

THE RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT: SOME INTRODUCTORY SUGGESTIONS

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Professor and Reporter Andrew Kull has brought reason and order to the law of restitution and unjust enrichment. He has done so with elegant expression and architecture, incisive and insightful comments, and careful analysis and research. With constructive suggestions from his advisers and consulting members of the American Law Institute and other scholars, judges, and lawyers in the United States and elsewhere, and with the careful examination and approval of drafts by the Institute's Council and membership, he has produced a masterpiece, the Restatement (Third) of Restatement and Unjust Enrichment.¹ He has reestablished the subject as a crucial building block of the law along with Contracts and Torts.

In this introductory comment, I will first summarize the structure and key points of the new Restatement and then, using two examples, examine briefly whether and how it might be used to address new claims.²

¹ Professor Kull acknowledges with special appreciation the contribution of Professor Douglas Laycock "whose work on the Restitution project has been (yet another) extraordinary contribution to the work of the American Law Institute. No other adviser to the project was so generous with his time or so consistently pertinent in his observations. (If Laycock agreed with me on a disputed point, I felt I had the strength of ten. If he criticized, I usually changed something.) In the entire history of the Institute, I presume, there can have been very few advisers who gave such valuable assistance to their reporters and their projects." Ltr. From Andrew Kull to Roberta Cooper Ramo, Michael Traynor, and Lance Liebman, Dec. 6, 2010 (on file with the author).

² In general, Restatements aim "at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court." *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* 4 (2005). By definition, Restatements do not purport to answer new questions although they may provide guidance.

I. The Structure and Key Points of the New Restatement

The General Principles: The first and central principle is that “A person who is unjustly enriched at the expense of another is subject to liability in restitution.”³ This principle is not a recipe for unbounded liability. There are basic limiting principles: A person who obtains a benefit without paying for it (for example, the donee of a gift) is not necessarily liable for restitution.⁴ A claimant’s rights may be limited by a valid contract; restitution does not authorize an end run around contract.⁵ A person who confers an unrequested benefit voluntarily will usually not be able to recover in restitution;⁶ and the law will not impose liability on an innocent recipient to a forced exchange,⁷ especially in the United States where we still prize personal autonomy and do not appreciate undue interference with our freedom to make choices. The enrichment must be “unjustified” under the

³ Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011). Unless otherwise stated, all section references as well as references to the “Restatement” are to this Restatement.

⁴ § 2(1): “The fact that a recipient has obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched.”

⁵ § 2(2): “A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.”

⁶ § 2(3): “There is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimants’ intervention in the absence of contract.”

⁷ § 2(4): “Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse.”

law, not simply “unjust” because you as a judge, scholar, or lawyer might think so.⁸

A corollary principle applies that “A person is not permitted to profit by his own wrong.”⁹ Whether the defendant’s conduct is “wrongful” will ordinarily turn on principles outside the scope of the Restatement.¹⁰

The Restatement also makes clear that restitution may be legal or equitable or both.¹¹ A claimant entitled to a remedy for unjust enrichment need not demonstrate the inadequacy of available remedies at law.¹² The term “restitution” connotes both liabilities and remedies for unjust enrichment.¹³ The term does not connote only a remedy.

Throughout the Restatement, the Reporter includes comments that not only explain the black letter but also provide helpful guidance. For example, with regard to torts, the Restatement comments that “Restitution is the law of

⁸ “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 transaction that the law treats as ineffective to work a conclusive alteration in ownership rights. . . . Because of its greater explanatory power, the term *unjustified enrichment* might thus be preferred to *unjust enrichment*, were it not for the established usage imposed by the first Restatement of Restitution. But while the choice between the two expressions may indicate a preferred vantage point, it implies no difference in legal outcomes.” § 1, Comment *b*.

⁹ § 3.

¹⁰ *Id.* at Comment *d*.

¹¹ § 4(1): “Liabilities and remedies within the law of restitution and unjust enrichment may have originated in law, in equity, or in a combination of the two.”

¹² § 4(2): “A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies in law.”

