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Howard HUNTER
Singapore Management University, howardhunter@smu.edu.sg

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MEASURING THE UNJUST ENRICHMENT IN A RESTITUTION CASE

*H. O. HUNTER**

Unjust enrichment is a theme common to most restitution cases in the United States.[1] The theory of recovery is based on a justice principle—the disgorgement of an unfairly obtained gain. The goal, in general, is to require the defendant to give up his gain rather than to compensate the plaintiff for a loss, as in a tort case, or to substitute damages for an unfulfilled expectancy, as in a contract case. This paper examines some of the issues that surround the measurement of the unjust enrichment and the defendant's liability. There are a number of straightforward rules for the calculation of damages for breach of contract or for trespass and the focus is clearly on what the plaintiff has lost by reason of the defendant's actions. The rules for the calculation of the defendant's unjust enrichment are not so clear, and, as several cases demonstrate, lack of clarity may result in under or over compensation.[2]

It should not be surprising that there are uncertainties and apparent inconsistencies.[3] Some restitution claims arise from tortious behavior. A court may try to measure recovery by reference to the defendant's gain

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* Professor of Law, Emory University School of Law, A.B., J.D., Yale University, Fulbright Senior Scholar, University of Sydney Law School 1988.

[1] For comprehensive treatments of the American law of restitution see Palmer, *Law of Restitution* (4 vols.) (1978) and *Restatement of Restitution* (1937). The unifying theme of Keener, *A Treatise on the Law of Quasi-Contract* (1893), was unjust enrichment. Keener's view became the dominant one among American commentators. See Dawson, *Unjust Enrichment* (1951); Woodward, *The Law of Quasi-Contract* (1913); Corbin, "Quasi-Contractual Obligations", 21 *Yale L. J.* 533 (1912).

[2] Some of the more difficult problems arise when the defendant has not diminished the plaintiff's net asset value and therefore has nothing to "restore" but, rather, has availed himself of an opportunity that might not have existed but for the plaintiff or but for the relationship between the parties. There are other cases in which the defendant has taken something from the plaintiff, perhaps something as tangible as a chattel, but has added value to it and there is difficulty in sorting the unjust portion of the defendant's gain from the just portion.

[3] Context is important in many of these cases. As one court stated, "In determining the measure of damages the court should consider the commercial setting of the injury, the likely future consequences of the breach and the nature and extent of the use [of misappropriated property]." *Structural Dynamics Research Corporation* v. *Engineering Mechanics Research Corporation*, 401 F. Supp. 1102, 1119 (E.D.Mich. 1975).

from his tortious acts, perhaps even by imposing a constructive trust,[4] but it will be difficult for a court to ignore the goals of compensation, deterrence and punishment. If the claim arises from a breach of contract,[5] there is likely to be consideration of the expected benefit of the bargain as well as some concern for the limitations on liability usually applicable in a breach of contract action.[6] Alternative pleading also may confuse the issue. A plaintiff must elect a theory of recovery at some point in the proceedings, but there is no longer any necessity to do so in the pleadings.[7] Thus a case may involve claims seeking compensation in damages for the plaintiff's loss, recovery of the defendant's gain, or some combination of these. Unless the trial judge is precise and understands exactly the competing remedial goals, it is quite easy for there to be confusion especially if the case is tried to a jury. The onus is on the lawyers as much as on the judge to clarify the theory of the case and the proper method of measuring recovery should the plaintiff prove liability.

Professor Dobbs has suggested that there are three ways to approach the calculation of the plaintiff's recovery in an action based on a theory of unjust enrichment: (1) the fair market value of services rendered or

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[4] For an extreme application of the constructive trust remedy see *Snepp* v. *United States*, 444 U.S. 507 (1980).

Justice Deane has described the constructive trust:

> . . . the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.

Muschinski v. *Dodds*, 60 A.L.J.R. 52, 65 (1986).

[5] Some American cases hold that there can be no recovery in restitution if there is an enforceable contract between the parties that covers the same subject matter.

> Where an express contract governs the relationship of the parties, a party's recovery is limited to the measure provided in the express contract; and where the contract 'fixes the value of the services involved,' there can be no recovery under a *quantum meruit* theory.

Hershey Foods Corp. v. *Ralph Chapek, Inc.* 828 F.2d 989, 999 (3d Cir. 1987) citing *Murphy* v. *Haws & Burke*, 235 Pa. Super. 484, 489, 344 A.2d 543, 546 (1975). See also *Infra-Pak (Dallas), Inc.* v. *Carlson Staples & Shippers Supply, Inc.*, 803 F.2d 862 (5th Cir. 1986); *Acorn Structures, Inc.* v. *Swartz*, 657 F. Supp. 70 (W.D.Va. 1987); *Forstmann* v. *Culp*, 648 F. Supp. 1379 (M.D.N.C. 1986). This rule is not applied universally. For example,

> It is well established that a party to a contract may have the right to a quasi-contractual remedy when the other party has breached. . . . This is particularly the case where there has not been full performance because of the breaching party's violation of the terms of the agreement.

