell v. Nye & Niseen Co.*, n340 relating to the misappropriation of an egg-washer, applied the savings method because it determined the defendant's labor savings n341 while the case of *Ablah*, relating to the [*384] defendant's misappropriation of the plaintiff's accounting work papers, was a replacement cost case. n342

In trade secret cases, the replacement approach has also been used in a different manner, which was to estimate the amount of research and development or even marketing effort the defendant saved by misappropriating the plaintiff's trade secret.

For this form of the cost comparison analysis, the plaintiff will carry the burden of proof to establish how the defendant's research or product development program would have progressed without the illicit information. To date, one of the most frequent forms of analysis is for the plaintiff to present the costs that it incurred in developing the information, allowing the trier of fact to award some fraction of that amount. n343

License Fee. The license fee approach is applied against the defendant that did not act willfully or consciously against the plaintiff or the plaintiff's property, n344 and it is awarded to the [*385] plaintiff that cannot otherwise reasonably establish the benefit enjoyed by the willful or conscious plaintiff. n345 The license fee approach is based on the assumption that if the plaintiff had had an opportunity to negotiate the use of her asset, she would have secured a minimum of a fair market license fee. n346 Patent statutes provide that monetary compensation for the plaintiff should be a minimum of a reasonable royalty. Depending on how a court limits the assumptions to be made underlying the calculation of a reasonable royalty, that calculation may or may not resemble a fair market value estimate. Assumptions that include the licensee providing the licensor with all relevant information, especially any ex post information, would normally lead to a rate different from a fair market rate.

The plaintiff that establishes liability and damages in fact, if required, is generally entitled at least to the consolation prize of a reasonable royalty or market rate of rent when actual profits cannot be calculated or separated from unrelated activities. n347 This minimum has been established in patent litigation n348 and even for most torts relating to the plaintiff's loss of use for misappropriated or converted property. License fees awarded for unjust enrichment [*386] have included periodic fees related to unit and dollar volume fees n349 or a one-time fixed fee. n350

Quantum Meruit. In the era of forms pleading, the claim for quantum meruit was a form of action included under assumpsit or unjust enrichment at law. According to Palmer, there are numerous opinions that confuse quantum meruit with unjust enrichment or that fail to define the role of quantum meruit within unjust enrichment at law. n351 It is basically a claim by the plaintiff that she negotiated a contract implied-in-fact, or that even without any implied contract, she transferred value to the defendant with the reasonable expectation of compensation. n352

[*387] One of the best known cases in this area is also a good example of a heavy handed judge that restricted the measure of remedy for the claim apparently due to his misgivings on the liability issues. n353 A longshoreman negotiated with his foreman for some compensation for a device that would enable the shipping company to enjoy substantial labor savings in ship loading. n354 The district court found that there was sufficient evidence to support such an agreement, but it required that the jury's verdict of \$ 90,000 be set aside unless the plaintiff agreed to an award of \$ 40,000, even though the later Second Circuit opinion affirmed that the plaintiff had established substantial evidence that the company saved more than \$ 5 million in labor savings. n355

More recently, the standard for quantum meruit has improved and the measure largely approximates the market value of the plaintiff's transfer. n356 Claims for quantum meruit frequently arise in cases relating to void or incomplete contracts.

[*388] Emergency Assistance Standard. The standard for unjust enrichment for the plaintiff in an emergency assistance situation represents a sensible compromise between the doctrine of no compensation for volunteers or officious intermeddlers and the regular standard of unjust enrichment. The plaintiff is entitled only to the true marginal costs of rendering the emergency assistance when either the defendant acknowledges or is aware of the assistance or when the plaintiff is meeting a common law n357 or statutory duty n358 of the defendant. Thus when the Atomic Energy Commission provided New York City with electricity during the city's blackout, the AEC was entitled to the cost of re-scheduling its generators and the direct cost of producing and transmitting the energy. In that case, the AEC's claim was reduced because it included some fixed costs. n359 In another case, a ship named the Overseas Progress was found liable for the increased fuel cost of the S.S. Canberra to sail 232 miles out of its way and to raise its speed above the most efficient cruising rate to take a sick sailor off the Overseas Progress to a hospital at the nearest port. n360

[*389]

C. Asset Approach To Measuring Unjust Enrichment

The "Lost Contract Paradigm" loses a great deal of its vigor and explanatory power in relation to specific restitution. According to Professor Kull, only one basic principal is needed to explain all of unjust enrichment. n361 Professor Laycock disagrees and asserts that unjust enrichment cannot be fully explained without the principal of specific restitution or restoration. He emphasizes that the two forms of restitution are not distinct, and that one can enhance or extend the other. For example, specific restitution of misappropriated property both restores the property to the rightful owner and deprives the misappropriator of his unjust gain. n362 Specific restitution is essential to explain the different measure of unjust enrichment for stolen goods, mistaken improvements, and trespass to minerals. However, neither Kull's nor Laycock's model adequately explains when or why any one alternative measure should be applied.

A defendant that transfers the plaintiff's assets outside of an informed and consensual contract can experience two types of profit. The defendant can use the assets in business operations to realize business operating profits, and/or the defendant can realize or accrue a profit from the increase in the market value of the asset. The income approach focuses more on the first type of profit and the asset approach on the latter type.

The simplest case relates to stolen property. When property is stolen, the original owner retains title and can seek specific restitution, generally without liability for any improvements made to the property. A buyer in good faith of the stolen property is similarly liable to the rightful owner for specific restitution or for the value of [*390] the property or sales proceeds if the buyer in good faith re-sold the property. n363

These cases and those relating to willful mistaken improvements and willful trespass to minerals appear to owe a great deal of their rationale to traditional property law. Thus, if the defendant willfully improves the plaintiff's property, the plaintiff can seek specific restitution of the property, and the defendant will not necessarily be entitled to counter-restitution for the improvements except for real estate taxes and necessary repairs. Although it has been criticized, n364 the case opinion in 319 East 72nd St. Corp. v. Warnecke & Co. may provide a useful example. n365

The plaintiffs thought that they were hiring a real estate agent in New York City to sell their empty lot for about \$ 655,000 in cash. n366 Instead, on the basis of continuous misrepresentations and deceit, the defendant constructed a 200-unit apartment house on the land at an additional cost of \$ 3,675,000. n367 The court awarded the entire project to the plaintiffs in a two-page opinion with no provision for the defendant. n368 Both the dissenting opinion n369 and Professor Oesterle n370 assert that the defendant should have received some apportionment for his contribution to the project, that the windfall to the plaintiff was too large to adhere strictly to the common law doctrine of knowing improvements. But the dissent reveals that the windfall may not have been very substantial because [*391] the property was burdened with a mortgage of \$ 3,500,000 to finance construction costs of \$ 3,675,000. n371 In fact, the plaintiffs may have received no windfall at all, considering that they were awarded a project that had been "constructed" by a fraud and thief. They might have been better advised to have sought an equitable lien or constructive trust with which to prime the mortgage creditor.

Similarly, plaintiffs with claims of trespass to minerals have been awarded the gross proceeds from the sale of the minerals sold. The defendants that can prove that the trespass or conversion was not willful or intentional are generally allowed counter-restitution for the expenses of exploring, producing, and transporting the minerals. Willful defendants are generally denied any such counter-restitution for expenses related to the oil, coal, or timber. n372 The earliest case known in this body of law relates to an English case in a court in equity holding that any less severe remedy would be inappropriate for the case of theft of the plaintiff's coal. n373

Aside from these three types of claims for unjust enrichment, most opinions debate the limit at which the plaintiff may no longer claim the defendant's actual or accrued profit on the value of the asset. n374 This doctrine was applied in *Janigan v. Taylor* n375 to a class [*392] action claim for securities fraud and expressly restricted for sellers of securities. Subsequently, the *Janigan* opinion was cited favorably by the Supreme Court in *Affiliated Ute Citizens of Utah v. United States*, n376 which also concerned defrauded sellers of securities. The only issue remaining is whether the calculation of unjust enrichment can include the current market price of the asset on the date of the trial if the defendant continues to own the asset. In *Randall v. Loftsgaarden*, the Court acknowledged that the doctrine as applied in *Affiliated Ute Citizens of Utah* "clearly does more than simply make the plaintiff whole for the economic loss proximately caused by the [*393] buyer's fraud," but that such a windfall was a significant part of the law's deterrent purpose. n377

Is there a different valuation standard when the property was acquired tortiously? Section 151 of the First Restatement of Restitution provides:

Where a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value or additions have been made to it. n378

Since the doctrine gained recognition from the *Janigan* opinion, there have been a couple of adjustments or reservations applied to it. The Third Circuit remanded a case to the trial court to determine if too much time has elapsed before the *Janigan* rule ceased to apply, stating that the plaintiff's right to capture the defendant's subsequent gains does not extend for an indefinite period of time. n379 The Third Circuit also established that the *Janigan* rule should be subject to equitable review if the defendant establishes that most of the subsequent gains were realized from the defendant's own efforts, but this perspective is contradicted by the Third Restatement of Restitution & Unjust Enrichment, section 40, in which comment [*394] (b) states: "To the extent that an appreciation in value is due to the efforts of the converter, an innocent converter will obtain a credit against liability in restitution but a conscious wrongdoer will not." n380

Change in the Market Value of the Defendant. Another interesting alternative would be to assess the unjust enrichment of the defendant by the change in the defendant's market value before and after the unjust act. In theory, this analysis would be compatible with the Restatement's definition of benefit and is also supported by *Dobbs*. n381 Such an analysis would, of course, require that the defendant be entitled to retain the misappropriated asset (for the same reason that future revenues are predicated on the absence of any injunction), and the expert for the plaintiff would need to conduct a very convincing study of the fluctuation in the defendant's stock price as in an event study for securities fraud claims. n382

D. Unjust Enrichment at Law

Even the authorities that endorse the assertion that courts at law can award the defendant's profits for unjust enrichment at law imply that courts at law are not the primary or most popular jurisdiction for that remedy. Traditionally, the "Onyx Cave Case," *Edwards v. Lee's Administrator*, has generally been regarded as the exception to the rule. n383 Recently, however, there has been a growing number of claims filed for unjust enrichment at law under state common law for

various types of claims relating to the misappropriation of intangible assets or properties. n384 Frequently the [*395] largest or most noteworthy issue in those cases has been the finding that federal intellectual property statutes do not pre-empt the claim under state law. On the other hand, many of these claims for unjust enrichment at law have succeeded in obtaining an award of the defendant's profits.

Table 2 below lists a number of cases relating to claims for unjust enrichment at law (excluding statutory unjust enrichment) and the measure of unjust enrichment.

Table 2: Unjust Enrichment at Law

Measure	Case
license	Cross v. Berg Lumber Co., 7 P.3d 922 (Wyo. 2000)
profits	Rhone-Poulenc Agro, S.A. v. Monsanto Co., 1:97CV1138, 2000 U.S. Dist. LEXIS 21330 (M.D.N.C. Feb. 8, 2000)
profits	Rasmussen & Associates, Inc. v. Kalitta Flying Service, Inc., 958 F. 2d 896 (9th Cir. 1992)
profits	Chou v. University of Chicago, 254 F.3d 1347 (Fed. Cir. 2001)
profits	Kremen v. Cohen, 325 F.3d 1035 (9th Cir. 2003)
profits	Adolph Gottscho, Inc. v. American Marking Corp., 139 A.2d 281 (N.J. 1958)
profits	Telewizja Polska USA, Inc. v. EchoStar Satellite Corp., No. 02 C 3293, 2005 U.S. Dist. LEXIS 21756 (N.D. Ill. Sept. 28, 2005)
profits	Univ. of Colo. Found. v. American Cyanamid Co., 342 F.3d 1298 (Fed. Cir. 2003)
profits	Sandare Chemical Co., Inc. v. Wako International, Inc., 820 S.W.2d 21 (Tex. App. Fort Worth 1991, no writ)
savings	Bourns, Inc. v. Raychem Corp., 331 F.3d 704 (9th Cir. 2003)
savings	Ocor Products Corp. v. Walt Disney Productions, Inc., 682 F.Supp. 90 (D.N.H. 1988)
savings	International Industries, Inc. v. Warren Petroleum Corp., 248 F.2d 696 (3d Cir. 1957)

The table shows that the types of remedies for unjust enrichment at law vary. This list, however, is not necessarily representative of case law as a whole. In fact, this sample shows a fairly high rate of awarding defendant's profits, largely due to the disproportionate share accounted for by the recent intellectual property cases based on state common law.

By comparison, Table 3 lists the most well-known cases relating to elective unjust enrichment at law, and very few of those cases award the defendant's profits:

Table 3: Elective Unjust Enrichment at Law

Measure	Case
license	Beck v. Northern Natural Gas Co., 170 F.3d 1018 (10th Cir. 1999)
license	De Camp v. Bullard, 54 N.E. 26 (N.Y. 1899)
license	Raven Red Ash Coal Co. v. Ball, 39 S.E.2d 231 (Va. 1946)
license	Proprietors of Second Turnpike Rd. v. Taylor, 6 N.H. 499 (1834)
license	Phillips Petroleum Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957)
profits	Edwards v. Lee's Adm'r, 96 S.W. 2d 1028 (Ky.Ct. App. 1936)
replacement	Ablah v. Eyman, 365 P.2d 181 (Kan. 1961)
savings	Cassinovs v. Union Oil Co. of Cal., 18 Cal. Rptr. 2d 574 (Ct. App. 1993)
savings	Dewey v. American Stair Glide Corporation, 557 S.W.2d 643 (Mo. Ct. App. 1977)
savings	Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1947).

It seems fairly clear, based on this admittedly unscientific sample, that the award of defendant's profits is not assured for unjust enrichment at law and is fairly rare for elective unjust enrichment. n385 [*397] As discussed earlier in Part III of the article, there are a number of factors that could explain this perception, but the problem is that with the artful advocacy of defense counsel, a court or jury could conclude that the defendant's profits should only be awarded, if at all, in cases of extremely rare circumstance. A key risk of choosing to file a claim as a tort and electing unjust enrichment (as opposed to filing a claim for unjust enrichment in equity or at law) is that a lesser measure of unjust enrichment will be awarded. The reverse is not necessarily true because it would appear more opportune for an artful plaintiff to file her claim for unjust enrichment at law if the plaintiff hopes to win an "upgrade" in remedy as opposed to elective unjust enrichment at law. Both forms of jurisdiction for unjust enrichment at law provide about the same range of measures, but unjust enrichment at law appears to offer a more substantial chance to realize the defendant's profits.

Few authorities can explain how a court either should or does choose between the many different measures of unjust enrichment for claims at law. Professor Dobbs tries to explain the outcome as determined by substantive policy:

For example, suppose the plaintiff under a five year oral contract supplies business consulting services, and that these include giving the defendant information about business opportunities. The defendant uses some of this information and makes an enormous profit, then repudiates the contract. Respect for the statute of frauds' policy (and some other reasons) seems to exclude restitution based on the defendant's profit from the information. The measure of restitution for which he would be liable if the statute of frauds' policy is respected might be the market value of the plaintiff's

services. But a very different measure of restitution may be justified if the defendant obtained the information, not under contract, but in breach of a fiduciary duty or conscious wrongdoing. In that case restitution might well be measured by the defendant's profits. [*398] Substantive policy guides the measure of restitution. n386

This does not seem to provide a practical guide for decision-making, especially in light of the high degree of unfamiliarity that is ascribed to most authorities that adjudicate claims for unjust enrichment. It appears to be a thicket of consideration and counter-consideration rather than pragmatic rule-making.

IX. Conclusion: How to Enrich Your Case Strategically

There are certainly some good reasons to avoid unjust enrichment, including the risk of varying outcomes in general and the loss of jury rights and punitive damages for unjust enrichment in equity. While in most jurisdictions today, unjust enrichment can be added as a claim or remedy in the alternative, the research and motion practice required to fully develop the option may in fact require a strategic commitment.

Some of the strategic advantages have already been fully discussed or analyzed:

- . Unjust enrichment may be the only way to establish liability.
- . The plaintiff who cannot prove damages gains a remedy of unjust enrichment even if it is just the consolation prize of a license fee.
- . Measuring the defendant's benefit is likely to produce a larger potential remedy than a claim for lost profits.
- . Especially in the area of intangible property, the measure of use value can be a significant alternative measure for the plaintiff.
- . The effective seniority rights of a successful claimant for unjust enrichment in equity can be so significant that unjust enrichment at law may be found an otherwise inadequate remedy.

[*399] One remaining category of possible strategic advantages relates to the unique ex post perspective afforded by unjust enrichment. Much of corporate and valuation and damages are calculated from an ex ante perspective, the value or damages at the time of the tort or unjust act. n387 Originally, one of the principal reasons for the claimant of a tort to waive the tort and sue in assumpsit was to be able to claim the defendant's receipts from the proceeds of the subsequent sale of a misappropriated asset.

From this perspective, the proprietary remedies of specific restitution or rescission can offer some unique awards for the plaintiff's claim. Specific restitution restores the asset to the plaintiff without motion practice or testimony about the value of the asset. If the value of an enterprise, previously sold or misappropriated, has dramatically risen in value since the date of the unjust act, the plaintiff can regain the appreciated asset. Similarly, if the value of the enterprise remains steady but it has generated a large return on its market value, specific restitution or rescission could allow the plaintiff to regain possession of the enterprise and the interim profits (offset, however, by the plaintiff's interest income on the original sales price). The litigation of *Kremen v. Cohen*, recounted in the introduction, demonstrate that scenario.

The buyer of an enterprise can enjoy similar advantages from rescission. The plaintiff who finds herself defrauded into buying a company that later proves less profitable than represented and eventually worthless has a heavy burden of proof to regain the full purchase price. n388 The plaintiff must fully establish the fraud, and then her expert must show that the value of the enterprise was [*400] worthless on the date of transaction. That the enterprise later was worthless and insolvent is irrelevant unless the plaintiff's expert can show that there were no intervening events that impaired the enterprise's value between the date of the transaction and the date that the enterprise was found worthless.

Such a transaction based even on significant misrepresentation can result in rescission. The seller must return the

purchase price and the interest income earned on the purchase price and the buyer must return the enterprise and any interim operating profits. Even in the aftermath of significant intervening events that substantially reduce the value of the enterprise after the transaction, the plaintiff-buyers have been awarded the full amount of the purchase price without adjustment for the intervening event.

Much remains to be determined about how courts should choose between competing measures of unjust enrichment, and how the actual measure is reached or whether the source of jurisdiction for the claim significantly impact those determinations. Even then, it is useful to remember Professor Laycock's research on adequate remedies at law and the irreparable injury rule which stands as a general advisory that unjust enrichment may not be practiced as prescribed and that the actions of courts in equity may not operate exactly as they claim.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Jurisdiction General Overview Education Law Instruction Extracurricular
Activities Publications Governments Federal Government Claims By & Against

FOOTNOTES:

n1. Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 Ga. L. Rev. 847, 892 (1999) (quoting Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1195 (1995) [hereinafter Kull, *Rationalizing Restitution*]); see also Kull, *Rationalizing Restitution*, supra, at 1191 ("Few American lawyers, judges, or law professors are familiar with even the standard propositions of the doctrine, and the few who are continue to disagree about elementary issues of definition."); Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1279 (1989) [hereinafter Laycock, *Scope and Significance*] ("Despite its importance, restitution is a relatively neglected and underdeveloped part of the law. In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground. Few law schools teach a separate course in restitution; no restitution casebook is in print; and scholarship in the field is largely devoted to specific applications.").

n2. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 224 (2002) (Ginsburg, J., dissenting) (naming law and equity "an ancient classification"); id. at 222 (Stevens, J., dissenting) (referring to the law-equity distinction as "obsolete").

n3. See David M. FitzGerald, Vice President and Deputy Chief Hearing Officer for the Nat'l Assoc. of Sec. Dealers (NASD), Address at FTC 90th Anniversary Symposium, *The Genesis of Consumer Prot. Remedies under Section 13(b) of the FTC Act 18-19* (Sept. 24, 2004), <http://www.ftc.gov/ftc/history/docs/fitzgeraldremedies.pdf>; FTC, *Federal Trade Commission Performance & Accountability Report for Fiscal Year 2003 20* ("The FTC continues to examine a range of management and support positions to determine which ones can be eliminated to put more staff at the front lines of the agency's missions. As part of this effort, in the late 1990s, the agency reduced by 24 percent the Office of the Executive Director, the agency's management and administrative organization. The FTC moved administrative positions to other organizations where the work could be performed more efficiently, but eliminated most of these positions to free positions for attorneys, investigators, and others at the front lines of the agency's consumer protection and competition missions."). See

also FTC, Federal Trade Commission Policy Statement on Monetary Equitable Remedies in Competition Cases (July 25, 2003) (announcing the use of disgorgement as a remedy for violations of the Hart-Scott-Rodino Act, FTC Act, and Clayton Act), <http://www.ftc.gov/os/2003/07/d disgorgementfrn.htm>.

n4. Eric M. Blumberg, Restitution and Disgorgement Find Another Home at the Food and Drug Administration, 58 Food & Drug L.J. 169, 170 (2003).

n5. Professor Andrew Kull is a Reporter for the Restatement (Third) of Restitution & Unjust Enrichment.

n6. Andrew Kull, Private Law, Punishment, and Disgorgement: Restitution's Outlaws, 78 Chi.-Kent L. Rev. 17 (2003) [hereinafter Kull, Private Law].

n7. *Kremen v. Network Solutions, Inc.*, 337 F.3d 1024 (9th Cir. 2003). For further background, see *Kremen v. Cohen*, 325 F.3d 1035, 1037-39 (9th Cir. 2003) (certifying a question to the California Supreme Court regarding whether an Internet domain name is property that can be converted under California tort law); *Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 502-04 (D.C. Cir. 1999) (giving an account of how Internet domain names are registered).

n8. Kremen's choice of remedies reflects a strong understanding of remedies law as he accomplished a "hat trick": specific restitution plus unjust enrichment plus punitive damages. Note that as an alternative, if Kremen had sought damages for the value of the website in a tort action, he would not have been entitled to regain control of the website, nor would he have been entitled to profits from the website after Cohen gained control. See Restatement (First) of Restitution § 128 cmt. i (1937) (setting out rules on tortious use of chattels); see also *Cross v. Berg Lumber Co.*, 7 P.3d 922, 935-36 (Wyo. 2000) (discussing the remedy of restitution).

n9. *Kremen v. Network Solutions, Inc.*, 337 F.3d 1027 (9th Cir. 2003).

n10. *Id.* at 1036.

n11. See 1 Dan B. Dobbs, *Law of Remedies* § 4.1(2), at 557 (2d ed. 1993) [hereinafter Dobbs, *Law of Remedies*] ("Unjust enrichment cannot be precisely defined, and for that very reason has potential for resolving

new problems in striking ways."); Laycock, *Scope and Significance*, supra note 1, at 1278 ("The rules of restitution developed much like the rules of equity. Restitution arose to avoid unjust results in specific cases - as a series of innovations to fill gaps in the rest of the law.").

n12. *Sw. Elec. Power Co. v. Burlington N. R.R. Co.*, 966 S.W.2d 467, 469 (Tex. 1998).

n13. Although the jury verdict was reversed and a cynic might allege that the jury was voting for lower utility bills, an award of \$ 100 million in a claim of unjust enrichment at law is no small accomplishment for the plaintiff's counsel.

