IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 06-55297 (consolidated with Docket No. 06-55391)
Cross Appeal Docket No. 06-55379

JOHN GARAMENDI, as Insurance Commissioner of the State of California and as Conservator, Rehabilitator and Liquidator of the Estate of Executive Life Insurance Company,

Petitioner,

vs.

ARTEMIS S.A.,

Respondent and Cross-Appellant.

From The United States District Court
For the Central District of California
Case No. CV 99-02829 AHM (CWx) consolidated
with Case No. CV 01-01339 AHM (CWx)

APPELLANT'S RESPONSE AND REPLY BRIEF

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INTRODUCTION

Respondent and cross-appellant Artemis wishes to portray itself as an innocent bystander in this litigation. Indeed, Artemis would have this court believe that it has been victimized by a runaway jury and a "standardless, result-oriented" judge. Br. 36. Nothing could be further from the truth. Both the court below and the jury paid careful attention to the evidence that was presented. While one awarded $700 million in punitive damages and the other ordered partial restitution based on unjust enrichment of $241 million, both the jury and judge were clear that Artemis was a knowing participant in a conspiracy "to obtain assets from the ELIC Estate by fraud" and should not be permitted to profit from its participation in that conspiracy.

Artemis is a corporation created by Credit Lyonnais and Francois Pinault in December 1992 as a vehicle to hold portions of the bond portfolio and insurance assets that Credit Lyonnais, Altus and its co-conspirators had acquired from the ELIC Estate through a fraudulent bid which they submitted to the California Commissioner of Insurance in the fall of 1991. At trial, there was voluminous evidence regarding the fraudulent nature of the Altus/MAAF bid and the misrepresentations that Altus and MAAF made in order to induce the Commissioner to approve their bid and transfer ELIC's assets to the members of the Altus/MAAF consortium. The jury and the judge also heard testimony from the Commissioner and his staff which confirms that the Commissioner would not, and could not lawfully, have allowed the ELIC bonds and insurance assets to be

transferred to the conspirators had he known the truth about the *portage* agreements and the secret relationship between Altus and MAAF.

The jury's findings that Artemis was a knowing participant in the conspiracy to defraud the ELIC Estate and that Artemis, itself, made false statements and omitted material facts in regulatory applications "with an intent to deceive," are supported by ample evidence and are not even challenged by Artemis.

Instead, Artemis asserts that the fact that the jury failed to award "compensatory damages" means that the Commissioner failed to establish that the conspiracy injured the ELIC Estate. The jury plainly believed otherwise. It found explicitly that "the scheme cause[d] harm to the ELIC Estate." ER 1153.

Jury Instruction No. 30 informed the jury that in order to find Artemis liable for "conspiracy" it had to determine whether the Altus/MAAF group obtained ELIC's assets through fraud. In finding liability, the jury necessarily concluded that this was so. The mere fact that the Commissioner was unable to obtain unanimity among jurors in support of his belief that NOLHGA would have won the auction if the true facts had been known, does not mean that the estate and its 330,000 former policyholders were not "harmed" when the Commissioner was fraudulently induced to sell the ELIC assets to Altus and its co-conspirators.

Whether the Commissioner would have chosen NOLHGA or another bidder in the original bidding or started a brand new auction, he and ELIC's policyholders were harmed by the conspirators' deception and their fraudulent bid. Equally important is the fact that, but for the fraud, Artemis and its co-conspirators would not have obtained ELIC's assets and the enormous profits that flowed from them.

Its verdicts and findings show that the jury understood these principles even if Artemis does not. The jury's findings in Verdict Forms 1, 3, 5, and 6 are fully consistent with the evidence and the belief that the harm to the ELIC Estate had already occurred by December 1992 when Artemis was created and joined the conspiracy. While the jury was unable to reach agreement on exactly what the Commissioner would have done, it had no difficulty on deciding how much profit Artemis had made ($700 million) or concluding that punitive damages was an effective way to prevent Artemis from profiting from its misdeeds.

The principal issue raised by these appeals is whether California law permits Artemis to keep its illegal profits and, if not, whether the federal constitution prohibits California from using a punitive damages award to disgorge illegal gains. The answers to those questions are entirely unsurprising: California provides several methods for disgorgement of the illegal profits from unlawful activity, including restitution and punitive damages. And, nothing in the Due Process Clause prohibits a state from permitting a jury to assess punitive damages in a sum sufficient to deprive a defendant of the financial benefits of its illegal activities.

The factual predicate for the legal questions in this case was resolved by a jury and is largely uncontested. Artemis does not challenge the sufficiency of the evidence to support the jury's verdict, nor does it ask this Court to overturn the jury's finding of liability. Artemis further does not contest the district court's finding that but for its participation in the conspiracy, it never would have obtained ELIC's former business and assets and never would have earned the more than $700 million in profits it derived from that ownership.

California law is clear that disgorgement of profits is a proper goal of a punitive damages award and that such an award is permissible, even if the plaintiff is not awarded compensatory damages. At the same time, there is nothing unconstitutionally arbitrary about making illegal conduct unprofitable. Putting Artemis back in the same position it would be in had it not joined the conspiracy is an extremely modest sanction for Artemis' serious misconduct.

Artemis is equally wrong in the arguments used in its cross-appeal. Artemis misstates the law when it claims that proof of "fraud" is an essential prerequisite to an unjust enrichment award. There is no doubt that fraud is a species of misconduct that will support unjust enrichment. However, unjust enrichment is not limited to fraud and applies to any situation in which a defendant "obtains a *benefit* that he or she may not *justly retain*." In the words of California Civil Code section 2224,

> One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, *or other wrongful act*, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

(emphasis added).

The judge and the jury found Artemis liable for knowing participation in a conspiracy to obtain assets from the ELIC Estate *by fraud*, and for making false statements and omitting material facts in regulatory filings submitted to the Commissioner as part of the conspiracy. That such conduct is "wrongful" is hard to dispute.

In its cross-appeal Artemis also claims that the district court erred in computing the unjust enrichment award by failing to give Artemis credit for amounts that other defendants paid in pretrial settlements. Artemis' argument that California Civil Code section 877 requires such an offset is incorrect. Section 877 applies to joint and several damages awards. The judgment against Artemis for unjust enrichment was not "joint and several;" it was not an award of damages and it did not hold Artemis responsible for wrongful profits made by anyone other than Artemis. In short, section 877 has no application to this case.

In its final argument Artemis asserts that the Commissioner's fraud and conspiracy claims are barred by *res judicata* because they constitute a collateral attack on the terms of the ELIC Rehabilitation Plan. Of course there is not a single word in the Rehabilitation Plan that authorizes Artemis to join conspiracies or make false statements to the Commissioner. Nor, since the secret *portage* agreements did not come to light until five years after the plan was approved, were the fraud and conspiracy claims against Artemis adjudicated as part of the rehabilitation proceedings. The only issues that the Rehabilitation Court considered in approving the plan had to do with whether the plan was "arbitrary or improperly discriminatory" and whether it conformed to the requirements of the California Insurance Code. The District Court flatly rejected this *res judicata* argument. This Court should do the same.

REPLY ARGUMENTS IN SUPPORT OF COMMISSIONER'S APPEAL

I. The Jury And The District Court Properly Found That The Commissioner Had Suffered Actual Damage Sufficient To Establish Liability And A Right To Seek Punitive Damages Under California Law.

The common thread running through much of Artemis' brief is its assertion that the jury's failure to award the Commissioner compensatory damages precludes the award of any legal or equitable remedy. That simply is not the law. The jury's finding that Artemis was liable for knowing participation in a conspiracy to defraud fully supports its punitive damages award.[1]

A. The Jury Found Artemis Liable For Conspiracy To Defraud.

Although it does not ask this Court to overturn the jury's liability verdict for insufficiency of the evidence, Artemis argues that the award of punitive damages was improper because, it claims, the jury's findings failed to establish a "complete verdict on [the Commissioner's] conspiracy claim." Br. 57. This is so, Artemis asserts, because "California law requires proof of actual, compensatory damages for a civil conspiracy," and the jury awarded no compensatory damages. Br. 56. This argument confuses "actual damage," which is a required element of a conspiracy claim, with "an award of compensatory damages," which is not.

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[1] The jury's verdict is entitled to deference and must be upheld as long as there is "substantial evidence" supporting it. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001) citing *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). A court must uphold a jury's verdict as long as there is "evidence adequate to support the jury's conclusion, even if it is possible to draw a contrary conclusion from the same evidence." *Id.*

A plaintiff alleging fraud or a conspiracy to defraud must establish that the fraud "result[ed] in damage." *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd*, 7 Cal.4th 503, 511 (1994); *Lazar v. Superior Court*, 12 Cal.4th 631 (1996) (same). In this case, the jury was instructed on the elements of a conspiracy claim and on the damage element in particular. The jury was instructed that the "harm" claimed by the Commissioner was that the conspirators "obtain[ed] ELIC's junk bond and insurance business through fraud."[2] The verdict form likewise required the jury to find, as elements of the conspiracy count, that Artemis conspired with others "to obtain the assets from the ELIC Estate by fraud," ER 1151, that Artemis agreed to participate in furtherance of the scheme, ER 1152, and that "the scheme cause[d] harm to the ELIC Estate." ER 1153. Following its instructions, the jury plainly concluded that the conspirators succeeded in obtaining the assets of the ELIC Estate by fraud, thereby causing harm to the Commissioner.[3]

Artemis never objected that the jury instruction or the verdict form failed to adequately describe the damages element of a conspiracy claim, or that the word

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[2] Instr. 30, ER 1099. The instruction described the harm needed to establish liability for conspiracy in the following terms: "The Commissioner claims that he was harmed by the following companies that allegedly conspired to, and did obtain, ELIC's junk bonds and insurance business through fraud . . ."

[3] Were there any doubt about the jury's findings, that doubt is resolved by the jury's award of punitive damages which, the district court instructed, were available "only if the Commissioner proves by clear and convincing evidence that Artemis engaged in conduct with malice, oppression, or fraud *that caused harm to the Commissioner*." ER 1381. (emphasis added).

"harm" somehow failed to convey the required element of "damage."[4] Nor does Artemis now ask this Court to review the adequacy of the jury instructions. Instead, Artemis argues that the unchallenged jury verdict is "incomplete" as a matter of law in the absence of an award of compensatory damages. Br. 56-57.

However, both this Court and the California courts have long recognized that although damage is a common element of many causes of action, it is distinct from the predicate required for an award of compensatory damages. As the district court instructed the jury in this case, compensatory damages are available only when the plaintiff has proven both the *fact* of damage *and* the dollar value of that damage "with reasonable certainty." *Clemente v. State of California*, 40 Cal.3d 202, 219 (1985). *See also Bains LLC v. ARCO Products. Co.*, 405 F.3d 764, 771 (9th Cir. 2005); Instr. 2, ER 1378 (requiring a "reasonable basis" for the amount of the award). Because of this distinction, it is quite possible for a plaintiff to prove liability, but be denied compensatory damages. Accordingly, the jury's failure to award compensatory damages is in no way inconsistent with its finding of damage or "harm" and liability.

[4] In fact, Artemis' proposed jury instruction on the elements of conspiracy also used the word "harm" and never mentioned "damages." *See* Further Disputed Jury Instructions, Artemis' proposed alternate to Commissioner's proposed Instr. 17, CSER 3.

B. The Jury's Liability Verdict And The District Court's Restitution Award Each Provided The Necessary Predicate For Punitive Damages.

Just as "actual damages" are required for a claim of conspiracy, "actual damages" or "actual injury" are a prerequisite for an award of punitive damages. Cal. Civ. Code §3294(a); *Kizer v. County of San Mateo*, 53 Cal.3d 139, 147 (1991). But Artemis errs in conflating "actual damage" with "compensatory damages."

Actual damage, but not necessarily an award of compensatory damages, is a predicate for punitive damages because without it, there would be no underlying violation for the punitive damages to remedy. *See, e.g., Brewer v. Second Baptist Church of Los Angeles*, 32 Cal.2d 791, 801-02 (1948) ("[The] rule that exemplary damages cannot be imposed unless the plaintiff has suffered actual damages is based on the principle that the defendant must have committed a tortious act before exemplary damages can be assessed."). Accordingly, it is widely recognized that "[i]f actual damages are alleged and proved, a separate award of compensatory damages is not a necessary foundation for an award of punitive damages." 6

Witkin, Summary of Cal. Law, Torts § 1609 (10th ed. 2005);[5] *see also* cases cited in Comm. Br. 50-55. It is settled authority that a liability verdict is sufficient as a matter of law to support an award of punitive damages.

Artemis asserts that this rule is wrong, but it cites nothing that actually supports its contrary view. The cases Artemis cites are entirely consistent with the law as the Commissioner describes it, requiring "actual damages,"[6] or "actual injury,"[7] but never asserting that *an award* of compensatory damages is required.[8]

Artemis asserts that "numerous other appellate courts have applied" its view, but then cites only two cases. Br. 53 n.19. *Jackson v. Johnson*, 128 Cal. App. 4th 1350, 1358 (1992), reversed a punitive damages award where the jury plainly

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[5] *See also* 23 Cal. Jur. 3d Damages § 144 (2006) ("Because the requirement of actual damages is simply the requirement that a tortious act be proven if punitive damages are to be assessed, if damages are actually suffered, punitive damages may be awarded in appropriate cases even if the injured party is not awarded compensatory damages."); Cal. Civ. Pract. Torts § 7:15 (2006) ("In California, as at common law, actual damages are an absolute predicate for an award of punitive damages. The requirement of actual damage simply means that a tortious act must be alleged and proved in order to support an award of punitive damages. Punitive damages may be recovered if only nominal, or no, compensatory damages have been awarded.")

[6] *Kizer,* 53 Cal.3d at 147 ("[A]ctual damages are an absolute predicate for an award of exemplary or punitive damages"); *Mother Cobb's Chicken Turnovers, Inc.*, 10 Cal.2d 203, 205 (1937) ("Actual damages must be found as a predicate for exemplary damages.").

[7] *Berg v. First State Ins. Co.*, 915 F.2d 460, 465 (9th Cir. 1990) ("Further, without actual injury, punitive damages are not recoverable under California law.")

[8] *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965 (1993), simply cited and quoted *Kizer* in the process of noting that "punitive damages sometimes may be assessed in unintentional tort actions under Civil Code section 3294." *Id.* at 1004. It hardly can be read to overturn the settled law in the state.

"determined that one of the elements of malpractice, actual damages, had not been established." The opposite is true in this case; the jury explicitly found that the Commissioner established each element of his conspiracy claim, including the element of harm. The other case, *Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212, 238 (2005), simply mischaracterizes the holdings of the cases it cites without any explanation or analysis. This single drive-by holding is wholly insufficient to counter the wealth of authority cited by the Commissioner and acknowledged by all the leading California law treatises.[9]

Even the cases Artemis relies upon acknowledge that nominal damages will support an award of punitive damages. *See, e.g., Kizer*, 53 Cal.3d at 147; *Sole Energy Co. v. Petrominerals Corp.*, 128 Cal.App.4th at 238 (2005); *see also Lane v. Hughes Aircraft Co.*, 22 Cal.4th 405, 417-18 (2000) (Mosk, J., concurring) ("Our case law reveals a number of instances of intentionally harmful conduct in which only nominal actual damages were awarded because such damages were difficult to quantify, but in which punitive damages hundreds or thousands of times greater were assessed."); Comm. Br. 52, 54-55 (collecting cases). That rule again reflects that the only requirement for an award of punitive damages is harm

[9] Artemis' citation to Cal. Civ. Code § 3295(d) is also misplaced. That provision simply governs trial procedure in cases involving punitive damages in state court. It does not purport to modify the substantive requirements for punitive damages awards, which are directly set forth in a different provision, § 3294(a), and which the state courts have interpreted as not requiring an award of compensatory damages. Being purely procedural, § 3295 has no application to cases such as this, heard in federal court. *See Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281 (C.D. Cal. 1998).

sufficient to establish liability, as the only predicate for nominal damages is a violation of the plaintiff's legal rights. *See* Cal. Civ. Code § 3360 ("When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.")

It is, of course, true that in this case the jury did not award nominal damages. But that failure was clearly an error in light of its liability verdict and the jury instruction Artemis itself proposed, which explained in no uncertain terms that "[i]f you find for the plaintiff but you find that the plaintiff has failed to prove damages as defined in these instructions, *you must award nominal damages*." Instr. 8, ER 1386 (emphasis added); *see also Hotel & Rest. Employees Union v. Francesco's B. Inc.*, 104 Cal.App.3d 962, 973 (1980) ("When a party is injured by the intentional act of another... the party is *entitled* to nominal damages.") (emphasis added).[10] This Court has explained that the fact that "a jury might choose to award zero actual damages is irrelevant to the legal question of whether, on the basis of the jury's verdict, the plaintiff was entitled to judgment and nominal damages." *Floyd v. Laws*, 929 F.2d 1390, 1402-03 (9th Cir. 1991). Likewise, the jury's failure to make a required award of nominal damages cannot deprive the Commissioner of an award of punitive damages that would plainly be permitted if the jury had acted as required. *See generally* Cal. Civ. Code 3528 ("The law respects form less than substance.")

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[10] Artemis' newfound skepticism of the Commissioner's right to nominal damages upon proof of liability (Br. 55) comes far too late. Having agreed to the instruction on mandatory nominal damages in the trial court, it cannot now contest that the jury's failure to follow the instruction was error.

Accordingly, California courts have upheld punitive damages awards even when a jury has wrongly failed to award nominal damages, so long as the existence of actual damage (and therefore an entitlement to nominal damages) is clear. *See, e.g.*, *James v. Pub. Fin. Corp.*, 47 Cal.App.3d 995 (1975); *Contento v. Mitchell*, 28 Cal.App.3d 356, 359 (1972); *Clark v. McClurg*, 215 Cal. 279 (1932).

For example, in *Clark*, the jury left empty the space on the verdict for "actual damages" but awarded $5,000 in punitive damages. *Id.* at 281. According to Artemis, the failure to award any compensatory damages required reversal of the punitive award. However, the California Supreme Court rejected that argument and affirmed the award. The court explained that because the plaintiff plainly established her cause of action for slander per se, the element of actual damage was conclusively established. *Id.* at 284. "Actual damages being shown," the court the considered it "essential to determine whether the money extent therefore must be found in order to sustain a finding of punitive damages." *Id.* at 282. The Court established the rule in California: so long as it was apparent from the jury's verdict and its instructions that actual damage was established, the failure to award even nominal compensatory damages "was an error in form and not of substance" and did not preclude the award of punitive damages. *Id.* at 285.

This case is no different. The jury in this case *expressly* found that the Commissioner had suffered actual damage, in accordance with clear instructions from the court that "harm" was a necessary prerequisite for both liability on the conspiracy charge and for punitive damages. That finding required an award of nominal damages and was sufficient to permit the punitive damages award. *See*

James v. Pub. Fin. Corp., 47 Cal.App.3d 995 (1975) (applying *Clark* in fraud case where actual damages were not presumed, or even found by the jury, but were clearly established in the evidence).

Finally, even if a substantial monetary award *were* a prerequisite to punitive damages, the Commissioner obtained a sizeable restitution award in this case. Artemis acknowledges that California courts have permitted punitive damages even when the plaintiff sought or received only restitution or other equitable relief. *See* Br. 57-58. A restitution award, like an award of compensatory or nominal damages, is a sufficient predicate because "[w]here the plaintiff's recovery is in the form of restitution ... plaintiff has indeed been damaged even though monetary damages are not awarded." *Esparza v. Specht*, 55 Cal.App.3d 1, 6 (1976); *Horn v. Guaranty Chevrolet Motors*, 270 Cal.App.2d 477, 484 (1969); *see also* Comm. Br. 8-50.[11]

Artemis' only other argument is that it is somehow "circular" to allow the restitution award to support the punitive damages. Br. 59. As noted above, punitive damages are often awarded in addition to restitution. There is no basis to change this rule simply because the restitution order followed the jury's punitive damages award. Whenever entered, the restitution award plainly serves the

[11] Artemis attempts to distinguish the Commissioner's cases *Topanga Corp. v. Gentile*, 249 Cal.App.2d 681 (1967) and *Ward v. Taggart*, 51 Cal.2d 736 (1959) by stating that the restitution awards in those cases were proper, while claiming that the district court should not have ordered restitution here. Br. 57-58. But that assertion is both baseless and irrelevant to the legal question of whether an award of restitution is a sufficient predicate for punitive damages.

necessary function of demonstrating that the Commissioner suffered actual damage supporting a punitive damages award.

II. The Jury's Punitive Damages Award Comports With Due Process And Satisfies The *BMW* Factors.

Nothing in the federal constitution prohibits California from permitting a jury to disgorge a defendant's illegal profits through a punitive damages award, even when the jury does not award compensatory damages.[12]

There can be no reasonable dispute that the State has a legitimate interest in ensuring that individuals and companies that violate its laws do not profit from their illegal conduct, both as a matter of simple justice and as a matter of deterrence. *See, e.g., Johnson v. Ford Motor Co.*, 35 Cal.4th 1191, 1208-09 (2005) ("[R]emoval of any profits the defendant has earned by a wrongful act is a logical step toward deterring its repetition or imitation."); *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (approving state jury instruction requiring consideration of

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[12] Artemis asserts that there is no "*factual* basis" for concluding that the jury's subjective intent was to use the punitive damages award to deprive it of its illegal profits (Br. 68 n.28), but it does not contest that this was the effect of the award. In any case, the jury's intent is easily inferred in light of the close relationship between the amount of profits and the punitive award, the fact that the Commissioner asked the jury to issue an award sufficient to disgorge Artemis' profits, and the district court's instruction that California law permits a punitive award for that purpose. *See* Comm. Br. 30. In any case, the jury's subjective intent is ultimately beside the point. The constitutional test is entirely objective, asking whether the amount of the award is so "grossly excessive" that it "furthers *no* legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). The question for this Court is not whether the jury award was *intended* to serve a legitimate state purpose, but whether the verdict actually *does* serve a legitimate purpose.

"the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss"). Indeed, disgorgement remedies have a long and unchallenged history in the law. Comm. Br. 31-32. Artemis does not even attempt to explain how disgorgement of profits through a punitive damages award – which serves the same important purpose – could "fairly be characterized as 'grossly excessive' in relation to" the state's interest in deterrence and punishment so as to "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW v. Gore*, 517 U.S. 559 (1996).

Unsurprisingly, nothing in *BMW v. Gore* or its progeny draws into question the constitutionality of using punitive damages awards to disgorge illegal profits. Application of the *BMW* factors to the present award makes this clear.

A. Reprehensibility

"Perhaps the most important indicium of reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. In this case, depriving Artemis of the profit it obtained through its illegal conduct – leaving it no worse off than it would be if it had obeyed the law in the first place – is a modest sanction for very serious misconduct.

Artemis asserts that its misconduct in this case was so innocuous that the Constitution forbade the jury from issuing *any punishment at all*. Br. 63. That claim is both false and a demonstration of the need for a substantial punitive

damages award in this case. Artemis' misconduct here strikes at the core of the State's attempts to protect its citizenry by regulating the business of insurance. The Commissioner simply *cannot* perform his critical regulatory function when the regulated entities conspire to conceal material information from him.

Artemis persists to this day in showing contempt for the Commissioner's right to obtain truthful information and the State's authority to decide who can conduct insurance business in the state. *See, e.g.*, Br. 67 (calling the restrictions it conspired to evade "relatively obscure" and asserting that "the policies underlying that provision are, at best, elusive."). The jury in this case properly concluded that "strong medicine is required to cure the defendant's disrespect for the law." *BMW*, 517 U.S. at 577.

Artemis attempts to downplay the seriousness of its conduct by noting that it could have been worse – the conspirators could have killed someone, for example, in the course of defrauding the government of billions of dollars in assets. But the Court has been clear that "substantial penalties" are warranted by conduct that – like Artemis' – in addition to involving "acts of affirmative misconduct" *BMW*, 517 U.S. at 579, also involve "intentional malice, trickery or deceit," *State Farm*, 538 U.S. at 419, or "deliberate false statements." *BMW*, 517 U.S. at 579. Remarkably, Artemis attempts to deny that these aggravating factors apply (Br. 65), even though the jury and the court specifically found that Artemis participated

in a conspiracy to defraud the Commissioner *and* that as part of this conspiracy Artemis itself lied to the Commissioner.[13]

Knowing that "repeated misconduct is more reprehensible than an individual instance of malfeasance" *BMW*, 517 U.S. at 577, Artemis again ignores the facts of the case in asserting that its misconduct "did not 'involve[] repeat actions.'" Br. 64. The conspiracy involved a great number of deceitful acts taken over the course of many years, culminating in a cover-up phase in which Artemis was created and used to dispose of illegally-held assets. *See* ER. 1491-92, 1495-98; Comm. Br. 13-15. Artemis itself made false statements, or failed to make truthful disclosures required by law, on scores of occasions. *See* ER. 1498; Comm. Br. at 15-17. That Artemis was eventually found liable on a single count of conspiracy hardly demonstrates that the underlying conduct constituted a one-time slip in judgment or a "mere accident." *State Farm*, 538 U.S. at 419.

Artemis cannot seriously contend that its conduct was so blameless as to make *any* award of punitive damages disproportionate to its offense. Nor can Artemis legitimately complain about the proportionality of the jury's actual award.

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[13] Artemis asserts that this conduct nonetheless does not constitute intentional trickery or deceit because the jury found that Artemis' direct lies to the Commissioner (as opposed to the fraud committed by the conspiracy as a whole) caused him no harm. Br. 65. But the relevant conduct here is the fraudulent conspiracy as a whole, a conspiracy the jury found *did* cause harm. *See Applied Equipment Corp.*, 7 Cal.4th at 511 (conspirators legally responsible for acts of entire conspiracy). The law has long treated participation in a conspiracy as deserving of punishment beyond that which would be imposed upon the defendant's own conduct standing alone. *See Pinkerton v. United States*, 328 U.S. 640, 646 (1946).

Here, all the jury took from Artemis is what it had no legal right to obtain in the first place.