Bushkin Associates, Inc. v. *Raytheon Co.*, 815 F.2d 142, 149-50 (1st Cir. 1987). See also *United States for the Use and Benefit of Susi Contracting Co.* v. *Zara Contracting Co.*, 146 F. 2d 606 (2d Cir. 1944).

[6] See, e.g., Perillo, "Restitution in the Second Restatement of Contracts," 81 *Colum. L. Rev.* 37, 44 (1981) ("Restitution for breach is a contractual remedy; consequently, it seems inappropriate to ignore the parties' allocation of the risks.") See also *Johnson* v. *Bovee*, 574 P.2d 513 (Colo. App. 1978).

[7] See, e.g., *United Australia Ltd.* v. *Barclays Bank, Ltd.* [1941] A. C. 1; *Suttons Motors Pty. Ltd.* v. *Campbell* (1956) 56 S. R. (NSW) 304; *Bushkin Associates, Inc.* v. *Raytheon Co.*, 815 F.2d 142 (1st Cir. 1987); *Landau & Cleary Ltd.* v. *Hribar Trucking Inc.*, 807 F.2d 91 (7th Cir. 1986).

The underlying basis for the claim may be important in determining the remedy. Professor Perillo has written:

> While there is a great variety of quasi-contractual obligations and probably numerous sound ways to classify them, one great and fundamental dichotomy should be deemed essential: quasi-contract as a source of primary rights versus quasi-contract as a remedy. . . . The principal difference is that when the law of quasi-contract provides the sole basis of recovery . . . its sole basis is very likely to be unjust enrichment. When, however, restitution is merely a secondary, remedial right in a contractual context, unjust enrichment is merely one factor in the reallocation of gains and losses between the parties.

Perillo, "Restitution in a Contractual Context," 73 *Colum. L. Rev.* 1208, 1213-15 (1973).

products supplied by the plaintiff; (2) the increase in value to the defendant's estate; or (3) the subjective value to the defendant.[8] To these might be added consideration for the plaintiff's loss, if any, and whether that should set a floor for the recovery.

Courts also tend to take into account the degree of culpability involved. An innocent trespasser may be held to account for substantially less than a willful trespasser. The case of *Payne* v. *Consolidation Coal Company*[9] provides a good example. The defendant coal company believed in good faith that it held title to a parcel of mining land. It built several structures on the land and mined coal from it. The plaintiff landowner sued when he learned of the activity. The plaintiff wanted to recover the defendant's profits plus the costs of restoring the property to its original condition. Instead the court allowed recovery of the royalty value of the coal removed as if there had been a willing sale of the mineral rights plus the diminution in value of the property caused by the presence of the mining structures.

Identifying the approaches to calculation is just the first step. Presenting evidence that makes it possible to determine the actual recovery with any degree of certainty is another matter altogether. Furthermore, the resulting recovery may vary tremendously depending on the approach used. For example, the plaintiff might be a builder who has constructed a house according to the defendant's instructions. Assume that the defendant fails to pay the builder and a court decides that the builder is entitled to a recovery.[10] The fair market value of the plaintiff's services may be X. The resulting increase in value of the defendant's estate might be X-N if the house is out of keeping with the neighborhood. The subjective value to the defendant might be X+N if the house meets the defendant's personal needs.[11] What is the proper measure of the "unjust" enrichment?[12]

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[8] D. Dobbs, *Remedies*, section 4.5, p. 264 (1973).

[9] 607 F. Supp. 378 (W.D.Va. 1985).

[10] If there is a contract, the builder's action normally should be for breach of contract, and if performance is complete the claim should be for the price. *United States for the Use and Benefit of Harkol Inc.* v. *Americo Construction Co. Inc.*, 168 F. Supp. 760 (D. Mass. 1958); *Restatement (Second) of Contracts*, section 373(2) (1981). In the United States some odd rules apply when the owner breaches prior to the completion of performance by the builder. In such a situation the builder may be able to recover the fair market value of services rendered even if that value is substantially greater than the proportionate amount that was due under the contract. American courts employ the fiction of a rescission by reason of the breach followed by a recovery on an unjust enrichment theory. See, e.g., *Scaduto* v. *Orlando*, 381 F. 2d 587 (2d Cir. 1967).

[11] If the house is well-built and the market is rising, it is just as likely that the increase in the defendant's estate value is X + N. In that situation one might argue that the recovery should be X + N because that is the amount by which the defendant has been enriched. But if the claim arose from the failure of the defendant to pay on a contract, and the contract price was X, then why should the defendant be entitled to a larger recovery? The difference between X and X + N would have belonged to the defendant had the contract been paid as planned and there would have been no inju tice in the defendant's retention of that profit.

[12] One commentator suggests the following answer:

> If there has been a request and mutual expectation of payment, then the reasonable value of the plaintiff's services is the appropriate remedy for both contract implied in fact and contract implied in law situations. The latter will include contracts invalid under the statute of frauds or service contracts that have been rescinded. Where there is no request, tier two's recovery of defendant's gain is the appropriate recovery.