¹³ § 1, Comment *e*, and 1, Reporter’s Notes, paragraph *e*, which notes that “The confused view that ‘restitution’ is merely a remedy appears to result from a historical accident in the American law-school curriculum.”

nonconsensual and nonbargained benefits in the same way that torts is the law of nonconsensual and nonlicensed harms;¹⁴ and, with regard to contracts, that “Contract is superior to restitution as a means of regulating voluntary transfers because it eliminates, or minimizes, the fundamental difficulty of valuation.”¹⁵ The Reporter wisely advises you to avoid the temptation of formulaic checklists,¹⁶ which if you are not careful, could turn into formulaic jury instructions that advance neither comprehension nor clarity.

Liability in Restitution: The law of restitution and unjust enrichment sometimes provides an independent ground for liability, for example, in cases of mistake, and often provides a supplemental or alternative ground for liability, for example in cases of tort or breach of contract.¹⁷ The Restatement has five chapters on liability: transfers subject to avoidance; unrequested intervention; restitution and contract; restitution for wrongs; and benefits conferred by a third person. Under these chapters, there are under a total of forty-four sections that address particular liability issues. The coverage is comprehensive. The liability part includes a specific section

¹⁴ § 1, Comment *d*.

¹⁵ § 2, Comment *c*.

¹⁶ See, e.g., § 1, Comment *d*, referring to the “specious precision” of formulas, and Reporter’s Note, paragraph *c*: “There is an understandable temptation to limit the far-reaching notion of unjust enrichment within the manageable confines of a check list, but the attempt usually leads to trouble.”

¹⁷ In sections 37-39, the Restatement discusses alternative remedies for breach of an enforceable contract.

entitled "Profit from opportunistic breach,"¹⁸ which is one of the Restatement's major contributions to and clarifications of the law and was thoroughly debated and improved as it went through the ALI process.

The Restatement, however, makes clear that "The attempt to make the list [of categories of liability] comprehensive cannot make it exclusive: cases may arise that fall outside every pattern of unjust enrichment except the rule of" section 1.¹⁹ The Restatement thus avoids what Professor John P. Dawson aptly described as "that well-known ailment of lawyers, a hardening of the categories."²⁰

Remedies: The Restatement provides a set of remedies other than compensatory damages for harm. They concentrate on what the defendant has received rather than what the plaintiff has lost.

The remedies cover money judgments and the measure of unjust enrichment focusing primarily on the defendant's gain rather than the claimant's loss. They include remedies enforceable against identifiable property, *i.e.*, rescission and restitution, constructive trust, equitable lien, and subrogation. The Remedies part explains how property may be followed into its product and against transferees; tracing into or through a commingled fund; priority; and restrictions on profitable recovery. It draws

¹⁸ § 39. For specific treatment in this symposium of the opportunistic breach section, see [cite to be supplied].

¹⁹ § 1, Comment *a*.

²⁰ See John P. Dawson, *Restitution or Damages*, 20 Ohio St. L. J. 175, 187 (1959).

important distinctions between innocent recipients and conscious wrongdoers and considers the interests of third party creditors.

Defenses to Restitution: The Restatement's last part includes the defenses that the recipient was not unjustly enriched, equitable disqualification (unclean hands), passing on and rights of third persons, change of position, bona fide purchaser, bona fide payee, value, notice, and limitation of actions and laches. This last section will guide claimants who are searching for an alternative ground of liability in restitution when their tort or contract claims are barred, and guide defendants who wish to assert the bar of a statute of limitations or the defense of unreasonable delay and prejudice caused by an intervening change of circumstances.²¹

II. New Claims

Often, the questions that judges, scholars, and lawyers confront are not just what the applicable law is as coherently set forth in a Restatement but also what the premises are for addressing new problems that are not controlled by restated precedents. I will mention two examples briefly, the issue of social norms and moral rights, and the issue of anticipated contracts that fail to materialize in circumstances accompanied by one party's conduct that edges on and potentially constitutes fraud or misrepresentation, duress, or undue influence.

²¹ § 70.