B. Ratio To Actual Or Potential Harm

Artemis also badly misconstrues the second *BMW* factor as precluding any punitive damages in the absence of a compensatory damages award. Br. 61-62.

The Supreme Court has never held that compensatory damages are a constitutional prerequisite to punitive damages, and this Court has held that they are not. *See, e.g.*, *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 514 (9th Cir. 2000); *Bise v. Int'l Brotherhood of Elec. Workers*, 618 F.2d 1299, 1305-06 (9th Cir. 1979); *Gill v. Manuel*, 488 F.2d 799, 803 (9th Cir. 1973); *see also* Comm. Br. 42-43 (collecting cases from other circuits). Perhaps unwilling to acknowledge that its view of *BMW* would require reversal of all of these decisions, Artemis asserts in passing that they are all distinguishable because, it says, each involved "either a presumption of, or a specific award of, compensatory damages." Br. 62. This assertion is quite odd. Each of the cases says quite clearly that a "specific award of compensatory damages" is *not* a prerequisite for punitive damages, and that either nominal damages will suffice or that no monetary award is required.

This is not surprising, for while compensatory damages will often serve as a helpful proxy for harm, there are any number of reasons why a violation causing great harm may not lead to large compensatory damages. For example, a large punitive award may be appropriate when "a particularly egregious act has resulted

in only a small amount of economic damages," *State Farm*, 538 U.S. at 425, or when "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine," *BMW*, 517 U.S. at 582. In other cases, a plaintiff may not even request compensatory damages or may otherwise be ineligible for a compensatory award. Nonetheless, punitive damages are appropriate.

The punitive damages award in this case is plainly proportional to the harm and potential harm caused by the conspiracy which Artemis joined, as well as to the restitution ordered and the profits received. While the jury was unable to determine the extent of the pecuniary damage to the ELIC Estate with sufficient certainty to award compensatory damages, it found that the conspiracy inflicted real harm in fraudulently inducing the Commissioner to sell the assets of the estate to the conspirators. The conspirators' disregard of state law also inflicted a substantial non-economic injury upon the Commissioner, the monetary value of which is hard to determine. That injury was not simply to the State's sovereign interest in compliance with its laws, but also to the Commissioner's ability to perform his essential regulatory functions. Even if these types of injuries were not grounds for permitting a *private* plaintiff to seek substantial punitive damages in the absence of more concrete compensable harm, there can be no question that such punishment serves a legitimate state interest in a suit brought by an arm of the State itself.

The proportionality of the jury's response to that harm is confirmed by the ratio of the award to Artemis' profits (one-to-one) and to the unjust enrichment

award (less than four-to-one). Contrary to Artemis' view, such comparisons are not precluded by *BMW*. For example, in *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1347 (Fed. Cir. 2001),[14] the court rejected the defendant's assertion that a $50 million punitive damages award was disproportionate to the award of $1 in nominal damages, where the plaintiff also obtained a $15 million unjust enrichment award. The defendant insisted that the only appropriate comparison was between the punitive award and the nominal compensatory damages. *Id.* The court of appeals disagreed, concluding "that under the facts of this case the unjust enrichment gained by [the defendant] is logically related to the harm or potential harm caused [the plaintiff], and it was appropriate to base the award of punitive damages on the unjust enrichment award." *Id.* at 1351.[15] The same is true here. The fact that the jury's punitive award did no more than disgorge Artemis' illegal profits, in an amount proportional to the district court's order of partial restitution, demonstrates that the jury did no more than was necessary to further the State's legitimate goals of punishment and deterrence.

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[14] The Supreme Court subsequently granted *certiorari* in *Rhone-Poulenc Agro*, vacated the decision and remanded for reconsideration in light of *State Farm*. *See* 538 U.S. 974 (2003). On remand, the court of appeals adhered to its prior decision. 345 F.3d 1366.

[15] *See also, e.g., Tisdale v. Federal Express Corp.*, 415 F.3d 516, 534 (6th Cir. 2005) (comparing punitive damages to backpay award); *EEOC v. W&O, Inc.*, 213 F.3d 600, 615-17 (11th Cir. 2000) (same); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 575-76 (8th Cir. 2002) (front pay).

C. Other Civil And Criminal Penalties

The district court declined to consider the third *BMW* factor – which compares the "punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct," *BMW*, 517 U.S. at 583 – but Artemis nonetheless insists that it supports the decision to void the award. Br. 65-66. Artemis is wrong.

In his opening brief, the Commissioner demonstrated that disgorgement remedies are ubiquitous in the law, providing Artemis ample notice that participation in an illegal conspiracy to defraud the State could result in the loss of any profits it derived from the venture. Comm. Br. 31-32, 46-47. Artemis simply ignores this showing and argues instead that it lacked any notice of the potential legal consequences of its acts because (1) its conduct was legal in France, Br. 60 & n.26; (2) Artemis is not subject to the Bank Holding Company Act, and (3) the California Insurance Code provides a civil penalty of $50,000 per violation. Br. 66-67. All three assertions are baseless.

First, while the Commissioner seriously doubts that conspiring to defraud the government is legal in France, the question is entirely immaterial to this case. Artemis was not held liable for engaging in conduct that "may have been lawful *where it occurred.*" *State Farm*, 538 U.S. at 421 (emphasis added). Artemis does not, and cannot, dispute that the for which it was held liable "occurred" in California.[16] Artemis is a sophisticated multinational corporation with a small

[16] Artemis attempts to avoid the obvious by asserting that "the underlying conduct at issue" is the "the alleged secret holding of shares for another person."

army of American lawyers and knows full well that if it wants to conduct business in the United States it must conform its conduct to American, not French, law.

Second, Artemis is also wrong in asserting that it is not subject to the criminal penalties of the Bank Holding Company Act ("BHCA"), 12 U.S.C. §§ 1841-1850 (1992), because it is not a bank. While that statute generally governs only the conduct of banks, Congress presciently extended its enforcement provisions to punish not only banks, but also those who aid or abet banks in violating the Act. 12 U.S.C. § 1847(a)(2), (b)(5).[17] In this case, Artemis conspired with Credit Lyonnais and Altus to assist them in violating the Act's prohibition on a bank's ownership of an insurance company. Artemis' potential liability under the BHCA far exceeds the punitive damages award in this case. *See* Comm. Br. 47.[18]

Br. 60 n.26. But as Artemis is well aware, the "underlying conduct at issue" in this case is not the use of *portage* agreements, but rather the conspiracy to defraud the Commissioner about the existence of those agreements.

[17] The BHCA authorizes fines of up to one million dollars per day against "*[w]hoever*, with the intent to deceive, defraud, or profit significantly, knowingly violates any provision of this chapter," 12 U.S.C. § 1847(a)(2) (emphasis added), and then provides that "[f]or the purposes of this section, the term 'violate' includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or *aiding or abetting a violation*," *id.* §1847(b)(5) (emphasis added).

[18] As the district court noted, Artemis entered into a $185 million settlement with United State's Attorney to resolve the federal government's criminal claims against Artemis for its role in the conspiracy. *See* Restitution Decision, ER 1484; *In re Exxon Valdez*, 270 F.3d 1215, 1245-50 (9th Cir. 2001) (comparing punitive award to settlement with the United States). The ratio between that settlement and the punitive damages award is less than one-to-four.

Third, the fact that Artemis was *also* subject to smaller penalties under Section 1215.10 of the California Insurance Code does not show that it lacked "fair notice" that it would be forced to disgorge any profits it earned through a conspiracy to defraud the Commissioner. Artemis Br. 66. As an initial matter, a wrongdoer cannot expect to keep its ill-gotten profits. Moreover, in *Haslip*, the Supreme Court encountered a similar situation in which the defendant committed insurance fraud that was clearly reprehensible and resulted in a punitive damages award more than 200 times the plaintiff's out-of-pocket expenses. 499 U.S. at 23. The Court observed that the punitive award was "much in excess of the fine that could be imposed," but nonetheless held the award constitutional in light of the seriousness of the fraud and the availability of other substantial sanctions. *Id.* The same is true here.[19]

While Artemis may believe that California's insurance laws are arcane and unworthy of obedience, this Court should defer to the State's judgment – expressed in its enforcement statutes, as well as the jury verdict in this case – that conspiring to evade government regulation of the insurance industry is a serious offense that

[19] The civil penalty provision is but one of many sanctions California has enacted for the serious misconduct undertaken in this case. *See, e.g.*, Cal. Ins. Code. § 1215.10(a) (civil forfeiture for individuals); 1215.10(c) (criminal prosecution of company officers); 1215.10(c)-(d) (imprisonment); 1215.12 (revocation of insurance business license); 12930 (noting these penalties are in addition to crimes in Penal Code); *State v. Altus Finance, S.A.*, 36 Cal.4th 1284, (2005) (noting Commissioner's authority to seek civil remedies such as restitution).

should, at the very least, be rendered unprofitable. The Court need decide no more to reinstate the jury award in this case.[20]

OPPOSITION TO ARTEMIS' CROSS-APPEAL

III. THE RESTITUTION AWARD WAS APPROPRIATE

If this Court restores the jury's punitive damages award, there is no need to decide Artemis' cross appeal, as the Commissioner has agreed to waive his right to restitution in those circumstances. However, Artemis' challenge to the award of partial restitution is meritless in any event. The district court did not abuse its discretion in ordering restitution of a small portion of Artemis' illegal profits. *See Securities and Exchange Commission v. Absolutefuture.com*, 393 F.3d 94, 97 (2d Cir. 2004) (decisions regarding the imposition and calculation of the amount of disgorgement are reviewed for abuse of discretion).

[20] Artemis also asserts in a footnote that the award is excessive under state law because it represents more than 10% of its net worth. Br. 56 n.24. The district court did not pass on this assertion, which is plainly meritless. Nothing in the single case Artemis cites, *Weeks v. Baker & McKenzie*, 63 Cal.App.4th 1128 (1998), stands for the proposition that a defendant is entitled to keep the fruits of illegal conduct whenever it is so poor, or the fraud is so large, that the ill-gotten gains constitute more than 10% of the defendant's net worth.

A. The Court's Restitution Award Was Properly Aimed At Forcing Artemis To Disgorge A Portion Of The Profit It Made From Its Participation In The Conspiracy.

1. Artemis Derived A Benefit From Its Participation In The Conspiracy.

Artemis does not challenge the findings of the jury and the court that it was a knowing participant in a conspiracy to obtain assets from the ELIC Estate through fraud. Instead, Artemis argues that it received no "benefit" from its wrongdoing because the Commissioner and the ELIC Estate received "fair market value" for the assets when they were sold to the conspirators. Br. 29. This is a "no compensatory damages, no restitution" argument, and it fails because a defendant's unjust enrichment is measured by the extent of the malefactor's gain, not by the extent of plaintiff's loss.[21]

A classic illustration of this principle can be found in the Restatement of Restitution:

> Knowing that he has no right to do so, A enters B's timber tract and thereon cuts trees which have a value of $1000 when cut.

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[21] "[R]estitution is measured by the benefit to the defendant, whereas liability for breach of duty is measured by the injury to the plaintiff. As a practical matter, therefore, the claim in restitution will have independent significance chiefly in those cases *where the benefit to the defendant's wrongdoing exceeds the injury to the plaintiff*; or where the measure of benefit to the defendant is at least *more easily established*." Restatement (Third) of Restitution § 3, cmt. a (Discussion Draft) (2006) (emphasis added).

Put another way, "the general requirement [of restoration] does not mean that the gain to defendant need be equated to the loss to the plaintiff, nor indeed that there need be *any loss* to the plaintiff except in the sense that a legally protected interest has been invaded") Palmer, *Law of Restitution* § 2.10, p. 133 (1978) (emphasis added).

> He then has them sawed into boards which are carried to the city at which place they are worth $2000. B is entitled recover $2000 from A by way of restitution. Restatement of Restitution § 151, cmt. d, illus. 5 (1937).

According to the Restatement, it is insufficient to return only $1000 (the "fair market value") to the plaintiff; because defendant took the timber wrongfully, he is made to disgorge his entire profit, $2000. This is true regardless of whether the plaintiff suffered economic damages. Indeed, even if the plaintiff had desired to have his land cleared, as long as the defendant's acquisition of the timber was "wrongful," he must disgorge his profit.[22]

Most importantly, Artemis' "no compensatory damages, no restitution" argument ignores the fundamental principle that "no one can take advantage of his own wrong." Cal. Civ. Code § 3517. A party guilty of misconduct becomes an involuntary trustee over property acquired by his "wrongful act" and holds the property and its proceeds for the rightful owner. Cal. Civ. Code § 2224. The equitable remedy of disgorgement was designed to confront precisely the situation in which a wrongful taking results in no economic damages, but the wrongdoer

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[22] California courts making restitution awards similarly focus on defendant's gain, not plaintiff's loss. In *Haskel Eng'g Supply Co. v. Hartford Acc. & Indem. Co.*, 78 Cal.App.3d 371, 374 (1978), when an employee embezzled funds from his employer, and used those funds to purchase real estate that appreciated in value, the remedy available to the employer in restitution included the gain on the real estate as well as the return of the embezzled funds because otherwise the employee would have been unjustly enriched by the profit he made on the funds belonging to his employer. *See also, CTC Real Estate Sers. v. Lepe*, 140 Cal.App.4th 856, 860 (2006) ("a victim of [identity] theft is entitled to recover the assets stolen or anything acquired with the stolen assets, even if those assets have a value that exceeds the value of that which was stolen.")

would be unjustly enriched if allowed to retain what he acquired. As is explained in the Restatement, in certain situations:

> ... a benefit has been received by the defendant but plaintiff has not suffered a corresponding loss, or, in some situations, *any loss*, but nevertheless the enrichment of the defendant would be *unjust*. In such cases, the defendant may be under a duty *to give to the plaintiff the amount by which he has been enriched.* Thus where a person with knowledge of the facts wrongfully disposes of the property of another and makes a profit thereby, he is accountable for the profit and not merely for the value of the property of the other with whom he wrongfully dealt.[23]

In the seminal case of *Ward v. Taggart*, 51 Cal.2d 736, 741-42 (1959) the California Supreme Court imposed a constructive trust on a dishonest broker despite the fact that fraud damages were not available because the plaintiff failed to establish that he paid more for certain land than it was worth. The court's imposition of a constructive trust and its award of unjust enrichment, plus punitive damages, was based entirely on the rationale of depriving the defendant of his ill-gotten gains and to enforce the principle that no one is permitted to "take advantage of his own wrong." *Id.*[24] The plaintiff's inability to show economic harm in the form of out-of-pocket damages was not an obstacle to recovery.

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[23] Restatement of Restitution § 1, cmt. e (1937) (emphasis added). *See also*, Restatement of Restitution § 151, cmt. f (1937) ("a person who tortiously has acquired, retained or disposed of another's property with knowledge that such conduct is wrongful is entitled to no profits therefrom").

[24] Artemis argues that *Ward* can be distinguished because it was decided before subsection 3343(a)(3) was added to the California Civil Code in 1971. Br. 38, n12. This is simply incorrect. First, section 3343(a)(3) had nothing to do with the decision in *Ward*. Second, even if *Ward* had been decided after the amendment, the result would have been the same. *Ward* did not turn on the unavailability of

Similarly, in *Coleman v. Ladd Ford Co.*, 215 Cal.App.2d 90, 93-94 (1963), the court upheld judgment on an unjust enrichment theory, despite the fact that the plaintiff suffered no out-of-pocket damages. The court explained its actions as consistent with *Ward's* dictate to fashion remedies "as necessary to do justice." *Id.* The court explained that out-of-pocket loss could not be the exclusive measure of recovery, because then "a fraudulent person can in no event lose anything by his fraud. He runs the chance of making a profit if he successfully carries out his plan and is not afterwards brought to account for it; and if he is brought into account, he will lose nothing by his conduct." *Id.* This is the exact result Artemis seeks. But it is contrary to California law.

2. Artemis Obtained A Benefit At The Expense Of The ELIC Estate.

Artemis' second argument - that did not receive a benefit "at the expense of" the Commissioner or the ELIC Estate - can be dispensed with in short order. Artemis argues that the Commissioner was not entitled to recover profits earned on Aurora "*after* the Rehabilitation Plan closed" as he "never had" those profits, and "never lost" them. Br. 30. However, evidence at trial established that the Commissioner sold the ELIC Estate assets to the Altus/MAAF syndicate without

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"lost profits" damages as a remedy (especially since the plaintiff in *Ward* was the buyer of the property). Compensatory damages were unavailable in *Ward* because there was no evidence in the record to support them. However, the evidence clearly showed that Taggart (the dishonest broker) had deceived both the buyer and the seller. Ward was decided in 1959 and would still be decided today on the equitable ground that a defendant should not be allowed to retain secret profits wrongfully obtained.

knowledge of the fraud and the illegality of the Altus/MAAF bid, and had he known the truth, he would never have done the deal.[25]

The fact that Artemis acquired its interests from its co-conspirators, after the original transaction closed, rather than from the Commissioner himself, does not excuse it from the obligation to tender restitution. As the district court pointed out in its Restitution Decision, "for a benefit to be conferred, it is not essential that money be paid directly to the recipient by the party seeking restitution." Restitution Decision, ¶3, ER 1502, citing *Solano v. Vallejo Redevelopment Agency*, 75 Cal.App.4th 1262, 1278 (1999); *see also, California Fed. Bank v. Matreyek*, 8 Cal.App.4th 125, 132 (1992) (same).

Moreover, Artemis was not a *bona fide* purchaser who took the assets without knowledge of the wrongful conduct and therefore could be permitted to keep the assets. Therefore, as between the Commissioner and Artemis, the profits from the insurance business should be returned to the Commissioner for the benefit of the ELIC Estate. *See, e.g., Burke v. Mission Bay Yacht Sales*, 214 Cal.App.2d 723, 733 (1963) (defendants knowing acceptance of the fruits of a fraud rendered them liable in restitution for the proceeds; "to allow them to retain the same would

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[25] Commissioner Garamendi testified that if he had known about the *portage* agreements in 1991, "there would be no Altus/MAAF bid. They'd have misled, lied to me, to my staff. They'd be history: gone, out, not to be thought of ever again." ER 756:3-5, 756:21-757:8. Chief Deputy Commissioner Baum testified "we would have removed [the Altus/MAAF group] from the bidding process and barred them." ER 955:12-21. Chief Counsel, Karl Rubinstein said much the same, "[M]y recommendation would have been . . . tell Altus/MAAF . . . get out of town; that we are not doing a deal with them." ER 680:16-22.

sanction their unjust enrichment at the expense of the plaintiff, which the law will not permit.")

3. Wrongful Acts, Rather Than Fraud, Are The Sole Predicate To A Restitution Award.

Artemis argues that the Commissioner's failure to prove his fraud claim against Artemis is fatal to his claim for restitution. Br. 33. This ignores the fact that both the jury and the court found sufficient wrongful predicate acts to support an unjust enrichment award when they held Artemis liable for its participation in the conspiracy to defraud. It also ignores the fact that both the jury and the court found that Artemis made repeated false representations of material fact, on which the Commissioner relied. The Court was entitled to award restitution against Artemis as long as it determined that retention of its profits would be *unjust*.[26]

As Civil Code section 2224 makes clear, fraud is but one of a variety of "wrongful acts" that will support imposition of a constructive trust The district court was entitled to award unjust enrichment as long as there was "wrongful conduct" by Artemis, and Artemis benefited from the ELIC Estate assets that it wrongfully obtained. *See, e.g., Dinosaur Development, Inc. v. White*, 216 Cal.App.3d 1310, 1316 (1989) (unjust enrichment found where "benefits were conferred by *mistake, fraud, coercion or request.*") (emphasis in original);

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[26] Restatement of Restitution §1, cmt. a (restitution required where person has received benefit and "retention of the benefit would be unjust"); 1 Witkin, Summary of Cal. Law, Contracts § 1013 (10th ed. 2005) ("where a person obtains a *benefit* he or she may not *justly retain*, the person is unjustly enriched"); *Branche v. Hetzel*, 241 Cal.App.2d 801, 807 (1966) (same).

Calistoga Civic Club v. City of Calistoga, 143 Cal.App.3d 111, 116 (1983) ("The wrongful act giving rise to a constructive trust need not amount to fraud or intentional misrepresentation. *All* that must be shown is that the acquisition of the property was wrongful and that the keeping of the property by the defendants would constitute unjust enrichment.") (emphasis added).

In this case, the jury found in favor of the Commissioner on his conspiracy claim and on every element of his fraud claim except "harm." The conspiracy verdict is sufficient to support the restitution award. Moreover, apart from the conspiracy verdict, the jury's findings (echoed by the district court) that Artemis made false statements and omitted material facts with an intent to deceive which were relied on by the Commissioner are independently sufficient (as "wrongful acts") to support the court's restitution award. As the California Supreme Court said in *Ward v. Taggart*, 51 Cal.2d 736, 740-42, "although the facts pleaded and proved by plaintiffs do not sustain the judgment on the theory of tort, they are sufficient to uphold recovery under the quasi-contractual theory of unjust enrichment."

Ward is but one of many California cases in which courts have awarded unjust enrichment despite the plaintiff's failure to allege or prove entitlement to compensatory damages. *See, e.g., St. James Armenian Church of Los Angeles v. Kurkjian*, 47 Cal.App.3d 547, 550 (1975) (defendants liable for secret brokerage commissions made on land purchased by church, even where there was no evidence that the commissions were above-market rates or that the church suffered "out-of-pocket" damages.); *Goehring v. Chapman University*, 121 Cal.App.4th

353, 384 (2004) (court awarded unjust enrichment to students wrongfully mislead by accreditation status of law school but who could not prove fraud damages).

B. The Commissioner's Equitable Claims Are Not Barred By Any Failure To Elect Between Potential Legal And Equitable Relief.

Artemis argues that an equitable award was not available because the Commissioner had an adequate remedy at law. Br. 37. This is incorrect. "In California, as in most jurisdictions, an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy." *Heckman v. Ahmanson,* 168 Cal.App.3d 119, 134 (1985) According to a leading treatise on equitable remedies, "although an occasional decision suggests that restitution will be denied when alternative remedies are considered adequate, innumerable cases demonstrate that this is incorrect." 1 Palmer, *Law of Restitution* § 1.6, p. 34 (1978).

It is well-established that a plaintiff may pursue both equitable and legal claims in his complaint. When he does so, restitution will not be denied if he prefers that remedy to damages.[27] "It is well established that where the plaintiff contracts in reliance upon the fraud of the defendant, he may elect either the contract remedy, consisting of restitution based on rescission, or the tort remedy, by affirming the contract and seeking damages." *Star Pacific Investments, Inc, v. Oro Hills Ranch, Inc.*, 121 Cal.App.3d 447, 461 (1981).

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[27] "One whose money or property is taken by fraud... is entitled to restitution measured by defendant's gain if the victim prefers that remedy to the damages remedy." 1 Dobbs, *Law of Remedies* § 4.1(1), p. 553 (2d ed. 2002).

It is equally clear that the need to avoid inconsistent remedies cannot be used to force a plaintiff to make a premature election. The Commissioner was not required to elect between legal and equitable remedies prior to final judgment. *Jahn v. Brickey,* 168 Cal.App.3d 399, 406 (1985) (plaintiff was not "required to make an election of remedies before the case was submitted to the jury"); *Wallis v. Superior Court*, 160 Cal.App.3d 1109, 1114 (1984) ("Ordinarily a plaintiff need not elect, and cannot be compelled to elect between inconsistent remedies during the course of trial"); *Williams v. Marshall*, 37 Cal.2d 445, 457 (1951) ("There is no good reason why the plaintiff in... an action [seeking equitable relief and damages] should be compelled to make an election between those remedies during the course of the trial, and such a rule would be contrary to fundamental principles of law").

At present there is no need for the Commissioner to make an election since he has yet to receive inconsistent legal and equitable awards. Artemis' misstatement of the rules on election of remedies is no basis for vacating the restitution award.

C. Rescission Is Not A Requirement For Equitable Relief Where It Would Be Impossible Or Impractical To Achieve.

Artemis further claims that restitution was unavailable because the Commissioner has not rescinded the Rehabilitation Plan. But as the district court recognized, "restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud...[or] where the defendant obtained a benefit from the plaintiff by fraud" ER 1503, Restitution Decision ¶9, citing *McBride v. Boughton*, 123 Cal.App.4th 379, 388 (2004).

In any case, the district court had already excused rescission because it was impossible or impractical to achieve, in keeping with California law. *Stegeman v. Vandeventer*, 57 Cal.App.2d 753, 761-62 (1943) (articulating the principle that rescission is excused where "circumstances have arisen that make it impossible to effect a full rescission, or where the rights of the defendant can be fully protected by the decree of the court of equity"); *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 740-42 (1907) (same). In excusing rescission the district court acknowledged that the Commissioner was dealing with an extremely complicated rehabilitation and the "utter impracticality" of "conventional rescission" in this case. *Low v. Altus Finance*, 136 F.Supp.2d 1113, 1120 (2001). Rescission would have required unwinding tens of thousands of transactions involving hundreds of thousands of policyholders, who had nothing to do with the fraud.

In excusing rescission the district court heeded "policy considerations" and the facts of this case. *Low v. Altus Finance S.A.*, 136 F.Supp.2d at 1120-21. It explained that to hold otherwise would "exalt technicalities over substance" and fail to redress a "great harm to the public interest." *Id.*[28]

[28] The district court understood that any offer of rescission by the Commissioner would be a mere "technicality," as Artemis and the other defendants preferred to keep their profits pending the outcome of the litigation, and opposed rescission in connection with the motions to dismiss. Where rescission is futile because it is clear a defendant will refuse to accept, courts may excuse rescission and afford equitable relief. *See, e.g., Ross v. Prudential Guarantee Building & Loan Assn.*, 140 Cal.App.148, 155 (1934) (offer of rescission not necessary "where it is certain that the offer, if made, will be refused").