n14. *Burlington N. R.R. Co. v. Sw. Elec. Power Co.*, 925 S.W.2d 92, 97 (Tex. App. - Texarkana 1996, aff'd, 966 S.W.2d 467 (Tex. 1998)) (internal citations omitted); see also *McNair v. City of Cedar Park*, 993 F.2d 1217, 1221 (5th Cir. 1993) ("We perceive no basis for finding the City's retention of McNair's payment unfair. The City has provided what it promised. The money paid did not, therefore, result in an unjust enrichment of Cedar Park.").

n15. For a rough estimate of filing activity for claims of unjust enrichment in federal and state courts, see George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity For Federal Agencies*, 12 *Fordham J. Corp. & Fin. L.* 1, 4-5 (2007) [hereinafter *Roach, A Default Rule of Omnipotence*] ("As further demonstrated in the chart in Appendix I, the average number of case opinions per year from federal courts relating to the defendant's profits has increased approximately 700% in the last 40 years. From 1965 to 2005, the federal share of federal and state case opinions increased from 50% to 80%. Given (1) the state of neglect attributed to practice in equity, (2) the increase in federal opinions and, most importantly, (3) that a handful of agencies file a disproportionately large share of the claims for implied jurisdiction, there is significant potential for this agency litigation to change the interpretation of the law in equity.").

n16. *In re Mike Moore, Attorney General, ex rel, State of Mississippi Tobacco Litig.*, No. 94-1429 (Ch. Ct. Miss. Apr. 18, 1996) (order granting defendant's motion to compel).

n17. *Rendleman*, supra note 1, at 848.

n18. 1 *Dobbs, Law of Remedies*, supra note 11, §1.1, at 5.

n19. See Kull, *Rationalizing Restitution*, supra note 1, at 1192 ("A complete account of civil liability in our legal system requires the inclusion of restitution or some functional equivalent, because there are important instances of liability that contract and tort, conventionally defined, cannot adequately explain.").

n20. Restatement (Third) of Restitution & Unjust Enrichment §1 cmt. c (Discussion Draft 2000); see also *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Ill. Range, Inc.*, 71 F. Supp. 2d 864, 871 n.4 (N.D. Ill. 1999) (observing that "to date there is no one precise definition of restitution," and noting that courts use the terms restitution and unjust enrichment interchangeably).

n21. Restatement (Third) of Restitution & Unjust Enrichment §1 cmt. h (Discussion Draft 2000) ("It is a natural use of the language to speak of 'requiring a criminal to make restitution'; the problem is that the liability imposed in such cases is not based primarily on unjust enrichment, but on compensation for harm."); see also Kull, *Rationalizing Restitution*, supra note 1, at 1191-92 ("For many lawyers the immediate connotation of the word 'restitution' will be something else entirely: criminal sanctions requiring wrongdoers to make restitution to their victims, a topic having almost nothing to do with the subject at hand. The linguistic confusion that bedevils the law of restitution - necessitating laborious definitions before anyone can understand what you are talking about - affords an early indication that the common name of this neglected body of law was singularly ill-chosen.").

n22. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002) (acknowledging *Dobbs*, *Palmer*, *Corbin*, and the Restatements as authorities on unjust enrichment).

n23. See 1 *Dobbs*, *Law of Remedies*, supra note 11, §4.1(2) (stating that unjust enrichment may be its own cause of action); Restatement (Third) of Restitution & Unjust Enrichment §1 cmt. h (Discussion Draft 2000) ("The identification of unjust enrichment as an independent basis of substantive liability in common-law legal systems was the central achievement of the first Restatement of Restitution. That conception of the subject is carried forward here."); *Laycock*, *Scope and Significance*, supra note 1, at 1277 ("The law of restitution offers substantive and remedial principles of broad scope and practical significance.").

n24. *Alternatives Unlimited, Inc. v. New Balt. City Bd. of Sch. Comm'rs*, 843 A.2d 252, 282 (2004) ("Among these common counts, the more familiar ones were 1) money paid to the defendant's use, 2) money had and received, 3) use and occupation of land, 4) goods sold and delivered, 5) quantum valebant ("how much were [the goods] worth?"), and 6) quantum meruit."); see also 1 *Dobbs*, *Law of Remedies*, supra note 11, at 583 (offering a brief description of quantum meruit and how it may apply both in cases of implied-in-fact contracts and in cases of quasi-contract).

n25. 1 Dobbs, *Law of Remedies*, supra note 11, §5.18, at 925 ("Modern procedure, with its emphasis on fact pleadings, suggests that restitution can be allowed if the facts warrant it, and that it is not necessary or even possible any longer to "sue in assumpsit." (quoting *Davis v. Tyree Indus., Inc.*, 668 P.2d 1186, 1192 (1983))).

n26. *Ross v. Berhhard*, 396 U.S. 531, 538 n.10 (1970) ("As our cases indicate, the "legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries.").

n27. *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946) ("Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.").

n28. See, e.g., *Daisy Group v. Newport News, Inc.*, 999 F. Supp. 548, 550 (S.D.N.Y. 1998) ("The parties disagree about whether, in the absence of a demand for ordinary monetary damages, a Lanham Act claim for defendant's profits under section 35(a) is legal or equitable."); *G.A. Modefine S.A. v. Burlington Coat Factory Warehouse Corp.*, 888 F. Supp. 44, 45-46 (S.D.N.Y. 1995) (considering whether trademark holders' action for infringement and unfair competition involves claims that are equitable or legal in nature); *Merriam-Webster, Inc. v. Random House, Inc.*, No. 91 Civ. 1221, 1993 U.S. Dist. LEXIS 7693, at 5 (S.D.N.Y. June 8, 1993) (involving claims for equitable legal remedies on the basis of trademark infringement in violation of the Lanham Act), vacated on other grounds, 35 F.3d 65 (2d Cir. 1994); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 955 F. Supp. 598, 601-03 (E.D. Va. 1997) (examining whether the plaintiff's claim was legal or equitable); *Am. Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784, 789 (D.N.J. 1986) (striking a jury demand because the plaintiff's claims were equitable); *Comm'r of Env'tl Prot. v. Conn. Bldg. Wrecking Co.*, 629 A.2d 1116, 1122-23 (1993) (holding that Connecticut law treats civil penalty suits as actions in equity).

n29. *BIC Corp. v. Far E. Source Corp.*, No. 99 Civ. 11385, 2000 U.S. Dist. LEXIS 16744, at 2 (S.D.N.Y. Nov. 16, 2000); see also *Am. Cyanamid*, 649 F. Supp. at 788-89 (stating that the plaintiff need not have been damaged by the defendant to sue for unjust enrichment).

n30. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002); *Porter*, 328 U.S. at 398; *The Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944); *Mitchell v. Robert Demario Jewelry, Inc.*, 361 U.S. 288, 291 (1960); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) ("Our determination under the first part of the Seventh Amendment analysis is only preliminary... . In this case, the

only remedy sought is a request for compensatory damages representing backpay and benefits. Generally, an action for money damages was "the traditional form of relief offered in the courts of law.' ... This Court has not, however, held that "any award of monetary relief must necessarily be "legal' relief." ... Nonetheless, because we conclude that the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable, we find that the remedy sought by respondents is legal." (quoting *Curtis v. Loether*, 415 U.S. 189, 196 (1974)) (internal citations omitted)); see also *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02 C 3293, 2005 U.S. Dist. LEXIS 21756, at 10-11 (N.D. Ill. Sept. 28, 2005) ("The Seventh Circuit in *Reich v. Continental Casualty Company* has stated that "restitution straddles the divide' between legal and equitable relief and that "restitution is merely not an exclusively equitable remedy like an injunction.' ... The Reich court interpreted the jurisprudence of the Supreme Court as holding "that restitution, in contrast to damages, is a remedy commonly ordered in equity cases and therefore an equitable remedy in a sense in which damages, though occasionally awarded in equity cases, are not.' ... Therefore, the Reich court concluded that "restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case.") (internal citations omitted).

n31. See *Wright v. Scotton*, 121 A. 69, 76 (Del. 1923) (providing some historical background on the "clean-up doctrine," indicating that it may have been practiced in the Courts of Chancery before 1789 and in other courts before the Lord Cairns Act was passed in 1858).

n32. 534 U.S. at 210.

n33. Jay M. Zitter, Annotation, Punitive Damages: Power of Equity Court to Award, 58 A.L.R. 4th 844, 847-52 (1987).

n34. *Beals v. Wash. Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. 1978).

n35. See, e.g., *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (holding that the proponent must prove that the claimed relief was traditionally awarded by English courts in equity in 1789); see also *Hipp v. Babin*, 60 U.S. 271, 277 (1857) (stating that section 16 of the Judiciary Act of 1789 declares "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law"); *Fenn v. Holme*, 62 U.S. 481, 483 (1859) (stating that the meaning of equity law comes from how the English Court of Chancery defined and enforced equity law); *Root v. Ry. Co.*, 105 U.S. 189, 207-215 (1882) (using English chancery law to determine the equity jurisdiction of the Court).

n36. See 1 Dobbs, *Law of Remedies*, supra note 11, §4.2(3) ("The idea that the action on the case should not be expanded to include actions for which some other writ already lay had been somewhat besmirched in *Slade's Case*, which allowed the plaintiff to bring *assumpsit* where debt had always been proper. Now, a century after *Slade's Case*, *assumpsit* was once again expanded to cover claims that might have been pursued by another writ. Where the defendant acquired personal property by tort, the plaintiff ordinarily would have an action in *trover*, *detinue* or *replevin*. However, presumably to gain the various procedural incidents attached to the action in *Assumpsit*, plaintiffs began to sue in *Assumpsit* to redress such wrongs, and in 1706 the King's Bench approved such an action" (internal citations omitted)); *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 576 (7th Cir. 2004) ("Restitution is available in any intentional tort case in which the tortfeasor has made a profit that exceeds the victim's damages (if the damages exceed the profit, the plaintiff will prefer to seek damages instead), whether or not the tort involved a breach of fiduciary duty."); George E. Palmer, *The Law of Restitution* § 2.2 (1978) (discussing suits for conversion); *Attorney Gen. v. Blake*, [2001] 1 A.C. 268, 280 (H.L.) (appeal taken from Eng.) (U.K.) ("In some instances the common law itself afforded a wronged party a choice of remedies. A notable example is the wrong of conversion. A person whose goods were wrongfully converted by another had a choice of two remedies against the wrongdoer. He could recover damages, in respect of the loss he had sustained by the conversion. Or he could recover the proceeds of the conversion obtained by the defendant Historically, the latter alternative was achieved by recourse to an element of legal fiction, whereby the innocent party 'waived the tort'. The innocent party could suppose that the wrongful sale had been made with his consent and bring an action for money 'had and received to his use'").

n37. See *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946) ("[A petition for related-claims adjudication] may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. To be sure, such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available."); *Tull v. United States*, 481 U.S. 412, 425 (1987) ("First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties." (citing *Porter*, 328 U.S. at 399)).

n38. See *infra* Part VIII tbls. 2 & 3.

n39. See Palmer, supra note 36, §2.12 ("Similarly, when the recovery of profits depends on tracing the plaintiff's property into another asset, with the aim of holding the defendant accountable either for the value of that asset or of the profits realized from its use, this can be achieved ... in a law action. But when the case is within the reach of quasi contract, and recovery of profits does not require the use of techniques available only in equity, we should discard the notion that profits are recoverable only in equity, and in a few decisions it has been discarded.").

n40. 64 *Geo. L. J.* 1 (1975); see also Palmer, supra note 36, §2.2 ("Today, with an increasing acceptance of unjust enrichment as a basis of civil liability, there is no justification for continued adherence to the rule of *Jones v. Hoar*. Nonetheless, this limitation on quasi contract continues in some states in which the issue was settled at

a relatively early time. But no modern decision has accepted the limitation where the case was one of first impression. The prevailing view is to permit recovery in quasi contract whether or not the goods have been sold.").

n41. .Lamine v. Dorrell, 92 Eng. Rep. 303 (K.B. 1705).

n42. .22 Mass. (5 Pick.) 285 (1827) (denying recovery in quasi-contract because the converted asset had not been re-sold, precluding the defendant's receipt of a tangible monetary benefit).

n43. .79 Mo. 278, 282 (1883) ("The extension of the doctrine would do away with the action of tort, for perhaps in a majority of the wrongs inflicted the wrong-doer receives some benefit.").

n44. .24 Ch. D. 439, 442 (Eng. C.A. 1883) (holding that the defendant was not liable for trespass unless the plaintiff could show that the defendant held some portion of the plaintiff's property). It should be noted that this opinion has been the subject of protracted controversy and revision. See William Swadling's discussion of the case in *Landmark Cases in the Law of Restitution* 163-83 (Charles Mitchell and Paul Mitchell eds., 2006) (arguing that the case does not stand for the controversial proposition for which it is often cited, that only "positive accretions to the defendant's wealth can be made the subject of a restitutionary claim for wrongdoing," not "a mere saving of expense"); James Edelman, *Gain-Based Damages* 131-35 (2002) (discussing the controversy).

n45. .155 U.S. 163, 172 (1894).

n46. .See *Zoltek Corp. v. United States*, 464 F.3d 1335, 1336 (Fed. Cir. 2006) (holding that until the Supreme Court chooses to overturn this decision, the district court could not hold Schillinger effectively overturned by implication).

n47. The opinion in *Edwards v. Lee's Administrator*, 96 S.W.2d 1028, 1031 (1936) stands out as an early exception to this legacy. The Restatement (First) of Restitution §129 cmt. a (1937) credits this opinion with a worthy refutation of *Phillips v. Homfray*. Some commentators question the fairness of attributing the plaintiff's share of the defendant's profits based on the share of square footage alone and without consideration for the investment and enterprise of the defendant, but these authorities overlook the fact that the defendant's related profits from an ancillary hotel were excluded from the calculation that today would comply with the precedent

set in *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 516 (9th Cir. 1985) for related profits. More importantly, the legal reasoning in the Edwards opinion is clear and even prophetic in its comparison of unjust enrichment for the misappropriation of tangible and intangible assets, especially given the fact that the Restatement was still in draft form at the time that the Edwards opinion was handed down.

n48. *Tull v. United States*, 481 U.S. 412, 420 (1987) ("First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties."); *Medtronic, Inc. v. Intermedics, Inc.*, 725 F.2d 440, 442-43 (7th Cir. 1984).

n49. For example, jurisdictions differ on the "clean-up doctrine" as to the level of significance required for the ancillary claim in relation to the injunctive relief. Compare *Medtronic, Inc.*, 725 F.2d at 442-43 (stating that although a good case in equity is required, a court has the discretion to reject the application of the doctrine if the claim in equity is only "incidental" to the remedy at law), with *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17, 20 (1st Cir. 1978) (relying on old equity court procedures to assert jurisdiction over both equitable and legal claims), and *Schine v. Schine*, 367 F.2d 685, 688-70 (2d Cir. 1966) (Friendly, J., concurring) ("So long as *Enelow v. New York Life Ins. Co.* . . . and *Ettelson v. Metropolitan Life Ins. Co.* . . . stand, federal appellate courts will necessarily have difficulty in determining whether an appeal is attracted by the rule of those cases or the contrary one of *City of Morgantown v. Royal Ins. Co., Ltd.* . . . and *Baltimore Contractors, Inc. v. Bodinger* . . . when a complaint seeks both legal and equitable relief. The best solution of an essentially insolvable problem appears to be the dominant purpose test, with any fair doubt being resolved against the claim that the action was predominantly one at law." (internal citations omitted)).

n50. *Tull*, 481 U.S. at 425 ("The Government next contends that, even if the civil penalties under § 1319(d) are deemed legal in character, a jury trial is not required. A court in equity was empowered to provide monetary awards that were incidental to or intertwined with injunctive relief. The Government therefore argues that its claim under § 1319(b), which authorizes injunctive relief, provides jurisdiction for monetary relief in equity This argument has at least three flaws. First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties. Second, the Government was aware when it filed suit that relief would be limited primarily to civil penalties, since petitioner had already sold most of the properties at issue. A potential penalty of \$ 22 million hardly can be considered incidental to the modest equitable relief sought in this case.") (internal citations omitted); see also *Design Strategies, Inc. v. Davis*, 367 F. Supp. 2d 630, 643 n.12 (S.D.N.Y. 2005) ("In characterizing injunction as an inherently equitable remedy, the Supreme Court in *Knudson* specified that, nevertheless, "any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002))). In *Knudson*, the Court also explained that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." 534 U.S. at 210-11 (citing Restatement (Second) of Contracts § 359 (1981); 3 Dobbs, Law of Remedies, supra note 11, § 12.8(2), at 199; 5A Arthur L. Corbin, Contracts § 1142, at 119 (1964)).

n51. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962); see also *In re Acushnet River & New*

Bedford Harbor Proceeding, 712 F. Supp. 994, 1004 (D. Mass. 1989) ("Because the recovery of abatement costs cannot be characterized as simple equitable restitution, because the legal or equitable nature of the remedies provided by state substantive law are unclear, and because the trend of *Beacon Theatres, Inc. v. Westover* ... - as well as the strong public policy of Massachusetts as expressed in its Constitution - is to favor jury trials in close cases, this Court rules that the Commonwealth's claims for natural resource damages and recovery of public nuisance abatement expenses present legal issues which must be tried to a jury as matter of right.") (internal citations omitted).

n52. See *infra* notes 84-90 and accompanying text.

n53. 1 Palmer, *supra* note 36, §1.2 ("Under Texas law, a cause of action for money had and received arises when defendant obtains money that in equity and good conscience belongs to plaintiff. The cause of action is not based on wrongdoing, but instead looks only to the justice of the case and inquires whether defendant has received money that rightfully belongs to another. In short, it is an equitable doctrine applied to prevent unjust enrichment." (citing *Hunt v. Baldwin*, 68 S.W.3d 117, 132 (Tex. App. - Houston [14th Dist.] 2001, no pet.))).

n54. 1 Palmer, *supra* note 36, §2.5, at 79 n.24 ("This is not to say that the law-equity distinction is irrelevant, only that it should be. In fact, there is a greater likelihood of obtaining restitution from a trespasser if the case is in equity. The ancient history which has generally made quasi contract unavailable does not apply to the equity suit, so that a court is more likely to feel free to give the relief called for by the merits of the case.").

n55. See generally Roach, *A Default Rule of Omnipotence*, *supra* note 15, at 67-112 (surveying the inconsistencies).

n56. *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 402-3 (1934) ("This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action."); *Daubman v. CBS Real Estate Co.*, 580 N.W.2d 552, 555 (1998); *Curtis v. Tromble*, 747 P.2d 590, 592 (Ariz. Ct. App. 1987); *Staats v. Miller*, 243 S.W.2d 686, 687-88 (Tex. 1951) (quoting *Jefferson Elec. Mfg. Co.*, 291 U.S. at 402-3); *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999) ("Constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice... Moreover, there is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted."); *Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 848 (D.D.C. 1996) ("In the District of Columbia, unjust enrichment occurs "when a person retains a benefit (usually money) which in justice and equity belongs to

another." (quoting 4934, Inc. v. D.C. Dep't of Employee Servs., 605 A.2d 50, 55 (D.C. App. 1992)); Lawson's Ex'r v. Lawson, 57 Va. (16 Gratt.) 230, 232 (1861) ("The action of indebitatus assumpsit for money had and received will lie whenever one has the money of another which he has no right to retain, but which ex aequo et bono, he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice; and it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such a case, no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the plaintiff's case, as it were upon a contract, quasi ex contractu as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay."); Foshee v. Gen. Tel. Co. of the Se., 322 So. 2d 715, 717 (Ala. 1975).

n57. Compare *Coop. Benefit Adm'rs, Inc. v. Ogden*, 367 F.3d 323, 331 (5th Cir. 2004) ("In *Knudson*, the Supreme Court revisited the boundaries of "equitable relief" under § 502(a)(3) and again carefully emphasized that Congress's use of the word "equitable" was not inadvertent, but rather was a deliberate act on its part to limit a § 502(a)(3) plaintiff's remedies to those that were traditionally considered equitable in nature. For an action to lie in equity, the Court stated, an ERISA plaintiff must "seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."), with *Gagne v. Vaccaro*, 835 A.2d 491, 495 (Conn. App. Ct. 2003) ("Although the right of recovery is based on equitable principles, it is nevertheless an action at law, the purpose of which is to prevent unjust enrichment The only remedy is in an award of money damages. There is no merit to the claim of the defendant that the plaintiff's only right of action was in equity and that equitable relief had to be sought."). See also Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 *Tex. L. Rev.* 2083, 2088-89 (2001) ("Equity, of course, is a term with several meanings. It can refer to individuation of justice and overriding of rules; it can refer more generally to what is morally fair; or it can refer to the rules and practice of English and American courts of equity. This leaves uncertain just what it means to say that unjust enrichment is a principle of equity or that restitution is equitable in nature.").

n58. 1 *Palmer*, supra note 36, §1.2, at 9.

n59. *Bank of Saipan v. CNG Fin. Corp.*, 380 F.3d 836, 840-41 n.1 (5th Cir. 2004) ("The Bank argues that the money had and received claim, as an action at law, is not subject to the "unclean hands' equitable doctrine Recovery for money had and received, though legal in nature, is controlled by equitable principles, and ... it is axiomatic that the "clean hands' doctrine functions in equitable actions." (internal citations omitted)). But see *First Nat. Bank of DeWitt v. Cruthis*, 203 S.W.3d 88, 94 (Ark. 2005) ("Because an equitable lien was sought, the circuit court erred in submitting Count I to the jury, and because we reverse on this basis, we need not address the remaining issues.").

n60. *Byron v. Clay*, 867 F.2d 1049, 1052 (7th Cir. 1989) ("But with the merger of law and equity, it is difficult to see why equitable defenses should be limited to equitable suits any more; and of course many are not so limited ... and perhaps unclean hands should be one of these. Even before the merger there was a counterpart

legal doctrine to unclean hands - in pari delicto - which forbade a plaintiff to recover damages if his fault was equal to the defendant's." (internal citations omitted)); see also 1 Dobbs, *Law of Remedies*, supra note 11, §2.6(3) ("The authors recognize, however, that many such defenses have 'worked over' into law and are now recognized as legal defenses, and also that merger of law and equity might have the effect of making all defenses 'legal' defenses." (citing Fleming James, Jr. & Geoffrey Hazard, Jr., *Civil Procedure* §8.8 (3d ed. 1985))).

n61. *Moses v. Macferlan*, 97 Eng. Rep. 676, 681 (K. B. 1760) ("In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.").

n62. See *infra* Part V.

n63. *Restatement (Third) of Restitution & Unjust Enrichment* §1 cmt. f (Discussion Draft 2000).

n64. *Pereira v. Farace*, 413 F.3d 330, 340-41 (2d Cir. 2005) ("Two years later, however, the Supreme Court's decision in *Great-West Life & Annuity Insurance Company v. Knudson* ... reconfigured the legal landscape of restitution." (internal citations omitted)); *Coop. Benefit Adm'rs, Inc. v. Ogden*, 367 F.3d 323 (5th Cir. 2004).

n65. Daniel M. Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 77 *Australian J. Legal Hist.* 1, 1 (2004) ("The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavored to draw to itself as much business as it could ... Each court endeavored, by superior dispatch and impartiality, to draw to itself as many causes as it could. The present admirable constitution of the courts of justice in England was, perhaps, originally in a great measure, formed by this emulation, which anciently took place between their respective judges; each judge endeavoring to give, in his own court, the speediest and most effectual remedy, which the law would admit, for every sort of injustice." (citing Adam Smith, *The Wealth of Nations* 241-42 (Edwin Canaan ed., Univ. of Chicago Press 1976) (1776)); see also William Landes and Richard Posner, *Adjudication as a Private Good*, 8 *J. Legal Stud.* 235, 254-55 (1979) ("In the early history of English law, the three royal courts were in competition with each other, with the court of Chancery, with the ecclesiastical courts, and with a variety of manorial and other local courts, for litigants."); *Restatement (First) of Restitution*, pt. 1, introductory note (1937) ("Gradually the common law judges become conscious of their omissions and jealous of the expanding power of the Court of Chancery, and with the invasion of the action of *assumpsit* they found a means of expanding their jurisdiction.").

n66. Klerman, *supra* note 65, at 8.

n67. James I was the last British monarch who reigned under the "Divine Right of Kings." His son, Charles I, was beheaded during the English Civil War. Otto J. Scott, *James I* 249-50 (1976) (James I is the author of the book *The Trew Law of Monarchies*, which according to Scott, "cited, in bald terms, the James Stuart theory that "Kings are called gods' and were to be considered 'loving fathers' to their nations."); see also *id.* at 408 ("[James I's] attempt to continue the theories of Elizabeth and his mother Mary Stuart, that sovereigns are above the law and created by divine sanction, led his son, Charles I, to the executioner's block and Louis XVI to the guillotine.").

