THE RESTITUTION REVIVAL AND THE GHOSTS OF EQUITY
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The irreparable injury rule is dead. Long live the irreparable injury rule.

ABSTRACT

A restitution revival is underway. Restitution and unjust enrichment theory, born in the United States, fell out of favor here while surging in Commonwealth countries and beyond. The American Law Institute’s Restatement (Third) of Restitution and Unjust Enrichment streamlines the law of unjust enrichment in a language the modern American lawyer can understand.

Restitution is often misinterpreted as always equitable given its historical focus on fairness. Such misguided temptations blur decisionmaking on the constitutional right to a jury trial, which “preserves” the right to a jury in federal and state cases for “suits at common law” satisfying specified dollar amounts. The Restatement explains that the law of restitution originated in law, equity, and sometimes both. Then the Restatement notably attempts to detangle restitution and unjust enrichment from the law-equity labels. It explicitly eschews equity’s irreparable injury prerequisite, which historically commanded that no equitable remedy would lie if an adequate legal remedy existed.

Complete merger of law and equity remains elusive in American civil law. The rhetoric of the irreparable injury rule lingers two decades after Professor Doug Laycock’s proof of its death and corresponding autopsy. The stubborn and persuasive lure of equity’s archaic rules ensnares current law reform debates such as the American Law Institute’s restitution project. As the project seeks to shed equity’s anachronistic language and requirements, it cannot resist hearing equity’s call from the grave.

Will restitution law avoid the pitfalls of the Supreme Court’s recent injunction cases that return to historical equitable principles and reanimate equity’s irreparable injury rule?

I argue that the ALI’s groundbreaking restitution project will suffer because it adopts language of inadequacy and affirms the hierarchy of remedies, which prefers legal to equitable remedies. The Restatement notably liberates all restitutionary remedies, including those emanating from equity (e.g., constructive trusts), from demonstrating the inadequacy of available remedies at law. This shift moves in the right direction, but ultimately the project falls short in a provocative section that authorizes disgorgement of profits for opportunistic breaches of contract.

The Restatement commands that the disgorgement remedy is attainable only if “the available damage remedy affords inadequate protection to the promisee’s contractual entitlement.” This limitation will block the disgorgement remedy even if plaintiff establishes the substantive elements of deliberate and profitable breach. The inadequacy requirement muddies already murky waters of unjust enrichment. It harkens to equity and reinforces remedial hierarchy based on formulaic rather than substantive preferences.

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The Restatement acknowledges that “[s]uch a test resembles in some respects the inadequacy of remedies at law,” but the Comments caution that it would be “serious error to regard the newly formulated rule . . . as ‘equitable.’” Accordingly, it’s a new legal remedy, but the court must conduct an analysis akin to whether the judge would have allowed the equitable remedy of specific performance. As Professor Laycock lamented about the irreparable injury rule, this analogy “highlights the obsolete distinction between law and equity, and subordinates more functional schemes for classifying remedies.” The disgorgement-remedy debate should focus on its appropriate goals rather than navigation of a quasi-jurisdictional bar to a legal remedy.

The inadequacy requirement may purposefully narrow a bold, and perhaps feared, restitutionary remedy, but it creates an unnecessary confusion by taking the proper focus away from the breaching parties’ opportunism and redirecting the focus to the adequacy of plaintiff’s compensation. Even as the restitution revival garners traction, inadequacy haunts this important restitutionary remedy with equity’s ghosts.

**Table of Contents**

I. Restitution, The Elusive Merger of Law and Equity, & Irreparable Injury  
II. The Irreparable Injury Rule is Dead. Long Live the Irreparable Injury Rule.  
III. Restitution Revival and the Shackles of Equity  
IV. Inadequacy’s Inadequacy for Restitution’s Contractual Disgorgement Remedy  
V. Keep on Merging and Embrace Disgorgement Remedy for Opportunistic Breach