It was fully within the district court's discretion to excuse rescission and adjust the equities in its final award. It is fundamental that "the requirement that the other party to the transaction should be placed in his original position exists to prevent enrichment by the rescinding party at the expense of another. *The reason for the rule limits it.*" Restatement of Restitution § 65, cmt. e (1937) (emphasis added). Where the court can make adjustments to insure that the plaintiff is not doubly-enriched, rescission is not necessary. Here the amount sought from Artemis was its "profit" – by definition a net number.[29] Giving Artemis a monetary credit for its investment when ordering disgorgement rather than attempting to unwind an extremely complicated rehabilitation was a sound and practical exercise of the district court's equitable powers that should not be disturbed.

IV. Artemis Is Not Entitled To An Offset For Settlements Paid By Its Co-Conspirators.

The district court correctly denied Artemis an offset against its unjust enrichment award for the settlement amounts paid by Credit Lyonnais and the other co-conspirators. Where co-defendants are held jointly and severally liable, and one defendant is required to pay the judgment for the group's cumulative liability, that defendant is entitled to an offset for any funds paid by other defendants, lest the plaintiff make a double recovery. *See* Cal. Civ. Proc. Code §

[29] As expert witness D. Paul Regan explained, in calculating Artemis' profit, he gave Artemis credit for "how much they paid for the assets." Regan, ER 1393, 128:4-19.

877; *Lafayette v. County of Los Angeles*, 162 Cal.App.3d 547, 556 (1984) ("the purpose of [offsets under] section 877 is to avoid double recovery for the same injury."); *Carr v. Cove,* 33 Cal.App.3d 851, 854-57 (1973) (denying offset under section 877 because the statute is designed to "prevent settlements from producing double recoveries".)

Section 877 has no application to a case such as this. The restitution order arises on an equitable claim of unjust enrichment, not a "tort" as required by section 877. The distinction is important for, consistent with the flexible and individualized nature of equitable remedies, Artemis was not required to make restitution for the profits earned by any of its co-conspirators, but was simply held individually responsible for its own ill-gotten gains. The district court explained that Artemis engaged in its *own* "wrongful behavior" for which it had to disgorge its *own* portion of the insurance profits. SER 1091.

Had Artemis been ordered to disgorge the profits earned by the conspirators as a group, it might have a claim to an offset, but then the judgment against it would have been substantially larger as well (representing the profits of all conspirators), dissipating the benefit of any offset.[30] That is, indeed, the entire

[30] Using the district court's own calculations, the Commissioner's awards to date, including the settlements and default judgments collected against Artemis' former co-defendants, as well as the restitution awarded against Artemis, total approximately $937,542,020. This amount includes the $696,450,000 that the Court attributed to settlements and default judgments (ER 1484), as well as the $241,092,020 that the court awarded in restitution from Artemis. ER 1561. As the Commissioner explained in his pre-trial submissions, the total combined profits derived by the defendants, without any double counting due to inter-conspirator transfers, was $2,302,694,747, before any interest award. SER 462. The

point of the offset provision – it provides a mechanism to insure that each defendant pays its own share of a joint judgment and the plaintiff does not obtain a double recovery. Where the judgment imposes solely individual liability for the defendant's own conduct (rather than joint liability among "tortfeasors claimed to be liable for the same tort"), section 877 has no purpose or application.[31]

Thus the Commissioner has found no case – and Artemis cites none – where section 877 has ever been applied in the context of an unjust enrichment award. As the district court observed, "there is not a single case addressing the application of California Code of Civil Procedure 877(a) to this situation..." SER 1090. Instead, the cases decided under section 877 concern the apportionment of responsibility among joint tortfeasors for economic damages. *See Ehret v. Congoleum Corp.*, 73 Cal.App.4th 1308, 1319 (1999) (section 877 "has no applicability to non-economic damages"); *Poire v. C.L. Peck/Jones Bros. Const. Corp.*, 39 Cal.App.4th 1832, 1838 (1995) ("a nonsettling defendant may not receive any setoff under section 877 for the portion of the settlement that is attributable to non-economic damages").[32]

Commissioner and the ELIC policyholders are still well over a billion dollars shy of a "double recovery."

[31] Artemis is equally wrong in its claim that the Commissioner agreed or "acknowledged" that any restitution award against Artemis would be offset by the settlements. Br. 21, 45. Artemis takes the Commissioner's statements in his settlement motions out of context. The motions merely recite the general law under section 877, and note that settlement by one "joint tortfeasor" discharges liability of another "joint tortfeasor" for "comparative contribution" – *i.e.*, for that portion of the recovery for which defendants have joint and several liability. SER 962-63.

V. *Res Judicata* Does Not Bar The Commissioner's Claims.

Artemis is also wrong to contend that the Commissioner's claims were barred by the *res judicata* effect of the final order approving the ELIC Rehabilitation Plan in August 1993, years before the fraud was discovered. The district court was correct to reject this argument and conclude that the "doctrine of preclusive effect of rulings in *in rem* proceedings is not applicable" in this action. SER 267, 271.

The Commissioner's fraud and conspiracy claims were not litigated in the rehabilitation proceedings. Indeed, at the time of the proceedings, the conspirators were successfully concealing their fraud from the Commissioner and the court. The only issues considered in approving the Rehabilitation Plan were whether the provisions of the plan were "arbitrary or improperly discriminatory" or otherwise violated the California Insurance Code. *See Commercial National Bank in Shreveport v. Superior Court*, 14 Cal.App.4th 393, 398 (1993).[33]

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[32] The cases Artemis cites are not to the contrary. In *McComber v. Wells*, 72 Cal.App.4th 512, 518 (1999) the court allowed an offset against the portion of a jury award attributable to "economic damages" for tort, but specifically rejected as "disingenuous" the argument that the portion of the judgment attributable to "non-economic damages is subject to an offset from the pretrial settlements." Artemis' remaining cases similarly concern offsets where settling and non-settling defendants allegedly had joint liability for economic damage awards. *Lafayette v. County of Los Angeles*, 162 Cal.App.3d at 555-56 (upholding offset where settling tortfeasor was "liable for the damages" resulting from non-settling tortfeasor's acts); *Vesey v. United States*, 626 F.2d 627, 633 (1980) (applying offset where there was but a "single wrong" – a wrongful death – and tortfeasors allegedly responsible for that death shared liability for the resulting economic damages).

[33] Therefore, the Rehabilitation Court considered whether the plan as a whole was fair and equitable to policyholders. SER 108-110.

The Commissioner's fraud and conspiracy claims against Artemis do not in any way disturb the validity or finality of the Rehabilitation Plan. Instead, the Commissioner seeks to impose *in personam* liability against Artemis, seeks damages or the return of the profits that Artemis obtained as a result of its participation in the conspiracy.

The rule in *in rem* proceedings is that "a judgment is binding only with respect to the interests in the property that were the subject of the [prior] action, and the claim preclusion doctrine will usually not bar subsequent actions brought to establish personal liability of the parties." 18 Moore, Federal Practice §131.24[2] (3d ed. 2006). Therefore, the Commissioner's separate *in personam* action against Artemis for its role in the conspiracy is perfectly appropriate.[34] This is especially true in a case such as this, which is based on facts which were not known at the time, and which independently establish grounds for a claim that was not even litigated in the prior action. *See* 18 Moore, Federal Practice § 131.22[1] (3d ed. 2006).

Artemis supposed authority is easily distinguishable. While Artemis likes to cite *In re Pardee*, 193 F.3d 1083 (9th Cir. 1999) for the proposition that even an illegal plan of reorganization is final, that case fundamentally differs from this one.

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[34] *See Marshall v. Marshall*, 126 S.Ct. 1735, 1749 (2006) (tortious interference claim not barred by probate order declaring will valid; plaintiff's claim was not the sole province of probate court because "plaintiff seeks an *in personam* judgment" against an individual, not the annulment of the will); *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 92 (4th Cir. 1995) (claim needing to be raised through adversary proceeding not barred by confirmation order).

In *In re Pardee*, it was clear *from the face of the document*, that the Chapter 13 plan was illegal. *Id.* at 1085-86. It was also clear on the face of the rehabilitation plan in *Pacific Mutual Life Insurance Company v. McConnell*, 44 Cal.2d 715, 724-27 (1955) that a wrong statute was used. Thus, all the parties were on notice of the illegal or improper provisions when they failed to object and were bound by the courts' orders. That is not the case here. It took many years and a French whistleblower for anyone to learn of this fraud.[35]

CONCLUSION

Artemis' claim to immunity from liability for its knowing participation in a conspiracy to defraud the Commissioner and the 330,000 innocent policyholders that he represents is a brazen attempt to rewrite the law. The Commissioner respectfully requests that it be denied and this Court reinstate the jury's award in order that Artemis be punished for its misconduct and to deter others from attempting the same. That punishment – which leaves Artemis in no worse position than it would have been had it not joined the conspiracy – is entirely appropriate.

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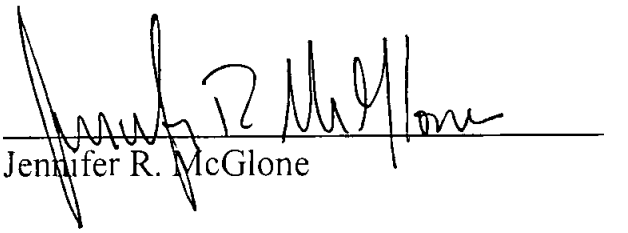
[35] Artemis' reliance on *In re Met-l-Wood Corp.* 861 F.2d 1012 (7th Cir. 1988) is similarly misguided. In that case, the relief sought was moving to vacate the judgment confirming approval of the sale of debtor's assets. Moreover, the court noted, "we have difficulty understand[ing] what the fuss is about." *Id.* at 1019. The jury already determined what the "fuss" was about here.

If the Court reinstates the punitive damages award in full, there is no need to decide the cross-appeal. However, if the Court considers the cross-appeal, it should affirm the restitution order. The district court's award of partial restitution is surely the minimum that should be imposed on the facts of this case.

Respectfully submitted.

Dated: October 6, 2006

THELEN REID & PRIEST LLP

By 
Jennifer R. McGlone

Attorneys for Plaintiff/Appellant John Garamendi, Insurance Commissioner of California and Conservator, Rehabilitator and Liquidator of the Executive Life Insurance Company

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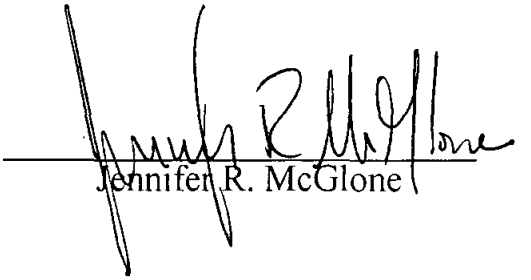

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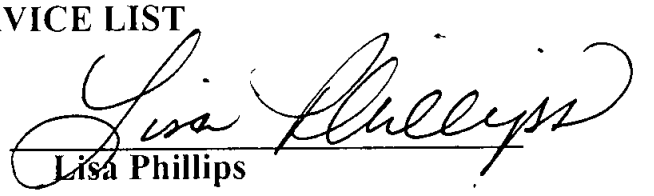

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U.S. Court of Appeals for the Ninth Circuit, Case Nos. 06-66297

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a simple money judgment from his point of view; but if that is the case, it has not been expressed in the decisions.

When a plaintiff has transferred property in performance of a contract which he is entitled to rescind, whether for fraud or the defendant's breach or other reason, there seems to be a tacit assumption that his primary right is to specific restitution of the property transferred.[18] If he can obtain specific restitution only by suit in equity, such relief usually is granted without inquiry into the adequacy of legal remedies. (a) One example of this is the conveyance of land obtained by the fraud of the defendant, where the plaintiff can recover his land only by suit in equity.[19] Courts have taken it for granted that such equitable relief is available without considering the adequacy of other remedies such as damages for deceit or quasi contract to recover the value of the land.[20] (b) So too where the defendant has obtained corporate shares from the plaintiff by fraud, and the only method by which the plaintiff can obtain specific restitution is through suit in equity, this has been allowed without inquiry into the adequacy of other remedies, such as value restitution in quasi contract, which is clearly available.[21] (c) Generally a vendor of land cannot obtain restitution for the purchaser's breach after title has been transferred, but occasionally this has been allowed, particularly in cases involving the exchange of land.[22] Where the court holds that restitution is available, it is again taken for granted that the plaintiff will be given specific

[18] This is discussed also in §4.7(a) *infra.*

[19] Davidson v. Brown, 215 Ala. 215, 110 So. 384 (1926), and *see* §3.15 *infra.*

[20] There is very little authority on the availability of quasi contract, doubtless because it is not sought by the vendor, but it is believed that such recovery will be given. Clark v. McCleery, 115 Iowa 3, 87 N.W. 696 (1901); Bacon v. Fox, 267 Mich. 589, 255 N.W. 340 (1934). There are also cases granting restitution in value where the plaintiff conveyed land pursuant to an oral and unenforceable agreement for the exchange of lands which the defendant thereafter refused to perform. See §6.4 *infra,* text at notes 18 to 20.

[21] Sher v. Sandler, 325 Mass. 348, 90 N.E.2d 536, 14 A.L.R.2d 849 (1950); Gray v. Trick, 243 Mich. 388, 220 N.W. 741 (1928). Replevin is not usually feasible as a possessory remedy in such cases because of the need for some form of indorsement of the share certificates.

[22] Gerycz v. Zagalski, 230 Mich. 381, 203 N.W. 65 (1925), and *see* §4.19 *infra.*

restitution, and the only manner in which this can be accomplished is by decree in equity. Presumably the plaintiff in such a case could obtain value restitution in quasi contract, but no case has been found in which the court considered whether this should be regarded as an adequate remedy which would bar equitable relief.

There is another side to the adequacy problem which may have an important bearing on restitution. There are some general types of cases in which restitution normally is refused, leaving the plaintiff to his damage remedy, but when this remedy is not adequate a court may order restitution. That is, while inadequacy of the damage remedy is not a prerequisite to restitution, the fact of inadequacy strengthens the case for restitution. Thus, when chattels are sold and both title and possession are transferred to the buyer, it is well settled that even for total breach by the buyer through failure to pay the price, the seller will not be able to obtain specific restitution of the chattel either at law or in equity.[23] Although the reason for this has never been fully explained, it very likely lies in the belief that the substantial effect of such relief would be to give the seller security for the performance of the buyer's obligation when he could easily have obtained security by agreement but failed to do so. If personal property such as a patent is sold, however, and the buyer agrees to pay a royalty instead of a fixed price, courts have granted specific restitution after the buyer breached his contract by failing to make the patent productive.[24] The assessment of damages in such a case would be highly speculative; courts have therefore regarded the damage remedy as unsatisfactory, and have awarded specific restitution as the only relief adequate to the needs of the situation. Somewhat the same thing has occurred in connection with conveyances of land in consideration of the grantee's promise to support the grantor. Normally even total breach by the grantee will not enable a grantor to obtain cancellation of a deed of land, but a failure to provide the agreed support has led to decrees of this sort in case after

[23] *See* §4.16 *infra*.
[24] Neenan v. Otis Elevator Co., 194 F. 414 (2d Cir. 1912).

plaintiff, even though that was a losing contract so that the defendant's tort caused no economic loss to the plaintiff.[4]

Keener took the position that for recovery in quasi contract it must "appear that what has been added to the defendant's estate has been taken from the plaintiff's. That is to say, the facts must show, not only a plus, but a minus quality." [5] Whatever the statement may mean, the decisions amply demonstrate that economic loss to the plaintiff is not a requisite. The idea which Keener was seeking to formulate has always defied accurate formulation and it seems likely that this will continue to be the case.

It is necessary to establish a connection between the interest of the plaintiff which was infringed and the benefit to the defendant. Often the connection is obvious, but when this is not the case it has proved difficult to formulate a satisfactory test. The means chosen by Keener, and adopted by Woodward, to define the necessary connection was to require that the benefit be "taken" from the plaintiff.[6] However, restitution is not limited this narrowly. In common usage Keener's language is descriptive of most of the cases in which restitution has been allowed, although it is helpful to add "use" to "taking." The language applies, for example, where the defendant takes possession of the plaintiff's personal property and either retains it, or consumes it, or sells it to a third person. The description is appropriate also where the defendant makes a temporary use of the plaintiff's property, once it is recognized that property interests are intangible even though they relate to tangible things. The defendant takes a property interest of the plaintiff whether he consumes a chattel owned by the plaintiff or merely uses it for a week and then returns it. But benefits obtained through tortious interference with a contract are not "taken" from the plaintiff, in the ordinary sense of the word — yet they should be and proba-

[4] Federal Sugar Ref. Co. v. United States Sugar Equalization Bd., 268 F. 575 (S.D.N.Y. 1920), discussed in §2.6 *supra*.

[5] Keener, Quasi-Contracts 163 (1893). Woodward adopted Keener's formulation. Woodward, Quasi Contracts §274 (1913).

[6] *Supra* note 5.

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[0]*See, e.g.*, Williams v. Bear Stearns & Co., 725 So. 2d 397 (Fla. App. 5th Dist. 1998).

Under Florida law, the general rule is that if the complaint on its face shows that adequate legal remedies exist, equitable remedies are not available. However, this doctrine does not apply to claims for unjust enrichment. It is only upon a showing that an express contract exists that the unjust enrichment claim fails.

In Willis v. Donnelly, 118 S.W.3d 10 (Tex. App. 2003), a minority shareholder brought action against the principals and majority shareholders of a closely held corporation, alleging, among other causes, breach of fiduciary duty. The pleadings referred to the principal's self-dealing, false characterization of capital, complete control of the business, and inaccurate record keeping. The court held that the complaint was sufficient to support a claim for equitable relief, and justified the imposition of a constructive trust on corporate realty and stock in the corporation. Imposition of a constructive trust was deemed appropriate, although the principals argued that money damages were available to the minority shareholder, and that he failed to establish that he lacked an adequate remedy at law. The court explained that the forms of constructive trust are practically without limit, and may be applied wherever necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer.

As stated by the court in Massachusetts Eye & Ear Infirmary v. QLT Therapeutics, Inc., 399 F.3d 360 (1st Cir. 2005), unjust enrichment provides an equitable stopgap for occasional inadequacies in contractual remedies at law by mandating that a person who has been unjustly enriched at the expense of another is required to make restitution to that other. In this case, there was found to be an issue of material fact as to whether a research partner's promises to obtain fair royalty rates induced a researcher to agree to modify a patent application so that the partner could claim co-inventorship, and this issue precluded summary judgment on the researcher's unjust enrichment claim.

See also Cross v. Berg Lumber Co., 7 P.3d 922 (Wyo. 2000), **quoting Palmer, Law of Restitution.**

§1.6, p.34, note 1. Insert at the end of the note:

The court in Brister v. All Star Chevrolet, Inc., 986 F. Supp. 1003 (E.D. La. 1997), held that a plaintiff asserting an unjust enrichment claim under Louisiana law must show, among other things, that he has no other legal remedies. Similarly, in Schiro del Bianco Enters. v. NSL, Inc., 765 So. 2d 1087 (La. App. 4th Cir. 2000), the court held that a general contractor could not recover from an owner, on a theory of unjust enrichment, on behalf of its subcontractors, for work done by the subcontractors but not paid for by the owner, because another remedy at law was available. The court stated that

comporting with due process, for taxpayers to contest tax assessment increases for real property, to pay taxes due thereon under protest, and to obtain a refund. Therefore, in a class action against the county property assessment board and county taxing authorities, challenging the constitutionality of a court-ordered, across-the-board two percent tax assessment increase, the complaining taxpayers were found to have an adequate statutory remedy to obtain the refunds they sought, and were not entitled to refunds based upon unjust enrichment. Dunn v. Bd. of Property Assessment, 877 A.2d 504 (Pa. Commw. Ct. 2005).

An adequate statutory remedy, precluding a claim for unjust enrichment, was also found in Brumbelow v. Law Offices of Bennett and Deloney, P.C., 372 F. Supp. 2d 615 (D. Utah 2005). The court in that case found that, under Utah law, shareholders of a corporate law firm could not be held liable for unjust enrichment. The court found that any benefit conferred by virtue of collection efforts taken against plaintiff debtor were conferred on the corporation, rather than the shareholders; no basis for piercing the corporate veil was alleged; and the shareholders and law firm were unjustly enriched only if their actions violated the Fair Debt Collection Practices Act, which thus provided an adequate remedy at law precluding an equitable remedy under the theory of unjust enrichment.

The Supreme Court of North Dakota has held that unjust enrichment is an equitable doctrine, applied in the absence of an express or implied contract, to prevent a person from being unjustly enriched at the expense of another. Thus, where a lessee of agricultural land owned by an estate had an adequate remedy at law concerning reimbursement for summer fallow work, the lessee was precluded from pursuing a claim for unjust enrichment against an heir who had purchased the land from the estate. The lessee had a legal remedy for breach of contract against the estate and the estate's personal representative as a result of an agreement between the lessee and the personal representative. Lochthowe v. C.F. Peterson Estate, 692 N.W.2d 120 (N.D. 2005).

In Schuster v. Dragone Classic Motor Cars, Inc., 98 F. Supp. 2d 441 (S.D.N.Y. 2000), the federal court, applying Connecticut law, stated that a precondition to recovery based upon unjust enrichment is the lack of remedy by an action on the contract.

Under Minnesota law, a plaintiff who has an adequate legal remedy cannot bring an equitable claim for unjust enrichment. Thus, an insurance producer who claimed that his insurance agency terminated him under a pretext so that it could reap the benefits of his book of business without compensating him for it had adequate legal remedies, and could not bring an action against the agency for unjust enrichment. Heimbach v. Riedman Corp., 175 F. Supp. 2d 1167 (D. Minn. 2001).

Likewise, under South Dakota law, restitution is considered an equitable remedy, which is generally unavailable when there exists an adequate remedy at law. In Northwestern Public Service v. Union Carbide Corp., 236

denied relief in a proceeding seeking restitution on the theory of unjust enrichment because the remedy at law, an action for damages, typically was adequate. Since plaintiffs' FLSA claim and any viable claim for breach of contract would provide an adequate remedy at law, plaintiffs' claims based upon unjust enrichment and *quantum meruit* were dismissed.

Where an unjust enrichment claim is duplicative of other claims asserted in the complaint, it may be dismissed. In American Mayflower Life Ins. Co. of N.Y. v. Moskowitz, 794 N.Y.S.2d 32 (App. Div. 2005), the court found that plaintiff life insurer's causes of action alleging that defendant Israeli corporation and its president were unjustly enriched by wrongful retention of policy proceeds, and that it was against good conscience and equity for them to retain the proceeds because these causes of action duplicated causes of action for fraud and forgery in the documents assigning the policy to the corporation.

In Hydro Turf, Inc. v. International Fid. Ins. Co., 91 P.3d 667 (Okla. Civ. App. 3d Div. 2004), a subcontractor brought an action against the surety that had issued a performance bond for the original contractor on the project but then hired a replacement contractor who was not secured or caused to secure a payment bond to guarantee payment of subcontractors. The appeals court held that it was not necessary for the trial court to invoke its equitable jurisdiction to consider the subcontractor's unjust enrichment claim, since an adequate remedy at law was available to the subcontractor through its negligence claim.

In Estate of Tillman v. Camelot Music, Inc., 408 F.3d 1300 (10th Cir. 2005), the federal circuit court, citing the *Hydro Turf* case, held that under Oklahoma law, an employer was not unjustly enriched by its receipt of the proceeds of a life insurance policy that it had maintained on its employee's life, although the employer had purchased the policy without an insurable interest in the employee's life, since the employee's estate had an adequate remedy at law to recover the proceeds of the policy. Due to the employer's lack of an insurable interest, the estate had a statutory claim to the proceeds of the policy, which precluded the assertion of a claim for unjust enrichment. In addition, the court noted that the employer's act of securing insurance did not prevent the employee from obtaining his own policy, and therefore there was no injustice to the employee.

See also Laborers' and Operating Engineers' Utility Agreement Health & Welfare Trust Fund for Arizona v. Philip Morris, Inc., 42 F. Supp. 2d 943 (D. Ariz. 1999); LaSalle Natl. Bank v. Perelman, 82 F. Supp. 2d 279 (D. Del. 2000); Wilson v. De Angelis, 156 F. Supp. 2d 1335 (S.D. Fla. 2001); Webster v. Royal Caribbean Cruises, Ltd., 124 F. Supp. 2d 1317 (S.D. Fla. 2000); Pawlikowski v. Toyota Motor Credit Corp., 722 N.E.2d 767 (Ill. App. 2d Dist. 1999); Nesby v. Country Mut. Ins. Co., 805 N.E.2d 241 (Ill. App. 5th Dist. 2004); King v. Terry, 805 N.E.2d 397 (Ind. App. 2004); Caldwell Wholesale Co., Inc. v. Central Oil Corp., 761 So. 2d 684 (La. App. 2d Cir. 2000); United Enterprises Corp. v. Dixon Mortgage Group, Inc., 762 So. 2d 43

example, the court held that, under New York law, cancer patients, asserting medical malpractice claims against hospitals and physicians who had allegedly misrepresented the efficacy of proposed treatment, failed to state a separate claim for unjust enrichment. The court stated that to the extent the claim was based on ineffectiveness of treatment, it was subsumed by the malpractice claim.

[7a] Ramona Manor Convalescent Hosp. v. Care Enters., 177 Cal. App. 3d 1120, 225 Cal. Rptr. 120 (1986).

[7b] *See* §2.6 infra.

[7c] §2.5 infra at 75.

[7d] Restatement of Restitution §129 and comment *a* (1937).

[7e] *Id.* §3, comment *a*.

[7f] 177 Cal. App. 3d at 1140, 225 Cal. Rptr. at 130. *See also* Boudreaux v. Jefferson Island Storage & Hub, LLC, 255 F.3d 271 (5th Cir. 2001), holding that under Louisiana law, a trespass claim is a remedy at law, and unjust enrichment claims are precluded by the availability of such a remedy. In this case, a claim in trespass was available to the landowner, and the availability of the legal remedy precluded an unjust enrichment claim regardless of the fact that the landowner had failed to recover under its trespass claim.

[7g] *Id.*

[7h] There is also a slight suggestion in the opinion that the court thought the action based on unjust enrichment was equitable and applied the maxim that equity will not act when the remedy at law is adequate. *Id.* The maxim is in fact irrelevant since the restitution action in these circumstances can be at law, although there also are cases that have ordered an accounting inequity. *See* §2.6 *infra* text at notes 4-6.