The famous settlement of 1616 was, in effect, the result of James's assertion of divine right and by transference to his court, the Court of Chancery. Scott describes the surrounding events to include a meeting between James I and twelve judges of the common law who had supported Coke's pronouncement that the Court of Chancery did not have the authority to act as the king wished. The twelve judges were forced to confess their grave error while on their knees before the king and were questioned one at a time by James himself. *Id.* at 352.

n68. *Id.* at 352 (James I was not gentle in his discussion with the judges at the time. "The absolute prerogative of the Crown is not subject for the tongue of a lawyer, nor is it lawful to be disputed. It is atheism."). See also Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 *U. Det. Mercy L. Rev.* 609, 612 (1997) (discussing Bacon's decision on the controversy between law and equity under James I and describing that monarch's preference for equity).

n69. See *supra* notes 67-68.

n70. Kennedy, *supra* note 68, at 612.

n71. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 *Harv. L. Rev.* 687, 711-14 (1990).

n72. See 1 Dobbs, *Law of Remedies*, *supra* note 11, §5.18(3), at 935 ("The adequacy test is usually invoked when law (not equity) created the substantive right asserted by the plaintiff. In such a case the equity court added nothing to the right but did supplement the legal remedy if that remedy was inadequate. But in some instances equity (not law) created the substantive right on which the plaintiff relies. In those instances there was no need to discuss the legal remedy at all and the adequacy test could not be invoked to bar equitable intervention. Because equity created the substantive rights against fiduciaries, equity has always taken jurisdiction in claims against them without regard to the adequacy test. Thus if the plaintiff seeks a constructive trust against a fiduciary who converts goods, that claim will not be denied merely because the plaintiff might have done just as well by claiming in *assumpsit*.").

n73. 1 Dobbs, *Law of Remedies*, supra note 11, §5.18(3), at 936 ("The legal remedy is clearly not adequate compared to the equitable remedy whenever the trust or lien would give the plaintiff a priority, or when the trust would give the plaintiff a return of specific unique property not reachable at law, but in such cases there is a question whether the more effective equitable remedy appropriately protects the interests of third-party creditors.").

n74. .Palmer, supra note 36, §2.5(2) ("The legal remedy is usually inadequate, and the equitable remedy usually granted, in cases like these: (1) Unique or special entitlements; (2) Repeated acts, multiplicity of suits; (3) Legal remedy available but not collectible; and (4) Damages cannot be measured with reasonable certainty.").

n75. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386-89 (7th Cir. 1984) (stating that four factors, not strictly legal issues, need to be considered in evaluating whether an adequate remedy exists at law: "(a) The damage award may come too late to save the plaintiff's business (b) The plaintiff may not be able to finance his lawsuit against the defendant without the revenues from his business that the defendant is threatening to destroy (c) Damages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected (d) The nature of the plaintiff's loss may make damages very difficult to calculate." (internal citations omitted)); *Clark v. Teeven Holding Co.*, 625 A.2d 869, 878-79 (Del. Ch. 1992) (applying the adequacy test to claim for deprivation of property through fraud when the property in question was money).

n76. .Restatement (Third) of Restitution & Unjust Enrichment §4 cmt. a (Discussion Draft 2000).

n77. See *infra* Part V (discussing unjust enrichment's roots in equity).

n78. See *infra* Part IX (surveying alternative measures of unjust enrichment).

n79. 1 Dobbs, *Law of Remedies*, supra note 11, §4.3(1), at 587 ("Equity's moral interest in conscience was coupled with an enormous power the law courts did not have, to act against the person rather than against the property. Equity courts would express the defendant's liability to recovery by calling him a constructive trustee."); C.C. Langdell, *A Brief Survey of Equity Jurisdiction II.*, 1 *Harv. L. Rev.* 111, 117 (1887) ("Even when common law and equity give the same relief, each adopts its own method of giving it. Thus, if a court of equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff, it does not

render a judgment that the plaintiff recover the money or the property, and then issue a writ to its executive officer commanding him to enforce the judgment; but it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.").

n80. Langdell, *supra* note 79, at 116.

n81. 1 Dobbs, *Law of Remedies*, *supra* note 11, §4.4, at 610 ("Specific restitution is not the result of an incantation. It does not matter whether the words constructive trust or reformation are used. If the plaintiff traces his real property into the hands of the defendant and the plaintiff is entitled to restitution, then specific restitution is appropriate. If a court wants to speak of rescission rather than constructive trust, an order requiring restitution is still appropriate."); see also Clark, 625 A.2d at 878-79 ("Certain forms of restitutionary relief, such as the imposition of a constructive trust, the imposition of an equitable lien, or a decree of subrogation, are available only in equity... . However, while a decree for money will sometimes be entered by a court of equity, ordinarily a money judgment based on restitution must be obtained in an action at law." (internal citations omitted)).

n82. *Sereboff v. Mid Atl. Med. Servs.*, 126 S. Ct. 1869, 1874 (2006) ("That impediment to characterizing the relief in *Knudson* as equitable is not present here. As the Fourth Circuit explained below, in this case Mid Atlantic sought "specifically identifiable" funds that were "within the possession and control of the Sereboffs" - that portion of the tort settlement due Mid Atlantic under the terms of the ERISA plan, set aside and "preserved ... [in the Sereboffs'] investment accounts." ... Unlike *Great-West*, Mid Atlantic did not simply seek "to impose personal liability ... for a contractual obligation to pay money." ... It alleged breach of contract and sought money, to be sure, but it sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a contract action at law.") (quoting *Mid Atl. Med. Servs. v. Sereboff*, 407 F.3d 212, 218 (4th Cir. 2005) (internal citations omitted)); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002).

n83. *Skretvedt v. E.I. Dupont de Nemours*, 372 F.3d 193, 211 (3d Cir. 2004) ("In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." (internal citations omitted)); *Primax Recoveries, Inc. v. Goss*, 240 F. Supp. 2d 800, 803 (N.D. Ill. 2002) ("However, "where money is paid by one person to another as a result of a mistake of such character that the payer is entitled to restitution, he is ordinarily not entitled to maintain a suit in equity for the specific recovery of the money, even though the payee still holds the money so that specific restitution would be possible, since a quasi-contractual action at law would give an adequate remedy.' ... Courts of equity did not traditionally allow suits for money damages, even if the plaintiff attempted to characterize the suit as a trust or lien over specific money damages." (quoting *Restatement (First) of Restitution* §160 cmt. e (1937) (internal citations omitted)).

n84. Skretvedt, 372 F.3d at 210-11 ("In cases in which the plaintiff "could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,' the plaintiff had a right to restitution at law through an action derived from the common-law writ of assumpsit." (internal citation omitted)).

n85. 1 Dobbs, Law of Remedies, supra note 11, § 4.3(2), at 597 ("The constructive trust is based on property, not wrongs.").

n86. Knudson, 534 U.S. at 213 ("In cases in which the plaintiff "could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,' the plaintiff had a right to restitution at law through an action derived from the common law writ of assumpsit... . In such cases, the plaintiff's claim was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.' ... Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).") (quoting 1 Dobbs, Law of Remedies, supra note 11, §4.2(1), at 571; Restatement (First) of Restitution § 160 cmt. a, at 641-42 (1937) (internal citations omitted)); Skretvedt, 372 F.3d at 210-11 ("But where "the property [sought to be recovered] or its proceeds have been so dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].' ... Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.") (quoting Restatement (First) of Restitution §215 cmt. a, at 867 (1937) (internal citations omitted)).

n87. Beals v. Washington Int'l, Inc., 386 A.2d 1156, 1159 (Del. Ch. 1978) ("I therefore hold that Chancery historically and traditionally did not enforce forfeitures or penalties and that this was the rule of law in the high court of chancery in England in 1776 and is there-fore the rule in this Court today.").

n88. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) ("We have recognized the "general rule' that monetary relief is legal, ... and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment." (quoting Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570 (1990)) (internal citations omitted)); Tull v. United States, 481 U.S. 412, 422 (1987) ("Remedies intended to punish culpable individuals ... were issued by courts of law, not courts of equity."). Additionally, as previously stated, a monetary remedy is not rendered equitable simply because it is "not fixed or readily calculable from a fixed formula." Id. at 422 n.7.

n89. *United States v. Bernard*, 202 F. 728, 732 (9th Cir. 1913) ("The appellant's counsel contend that the government is entitled to recover exemplary damages. In actions of trespass, where the injury is wanton or malicious, or gross and outrageous, or is done against the protest to the plaintiff, or in known violation of the law, the court may permit the jury to add to the measured compensation of the plaintiff further damages by way of punishment or example, the amount thereof to be left to the jury's discretion, in view of the special, peculiar circumstances of the case. But the function of a court of equity goes no farther than to award as incidental to other relief, or in lieu thereof, compensatory damages. It has no authority to assess exemplary damages. By applying to a court of equity for relief, the complainant waives all claim to vindictive damages."); *Roach v. Concord Boat Corp.*, 880 S.W.2d 305, 307 ("Because equity courts generally do not enforce penalties, when a party having an adequate remedy at law proceeds in equity, he or she is held to have waived any right to punitive damages.").

n90. *Tull*, 481 U.S. at 422 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." (citing *Curtis v. Loether*, 415 U.S. 189, 197 (1974); *Ross v. Bernhard*, 396 U.S. 531, 536 (1970))).

n91. 278 F.3d 656, 662 (7th Cir. 2002) ("*SEC v. Clark* ... assumed, but without discussion, and we think erroneously, that civil penalties in SEC cases are not a form of legal relief." (internal citations omitted)).

n92. See *Zitter*, supra note 32, §3 (listing state courts that have ruled that equity courts may award some form of punitive damages).

n93. See supra notes 50, 83 and accompanying text.

n94. See supra note 29 and accompanying text.

n95. 1 *Dobbs*, *Law of Remedies*, supra note 11, § 2.6(3) ("Not all money claims are damages claims at law and many restitution claims are claims at law.").

n96. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-13 (2002); see also *Gerosa v. Savasta & Co.*, 329 F.3d 317, 321 (2d Cir. 2003) ("In determining the propriety of a remedy, [a court] must look to the real nature of the relief sought, not its label."); *Eichorn v. AT&T Corp.*, No. 96-3587, 2005 U.S. Dist.

LEXIS 29261, at 36 (D.N.J. Nov. 22, 2005) ("Third, the plaintiffs' efforts to cloak their damages in the garb of an 'equitable decree' does not advance their argument."); *Coan v. Kaufman*, 333 F. Supp. 2d 14, 25 (D. Conn. 2004) ("And in [Knudson,] the Supreme Court made it clear that an individual cannot evade this restriction on damage claims by characterizing one's request for monetary relief as 'restitution.'" (quoting *Knudson*, 534 U.S. at 214) (internal citations omitted)).

n97. See *supra* note 49 and accompanying text; see also *Amschwand v. Spherion Corp.*, No. H-02-4836, 2005 U.S. Dist. LEXIS 21007, at 20-21 (S.D. Tex. Aug. 24, 2005) ("[Plaintiff's] request for an injunction is simply an indirect attempt to recover from Defendants what she cannot recover directly - the value of the life insurance proceeds. Plaintiff cannot obtain the relief she seeks under ERISA § 502(a)(3), and her § 502(a)(3) claim must therefore be dismissed."); *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401, 409 (10th Cir. 2004) (holding that "in a suit by a beneficiary against a fiduciary, the beneficiary may not be awarded compensatory damages as appropriate equitable relief under §502(a)(3) of ERISA").

n98. See, e.g., *Root v. Ry. Co.*, 105 U.S. 189, 214-15 (1882) ("It is true that it is declared in those cases that, in suits in equity for relief against infringements of patents, the patentee, succeeding in establishing his right, is entitled to an account to the profits realized by the infringer, and that the rule for ascertaining the amount of such profits is that of treating the infringer as though he were a trustee for the patentee, in respect to profits. But it is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and to compel the trustee to account... . All that was meant in the opinions referred to was to declare according to what rule of computation and measurement the compensation of a complainant would be ascertained in a court of equity, which, having acquired jurisdiction upon some equitable grounds to grant relief, would retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action... . This rule was adopted, not for the purpose of acquiring jurisdiction, but, in cases where, having jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity to award damages in the sense in which the law gives them, but a substitute for damages, at the election of the complainant, for the purpose of preventing multiplicity of suits... . The rule itself is reasonable and just, though sometimes perverted and abused. It has been constantly acted upon by the courts. But it is a rule of administration and not of jurisdiction; and although the creature of equity, it is recognized as well at law as one of the measures, though not the limit, for the recovery of damages." (internal citations omitted)).

n99. *Tull v. United States*, 481 U.S. 412, 424 (1987); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1174 (9th Cir. 1977); *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1538 (2d Cir. 1992) ("However, it is important to point out that absent another ground for jurisdiction, such as the request for an injunction, a court of equity did not have jurisdiction to award profits, which were viewed as incidental to the injunctive relief and represented compensation for the plaintiff's damages."); *Daisy Group, Ltd. v. Newport News, Inc.*, 999 F. Supp. 548, 551-52 (S.D.N.Y. 1998) (holding that there is a right to a jury trial when profits are sought as a rough proxy measure of damages); *Ideal World Mktg., Inc. v. Duracell, Inc.*, 997 F. Supp. 334, 338-39 (S.D.N.Y. 1998) (holding that there is a right to a jury trial when an award of profits is sought); *Gucci Am., Inc. v. Accents*, 994 F. Supp. 538, 540-41 (S.D.N.Y. 1998) (holding that there is a right to a jury trial when profits are sought for the purpose of deterrence). But see *G.A. Modefine S.A. v. Burlington Coat*

Factory Warehouse Corp., 888 F. Supp. 44, 45-46 (S.D.N.Y. 1995) (concluding that disgorgement of profits is an equitable remedy; therefore, there is no right to a jury trial).

n100. See supra note 98; see also Palmer, supra note 36, §2.7 ("Decisions of the United States Supreme Court in the nineteenth century established that in a suit in equity for infringement of patent or copyright, the patent or copyright holder was entitled to recover the profits made through the infringement. Although the Court sometimes explained this as a method for measuring the plaintiff's damages, it was clear that the relief was based on unjust enrichment, as the Court later recognized. In the cases during this earlier period, recovery of profits could be obtained only in equity, where there was an independent basis for an injunction. If there was no such independent basis a suit in equity could not be maintained merely in order to recover the infringer's profits. The plaintiff was left to his action at law, and in that action he could recover only compensation for his pecuniary loss."); see also *Oyster Software, Inc. v. Forms Processing, Inc.*, No. C-00-0724 JCS, 2001 U.S. Dist. LEXIS 22520, at 26 (N.D. Cal. Dec. 6, 2001) ("As the court explained in *Maier*, the Ninth Circuit has rejected this traditional approach to an accounting, which allowed a plaintiff to obtain an accounting only where the defendant was a competitor on the theory that the defendant's profits provided a rough measure of plaintiff's lost profits. Rather, the Ninth Circuit has adopted a broader approach under which an accounting may be awarded not only as a measure of damages suffered by the plaintiff but also on a theory of unjust enrichment to further the objective of deterrence."); *Attorney Gen. v. Blake*, [2001] 1 A.C. 268, 279-80 (H.L.) (appeal taken from Eng.) (U.K.) ("In these cases the courts of equity appear to have regarded an injunction and account of profits as more appropriate remedies than damages because of the difficulty of assessing the extent of the loss. Thus, in 1803 Lord Eldon L.C. stated, in *Hogg v. Kirby* a passing off case: "what is the consequence in Law and in Equity? ... a Court of Equity in these cases is not content with an action for damages; for it is nearly impossible to know the extent of the damage; and therefore the remedy here, though not compensating the pecuniary damage except by an account of profits, is the best: the remedy by an injunction and account.").

n101. *Sertich v. Moorman*, 783 P.2d 1199, 1201 (Ariz. 1989) ("Relief was not available at law for complex transactions, however, because a jury could not be expected to work out the details of complex accounts. Claims involving complex transactions between partners, therefore, required equity's intervention and thus the action for an accounting in equity emerged... . This action evolved, in part, because of the unique availability of the masters of the Chancery Court who served as auditors and reported complex accountings to the court. Moreover, the Chancellor had the power to compel the actual parties' testimony, a discovery device forbidden the judge at law. Finally, parties standing in fiduciary relationship to each other could challenge a breach of that relationship only in a court of equity. For complex transactions between partners, therefore, the only remedy available was in equity." (internal citations omitted)).

n102. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478-79 (1962).

n103. 1 Dobbs, *Law of Remedies*, supra note 11, §2.6(3) ("There is nothing especially equitable about the fact that the plaintiff recovers the defendant's profits or gains; quasi-contract claims permit recovery of such gains, and quasi-contract claims are indisputably claims "at law." So if the ultimate award in the accounting is

merely a non-coercive money judgment, the accounting claim might be thought to require a jury trial." (citing *Dairy Queen*, 369 U.S. at 469; *John A. McCarthy & Co. v. Hill*, 67 N.E.2d 375 (N.Y. 1946)); Palmer, supra note 36, §2.12, at 165 (1978) ("In summary, under the common-law decisions, restitution of profits always will be granted against an intentional wrongdoer, provided the profits are the product of a wrongful taking or other interference with the injured party's legally protected interest. In some situations profits are recoverable in quasi contract, but traditionally such relief usually was given in equity when the profits were realized from use of an asset wrongfully acquired, or from infringement of or interference with some legally protected interest of the plaintiff Under procedures comparable to the federal system, courts go directly to that question and order restitution with no need to consider whether the case formerly would have been at law or in equity."); 1 Dobbs, *Law of Remedies*, supra note 11, § 2.6(3), at 158 ("If the ultimate award in the accounting is merely a non-coercive money judgment, the accounting claim might be thought to require a jury trial."); *Am. Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784, 788 (D.N.J. 1986) ("It follows that no distinction can be drawn which would justify recognition of the right to jury trial for 'damages' and its denial in a claim for 'profits' on the theory that 'damages' are recoverable in an action at law whereas 'profits' have their origin in equitable principles which hold the infringer a trust for the patent holder. For whether the patentee's recovery is based upon 'damages' - the loss to him, or upon 'profits' - the unjust enrichment of the infringer, the underlying issue remains essentially the same - infringement. It is similarly indecisive whether plaintiff affixes the label of 'accounting' to the remedy he seeks. For the plaintiff must always establish the amount which he is entitled to recover. While it is true that equity traditionally has had jurisdiction in actions for an accounting, it has always been recognized that there may be a suit for accounting at law and indeed the essential ingredient of equity's jurisdiction has been the complicated nature of the accounting. The claim for an accounting, therefore, does not, on its face, destroy the right to a jury trial now that it is recognized to exist in cases where the court itself may also fashion equitable relief."). According to an authority on British remedy law, this confusing schism also prevails today in the British legal system. Andrew Burrows, *We Do This At Common Law But That In Equity*, 22 *Oxford J. Legal Stud.* 1, 12 (2002) ("At both common law and equity, the courts have for a long time been awarding restitution for certain types of wrong. After *Attorney-General v. Blake* we must now add breach of contract to the list, albeit only in exceptional cases. Unfortunately that truth has often been obfuscated by there being differently labelled common law and equitable remedies designed to achieve the same end of awarding restitution." (internal citations omitted)).

n104. Palmer, supra note 36, §2.12, at 159 ("Similarly, when the recovery of profits depends on tracing the plaintiff's property into another asset, with the aim of holding the defendant accountable either for the value of that asset or of the profits realized from its use, this can be achieved in a law action. But when the case is within the reach of quasi contract, and recovery of profits does not require the use of techniques available only in equity, we should discard the notion that profits are recoverable only in equity, and in a few decisions it has been discarded.").

n105. See supra note 98.

n106. See, e.g., *Univ. of Colo. Found. v. Am. Cyanamid Co.*, 342 F.3d 1298, 1300 (Fed. Cir. 2003) (affirming trial court on the basis of a claim in quasi-contract for defendant's profits); *County of Essex v. First Union Nat'l Bank*, 862 A.2d 1168, 1171 (N.J. Super. Ct. App. Div. 2004) ("The jury awarded the County \$ 600,000 for unjust enrichment. On the USL claim the jury found that there were misrepresentations; but it did

not reach the issue of damages because it also found that the County knew the truth as to the matters which were the subject of the misrepresentations. On the breach of contract claim, the jury found a breach by the bank but also found that the County suffered no loss. On the breach of fiduciary duty claim, the jury found there was neither a breach nor a loss. On the RICO claim, the jury found that all elements had been proven except for loss.").

n107. Restatement (Third) of Restitution & Unjust Enrichment §42 cmt. d (Tentative Draft No. 4, 2005) ("To the extent that the defendant's profits from infringement represent profits the plaintiff would otherwise have earned, the calculation of 'infringer's profits' becomes an indirect mode of showing 'plaintiff's damages,' and the same amount might be recovered under either heading - subject to protection against double-counting. Such a conception evidently underlies the language of the Copyright Act, 17 U.S.C. § 504(b), which directs recovery of 'actual damages' plus 'profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.' Following the same model, the Uniform Trade Secrets Act § 3(a) authorizes recovery of 'unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.'"); *Daisy Group v. Newport News*, 999 F. Supp. 548, 551 (S.D.N.Y. 1998) (noting that "an award of profits for trademark infringement 'is really a surrogate for damages' available as a rough measure of damages because of the difficulty of proving plaintiff's actual damages" (quoting *Oxford Indus., Inc. v. Hartmarx Corp.*, No. 88 C 0322, 1990 U.S. Dist. LEXIS 5979 (N.D. Ill. May 2, 1990))); *Swofford v. B & W, Inc.*, 336 F.2d 406, 411 (5th Cir. 1964) ("The profits which were recoverable in equity against an infringer of a patent were compensation for the injury the patentee had sustained from the invasion of his rights. Such profits were considered the measure of the patentee's damages. It was very early recognized that, "though called profits, they are really damages." (quoting *Mowry v. Whitney*, 81 U.S. (14 Wall.) 620, 653 (1872))); *Deering, Milliken & Co. v. Gilbert*, 269 F.2d 191, 194 (2d Cir. 1959) ("Thus it is apparent from the face of the statute that the court in formulating its award has as much discretion as to the defendant's profits as it has over the plaintiff's damages. The only difference is that the statute places no precisely stated ceiling over the amount of the defendant's profits which may be included in the award. Especially in view of the deliberate and fraudulent nature of the infringement, we could not find it an abuse of discretion if the judge had trebled the defendant's profits measured by the plaintiff's minimum license fee which the defendant by its infringement had "saved."").