Social Norms and Moral Rights: Questions of restitution and unjust enrichment might conceivably arise in connection with conduct that is “wrongful” although not necessarily in violation of presently applicable common law or statutes. Such conduct might involve the violation of a social norm, for example, the one prevailing among stand up comics not to steal another’s routine, whether or not it is entitled to legal protection,²² or the violation of a “moral” right such as an author’s moral right to attribution.²³

I do not propose to enter here into the law-norm debate or to engage in a detailed analysis in what is just an introductory comment, but I am at least initially skeptical whether the law of restitution and unjust enrichment is a good place for addressing such issues as the violation of social norms or moral rights. It bears emphasis that the Restatement provides a specific section on “Interference with intellectual property and similar rights,”²⁴ which refers to “legally protected rights.”²⁵ It also refers in another section entitled

²² See Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 Va. L. Rev. 1787 (2008); Dotan Oliar & Christopher Sprigman, *From Corn to Norms: How IP Entitlements Affect What Stand-Up Comedians Create*, 95 Va. L. Rev. In Brief 57 (2009).

²³ See Berne Convention for the Protection of Literary and Artistic Works, art 6bis(1), Sept. 9, 1986, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 (1986).

²⁴ § 42

²⁵ *Id.* The black letter provides that “A person who obtains a benefit by misappropriation or infringement of another’s legally protected rights in any idea, expression, information, image, or designation is liable in restitution to the holder of such rights.” Comment a states that “The rights referred to in this section, and the acts that constitute a prohibited interference, are defined by state and federal law outside the scope of this Restatement.” Thus, the limited statutory right “to claim authorship” provided by the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A, might constitute a legally protected right under section 42.

“Interference with Other Protected Interests” to “legally protected interests.”²⁶ Such specific sections do not necessarily preclude an independent claim for restitution under section 1 but they reflect a general policy of limiting claims to ones that involve “legally protected” rights or interests.

Even if such rights or interests are present, the remedies via money judgment or rights in identifiable property may not be particularly apt. Whether attribution to an author was given, for example, might be relevant to a defense of fair use but additional monetary or equitable remedies for nonattribution are problematic.²⁷ Moreover, unlike a rule of law, sometimes “a custom can withstand legalistic challenges, clever efforts to create exceptions, and pretenses at compliance, and it relies not on sometimes cumbersome enforcement mechanisms but on individual and collective responsibility.”²⁸

Anticipated Contracts that Fail to Materialize: As the law of fraud and misrepresentation, duress, and undue influence is clarified, perhaps in a new Restatement (Third) of Torts: Liability for Economic Harm, new questions (as well as familiar law school questions) may also arise in

²⁶ § 44. This section contains a useful illustration derived from *Moore v. Regents of the University of California*, 51 Cal.3d 120, 793 P.2d 479 (1990). § 44, Comment *b*, Illus. 10, and Reporter’s Note, paragraph *b*.

²⁷ See Michael Traynor & Katy Hutchinson, *Some Open Questions About Intellectual Property Remedies*, 14 Lewis & Clark L. Rev. 453, 461-466 (2010).

²⁸ Michael Traynor, Address at the 85th Annual Meeting of the American Law Institute, 2008 ALI Proceedings 213, 224.

connection with anticipated contracts that do not materialize and for which there is no obvious contract or tort claim. The facts may not readily fall into patterns that are easily governed by precedents or neatly into one of the detailed sections or illustrations of the Restatement.

If the situation essentially involves an effort by the claimant to impose a bargain on an unwilling party and does not involve mistake, fraud, or compulsion, the Restatement almost certainly will preclude a restitution claim.²⁹ The facts may not be all that clear, however. The parties' course of dealing may implicate potentially not only the law of contract and promissory estoppel, but also the Restatement's provisions as well as applicable law on fraud and misrepresentation,³⁰ duress,³¹ or undue influence.³²

These borderline cases may involve an imbalance in bargaining power or sharp practice or the phenomenon of one party stringing the other along.