A builder does not have a cause of action sounding in unjust enrichment where he has a remedy at law available. Thus, where a builder has won a judgment against a party for whom he built the shell of a home (but where the party did not pay the builder), the builder cannot thereafter seek restitution couched in unjust enrichment against another party who owned the property the house was built on and who is living in the house simply because he has been unable to collect on the judgment. Scott v. Wesley, 589 So. 2d 26, 28 (La. App. 1991).

To recover on a claim of unjust enrichment in Louisiana, a plaintiff has the burden of proving that (1) the defendant was enriched, (2) the plaintiff was impoverished, (3) there was a connection between the enrichment and impoverishment, (4) there was no justification or cause for the enrichment and impoverishment, and (5) the plaintiff had no remedy at law. McPhearson v. Shell Oil Co., 584 So. 2d 373, 376 (La. App. 1991). The doctrine of unjust enrichment will not lie to save a plaintiff who has waived a viable legal remedy. *Id.* Thus, where a plaintiff-inventor waived the use of a state trade secrets act to sue a company allegedly improperly availing itself of his invention, he could not later be heard to complain that the company using his idea had been unjustly enriched. *Id.*

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. . . relating to jury

[11a] *See, e.g.*, Brow
which trustees of a

employers seeking unpaid contributions under collective bargaining agreements. The court found that the claim was essentially one for breach of contract, on which the employers were entitled to a jury trial. The trustees' argument that what they were seeking was essentially restitution was rejected by the court, which noted that the gravamen of plaintiffs' claim was not that defendants had wrongfully secured a benefit or had passively received one that it would be unconscionable to retain, but that defendants violated the terms of the CBA. The court characterized restitution as an equitable remedy, and noted that before equitable relief will be granted, plaintiffs must show that they have no adequate remedy at law.

§1.6, p.36. Add a new note as follows in line 10 of the second paragraph:

. . . party asks for it.[13a]

[13a] There are times when equitable relief will be refused, not because of the adequacy of the remedy at law, but rather because "the harms and difficulties [such relief] would create for the parties, for third persons and for the court are disproportionate to the advantages to be gained." Fishman v. Estate of Wirtz, 594 F. Supp. 853, 885 (N.D. Ill. 1985), discussed in §2.6 *infra* text at note 29 (Supp.).

§1.6, p.38, note 18. Insert at the end:

See also §3.15, §4.19, text at note 18, and §4.20(a) *infra*.

§1.6, p.38, note 21. Insert between sentences in line 2:

Specific restitution in equity has been granted also for the stock purchaser's breach of contract. *See* §4.7(a) *infra* text at note 9.

§1.6, p.39. Insert new note 22a in the fifth line of the first full paragraph as follows:

. . . a court may order restitution.[22a]

[22a] In Northwestern Public Serv. v. Union Carbide Corp., 115 F. Supp. 2d 1164 (D.S.D. 2000), the court denied a motion to dismiss a restitution claim, while acknowledging that plaintiff may have an adequate remedy at law, in the form of an action for fraud or breach of warranty. Plaintiff would be

permitted to plead al
preliminary stage of the
claims could be redresse

§1.7, p.41. Add a ne
full paragraph as f

. . . enrichment of the

[3a] *See* Piccoli A/S v. (
(S.D.N.Y. 1998); Lawy
F. Supp. 2d 785 (W.D.
F. Supp. 2d 956, 972 (E.I

§1.7, p.41. Add a ne
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. . . regarded as unjust

[3b] In holding that a con
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comment (c) (1937):

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D.N.Y. 1978), in granting a prelimi-
's use of the plaintiff's likeness, the
ngful appropriation of the market
ank of Commerce v. Shaklee Corp.,
. v. S. C. Johnson & Son, 90 Wis. 2d

vs at the end of line 4:

pp. 836 (S.D.N.Y. 1975), applying
ere not entitled to an accounting of
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when he profits through the use of
rofit should be recoverable. When
recovery is through a suit in equity
court should give. The Wisconsin
vides for recovery based on unjust

in first line to:

iscussed in Shipley, Publicity Nev-
licity and Federal Preemption, 66

Insert as a second paragraph:

Among the numerous law review comments on the *Zacchini* case, the following are especially useful: Note, 26 Cleve. State L. Rev. 587 (1977); Comment, 31 Rut. L. Rev. 269 (1978); Note, 30 Stan. L. Rev. 1185 (1978).

§2.9, p.132, note 37. Change the citation to:

433 U.S. at 577-578, n.13 (1977).

§2.10, p.137. Add a new note as follows at the end of the paragraph:

. . . in that amount.[15a]

[15a] This occurred in an analogous situation in Evans v. City of Johnstown, 96 Misc. 2d 755, 410 N.Y.S.2d 199 (Sup. Ct. 1978). The complaint alleged that the defendant had dumped sewage and other substances on the plaintiff's land without paying for the right to do so. This was held to state a case for recovery based upon unjust enrichment.

§2.10, p.140, note 22. Insert at the end:

This analysis is accepted also in Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504, 542-543 (1980).

§2.11, p.141, note 1. Insert as a third paragraph:

Restitution of the fiduciary's profits often will secure the largest money recovery for the plaintiff, but a far more extensive recovery was awarded as damages in Matter of Rothko, 43 N.Y.2d 305, 372 N.E.2d 291 (1977). Executors breached their duty of loyalty in selling paintings of the decedent, Mark Rothko. There was a large increase in the value of the paintings after the sale, and two of the three executors were held liable for "appreciation damages," measured by reference to the value of the paintings at the time of trial. In addition to damages measured by the value of the paintings at the time of sale, the two executors were held liable for $2,787,150 because of the increase in value thereafter. The decision is discussed

payment for plaintiff's prescription information, and the other to realize an increase in its customer base.

[39] Anonymous v. CVS Corp., 728 N.Y.S.2d 333 (Sup. Ct. N.Y. Co. 2001).

§2.10, p. 133. Insert a new note at the end of the second line, as follows:

. . . at the plaintiff's expense,[0]

[0] *See, e.g.*, Pitts v. Jackson Natl. Life Ins. Co., 574 S.E.2d 502, 512 (S.C. App. 2002), in which the South Carolina court explained that in a law action, the measure of damages is determined by the parties' agreement, while in equity, the measure of the recovery is the extent of the duty or obligation imposed by law and is expressed by the amount by which the court considers the defendant has been unjustly enriched at the expense of the plaintiff.

In Struna v. Convenient Food Mart, 160 Ohio App. 3d 655, 828 N.E.2d 647 (8th Dist. 2005), plaintiff, a lottery player, purchased 52 of 53 winning state lottery tickets from a convenience store, with a prize of $100,000 per ticket, but recovered less than $100,000 per ticket due to a $1 million payout cap. Plaintiff sought to establish an unjust enrichment claim against the convenience store and its owner, based on the theory that the defendants were unjustly enriched by the commission the store received for plaintiff's purchase of the tickets plus the amount the store received in bonuses for each of the 52 winning tickets. The claim was rejected, since the lottery commission, rather than the lottery player, conferred this benefit on the store, and furthermore, although the commission would not have conferred this benefit absent plaintiff's purchase of the tickets, any benefit he claimed in connection with the tickets was governed by the express terms of the lottery contract.

§2.10, p.134. Insert at end of carryover paragraph at top of page:

Insurance brokers who received fees based upon fraudulently placed coverage were liable to the insurers on a theory of unjust enrichment although the fees were paid to them not by plaintiffs but by the insureds. Defendants were enriched at the plaintiffs' expense to the extent that their commissions were based on a scheme whereby plaintiffs provided coverage for insufficient premiums to cover the risks.[4a]

Similarly, in Hoberman v. Fishman, 758 N.Y.S.2d 301 (App. Div. 1st Dept. 2003), the court held that defendants who procured life insurance policies for plaintiffs were not unjustly enriched. As the court noted, plaintiff did not claim that it paid an unfair price for the life insurance policies procured by defendants, or did not receive the coverage it had bargained for, but rather that the policies were not an appropriate investment vehicle.

When a plaintiff receives the services for which it bargained, a claim of unjust enrichment will not lie. In Walter v. Magee-Women's Hospital of UPMC Health System, 876 A.2d 400 (Pa. Super. 2005), patients filed a class action suit against defendant hospital that alleged that plaintiffs were intentionally misled by the hospital's issuance of Pap smear test reports that bore the name of a physician even though a cytotechnologist, not a physician, reviewed the report. The court found that plaintiffs failed to establish a claim for unjust enrichment, since they failed to establish that the Pap smear reports, for which they tendered payment, were "inherently unreliable" as a result of the reproduced physician signatures, and thus the hospital's receipt and retention of payment was not unjust. The patients had received the services for which they had bargained.

Under Rhode Island law, the doctrine of unjust enrichment did not bar the state from changing the statute under which correction officers were compensated for amassing education credits from percentage of pay to a flat-rate basis. It was not inequitable for the state to benefit from enhanced skills related to additional education, in light of the ability of the state to rescind or alter the terms of the education program at any time, and the officers did not sustain the necessary net loss, as they retained the benefits of an enhanced education despite the loss of some compensation. Rhode Island Brotherhood of Correctional Officers v. Rhode Island, 264 F. Supp. 2d 87 (D.R.I. 2003).

In Peneguy v. Porteous, 823 So. 2d 380 (La. App. 4th Cir. 2002), the heirs of a decedent and beneficiaries of 40 percent of the decedent's trust brought a declaratory judgment action against the heirs of attorneys who received one-third of 40 percent of the decedent's trust for representing decedent's wife and his two daughters in a lawsuit to set aside decedent's donation of the trust to the City of New Orleans. Plaintiffs alleged that the amount of money received by the attorneys' heirs was an unreasonably excessive fee, and that they had been unjustly enriched. The court found that plaintiffs were not impoverished as a result of the attorneys' fee, as is required to support a claim for unjust enrichment in Louisiana, since, but for the legal service of the attorneys, the heirs of decedent would not be receiving anything from the trust. The "cause" inherent in the contract between decedent's wife and daughters and the attorneys was to attack the donation made by decedent without his wife's consent, and the goal of the litigation was accomplished.

Under Florida law, unjust enrichment is an equitable claim that is precluded where payment has been made for the benefit conferred.

General Electric Co. v. Latin American Imports, S.A., 214 F. Supp. 2d 758 (W.D. Ky. 2002). *See also* Helm Fin. Corp. v. Iowa Northern Ry. Co., 214 F. Supp. 2d 934 (N.D. Iowa 2002), in which the court held that there could be no unjust enrichment where plaintiff was compensated for defendant's use of railroad equipment by an offset against power owed to defendant by plaintiff under a power-sharing agreement.

The court in Artech Information Sys. v. Tee, 721 N.Y.S.2d 321 (App. Div. 1st Dept. 2001), found that a provider of computer services, which was providing services to a computer consultant's customer pursuant to a professional services agreement with the consultant, was not liable to the consultant under a theory of unjust enrichment when it began dealing directly with the customer. Any benefits conferred on the provider had nothing to do with any services rendered by the consultant.

In Mehul's Investment Corp. v. ABC Advisors, Inc., 130 F. Supp. 2d 700 (D. Md. 2001), plaintiff alleged that defendant had been unjustly enriched by selling to other companies certain bid services that belonged to plaintiff, claiming that the proceeds of the sales were a benefit inequitably retained by defendant. The court rejected the claim, finding that the benefit was not conferred upon defendant by plaintiff, which is a necessary element of an unjust enrichment claim.

Stock investors had no cause of action for unjust enrichment against tippees who had allegedly received and benefited from insider information with regard to the target of a tender offer, since there was no direct relationship between the investors and the tippees. In re Motel 6 Securities Litigation, 161 F. Supp. 2d 227 (S.D.N.Y. 2001).

In Lasala v. Needham & Co., Inc., 399 F. Supp. 2d 466 (S.D.N.Y. 2005), investors brought a securities fraud action against the issuers and underwriters of an initial public offering (IPO) of the issuers' stock. After the claims against the issuers were settled, the assignee of the issuers' claims against the underwriters pursuant to the settlement agreement filed claims against the underwriters, alleging breach of contract and unjust enrichment. In granting dismissal of the claims, the court held that the assignee's allegations—that the underwriters breached the underwriting agreement when they received excessive compensation from customers who bought stock in the IPO—failed to state a breach of contract claim against underwriters under New York law. The assignee did not allege that the underwriters failed to provide the issuer with the benefits of the underwriting agreement, which was to buy the prescribed number of shares and sell them at the agreed-upon offering price. Likewise, the allegations were insufficient to state an unjust enrichment claim against the underwriters, absent an allegation that the underwriters were enriched at the issuer's expense.

Viewers of the Mike Tyson-Evander Holyfield fight, in which Tyson was disqualified for biting Holyfield's ear, brought a class action against the boxer, promoters, and telecasters of the fight, seeking a refund of the money they had paid to view the fight. The court held that plaintiffs' unjust

enrichment claim (as well as a variety of claims based on other theories of recovery) was properly dismissed since the plaintiffs had received what they had paid for, namely the right to view whatever event transpired. Castillo v. Tyson, 701 N.Y.S.2d 423 (App. Div. 1st Dept. 2000)

Co-owners of mineral interests could not recover for unjust enrichment on grounds that defendant co-owners received a kickback of finders' fees and commissions from a third party, since plaintiffs continued to receive the royalty to which they were entitled under their agreement with defendants. Although defendants were enriched by the payments, plaintiffs were not impoverished by them, and for an unjust enrichment recovery, there must be both an enrichment and an impoverishment. Johnco, Inc. v. Jameson Interests, 741 So. 2d 867 (La. App. 3d Cir. 1999).

Where defendant mortgage broker had a valid legal agreement with borrowers, its enrichment resulted from that agreement, and not from the impoverishment of a prior broker who had done the majority of the work to procure the commission. Since there was a valid cause for the enrichment, there could be no recovery for unjust enrichment. United Enterprises Corp. v. Dixon Mortgage Group, Inc., 762 So. 2d 43 (La. App. 4th Cir. 2000).

Similarly, where a county was awarded a judgment in a suit against the federal government arising from the federal possession of a portion of a road that crossed an air force base, a subsequently incorporated city, which included the roads and pathways affected by the loss of the road to the air force, could not impose a constructive trust upon the proceeds of the judgment. The court in City of Lakewood v. Pierce County, 6 P.3d 1184 (Wash. App. Div. 2 2000), held that the county had not profited to the detriment of the citizens of the subsequently incorporated city. It noted that no authority had been cited for the proposition that a trust can arise for a beneficiary that did not exist when the trust proceeds came into existence. At the time the county was awarded the money, the citizens of the city were part of the county, and the county received the money as an entity, not on behalf of any subset of its citizens.

In a Texas case, the court found that defendant mineral surveyors had not been unjustly enriched by obtaining geophysical data about the mineral estate under plaintiff's property, although defendant's permit to conduct seismic testing did not include plaintiff's land. The court found that the testing had properly been conducted on neighboring land, and that defendants had neither invaded nor injured plaintiff's property. Thus there was no trespass. Although the information obtained was valuable, it was neither wrongfully secured nor unconscionably retained. Villarreal v. Grant Geophysical, Inc., 136 S.W.3d 265 (Tex. App. 2004).

A commercial lessor in an Oregon case failed to state a claim for "theft of services," which appeared to be a claim for unjust enrichment against its lessee's neighbors arising from their alleged use of the lessee's parking spaces, where there was no evidence regarding any amount by which the neighbors had been unjustly enriched. The court pointed out that the

legal theory of unjust enrichment is that the defendant has been unjustly enriched by the amount that the plaintiff would otherwise have been enriched. Phillips v. Rathbone, 93 P.3d 835 (Or. App. 2004).

In Frank Crain Auctioneers, Inc. v. Delchamps, 797 So. 2d 470 (Ala. Civ. App. 2000), a real estate broker sought payment of a commission from an auction house for having acquired a buyer for a parcel property. In denying relief, the court found that there was no agreement to pay a commission, and no knowledge on the part of the auction house that the broker was acting as a broker on behalf of any other potential buyers. The broker had merely registered as a bidder at the auction, and, in fact, was himself a member of the investment group that purchased the property. Under the circumstances, the court found that the broker could have no reasonable expectation of compensation for his services.

In Estate of Ford, 116 Cal. Rptr. 2d 858 (Ct. App. 1st Dist. 2002), the decedent's foster son could not inherit his foster father's estate by intestate succession, under a theory of equitable adoption established by quasi contract. In holding that a quasi-contract theory was inapplicable, the court pointed out that the decedent's niece and nephew who inherited were not unjustly enriched, allowing the foster son to inherit would not put him back in a former position, and some showing of intent to adopt was required to invoke the equitable adoption doctrine.

To prevail on a claim of conversion, unjust enrichment, or constructive trust based on the payment of funds to defendant, plaintiff must possess a property right in the funds. A mere expectation that a third party will fulfil its contractual obligation to plaintiff and pay plaintiff out of those funds is insufficient. Thus, in Shenandoah Assocs. Ltd. Partnership v. Tirana, 182 F. Supp. 2d 14 (D.D.C. 2001), the court held that three limited partnerships did not have a property interest in rents from their apartment buildings collected and held in escrow accounts by their management company, as would be required to support claims for conversion, unjust enrichment, and constructive trust under Virginia law against the attorney for the company, who had advised the company to pay his attorney's fees out of rent proceeds from the partnerships' escrow accounts. The funds in the accounts were intangible property, and the partnerships had merely an expectation that the management company would fulfil its contractual obligations to turn over the rent proceeds.

By contrast, the court in Cadle Co. v. Gabel, 69 Conn. App. 279, 794 A.2d 1029 (2002), held that a constructive trust can be imposed in favor of a plaintiff who has not suffered a loss or who has not suffered a loss as great as the benefit received by defendant. In these situations defendant is compelled to surrender the benefit on the ground that he or she would be unjustly enriched if permitted to retain it, even though that enrichment is not at the expense or wholly at the expense of plaintiff.

Likewise, in Linton v. New York Life Ins. & Annuity Corp., 392 F. Supp. 2d 39 (D. Mass. 2005), the court held that, under Massachusetts law, an

insured's allegations that he purchased an insurance policy as a vehicle for investment in mutual funds, based on the insurer's statements regarding the availability of telephone orders and immediate execution of investment instructions, and that the insurer then eliminated those services but retained his payment for investment services, were sufficient to state a claim against the insurer for unjust enrichment.

§2.10, p.137. Add a new note as follows at the end of the first full paragraph:

. . . in that amount.[15a]

[15a] This occurred in an analogous situation in Evans v. City of Johnstown, 96 Misc. 2d 755, 410 N.Y.S.2d 199 (Sup. Ct. 1978). The complaint alleged that the defendant had dumped sewage and other substances on the plaintiff's land without paying for the right to do so. This was held to state a case for recovery based upon unjust enrichment.

§2.10, p.140, note 22. Insert at the end:

This analysis is accepted also in Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504, 542-543 (1980).

§2.11, p.141, note 1. Insert as additional paragraphs:

In Jackman, Restitution for Wrongs, 48 Cambridge L.J. 302, 312-314 (1989), there is a useful discussion of the settled view that restitution of the fiduciary's gain does not depend on loss to the beneficiary. In the writer's view, the conduct of the fiduciary causes institutional harm even though there is no personal harm.

Restitution of the fiduciary's profits often will secure the largest money recovery for the plaintiff, but a far more extensive recovery was awarded as damages in Matter of Rothko, 43 N.Y.2d 305, 372 N.E.2d 291 (1977). Executors breached their duty of loyalty in selling paintings of the decedent, Mark Rothko. There was a large increase in the value of the paintings after the sale, and two of the three executors were held liable for "appreciation damages," measured by reference to the value of the paintings at the time of trial. In addition to damages measured by the value of the paintings at the time of sale, the two executors were held liable for $2,787,150 because of the increase in value thereafter. The decision is discussed critically in Wellman, Punitive Surcharges Against Disloyal Fiduciaries—Is *Rothko* Right?, 77 Mich. L. Rev. 95 (1978).

Restatement of the Law -- Restitution
Restatement (First) of Restitution
Current through September 2006

Part I. The Right To Restitution (Quasi Contracts And Kindred Equitable Relief)
Chapter 1. Introductory Matters
Topic 1. Underlying Principles

§ 1. Unjust Enrichment

Link to Case Citations

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

Comment:

a. A person is enriched if he has received a benefit (see Comment *b*). A person is unjustly enriched if the retention of the benefit would be unjust (see Comment *c*). A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money. Ordinarily, the measure of restitution is the amount of enrichment received (see Comment *d*), but as stated in Comment *e*, if the loss suffered differs from the amount of benefit received, the measure of restitution may be more or less than the loss suffered or more or less than the enrichment.

b. What constitutes a benefit. A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives thereby a greater chance of living.

c. Unjust retention of benefit. Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution. The Restatement of this Subject states the rules by which it is determined whether or not it is considered to be just to require restitution.

d. Where benefit and loss coincide. Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result of the remedies given under the rules stated in the Restatement of this Subject is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has

suffered. Thus, where a person who is indebted to another makes an overpayment under a mistake of fact, the payee would be unjustly enriched by the amount of the overpayment if he were permitted to keep it and the payor would be unjustly deprived of that amount if he were not permitted to recover it. So also, where a person is induced by the fraud of another to make a gratuitous conveyance of land to him, the transferee would be unjustly enriched and the transferor unjustly deprived of the property if the transferee were permitted to keep it; in such case the transferor can charge the transferee as constructive trustee of the land for him, and compel him to retransfer the land.

e. Where benefit and loss do not coincide. There are situations, however, in which a remedy is given under the rules applicable to this Subject, where the benefit received by the one is less than the amount of the loss which the other has suffered. In such a case, if the transferee was guilty of no fault, the amount of recovery is usually limited to the amount by which he has been benefited. Thus, if a person's chattels are incorporated into the land of another without the other's knowledge, the owner of the land is liable, if at all, only to the extent to which its value has been increased, although the value of the chattels was greater (see § 42). The amount of recovery, however, is not invariably determined by the value of what has been received. In some cases the value of what is given is determinative, as where, because of fraud or breach of contract, services or chattels are given, the value of which is greater than the amount by which the recipient's estate has been increased (see §§ 151 and 152).

In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched. Thus where a person with knowledge of the facts wrongfully disposes of the property of another and makes a profit thereby, he is accountable for the profit and not merely for the value of the property of the other with which he wrongfully dealt (see § 151). So, also, where a person in a fiduciary relation to another makes a profit in connection with transactions conducted by him as fiduciary, he is ordinarily accountable to his beneficiary for the profit, although the beneficiary suffered no loss (see Restatement of Agency, § 388, and Restatement of Trusts, § 203).

On the other hand, a person who has been unjustly deprived of his property or its value or the value of his labor may be entitled to maintain an action for restitution against another although the other has not in fact been enriched thereby. Thus, a person who refuses to return goods for which he innocently paid full value to a thief is liable to the owner for their full value, not only in an action of tort, but also in the quasi-contractual action of general assumpsit (see § 128). Likewise, a physician who attends and skillfully but unsuccessfully treats an unconscious woman, the victim of an accident, is entitled to recover the value of his services from her husband or, under some circumstances, if she dies, from her estate, although she was spared no pain and the husband or the estate was spared no expense (see §§ 114 and 116).

Restatement of the Law -- Restitution
Restatement (Third) of Restitution And Unjust Enrichment (Tentative Drafts) FNa
Current through September 2006

Part I. Introduction
Chapter 1. General Principles

§ 1. Restitution And Unjust Enrichment

Discussion Draft

Case Citations Through June 2005

Case Citations July 2005 -- April 2006

Discussion Draft:

A person who is unjustly enriched at the expense of another is liable in restitution to the other.

Comment:

a. Liability in restitution. The source of a liability in restitution is the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of the defendant at the expense of the plaintiff. The consequence of a liability in restitution is that the defendant must either restore the benefit in question (or its traceable product), or else pay money in the amount necessary to eliminate unjust enrichment.

b. Unjust and unjustified enrichment. The law of restitution is the law of unjust enrichment, but "unjust enrichment" is a term of art. The substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as "unjust" for purposes of imposing liability.

There is a substantial tradition within English and American law of referring to unjust enrichment as if it were something identifiable a priori, by the exercise of a moral judgment anterior to legal rules. This equitable conception of the law of restitution is crystallized by Lord Mansfield's famous statement in Moses v. Macferlan (1761): "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." Explaining restitution as the embodiment of natural justice and equity gives the subject an undoubted versatility, an adaptability to new situations, and--in the eyes of many observers--a particular moral attractiveness. Restitution in this view is the one aspect of our legal system that makes a direct appeal to standards of equitable and conscientious behavior as a source of obligations that society will enforce with a legal sanction.

At the same time, the purely equitable account of the subject is open to substantial objections. Saying that liability in restitution is imposed to avoid unjust enrichment effectively postpones the real work of definition, leaving to a separate inquiry the question whether a particular transaction is productive of unjust enrichment or not. There are numerous cases in which natural justice and equity do not in fact provide an adequate guide to decision, and would not do so even if their essential requirements could be treated as self-evident. Unless a definition of restitution can provide a more informative generalization about the nature of the transactions leading to liability, it is difficult to avoid the objection that sees in "unjust enrichment," at best, a name for a legal conclusion that

remains to be explained; at worst, an open-ended and potentially unprincipled charter of liability.

In reality, the law of restitution is very far from imposing liability for every instance of what might plausibly be called unjust enrichment. The law's potential for intervention in transactions that might be challenged as inequitable is narrower, more predictable, and more objectively determined than the implications of the words "unjust enrichment" might lead us to suppose. For example, equity and good conscience might well see unjust enrichment resulting from the performance of a valid contract that was too hard a bargain, or in profits made through another's misfortune. But the moral objection to such transactions stands in the same relation to the law of restitution as it does to the law of contracts, distinct from the question of legal obligation. See Illustrations 1-2.