n108. *Sandare Chem. Co. v. WAKO Int'l, Inc.*, 820 S.W.2d 21, 23 (Tex. App. - Fort Worth 1991, no writ) ("An unjust enrichment measure of damages is appropriate for wilful interference with contractual relations, at least where the plaintiff's lost profits are not readily ascertainable."); see also *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 77 (3d Cir. 1993) (holding that unlawful profits are a proper measure of the amount of disgorgement).

n109. *Henry Lacey McClintock, Handbook of the Principles of Equity*, § 24, at 53 (2d ed. 1948); see also *Langdell*, *supra* note 79, at 116 ("The object of equity, in assuming jurisdiction over legal rights, is to promote justice by supplying defects in the remedies which the courts of law afford.").

n110. *Marcus, Stowell & Beye Gov't Secs. v. Jefferson Inv. Corp.*, 797 F.2d 227, 232 (5th Cir. 1986); *PGI, Inc. v. Rathe Prods., Inc.*, 576 S.E.2d 438, 440 (Va. 2003).

n111. Laycock, *Scope and Significance*, supra note 1, at 1284; see also 1 Dobbs, *Law of Remedies*, supra note 11, §4.1 (discussing unenforceable contracts and mistakes); Rendleman, supra note 1, at 868 ("Courts have used broad freestanding unjust enrichment as a statement of positive law and a guide to decisions.").

n112. *Kenai Peninsula Borough v. Port Graham Corp.*, 871 P.2d 1135, 1138 (Alaska 1994) ("The common law has long recognized a cause of action in assumpsit to recover overpayment of taxes."); *Salisbury v. Detroit*, 241 N.W. 888, 889 (Mich. 1932) ("The remedy to recover illegal taxes paid is in assumpsit for money had and received."); *Patterson v. Gladwin Corp.*, 835 So. 2d 137, 143 (Ala. 2002) ("A direct action for a refund of taxes paid to the State is essentially "a common law action of indebitatus assumpsit against the State." (quoting *J.R. Raible Co. v. State Tax Comm'n*, 194 So. 560, 561 (Ala. 1939))).

n113. *Kraft Constr. Co. v. Cuyahoga County Bd. of Comm'rs*, 713 N.E.2d 1075, 1086 (Ohio Ct. App. 1998) ("Kraft's theory of unjust enrichment was premised on the argument that the County economically forced Kraft to build a larger and more expensive pumping station than Kraft's own needs required and that the County did this by requiring expensive changes ..."); see also *Yellow Freight Sys. v. State*, 585 N.W.2d 762, 766 (Mich. Ct. App. 1998), rev'd on other grounds, 627 N.W.2d 236 (Mich. 2001) ("We also reject the state's argument that governmental immunity ... bars plaintiff's action. The wrong alleged by plaintiff does not fall within the definition of a tort." (internal citations omitted)).

n114. *Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Rep. 1136, 1136-1137 (K.B. 1776); *Henshaw v. Miller*, 58 U.S. 212, 218 (1854); *Sullivan v. Associated Billposters & Distribs.*, 6 F.2d 1000, 1005 (2d Cir. 1925) ("Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer as beating or imprisoning a man, etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall. So far as the tort itself goes, an executor shall not be liable; and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged.").

n115. Restatement (Second) of Torts § 926 (1979) ("Under statutes providing for the survival or revival of tort actions, the damages for a tort not involving death for which the tortfeasor is responsible are not affected by the death of either party before or during trial, except that (a) the death of the injured person limits recovery for damages for loss or impairment of earning capacity, emotional distress and all other harms, to harms suffered

before the death, and (b) the death of the tortfeasor terminates liability for punitive damages."); Restatement (First) of Restitution § 149 cmt. b (1937) ("In States where a cause of action for a tort is terminated by the death of one of the parties, a cause of action for restitution is not affected by the death of either party. This is true although the cause of action is based upon a tort, as where property was obtained by force or fraud.").

n116. Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 (2000).

n117. Fed. Trade Comm'n v. Capital City Mortg. Corp., 321 F. Supp. 2d 16, 23 n.5 (D.D.C. 2004).

n118. See George E. Palmer, *supra* note 36, § 2.3(c) ("Voices have been raised in opposition, most prominently that of Arthur Linton Corbin, who thought the privilege to use the longer period of limitations a bit of historical fluff that could be blown away."); see also Dobbs, Handbook on the Law of Remedies: Damages - Equity - Restitution, at 63-64 (1973) [hereinafter Dobbs, Handbook] ("Although some influential writers have condemned these decisions, their views have had relatively little influence on the course of decision.").

n119. See *Birmingham v. Chesapeake & Ohio Ry. Co.*, 37 S.E. 17, 17 (Va. 1900) ("The limitation is not determined by the form of action, but by its object. If the thing complained of is an injury to the person, the limitation in assumpsit is the same as if the action were in form *ex delicto*."); *Demarest v. Broadhurst*, 92 P.3d 1168, 1171 (Mont. 2004) ("When faced with different limiting statutes, or where doubt exists as to the nature of the action, doubt should be resolved in favor of the longer limiting statute. However, a plaintiff cannot, simply by virtue of mislabeling a cause of action, create a conflict between two or more statutes of limitations or insert doubt as to the gravamen of the plaintiff's action."); *United States v. Sutton*, 795 F.2d 1040, 1061 (Temp. Emer. Ct. App. 1986) ("State statutes of limitation are not applicable to cases brought to enforce DOE regulations.").

n120. *FDIC v. Bank One, Waukesha*, 881 F.2d 390, 392 (7th Cir. 1989). The court went on to say, "the two courts of appeals that have examined the question before us reached the conclusion that the United States may choose the six-year period in unjust enrichment cases." *Id.* at 393.

n121. Restatement (First) of Restitution § 148 cmt. f (1937) ("The statutes commonly known as statutes of limitations ordinarily are applicable to actions at law. They also apply to equitable proceedings in which there is a concurrent legal remedy. As commonly interpreted, the ordinary statutes do not apply to other equitable proceedings; in some States, however, there are statutes specifically applicable to equitable proceedings and, as stated in Comment d, equitable proceedings may be barred by analogy to the statute of limitations.").

n122. *Dunham v. Dunham*, 528 A.2d 1123, 1135-36 (Conn. 1987) ("The fallacy in the defendant's argument is his assumption that a court, acting under its equitable powers, is bound to apply the statute of limitations that governs the underlying cause of action. In fact, in an equitable proceeding, a court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within the period of the statute... . Although courts in equitable proceedings often look by analogy to the statute of limitations to determine whether, in the interests of justice, a particular action should be heard, they are by no means obligated to adhere to those time limitations." (internal citations omitted)).

n123. *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948); Restatement (Third) of Restitution & Unjust Enrichment §43 cmt. h (Tentative Draft No. 4, 2005) ("Measure of recovery. Disgorgement liability by the rule of § 42 is not restricted to conscious wrongdoers. In contrast to the property-based rules of §§ 40-42, the prophylactic aims of fiduciary duty require a fiduciary to disgorge consequential gains even if the breach of duty is inadvertent. The same liability is imposed on a third party who acquires a benefit with notice of the fiduciary's breach. The only defendant under § 43 who will be held to the lesser measure of disgorgement liability in restitution - being accountable for direct benefits received, but not for consequential gains - is the third party who acquires a benefit without notice of its origin in another's breach of duty."). For discussion of issues relating to relief defendants see *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991); *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005); *United States v. The Inc. Vill. of Island Park*, 888 F. Supp. 419, 455 (E.D.N.Y. 1995).

n124. See, e.g., *M.M. & G. Inc. v. Jackson*, 612 A.2d 186, 188-89 (D.C. 1992) (deciding a dispute over real property between a representative of the estate to which the property originally belonged and a corporation that had bought the property from someone who had forged the deed); *Roberts v. Evans*, 43 Cal. 380, 382 (1872) (dealing with a case of stolen cast-iron shoes and dies); see also Restatement (First) of Restitution § 128 (1937) ("A person who has tortiously obtained, retained, used, or disposed of the chattels of another, is under a duty of restitution to the other."); *Simonds v. Simonds*, 380 N.E.2d 189, 194 (N.Y. 1978) ("Innocent parties may frequently be unjustly enriched. What is required, generally, is that a party hold property "under such circumstances that in equity and good conscience he ought not to retain it." (quoting *Miller v. Schloss*, 113 N.E. 337, 339 (N.Y. 1916))); C.R. McCorkle, Annotation, Compensation For Improvements Made or Placed on Premises of Another by Mistake, 57 A.L.R.2d 263 §1 (1958) (referring to improvements made in good faith to property by persons believing they own the property).

n125. Restatement (Third) of Restitution & Unjust Enrichment § 13 cmt. g (Tentative Draft No. 1, 2001); see also 1 Dobbs, *Law of Remedies*, supra note 11, § 4.3(2), at 597 ("The constructive trust is based on property, not wrongs.").

n126. *U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 928 (4th Cir. 1995) ("We interpret these cases to say that so long as the government's interest in enforcing a debt is penal, it makes no difference that injured persons may thereby receive compensation for pecuniary loss. In other words, the "not compensation for actual pecuniary loss" phrase in § 523(a)(7) refers to the government's pecuniary loss. For example, a person drives recklessly and collides with a city garbage truck. A city policeman

issues him a traffic ticket, and the city attorney files a negligence suit and obtains a judgment for the amount of damage to the garbage truck. The person can discharge the judgment for damaging the truck, but he cannot discharge his reckless driving fine. We therefore agree with the district court that the judgment in this case is not dischargeable in a Chapter 7 bankruptcy proceeding." (internal citations omitted)); see also *In re Randy*, 189 B.R. 425, 444 (Bankr. N.D. Ill. 1995) (holding that securities laws fines are restitutionary and cannot when paid be offset against an estate in bankruptcy); *In re Ott*, 218 B.R. 118, 125 (Bankr. W.D. Wash. 1998) (holding disgorgement under a state racketeering statute to be nondischargeable in bankruptcy); *In re Telsey*, 144 B.R. 563, 565 (Bankr. S.D. Fla. 1992) (holding SEC fines to be nondischargeable in bankruptcy); *Tex. Am. Oil Corp. v. U.S. Dep't of Energy*, 44 F.3d 1557, 1569 (Fed. Cir. 1995) (holding that restitution warrants higher priority than disgorgement in excess of plaintiff's losses).

n127. *Cost Control Mktg. & Sales Mgmt.*, 64 F.3d at 928.

n128. *In re Porcelli*, 325 B.R. 868, 871-874 (Bankr. M.D. Fla. 2005).

n129. See *supra* note 88 and accompanying text.

n130. *Weiss v. Lehman*, 759 F. Supp. 1, 2 (D.D.C. 1989); see also *The Bank of Saipan v. CNG Fin. Corp.*, 380 F.3d 836 (5th Cir. 2004) (holding that negligence is not the same as the unclean hands doctrine); *Romano v. Ret. Bd. of the Employees' Ret. Sys.*, 767 A.2d 35, 44 (R.I. 2001) ("[A] party who has conferred a benefit upon another by mistake is not precluded from maintaining an action for restitution because the mistake was caused by that party's own lack of care." (citing *Toupin v. Laverdiere*, 729 A.2d 1286, 1289 (R.I. 1999))).

n131. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) ("Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205 (e)... . When the Administrator seeks restitution under § 205 (a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205 (e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. Thus it is plainly unaffected by the provisions of § 205 (e)." (internal citations omitted)); *The Hecht Co. v. Bowles*, 321 U.S. 321, 324-30 (1944); *Mitchell v. Robert Demario Jewelry, Inc.*, 361 U.S. 288, 291 (1960).

n132. *SEC v. AMX, Int'l, Inc.* 7 F.3d 71, 74 (5th Cir. 1993) ("Pierce involved the issue of whether a contempt sanction enforcing disgorgement of unlawful gains under the Interstate Land Sales Full Disclosure

Act, 15 U.S.C. §§ 1701-1720, violated federal and state prohibitions on imprisonment for debt. This Circuit concluded that disgorgement was not a "debt" because it is not a remedy at law; rather disgorgement is equitable in nature, constituting "an injunction in the public interest." Thus, enforcement of the disgorgement order through contempt sanctions was permissible." (quoting *Pierce v. Vision Inv., Inc.*, 779 F.2d 302, 307 (5th Cir. 1986)).

n133. In re Estate of Corriea, 719 A.2d 1234, 1240 (D.C. 1998) ("INAPRO's premise that punitive damages are legally 'uninsurable' under District law is one we need not evaluate, because we reject the equation of disgorgement and punitive damages."); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 214 (Minn. 1984) ("Damages measured by the forfeit of attorney fees for breach of fiduciary duty are not 'exemplary or punitive damages,' as that phrase is used in the policy, and therefore that exclusion is not applicable"); *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987). But see *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1033 (Md. 1993) ("The payment of damages - even broadly defined - remains distinct from other expenditures, such as fines, penalties, or assessments, which would not be covered under the ... policy."); see also *Allen Bros. v. Abacus Direct Corp.*, 2005 U.S. Dist. LEXIS 8444, at 6 (D. Ill. Feb. 23, 2005) ("However, the Act provides that 'this article displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret' while not affecting the contractual remedies between the parties... . Thus, because the Act preempts the common law of restitution and allows for a claim of unjust enrichment, this claim is not dismissed." (internal citations omitted)).

n134. *Ellett Bros., Inc. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 387 (4th Cir. 2001) ("We have no difficulty concluding that none of the complaints seeks 'damages' against Ellett. Neither the California municipalities nor the NAACP seek compensation for past injuries. Although they seek money from Ellett in the form of restitution, disgorgement, civil penalties, attorney's fees, cost of suit, and (in the NAACP suit) contribution to a fund to monitor gun dealers, none of these constitutes "damages."").

n135. *County of Essex v. First Union Nat'l Bank*, 862 A.2d 1168, 1177 (N.J. Super. App. Div. 2004) ("We reject the bank's first contention that R. 4:42-11(b) controls for the obvious reason that unjust enrichment is not a tort and the rule is limited to the provision of interest in tort cases. Unjust enrichment is an equitable remedy.").

n136. Restatement (First) of Restitution § 4(d) (1937) ("The proceedings in which specific restitution is sought may consist of (a) a bill for the specific restitution of property; (b) a bill for the reformation of a transaction, in which either a conveyance or reconveyance is asked or the cancellation of a deed is sought; (c) a bill to cancel a release or surrender; (d) a bill of review or other bill attacking a prior judgment or decree, the final judgment or decree having the effect of transferring the subject matter or discharging a claim created by the prior judgment; (e) a motion for restitution after the reversal of a judgment; or (f) any other proceeding which attacks the validity of a conveyance or transaction creating a right."); 1 Dobbs, *Law of Remedies*, supra note 11, §4.4 ("Specific restitution is not the result of an incantation. It does not matter whether the words constructive trust or reformation are used. If the plaintiff traces his real property into the hands of the defendant and the plaintiff is entitled to restitution, then specific restitution is appropriate. If a court wants to speak of rescission

rather than constructive trust, an order requiring specific restitution is still appropriate.").

n137. Restatement (First) of Restitution § 4(c) (1937) ("The common law actions by which land or chattels are returned to a person entitled to the possession of them are the tort actions of ejectment, replevin and detinue."); Andrew Kull, Restitution in Bankruptcy: Reclamation and Constructive Trust, 72 Am. Bankr. L.J. 265, 281 (1998) [hereinafter Kull, Restitution in Bankruptcy] ("But unlike the victim of simple conversion, the victim of fraud or mistake needs the law of restitution - in this aspect, the law of rescission and avoidance - to establish rights of ownership."); 1 Dobbs, Law of Remedies, supra note 11, §4.4 ("If the plaintiff cannot have replevin or if replevin will not be satisfactory, he can recover the specific personal property by a straight-forward injunctive order. Whether that order is explained as a constructive trust or simply as an injunction does not matter.").

n138. There is some evidence that specific restitution at law is less apt to require such counter-restitution than restitution in equity. See McCorkle, supra note 124, §§ 4-5 (observing that in cases of property improvement, restitution at law is typically limited to a set-off against "rents, profits, or damages," while restitution at equity involves one party giving the property back while the other party disgorges the value of the improvements).

n139. 337 F.3d 1024 (9th Cir. 2003).

n140. Restatement (First) of Restitution § 128(i) (1937) ("A person who has tortiously used the chattel of another is under a duty of restitution to the owner for the value of the use, although the owner would not have used the chattel and although it was not harmed by the use, unless the owner has obtained a judgment for its value. If, however, the owner gets a judgment for the value of the subject matter in an action for conversion or otherwise, he is not entitled to restitution for the value of the use subsequent to the time of the conversion" (internal citations omitted)); see also Cross v. Berg Lumber Co., 7 P.3d 922, 935 (Wyo. 2000) ("The unjust enrichment remedy is not punitive but is one method of compensating the plaintiff's loss.").

n141. See, e.g., Maumelle Co. v. Glenn, 865 S.W.2d 272, 274 (Ark. 1993) (noting that rescission is recognized at law and must take place before the court awards restitution).

n142. 2 Dobbs, Law of Remedies, supra note 11, § 9.1, at 547 ("Rescission is readily available and perhaps somewhat more readily available in some cases than damages; rescission may be permitted for some kinds of wholly innocent misrepresentation even though damages might not."); Restatement (Third) of Restitution & Unjust Enrichment §13 cmt. c (Tentative Draft No. 1, 2001) ("A transfer is not subject to invalidation for

misrepresentation, fraudulent or otherwise, unless the misrepresentation induced the transfer. Subject to this test of causation, a transfer induced by fraud is subject to rescission without regard to materiality; whereas a transfer induced by innocent misrepresentation is subject to rescission only if the misrepresentation was material.").

n143. Restatement (Third) of Restitution & Unjust Enrichment §13 cmt. e (Tentative Draft No. 1, 2001) ("By contrast to the rule in tort, where a misrepresentation is actionable only if it results in pecuniary loss to the plaintiff, the rule of this section allows rescission without any showing that the transferor has suffered economic injury. Moreover, unlike most instances of liability in restitution, a transferor's right to rescind a transfer under this section does not depend on a showing that the transferee would otherwise be unjustly enriched Because the primary function of restitution in this context is to vindicate the transferor's transactional autonomy, neither injury nor enrichment is a necessary condition of the entitlement to rescission. To establish a right to rescind under this section, it is sufficient to show that the transferor's consent has been improperly derived." (internal citations omitted)); see also *Peine v. Murphy*, 377 P.2d 708, 714 (Haw. 1962) (holding that an actionable fraud existed despite no pecuniary damage); *Seeger v. Odell*, 115 P.2d 977, 982 (Cal. 1941) (holding that an action for fraudulent misrepresentation sounded in equity requires no showing of damages).

n144. Restatement (Third) of Restitution & Unjust Enrichment §13 illus. 16 (Tentative Draft No. 1, 2001); see also Restatement (Second) of Torts § 548A, cmt. b (1965) ("Pecuniary losses that could not reasonably be expected to result from the misrepresentation are, in general, not legally caused by it and are beyond the scope of the maker's liability."); *Randall v. Loftsgaarden*, 478 U.S. 647, 659 (1986) ("Indeed, by enabling the victims of prospectus fraud to demand rescission upon tender of the security, Congress shifted the risk of an intervening decline in the value of the security to defendants, whether or not that decline was actually caused by the fraud."); 2 *Dobbs*, *Law of Remedies*, supra note 11, §9.3(2), at 583 ("A number of cases have permitted the plaintiff to rescind for a misrepresentation, and thus to avoid all losses associated with the transactions, including those losses not resulting from the misrepresentation [The plaintiffs in *Farnsworth v. Feller*] obtained rescission of their purchase of a sand-and-gravel business by showing that defendants had induced the transaction by means of a 'false and forged appraisal report.' Defendants argued on appeal that the 'real reason' for rescission was the loss sustained by plaintiffs in their first months of operating the business. The Oregon court rejected this argument, noting that 'the fact that one who has been defrauded may also have some other reason to desire the rescission of a transaction is not a defense in a suit for rescission if all of the required elements have been established.'" (citing 471 P.2d 792, 797 (Ore. 1970) (internal citations omitted))).

n145. *Mfrs. Tech., Inc. v. Cams, Inc.*, 728 F. Supp. 75, 82 (D. Conn. 1989); *Borg-Warner Corp. v. York-ShIPLEY, Inc.*, 136 U.S.P.Q. (BNA) 255, 259 (N.D. Ill. 1963) (holding that although the owner of the trademark had the burden of providing a reasonable basis for computation of its damages arising from infringement, the alleged infringer need not have negated every conceivable intervening factor other than infringement that might have caused a decline in its sales, and that the law requires the owner of the trademark only to make a prima facie showing, at which point the alleged infringer has the burden of rebutting the prima facie showing).

n146. Laycock, *Scope and Significance*, supra note 1, at 1280 ("Specific restitution of misappropriated property both restores the property to the rightful owner and deprives the misappropriator of his unjust gain. But such explanations are often indirect and sometimes ill-fitting in more complex situations. The misappropriator is unjustly enriched whether or not the rightful owner can trace the specific property taken. Yet, a plaintiff who can trace the specific property gets a far more powerful remedy than one who cannot. The conceptual basis for this remedy is plaintiff's claim to restoration of property that is still identifiable as his. Elaborate tracing rules separate the property still identifiable as plaintiff's from property that has passed into the misappropriator's general assets."); *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948) ("The specific instances in which equity impresses a constructive trust are numberless - as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." (internal citations omitted)).

n147. See infra Part VII for a detailed discussion of benefit.

n148. See supra note 100 and accompanying text.

n149. *Tenney v. Jacobs*, 240 A.2d 138, 140 (Del. 1968) ("This being so, the matter falls within the purview of the familiar principle of equity that when it takes jurisdiction of a cause and decides that relief shall be granted, the relief, including damages, if any, will be tailored to suit the situation as it exists on the date the relief is granted." (internal citations omitted)).

n150. For further explanation of range of valuation dates, see George P. Roach, *Correcting Uncertain Prophecies: An Analysis of Business Consequential Damages*, 22 Rev. Litig. 1, 29 (2003) [hereinafter Roach, *Correcting Uncertain Prophecies*].

n151. But see *Palmer*, supra note 36, § 2.12, at 157-58 (noting that cases show that an "innocent" tortfeasor is liable for the full proceeds of the sale, rather than just the lost profits).

n152. Roach, *Correcting Uncertain Prophecies*, supra note 150, at 3.

n153. Roach, *Correcting Uncertain Prophecies*, supra note 150, at 2.

n154. *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965); see also *Guy. Tel. & Tel. Co. v. Melbourne Int'l Commc'ns*, 329 F.3d 1241, 1249 (11th Cir. 2003) (noting that a plaintiff suing for restitution may be entitled to "the fair market value of the transferred goods and services").

n155. *Chauncey v. Yeaton*, 1 N.H. 151, 154 (1818) ("It is obvious that the owner of property, which has been wrongfully converted, should possess a right to institute such a suit for the injury, as will afford him an ample indemnification. If the wrong doer hath sold, or used and then sold the property, the owner may waive the tort and in assumpsit recover the nett [sic] proceeds received both for the use and by the sale... . The amount recoverable in assumpsit cannot upon general principles, operate unfavorably to the trespasser." (citing *Cummings v. Noyes*, 10 Mass. 433, 435-36 (1813))).

n156. See *supra* note 73 and accompanying text for examples that discuss issues of seniority as cause to find remedies at law inadequate.

n157. 1 *Dobbs, Law of Remedies*, *supra* note 11, §4.3(1), at 568.

n158. Restatement (First) of Restitution § 202 (1937) ("In a number of cases it has been held that where the money of one person has wrongfully been used in paying all the premiums upon a life insurance policy taken out by the wrongdoer, the other person can impose a constructive trust of the proceeds."); see also *Palmer*, *supra* note 36, §2.13 ("If, however, the claim is being asserted in an insolvency proceeding, general creditors should be protected by limiting the claimant to a lien. It is not equitable to permit him to recover more than the amount of his money claim at the expense of general creditors.").

n159. See *Atlas, Inc. v. United States*, 459 F. Supp. 1000, 1005 (D.N.D. 1978) (holding that the victim of an embezzler could trace embezzled funds to investment in a house and constructive trust gave the victim priority over the government's tax lien on the house); *TMG II v. United States*, 1 F.3d 36, 39 (D.C. Cir. 1993) (holding that if the plaintiffs could show that the property in question belonged to them rather than the defendant at the time the federal tax lien attached, the lien would be ineffective against their claims); *Blachy v. Butcher*, 35 F. Supp. 2d 554, 563-64 (W.D. Mich. 1998) (holding that a constructive trust strips an IRS lien); *Mickelson v. Barnet*, 460 N.E.2d 566, 571-72 (Mass. 1984) (stating in dicta that the plaintiffs are entitled to the trust and that their claim on the trust superseded the federal government's).

n160. *Hamblet v. Coveny*, 714 S.W.2d 126, 129 (Tex. App. - Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Jones v. Carpenter*, 106 So. 127, 129 (1925); *Long v. Earle*, 269 N.W. 577, 582 (1936) ("It was never contemplated or intended ... that a homestead could be created and maintained with stolen or embezzled

property, or with property wrongfully converted which rightfully belonged to the beneficiaries of a trust fund."); *Shinn v. McPherson*, 58 Cal. 596, 599 (1881) (holding that California homestead laws were not intended "to be a secure and impregnable asylum in which to deposit peculations from others"); *Am. Ry. Express Co. v. Houle*, 210 N.W. 889, 890 (Minn. 1926).

n161. *Pope v. Garrett*, 211 S.W.2d 559, 561 (Tex. 1948) ("In this case, Claytonia Garrett does not acquire title through the will. The trust does not owe its validity to the will. The statute of descent and distribution is untouched. The legal title passed to the heirs of Carrie Simons when she died intestate, but equity deals with the holder of the legal title for the wrong done in preventing the execution of the will and impresses a trust on the property in favor of the one who is in good conscience entitled to it.").

n162. *Kull, Restitution in Bankruptcy* supra note 137, at 290. Kull writes: "the truth about constructive trust and bankruptcy is that only in bankruptcy does constructive trust really matter." He also states:

Wider recognition that reclamation is a species of restitution might influence two ongoing debates about the remedy. First, from a restitution standpoint, there can be no doubt that the right to reclamation extends to traceable proceeds... . Second, it seems unlikely as a matter of restitution law that a secured creditor of the buyer claiming priority in the reclaimed goods under an after-acquired property clause should be regarded as giving "value" sufficient to make him a good faith purchaser with priority over the seller's right of reclamation.