Potential examples include an inventor or author whose options are foreclosed or limited by a drawn out negotiation with a prospective user of

²⁹ See § 30 and Comments *b* and *c*. For example, Comment *b* states in part that "A private party normally cannot compel another to pay for benefits conferred without request, no matter how appropriate the transaction or how reasonable the terms of the compensation demanded, if the effect of payment would be to complete an exchange that—had it been proposed as a contract—the recipient would have been free to reject;" and Comment *c* states in part that "It frequently happens that one party confers benefits on another in the hope (or the reasonable expectation) of a future contract between them. If the contract is not forthcoming, the performing party will sometimes claim compensation for the benefits conferred in anticipation thereof. Although such a claim may be framed in the language of unjust enrichment, the decisive issues in determining liability involve contract, not restitution." Comment *c* then provides three illustrations in which there is no claim of restitution absent some wrongdoing by the defendant.

³⁰ § 13.

³¹ § 14

³² § 15

the patent, copyright, or trade secret involved; an associate lawyer who is kept on a case while anticipating a partnership and giving up other opportunities when the partners without her knowledge plan to terminate her services when the case is over; a prospective franchisee or employee who relocates in anticipation of a rewarding franchise or job that does not materialize or that turns out to be far less rewarding than expected; or an architectural firm that prepares and submits extensive plans for a city project and knowingly takes the risk that its submission may not be accepted but does not knowingly take the risk that the city will abandon the project.³³

Sometimes such cases will involve too many uncertainties and insufficiently high stakes to make a lawsuit worthwhile. Sometimes the stakes will be high enough to persuade the claimant to bring an action and the uncertainties will be high enough to persuade both parties to settle.

³³ There is substantial literature on this and related topics. On the architect example, see *Sabemo Pty. Ltd. v. North Sydney Municipal Council* [1977] 2 N.S.W.R. 880; Gareth Jones, *Claims Arising out of Anticipated Contracts Which Do Not Materialize*, 18 U. W. ONTARIO L. REV. 447 (1980); Geoffrey F. Cauchi, *The Problem of the Reliance Interest and Anticipated Contracts Which Fail to Materialize*, 19 U. W. ONTARIO L. REV. 239 (1981). By contrast with the *Sabemo* case, the architect who takes both the risk that the plans will not be accepted and the risk that the city will abandon the project does not have a claim in restitution. See § 2, Comment c, Illus. 4. On the failed negotiation set of issues, see, e.g., E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); Friedrich Kessler and Edith Fine, "Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study", 77 HARV. L. REV. 401 (1964); Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 701; Gregory M. Buhl, *Red Owl's Legacy*, 87 MARQ. L. REV. 297 (2003). Compare Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L. J. 71 (2007) with Juliet P. Kostritsky, *Uncertainty, Reliance, Preliminary Negotiations and the Holdup Problem*, 61 S.M.U. L. REV. 1377 (2008).

Sometimes the cases may involve claims in contract or tort that are sufficiently plausible, at least barely, to justify their going to a jury, perhaps along with a claim and an instruction on a count of restitution and unjust enrichment. A rule that forecloses liability, especially one that requires dismissal of a case on demurrer or motion to dismiss, may facilitate sharp or overreaching practice although it might also educate clients and their lawyers to demand contractual protection and not be strung along by seductive yet not quite fraudulent or coercive methods of persuasion.

This area of the law invites examination of the question whether and to what extent the law of restitution should, on the one hand, be solicitous of people who innocently although unwisely or naively lose money, property, or opportunities or suffer impairment of their rights while others are enriched by their loss or, on the other hand, establish barriers to liability and consequently alert people to be wary of being duped and take measures to protect themselves.³⁴

³⁴ The Reporter's Note to section 30, Comment c on anticipation of contract states briefly that "The topic is addressed, from different perspectives, by Restatement of Restitution § 57 (1937) ["gifts made in anticipation of gratuity or contract"] and Restatement Second, Restitution § 6 (Tentative Draft No. 1, 1983)." The Restatement (Second) of Restitution project, which was discontinued, provided in Section 6 ("Benefit in Relation to an Agreement") that: "(1) A person may be unjustly enriched by receiving benefit from the conduct of another in reliance on an agreement between the recipient and the other. (2) A person whose conduct in negotiating for a gain or advantage results in a benefit to him and a loss or expense to another may be unjustly enriched by the benefit if, in the absence of compensation to the other, the conduct appears unconscionable in purpose or effect. No account is taken of uncompensated loss or expense in this connection if it results from a risk fairly chargeable, as between the parties, to the person who bears it. Such loss or expense is taken into account only if it was foreseeable by the person receiving the benefit." Draft