The concern of restitution is not, in fact, with unjust enrichment in this broad sense, but with a narrower set of circumstances giving rise to what is more appropriately called unjustified enrichment. Compared to the open-ended implications of the term "unjust enrichment," instances of unjustified enrichment are both predictable and objectively determined, because the justification in question is not moral but legal. Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights. Because the legal basis that makes a transfer effective is ordinarily a consensual exchange, a valid gift, or a legal duty (such as a liability in tort or an obligation to pay taxes), the concern of restitution is predictably with those anomalous transfers that cannot be justified by the terms of a valid and enforceable exchange transaction; by the intention of the transferor to make a gift; or by the existence of a legal duty to the transferee. See Illustrations 3-5.

Because of its greater precision and explanatory power, the term unjustified enrichment is sometimes employed by this Restatement to describe the fundamental grounds of a liability in restitution. This occasional deviation from the terminology of the first Restatement of Restitution is not intended either to repudiate the traditional, equitable explanation of restitutionary liability, or to suggest any change in the nature or scope of those rules that have heretofore been described in terms of unjust enrichment. When used to describe the circumstances that give rise to legal liability, the terms unjust enrichment and unjustified enrichment are precisely coextensive: they identify, from different conceptual perspectives, the same transactions and the same legal relationships. Though not synonymous, the two terms may be used interchangeably to identify the circumstances in which the law imposes a liability in restitution. This is because--notwithstanding the potential reach of the words, and Lord Mansfield's confident reference to "natural justice"-- the circumstances in which American law has in fact identified an unjust enrichment resulting in legal liability have been those and only those in which there might also be said to be unjustified enrichment, meaning the transfer of a benefit without adequate legal ground.

The two expressions, moreover, point to mutually reinforcing explanations of liability. Enrichment is unjust, in legal contemplation, to the extent it is without adequate legal basis; and the law supplies a remedy for unjustified enrichment because such enrichment cannot conscientiously be retained. In no instance does the fact or extent of liability in restitution depend on whether the source of that liability is conceived or described as unjust enrichment, as unjustified enrichment, or as a combination of the two.

Illustrations:

1. A, a poor widow, sells to B, a prosperous jeweler, a curious stone that both believe to be a topaz. B pays A the contract price of $1. When the stone proves unexpectedly to be a yellow diamond, B resells it for $750. On suit by A, the court finds no grounds for avoidance of the contract. Although it might be argued that equity and good conscience require B to share with A the profit on resale, there is no "unjust enrichment" of B as the term is used in the law of restitution. Nor is there "unjustified enrichment" as the result of the transaction, since the legal basis for B's enrichment is a valid contract of sale.
2. Debtor's obligations to Creditor are discharged in bankruptcy; Debtor could easily pay the debt thereafter but chooses not to. Depending on the circumstances of the parties both before and after the discharge, it might be natural to conclude that Debtor has been unjustly enriched by Creditor's uncompensated transfer. On these facts, however, there is no "unjust enrichment" as the term is used in the law of restitution. Even if Debtor's refusal to

pay is unjust and inequitable, Debtor's enrichment at Creditor's expense finds a valid basis in applicable law.
3. By an honest mistake as to boundaries, A constructs a house on B's unimproved land. B thereupon sells the property for $100,000, of which $75,000 is attributable to A's mistaken improvement. The net benefit to B at the expense of A is an unjustified enrichment because it results from an involuntary transfer of wealth, one that (unlike the transfers in Illustrations 1-2) has not been validated by contract. B may be liable to A for all or part of the $75,000. See § 10.
4. Acting in an emergency and with no opportunity to contract, A provides medical services to B. A does not intend to act gratuitously and plans to seek compensation later. The circumstances of the transaction make it one in which the law permits A to assert that he did not intend to make B a gift of services. The resulting benefit to B (probably measured by the amount of A's reasonable and customary fee) constitutes unjustified enrichment for which B is liable in restitution. See § 19.
5. A repeatedly and intentionally trespasses on B's land, avoiding the higher costs of transportation by an alternate route and hoping to avoid paying B for a license. A's saved expenditure (the net costs avoided or the price of a license, whichever is higher) is an unjustified enrichment because it is the result of a legal wrong. More specifically, A's enrichment is the product of A's conscious neglect of the duty to contract with B for the use of B's property. A is liable to B in restitution in the amount of A's saved expenditure, whether or not A's repeated trespass has caused any injury to B's land. See § 37.

c. Restitution and restoration. Employed to denote liability based on unjust enrichment, the word "restitution" is a term of art that has frequently proved confusing. The first Restatement of Restitution adopted the name "restitution for this topic because recognition of unjust enrichment leads, in most instances, either to the avoidance of a transfer or to an obligation on the part of the transferee to pay for what has been transferred. Either remedy results in a form of "restitution" to the transferor. And yet the concepts of unjust enrichment and restitution (in the literal meaning of "restoration") correlate only imperfectly. On the one hand, there are significant instances of liability based on unjust enrichment that do not involve the restoration of anything the claimant previously possessed. Salient examples include cases involving the disgorgement of profits, or other benefits wrongfully obtained, in excess of the plaintiff's loss. On the other hand, there are numerous situations in which a claimant's undoubted right to the restitution (or restoration) of something does not depend on the unjust enrichment of the defendant. Enforcement of an ordinary bailment contract is one obvious example. Another is the owner's right to recover property from an innocent converter, someone who has paid value in good faith for what proves to be stolen property.

There are, moreover, many other legal relations in which an owner's entitlement to the restoration of property might theoretically be explained in terms of the defendant's unjust enrichment but which, by convention, are not so classified. It would serve no useful purpose to elaborate a redundant, enrichment-based explanation of the owner's right to recovery of property from a thief, or of a contracting party's right to recover a prepayment upon the other party's repudiation, simply because the legal relations in question already receive a full account in tort or contract, as the case may be.

In short, most of what is covered by the law of restitution might more helpfully be called the law of unjust or unjustified enrichment. See Comment b. At the same time, while the name "restitution" may invite misunderstanding among those who are unfamiliar with its technical significance, it remains the word most commonly employed throughout the common-law world to refer to this set of legal obligations and their associated remedies, some but not all of which involve a literal restitution in the sense of restoration or giving back. The title of the present Restatement incorporates both terms, in order to convey as clearly and immediately as possible an accurate idea of its subject matter. When used in this Restatement to refer to a theory of liability or a body of legal doctrine, the terms "restitution" and "unjust enrichment" will generally be treated as synonymous. Any more specific meaning attached to either term will be apparent from the context.

d. Nonconsensual transfers. Liability in restitution is imposed in response to a transfer that lacks an adequate legal basis. See Comment b. The common characteristic of these defective or anomalous transfers--of the entire set of transactions, in other words, that give rise to a potential liability in restitution--is that they are all in some sense

nonconsensual. Such transactions may be conveniently grouped under three headings, forming the three broad divisions of liability in restitution as presented in this Restatement.

The first type of nonconsensual transfer, the subject of Chapter 2, is one that is void or voidable at the election of the transferor. This division of the law of restitution deals with cases in which a transfer is denied conclusive effect against the transferor because it has been induced by mistake, fraud, duress, or other invalidating cause. See Illustration 7. A second category of nonconsensual transfers, addressed in Chapter 3, consists of transactions in which the plaintiff intentionally confers a benefit on the defendant, not intending to make a gift, but outside the terms of an unenforceable contract. Some transfers of this kind give rise to a claim for compensation, while others do not: restitution is the body of law that draws the distinction. See Illustrations 8-9. The third main branch of liability in restitution, the subject of Chapter 4, deals with benefits wrongfully obtained. Transactions in which a benefit is obtained by wrongdoing generally involve a form of taking without asking; the resulting transfer is nonconsensual because the defendant has neglected a duty to contract with the owner for the property or its use. See Illustration 10.

Illustrations:

6. A owes B $100 on account. By mistake, A pays B $200. There is no contract between A and B establishing a duty to refund a payment not due. B's obligation to refund the overpayment is a liability in restitution. See § 6.
7. A and B own Blackacre as tenants in common. A pays taxes on the property after B refuses to do so. There is no contract between A and B governing their duties as co-owners. B's obligation to contribute a pro rata share of the taxes is a liability in restitution. See § 23.
8. A and B are determined to be jointly liable in tort for an injury to C. C recovers the whole of the judgment from A. The law of the jurisdiction permits contribution between joint tortfeasors. A and B are complete strangers, and B has not authorized A to make payments to C on B's behalf. B's liability to A is a liability in restitution. See § 27.
9. A intentionally infringes B's trademark, realizing $5,000 profit from infringing sales. B suffers no demonstrable injury from A's infringement. A is liable to disgorge the $5,000 profit to B, despite the absence of any compensable harm as a result of A's wrongdoing. A's liability to account for profits is a liability in restitution. See § 39.

e. Origins of the law of restitution. [This Comment will present a concise historical sketch of the law of restitution, emphasizing (a) origins in general assumpsit and common counts, on the law side, and in constructive trust and other remedial innovations on the equity side; (b) Mansfield; (c) American development through Keener; and (d) the first Restatement. A concluding paragraph or two will offer a reassuring explanation of how it is that this long-accepted part of American law has come to appear relatively unfamiliar. The purpose of this Comment will not be to present an essay in legal history, but simply to demystify the modern subject of restitution.]

f. Legal or equitable. [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 Mansfeldian proposition about the equitable basis of a legal liability to conclude that what is essentially a common-counts claim is Equity rather than Law. The Comment will make it clear that modern Restitution is an amalgam of legal and equitable elements; that their sources can be historically distinguished if need be; and that Lord Mansfield was a judge in the law courts.]

g. Topics omitted. A number of topics that might logically be treated as part of the law of restitution are omitted from this Restatement for reasons of convenience.

As already noted (see Comment c), there are instances in which a liability that might theoretically be ascribed to restitution merely duplicates a liability that is conventionally explained in other terms. Because it is understood that a thief who steals property worth $100 is liable in tort for $100 damages, it is redundant to point out that,

because the thief is unjustly enriched in the amount of $100, the same liability has an alternative explanation in terms of restitution. These instances of what might be called a duplicative liability in restitution are accordingly omitted.

More significantly, some instances of a liability that is distinctively restitutionary in nature have become so closely associated with more specialized legal topics that it would serve no practical purpose to give them extensive treatment in this more general work. For example, the whole law of "insider trading" is currently built on a foundation of restitution theory, inasmuch as the penalities for insider trading purportedly seek to recover profits realized through misappropriation of protected information or through a breach of a confidential relationship. But anyone requiring a detailed discussion will naturally turn to the materials of federal securities law. Where they have not been specified by contract, the characteristic remedies of the law of suretyship (exoneration, indemnification, subrogation, and contribution) all enforce what is at some basic level a liability in restitution; but the present Restatement does not repeat the more specialized treatment of Restatement Third, Suretyship and Guaranty. In the same way, certain well-known problems of restitution arising in the context of trusts, or agency, or donative transfers, have been left primarily to the Restatements of those subjects.

Statutes displace an analysis in common-law restitution of the particular points that they regulate, and as to such points the lawyer's first recourse will inevitably be to the statute and the accompanying decisional law. It is frequently the case, however, that an understanding of the restitutionary principles incorporated (more or less directly) by such a statute will shed valuable light on its interpretation. Obvious examples include the provisions of Article 3 of the Uniform Commercial Code regarding mistaken payments in respect of negotiable instruments, or the federal statutes permitting recovery of profits for intentional infringement of a copyright or trademark. Less obvious examples include statutes regulating mechanics' liens or fraudulent conveyances. The list might be much longer.

The present Restatement includes Illustrations based on these and similar topics, with cross-references to sources of the relevant law, whenever such examples serve to demonstrate the rationale and the reach of the broader restitution principles under discussion. Detailed discussion of the applicable rules is left to the more specific works that the reader is likely to consult in any event.

h. What restitution is not. The treatment of restitution proposed by this Restatement rejects two common misconceptions about the subject.

Law that establishes (by statute or otherwise) the terms on which a convicted criminal may be ordered to make restitution to crime victims is not part of the law of restitution as defined by this Restatement. 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. To the extent that this aspect of potential criminal sanctions has a basis in civil obligations, therefore, it is more easily described in terms of tort than of restitution. The confusion is primarily a linguistic one, illustrating one of the fundamental objections to using the name "restitution" to refer to the law of unjust enrichment. See Comment c.

A more important misconception is that restitution is essentially a remedy, available in certain circumstances to enforce obligations derived from torts, contracts, and other topics of substantive law. On the contrary, restitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution's own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies. 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.

REPORTER'S NOTE

b. Unjust and unjustified enrichment. The term "unjust enrichment" is too firmly fixed as the keystone of

American restitution to be replaced without harm to the structure. Given a free choice, "unjustified enrichment" might well be preferable, for reasons suggested in the Comment. See Barry Nicholas, "Unjustified Enrichment in Civil Law and Louisiana Law," 36 Tulane L.Rev. 605, ___ (1962). The term "unjustified enrichment" exists in common academic usage, but chiefly in those English-speaking jurisdictions, such as Scotland, having a closer relation to the civil-law tradition. See E.M. Clive, Draft Rules on Unjustified Enrichment and Commentary 19-20 (1994) [published by the Scottish Law Commission as an appendix to its Discussion Paper No. 99, Judicial Abolition of the Error of Law Rule and Its Aftermath]. One reason is that "unjustified enrichment" makes an approximate translation of both the German ungerechtfertigte Bereicherung (BGB § 812) and the French enrichissement sans cause. In the statute law of Louisiana, the source of what is here called a liability in restitution is described as an "enrichment without cause," La.Code Civ. § 2298 (___). As expressed in Canadian law, a claim in restitution requires that the plaintiff establish an enrichment, a corresponding deprivation, and "the absence of any juristic reason ... for the enrichment." Rathwell v. Rathwell, [1978] 2 S.C.R. 436, 455.

Illustration 1 is based on Wood v. Boynton, 64 Wis. 265, 25 N.W. 42 (1885). Illustration 4 is based on Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907). Illustration 5 is based on Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946).

[Bibliography of general works on restitution, including non-U.S. authorities, to be included in the Reporter's Note to § 1.]

Case Citations Through June 2005:

C.A.7, 2001. Quot. in disc. (Discussion Draft, 2000). Borrower sued bank for breach of contract and violations of state law, alleging that he sold his stock used as collateral for loan because defendant had led him falsely to believe that it had the power to sell the stock to pay off the loan and would do so. Affirming the district court's grant of summary judgment for defendant, this court held, inter alia, that the voluntary-payment doctrine applied to preclude plaintiff from recouping his payment to defendant, since plaintiff, rather than assert his rights under the contract in a timely and forthright manner when faced with a demand for payment, chose to accept defendant's interpretation of his legal rights. Randazzo v. Harris Bank Palatine, N.A., 262 F.3d 663, 668.

Ct.Fed.Cl.2004. Coms. (a)-(c) quot. in ftn. (Discussion Draft, March 31, 2000). Financial advisory firm that served as HUD contractor sued the United States for breach of contract. This court denied the parties' motions for summary judgment, and granted defendant 10 days to amend its counterclaim to state a claim in quasicontract for restitution. Although the court denied defendant's breach-of-contract counterclaims, it determined that defendant should be afforded an opportunity to pursue them in quasicontract for restitution, in light of the difference between the two causes of action. Hamilton Securities Advisory Services, Inc. v. U.S., 60 Fed.Cl. 144, 159.

N.D.Cal.2003. Illus. 6 quot. but dist. (Disc. Draft, 2000). Trustees, on behalf of union benefit trust fund, brought an ERISA equitable-restitution action against health-care provider for reimbursement of amounts allegedly overpaid for fund participant's inpatient treatment. Granting defendant's motion to dismiss, the court held, inter alia, that subject-matter jurisdiction was lacking because the substance of plaintiffs' remedy was legal, rather than equitable. The court said that plaintiffs' claim did not lie in equitable restitution because their alleged overpayment for medical services was not simply the result of a clerical error, but arose from a dispute over the parties' interpretation of the contract. Trustees on Behalf of the Teamsters Benefit Trust v. Doctors Medical Center of Modesto, Inc., 286 F.Supp.2d 1234, 1239.

D.Mass.2004. Quot. in disc. (Discussion Draft 2000). End payors brought a class-action suit against a drug company for the company's unlawful delay in introducing a generic drug by wrongfully filing patent lawsuits. The court explained its grant of class certification, noting that the various laws of the states in which consumer purchases were made would apply. The class was reduced to exclude those states in which variations in state laws were sufficiently significant to negate predominance, and the court limited its consideration to 12 states that permitted indirect purchaser actions under antitrust, consumer protection, or unfair-trade-practices statutes, and

allowed for causes of action for unjust enrichment. In re Relafen Antitrust Litigation, 221 F.R.D. 260, 277-278.

E.D.N.Y.2003. Quot. in sup. Consumers, medical-benefits providers, and consumer-advocacy groups sued owner of patent for cancer drug tamoxifen and maker of generic version of drug, alleging market monopoly stemming from settlement between defendants dismissing generic-drug maker's challenge to validity of owner's patent in exchange for license to sell drug and vacating earlier ruling that patent was invalid. Granting defendants' motion to dismiss, this court held, inter alia, that defendants did not wrongfully secure benefits of allegedly charging monopolistic prices where lack of competition in the marketplace was result of valid patent and not of anticompetitive, monopolistic conduct. In re Tamoxifen Citrate Antitrust Litigation, 277 F.Supp.2d 121, 139.

S.D.N.Y.2001. Com. (c) cit. in ftn. (Discussion Draft, 2000). Corkscrew manufacturer brought, in part, claims for unfair competition and trade-dress infringement against competitor. Granting defendant's motion to dismiss the unfair-competition claim, this court held, inter alia, that because plaintiff did not show a likelihood of confusion between the parties' corkscrews, it was not entitled to the equitable remedy of disgorgement of defendant's profits. Metrokane, Inc. v. The Wine Enthusiast, 160 F.Supp.2d 633, 641.

Case Citations July 2005 -- April 2006:

S.D.N.Y.2005. Coms. (a) and (b) cit. and quot. in ftn., com. (h) cit. in ftn. (Disc. Draft 2000). Health-benefit providers sued pharmaceutical manufacturer for allegedly misrepresenting to their pharmacy-benefit manager (PBM) the safety of an oral drug used for treating type 2 diabetes that was later withdrawn from the market, causing PBM, and, thus, plaintiffs, to pay higher prices for type 2 diabetes drugs than they would have if the withdrawn drug had been excluded from their formularies. Granting summary judgment for manufacturer, this court held, inter alia, that, because plaintiffs did not purchase the drug directly from manufacturer, the relationship between the parties was too attenuated to allow for restitution for manufacturer's possible unjust enrichment. In re Rezulin Products Liability Litigation, 392 F.Supp.2d 597, 617, 618, amending 390 F.Supp.2d 319.

FNa This Draft is being circulated for discussion and comment. The Council's consideration of the material herein has not been completed. As of the date of its publication the views expressed in the Draft have not been considered by the members of The American Law Institute, and therefore they do not represent the position of the Institute on any of the issues with which the Draft deals.

(2000)

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Restatement of the Law -- Restitution
Restatement (First) of Restitution
Current through September 2006

Part I. The Right To Restitution (Quasi Contracts And Kindred Equitable Relief)
Chapter 2. Mistake, Including Fraud
Topic 5. Defenses And Conditions

§ 65. Offer Of Restoration As Condition Of Restitution

Link to Case Citations

The right of a person to restitution for a benefit conferred upon another in a transaction which is voidable for fraud or mistake is dependent upon his return or offer to return to the other party anything which he received as part of the transaction or, where specific restoration is not required under the rule stated in § 66, its value, except where such thing
(a) can properly be retained irrespective of the voidable transaction, or
(b) has been returned to or is held subject to the orders of a person having a right superior to that of the other party, or
(c) has been continuously worthless, or
(d) has become worthless or impossible of restoration by act of the other or because of lack of qualities represented by him, or
(e) consists of a commodity which has been consumed or disposed of before notice of the facts and opportunity for return and for which a ratable price has been fixed, if such price can be credited upon the granting of restitution, or
(f) consists of money which can be credited if restitution is granted.

Comment:

a. The rule stated in this Section states only the circumstances under which the transferor is required to restore or offer to restore the transferee to his original position either by the return in specie of what he has received or its value. Section 66 states when the thing received must be returned in specie. Section 67 states the rule as to the duty of the one seeking restitution if the other refuses to receive back what he gave.

In addition to the return of what he has received or its value, the one seeking restitution may be required to pay for expenses incurred by the other party with reference to the subject matter, as well as to account for losses (see § 158). Except where the conduct of the other makes it equitable for him to suffer a loss which must be borne by one of them, the one seeking restitution must put the other back into as good a position as he was at the beginning (see § 142).

b. Requirement of an exchange transaction. The rule stated in this Section is applicable where there has been a transaction between the transferor and the transferee, which the transferor is entitled to have rescinded. Thus the rule is applicable to agreements and conveyances voidable for fraud or mistake see Illustration 1). The rule may apply to transactions which are not effective as contracts because of lack of mutual assent or consideration, or because the parties are mistaken as to the subject matter transferred or as to the identity of the parties (see Illustrations 2 and 3). It applies even to transactions in which the transferee has fraudulently caused the transferor to convey something not intended (see Illustrations 4 and 5), although such conveyance does not result in the passage of title.

On the other hand, the rule stated in this Section does not apply to situations in which the person seeking restitution has acquired the benefit otherwise than by a transaction in which he consented to an exchange with the other. Thus it does not apply where a converter has left his things in place of the things converted (see Illustration 6). In this case, it is sufficient if the person who has received the things thus offered for exchange does nothing to prevent the other from taking his own goods. Likewise, the rule stated in this Section does not apply to an infant who because of the policy of protection to him may not be required to return the value of the benefit which he has received in exchange if it is no longer in existence.

Illustrations:

1. A agrees with B to exchange Whiteacre owned by A for Blackacre, the qualities of which B fraudulently misrepresents. After the transfer of titles, A discovers the fraud. He is entitled to restitution only on condition of a reconveyance of Blackacre to B.
2. A agrees to charter the ship "Peerless." There are two ships "Peerless," A justifiably having in mind only one, and B equally justifiably having in mind only the other. A pays B $1000 as an advance payment and B sends to A the ship's papers and the keys to the various rooms upon the ship. Upon discovery of the facts, A is entitled to the restitution of his $1000 but only on condition of an offer by him to return to B the papers and the keys.
3. A, agent for B, but acting without power to bind B thereby, sells B's goods to C who pays therefor $1000 which A deposits to B's account in the bank. C is entitled to the return of his money unless B ratifies, but only upon his offer to restore to B what he has received from A.
4. A agrees to purchase Blackacre from B for $1000. A pays B the money and B signs a deed which he believes to be a deed conveying Blackacre but which in fact, owing to sleight-of-hand practiced by A, is a deed to Whiteacre which B also owns. B is entitled to a reconveyance of Whiteacre only if he repays to A the purchase money or, at his election, conveys Blackacre to him.
5. A agrees to sell to B shares in a corporation for the price of $1000 to be paid by a promissory note payable in one year. A transfers the shares to B and causes B to sign a document which B believes to be a note for $1000 payable in a year, but which in fact is a check drawn upon B's bank for $1000. A gets the money from the bank. Upon discovery of the facts B is entitled to maintain an action against A for $1000 for money had and received, only if, at his option, he offers to return the certificates representing the shares or tenders a note for $1000.
6. Mistakenly believing that A has offered to exchange chattels with him, B leaves his own chattel on A's premises and takes from them a chattel belonging to A. A is entitled to maintain an action against B for the value of the chattel taken without a tender of B's chattel.

c. Surrender of evidence. The rule stated in this Section does not apply where only a promise has been given by the transferee. If the promise was not incorporated in a writing evidencing its existence, of course nothing need be returned at any time. Even where there was the delivery of a document constituting evidence of the promise, the rule stated in this Section has no application and there need be no offer to return it. If, however, the document is a negotiable instrument signed by the transferee or is a document the continued existence of which is likely to harm or to embarrass him if restitution is granted, the court will provide for its surrender before final process is issued in favor of complainant. The time and method for securing this will depend upon the local procedure.

d. When offer to restore must be made before action brought. In actions at law which are founded on the existence of a cause of action and in which there cannot ordinarily be a conditional judgment, the entire cause of action must exist before suit is brought. Action is maintained only because of the right already accrued to the plaintiff. Hence in situations in which restoration of the consideration is required, an offer to restore is a condition precedent to a cause of action for goods sold and delivered or for money had and received. This offer must be made with reasonable promptness after the facts are known (see § 64); the offer to restore is a necessary part of the manifestation of an election to rescind. The offer need not be unconditional; it may be conditioned upon restitution by the other party since it is only by mutual restitution that the transaction is effectively rescinded. It is not within the scope of the Restatement of this Subject to state the circumstances necessary for an action for conversion or an action of replevin.

The offer of restitution, essential in the ordinary actions at law, is required only where a conditional decree cannot be rendered; in equity, however, and in proceedings at law in which by statute or otherwise a conditional decree can be rendered, there need be no offer to restore antecedent to the proceedings. The mutual restoration can be accomplished by the decree.

e. When no offer to restore or restoration is necessary. The requirement that the other party to the transaction should be placed in his original position exists to prevent enrichment by the rescinding party at the expense of the other. The reason for the rule limits it. Where, aside from the transaction, the person seeking restitution would be entitled to retain what the other gave as the result of the agreement, the transaction does not enrich him even though he retains such things, nor does it diminish the net assets of the other (see Illustrations 7 and 8). Where the subject matter belongs to a third person and it has been returned to him or he has made a claim therefor which the holder has acknowledged, and hence where it would be improper for it to be returned to the other party, a requirement of restoration would be unjust and would cause circuity of action (see Illustrations 9 and 10). Where the subject matter was worthless, the law will not require the formality of its return (see Illustration 11).

Where the thing received by the party seeking restitution has been destroyed or has deteriorated because of the fault of the other or because it did not have the qualities which the other represented it to have, there is necessarily a loss suffered by one of the parties and it is fair that, irrespective of the agreement as to the risk of loss, it should be borne by the person responsible therefor (see Illustrations 12 and 13).