Kull, supra note 137, at 268 n.8. See also *In re Application of Radke*, 619 P.2d 520, 525 (Kan. Ct. App. 1980) (allowing funds to be traced in equity cases and the owner to claim funds when they can be identified); *Tex. Am. Oil Corp. v. U.S. Dep't of Energy*, 44 F.3d 1557, 1571 (Fed. Cir. 1995) (treating concepts differently when doing so allowed court to change government's priority against creditors of bankrupt from class 7 to lower class 9); *Gordon v. Spalding*, 268 F.2d 327, 381 (5th Cir. 1959) (allowing the plaintiffs to claim money from a constructive trust whose trustee had filed for bankruptcy).

n163. *Pierce v. Vision Inv., Inc.*, 779 F.2d 302, 309 (5th Cir. 1986) ("Because the court's order in the present case is an equitable decree designed to protect the public and to permit effective enforcement of the Interstate Land Sales Full Disclosure Act, a judgment of contempt designed to enforce that order is entirely appropriate. As our court recently emphasized in discussing contempt sanctions imposed to enforce an injunction in securities fraud litigation: "Courts possess the inherent authority to enforce their own injunctive decrees... . Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender." Thus, we conclude that a consent order entered in a case brought by the Secretary of Housing and Urban Development under the Interstate Land Sales Full Disclosure Act is enforceable by civil contempt." (quoting *Waffenschmidt v. Mackay*, 763 F.2d 711, 716 (5th Cir. 1985))).

n164. 2 Dobbs, *Law of Remedies*, supra note 11, §6.1(3), at 11 ("Although a number of cases have allowed the wrongdoer's victim to reach the proceeds of the life policy, only a few have supported a recovery of the whole of the proceeds when those proceeds exceeded the plaintiff's loss.").

n165. Note, however, that the Third Restatement of Restitution advises that when a constructive trust or equitable lien would operate to deprive third party creditors of their repayment, the senior priority of the constructive trust or equitable lien should only apply to the amount of unjust enrichment that satisfies the plaintiff-creditor's damages:

B embezzles \$ 50,000 from A and invests the money. A traces the stolen funds into shares now worth \$ 200,000. In a two-party contest between A and B, A is entitled to a declaration that B holds the shares in constructive trust for A. Assuming, however, that B has numerous unsatisfied creditors and no assets other than the shares, A will be entitled to a proprietary remedy only to the extent of an equitable lien on the shares, securing his claim to recovery of \$ 50,000 plus interest. The rationale of disgorgement that would justify constructive trust in the contest between A and B does not extend to the contest between A and B's other creditors. So long as the stolen funds are restored, the suggestion that restitution prevents the unjust enrichment of B's other creditors at the expense of A - a claim that is entirely plausible in the circumstances of the previous Illustration - here becomes attenuated and artificial.

Restatement (Third) of Restitution & Unjust Enrichment §4 illustration 3 (Draft Discussion 2000).

n166. *Tex. Am. Oil Corp.*, 44 F.3d at 1569 (holding that restitution warrants higher priority than disgorgement in excess of plaintiff's losses).

n167. *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) ("True, "in establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.' ... But all that means is that Taylor could have made out a prima facie case for an award of infringer's profits by showing Meirick's gross revenues from the sale of the infringing maps. It was not enough to show Meirick's gross revenues from the sale of everything he sold, which is all, really, that Taylor did. If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits." (quoting 17 U.S.C. § 504(b) (2000))).

n168. *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. Mfg. Co.*, 225 U.S. 604, 620 (1912) (stating that a guilty trustee's wrongdoing justifies the risk of offsets being lost); *Gordon Form Lathe Co. v. Ford Motor Co.*, 133 F.2d 487, 494 (6th Cir. 1943) (stating that the defendant's inadequate recordkeeping would be held against it).

n169. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1945) (maintaining that the plaintiff is held to a lower burden of proof in ascertaining the exact amount of damages because "the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created."); *Deering, Milliken & Co. v. Gilbert*, 269 F.2d 191, 193 (2d Cir. 1959) ("Where the defendant controls the most satisfactory evidence of sales the plaintiff need only establish a basis for a reasoned conclusion as to the extent of injury caused by the deliberate and wrongful infringement."); *Id.* at 193-94 (advocating a more flexible standard for plaintiff's burden of showing defendant's revenues are appropriate when defendant "prevented proof by direct evidence of the true facts essential to an accurate determination of the royalties due under the (Copyright) Act." (quoting *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 267-68 (2d Cir. 1959))); *Aris Isotoner Inc. v. Dong Jin Trading Co.*, No. 87 Civ. 8904 (RO), 1989 U.S. Dist. LEXIS 18447, at 18 (S.D.N.Y. May 16, 1989) ("Thus, when the defendant fails to provide satisfactory evidence of its actual sales, the court may rely on indirect or circumstantial evidence."); see also *Phillip Morris USA Inc. v. Otamedia Ltd.*, No. 02 Civ. 7575 (GEL)(KNF), 2005 U.S. Dist. LEXIS 1259, at 16 (S.D.N.Y. Jan. 28, 2005) ("Furthermore, if a defendant's actual sales cannot be determined with precision, because the defendant fails to produce satisfactory evidence of those sales, the court may rely on indirect and circumstantial evidence in calculating profits." (internal citations omitted)); *Intel Corp. v. Terabyte Int'l*, 6 F.3d 614, 621 (9th Cir. 1993) (stating that while "the method the district court used to measure damages was somewhat crude ... if there was some doubt as to the result, [the defendant] should have come forward with evidence to demonstrate the error"); *A & M Records v. Abdallah*, 948 F. Supp. 1449, 1459 (C.D. Cal. 1996) (finding the plaintiff's estimate of the defendant's illegitimate profits as fact because defendant presented no evidence on the point).

n170. *Roach*, A Default Rule of Omnipotence, *supra* note 15, at 61 ("Out of approximately 116 opinions, the court held the defendant in default for the revenues proven by the plaintiff in 73 opinions while in 43 opinions the court acknowledged the default rule but approved an alternative estimate or rule of thumb to establish the defendant's benefit, generally measured by an estimate of the defendant's gross profit.").

n171. *Am. Honda Motor Co. v. Two Wheel Corp.*, 918 F.2d 1060, 1063-64 (2d Cir. 1990) ("Plaintiff's claim for damage award based on gross sales, because of lack of proof of deductions, is properly rejected because plaintiff received wholesale price of goods sold to defendant, who was former dealer of plaintiff.").

n172. See *infra* notes 230-37 and accompanying text.

n173. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 206-07 (1941) ("Infringement and damage having been found, the Act requires the trade-mark owner to prove only the sales of articles bearing the infringing mark The burden is the infringer's to prove that his infringement had no cash value on sales made by him. If he does not do so, the profits made on sales of goods bearing the infringing mark properly belong to the owner of the mark. There may well be a windfall to the trade-mark owner where it is impossible to isolate the profits which are attributable to the use of the infringing mark. But to hold otherwise

would give the windfall to the wrongdoer... . It promotes honesty and comports with experience to assume that the wrongdoer who makes profits from the sales of goods bearing a mark belonging to another was enabled to do so because he was drawing upon the good will generated by that mark." (quoted with approval in *Novell, Inc. v. Network Trade Ctr.*, 25 F. Supp. 2d 1233, 1243 (D. Utah 1998)); *Aris Isotoner Inc.*, 1989 U.S. Dist. LEXIS 18447, at 18 ("To recover profits, plaintiff must prove only the defendant's sales; the defendant has the burden to prove any costs or deductions from its gross revenues... . Moreover, if the actual sales cannot be precisely determined, the court may resolve any doubts against the defendant in calculating profits, particularly if the uncertainty is due to the defendant's inadequate recordkeeping or failure to produce documentary evidence... . Indeed, in such a situation it is permissible to award the highest reasonably ascertainable amount of profits." (internal citations omitted)); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514 (9th Cir. 1985) ("Any doubt as to the computation of costs or profits is to be resolved in favor of the plaintiff... . If the infringing defendant does not meet its burden of proving costs, the gross figure stands as the defendant's profits." (internal citations omitted)).

n174. *Boston Children's Heart Found., Inc. v. Nadal-Ginard*, 73 F.3d 429, 435 (1st Cir. 1996) (noting that a court can require a fiduciary to forfeit the right to retain or receive compensation for conduct in violation of his or her fiduciary duty, even absent a showing of actual injury to the principal); *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 8 (Del. Ch. 1949) ("In equity when the breach of a confidential relation by an employee is relied on and an accounting for any resulting profit is sought, loss to the corporation need not be charged in the complaint."); *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969) ("It is true that the complaint before us does not contain any allegation of damages to the corporation but this has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty... . This is because the function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but, as this court declared many years ago "to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates." (quoting *Dutton v. Willner*, 52 N.Y. 312, 319 (N.Y. 1873)) (internal citations omitted)); *People ex rel. Plugger v. Twp. Bd. of Overyssel*, 11 Mich. 222, 225-26 (1863) ("Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal."); Restatement (First) of Restitution §128 cmt. f (1937) ("Normally the plaintiff must have suffered a loss and an action not based upon loss is not restitutionary. In some cases, however, the quasi-contractual action of assumpsit is based wholly upon the unjust enrichment of the defendant. Thus a principal is entitled to a bribe received by his agent from a third person, although the principal's profit from the transaction, aside from the bribe, was the same as it would have been if no bribe had been given."); *Walraven v. Martin*, 333 N.W.2d 569, 571 (1983); *Groothand v. Schlueter*, 949 S.W.2d 923, 927 (Mo. Ct. App. 1997); Restatement (Third) of Restitution & Unjust Enrichment §3 cmt. c (Discussion Draft 2000) ("Liability to disgorge profits is ordinarily limited to instances of conscious wrongdoing As an exception to this general rule, trustees and other fiduciaries may be made liable for profits realized even as the result of an unintentional breach of fiduciary duty." (internal citations omitted)).

n175. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) ("We therefore conclude that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client."); *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) ("Clients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that

their attorney breached that duty, not that the breach caused them injury."); In re Estate of Corriea, 719 A.2d 1234, 1241 (D.C. 1998) (noting that plaintiff's inability to quantify the damages suffered did "not disqualify the profits ordered disgorged as "just compensation for the wrong." (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940))); Eriks v. Denver, 824 P.2d 1207, 1213 (Wash. 1992) (en banc) (rejecting the argument that a finding of damages and causation is required to order fee forfeiture); Rice v. Perl, 320 N.W.2d 407, 411 (Minn. 1982) (holding that the client need not prove actual harm to obtain fee forfeiture); Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So. 2d 947, 953 (Fla. Dist. Ct. App. 1993) ("Fee forfeiture should be considered only when an ordinary remedy like offsetting damages is plainly inadequate."); see also Frank v. Bloom, 634 F.2d 1245, 1258 (10th Cir. 1980) (recognizing that "when the attorney is representing clients with actual existing conflicts of interest ... the attorney's compensation may be withheld even where no damages are shown").

n176. Riggs Inv. Mgmt. Corp. v. Columbia Partners, L.L.C., 966 F. Supp. 1250, 1271 (D.D.C. 1997); Estate of Bishop v. Equinox Int'l Corp., 256 F.3d 1050, 1055 (10th Cir. 2001) ("In short, we have acknowledged showing of actual damages is not required to recover portion of infringing defendant's profits in trademark action, and that plaintiffs in such cases may recover the defendant's profits based upon the alternative theories of the prevention of unjust enrichment and the deterrence of willful infringement."); ISP.NET.LLC v. Qwest Commc'ns Int'l, Inc., No. IP 01-0480-C-B/S, 2004 U.S. Dist. LEXIS 20237 (S.D. Ind. Sept. 24, 2004); Monsanto Co. v. Campuzano, 206 F. Supp. 2d 1239, 1249 (S.D. Fl. 2002); Pure Oil Co. v. Paragon Oil Co., 117 U.S.P.Q. (BNA) 321 (N.D. Ohio 1958); Laskowitz v. Marie Designer, Inc., 119 F. Supp. 541, 555 (C.D. Cal. 1954). But see Intel Corp. v. Terabyte Int'l, 6 F.3d 614, 621 (9th Cir. 1993) (holding the trial court did not abuse its discretion in calculating damages "somewhat crudely" because the infringer offered no evidence in rebuttal to the calculation); Jeffrey Chain, L.P. v. Tropodyne Corp., Nos. 99-6268, 99-6269, 2000 U.S. App. LEXIS 33926, at 15 (6th Cir. Dec. 20, 2000) ("In trademark cases courts draw a sharp distinction between proof of the fact of damage and proof of the amount of damage... . To be entitled to damages the plaintiff must prove that "some damages were the certain result of the wrong.' ... Damages are precluded where the damage claimed is not the certain result of the wrong." (quoting Broan Mfg. Co. v. Associated Distribs., Inc., 923 F.2d 1232, 1235 (6th Cir. 1991)) (internal citations omitted)).

n177. Restatement (First) of Restitution § 128 cmt. f (1937) ("Although it is essential to an action of restitution that the defendant should have had possession or should have disposed of the chattel, restitution is granted even though the conversion was innocent and the entire transaction resulted in no net benefit to the defendant.").

n178. .2 Dobbs, Law of Remedies, supra note 11, §9.1, at 581 ("The ordinary rule is that the plaintiff must demonstrate the existence of actual damages to have a common law action for damages based on misrepresentation. Restitution claims are different. Most courts seem to have rejected any pecuniary damages requirement as a pre-condition to restitution where the misrepresentation was clearly material even though it did not bear on economic value and even where the misrepresentation understated the value of goods involved." (citing Ind. & Mich. Elec. Co. v. Harlan, 504 N.E.2d 301 (Ind. App. 1987))).

n179. *Peine v. Murphy*, 377 P.2d 708, 712 (1962) ("Plaintiff's suit in the trial court was clearly based on a constructive trust-unjust enrichment theory in equity where rescission and other relief may be given even though plaintiff did not prove any pecuniary damage.").

n180. *A & M Records, Inc. v. Heilman*, 142 Cal. Rptr. 390, 397-98 (Ct. App. 1977).

n181. *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836, 837 (Tex. 1967).

n182. .1 *Dobbs, Law of Remedies*, supra note 11, §4.1(4) ("Although the statute of frauds prohibits a recovery of damages 'on the contract,' the statute does not prevent a recovery of restitution."); *Eglin v. Schober*, 759 S.W.2d 950, 953 (Tex. App. - Beaumont 1988, writ denied) ("An oral promise to buy for another creates a constructive trust which can bypass the Statute of Frauds."); *Matthews v. Am. W. Sav. Ass'n*, 825 S.W.2d 552, 554 (Tex. App. - Beaumont 1992, writ denied).

n183. *Merex A.G. v. Fairchild Weston Sys.*, 29 F.3d 821, 825 (2d Cir. 1994).

n184. *Mobil Oil Corp. v. Dade County Esoil Mgmt. Co.*, 982 F. Supp. 873, 880 (S.D. Fla. 1997).

n185. *Zitter*, supra note 33, §3.

n186. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 480 (1962).

n187. See *Tex. Am. Oil Corp.*, 44 F.3d at 1567 (discussing cases considering the "windfall" problem); *Roach, A Default Rule of Omnipotence*, supra note 15, at 49-67 (discussing disgorgement and its history).

n188. *Nutting v. Ram Sw., Inc.*, 69 F. App'x 454, 459 (Fed. Cir. 2003) ("Deterrence, while long acknowledged by courts as a rationale for the award of profits, rests on questionable foundations. By the terms of 15 U.S.C.S. 1117(a) an award of either plaintiff's damages or defendant's profits constitutes compensation and

not a penalty. The Tenth Circuit, as have other courts, has recognized that if deterrence is too weak and too easily invoked a justification for the severe and often cumbersome remedy of a profits award."); *ALPO Petfoods v. Ralston Purina Co.*, 913 F.2d 958, 968-69 (1990) ("Foxtrap, however, cites *W.E. Bassett* to suggest that courts can award profits only when they find "a relatively egregious display of bad faith." ... Indeed, this court in *Foxtrap* advised a district court to make an award that would "deter the defendant, yet not be a windfall to plaintiff nor amount to punitive damages." ... Based on *Foxtrap*, as well as our concern that deterrence is too weak and too easily invoked a justification for the severe and often cumbersome remedy of a profits award, we hold that deterrence alone cannot justify such an award." (quoting *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 641, 642 n.11 (1982)) (internal citations omitted)); *Stuart v. Collins*, 489 F. Supp. 827, 833 (S.D.N.Y. 1980) (holding that an award should not be a windfall to plaintiff).

n189. *Attorney Gen. v. Blake*, [2001] 1 A.C. 268, 292 (H.L.) (appeal taken from Eng.) (U.K.).

n190. See *supra* note 56 and accompanying text.

n191. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 229-230 (2002) (Ginsburg, J., dissenting) ("In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." ... These cases establish what the Court does not and cannot dispute: Restitution was "within the recognized power and within the highest tradition of a court of equity." (quoting *Moses v. Macferlan*, 97 Eng. Rep. 676, 681 (K. B. 1760))); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)).

n192. Restatement (Third) of Restitution & Unjust Enrichment §1 cmt. b, cmt. f (Discussion Draft 2000).

n193. *Am. Online, Inc. v. Nat'l Health Care Disc., Inc.*, 121 F. Supp. 2d 1255, 1278 (N.D. Iowa 2000).

n194. Compare *SEC v. Buntrock*, No. 02 C 2180, 2004 U.S. Dist. LEXIS 9495, at 7-9 (N.D. Ill. May 25, 2004) ("Given this analytical framework, we agree with the SEC that the disgorgement remedy it seeks is equitable in nature and, therefore, an acceptable form of relief. As the SEC has accurately stated, disgorgement has historically been viewed as an equitable remedy employed against those who profit by abusing positions of trust.") with *Roach, A Default Rule of Omnipotence*, *supra* note 15, at 47 n.175 (surveying all federal and state case law and revealing only eleven known case opinions that use the term "disgorgement" in any sense before 1960).

n195. Rendleman, *supra* note 1, at 851 ("Indifference to the substantive law in the attorney generals' Medicaid recovery litigation is widespread, and it features endemic references to the Medicaid restitution litigation as "tort."").

n196. Kull, *Rationalizing Restitution*, *supra* note 1, at 1194-95 ("Disagreement at this basic level about the content of the law of torts or the law of contracts would be unthinkable - not because these subjects have an immanent or ideal form (any more than restitution does), but because they have acquired stable conventional definitions (as restitution has yet to do). The nineteenth-century treatise writers defined bodies of law called 'torts' and 'contracts' that lawyers came to regard as appropriate, because the subjects as defined lent themselves to fruitful analysis and analogy. By contrast, in the area of liability for unjust enrichment - for reasons that were more circumstantial than substantive - this threshold task of definition was not pursued to a conclusion when the rest of the legal landscape was being given its modern shape. The result has been a persistent uncertainty about this part of the law that continues to hamper analysis and even comprehension.").

n197. Kennedy, *supra* notes 68 and 70.

n198. Kennedy, *supra* notes 68 and 70, at 609.

n199. See *Jeffer v. Stubbs*, 970 P.2d 1234, 1243 (Utah 1998) ("Courts have broad authority to grant equitable relief as needed.").

n200. See *Navajo Acad., Inc. v. Navajo United Methodist Mission Sch., Inc.*, 785 P.2d 235, 240 (N.M. 1990) ("It is anything but new for this Court to validate an equitable solution to a problem such as the one before us when a party asks for justice and a 'legal' remedy is inadequate; 'equity frequently interferes.'" (quoting *Romero v. Munos*, 1 N.M. 314, 316 (1859))).

n201. 1 Dobbs, *Law of Remedies*, *supra* note 11, §4.3(1), at 587.

n202. Note, *Discretionary Power of Courts of Equity*, 16 *Harv. L. Rev.* 444 (1903).

n203. *Fuller v. Berger*, 120 F. 274, 278 (7th Cir. 1903). But see *Chauncey v. Yeaton*, 1 N.H. 151, 156

(1818) ("Public policy requires the absolute defeat and rejection of all such claims, in order that every legal obstacle may be interposed to put a stop to such transactions.").

n204. Fuller, 120 F. at 279.

n205. *Bambu Sales, Inc. v. Testini*, No. 87 CV 3190, 1988 U.S. Dist. LEXIS 14601, at 8 (E.D.N.Y. Dec. 19, 1988) ("It is well-settled that a defense of unclean hands is not to be considered independently of the merits of plaintiff's claim... More specifically, "the maxim of unclean hands is not applied where plaintiff's misconduct is not directly related to the merits of the controversy between the parties, but only where the wrongful acts in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication.' ... For this reason "the alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that he has personally been injured by the plaintiff's conduct.'" (quoting *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 863 (5th Cir. 1979) (internal citations omitted))).