On duress, particularly, the Restatement recognizes that “If unjust enrichment is easy to demonstrate and easy to measure . . . relatively modest pressure may be found to constitute duress if there is no other basis on which to order restitution” and that the critical distinction is “not between voluntary and coerced transactions, but between permissible and impermissible forms of coercion.”³⁵ It recognizes that “A general distinction between the lawful and the unlawful forms of coercion is notoriously difficult to state.”³⁶

On balance, with regard to duress and other potential torts that may provide the basis for the claim for restitution, I tend to favor an approach that allows the relevant facts and circumstances to be developed through discovery and that allows a reasonably arguable case to go to trial rather than a strict rule-oriented approach that would result in cases being dismissed before such development and possible trial can occur. In this area, the uncertainties involved should tilt against sharp or unconscionable practice rather than

section 6, particularly subsection (2), was discussed extensively at the Institute’s annual meeting in 1983. See 1983 ALI Proceedings 100-128.

³⁵ § 14, Comment *b*.

³⁶ *Id.*, Comment *g*. The comment goes continues as follows: “A conclusion that a transfer has been induced by duress depends not only on an appreciation of the particular circumstances of the transaction—including the considerations motivating one party to make the threat and the other party to yield to it—but on an underlying social judgment about the forms and the extent of pressure that one person may legitimately try to bear in seeking to influence the actions of another. The present section does not state a rule to distinguish permissible from impermissible coercion. The purpose of the present Comment is merely to identify certain recurring circumstances in which a threat or refusal inducing a transfer is predictably characterized as duress. Such an enumeration of instances obviously does not purport to be comprehensive.” The comment also states that “Lawful coercion becomes impermissible when employed to support a bad-faith demand: one that the party asserting it knows (or should know) to be unjustified.”

against vulnerable claimants. In contrast with the social norm and moral rights areas, which may call for a bright line, it may be constructive to impose on persons engaging in sharp or unconscionable practice that potentially involves duress, for example, the risk that the line in a particular case will be drawn by a jury.

In concluding this introductory comment, I have some general suggestions about how new claims should be approached.

First, the Restatement is comprehensive and provides numerous illustrations. If a case falls close to but not within the patterns of unjust enrichment that are covered in one or more detailed sections or illustrations, the claimant and court should be prepared to explain why the restitution claim is viable and why the section or illustration should either be distinguished or applied by analogy. If the claim lacks critical elements that would make it viable under such a section or illustration, the claimant should be prepared to establish the unique features that should entitle the claim to recognition under section 1.

Second, judges who are considering new claims and lawyers bringing them should satisfy themselves that the claim does not contradict the Restatement's limiting principles; that one or more of the remedies will fit the circumstances of the claim; and that the claim is not subject to one or more of the recognized defenses.

Third, judges and lawyers as well as scholars can contribute to the development of the law by keeping their minds open for compelling new cases and weeding out weak ones. By “compelling,” I suggest that the facts reflect that the claimant has either lost something significant (*e.g.*, money, property, or opportunity) or had a significant right impaired; that the defendant has gained something valuable as a result of that loss; that the claimant was in a vulnerable position compared to the defendant; that the claimant has acted in good faith and innocently, even though naively; that the defendant has engaged in conduct that can be identified as a “wrong” and that should be remedied; and that there is a practical remedy.

In keeping with the law of restitution’s historic utility as a creative force for addressing and solving unforeseen problems, the new Restatement holds the door open for new and compelling claims for restitution of unjust enrichment. But lawyers and judges especially should understand that the door is not wide open and that the governing principle that “A person who is unjustly enriched at the expense of another is subject to liability in restitution,” is not a blanket invitation to litigate lost causes or “every instance of enrichment” that a client, lawyer, or even a court might regard as unjust.³⁷

³⁷ § 1, Comment *a*.