Ordinarily there can be no rescission in part; but if the transaction is separable in the sense that a part of the subject matter is definitely represented by a portion of the consideration, and this part of the subject matter has been disposed of, there may be rescission as to the remaining part without an offer to return that which was received or its value if the value can be credited (see Illustration 14). Even in the case where a definite price is apportioned, however, if the subject matter has not been destroyed or disposed of, it must be returned as a condition to restitution (see Illustration 15). If no definite price has been apportioned to the part sold there cannot be affirmance as to that and rescission as to the remainder.

If what has been received is merely money which can be credited upon the amount which will be paid to the transferor, it is unnecessary to require him to offer to repay it (see Illustrations 17 and 18).

Illustrations to Clause (a):

7. By fraud A obtains possession of goods from B, a dealer in second-hand goods. Thereafter A sells the same goods to an agent of B who does not recognize them as belonging to B. B is entitled to recover the price paid without offering to restore the goods.
8. A owes B a sum which is uncertain, but which is not less than $100. By fraudulent representations A induces B to accept Blackacre with $100 in money, in exchange for Whiteacre and a release of the debt. B is entitled to rescission of the transaction upon tender of a deed to Blackacre without a tender of $100, which will be credited upon the original debt.

Illustrations to Clause (b):

9. A sells to B for $500 goods which A has stolen from C. Upon discovering that B has them, C successfully maintains an action of replevin against B and thereby obtains the goods. B is entitled to restitution of $500 from A.
10. Same facts as in Illustration 9, except that upon C's demand B agrees to hold the goods on C's account. B is entitled to restitution of $500 from A.

Illustration to Clause (c):

11. A sells to B mineral represented to be gold ore but in fact only worthless iron pyrite, B paying $1000

therefor. B is entitled to an action for restitution without offering to restore the worthless ore.

Illustrations to Clause (d):

12. A sells to B fruit which has already begun to decay, but which A fraudulently represents as sound. B stores the fruit for several weeks, during which time the fruit is completely spoiled. B is entitled to maintain an action for restitution without the return of the spoiled fruit.
13. Fraudulently misrepresenting that an automobile is in good repair, A sells it to B. Shortly thereafter, owing to a defective steering wheel of which A was aware, the automobile is wrecked and becomes worthless. B is entitled to restitution, without a tender of the valueless junk.

Illustrations to Clause (e):

14. Induced by A's false representations, B buys from A, and pays for, 1000 barrels of potatoes at $3 a barrel, to be delivered as B shall call for them. B orders 200 barrels which he receives and sells. Upon discovery that the potatoes received do not correspond to the representations, B demands restitution of $2400 from A. He is entitled to this.
15. Same facts as in Illustration 14, except that B discovers the poor quality of the potatoes before he has disposed of any. He is not entitled to restitution from A until he offers to restore those which he still has on hand.
16. Induced by A's false representations, B purchases from A a miscellaneous lot of goods for $1000 paid in advance. Having sold approximately one-fourth of these, B discovers the fraud. He is not entitled to restitution from A of three-fourths of the purchase price upon offering to return the remaining goods.

Illustrations to Clause (f):

17. Fraudulently misrepresenting his assets and the current exchange quotation, A obtains from B ten shares of stock for $500 in money and a promise to pay $1500. A sells the shares for $3000. Upon discovery of the fraud and without offering to return the $500 B demands from A the proceeds of the shares. B is entitled to recover the value of the shares or the amount of their proceeds, less $500.
18. Same facts as in Illustration 17, except that A sells only two shares, receiving therefor $500. B is entitled to maintain an action for the restitution in specie of the remaining eight shares or of their value without offering to return the $500 paid.

Case Citations

Case Citations Through June 1986

Case Citations July 1986 -- June 2005

Case Citations Through June 1986:

C.A.1, 1960. Cit. in sup. In action by oil refinery against contractor to recover damages for alleged fraudulent representations inducing refinery's execution of construction contracts, and for such rescission as might be just and equitable, court held that clauses in contracts to effect that any relevant controversy was to be subject to arbitration was broad enough to include refinery's claim of damages for fraudulent inducement, and court also declared that purpose of action for rescission is to permit the defrauded party to obtain restitution of the benefits conferred by him and that therefore there cannot be partial rescission, and held the case not proper for substituted restoration because permitting plaintiff to make substituted restoration would be another way of letting it rescind only the arbitration clauses, as to which no fraud was alleged and also because plaintiff never mentioned fraud or rescission for four years after negotiations began. Lummus Co. v. Commonwealth Refinery Co., 280 F.2d 915, 928, 91 A.L.R.2d 912, certiorari denied 364 U.S. 911, 5 L.Ed.2d 255, 81 S.Ct. 274.

C.A.2, 1939. Clauses d and e cit. in sup. A disaffirmance of a sale of furs wherein the purchaser gave the seller $2,000 in cash and notes for the balance of $4,315 need not be accompanied by a tender of the down payment. In re Meiselman, 105 F.(2d) 995, 998, 999.

C.A.3, 1949. Sub. f cit. in sup. in ftn. In action under Fair Labor Standards Act, defense that because plaintiff retained amounts paid him in consideration of release, plaintiff was barred from bringing action, was insufficient, where in allowing recovery, amounts received by plaintiff were credited against amounts defendant still had to pay. Stilwell et al. v. Hertz Drivurself Stations, Inc., 174 F.2d 714, 717.

C.A.8, 1946. Com. e cit. in sup. Whether transfer to third person of insurance agent's business worth about $20,000 was made under duress was for jury, where agent was delinquent to company for premiums in amount of $7,000 and company threatened to cancel unlawfully the policies of the agent's customers unless agent transferred the agency in consideration of the release of the $7,000 delinquencies, and agent could sue at law for damages which would amount to a rescission without having made restitution of the $7,000 cancelled indebtedness since such sum could be deducted from the eventual recovery. Furman v. Gulf Ins. Co. of Dallas, 152 F.2d 891, 895.

C.A.8, 1967. Illus. 17 and 18 cit. in sup. The plaintiffs, former shareholders in a corporation, brought an action against two groups of defendants under section 10b-5 of the SEA: (I) their fellow shareholders, to whom they sold the stock; (2) purchasing agents for the shareholders, who informed the plaintiffs that the corporation's financial condition was bad and that they were going to get out of it, meanwhile knowing sales of the corporation had recently substantially increased, and whose statements allegedly induced the plaintiffs' sales. As the stock purchased by the first group of defendants was thereafter sold by them, hence destroying any possibility of measuring damages by the market value of the stock at the time of the original sale, and as the value of the stock had fluctuated since the original sale, an instruction by the trial court permitting the jury to determine the damages by computing the value of the stock as of a time after the original sale was held correct, and the resulting judgment for the plaintiffs of over $400,000 was affirmed. Myzel v. Fields, 386 F.2d 718, 743, cert. denied, 390 U.S. 951, 19 L.Ed.2d 1143, 88 S.Ct. 1043 (1968).

C.A.9, 1949. Cit. in sup. In action under Federal Employer's Liability Act wherein defendant relied on release executed by plaintiff, fact that both parties were unaware of extent of plaintiff's injuries, that release was executed in reliance on statement of defendant's physician and that plaintiff offered to restore consideration received for such release was sufficient to present question of whether release was rescinded to jury so that directed verdict for defendant was error. Graham v. Atchison, T. & S.F. Ry. Co., 176 F.2d 819, 826.

C.A.10, 1962. Cit. in sup. in ftn. The innocent mistake of Mexican twine importers in selling to an American customer, not an authorized purchaser under Mexican law, was sufficient to entitle the importer to rescission after the purchaser's bankruptcy, and the fact that the purchaser had partially paid for the goods did not defeat the rescission since the thing received was money, which could be credited. Potucek v. Cordeleria Lourdes, 310 F.2d 527, 532, certiorari denied 372 U.S. 930, 9 L.Ed.2d 734, 83 S.Ct. 875.

U.S.Ct.Cl.1965. Com. e quot. in part in sup. in ftn. A subcontractor had performed certain work for a general contractor who was under a contract for the United States. Because of a double agency provision and certain kickbacks between the contractor's agent and the subcontractor, the government rescinded its agreement. The subcontractor had received some payments for work done but prosecuted this claim for the balance due and owing. The court held that the subcontractor was entitled to restitutionary relief for benefits conferred but did not give plaintiff judgment, since it had already collected more than the reasonable value of its work. Acme Process Equip. Co. v. United States, 171 Ct.Cl. 251, 347 F.2d 538, 555, motion for reconsideration and to amend judgment denied 351 F.2d 656.

D.Colo.1965. Cit. in sup. Plaintiff-corporation negotiated the sale of the stock of its wholly owned subsidiary to defendant, and received $100,000 down payment. Thereafter, by means of alleged fraud, the defendant failed to pay anything more on the purchase price. Plaintiff brought this action to recover the stock. Defendant made a

motion to dismiss on the basis of back restoration of that which plaintiff received. The court held that since the plaintiff did not return or offer to return that which he received, namely $100,000, to defendant, the relief of rescission cannot be granted. Parker v. Baltimore Paint & Chemical Corp., 244 F.Supp. 267, 270.

D.Mass.1945. Cl. F cit. in sup. Where designer of plastic machine had performed his part of contract to supply his knowledge of plastics to corporation in exchange for certain type of stock and thereafter designer executed releases to controlling stockholders for designer's claim to stock, upon rescission of releases for fraud, designer was entitled, if contract could not be reformed or performed, to recover his secret processes and profits from their use and to injunctive protection against the shareholders and the corporation for whom they acted, or to recover upon quasi-contractual rights for benefits conferred upon controlling stockholders and corporation, even though contract was ultra vires, and designer had no duty to tender back the money consideration plus interest which he received for executing the fraudulent releases as a condition for bringing the suit for restitution. Falk v. Levine, 60 F.Supp. 660, 662.

S.D.Ohio, 1975. Cit. in sup. Former stockholders of a merged corporation brought a securities fraud action against the parent corporation. Plaintiffs sought preliminary injunctive relief against defendant prohibiting the parent from further commingling of the assets and funds of the merged corporation. In denying preliminary injunctive relief, the court stated that a status quo injunction would be improper because the parties could not be returned to their pre-merger positions, due to subsequent transactions; that circumstances did not justify issuing the injunction to facilitate the determination of profits prayed for in the complaint; and that circumstances did not justify freezing the merged corporation's assets to prevent their depletion. McIntyre v. KDI Corp., 406 F.Supp. 592, 597.

E.D.Pa.1941. Cit. in sup. In seeking to recover damages for machines which lien holder refused to release, person injured must restore machines which were removed. Bailis v. R.F.C., 38 F.Supp. 721, 725.

Alaska, 1981. Cit. in disc. The plaintiffs sold a piece of real estate to the defendants. Subsequently, the defendants made an initial payment, moved in and began making alterations. Several months later the buyers sent the plaintiffs a formal notice purporting to cancel the sale, claiming that they had been misled by the terms of the sale. The plaintiffs then sued for the remainder due on the promissory note and the defendants counterclaimed, requesting rescission of the sale and monetary damages. The trial court granted judgment for rescission; at a hearing for restitution the court awarded the plaintiffs restitutionary damages for the rental value of the property after the breach and the cost of restoring the altered interior. Both parties appealed, the defendants arguing that they should not owe the plaintiffs the rental value after they had given notice of rescission and had offered to restore possession to the plaintiffs. The court reasoned that while the defendants initially had a very limited obligation toward the property after they offered to return it, an obligation to pay the fair rental value arose when they chose to stay on the property. The court also found that the defendants had an obligation to return the property in as good a condition as when they received it and therefore found no error in the lower court's award of damages for the alterations that adversely affected the value of the property. Because of problems with the award of attorney's fees, the case was affirmed in part, vacated in part and remanded. Miller v. Sears, 636 P.2d 1183, 1194.

Ariz.App.1983. Cit. in sup. The defendant was named as payee on a check drawn on an account at the plaintiff bank. The bank mistakenly paid the full amount of the check to the payee before the check had cleared. Because the bank was able to recover only part of the money, it brought this suit to recover the balance. Although the bank conceded that it was not entitled to a charge back under the relevant state statute, it argued that this did not preclude recovery under a theory of restitution. On appeal, the court vacated the trial court's judgment for the defendant and held that the common-law remedy of restitution was available to the bank. A bank was not precluded from seeking restitution merely because the check in question was not returned to the payee prior to institution of this action. The court also emphasized that application of common-law principles to this case did not undermine the UCC policy of the protection of holders in due course. The trial court's judgment was vacated and remanded on the issue of the bank's claim for restitution. Great Western Bank and Trust v. Nahat, 138 Ariz. 260,

674 P.2d 323, 328.

Cal.1941. Cit. in dictum. Owners of realty who set aside foreclosure, must restore to mortgagees all benefits received under agreement between owners and mortgagees. Seeger v. Odell, 18 Cal.(2d) 409, 417, 115 P.(2d) 977, 982.

Colo.1941. Coms. d and e quot. in sup. In action to rescind sale of farm loan notes it is not necessary to tender notes when defendant previously foreclosed on farm and issued deposit receipts in lieu thereof. Bankers Tr. Co. v. International Tr. Co., 108 Colo. 15, 29, 113 P.(2d) 656, 663.

Colo.App.1976. Cit. in sup. The purchasers of a motel brought this action for damages for the vendor's alleged fraud in the sale of the motel. The trial court awarded the purchasers, as damages, the sums they had paid at the time of the execution of the contract and the amount of a credit given to them for property they had conveyed to the vendors. On appeal, this court observed that under the parties' agreement, the motel was not conveyed to the purchasers. Rather, the parties had signed a contract for sale under which the vendors were to deliver to the purchasers a deed to the property when the unpaid balance of a promissory note given in partial payment for the motel had been reduced to a specified amount. It was found that sometime during the pendency of the action, the purchasers had surrendered possession of the motel to the vendors who then resold the property by exchange. Although the trial court had properly found this to be a rescission of the contract, this court held that further proceedings were necessary to determine the amount to be awarded as a result of the rescission. Noting that in suits involving rescission the parties must be placed in status quo, the court determined that the purchasers were entitled to a return of their payments on the promissory note and to interest on each payment from the date thereof. For the purpose of determining the other equities between the parties resulting from the rescission, the court noted that factors to be considered may include the reasonable rental value of that portion of the property utilized by the plaintiffs for their own personal use and the reasonable value of their services in managing the motel. Rice v. Hilty, 559 P.2d 725, 727.

Kan.1973. Cit. in sup. The plaintiff insured brought an action against defendant insurer for rescission of two life insurance policies two years after issuance thereof because of fraudulent material misrepresentations by defendant's agents that the policies would contain certain investment provisions not included in the written insurance contracts, and which, contrary to the agents' assurances, were never delivered in separate contracts to the plaintiff. On appeals by both parties from an order granting rescission with partial restoration of premiums paid, the court reversed as to plaintiff's appeal and affirmed as to defendant's appeal; and held, inter alia, that it was not necessary that plaintiff restore the value to him or the cost to the insurer of the insurance coverage prior to the rescission, as plaintiff had nothing whatever of real value to return to the insurer. Dreiling v. Home State Life Insurance Company, 213 Kan. 137, 515 P.2d 757, 767.

Md.1966. Cit. in sup. The plaintiff-property owners sought to construct a high-rise apartment house on part of a tract of thirty acres which they owned and, therefore, sought to have an ordinance, limiting the height of buildings to seventeen stories, declared void as well as for an injunction against the defendant town's enforcement. This court held that the plaintiff's cause of action for equitable relief was sufficient to withstand a demurrer in order to rescind an agreement between the two parties and to reconvey an easement based on the defendant's breach of agreement. Funger v. Mayor and Council of Town of Somerset, 244 Md. 141, 223 A.2d 168, 173, 174.

Md.1967. Cit. in sup. The plaintiff homeowners sought to have a mortgage and note, executed by them, declared void, and to recover payments made thereon from the defendant finance corporation, which purchased the note as one of a lot from a notoriously fraudulent construction company that had contracted with the plaintiffs to make home improvements. The defendant was found not to have been a bona fide purchaser, the note and mortgage were declared void, and the plaintiffs were permitted to recover any excess paid over the value received by them from the transaction previous to their discovery of the fraud. Financial Credit Corp. v. Williams, 246 Md. 775, 229 A.2d 712, 717.

Md.1968. Cit. but dist. The plaintiff, a building contractor, and the defendant city entered into an agreement whereby the plaintiff was to receive a certain tract for development of apartment buildings in return for developing part of the tract as a scenic easement and conveying another tract to the defendant. The defendant was also to obtain zoning regulations which would permit the plaintiff's project. The contract was substantially performed, but disagreement was encountered over the height of the buildings, plaintiff desiring to build 30 stories high, defendant being unwilling to modify zoning regulations to permit buildings higher than 14 stories. A subsequent flurry of claims and counterclaims included the plaintiff's claim for rescission, on the grounds that the defendant had failed to provide the promised zoning regulations. Although the court recognized that rescission generally could not be granted until the party seeking rescission gave restitution by restoring the consideration given by the other party, since complete restoration was found impossible here, the court reversed a judgment denying rescission, ordering plaintiff to merely make an earnest endeavor to restore the parties. Funger v. Mayor and Council, 249 Md. 311, 239 A.2d 748, 760.

Md.1974. Cit. in sup. and com. (e) cit. in sup. Defendant, in a counterclaim to plaintiff's claim for default on a promissory note, sought rescission of their contract on grounds of fraud and misrepresentations. The trial court ruled for plaintiff, denied defendant's counterclaim, and defendant appealed. This court, in affirming the trial court, stated that defendant failed to tender to the plaintiff all the consideration and benefits he had received under their contract. For a period of time well after defendant discovered tax liabilities and fire code deficiencies, he continued to operate the business and accrue benefits. The failure of defendant to make a complete repudiation of the contract and to indicate his unwillingness to continue to operate under it resulted in an insurmountable barrier to his plea for rescission. Lazorcak v. Feuerstein, 273 Md. 69, 327 A.2d 477, 481, 482.

Md.1985. Cit. in disc., subsecs. (c) and (d) cit. in disc. A company which sold mail-order diet pills filed an appeal from the state consumer protection division's cease and desist order requiring the company to revise its advertisement and make restitution to consumers. The trial court vacated the division's order and substituted a new order allowing the enforcement of a previous agreement between the company and the postal service. On grant of certiorari, the court of appeals reversed and remanded, holding, inter alia, that the agreement with the postal service did not bar the cease and desist order because the agreement did not cover all of the complaints. The court overturned the restitution order because it provided no mechanism for processing individual claims. The court stated that usually the plaintiff must restore what he received before defendant must make restitution, but that standard is relaxed when the product is to be consumed or is worthless. The court noted the general rule that the consumer must show reliance on the misrepresentations for recovery. Consumer Protection v. Consumer Publishing, 304 Md. 731, 501 A.2d 48, 72.

Mass.1945. Cit. in sup. Where wife recovers money which she claimed was fraudulently obtained from her by husband to be used for purchase of realty the title to which was to be taken solely in her own name, but that title was taken by husband and wife as joint tenants, court has power to impose equitable conditions upon relief granted, and wife will be required to execute such conveyance as should be necessary to transfer to husband all her right, title, and interest in real estate. Jurewicz v. Jurewicz, 58 N.E.2d 832, 834, 317 Mass. 512.

Mich.1951. Com. e quot. in sup. Persons who sought to void release settling plaintiffs' claim against defendant on ground that person who gave release was mentally incompetent and who maintained action on such claim was first required to return to defendant amount received in consideration for release. Carey et al. v. Levy et al., 45 N.W.2d 352, 355, 329 Mich. 458.

Minn.1954. Cit. in case cit. in dictum. In action to recover for personal injuries by plaintiff while employed by defendant wherein defendant set up a release, court held that the release was invalid because of statements made by the defendant's physician and that the offer of the plaintiff to return the consideration received on the release or to apply it on any verdict returned was not untimely as a matter of law. Allison v. Chicago Great Western Ry. Co., 240 Minn. 547, 62 N.W.2d 374, 382.

Pa.1962. Cit. in sup. In action arising out of dispute over school construction contract, court held that when

school had accepted the benefits and voluntarily tendered the consideration on an unauthorized contract, it could not maintain an action to recover the payments unless a denial of recovery would result in an unjust enrichment of the other party. Scott Township School District Authority v. Branna Construction Corp., 409 Pa. 136, 185 A.2d 320, 323.

Pa.Super.1942. Com. e cit. in sup. Bank may recover from township on note used to pay third party for road roller even though bank did not tender note. First Nat. Bk. etc. v. Carroll Tp., 150 Pa.Super. 241, 247, 27 A.(2d) 527, 530.

Tenn.1978. Com. (d) cit. in sup. Purchasers sought compensatory and punitive damages from builder/vendor, rescission of sales and building contracts and damages for tortious misrepresentation. Defendant counterclaimed for the unpaid balance of the construction contract. Purchasers had bought a lot in a hilly area and were planning to construct a house on a portion affording a scenic view. After work was begun on construction, it was discovered that the construction site was on property owned by another party. The trial court entered judgment for plaintiffs. The court of appeals reversed and remanded. This court reversed the judgment of the court of appeals and reinstated the judgment of the trial court as to the extent of the compensatory award and the rescission but reversed and dismissed the judgment for punitive damages. Citing the Restatement, the court found, inter alia, that there had been a mutual mistake by plaintiffs, their architect, and defendant as to the location of the construction site and that rescission of the contracts, with restoration of the property by vendee, was proper. Vendee was not limited to the purchase price of the property upon rescission. There was material evidence to support the jury's award of compensatory damages but no evidence whatever of fraud or deceit to justify an award of punitive damages. Isaacs v. Bokor, 566 S.W.2d 532, 540.

Vt.1959. Com. e cit. in sup. of conc. op. In action for balance due on subcontract, where the defendant asserted that plaintiff for valuable consideration had released the defendant of all claims and plaintiff asserted that release was fraudulently obtained, the pleadings disclosed no excuse for plaintiff's failure to allege a tender of return of such consideration. Caledonia Sand and Gravel Co. v. Joseph A. Bass Co., 121 Vt. 161, 151 A.2d 312, 316.

Case Citations July 1986 -- June 2005:

U.S.1998. Cit. in headnote, com. (d) cit. in disc. Employee who, as part of her termination agreement, released all claims against former employer sued former employer for violations of the Age Discrimination in Employment Act (ADEA). Defendant moved for summary judgment, arguing that plaintiff could have elected avoidance if she had returned the monies securing the release, which failed to comply with the terms of the Older Workers Benefit Protection Act (OWBPA); however, because she did not satisfy the "tender-back" requirement, she ratified the nonconforming release. The district court granted the motion and the Court of Appeals for the Fifth Circuit affirmed. Reversing and remanding, this court held that, because the release did not comply with the OWBPA, it had no effect on plaintiff's ADEA claim. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 422, 425, 118 S.Ct. 838, 838, 841, 139 L.Ed.2d 849.

C.A.1, 1996. Cit. in disc. Purchasers of condominium investment contracts sued a bank, asserting that the contracts were securities under state securities laws and should have been registered before being offered to the public. The bank was later declared insolvent, and the FDIC, as receiver, was substituted for the bank as a defendant. Massachusetts federal district court held FDIC liable and awarded plaintiffs rescissionary damages, attorneys' fees, and interest. On appeal, plaintiffs argued that district court should have allowed them to keep the units as a setoff for any damages owed to them from the FDIC that would be left unpaid because of the bank's insolvency. This court affirmed as to liability but vacated and remanded as to damages, holding, inter alia, that 12 U.S.C. § 1823(e) and the D'Oench doctrine did not shield the FDIC from liability for the bank's sale of unregistered securities. The court determined that since tender of the unit was a condition for triggering the bank's obligation to repay the amount paid for the units, plaintiffs could also use the units as setoffs. Adams v. Zimmerman, 73 F.3d 1164, 1173.

C.A.7, 1989. Com. (b) cit. in disc. A securities investor sued the sellers of oil and gas properties, seeking to rescind his purchase of interests in the oil and gas properties and to retrieve monies he paid for the properties. The district court entered judgment for the plaintiff. This court affirmed but remanded, stating that the trial court erred in directing the defendants to satisfy the judgment before the plaintiff tendered his interests and in holding that the plaintiff need not tender to the defendants the judgment rights obtained against the promoters and operators of the oil and gas properties, since this holding was contrary to a state statute directing that the party seeking rescission must tender the securities sold before restitution was due. The court added that, if the defendants had issued the securities, it would have been simple to enter a judgment canceling the plaintiff's interest, but since the defendants were not the issuers, it was best to carry out the statutory program precisely. Mosler v. S/P Enterprises, Inc., 888 F.2d 1138, 1143.

Cal.App.2004. Quot. in ftn. Unmarried man who spent funds to support child, in reliance on mother's representation that he was child's father, sued mother for unjust enrichment, seeking return of funds after discovering that child was not his biological offspring. Trial court dismissed. This court affirmed, holding that two of state's most fundamental public policies--enforcement of parents' obligations to support their children, and protection of children's interest in stability of their family relationships--precluded the court from requiring defendant to make restitution to plaintiff based on unjust enrichment. The court stated that if it granted plaintiff restitution from child's biological parents, who retained responsibility for support, it would be giving priority to plaintiff's desire to be made financially whole to potential detriment of child's ongoing needs. McBride v. Boughton, 123 Cal.App.4th 379, 392, 20 Cal.Rptr.3d 115, 125.

D.Del.2002. Com. (e) quot. in disc. Insurer brought suit against former supervising master agent for a declaration that a general release precluded agent's claims raised in arbitration proceedings. After the district court entered judgment on a jury verdict for agent, and the court of appeals affirmed in part and reversed in part, the parties cross-moved to amend the district court's judgment. This court held that agent, who had elected to rescind the release rather than affirm it and seek fraud damages, was not required to return the consideration he received in return for the release before continuing the arbitration proceeding, but had to return that money to insurer as a set-off from any damages award from the arbitration panel. American Life Ins. Co. v. Parra, 187 F.Supp.2d 203, 210, 212.