n206. *Magee v. Young*, 198 S.W.2d 883, 889 (Tex. 1947) ("In order to satisfy the demands of justice, courts of equity will indulge in presumptions and even pure fiction. For examples, under proper facts, they will (a) presume a grant where none is proved, ... and will (b) create a trust contrary to the intentions of the parties to the transaction" (internal citations omitted)).

n207. *Susan H. v. Jack S.*, 37 Cal.Rptr. 2d 120, 124 (Ct. App. 1994); see also *McBride v. Boughton*, 20 Cal. Rptr. 3d 115 (Ct. App. 2004) (holding that, as a matter of public policy, an unmarried man who supported a woman and her child upon a false representation by the mother that the child was biologically his may not sue the mother for unjust enrichment).

n208. *Day v. Heller*, 653 N.W.2d 475, 479 (Neb. 2002) (internal citations omitted).

n209. *Rankin v. Emigh*, 218 U.S. 27, 35 (1910); see also *Penny v. Orthalliance, Inc.*, No. 3:01-CV-1569-N, 2003 U.S. Dist. LEXIS 12495 (N.D. Tex. July 9, 2003) (refusing to dismiss a claim for unjust enrichment relating to a void contract).

n210. This case is sometimes cited for the key factual distinctions that the plaintiff does not need to be the transferor - i.e., the plaintiff does not need to have unjustly benefited the defendant - nor is the defendant required to have committed the unjust act. 211 S.W.2d at 561-62.

n211. *Chicago v. Roppolo*, 447 N.E.2d 870 (Ill. App. Ct. 1983).

n212. 1 Dobbs, *Law of Remedies*, supra note 11, §2.4(7), at 115; *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1096 (7th Cir. 1994) ("We also do not conclude that the district court abused its discretion by refusing to award Old World's profits... . The variety of circumstances in which a court may award disgorgement by no means indicate that the district court is required to award disgorgement." (internal citations omitted)); see also *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) ("Although there is a sense in which equitable relief is inherently discretionary because historically, and still to a large extent, there is no absolute right to an equitable remedy."); *Wisconsin v. Weinberger*, 745 F.2d 412, 425 (7th Cir. 1984) ("This is a different meaning of discretion, one that actually cuts against a highly deferential standard of review when as in this case the district court grants the preliminary injunction."); *W. Diversified Servs. v. Hyundai Motor Am., Inc.*, 427 F.3d 1269, 1273 (10th Cir. 2005) ("Even with a finding of willfulness, a court may still exercise its discretion to reduce or even eliminate a profit award in the name of fashioning an equitable remedy to meet the needs of each case."); *Developers Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130, 1136 (Ohio Ct. App. 1990) (denying recovery of defendant's gain in an action for tortious interference with contract).

n213. *Byron v. Clay*, 867 F.2d 1049, 1051-52 (7th Cir. 1989) ("In arguing that he, not Clay fils, should have the opportunity to defraud the people of Indiana, Byron is like the highwayman who sued his partner in crime for an accounting of the profits - and was hanged for his efforts." (internal citations omitted)).

n214. *Aaron v. SEC*, 446 U.S. 680, 701 (1980) ("And the proper exercise of equitable discretion is necessary to ensure a "nice adjustment and reconciliation between the public interest and private needs." (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944))); see also *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 209 (D. Me. 2004) ("The premise for such a claim must be that, even if the defendants' conduct is blameless under the substantive requirements of federal and state antitrust statutes and state consumer protection statutes, the plaintiffs nevertheless can still obtain restitution of some part of their vehicle purchase price. But such a conclusion could result in restitution undermining another body of substantive law, to the extent that the scope of antitrust laws and consumer protection statutes is designed to permit unfettered economic activity in matters that are not within their proscription."). But see *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000) ("Courts often award equitable remedies under common law claims for unjust enrichment in circumstances where claims based upon contract or other state law violations prove unsuccessful."); *Int'l Bhd. of Boilermakers v. Szoke*, 715 F. Supp. 696, 700 (E.D. Pa. 1989) ("To the extent specific restitution - the return of the land - is a potential remedy for the purported breach, I find that this is not a case where specific restitution is available. It is well recognized that when the court believes "that such relief would interfere unduly with the certainty of titles to land,' the court may, in its discretion, refuse to grant specific restitution." (quoting *Palmer*, supra note 36, § 4.19)).

n215. *Rendleman*, supra note 1, at 868-69 (quoting *Navajo Acad., Inc. v. Navajo United Methodist Mission*

Sch., Inc., 785 P.2d 235, 236 (N.M. 1990)).

n216. George P. Roach, Reasonable (Not Rational) Royalties, A Statistical Abstract (on file with author).

n217. Holiday Inns, Inc. v. Alberding, 683 F.2d 931, 934-35 (5th Cir. 1982).

n218. Id. at 935.

n219. Edwards v. Lee's Administrator, 96 S.W.2d 1028, 1031 (1936).

n220. For another example of a court's economic analysis that sounds more in rationalization than reason, see GTFM, Inc. v. Solid Clothing, Inc., 215 F. Supp. 2d 273 (S.D.N.Y. 2002) (holding that because the trademark infringer was shown to have acted in bad faith, and trademark owner presented more reliable evidence of infringer's sales, damages should be based on information provided).

n221. Attorney Gen. v. Blake, [2001] 1 A.C. 268, 268 (H.L.) (appeal taken from Eng.) (U.K.).

n222. Comparisons between the Blake case in Great Britain and Snepp v. United States, 444 U.S. 507 (1980), are regularly drawn because they both relate to the unauthorized publication of "memoirs" by former intelligence agents. The Snepp case is even mentioned in the House of Lords opinions. However comparable the legal issues may be, there is no similarity between the public images of the two defendants. Frank Snepp was not regarded as a traitor to the United States and is generally regarded as a prominent member of the academic media community.

n223. Attorney Gen. v. Blake, [1998] Ch. 439, 464 (Eng. C.A. 1997).

n224. Blake, [2001] 1 A.C. at 292.

n225. Id.

n226. In a somewhat cryptic remark, Professor Dobbs appears to imply that the U.S. Supreme Court reacted strongly to the *Snepp* case. 1 Dobbs, *Law of Remedies*, supra note 11, §4.1(3), at 565 ("If the wrong is bad enough, even a radical remedy that captures the defendant's own property to protect the plaintiff's rights may be acceptable." (internal citations omitted)).

n227. E.g., *Farnum v. Silvano*, 540 N.E.2d 202, 206 (Mass. App. Ct. 1989) (holding that the plaintiff was entitled to rescission).

n228. E.g., *World Wide Prosthetic Supply, Inc. v. Mikulsky*, 640 N.W.2d 764, 765-66 (Wis. 2002) ("When World Wide's customers began complaining that some of the components produced by Voyager were cracked and broken, the parties' relationship deteriorated. World Wide suspected that the problems were due to manufacturing defects. After attempting to reconcile the problems with Voyager, World Wide stopped marketing the defective product and made arrangements to have a different company manufacture its components. Upon the ending of the business relationship between Voyager and World Wide, Voyager continued to manufacture and also to distribute prosthetic components, without making changes to their appearance or design.").

n229. *Boston Prof'l Hockey Ass'n. v. Dallas Cap & Emblem Mfg., Inc.*, 597 F.2d 71, 77 (5th Cir. 1979) (remanding for further fact findings to determine whether infringer's conduct related to willful infringement and damage to plaintiff or is subject to other more appropriate sanctions than doubling of damages).

n230. See Restatement (Third) of Restitution & Unjust Enrichment § 40, illus. 15 (Tentative Draft No. 4, 2005) ("Measurement of the grader's use value at \$ 75,000 is a response to egregious misconduct; a more restricted measure of use value would be appropriate against a less culpable defendant."); Palmer, supra note 36, §2.2(a), at 58 ("In *Cross v. Berg Lumber Co.*, an award of restitutionary damages based on unjust enrichment was deemed appropriate in an action for conversion of a road grader. The court noted that it would be difficult to calculate the owner's loss in terms of opportunity costs, and defendant, by converting and concealing the grader and lying about its whereabouts, engaged in willfully deceptive misconduct that should be discouraged.").

n231. *Cross v. Berg Lumber Co.*, 7 P.3d 922, 929 (Wyo. 2000).

n232. *Id.* at 935-36.

n233. E.g., *A & M Records, Inc. v. Heilman*, 142 Cal. Rptr. 390 (Ct. App. 1977) (dealing with an egregious copyright violator); *Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846 (Okla. 1987) (dealing with an egregious breach of trust by the management of a coporation against its shareholders).

n234. No. 01 C 6405, 2003 U.S. Dist. LEXIS 7134, at 57-63 (N.D. Ill. Apr. 24, 2003).

n235. *Id.* at 20-21 (internal citations omitted).

n236. *Id.* at 21 ("The Court draws the inference from Defendants' refusal to disclose their actual sales experience with the product lines that Defendants' sales and profits meet or exceed those forecast by Lucini.").

n237. *Id.* at 57-59; see also *Novell, Inc. v. Network Trade Ctr.*, 25 F. Supp. 2d 1233, 1239-43 (D. Utah 1998) (affirming the Special Master's conclusion that the plaintiff should be awarded lost profits of \$ 13.3 million, defendant's profits of \$ 6.9 million, enhancement for lost goodwill of \$ 500,000, corrective advertising costs of \$ 337,996, and nine months of fees for the plaintiff's attorneys because the defendants' "concealment of documentation of infringing activities" meant that their actions were willful as a matter of law).

n238. 1 Dobbs, *Law of Remedies*, supra note 11, § 4.1(2), at 371; see also Colleen Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577, 1610 (2002) (a professional discussion of the terminology of restitution).

n239. Attributed to Charlie Chaplin by George M. Martin, *Research on Aging: The End of the Beginning*, 299 Science 1339, 1341 (2003).

n240. Roach, *Correcting Uncertain Prophecies*, supra note 150, at 11.

n241. Free cash flow is equal to operating cash flow before interest payments and dividends but after income taxes, changes in working capital and anticipated capital expenditures to support the projected level of sales.

n242. See *Andersen v. Cumming*, 827 F.2d 1303, 1304 (9th Cir. 1987) (holding that related capital expenditures should be offset in determining the defendant's unjust enrichment in the form of operating profits).

n243. *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir. 1985) (rejecting a claim for lost growth potential for lack of adequate support).

n244. *Carter Prods., Inc. v. Colgate-Palmolive Co.*, 214 F. Supp 383, 403 (D. Md. 1963) ("The purpose of the apportionments with which we are concerned in this case is not to serve business convenience or business policy, but to secure a proper accounting by a wrongdoer for the total gains of his wrongdoing. What may be a proper method of apportioning expenses in reporting results to management may not be and in this case is not a proper method to be used in accounting for profits derived as a result of the misappropriation of trade secrets.").

n245. 17 U.S.C. §504(b) (2000) ("Actual damages and profits. The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."); 15 U.S.C. §1117(a) (2000) ("Profits; damages and costs; attorney fees. When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 43(a) or (d) [15 U.S.C. §1125(a) or (d)], or a willful violation under section 43(c) [15 U.S.C. §1125(c)], shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32 [15 U.S.C. §§ 1111, 1114], and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.").

n246. For example, the term "gross profits" is frequently confused with the term "revenues." See *Rocket Jewelry Box, Inc. v. Quality Int'l Packaging, Ltd.*, 250 F. Supp. 2d 333, 340-41 (S.D.N.Y. 2003) ("By analogy, in copyright actions, the owner must first establish the infringer's gross profits, and then the infringer has the burden of proving deductible expenses, ... and the courts determine what expenses should be deducted." (internal citations omitted)); *Taylor v. Meirick*, 712 F.2d 1112, 1120 ("Though labeled 'gross profits,' the figure is actually sales revenue minus cost of goods sold."); *The Libman Co. v. Vining Indus., Inc.*, 876 F. Supp. 185, 189

(C.D. Ill. 1995) ("The costs necessary to generate the income from the infringing products must be estimated by the court and allowed as a deduction from gross profits."); *M.B.S. Love Unlimited, Inc. v. Park's Sportswear Corp.*, No. 90 CIV 0311 (LBS), 1991 U.S. Dist. LEXIS 3770, at 8-10 (S.D.N.Y. Mar. 28, 1991) (holding that for defendant whose T-shirt infringement was clear and direct, plaintiff is entitled to \$ 43,200 per defendant, based on gross profits minus rent, without any allowance for cost of goods sold, due to lack of defense evidence on those costs); *With Love Designs, Inc. v. Dressy Tessa, Inc.*, No. 91 Civ. 4717 (RPP), 1992 U.S. Dist. LEXIS 15629, at 8-13 (S.D.N.Y. Oct. 9, 1992) (calculating profits from infringing sales of women's clothing as gross profits minus cost of sales, with disallowed deductions for agents' fees and withheld retailer payment, resulting in \$ 39,207 against one defendant and \$ 22,450 against another defendant); *Tonka Corp. v. Tonka Phone, Inc.*, No. 3-83-1544, 1985 U.S. Dist. LEXIS 12228, at 27 (D. Minn. Dec. 30, 1985) (deducting 45% for costs of goods and awarding plaintiff \$ 250,319, although defendant proved no deductions from gross profits of \$ 553,803 for sales of TONK-A-PHONE coin telephones infringing on plaintiff's family of TONKA marks for toys). For cases that use the term in a more standard definition, see *Maltina Corp. v. Cawy Bottling Co.*, 613 F.2d 582, 586-87 (5th Cir. 1980) (awarding plaintiff gross profit of infringer based on total revenue received minus cost of goods sold); *Levi Strauss & Co. v. Diaz*, 778 F. Supp. 1206, 1208 (S.D. Fla. 1991) (awarding the plaintiff "total amount of Defendant's profits").

n247. Restatement (First) of Restitution §154 cmt. a (1937).

n248. .Palmer, *supra* note 36, § 2.12, at 157-58.

n249. Restatement (Third) of Restitution §3 (Discussion Draft 2000).

n250. 328 U.S. 395 (1946).

n251. *Id.* at 396-401.

n252. *Id.* at 398 (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

n253. *Mitchell v. Robert Demario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) ("The applicability of this principle is not to be denied, either because the Court there considered a wartime statute, or because, having set forth the governing inquiry, it went on to find in the language of the statute affirmative confirmation of the power to order reimbursement... . When Congress entrusts to an equity court the enforcement of prohibitions

contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to ... give effect to the policy of the legislature." (quoting *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 203 (1839)) (internal citations omitted).

n254. *Mitchell*, 361 U.S. at 291-92; *Porter*, 328 U.S. at 402 ("Restitution, which lies within that of equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e)... . When the Administrator seeks restitution under § 205(a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205(e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. Thus it is plainly unaffected by the provisions of § 205(e)." (internal citations omitted)).

n255. See *Murphy*, supra note 238, at 1593 n.79 (explaining the holding in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), and how it differs from the holding in *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999)); see also Douglas Laycock, *Modern American Remedies* 617 (2d ed. 1994) ("It would surely be better to confine the word damages to measures of plaintiff's loss, and to settled usage concerning punitive damages, and to use restitution to describe recovery of defendant's profits. Restitution is not an alternate measure of damages; rather, restitution and damages are alternate measures of monetary recovery.").

n256. But see *Schillinger v. United States*, 155 U.S. 163, 169-72 (1894) (affirming the Court of Claims' dismissal of a claim of damages stemming from patent infringement by the U.S. government because the claim was essentially a tort).

n257. See supra Part IV, *How Restitution Can Enrich Your Case Tactically*, for further details.

n258. See 1 Dobbs, *Law of Remedies*, supra note 11, §4.1(1) ("If a liability insurance company must pay 'damages' for which its insured is legally liable, the insurer may argue that that its coverage does not protect the insured against liability for 'restitution.'" (citing *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507 (1990))).

n259. 106 F.2d 45 (2d Cir. 1939), aff'd, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940). Note that the Second Circuit's opinion was affirmed by the Supreme Court but the Supreme expressed no opinion on specific issues relating to offsetting expenses which were dismissed as questions of fact.

n260. *Id.* at 51 (citing Restatement (First) of Restitution §158 cmt. d (1937)) (internal citations omitted). For cases quoting the misstatement favorably, see *Softel, Inc. v. Dragon Med. & Scientific Commc'ns*, 891 F. Supp. 935, 941-942 (S.D.N.Y. 1995) ("Courts have allowed the deduction of a variety of expenses, including an allocation of fixed cost overhead expenses associated with the production of an infringing product."); *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1331 (9th Cir. 1984) ("[In *Sheldon*, 106 F.2d 45 (2d Cir. 1939)], the court of appeals found 'a deliberate plagiarism,' and for that reason allowed the infringers to deduct from profits 'only ... such factors as they bought and paid for.'" (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939))); *ZZ Top v. Chrysler Corp.*, 70 F. Supp. 2d 1167, 1169 (W.D. Wash. 1999) (noting the plaintiff's argument in *Kamar* that *Sheldon*, 106 F.2d 45 (2d Cir. 1939), "prevents the deduction of overhead costs"); *Warren*, 741 P.2d at 852 ("A constructive trustee who consciously misappropriates the property of another is often refused allowance even of his actual expenses.").

n261. Restatement (First) of Restitution §158 cmt. d (1937) (internal citations omitted).

n262. *Id.* §158 cmt. b.

n263. *Id.* §158 cmt. c.

n264. *Id.* §158 cmt. b.

n265. *In re Estate of Corriea*, 719 A.2d 1234, 1239 (D.C. 1998) ("The remedy of disgorgement, much like that of a constructive trust, is meant "to provide just compensation for the wrong, not to impose a penalty'" (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940))).

n266. *Ewen v. Peoria & E. Ry. Co.*, 78 F. Supp. 312, 326 (S.D.N.Y. 1948). See also *Lewis v. Ingram*, 57 F.2d 463, 465 (10th Cir. 1932) ("An unfaithful trustee is not entitled to any compensation for his services."); Restatement (Second) of Agency §439 cmt. a ("Indemnity is allowed, even though in the transaction the agent committed a breach of trust. Thus where an agent, who is authorized to buy property, makes a secret profit, the principal must indemnify the agent for his proper expenditures, although entitled to any improper profit made by the agent: *Schwartz v. Artel*, 105 P.2d 380 (1940). Likewise an agent who violated his fiduciary duty in refusing to convey property bought for the principal is entitled to be reimbursed for the purchase price, as a condition to recovery by the principal." (internal citations omitted)); *Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts* §243 (4th ed. 1987) ("Although the trustee is denied compensation because of breaches of trust committed by him, he is not denied indemnity for expenses properly incurred by him; but his liability for loss resulting from a breach of trust may be set off against his claim to indemnity."); *id.* §244.3.

n267. Restatement (First) of Restitution § 42 (1937); see also McCorkle, *supra* note 124, §11 (listing cases in which the defendant paid taxes on the property on which plaintiff was suing).

n268. Restatement (Third) of Restitution & Unjust Enrichment § 13 (Tentative Draft No. 1, 2001); see also *Randall v. Loftsgaarden*, 478 U.S. 647, 659 (1986) ("Under the 'direct product' rule, the party seeking rescission was required to credit the party against whom rescission was sought only with gains that were the 'direct product' of the property the plaintiff had acquired under the transaction to be rescinded: 'The phrase direct product means that which is derived from the ownership or possession of the property without the intervention of an independent transaction by the possessor.'" (quoting Restatement (First) of Restitution § 57 cmt. b (1937))).

n269. Kull, *Private Law*, *supra* note 6.

n270. Kull, *PrivateLaw*, *supra* note 6, at 30.

n271. Courts have treated the decision as to whether fixed expenses should be deducted from total costs as a question of fact. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 409 (1940) ("These contentions [deductions allowed in the computation of net profits] involve questions of fact ..."); *Levin Bros. v. Davis Mfg. Co.*, 72 F.2d 163, 165 (8th Cir. 1934) ("No fast and hard rules should or can be stated to guide application of this general rule to the infinite variety of fact situations developed in different cases... . Because a recurring item, like overhead, is handled a certain way in a given case such is no statement of a rule of law that the same item must be similarly dealt with in all cases. The 'rules' contended for by the parties here are not rules of law. They are but illustrations of applications of the above single broad rule to different fact situations." (internal citations omitted)).

n272. One of the exceptions to this generalization is that some jurisdictions approve the deduction of overhead for the measure of benefit but most jurisdictions do not approve the deduction of overhead for the calculation of patent damages and damages for the breach of contract.

For example, the defendant's benefit has been measured by some federal circuit courts in copyright claims as allowing the deduction of an allocated portion of the defendant's relevant fixed overhead. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 53 (2d Cir. 1939); *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1331 (9th Cir. 1984)).

On the other hand, it is widely held that overhead is not deducted when measuring contract damages. *Sure-Trip, Inc. v. Westinghouse Engineering*, 47 F.3d 526, 531 (2d Cir. 1995); *Vitex Mfg. Corp. v. Caribtex*

Corp., 377 F.2d 795, 799 (3d Cir.1967); see also *Taylor v. Meirick*, 712 F.2d 1112, 1120 (7th Cir. 1983) ("Costs that would be incurred anyway should not be subtracted, because by definition they cannot be avoided by curtailing the profit-making activity. This principle is well established in the treatment of overhead costs in calculating damages for breach of contract.").