S.D.N.Y.Bkrtcy.Ct.2000. Subsec. (d) cit. in ftn. Purchaser sought the imposition of a constructive trust on the consideration paid for debtor's securities, alleging that it was fraudulently induced to sign the purchase agreement. Granting debtor's motion to dismiss, the court held, in part, that purchaser's failure to disaffirm the agreement was a bar to the remedy requested, and that, even if purchaser had disaffirmed the contract, a constructive trust was inappropriate where purchaser had not established inequitable conduct by debtor, debtor's unjust enrichment, or purchaser's restoration to debtor of any benefits received. In re Stylesite Marketing, Inc., 253 B.R. 503, 510.

D.N.D.2000. Cit. in case cit. in disc. Federal employee who was injured while working for railroad sued railroad under Federal Employers' Liability Act, alleging that defendant negligently caused the accident and his injuries. Two years earlier, employee had entered into a release and settlement agreement through which he released railroad from liability arising from accident. This court denied railroad's motion to dismiss, holding that employee was not prevented from pursuing his claim even though he failed to tender back the $100,000 consideration received pursuant to release he now sought to rescind. Tender back was not required because employee pleaded that release was executed by fraud or mutual mistake. It did not matter whether fraud was "in the inducement" or "in the execution." Lusby v. Burlington Northern and Santa Fe Ry. Co., 149 F.Supp.2d 905, 908.

Colo.1995. Cit. in ftn. Software developer brought an action for breach of contract against customer, seeking to rescind the parties' software development contracts owing to customer's failure to make royalty payments. The trial court entered judgment for plaintiff, ordering defendant to disgorge all profits it realized as a result of the breach; the court of appeals affirmed. Affirming in part, reversing in part, and remanding, this court held that the

proper measure of restitution for partial rescission of a contract was disgorgement of defendant's profits but the trial court erred by not giving credit to defendant for that portion of the profits that were attributable to defendant's effort and investment. EarthInfo v. Hydrosphere Resource, 900 P.2d 113, 119.

Mich.1990. Com. (d) quot. in ftn. to diss. op.; com. (e) quot. in case quot. in sup., quot. in diss. op., cit. and quot. in ftns. to diss. op.; illus. 8 quot. in ftn. to diss. op. An employee sued her former employer for wrongful discharge, after signing a release of all claims and accepting payments recited as consideration for the release. The employee alleged that she was already entitled to the payments and so the release was invalid for want of consideration, but the trial court dismissed the complaint. On rehearing, the employee's complaint was dismissed with prejudice. The intermediate appellate court affirmed, but on remand determined that an offer by the employee to tender back the payments was made within a reasonable time. This court reversed, holding that tender of consideration received in a settlement agreement must occur not only within a reasonable time, but prior to or simultaneous with any proceeding raising a legal claim in contravention to the agreement. The court noted that allowing the employee to retain the payments while bringing suit against the employer would deny the employer its benefit of the release, and would undermine the stability of release agreements. Two dissenting opinions noted that the tender rule would not apply if the employee was entitled to the payments, as there would then be no unjust enrichment. Stefanac v. Cranbrook Educ. Community, 435 Mich. 155, 458 N.W.2d 56, 65, 75, 84, 87-88.

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Restatement of the Law -- Restitution
Restatement (First) of Restitution
Current through September 2006

Part I. The Right To Restitution (Quasi Contracts And Kindred Equitable Relief)
Chapter 8. Rules Generally Applicable To Actions For Restitution
Topic 2. Measure Of Recovery

§ 151. Value Of Property Acquired By Consciously Tortious Conduct

Link to Case Citations

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.

Comment:

a. Situations to which the rule applies. The rule stated in this Section applies only where a person by a consciously tortious act has deprived another of the title, possession or other interest in land, chattels, or choses in action. Section 152 deals with the situations where the benefit consists of services. Section 153 states the rules as to the discharge of debts. The liability of the innocent converter is dealt with in § 154; that of persons who have acquired or dealt with property without tortious conduct in § 155.

The rule applies to cases where there was fraud or duress sufficient to make the transaction between the transferor and the transferee voidable, whether or not the conduct of the recipient was such that an action at law could be maintained against him. It applies where a subsequent transferee of things obtained by fraud or duress either participated in the original wrongful conduct, or knew of the facts before receiving or disposing of the subject matter. It applies where a person has taken goods by force from the possession of the owner, as well as where fiduciaries have misused things belonging to their beneficiaries. The rule applies also to cases where a person has rightfully acquired possession or title to the property of another, but where after learning that the other is entitled to it, he wrongfully uses, disposes of, or refuses to surrender it. On the other hand, it does not apply to an innocent converter (see § 154), nor to one who should but, from ignorance of facts, does not realize that his conduct is an invasion of another's rights, as where one obtains title as the result of his negligent misrepresentation (see Caveat to § 155).

The rule stated in this Section does not normally apply to a person who has tortiously obtained the title to land, since, unless he has disposed of it, or it has been destroyed, he is not liable for its value (see Comment *a* on § 130). A person who has obtained a chattel by a consciously tortious act is, however, under a duty of paying its value, even though specific restitution would be granted, and he has no privilege of returning it in mitigation of damages, as an innocent converter may have (see Comment *g* on § 128).

b. Value. The value of property is its exchange value measured in money, or the amount for which it could be exchanged if there were an open market with a wide opportunity for buyers. In the case of land there is ordinarily no such market by which the value can be determined, in which case as in other cases where there is no market the value must be determined by the opinion of those having such information as gives them a basis for judgment.

The fact that the subject matter was of little or no worth to the person obtaining it is not material, nor is the fact that he could have obtained it or an equivalent at a lower price.

Illustrations:

1. A, by trespassing upon B's land, takes valuable black walnut timber worth $10,000, using it for building a bridge. The same quantity of other timber equally useful for bridge-building would be worth only $4000. A is liable to B for $10,000 in an action for restitution.
2. A orders from B a 100-gallon drum of lubricating oil at a contract price of 20 cents a gallon, which he pays. By mistake, B delivers to A a 100-gallon drum of superior oil, having a market price of 60 cents a gallon. A realizes that B made a mistake but hoping that B will not notice it, he uses 50 gallons of the oil for purposes for which the cheaper oil would have been equally useful. B is entitled to restitution from A in the amount of $40 since, by using part of the contents of the drum with knowledge of the error, A became liable for its entire value.

c. Where the subject matter is of fluctuating value. Where the subject matter is of fluctuating value, and where the person deprived of it might have secured a higher amount for it had he not been so deprived, justice to him may require that the measure of recovery be more than the value at the time of deprivation. This is true where the recipient knowingly deprived the owner of his property or where a fiduciary in violation of his duty used the property of the beneficiary for his own benefit. In such cases the person deprived is entitled to be put in substantially the position in which he would have been had there not been the deprivation, and this may result in granting to him an amount equal to the highest value reached by the subject matter within a reasonable time after the tortious conduct. This is done if he can prove that he probably would have made a sale while the subject matter was at its highest point in value. Special rules with reference to restitution by two types of fiduciaries are stated in the Restatement of Agency, §§ 402-404, and 407 and the Restatement of Trusts, §§ 197-226.

Illustrations:

3. By fraud as to his financial condition, A purchases shares from B on January first, the market value of the shares being $3000 which A promises to pay. A week later the shares rise to $4000 at which time B would have sold them if A had not bought them. They then drop back to $3500, when B discovers the fraud and demands restitution. B is entitled to receive $4000 from A.
4. Same facts as in Illustration 3, except that, shortly after purchasing the shares, A sold them for $2800. B is entitled to receive $4000 from A.

d. Additions made to the subject matter. Where a person with knowledge of the facts has wrongfully obtained another's chattels and thereafter makes additions to them, he is under a duty of returning them in specie even though the duty is not specifically enforceable, unless the additions or improvements are so great as to transfer the title to him. It follows, therefore, that although the owner is not able to get the things back, either because self-help is not practicable or because the remedy afforded, such as replevin, is not adequate, he is entitled to the full value of such things after the additions have been made but before the title is obtained. This is a form of penalty imposed upon a person who has done a consciously wrongful act. As to the innocent converter, see Comment *a* on § 154.

Where land has been acquired by fraud or duress and is restored by a proceeding in equity, the court has discretion in making restitution conditional upon payment of the value of improvements made thereon; in no case, however, will the court require such improvements to be paid for unless, in view of the purposes of the defrauded transferor, the land has become more valuable (see § 158 which also states the rule as to deductions for the payment of liens, repairs and other similar matters).

Illustration:

5. Knowing that he has no right so to do A enters B's timber tract and thereon cuts trees which have a value of

$1000 when cut. He has them sawed into boards which are carried to the city at which place they are worth $2000. B is entitled to recover $2000 from A by way of restitution.

e. Value at time of refusal or disposal. The rules as to value stated in Comments *c* and *d* apply where property was improperly obtained, irrespective of a subsequent improper refusal to deliver it or an improper disposal of it. If, however, the property was lawfully acquired and subsequently was improperly retained, the value is determined as of the time of improper retention. If a chattel was tortiously obtained and the wrongdoer retains it, by making demand the owner can obtain its value at the time of demand; if the converter disposes of it, the owner is entitled to its value at the time of its disposition irrespective of what the converter received for it in exchange. In all such cases, the person deprived can elect to have the value determined at the time of the first conversion, or at the time of any demand if the chattel is still in the hands of the converter, or at the time of disposition.

Illustrations:

6. A obtains goods from B by mistake for which neither party was responsible. The goods are worth $500. A month later B discovers the mistake and demands the goods from A who still has them but refuses to surrender them. The goods are now worth $400. B is entitled to receive $400 from A by way of restitution.
7. The same facts as in Illustration 6 except that B renews his demand for the goods six months later at which time they are still in A's possession and worth $600. B is entitled to receive $600 from A by way of restitution.
8. The same facts as in Illustration 6 except that after refusing to deliver the goods to B, A sells them for $700, the goods being then worth $750. B is entitled to receive $750 from A by way of restitution.

f. Profits and losses. A person who tortiously has acquired, retained or disposed of another's property with knowledge that such conduct is wrongful is entitled to no profits therefrom. Therefore, he is subject to liability at the election of the rightful owner for the value of anything received in exchange therefor (see § 202). He is also liable for profits made by its use (see § 157). On the other hand, if a loss results whether or not the result of the transaction by which he acquired it, he suffers the loss; a change of circumstances is not a defense (see § 142(3)). Thus if the property received deteriorates in value or is lost or destroyed, he remains liable for the value which it had at the time of his wrongful conduct.

Illustrations:

9. A, mistakenly believing that he has a contract with B for the delivery of goods, delivers goods of the value of $1000. B receives them, knowing that A was mistaken and consigns them to C with directions to sell them for B's account. C sells the goods for $1200. A is entitled to restitution from B in the amount of $1200.
10. Same facts as in Illustration 9, except that C sells the goods for $900. A is entitled to restitution from B in the amount of $1000.
11. Same facts as in Illustration 9, except that before the goods could be sold by C they are destroyed and B gets nothing from them. A is entitled to restitution from B in the amount of $1000.

g. Constructive trust and equitable lien. A person wrongfully acquiring title to the property of another holds such property on a constructive trust for the other (see § 160). Where a person wrongfully disposes of the property of another, knowing that the disposition is wrongful and acquires in exchange other property, the other is entitled, at his option, to enforce a constructive trust or an equitable lien (see § 202).

h. Where the person deprived has a limited interest. A person who has been deprived of a beneficial interest less than full ownership is entitled to recover for the value of his interest. For specific applications to the holders of various kinds of interests in land, see the Restatement of Property.

Illustration:

12. By fraud, A obtains from B and C, holding as tenants in common, a conveyance of Blackacre then subject to a

mortgage of $1000 for a debt incurred by B and C. A pays B and C $2000 and assumes the mortgage which upon maturity he pays. A transfer Blackacre to D for $4000, its value. Upon discovery of the fraud, B brings a bill for restitution against A. He is entitled to receive $500 from A.

i. A person entitled to maintain an action in a representative capacity, such as a trustee, is entitled to recover for the value of the interest of the person on whose behalf he brings the action. A person having a possessory interest in a chattel is entitled to recover for the full value of the chattel (see Restatement of Torts, §§ 219 and 222).

Case Citations

Case Citations Through June 1986

Case Citations July 1986 -- June 2005

Case Citations July 2005 -- April 2006

Case Citations Through June 1986:

C.A.1, 1965. Cit. in sup. Defendant, president of a corporation, represented to stockholders that there was no expectation of better earnings in the future. On this basis the stockholders accepted a deflated price for all of their stock. The representation was false and the defendant resold the stock at a high profit. In an action under Section 10b of the Securities Exchange Act of 1934, the plaintiffs could recover the profits reaped by the defendant as a result of his fraudulent misrepresentations. Janigan v. Taylor, 344 F.2d 781, 786, certiorari denied 382 U.S. 879, 15 L.Ed.2d 120, 86 S.Ct. 163.

C.A.2, 1973. Com. c cit. in ftn. in sup. The plaintiffs, minority shareholders of GOA, a company acquired by the defendant, brought a class action suit alleging that the defendant's proxy statement was false and misleading in violation of Section 14(a) and Rule 14a-9(a) of the Securities Exchange Act. Before the acquisition, the defendant controlled GOA and engaged in a program of selling GOA plants. The proxy statement said that there were no agreements or understandings concerning sale of other plants, but soon after the merger was consummated, the new company sold all the remaining plants making profits that would have increased GOA's net worth by more than 25%. The court rejected the argument that the failure to report the appraised values of GOA's remaining plants made the statement false and misleading because of the Security and Exchange Commission's policy against such reports. However, the court held that the statement was misleading in that it did not adequately disclose that the defendant intended to pursue the policy of selling the plants after the merger, especially in light of the defendant's representation that it intended to continue GOA's business. The court also held that only negligence, and not scienter, need be proven in a Rule 14a-9 action. Furthermore, the court held that this defect in the proxy statement was material in that a reasonable man would have attached importance to it. With regard to damages, the court held that the defendant would not be liable for the appreciation of two GOA assets which it had no intention of selling at the time of the merger. The court also held that prejudgment interest could be levied on the difference between the values, at the time of the merger, of the plaintiffs' share of GOA assets and of the stock they received, from the date of the merger until the day of judgment. Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1306.

C.A.3, 1975. Cit. in sup. and com. cit. in sup. The plaintiff, who was fraudulently induced to sell his stock to the defendant, had been awarded damages for the value of the stock by the district court under Rule 10b-5. The defendant appealed, claiming that the plaintiff should have been awarded the stock in kind. The court held that the plaintiff was properly awarded damages for the value of the stock, since, as the injured party, he was entitled to elect the form of the damages. The case was remanded, however, since the court determined that there was insufficient evidence to establish the value of the stock. Rochez Bros., Inc. v. Rhoades, 527 F.2d 891, 893, cert. denied 96 S.Ct. 2205, 48 L.Ed.2d 817, (1976).

C.A.4, 1969. Cit. com. c in sup. This was an action for violation of the S.E.C. rule proscribing misrepresentations and material nondisclosures when an insider buys stock. The court held that former stockholders were entitled to damages measured by lost profits resulting from the violation of the S.E.C. insider rule in the defendants' purchase of the stock, determined as of the date approximating the date of the discovery of the transaction. Baumel v. Rosen, 412 F.2d 571, 576, cert. denied, 396 U.S. 1037, 24 L.Ed.2d 681, 90 S.Ct. 681, 688 (1970).

C.A.8, 1967. Quot., com. c quot. in part in ftn., and illus. 3 quot. in ftn. in sup. The plaintiffs, former shareholders in a corporation, brought an action against two groups of defendants under section 10b-5 of the SEA: (1) their fellow shareholders, to whom they sold the stock; (2) purchasing agents for the shareholders, who informed the plaintiffs that the corporation's financial condition was bad and that they were going to get out of it, meanwhile knowing sales of the corporation had recently substantially increased, and whose statements allegedly induced the plaintiffs' sales. As the stock purchased by the first group of defendants was thereafter sold by them, hence destroying any possibility of measuring damages by the market value of the stock at the time of the original sale, and as the value of the stock had fluctuated since the original sale, an instruction by the trial court permitting the jury to determine the damages by computing the value of the stock as of a time after the original sale was held correct, and the resulting judgment for the plaintiffs of over $400,000 was affirmed. Myzel v. Fields, 386 F.2d 718, 743, 747, cert. denied, 390 U.S. 951, 19 L.Ed.2d 1143, 88 S.Ct. 1043 (1968).

C.A.9, 1982. Coms. (c) and (b) cit. in sup. The defendants, who fraudulently purchased a majority of a corporation's stock from the plaintiff on behalf of the members of a pooling agreement, and who were the record owners of the control group's stock but who were the beneficial owners of only 30 percent of the control group's stock, were ordered by the federal district court to completely disgorge all profits received by them only for the shares for which they were the beneficial owners. The plaintiff appealed, alleging that the damage computation, on the remand to the district court, was inconsistent with the mandate of this court. On the issue of damages, this court noted that the purpose of restitution was twofold: (1) to restore the defrauded party to the position he would have had absent the fraud; (2) and to deny the fraudulent party any benefit, whether or not foreseeable, which derived from his wrongful act. Thus, where a person with knowledge of the facts wrongfully disposed of or acquired property of another and made a profit thereby, he was accountable for the profits. When the property was of fluctuating value, such as stock, the injured party could be awarded an amount equal to the highest value reached by the stock within a reasonable time after the tortious act. Since the defendants here only benefitted from the purchase of their stock and did not gain by the purchase for the others, the court concluded that the defendants should only have had to disgorge the profits from the shares for which they were the beneficial owners. Judgment affirmed. Nelson v. Serwold, 687 F.2d 278, 281.

C.A.10, 1957. Com. c cit in sup. Where agreement for processing turkeys provided that growers would deliver turkeys to processing plant, transportation costs were chargeable to growers and should not have been submitted to jury as element of damages, and judgment was reversed and case remanded. Nephi Processing Plant, Inc. v. Talbott, 247 F.2d 771, 774.

C.A.10, 1984. Cit. in disc. A citizens group sued a water conservancy district, contending that the district's formation was unconstitutional. The group later amended its complaint, alleging that a state law validating formation of the district was unconstitutional and seeking special and general damages. The plaintiff sought special damages, which it called "equitable restitution," to compensate members for expenses incurred in the petition drive opposing the district's formation. The trial court granted the defendant's motion to dismiss. This court affirmed, noting that, since neither the defendant nor its directors derived any benefit from the plaintiff's expenditures, restitution would be improper. Taxpayers for Animas-La Plata v. Animas-La Plata, 739 F.2d 1472, 1479.

C.A.D.C.1971. Cit. but dist. Certain railroads failed to hire the required number of firemen proscribed by the union contract. The union brought an action seeking to recover the wages that the railroad would have paid had the proper number been employed and to apply this recovery to the class most nearly approximating those

harmed--union firemen. The court refused to grant this relief because the class actually injured and the class that would be benefitted were not sufficiently related. Theories that would allow recovery, were held to apply only to cases of intentional tortious conduct or contractual relations other than employer-union. Bangor & A.R. Co. v. Brotherhood of Loc. Fire. and Eng., 143 App.D.C. 90, 442 F.2d 812, 821.

D.Del.1955. Sec. and com. c quot. and fol. Where parent corporation, which planned to liquidate subsidiary, purchased Class B stock of subsidiary, and withheld information as to extent of assets, Class B shareholders were entitled, in suit for breach of duty, to recover proportionate share of value of assets at time of liquidation. Speed v. Transamerica Corp., 135 F.Supp. 176, 190, modified (C.A.3) 235 F.2d 369.

N.D.Iowa, 1954. Com. a quot. in sup. In action for restitution, court held that where warehouse company knowingly colluded with insolvent meat packer to substitute cattle purchased and paid for by packer's purchasing agent for beef carcasses previously removed from warehouse without authority from bank which held warehouse receipts for such carcasses as collateral on loan to packer, warehouse company was bound to make restitution to agent to extent of value of cattle thus substituted. Twohig v. Lawrence Warehouse Co., 18 F.Supp. 322, vacated (C.A.8) 224 F.2d 493.

D.Md.1968. Coms. c and e cit. in dictum. The plaintiff vendors of stock in a land and title company sought a rescission of the sale and/or damages from the defendants, the majority stockholders and operators of the corporation, on the grounds that the latter had violated rule 10b-5 of the SEC. The plaintiffs, unschooled in business transactions, sold their stock at a profit but to their disadvantage after the defendants and their agents had misrepresented the corporation's need for funds. The court recognized in ascertaining damages that, had the plaintiffs pressed for money damages, they would have been entitled to measure such damages by taking into account the accretions in value occurring within a reasonable time after they discovered the defendants' tortious conduct, as well as those occurring within the date of such conduct or the date of their demand after such conduct; however, since they did not choose to do so, the court was willing to conditionally grant the plaintiffs a rescission. Baumel v. Rosen, 283 F.Supp. 128, 146, 147, aff'd in part and rev'd in part, 412 F.2d 571 (4th Cir.1969).

E.D.N.Y.1969. Cit. in sup. This was an action by minority stockholders of an outdoor advertising corporation, which was merged into its dominating majority stockholder, for accounting and restitution. The claim was predicated on various grounds including breach of fiduciary obligations by said dominant stockholder, illegality of the merger and misrepresentations contained in the proxy material. The court held, inter alia, that where the return of the parties to status quo ante is not possible, the restitutional basis of recovery is the value of the property at the time the sale was consummated, or a higher value at a subsequent time if the value of the property has thereafter fluctuated or additions have been made thereto. Gerstle v. Gamble-Skogmo, Inc., 298 F.Supp. 66, 101.

E.D.N.Y.1971. Com. c cit. in disc. This was a proceeding on a special master's report determining the amount of restitution due to the plaintiffs for damage sustained because of reliance on a false and misleading proxy statement which the defendant issued to obtain votes of the plaintiffs and others in favor of a corporate merger. Although the court recognized that objections to the formula provided in the original decree would normally be ignored under the principle that the defendant by its conduct was estopped from raising such objections at this late hour, the court adopted a new formula because it concluded that the old formula of valuation of damages of its original decree was impractical and speculative, being erroneously based on the highest value of certain fluctuating values of assets when there was no showing that the plaintiffs, by the act of the defendant, were deprived of an opportunity to gamble on fluctuating prices. Since the misrepresentation related only to static elements of liquidating values of the properties, the plaintiffs could recover only their share of profits received by the defendant using the value of the subsidiary stock on the date of the merger. Gerstle v. Gamble-Skogmo, Inc., 332 F.Supp. 644, 647, modified, 478 F.2d 1281 (2d Cir.1973).

E.D.Va.1980. Quot. in disc., quot. in part in ftn., cit. in sup., com. (c) quot. in disc. The plaintiff, a diversified

financial services organization and sophisticated financial investor, sued the defendant insurance holding company, which had repurchased a block of its own stock from the plaintiff, on the ground that the defendant had misrepresented and failed to disclose to the plaintiff prior to the sale of the shares the existence of recent substantive merger negotiations between the defendant and interested acquirer companies. The plaintiff sought rescission of the contract and restitution of its shares in the defendant or, alternatively, damages. Holding that the plaintiff would not have sold its shareholdings in the defendant in January 1978 at the selling price had it known of the merger negotiations, the court found the defendant liable to the plaintiff. The court stated that, although the plaintiff was entitled to rescission of the contract and restitution of its shares in the defendant as it had requested, this relief was unavailable to the plaintiff because the defendant had ceased to exist after a 1979 merger. The court therefore awarded the plaintiff the monetary equivalent of rescission or rescissional damages, which were to be computed on the basis of the market value of the stock at a reasonable time, in this case, two weeks, after public disclosure of the fraud, i.e., the secret merger negotiations. Am. General Ins. Co. v. Equitable General Corp., 493 F.Supp. 721, 763, 765.

Del.1966. Cit. in dictum. The plaintiffs, who sold their stock to the defendant, now allege that the sale was induced by fraudulent misrepresentations. The court, assuming the allegations to be true, determined that the true measure of damages should be the difference between the actual value of the stock and the price paid, but held that the lower court had improperly determined the value of the stock by comparing incomparables and remanded for a new determination of the true value. Poole v. N.V. Deli Maatschappij, 224 A.2d 260, 264.

Del.1981. Quot. in sup. Class action was brought seeking damages for minority stockholders as a result of the breach of a fiduciary duty in connection with a tender offer by a majority stockholder. Following a judgment for the defendants, this court reversed and remanded on the grounds that the tender offer had failed to make a full disclosure. On remand, the lower court entered judgment for the defendants as to damages and an appeal was taken. This court stated that rescission calls for the cancellation of the bargain and return of the parties to the status quo, and where this is impossible because of the disposal or retirement of the stock involved, the proper measure of damages should be the equivalent value of stock at the time of resale or at the time of judgment. The court held, inter alia, that although rescission was the preferable remedy, rescission was not feasible due to merger and other corporate changes. Therefore the majority stockholder should be required to pay damages to the plaintiffs measured by the equivalent value of corporate stock at the time of judgment. Lynch v. Vickers Energy Corp., 429 A.2d 497, 502.

Del.Super.1948. Cit. in sup. Where there was a conversion of stock of fluctuating value, the measure of damages was the highest value of the stock from the time of the conversion up to a reasonable time after the owner received notice of the conversion plus interest. Wyndham, Inc. v. Wilmington Trust Co., 59 A.2d 456, 459, 5 Del.Super. 324.

Ill.1955. Cit. in sup. Where plaintiff, in reliance upon defendant's promise to convey realty to plaintiff, made valuable improvements upon said realty, and defendant conveyed realty to a third person, plaintiff was entitled to an equitable lien on premises for reasonable value of permanent improvements, and was not limited to recovery of amount by which value of property was enhanced. Pope v. Speiser, 7 Ill.2d 231, 130 N.E.2d 507, 511.

Me.1979. Cit. in disc. Plaintiffs brought an action against a real estate broker who had assisted them in the purchase of a residential property. The plaintiff's alleged fraud and violation of an unfair trade practices statute because the property was found to be one-half of an acre rather than the advertised three-quarters of an acre. The trial court found for the defendant and the appellate court affirmed. The appellate court noted that the applicable statute provided that restitution was defined as a person's recovery of benefits which he had conferred on another in circumstances making it unjust or inequitable for the other to retain those benefits. However, the plaintiff's complaint herein did not state a cause of action for restitution. The court stated that the plaintiffs could have maintained a cause of action for restitution if the parties had arrived at a contract price based upon a per acre computation and if the plaintiffs had paid the price in ignorance of the mistake in the acreage. Bartner v. Carter, 405 A.2d 194, 202.

Mich.1956. Quot. in dictum in diss. When wrongdoer converts property of aggrieved party and sells it, and the aggrieved party waives his right to proceed in trespass on the case and declares in assumpsit, the aggrieved party is deemed to have elected to regard the wrongdoer as having made such sale for the aggrieved party's use and benefit, and the aggrieved party is entitled to recover amount received by the wrongdoer from the sale. Janiszewski v. Behrmann, 345 Mich. 8, 75 N.W.2d 77, 93.

Miss.1982. Com. (f) quot. in diss. op. The plaintiff, a corporation engaged in the business of designing and selling house plans, brought this action against the defendants, a newly formed competing corporation, seeking damages and an injunction enjoining the defendants from using residential house plans belonging to the plaintiff corporation which had been wrongfully taken by one of the defendants, a former corporate officer of the plaintiff. The defendant, while an officer of the plaintiff, had duplicated approximately 74 house plans on the plaintiff's machines and had stored them at his home without the knowledge of the plaintiff. After he severed all his connections with the plaintiff, the defendant began using these plans in his new business. The trial court entered a permanent injunction against the use of the plans and awarded damages. On appeal, the defendants argued that the house plans were neither confidential nor trade secrets; therefore they committed no wrongs in using them. This court held that, although the ideas and information set forth on the plans did not constitute private property, the reproduced copies did, and the defendant had a fiduciary duty, which he breached, to return them to the plaintiff when their business connection ended. This court held that the grant of the permanent injunction was an error because even in trade secret cases, former employees were entitled to injunction relief for no longer than it would take the former employee to secure the same information by individual means. This court stated that the amount of damages should be fixed at the amount of profits made by the defendant from the sale of the reproduced copies for the reasonable length of time that it would have taken him to have reproduced the plans by individual means, plus the reasonable market value of the reproduced copies at the time of the conversion. The court remanded for an exact determination of damages. The dissent argued that the award of damages should be the total amount of profits which the defendants admitted they made from the wrongful use, because the general rule stated that when a trustee wrongfully converted the property of his principal to his own use, he should not be permitted to retain any of the profits realized from his wrongful use. Planhouse, Inc. v. Breland & Farmer, Etc., 412 So.2d 1164, 1168, appeal after remand 453 So.2d 692 (1984).

Or.1955. Cit. in sup. Where corporate officers, through misrepresentation, purchased stock from stockholders, then divided stock among themselves in unequal proportions in anticipation of dissolution of corporation, profiting on liquidation, liability of officers to make restitution to stockholders under theory of unjust enrichment was joint and several. Bernes v. Eastern & Western Lumber Co., 205 Or. 553, 287 P.2d 929, 947.

Pa.Super.1976. Quot. in disc. Plaintiffs, husband and wife, at the encouragement of defendant Peters, invested in a private club. On discovering that they were the sole investors and the their investment was plagued by appropriation and fraud, they brought suit first on a conspiracy theory, then on an unjust enrichment and/or conversion theory against various people allegedly involved in the scheme. Only defendant Caputo filed an answer. The jury found for plaintiffs. The superior court, in granting a new trial, held that even assuming plaintiffs, did establish criteria for recovery on either theory, there was no support in the record for the $5,000 jury verdict. Recovery on an unjust enrichment theory would involve relief in the nature of restitution measured by the amount of unjust enrichment to the defendant, and not measured by the amount of the investment. Recovery on a conversion theory would involve relief also in the nature of restitution--measured by the amount of plaintiffs' loss which in turn is measured by the value of the property at the time of conversion. The court further noted that the question of damages was directly intertwined with that of liability but that the liability issues were presented by the plaintiffs in an extremely confusing manner. The dissent was of the opinion that judgment should be reduced to $5,000, the amount defendant Caputo was unjustly enriched in connection with the transfer of a liquor license to the club. The dissent contended that defendant was not otherwise unjustly enriched, that defendant and his company gave value for whatever property they received, and that they had no notice of fraud. Diesel v. Caputo, 244 Pa.Super. 195, 366 A.2d 1259, 1266.

Pa.Super.1983. Quot. but dist., com. (c) cit. in sup. and cit. in ftn. The plaintiff brought a conversion action

against a city to recover the value of a car which was confiscated by the city and which the city was thereafter unable to locate. The trial court entered judgment for the plaintiff, and the city appealed. This court held, inter alia, that the trial court erred in awarding damages based on the value of the car at the time of trial pursuant to an improper application of a rule providing that, in compensating for the conversion of items fluctuating in value, a court could base an award on market value other than that at the time of conversion. The plaintiff succeeded in demonstrating that the car appreciated in value, as distinguished from fluctuating in value. This court vacated and remanded for a new trial on the issue of damages, with instructions to assess the value of the car at the time of conversion. Sullivan v. City of Philadelphia, 314 Pa.Super. 381, 460 A.2d 1191, 1193, 1194.

Tex.Civ.App.1973. Com. f quot. in part in sup. Plaintiffs, who owned an income producing property, sold it to one of the defendants, the payee of the notes exchanged for plaintiffs' real estate. This defendant then conveyed the property to his wholly owned corporation, the other defendant, which in turn sold it to a bona fide purchaser. Upon the bankruptcy of the corporation securing the notes, plaintiffs realized they had been defrauded, and they brought this action to rescind the sale of the property and to impress a constructive trust on the proceeds of the subsequent sale of the property to the bona fide purchaser. Defendants appealed an adverse judgment, on the ground, inter alia, that it was error to award plaintiffs the full consideration paid for the second sale of the property, because this was in excess of plaintiffs' sale price. The court held that the proceeds of defendants' sale were impressed with a constructive trust in favor of the plaintiffs, and that although the trust could be enforced only on the proceeds remaining in the hands of defendants at the time the lower court's judgment was rendered, plaintiffs were also entitled to a judgment against defendants for the balance of the proceeds, including defendants' "profit." Bierschwale v. Oakes, 497 S.W.2d 506, 520, rev'd 516 S.W.2d 125 (1974).

Wash.1943. Com. f cit. in sup. Where a constructive trust was established as to property acquired by defendant, refusal to allow defendant a credit for net loss of operations during period covered by the accounting was not error, since a constructive trustee is generally not entitled to recover losses resulting from the operation of property belonging to another. Ryan v. Plath et al., 18 Wash.(2d) 839, 872, 140 P.(2d) 968, 983.

Case Citations July 1986 -- June 2005:

D.Md.2000. Cit. in disc. The Commodity Futures Trading Commission sued, among others, manager of companies that promoted investments in foreign currency futures, alleging, in part, fraud and misappropriation of customer funds in violation of the Commodity Exchange Act. Granting Commission's motion for summary judgment against defendant, the court held, inter alia, that to prevent an impermissible double recovery against defendant, Commission was entitled to an order requiring restitution of customers' investments, but not an additional disgorgement award encompassing the salary and commissions received by defendant, since defendant's salary and commissions were taken out of the funds that investors paid in. Commodity Futures Trading v. Noble Wealth Data, 90 F.Supp.2d 676, 693.

D.Mass.1990. Quot. in sup., com. (c) quot. in sup. Two investors sued a brokerage house and an account supervisor for securities fraud, alleging that the supervisor recommended they sell shares of stock, which the brokerage purchased in its role as a market maker, a dealer holding itself out as willing to buy and sell a particular stock for its own account on a regular or continuous basis. The stock rose substantially in value following the sale. Acting on a magistrate's recommendations, the court awarded partial summary judgment for the defendants but allowed further discovery to determine whether the defendants as a market maker for the stock, had enjoyed any profit from the stock's sale. The court said the prospective profits sought by the plaintiffs were too speculative to permit recovery absent a showing that either defendant had profited from the supervisor's sell recommendation. Hutt v. Dean Witter Reynolds, Inc., 737 F.Supp. 128, 133, 134.

Colo.App.1995. Cit. in headnote, cit. in sup. Parents whose son quit his job and moved back to parents' home in order to modernize and make more productive their packing plant, all based on their allegation that he would eventually inherit the land, sold farm and then brought action alleging that son fraudulently induced them to release a deed of trust he had executed in their favor. Son counterclaimed for, inter alia, unjust enrichment. When

parents claimed they were unable to proceed with the litigation, the trial court entered judgment for son on his counterclaims. Affirming, this court held that where son conferred a benefit on parents by converting grassland into a productive farm and parents sold the land at a price representing a substantial increase over their cost, son was entitled to receive compensation in the amount of parents' enrichment. Engel v. Engel, 902 P.2d 442, 443, 445.

Fla.App.2004. Cit. in disc. Film-editing company sued software company and another film-editing company that bought part of software company's business for unjust enrichment, inter alia, alleging that buyer's acquisition of source code for certain software violated plaintiff's rights pursuant to plaintiff's software-development contract with software company. Trial court entered judgment on jury verdict for plaintiff, awarding $8.9 million for unjust enrichment. This court reversed in part and remanded, holding, inter alia, that, despite contractual provision, plaintiff's interest in source code was limited to 50%, and the measure of its recovery for buyer's improper acquisition of code was limited accordingly. Thus, trial court should have ordered remittitur of $4.45 million in order to reduce award by one-half. Montage Group, Ltd. v. Athle-Tech Computer Systems, Inc., 889 So.2d 180, 196.

Hawaii, 1998. Quot. in ftn. in sup., com. (c) quot. in part in ftn. Philippine national discovered booty allegedly plundered by the Japanese Army during World War II buried near his home; his estate sued estate of former Philippine president, among others, for, inter alia, conversion, arguing that defendants stole his find. The trial court entered judgment on a jury verdict for plaintiff. Affirming in part, reversing in part, and remanding, this court held that, while Philippine law probably could have applied, the law of Hawaii controlled, since the parties failed to address choice-of-law issues or provide the court with the applicable provisions of Philippine law; that defendant-wife should not have been substituted as personal representative of her late husband's estate; that judgment against wife was appropriate based on her individual wrongdoing; that late husband had engaged in conversion; and that the proper measure of damages was the value of the goods within a reasonable time after national learned of the conversion. Roxas v. Marcos, 89 Hawaii 91, 969 P.2d 1209, 1267, 1268.

Me.1988. Cit. in disc. The plaintiff sold his entire interest in the family business to other family members as a result of disagreements with his brother, the other primary stockholder. The plaintiff later sued his brother for, inter alia, violating the fiduciary duties he owed the plaintiff as a business associate and wrongfully forcing him to sell at an unfairly low price. The trial court entered judgment on a jury verdict for the plaintiff. This court vacated the judgment and remanded, holding that the defendant was entitled to an instruction on the theory of substituted contract. The court stated that whether the parties intended the agreement to sell as a standard accord and satisfaction or as a substituted contract was a question of the parties' intent, properly reserved to the factfinder. On the issue of damages, the court held that, if the jury on remand found that the defendant had violated his fiduciary duty, the plaintiff could seek damages for the amount he was wrongfully underpaid, with interest from the sale date to the judgment date. Rosenthal v. Rosenthal, 543 A.2d 348, 356.

Utah, 1993. Cit. in ftn. in sup. Plaintiff steel fabricator sued defendant seller of steel for fraud, conspiracy, conversion, and violation of Utah's Pattern of Unlawful Activity Act, alleging that defendant purchased stolen remnant steel from plaintiff's employee at a fraction of its value and then paid kickbacks to plaintiff's employee for contracts to sell the steel back to plaintiff at fraudulently inflated prices. The trial court ruled in plaintiff's favor on its fraud, conspiracy, and conversion claims but dismissed plaintiff's other claims. Affirming in part, this court held that plaintiff was entitled to elect as its measure of damages the amount of money defendant made from its sales of the converted steel, rather than the wholesale price, because defendant knew that its conversion and disposal of the steel were wrongful. Since the evidence established that defendant engaged in a pattern of unlawful activity entitling plaintiff to double damages under the Utah statute, the court reversed the dismissal of plaintiff's statutory claim and remanded for entry of judgment doubling plaintiff's actual damages. Alta Industries Ltd. v. Hurst, 846 P.2d 1282, 1291.

Utah App.1999. Com. (f) quot. in conc. and diss. op. Sublessees sued lessors for conversion of certain restaurant equipment. The trial court entered judgment for plaintiffs, awarding them the salvage value of the equipment.

Affirming, this court held that the lower court did not err in awarding damages rather than possession, and that plaintiffs were not entitled to the in-place value of the equipment. Concurring and dissenting opinion believed that defendants should have been prevented from reaping a windfall or benefiting from their wrongful conduct, and that such a goal was best achieved by awarding plaintiffs the in-place value of the equipment. Lysenko v. Sawaya, 973 P.2d 445, 450.

Wash.2005. Quot. in ftn. Following divorce proceedings, former wife moved for judgment against ex-husband for allegedly converting stock options that trial court assigned to wife pursuant to the divorce decree. Trial court found that husband did convert wife's stock options, and ordered damages based on fair market value of stock as of the moment they were exercised. The court of appeals affirmed the conversion, but ruled that the conversion took place when husband sold stock, rather than when options were exercised. This court also affirmed the conversion, but reversed in part and remanded on the damages issue, and held that because husband knew that he was not entitled to the options, the standard measure of damages, namely, the value of the options at the time they were exercised, applied. In re Marriage of Langham and Kolde, 153 Wash.2d 553, 106 P.3d 212, 220.

Case Citations July 2005 -- April 2006:

Cal.App.2006. Quot. in sup., com. (b) quot. in sup. Consumers brought a class action against tool manufacturer for violations of state false-advertising and other statutes, alleging that it labeled and advertised its products as "Made in U.S.A." when parts of those products were manufactured outside the United States. The trial court granted plaintiffs' motions for summary adjudication on liability, and awarded restitution damages and other relief. Reversing in part and remanding, this court held, inter alia, that the trial court erred in granting its restitution order because there was no evidentiary support in the record concerning the amount of restitution necessary to restore plaintiffs to the status quo ante. Colgan v. Leatherman Tool Group, Inc., 135 Cal.App.4th 663, 698, 699, 38 Cal.Rptr.3d 36, 62.

(1937)

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Restatement (Third) of Restitution & Unjust Enrichment § 3 (D.D., 2000)

Restatement of the Law -- Restitution
Restatement (Third) of Restitution And Unjust Enrichment (Tentative Drafts) FNa
Current through September 2006

Part I. Introduction
Chapter 1. General Principles

§ 3. No Profit From Conscious Wrongdoing

Discussion Draft
Case Citations Through June 2005

Discussion Draft:

A person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to the other for any profit realized by such interference.

Comment:

a. Enrichment. A conscious wrongdoer may not lawfully profit from a wrongful act. This cardinal principle of the law of unjust enrichment has been traditionally expressed by the formula that "A person is not permitted to profit by his own wrong at the expense of another." Restatement of Restitution § 3. The language of the present section describes the reach of this principle in practice.

Because the profits referred to in this section are realized in consequence of the defendant's wrongdoing, the same transaction that makes the defendant liable in restitution will often result in liability for a tort or other breach of duty. The most obvious distinction between these overlapping theories of liability is that liability in restitution is measured by the benefit to the defendant, whereas liability for breach of duty is measured by the injury to the plaintiff. As a practical matter, therefore, the claim in restitution will have independent significance chiefly in those cases where the benefit to the defendant from defendant's wrongdoing exceeds the injury to the plaintiff; or where the measure of benefit to the defendant is at least more easily established.

Any profit realized in consequence of intentional wrongdoing is unjust enrichment because it results from a wrong to the plaintiff. It is unjustified enrichment because it results from a transfer to the defendant, direct or indirect, that lacks an adequate legal basis. In the great majority of cases, the legal basis that is lacking is a contract that the defendant consciously neglected to make with the plaintiff. The missing contract is one in which the plaintiff would have authorized the defendant to make use of the plaintiff's property, or licensed some other act by the defendant otherwise constituting an infringement of the plaintiff's legally protected rights.

b. Disgorgement. Where the defendant has acted in conscious disregard of the plaintiff's rights, the whole of any resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed both (i) the measurable injury to the plaintiff, and (ii) the reasonable value of a license authorizing the defendant's conduct. See Illustrations 1-2.

Illustrations:

1. A publishes B's work in conscious violation of B's copyright, realizing a profit of $5,000. The provable economic injury to B, measured by the best available evidence of lost sales, is $50. If A had negotiated with B ahead of time, B would have licensed A's publication for a fee of $500. A is liable to B in restitution for $5,000.

2. A steals B's car and sells it for $6,000. At the date of the theft, the car had been reliably appraised at $4,000, and B had advertised it for sale at $5,000. A is liable to B in restitution for $6,000.

Restitution requires full disgorgement of profits by a conscious wrongdoer, because any lesser

liability would provide an inadequate incentive to contract. On the facts of Illustration 1, for example, A might elect not to negotiate with B if A's anticipated liability for infringement were anything less than full disgorgement, since any lesser liability leaves open the possibility that the nonconsensual transaction might be more profitable for A than the consensual one.

The conscious wrongdoer is the mirror image of the officious restitution claimant. Instead of negotiating beforehand for compensation, the officious claimant confers a benefit, then sues the recipient to recover the value of what was given. The law deters this form of misbehavior by denying a claim in restitution. See § 2, Comment e. Here, instead of negotiating beforehand for a license, the conscious wrongdoer takes what he wants, proposing to litigate--if detected--about the value of what was taken. The law deters this form of misbehavior by imposing liability for full disgorgement. The two forms of misbehavior are fundamentally the same, since each is an attempt to avoid the ordinary necessity of conducting exchange transactions on the basis of contract.

c. Conscious wrongdoing. Liability to disgorge profits is ordinarily limited to instances of conscious wrongdoing: the specific disincentives created by the disgorgement remedy (see Comment b) have no application to cases of inadvertent or involuntary wrong. See § 52. 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. Disgorgement in such instances serves a prophylactic function. See § 40.

REPORTER'S NOTE

a. Enrichment. On the plaintiff's choice between an action in tort and an action in restitution, compare Laycock, The Scope and Significance of Restitution, 67 Tex.L.Rev. 1277 (1989), with Kull, Rationalizing Restitution, 83 Calif.L.Rev. 1191 (1995); [ ].

b. Disgorgement. Illustration 1 is based on Taylor v. Meirick, 712 F.2d 1112 (7th Cir.1983). See generally Kull, Restitution and the Noncontractual Transfer, 11 J. Contract L. 93 (1997); [ ]. Illustration 2 represents the standard scenario traditionally (and confusingly) referred to as "waiver of tort and suit in assumpsit." See 1 Palmer, Law of Restitution § 2.2(a) (1978 & Supp.); Corbin, Waiver of Tort and Suit in Assumpsit, 19 Yale L.J. 533 (1912). The tort victim, of course, does not "waive" the legal rights that accrue in consequence of the defendant's wrong. But in the circumstances of a profitable tort--where the benefit realized by the defendant exceeds the injury to the plaintiff--the plaintiff may elect to pursue a claim in restitution to recover the amount of the defendant's unjustified enrichment, rather than a claim in tort to recover compensation for harm.

Case Citations Through June 2005:

D.Mass.2004. Quot. in disc. (Disc. Draft 2000). End payors brought a class-action suit against a drug company for the company's unlawful delay in introducing a generic drug by wrongfully filing patent lawsuits. The court explained its grant of class certification, noting that the various laws of the states in which consumer purchases were made would apply. The class was reduced to exclude those states in which variations in state laws were sufficiently significant to negate predominance, and the court limited its consideration to 12 states that permitted indirect purchaser actions under antitrust, consumer protection, or unfair-trade-practices statutes, and allowed for causes of action for unjust enrichment. In re Relafen Antitrust Litigation, 221 F.R.D. 260, 277-278.

S.D.N.Y.2001. Illus. 1 cit. in ftn. (Discussion Draft, 2000). Corkscrew manufacturer brought, in part, claims for unfair competition and trade-dress infringement against competitor. Granting defendant's motion to dismiss the unfair-competition claim, this court held, inter alia, that because plaintiff did not show a likelihood of confusion between the parties' corkscrews, it was not entitled to the equitable remedy of disgorgement of defendant's profits. Metrokane, Inc. v. The Wine Enthusiast, 160 F.Supp.2d 633, 641.

FNa This Draft is being circulated for discussion and comment. The Council's consideration of the material herein has not been completed. As of the date of its publication the views expressed in the Draft have not been considered by the members of The American Law Institute, and therefore they do not represent the position of the Institute on any of the issues with which the Draft deals.

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Witkin
Summary of California Law, Tenth Edition
B.E. Witkin and Members of the Witkin Legal Institute

Chapter I. Contracts
XX. QUASI-CONTRACTS AND RESTITUTION
A. In General.

1. [§ 1013] Nature of Restitution.

The right to restitution or quasi-contractual recovery is based upon *unjust enrichment.* Where a person obtains a *benefit* that he or she may not *justly retain,* the person is unjustly enriched. The quasi-contract, or contract "implied in law," is an *obligation* (not a true contract; see supra, § 103) created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money. (See *Court* (1934) 1 C.2d 527, 531, 36 P.2d 642; *Ghirardo v. Antonioli* (1996) 14 C.4th 39, 51, 57 C.R.2d 687, 924 P.2d 996, 4 *Summary* (10th), *Security Transactions in Real Property,* § 215; *Petersen v. Lyders* (1934) 139 C.A. 303, 305, 33 P.2d 1030; *Branche v. Hetzel* (1966) 241 C.A.2d 801, 807, 51 C.R. 188, quoting the text; *Kossian v. American Nat. Ins. Co.* (1967) 254 C.A.2d 647, 651, 62 C.R. 225, infra, § 1016; *First* *Perry* (1992) 11 C.A.4th 1657, 1662, 15 C.R.2d 173, *Maglica v. Maglica* (1998) 66 C.A.4th 442, 449, 78 C.R.2d 101, quoting the text; *Lectrodryer v. SeoulBank* (2000) 77 C.A.4th 723, 726, 91 C.R.2d 881 [bank was unjustly enriched when it refused to honor prepaid letter of credit and retained funds after allowing letter to expire]; *California Med. Assn. v. Aetna U.S.* 151, 170, 114 C.R.2d 109, citing the text [where health care plan delegated payment obligation to intermediaries who were then required to reimburse doctors who had furnished services to plan's enrollees, plan was not unjustly enriched even though it would benefit from intermediaries' actions]; *Desert Healthcare Dist. v. PacifiCare FHP* (2001) 94 C.A.4th 781, 786, 114 C.R.2d 623 [same]; Rest., Restitution § 1; Rest.2d, Contracts § 4, Comment b; 1 Corbin (Rev. ed.), § 1.20.; 1 Williston 4th, § 1:6; 83 Cal. L. Rev. 1191 [liability based on unjust enrichment]; 19 Hastings L. J. 991 [symposium on restitution, with extensive bibliography]; 36 Loyola L.A. L. Rev. 777 [symposium on restitution]; 66 Am.Jur.2d (2001 ed.), Restitution and Implied Contracts § 1 et seq.; Cal. Civil Practice, 3 Business Litigation, § 34:1 et seq.)

However, "[t]he mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor." (Rest., Restitution § 1, Comment c; see *Marina* *Assn. v.* *Co.* (1986) 181 C.A.3d 122, 134, 226 C.R. 321.)

Restitution may also be awarded in contract actions, where it often follows rescission (which typically applies only in contract actions). However, restitution is also available as a remedy to redress statutory violations. And in a statutory action, rescission is not a prerequisite to granting restitution. (*People v. Beaumont Inv. Ltd.* (2003) 111 C.A.4th 102, 132, 3 C.R.3d 429 [in unfair competition law action involving leases that violated particular ordinance, it was not necessary to rescind leases before ordering restitution for unfair competition]; on rescission, see supra, § 930.)

The cause of action, just as one based on true contract, is *assignable* and provable in bankruptcy. (Rest., Restitution § § 5, 149.)

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Witkin
Summary of California Law, Tenth Edition
B.E. Witkin and Members of the Witkin Legal Institute

Chapter IX. Torts
XVII. DAMAGES: IN GENERAL
C. Punitive or Exemplary Damages.
8. Necessity of Actual Damages.

c. [§ 1609] Separate Award Is Not Essential.

If actual damages are alleged and proved, a separate award of compensatory damages is not a necessary foundation for an award of punitive damages. In *Clark v. McClurg* (1932) 215 C. 279, 9 P.2d 505, the jury brought in a verdict against defendant for publication of matter libelous per se, but assessed the damages as "$... dollars" actual damages, and $5,000 punitive damages. *Held,* the proof of a libel per se entitled the plaintiff to actual or compensatory damages, and the jury's inadvertence in assessing the entire amount as punitive damages was a mere error of form. (215 C. 285.) (See *Contento v. Mitchell* (1972) 28 C.A.3d 356, 358, 104 C.R. 591 [following *Clark;* slander per se, judge awarded $3,000, with conclusion of law characterizing entire amount as punitive damages]; 7 *Cal. Proc.* (4th), *Trial,* §372.)<<* p.1114>>

Similarly, a general verdict in a single sum for compensatory and punitive damages will be sustained in the absence of a request for segregation of the amounts. (*McChristian v. Popkin* (1946) 75 C.A.2d 249, 262, 171 P.2d 85; *Rogers v. Kabakoff* (1947) 81 C.A.2d 487, 491, 184 P.2d 312.) (See 7 *Cal. Proc.* (4th), *Trial,* §375 et seq.)

In *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980, infra, §1620, the court disapproved of the undifferentiated verdict form (single space for damages and no means of segregation). Such a verdict makes review of the issue of excessive damages "next to impossible" for the trial judge on motion for new trial and for the appellate court on appeal. (21 C.3d 927.) However, under the facts, review was not difficult: Plaintiff husband was precluded by statute from recovering damages for emotional distress suffered by decedent wife, and the economic damages were no more than $10,000; hence, the amount of punitive damages awarded by the reduced verdict was about $740,000. (21 C.3d 927.)

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