Similarly, it is widely agreed that patent damages and copyright damages do not deduct the plaintiff's fixed costs from his lost revenues. See e.g. *Grain Processing Corporation v. American Maize-Products Company*, 185 F.3d 1341, 1427 (Fed. Cir. 1999) (concerning patent damages), *W.R. Grace & Co.-Conn v. InterCat, Inc.*, 60 F. Supp. 2d 316, 325 (D. Del. 1999) (summarizing patent damage case law) and *Computer Assocs. Int'l v. Altai, Inc.*, 775 F. Supp. 544, 570-572 (E.D.N.Y. 1991) (holding that the profit margin on the plaintiff's copyright damages should be 83% and 2% for the defendant's unjust enrichment).

n273. *Palmer*, supra note 36, §1.8 ("The two most important meanings are, first, that there has been an addition to the defendant's wealth or an increase in his estate; and second, that a performance requested by the defendant has been rendered. But a crucial question in many circumstances is when a benefit has been transferred.").

n274. 1 *Dobbs, Law of Remedies*, supra note 11, §4.1(4). Please note that the footnotes and case annotations in this list are supplied by the author, not Professor Dobbs.

n275. This applies to stock options of ex-employees. See, e.g., *Dyll v. Montague and Co.*, 167 F.3d 945, 948 (5th Cir. 1999) (affirming a constructive trust on stock options which increased in value and would otherwise have been worthless absent the tort, including the options of an innocent third party); see also *Gen. Clutch Corp. v. Lowry*, 10 F. Supp. 2d 124 (D. Conn. 1998) (refusing to reduce award for unjust enrichment based on the value of stock despite testimony that there was no ready market for the stock).

n276. *Campbell v. Tenn. Valley Auth.*, 421 F.2d 293 (5th Cir. 1969).

n277. *Cross v. Berg Lumber Co.*, 7 P.3d 922, 934 (Wyo. 2000) ("Where wrongfully detained property has a value for use, the measure of damages is the value of such use during the detention period."); *De Camp v. Bullard*, 54 N.E. 26, 28 (N.Y. 1899) ("If a man's house is vacant with no prospect of a tenant and no intention on his part of occupying it himself, and a trespasser occupies it, he must pay as damages for the trespass the value of the use and occupation, for this would be the duty of a tenant contracting upon a quantum meruit for the use, by consent, of that which the trespasser uses without consent."); see also *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 239 (Va. 1946) (stating that the plaintiff was entitled to recover the amount equal to the benefits gained by defendant from using and occupying a strip of plaintiff's land to haul and transport coal); *Proprietors of Second Tpk. Rd. v. Taylor*, 6 N.H. 499, 502 (1834) (holding that the plaintiff was entitled to ordinary tolls from a toll road user who had refused to pay because he believed that he was exempt).

n278. *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965); *Randall v. Loftsgaarden*, 478 U.S. 647 (1986).

n279. Restatement (First) of Restitution § 157 cmt. b (1937).

n280. See *Bus. Trends Analysts, Inc. v. Freedonia Group, Inc.*, 887 F.2d 399, 404 (2d Cir. 1989) ("Although we recognize that proving the value received from an infringing product used to enhance commercial reputation may be difficult, we are unpersuaded that the difficulty is so universal that an award for such gains may never be made as a matter of law."); see also *Tamko Roofing Prods., Inc. v. Ideal Roofing Co., Ltd.*, 282 F.3d 23, 35 (1st Cir. 2002) ("It is reasonable to conclude that Ideal was unjustly enriched by trading on Tamko's goodwill beyond the two companies' areas of direct competition."); *Beacon Mut. Ins. Co. v. OneBeacon Ins. Group*, 376 F.3d 8, 10 (1st Cir. 2004). ("We also hold that relevant commercial injury includes not only loss of sales but also harm to the trademark holder's goodwill and reputation."); *Nat'l Fire Prot. Ass'n v. Int'l Code Council, Inc.*, No. 03-10848-DPW, 2006 U.S. Dist. LEXIS 14360, at 86 (D. Mass. Mar. 29, 2006) ("I find that there is a genuine issue of material fact as to whether NFPA suffered actual harm to its goodwill associated with its International Electrical Code mark.").

n281. *Am. Speedy Printing Ctrs. v. AM Mktg., Inc.*, 69 F. App'x 692 (6th Cir. 2003); *Centrol, Inc. v. Morrow*, 489 N.W.2d 890, 895 (S.D. 1992); *JTH Tax Inc. v. H&R Block E. Tax Servs.*, 245 F. Supp. 2d 749, 750-51 (E.D. Va. 2002).

n282. Dennis S. Corgill, *Measuring the Gains of Trademark Infringement*, 65 *Fordham L. Rev.* 1909; see also *Carter Prods., Inc. v. Colgate-Palmolive Co.*, 214 F. Supp. 383, 402 (D. Md. 1963) ("Colgate's wrongful acts in the manufacture and sale of the adjudicated products included not only patent infringement, carried to the point of contempt of this court's injunction, but also repeated and continuous misappropriation of trade secrets, and deceit in connection therewith. These acts enabled Colgate to become the leading manufacture of pressurized shaving creams and to build up a momentum of good will for the adjudicated products which it was able to transfer in large measure to the altered products by so packaging and advertising those products that the public was not told there had been any change. They enabled Colgate to begin marketing its altered products at a sales level which could not otherwise have been attained for several years, and to avoid some of the costs of introducing a new product.").

n283. Restatement (Third) of Restitution & Unjust Enrichment §2 cmt. d (Discussion Draft 2000).

n284. *MCA, Inc. v. Wilson*, 677 F.2d 180, 186 (2d Cir. 1981); see also *W. Coast Winery, Inc. v. Golden W. Wineries, Inc.*, 158 P.2d 623, 625-26 (Cal. Ct. App. 1945) (noting that the term "profits" properly means "net profits").

n285. *Rubber Co. v. Goodyear*, 76 U.S. 788, 803-04 (1869) ("The calculation is to be made as a manufacturer calculates the profits of his business. 'Profit' is the gain made upon any business or investment, when both the receipts and payments are taken into the account."); *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 103-104 (2d Cir. 1989) ("We hold that the district court should have based its assessment of damages on net profits."); see also *W.E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 665 (2d Cir. 1970) (holding that in determining defendants' profits for purposes of trademark liability, defendant was entitled to deduct overhead, operating expenses and income tax from net sales); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 149 (4th Cir. 1987); *Taylor v. Meirick*, 712 F.2d 1112, 1121 (7th Cir. 1983) (stating that in computing plaintiff's lost profits for copyright infringement award, costs necessary to generate the income should be deducted from sales revenue); *Pfizer, Inc. v. Y2K Shipping & Trading, Inc.*, No. 00 CV 5304(SJ), 2004 U.S. Dist. LEXIS 10426, at 34 (E.D.N.Y. Mar. 26, 2004) ("Plaintiff mistakenly argues that it is entitled to \$ 57,485.11, which represents the total amount of sales - not profits - for the TRIAGRA product."); *Softel, Inc. v. Dragon Med. & Scientific Commc'ns*, 891 F. Supp. 935, 941-942 (S.D.N.Y. 1995) ("Plaintiff urges that because Judge Cannella determined that the infringement was willful, defendants should not be able to deduct any expenses in calculating profits. Plaintiff's view is supported by neither a plain reading of the Copyright Act nor decisions in this Circuit." (internal citations omitted)); *Centrol, Inc. v. Morrow*, 489 N.W.2d 890, 898 (S.D. 1992) (ruling that trial court erred by not taking business expenses into account); *Brown v. Rullam Enters., Inc.*, 44 S.W.3d 740, 745 (Ark. Ct. App. 2001) ("We hold that the proper method of calculation is on the basis of net profit, whether lost by the injured party or gained by the wrongdoer, based upon our examination of authority from across the United States, and we reverse and remand to the chancellor with instructions to recalculate the damages award."); *Del. Express Shuttle, Inc. v. Older*, No. 19596, 2002 Del. Ch. LEXIS 124, at 60 (Del. Ch. Oct. 23, 2002) ("The Defendants' profits, not their revenues, are the correct measure of their unjust enrichment and of Delaware Express' damages."); *USM Corp. v. Marson Fastener Corp.*, 467 N.E.2d 1271, 1279 (Mass. 1984) ("The further fact that the defendant was a knowing and intentional tortfeasor may justify rendering judgment and resolving unanswerable damages questions against it, but it cannot justify ignoring an ascertainable expense.").

n286. Restatement (Third) of Restitution & Unjust Enrichment §42 (Tentative Draft No. 4, 2005) ("By contrast, a refusal to allow relevant deductions for expenses that will not otherwise be recovered subverts the ostensible function of the accounting for profits, importing a punitive component that has no basis in the statutes on which these actions for accounting are ordinarily based. The fact that the statutes make express provision for enhanced damages in particular cases makes it harder to justify the manipulation of the profits-based remedy to inflict a punishment not specified by statute.").

n287. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406 (1940) ("Petitioners stress the point that respondents have been found guilty of deliberate plagiarism, but we perceive no ground for saying that in awarding profits to the copyright proprietor as a means of compensation, the court may make an award of profits which have been shown not to be due to the infringement. That would be not to do equity but to inflict an unauthorized penalty."); *Coastal Oil & Gas Corp. v. Fed. Energy Regulatory Comm'n*, 782 F.2d 1249, 1253 (5th

Cir. 1986) ("We can see no way to characterize the 'disgorgement' remedy in the present case as anything other than a penalty. Refunding to FGT all of the revenues from Coastal's intrastate sales exceeds both the injury to FGT's interstate customers and the unjust enrichment of Coastal. Coastal not only forfeits all of its profits, but it is also denied any payment whatsoever for the gas, including the recoupment of costs."); *Sands, Taylor & Wood v. Quaker Oats Co.*, 34 F.3d 1340, 1349 (7th Cir. 1994) ("The monetary relief must be great enough to further the statute's goal of discouraging trademark infringement but must not be so large as to constitute a penalty."); *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 931 (7th Cir. 2003) ("There is no basis in the law for requiring the infringer to give up more than his gain when [such gain] exceeds the copyright owner's loss. Such a requirement would add a punitive as distinct from a restitutionary element to copyright damages, and while the copyright statute does authorize statutory damages unrelated to losses or gains ... the statute contains no provision for punitive damages." (internal citations omitted)); *ZZ Top v. Chrysler Corp.*, 70 F. Supp. 2d 1167, 1169 (W.D. Wash. 1999) ("If an infringer were not permitted to deduct all costs incurred in generating the gross revenues, including overhead costs, the copyright owner would be awarded more than just profits and the infringer would not only be deprived of whatever benefit it derived from the infringement, as was the apparent intent of Congress, but would also suffer affirmative punishment.").

n288. Restatement (Second) of Agency § 403 cmt. c (1958).

n289. See, e.g., *Driscoll v. Burlington Bristol Bridge Co.*, 86 A.2d 201, 234 (N.J. 1952) ("[The defendants] are therefore liable to repay the \$ 3,050,347 gross profit which they received for their stock as the result of this transaction and they are not entitled to any credit for the expenses incurred in effectuating the fraudulent scheme, for none of those expenses can rightly be said to have been of benefit to the bridge commission or the public it represents."); *S.T. Grand, Inc. v. City of New York*, 298 N.E.2d 105, 109 (N.Y. 1973) (enforcing "the general rule of complete forfeiture" in a municipal bribery case). But see *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 576 (7th Cir. 2004) ("The victim of commercial bribery can obtain either his damages or the profits that the bribe yielded. The total profits equal the amount of the bribe plus the revenues generated by the bribe minus the cost of goods sold any other variable costs incurred in making the sales.").

n290. *Jay v. Gen. Realties Co.*, 49 A.2d 752, 755 (D.C. 1946) (internal citations omitted); see also *United States v. Leon Wight*, 839 F.2d 193, 197 (4th Cir. 1987) (allowing defendant to deduct expenses from revenues); *Burg v. Miniature Precision Components, Inc.*, 330 N.W.2d 192, 199 (Wis. 1983) (affirming trial court's decision to deduct expenses from revenues). But see *Raymond Farmers Elevator Co. v. Am. Sur. Co.*, 290 N.W. 231, 235 (Minn. 1940) (disallowing truck operating costs in calculating profits but allowing the cost of grain in grain sale revenue).

n291. 1 Dobbs, *Law of Remedies*, supra note 11, §4.5(1), at 630 n.10.

n292. See, e.g., *Jones Apparel Group, Inc. v. Steinman*, 466 F. Supp. 560, 563 (E.D. Pa. 1979) (stating that

losses from sales of infringing garments below purchase price are not deducted from profitable sales, and total profits of \$ 320 are awarded).

n293. Dobbs, Handbook, supra note 118, §4.5, at 275-76; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 55 (2d Cir. 1939) ("The exhibition of a picture at theatre X was a separate tort which the plaintiffs might elect to sue upon, ignoring any losses from the exhibition at theatre Y."); *Burger King Corp. v. Mason*, 855 F.2d 779, 781-82 (11th Cir. 1983) (holding that the district court acted within its discretion in awarding damages based on profits of profitable restaurants and in not offsetting losses of unprofitable restaurants, in limiting attorney fees to trial portion of law suit and not to appeal, and in ruling on various deductions proposed by defendant, who was former franchisee of plaintiff).

n294. *Black & Decker (U.S.) Inc. v. Pro-Tech Power Inc.*, 26 F. Supp. 2d 834, 856 (E.D. Va. 1998) ("Given that the calculation of damages rests on equitable considerations, the Court will not allow Pro-Tech to offset the profits it made in 1995, 1995, 1997, and 1998 by its losses in 1993 and 1996.").

n295. *Crosby Steam Gage & Valve Co. v. Consol. Safety Valve Co.*, 141 U.S. 441, 451 (1891) ("As for the contention that the destroyed valves ought to form a credit against the profits actually realized by the defendant on other valves, it is sufficient to say that the only subject of inquiry is the profit made by the defendant on the articles which it sold at a profit, and for which it received payment, and that losses incurred by the defendant through its wrongful invasion of the patent are not chargeable to the plaintiff, nor can their amount be deducted from the compensation which the plaintiff is entitled to receive.").

n296. *Wolfe v. Nat'l Lead Co.*, 272 F.2d 867, 883 (9th Cir. 1959) (quoting *Duplicate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448, 458 (1936) (internal citations omitted)).

n297. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 55 (2d Cir. 1939).

n298. *Id.* at 53.

n299. *Id.* at 54; see also *United States v. Sutton*, 795 F.2d 1040, 1062 (Temp. Emer. Ct. App. 1985) ("The trial court ultimately based its award upon total profits realized by defendants through their miscertification scheme. In this respect, the court took into account defendants' practice of selling all tiers of crude oil at one averaged price with a markup, and this of course resulted in losses on some sales of oil."); *Adolph Gottschco, Inc.*

v. Am. Mktg. Corp., 139 A.2d 281, 286 (1958) (holding that the defendant, in accounting for profits from misappropriation of trade secrets, was held not entitled to set off a loss year against ensuing profitable ones).

n300. Restatement (Second) of Trusts §213 (1959) ("A trustee who is liable for a loss caused by a breach of trust may not reduce the amount of the liability by deducting the amount of a profit that accrued through another and distinct breach of trust; but if the breaches of trust are not separate and distinct, the trustee is accountable only for the net gain or chargeable only with the net loss resulting therefrom.")

n301. Restatement (Second) of Trusts §213 cmt. e. (1959). If the trustee makes a profit and also incurs a loss through breaches of trust that are not separate and distinct, the beneficiaries are entitled, as the case may be, to the amount of the profit only after deducting the amount of the loss or to charge the trustee with the loss reduced by the amount of the profit.

n302. Langdell, *supra* note 79, at 130 ("There is, however, an obstacle in the way of obtaining a remedy at law for a permanent nuisance, which has not yet been adverted to. Such a nuisance is a continuing tort, i.e., it is a new tort every moment; and the only damages that can be recovered for such a tort are such as have been already suffered; and hence the person injured, if he would obtain full indemnity, must sue periodically so long as the tort continues... . If, therefore, a permanent nuisance has been erected, and it cannot be abated, justice would seem to require that the person injured by it should at least recover at once, and by a single action, a full compensation in money for the injury, and this measure of justice equity may, it seems, grant; for, though equity cannot itself assess damages, yet it may have the full amount of the damages which will be caused by the nuisance assessed by means of a feigned issue, and it may then make a decree that the defendant pay the damages so assessed; and if the defendant, having paid these damages, shall be afterwards sued at law, he may obtain an injunction against the prosecution of the action."); see also *Attorney Gen. v. Blake*, [2001] 1 A.C. 268, 281 (H.L. 2000) (appeal taken from Eng.) (U.K.) ("Lord Cairns' Act had a further effect. The common law courts' jurisdiction to award damages was confined to loss or injury flowing from a cause of action which had accrued before the writ was issued. Thus in the case of a continuing wrong, such as maintaining overhanging eaves and gutters, damages were limited to the loss suffered up to the commencement of the action Lord Cairns' Act liberated the courts from this fetter. In future, if the court declined to grant an injunction, which had the effect in practice of sanctioning the indefinite continuance of a wrong, the court could assess damages to include losses likely to follow from the anticipated future continuance of the wrong as well as losses already suffered. The power to give damages in lieu of an injunction imported the power to give an equivalent for what was lost by the refusal of an injunction" (internal citations omitted)).

n303. *Blake*, [2001] 1 A.C. at 281 ("It is important to note, however, that although the Act had the effect of enabling the court in this regard to award damages in respect of the future as well as the past, the Act did not alter the measure to be employed in assessing damages Thus, in the same way as damages at common law for violations of a property right may be measured by reference to the benefits wrongfully obtained by a defendant, so under Lord Cairns' Act damages may include damages measured by reference to the benefits likely to be obtained in future by the defendant. This approach has been adopted on many occasions." (internal

citations omitted)).

n304. Republic Aviation Corp. v. Schenk, 152 U.S.P.Q. (BNA) 830, 835 (N.Y. Sup. Ct. 1967) (granting accounting but denying injunction due to a possible adverse impact on war effort and holding that future accountings might be required upon application of the plaintiff).

n305. Next Level Commc'ns L.P. v. DSC Commc'ns Corp., 179 F.3d 244, 254 (5th Cir. 1998) ("In its appellate brief, DSC again argued that it was entitled to a limited permanent injunction in addition to monetary damages to prevent the transfer or disclosure of its trade secrets This court rejected DSC's arguments and affirmed the district court's refusal to grant either type of injunction."); Home Pride Foods, Inc. v. Johnson, 634 N.W.2d 774, 784 (Neb. 2001) ("The court's award for the value of future sales is inconsistent with the issuance of a permanent injunction. Home Pride requested, and was given, a permanent injunction. The court's award of \$ 10,000 for future sales was an impermissible double recovery and is reversed.").

n306. Galveston, Harrisburg & San Antonio Co. v. Texas, 210 U.S. 217, 226 (1908) (stating that present market value is based on future expectations as Justice Holmes stated, "the commercial value of property consists in the expectation of income from it").

n307. Children's Broad. Corp. v. Walt Disney Co., 357 F.3d 860, 869 (8th Cir. 2004) [hereinafter Children's Broad. Corp. II]. For more cases on future unjust enrichment, see generally Fin. Programs, Inc. v. Falcon Fin. Servs., Inc., 371 F. Supp. 770 (D. Or. 1974) (applying Oregon law); Am. Speedy Printing Ctrs. v. AM Mktg., Inc., 69 F. App'x 692, 699 (6th Cir. 2003) (awarding franchisor "lost future profits"); JTH Tax Inc. v. H&R Block E. Tax Servs., 245 F. Supp. 2d 749, 750-51 (E.D. Va. 2002) (calculating net present value of six years' worth future earnings); Abend v. MCA, Inc., 863 F.2d 1465, 1479 (9th Cir. 1988) ("The district court is capable of calculating damages caused to the fair market value of plaintiff's story by the re-release of the film."), aff'd on other grounds sub nom., Stewart v. Abend, 495 U.S. 207 (1990); Dozor Agency, Inc. v. Rosenberg, 218 A.2d 583, 586 (Pa. 1966) (using the present value of projected income to calculate damages); Whiteside Biomechanics v. Sofamor Danek Group, 88 F. Supp. 2d 1009, 1020 (E.D. Mo. 2000) (recognizing jury's verdict at trial level as incorporating future damages); Next Level Commc'ns, 179 F.3d at 250 (ruling that jury's verdict including future damages was sufficient compensation to preclude enjoining against future transfer or disclosure of trade secrets); Mike's Train House, Inc. v. Lionel L.L.C., No. 00-71729, 2004 U.S. Dist. LEXIS 22679, at 9 (E.D. Mich. Nov. 1, 2004) (holding that jury's determinations of damages, including the calculation of lost future profits, "are well supported in the record"); Broan Mfg. Co., Inc. v. Associated Distribs., Inc., 923 F.2d 1232, 1237 (6th Cir. 1991) (holding that jury's calculation of future damages was not "speculative"); Clarke-Reliance Corp. v. McNab, Inc., No. 89 Civ. 1367 (MEL), 1994 U.S. Dist. LEXIS 1879, at 13 (S.D.N.Y. Feb. 23, 1994) ("Clark-Reliance calculates the present value of McNab's gross sales revenue from the maintenance and servicing of Jacoby-Tarbox products for the seven year period from July 1, 1990 through June 30, 1998 to be approximately \$ 3,221,000."); Yeti by Molly Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1107-1108 (9th Cir. 2001) (affirming jury's award of compensatory damages including damages for "lost opportunities").

n308. Children's Broad. Corp. II, 357 F.3d at 864.

n309. Id. at 869.

n310. Children's Broad. Corp. v. Walt Disney Co., 245 F.3d 1008, 1014 (8th Cir. 2001) [hereinafter Children's Broad. Corp. I].

n311. JTH Tax, 245 F. Supp. 2d at 750-51.

n312. 1 Dobbs, Law of Remedies, supra note 11, §4.1(3), at 569.

n313. Carbo Ceramics, Inc., v. Keefe, 166 F. App'x 714, 723 (5th Cir. 2006) ("The value of what the defendant has gained as a result of the misappropriation can be measured by a number of methods. First, the plaintiff can seek damages measured by the defendant's actual profits resulting from the use or disclosure of the trade secret (unjust enrichment). Second, the plaintiff can seek damages measured by the value that a reasonably prudent investor would have paid for the trade secret. Third, the plaintiff can seek damages measured by the costs saved by the defendant. This is typically shown through saved development costs.").

n314. E.g., Restatement (Third) of Restitution & Unjust Enrichment § 40 (Tentative Draft No. 4, 2005) (giving a range of answers for restitution amounts in the illustrations).

n315. Andrew Kull, Restitution and the Noncontractual Transfer, 11 J. Cont. L. 93 (1997) [hereinafter Kull, Restitution and the Noncontractual Transfer]; see also Attorney Gen. v. Blake, [2001] 1 A.C. 268, 281 (H.L. 2000) (appeal taken from Eng.) (U.K.) ("The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct.").

n316. Kull, Restitution and the Noncontractual Transfer, supra note 315, at 95.

n317. See Robert J. Sharpe & S.M. Waddams, Damages for Lost Opportunity to Bargain, 2 Oxford J. Legal Stud. 290, 290 (1982) ("The legal position can be explained by saying that the defendant should be prevented from circumventing the bargaining process, and where prevention fails, damages should be awarded to compensate the plaintiff for the lost opportunity.").

n318. Kull, Restitution and the Noncontractual Transfer, *supra* note 315 at 103.

n319. Taylor v. Meirick, 712 F.2d 1112, 1120-22 (7th Cir. 1983).

n320. *Id.* at 1122.

n321. U.S. Naval Inst. v. Charter Commc'ns, Inc., 936 F.2d 692, 693 (2d Cir. 1991).

n322. *Id.*

n323. *Id.* at 694.

n324. *Id.* ("The district judge held that Berkley's profits 'attributable to the infringement' were only those profits that resulted from 'sales to customers who would not have bought the paperback but for the fact it became available in September.' ... He found that most of the September paperback sales were made to buyers who would not have bought a hardcover edition in September, and therefore only those September sales that displaced hardcover sales were attributable to the infringement. Berkley's profit on the displacing copies totaled \$ 7,760.12, and the court awarded that amount to Naval." (internal citations omitted)); see also Rhone-Poulenc Agro, S.A. v. Monsanto Co., No. 1:97CV1138, 2000 U.S. Dist. LEXIS 21330 (M.D.N.C. Feb. 8, 2000), *aff'd*, 345 F.3d 1366 (Fed. Cir. 2003) (attempting to properly apportion damages in suit over lost corn sales while taking into account the defendant's own ingenuity in developing a particular strain of corn).

n325. 1 Dobbs, Law of Remedies, *supra* note 11, §4.5(2), at 632 n.6 ("If the defendant has realized savings

or will more likely than not realize savings in the future, those savings can form the basis for figuring restitution. The savings measure is not a market measure. To save an expense is to increase a profit or surplus. So this is a consequential restitution measure."); *Wilkie v. Santly Bros., Inc.*, 139 F.2d 264, 265 (2d Cir. 1943) ("If it was proved that [the defendant] lost less because of the infringement, to that extent the infringement gave it a profit for which it must account.").

n326. *Telex Corp. v. IBM*, 510 F.2d 894, 932 (10th Cir. 1975); see also *Avery Dennison Corp. v. Four Pillars Enter. Co.*, 45 F. App'x 479, 486-7 (6th Cir. 2002) ("Courts seeking to establish a reasonable royalty measure the value of the secret to the defendant at the time that it was misappropriated, regardless of the commercial success of the enterprise.").

n327. 1 Dobbs, *Law of Remedies*, supra note 11, §4.5(3).

n328. In the event the court determines that the defendant's acts were innocent of willful or conscious motive to commit the act that proved unjust, the remedy would be limited to a compensatory measure of unjust enrichment or fifteen cents. Over time, it appears that this measure is the consolation prize for the plaintiff that established the defendant's willful or conscious liability but can prove no greater amount of unjust enrichment. Congress incorporated this concept into patent law, which provides that the plaintiff shall receive no less than a reasonable royalty. 35 U.S.C. §284 (2000).

n329. *Jones Apparel Group, Inc. v. Steinman*, 466 F. Supp. 560, 563 (E.D. Pa. 1979).

n330. Kull's implied contract model suggests this sort of flexibility in hypothecating various sets of terms for the putative contract, depending on the case facts. However, the model does not appear to suggest any objective manner in which to compare two possible contracts.

n331. *Palmer*, supra note 36, §2.8, at 111-12 ("Courts also uphold another method of measuring the defendant's profits, commonly referred to as the 'standard of comparison' method, in which the aim is to deprive the defendant of the expense saved by the wrongful use of the trade secret. His cost from wrongful use of the secret information is compared with the cost of accomplishing the same result through a method properly open to him, and the difference represents the 'benefits, profits or advantage gained by the defendant in the use of the trade secret.' When the saving relates to the development of a product, such a recovery is not disturbed by the preemption decisions of the Supreme Court, as several cases have recognized."); *Palmer*, supra note 36, §2.2, at 57 ("Quasi contract has been allowed also to recover the value of the temporary use of personal property which was converted but later returned to the owner, although presumably this would not be permissible in a

jurisdiction which follows the rule of *Jones v. Hoar.*").

n332. *Mfg. Co. v. Cowing*, 105 U.S. 253, 255 (1882) ("The question to be determined ... is, what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result. The fruits of the advantage are his profits.' It does not necessarily follow from this that where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately." (quoting *Mowry v. Whitney*, 81 U.S. (14 Wall.) 620, 651 (1872))); *Tilghman v. Proctor*, 125 U.S. 136, 146 (1888) ("The infringer is liable for ... the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result.").

n333. *Int'l Indus., Inc. v. Warren Petroleum Corp.*, 248 F.2d 696, 702 (3d Cir. 1957) ("Where the thing appropriated or infringed is a process rather than a manufactured article, the profits are simply measured by the savings determined by the standard of comparison computation... The credit for interest is allowed without regard to the source of the capital invested." (internal citations omitted)).

n334. 133 F.2d 487, 490 (6th Cir. 1943). The circumstances in this case are a clear example of a claim that can establish no causation to the defendant's revenues: a machine that produces camshafts cannot be reasonably related to the defendant's automobile revenues; see also *Ocor Prods. Corp. v. Walt Disney Prods., Inc.*, 682 F. Supp. 90 (D.N.H. 1988) (holding that a savings measure could be justified in Ocor's claim for Disney's violation of a design for a cellophane customer gift bag, implying no relationship between the gift bag design and Disney revenues).

n335. *Gordon Form Lathe Co. v. Ford Motor Co.*, 133 F.2d 487, 494 (6th Cir. 1943). For an example of a comparable cost standard that was rejected, see *Devex Corp. v. Gen. Motors Corp.*, 494 F. Supp. 1369, 1377 (D. Del. 1980) ("There must be some basis for believing that the alternative process on which his standard is based was a realistic alternative, and not some process the only possible value of which is to make the patentee's process appear more useful than, in fact, it is.").

n336. *Gordon Form Lathe Co.*, 133 F.2d at 494 ("In *Mowry v. Whitney*, ... in referring to the period of infringement, the court said it must be a device 'then open to the public.' In *Sessions v. Romadka*, ... the court said it must be a device 'known and in general use ... anterior to the date of the patent.' In *Black v. Thorne*, ... the court said the device must be in 'common use [and] produce the same results.' None of the reported cases, so far as we have been able to discover, are determinative of the precise question here presented." (internal citations omitted)).

n337. *C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1304-05 (Fed. Cir. 2000) ("Finally, IBP argues that it 'could have used' the process publicly disclosed in C&F's '094 patent, instead of the secret process, to make its product. However, again, the record does not show that IBP was able to, and did, produce precooked sausage topping of the quality required by its customer without use of C&F's trade secrets.").

n338. See *Olwell v. Nye & Nissen Co.*, 173 P.2d 652, 653 (Wash. 1946) (noting that defendant saved ten dollars a day by using plaintiff's patented egg-washing machine).

n339. See *Bourns, Inc., v. Raychem Corp.*, 331 F.3d 704, 709-710 (9th Cir. 2002) ("Bourns denies that Raychem proved that it suffered \$ 9 million in damages. Raychem replies by pointing to Bourns' enrichment by its torts. According to Hogge, 'the burn rate,' or development cost, on PPTCs was \$ 3 million per year. According to credible evidence from the industry, Bourns saved at least three years of development by its torts. As the district court found, this unjust enrichment is fairly recoverable by Raychem.").

n340. 173 P.2d 652 (Wash. 1946).

n341. See also *Cassinovs v. Union Oil Co. of Cal.*, 18 Cal. Rptr. 2d 574, 584 (Ct. App. 1993) ("The trial court found that operators in the area charged \$ 1.75 per barrel delivered to disposal sites. For its own benefit, Union injected 2,067,343 barrels of wastewater into A-16 to preserve disposal capacity in its own field and to boost production of oil and gas on that field. The trial court found that Union should disgorge the benefit, implied in law, that it derived by the trespass and accordingly awarded the Escolle TIC judgment in the principal sum of \$ 3,617,843.").

n342. *Ablah v. Eyman*, 365 P.2d 181, 193 (Kan. 1961) ("By a liberal interpretation of the allegations, the clear import of the cause of action is one to recover on quasi contract or unjust enrichment the value of benefits plaintiffs received by their wrongful seizure and detention of defendant's property. Such a construction is obviously in the interest of substantial justice. As previously indicated, the working papers had a value only in their use by either plaintiffs or defendant. Manifestly, that value must be determined by its value to the user, and the resulting benefit rule is applicable as a measure of recovery. A judgment in favor of the defendant on such basis would be a positive gain to him, yet it imposes no penalty upon plaintiffs, it would merely compel them to pay for the use of that which they had no right to appropriate.").

n343. See *Servo Corp. of Am. v. Gen. Elec. Co.*, 393 F.2d 551, 556 (4th Cir. 1968) (holding that damages would be measured by the cost of experimentation to develop the component or components not disclosed and the cost to discover how to combine all components); *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 908 F.2d 706,

714 (11th Cir. 1990) ("In addition, the district court found that Salsbury had spent over \$ 1 million researching and developing MG BAC and more than \$ 2 million marketing and advertising the vaccine, for a total of \$ 3 million. Of that amount, the court awarded Salsbury \$ 1 million, representing the savings in research, development and marketing Merieux enjoyed as a result of misappropriating Salsbury's trade secrets."); *Elcor Chem. Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204, 214 (Tex. Civ. App. - Dallas 1973, writ ref'd n.r.e.) (stating that reasonable royalty on sales of the defaulting fiduciary, ELCOR's cost of research and development, ELCOR's lost profits, and Agri-Sul's profits gained at ELCOR's expense are proper elements of damages in a trade secret case but finding that ELCOR failed to meet its burden of production).

n344. See *De Camp v. Bullard*, 54 N.E. 26, 28 (N.Y. 1899) (holding that a trespasser has the same duty to pay a landowner that a tenant does).

n345. See *Deering, Milliken & Co. v. Gilbert*, 269 F.2d 191, 193-94 (2d Cir. 1959) (holding that if it is impossible to compute defendant's profits from its own records, a reasonable estimation of what defendant saved by infringement may be made by recovery of royalty usually charged by plaintiff for license of its trademark).

n346. *Preston Mining Corp. v. Matney*, 90 S.E.2d 155, 158 (Va. 1955) (holding that a trespasser is obliged "to pay the plaintiff the 'fair value of the benefits received' by him, the defendant, for the use and occupancy of the land." (quoting *Red Raven Ash Coal Co. v. Ball*, 39 S.E.2d 231, 238 (Va. 1946))).

n347. *Egry Register Co. v. Standard Register Co.*, 23 F.2d 438 (6th Cir. 1928). But see *Mullins v. Equitable Prod. Co.*, No. 2:03CV00001, 2003 U.S. Dist. LEXIS 13024, at 11 (W.D. Va. July 29, 2003) ("Mullins has apparently convinced himself (aided and abetted by his lawyer) that because of Equitable's trespass, he is entitled to a portion of the value of the gas that flowed through the pipeline, which he calls a 'royalty,' and which he estimates to be a million dollars. But there is no evidence that such royalty payments are the reasonable or normal cost of a gas pipeline right-of-way.").

n348. A prevailing patentee is entitled to a damage award that is "adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer." 35 U.S.C. § 284 (2000).

n349. See, e.g., *Steven Greenberg Photography v. Matt Garrett's of Brockton, Inc.*, 816 F. Supp. 46, 49 (D. Mass. 1992) ("Where, as here, a plaintiff's damages are not easily ascertainable, courts often measure actual damages by applying the 'value of the infringer's use' standard."); *Beck v. N. Natural Gas Co.*, 170 F.3d 1018, 1021 (10th Cir. 1999) ("The jury found in favor of the landowners on both claims and awarded \$ 100.00 per acre

as fair rental value of the property for the period in question. The district court subsequently assessed attorney fees, expenses, and costs in the amount of \$ 139,554.10 against Northern.").

n350. See, e.g., *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064, 1078 (N.D. Cal. 2005) (noting that according to the expert's report, "the parties in a hypothetical negotiation would agree to a \$ 900,000 ... royalty"); *Mid-Mich. Computer Sys. v. Marc Glassman, Inc.*, 416 F.3d 505, 510 (6th Cir. 2005) (stating that "there was evidence before the jury that the parties valued the misappropriated trade secrets at \$ 2 million").

n351. George E. Palmer, *Law of Restitution* §1.1, at 4 (Supp. 2007) [hereinafter Palmer, *Law of Restitution* (Supp. 2007)] ("It is not uncommon for courts to confuse quantum meruit and unjust enrichment, probably because quantum meruit is awarded in order to avoid unjust enrichment.").

n352. Palmer, *Law of Restitution* (Supp. 2007), supra note 351, at 5 ("Courts are mindful of the overlap between claims based on quantum meruit and claims based on unjust enrichment. Although the District of Columbia Circuit uses the term 'quantum meruit' to describe both forms of recovery, it distinguishes between these two causes of action. The first, quantum meruit, rests on a contract implied in fact, that is, a contract implied from the conduct of the parties. The cause of action has four requirements: (1) valuable services rendered by the plaintiff; (2) for the person from whom recovery is sought; (3) which services were accepted and enjoyed by that person; and (4) under circumstances that reasonably notified the person that the plaintiff, in performing such services, expected to be paid. On the other hand, 'unjust enrichment' rests on a contract implied in law, that is, on a principle of quasi contract. Recovery on unjust enrichment is possible in the absence of any contract, actual or implied in fact. Recovery on an unjust enrichment theory requires a showing that a person retains a benefit in which justice and equity belongs to another.").

n353. *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 631 (2d Cir. 1946).

n354. *Id.* at 632.

n355. *Id.*

n356. See, e.g., *Campbell v. Tennessee Valley Auth.*, 421 F.2d 293, 296 (5th Cir. 1969) ("The claimants are entitled to recover on a quantum meruit basis. But quantum meruit is ambiguous; it may mean (1) that there

is a contract "implied in fact" to pay the reasonable value of the services, or (2) that, to prevent unjust enrichment, the claimant may recover on a quasi contract (an as if contract) for that reasonable value. It has been suggested that the latter is a rule-of-thumb measure of damages adopted in quasi contract cases where the actual unjust enrichment or benefit to the defendant is too difficult to prove' In the present situation the District Court was correct in using the "rule of thumb" measure of damages and in instructing the jury that the measure of damages was "the fair market value of the microfilm that benefited TVA,' instead of instructing that the measure of damages was the reasonable value of the benefit realized by TVA from the microfilm, since the actual benefit to TVA would not have been susceptible of proof." (quoting *Martin v. Campanaro*, 156 F.2d 127, 130 n.5 (2d Cir. 1946)) (internal citations omitted)); see also *Cities Serv. Gas Co. v. United States*, 500 F.2d 448, 457 (Ct. Cl. 1974) ("On the other hand, value determined on a quantum meruit basis under an implied in fact contract is not based on costs nor a reasonable return on investment of the seller, but on the reasonable value in the marketplace of the property sold."); *Int'l Cargo Mgmt. Specialists v. EG&G Dynatrend*, No. 91-1360 (NHJ), 1995 U.S. Dist. LEXIS 9577, at 52 (D.D.C. Mar. 31, 1995) ("After careful consideration of the testimony of the economic witnesses provided by both parties, the Court concludes 25% of EG&G Dynatrend's award fees under the Customs Contract represents a reasonable figure for damages. The Court concludes that ICMS has proved its damages in the amount of \$ 1,229,000 with reasonable certainty.").

n357. See *Ford v. United States*, 88 F. Supp. 263, 264 (1950) (holding that an American soldier could be held liable for quasi-contract to United States, which repaid foreign money that the soldier stole); *Presby v. Bethlehem Vill. Dist.*, 416 A.2d 1382, 1384 (1980) (holding that a contractor is entitled under the theory of quasi-contract to recover the cost of installation from a governmental entity for performing a duty of the governmental entity).

n358. See *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 197 (1967) (dealing with a case under the Rivers and Harbors Act of 1889); *United States v. P/B STCO 213*, 756 F.2d 364, 374-76 (5th Cir. 1985) (deciding a case under the Federal Water Pollution Control Act); *United States v. Moran Towing & Transp. Co.*, 374 F.2d 656, 667 (4th Cir. 1967) (considering arguments under the Rivers and Harbors Act of 1889).

n359. *United States v. Consol. Edison Co. of N.Y.*, 580 F.2d 1122, 1127 (2d Cir. 1978).

n360. *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830 (2d Cir. 1977); see also *Restatement (First) of Restitution* §§114-15 (1937) (noting that an individual who performs the duty of another by supplying a third person with necessities may be entitled to restitution even though that person is acting without the other's knowledge or consent, if the things or services supplied were immediately necessary to prevent serious bodily harm or satisfy the requirements of public decency, health, or safety).

n361. *Kull, Rationalizing Restitution*, supra note 1, at 1196 ("My proposition is that the law of restitution be defined exclusively in terms of its core idea, the law of unjust enrichment. By this definition it would be

axiomatic (i) that no liability could be asserted in restitution other than one referable to the unjust enrichment of the defendant, and (ii) that the measure of recovery in restitution must in every case be the extent of the defendant's unjust enrichment.").

n362. Laycock, *Scope and Significance*, supra note 1, at 1279 ("Lawyers use the word 'restitution' in at least two senses. 'Restitution' means recovery based on and measured by unjust enrichment. It also means restoration in kind of a specific thing. Both usages are part of any complete definition of restitution. Palmer and the Restatement use the word both ways, but neither defines it to include both meanings.").

n363. See, e.g., *Schmeller Aluminum Foundry Co. v. Cohen*, 183 N.E.2d 621, 621 (Ohio Ct. App. 1962) (holding that in a case where a stolen car was purchased by the defendant in good faith from the thief for \$ 2,053 and resold for \$ 2,295, the true owner could recover the full proceeds); see also *Wilson v. Stevens*, 446 S.W.2d 122, 124 (Tex. Civ. App. - San Antonio 1969, writ ref'd n.r.e.) ("The general rule of restitution is that where one sells stolen property, he cannot pass good title and the purchaser has a right to recover the purchase price.").

n364. Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306*, 68 Cornell L. Rev. 172, 202 n.56 (1983) (stating that "defendant may not set off the costs of improvement or receive credit for any portion of the increased value of a once-barren piece of land worth \$ 655,000 that defendant improved to the extent that it was worth \$ 3,675.000").

n365. 244 N.Y.S.2d 604 (App. Div. 1963).

n366. *Id.* at 607 (Eager, J., dissenting).

n367. *Id.* (Eager, J., dissenting).

n368. *Id.* at 605-06.

n369. *Id.* at 607 (Eager, J., dissenting).

n370. Oesterle, *supra* note 364, at 202 n.56.

n371. 319 East 72nd St. Corp., 244 N.Y.S.2d at 607 (Eager, J., dissenting).

n372. See *United States v. Wyoming*, 331 U.S. 440, 458 (1946) ("An agreed premise is found in the rule that one who 'willfully' or 'in bad faith' trespasses on the land of another, and removes minerals, is liable to the owner for their full value computed as of the time the trespasser converted them to his own use, by sale or otherwise, but that an 'innocent' trespasser, who has acted 'in good faith,' may deduct from such value the expenses of extraction. It is also clear that when suit is brought for the value of minerals wrongfully removed from the plaintiff's land, and the trespass and conversion are established, the burden of pleading and proving good faith is on the defendant. The 'good faith' contemplated by these rules is something more than the trespasser's assertion of a colorable claim to the converted minerals.").

n373. *Wooden-ware Co. v. United States*, 106 U.S. 432, 433-34 (1882) ("The doctrine of the English courts on this subject is probably as well stated by Lord Hatherley in the House of Lords, in the case of *Livingstone v. Rawyards Coal Co.*, ... as anywhere else." (internal citations omitted)). Modern English authorities state that the more appropriate precedent is actually *Martin v. Porter* (1839), 5 M & W 351, 151 ER 969 and is regarded as a punitive measure. See James Edelman, *Gain-Based Damages* 114, 138 (2006) (discussing the English authorities in this area).

n374. *Lawton v. Nyman*, 327 F.3d 30, 47 (1st Cir. 2003) ("Janigan itself recognized at least two limits. First, it referred only to the profit which was 'the proximate consequence of the fraud,' itself a limiting factor. This court, sitting en banc, limited the application of the Janigan rule in the context of publicly traded companies... . MacDonald held that the SEC could not recover, on a disgorgement of profits theory, the defendants' profits from use of insider information for a period beyond a reasonable time after public dissemination of the information. This was so, we held, because "when a seller of publicly traded securities has learned of previously undisclosed material facts, and decides nevertheless not to replace the sold securities, he cannot later claim that his failure to obtain subsequent stock appreciation was a proximate consequence of his prior ignorance.' ... Here, we have a close corporation; the plaintiffs lacked the opportunity, available to public shareholders, to reenter the market. Rather, MacDonald is significant, for our purposes, for its emphasis on the need for the wrongful profits to be 'causally related' to the breach of duty... . MacDonald also holds that the purpose of Janigan-type recovery is remedial, not punitive." (internal citations omitted)); see also H.S. Bloomenthal & S. Wolff, *Securities and Federal Corporate Law* § 13:44, at n.15 (2d ed. 1999) ("Unlike the publicly traded situation, the plaintiff does not have the alternative of covering by going into the market and purchasing the security after becoming aware of the fraud.").

n375. 344 F.2d 781, 786 (1st Cir. 1965). However, the court stated that where the property is bought from the other person by the insider, future accretion not foreseeable at the time of the transfer, and hence speculative,

is subject to another factor, that is, that it accrued to the fraudulent party. The court stated that in such an instance, there could be no speculation but that the insider actually made the profit, and once it was found that he acquired the property by fraud, the profit was the proximate consequence of the fraud, whether foreseeable or not. The court concluded that under those circumstances, it was more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them. The court commented, however, that there were limits to the principle applied, and that accretions in value resulting from special efforts of the insider should not accrue to the seller; see also *Welch v. Kosasky*, 509 N.E.2d 919, 922 (Mass. App. Ct. 1987) (exploring several cases dealing with appreciation of property after conversion).

n376. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155 (1972).

n377. *Randall v. Loftsgaarden*, 478 U.S. 647, 663 (1986).

n378. Restatement (First) of Restitution § 151 (1937); see also *Mortellite v. Am. Tower, L.P.*, 819 So. 2d 928, 934 (Fla. Dist. Ct. App. 2002) (allowing for plaintiff's recovery of the appreciated value of property); *Dyll v. Montague and Co.*, 167 F.3d 945, 948 (5th Cir. 1999) (noting that the value of the stock in question had increased); *Rochez Bros., Inc. v Rhoades*, 491 F.2d 402, 417 (3d Cir. 1973) (holding that the measure of damages normally is the difference between the fair value of what the seller received for his stock and what he would have received had there been no fraudulent conduct, but where the defendant received more than the seller's actual loss, the damages were the amount of defendant's profits).

n379. *Thomas v. Duralite Co., Inc.*, 524 F.2d 577, 589 (3d Cir. 1975).

n380. Restatement (Third) of Restitution & Unjust Enrichment §40 cmt. b (Tentative Draft No. 4, 2005).

n381. See *supra* notes 164-65.

n382. The author participated in such a claim and such an analysis but the case was settled before the admissibility of the expert's analysis was litigated. Opposing experts in that case objected to the methodology applied but did not object to the theory of a claim for the increase in the defendant's total market value over and above normal market fluctuation. See *Softel, Inc. v. Dragon Med. & Scientific Commc'ns*, 891 F. Supp. 935, 941 (S.D.N.Y. 1995) ("Plaintiff correctly notes that an increase in defendants' good will resulting from their infringement may be considered a 'profit' for which the plaintiff is entitled to damages under Section 504(b).").

n383. 96 S.W.2d 1028 (Ky. App. 1936).

n384. See, e.g., Rhone-Poulenc Agro, S.A. v. Monsanto Co., No. 1:97CV1138, 2000 U.S. Dist. LEXIS 21330, at 4-6 (M.D.N.C. Feb. 8, 2000), *aff'd*, 345 F.3d 1366 (Fed. Cir. 2003) (dealing with intellectual property of corn plant genetics); *Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 899-900 (9th Cir. 1992) (describing a case involving "pirated" information from a Supplemental Type Certificate, FAA-certified airplane modification documents); *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 305 (7th Cir. 1990) (offering in dicta that "'there is perhaps no very valid and essential reason why there might not be conversion' of intangible property" (quoting H.D. Warren, Annotation, Nature of Property or Rights Other Than Tangible Chattels Which May Be Subject of Conversion, 44 A.L.R.2d 927, 929 (1955))); *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1367 (Fed. Cir. 2001) (holding the trial court to have erred in dismissing plaintiff's claim against defendant for unjust enrichment because equity dictated that the defendant should not benefit if it wrongfully usurped plaintiff's proper inventorship status); *Univ. of Colo. Found. v. Am. Cyanamid Co.*, 342 F.3d 1298, 1300 (Fed. Cir. 2003) (dealing with a vitamin supplement formula).

n385. See *supra* note 39.

n386. 1 Dobbs, Law of Remedies, *supra* note 11, §4.5(1), at 630 n.10.

n387. Roach, Correcting Uncertain Prophecies, *supra* note 150, at 29.

n388. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997) ("In this case, the jury was not asked to find direct damages at the time of the sale as well as consequential damages attributable to Arthur Anderson's [sic] misrepresentations. Rather, the jury was simply asked to consider the purchase price as part of the overall damages. PECO did present evidence that the purchase price was eventually a total loss. There was also evidence that Maloney was losing money at the time of the sale and continued to do so until it declared bankruptcy. What PECO did not establish, however, was how much of its loss occurred at the time of the sale and how much was attributable to subsequent events for which Arthur Anderson [sic] should bear legal responsibility. If subsequent losses were caused by Arthur Andersen's wrongful conduct and were not simply part of the risk a buyer of the business would have assumed, they may be part of PECO's consequential damages.").