How is a court to measure the "subjective" value that a defendant attaches to a property or a service without running afoul of the rules that prohibit conjecture and speculation in the calculation of remedies? To what extent should a court be guided by practical considerations such as the ease in determining the market value of standard services or products? Should the conservation of judicial resources be a factor in deciding which approach to favour? To what extent, if at all, should a court take into account the most efficient allocation of resources? The answers to these questions are not clear, but at least an understanding of the questions is useful in analyzing the best approach to a particular problem. A number of recent American decisions provide useful illustrations of approaches to these and other problems.

A. The Quantum Meruit Approach

In many cases the plaintiff seeks to recover the fair market value of goods or services provided to the defendant. If there is a ready market for these goods or services, proof is fairly simple.[13] In the absence of a ready market the plaintiff must offer evidence of a range of values in similar circumstances. The plaintiff may offer his own estimate of value, but that may not be persuasive unless it is backed by evidence from independent sources.[14] The litigants must be especially careful to present evidence from the correct market, e.g., wholesale or retail.[15] In the United States the final determination of value is usually a question for the jury.[16]

A case involving the storage of hazardous nuclear waste illustrates a common practical approach to the determination of an unjust enrichment recovery.[17] The plaintiff, a public benefit corporation, wanted to recover the cost of storing nuclear fuels for public utilities at a nuclear fuels disposal and reprocessing facility in New York. The recovery was based on the reasonable out of pocket costs of storage plus a margin of profit that took into account the plaintiff's public benefit status. Actual costs were determined by testimony of experts based upon generally accepted

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[12] *continued*
Kovacic, "A Proposal to Simplify Quantum Meruit Litigation", 35 *Am.U.L.Rev.* 547, 642-43 (1986). This approach is generally the one followed by the American courts but more for reasons of pragmatism than principle. It may be simpler to determine the fair market value of readily traded services than it is to determine the change in the defendant's net asset value, but that avoids the underlying question: If the goal is disgorgement of an unjust gain, then shouldn't the recovery reflect the full amount of that gain?

[13] See, e.g., *Peavey* v. *Pellandini*, 97 Idaho 655, 551 P. 2d 610 (1976); *Huff* v. *Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975). The Uniform Commercial Code does not apply in most restitution cases, but it may provide useful analogies. Sections 2-723 and 2-724 take a sensible approach to the admission of market quotations and other evidence of market value.

[14] See, e.g., *Development Corp. of Ga.* v. *Berndt*, 131 Ga. App. 277, 205 S.E. 2d 868 (1974).

[15] See, e.g., *Kashi* v. *Gratsos*, 790 F. 2d 1050 (2d Cir. 1986); *Charles Street Garage Co.* v. *Meyer Kaplan*, 312 Mass. 624, 45 N.E. 2d 928 (1942).

[16] See, e.g., *Bernini* v. *Zylka*, 51 A. D. 2d 689, 379 N.Y.S. 2d 104 (1976).

[17] *New York State Energy Research and Development Authority* v. *Nuclear Fuel Services Inc.*, 640 F. Supp. 1558 (W.D.N.Y. 1986).

business practices of the industry. To determine the appropriate profit margin the court considered the profits of similar or related industries during the same time period.

Reliance on business experts is an accepted practice, but it may be insufficient. The testimony of experts should be supplemented by evidence of the plaintiffs' actual expenses and by evidence of the services performed and their value to the defendant.[18] This kind of evidence may integrate the various theoretical approaches to claims for relief. It may be simple enough for a plaintiff to prove that he expended $100,000 but that figure has meaning only in the context of evidence that shows what the plaintiff performed as a result of spending $100,000 and what the defendant received as a result of that performance. The defendant's total gain should not be ignored, especially if it exceeds the plaintiff's losses plus profits, because one of the purposes of an unjust enrichment case is to prevent the unfair retention of a benefit.[19]

B. Calculations and Economic Efficiency

Judge Richard Posner[20] of the federal Court of Appeals for the Seventh Circuit undertook a thorough examination of the calculation of an unjust enrichment in *Taylor* v. *Meirick*,[21] a 1983 decision. The *Taylor* case is a particularly useful subject for study because the trial judge thoroughly misunderstood the issues involved in the action. The facts were quite simple. The plaintiff held copyrights on fishermen's maps for three lakes in the state of Illinois. The defendant, a competitor of the plaintiff, copied the maps without permission and sold reproductions in direct violation of the plaintiff's copyrights. There was no doubt about liability. The only issue was the measurement of the plaintiff's recovery.

The trial court awarded the plaintiff the sum of the defendant's profits from sales of the copied maps and the plaintiff's losses from lost sales opportunities due to the diversion of customers. By summing the two categories the court caused the defendant to disgorge improperly obtained profits and to compensate the plaintiff for losses. Adding together the defendant's gain and the plaintiff's loss might be a windfall recovery in any case, but the mistake is even greater if there is a cross-elasticity of customers.[22] The more immediate difficulty that Judge Posner had

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[18] *Overseas Development Disc Corp.* v. *Sangamo Construction Co. Inc.*, 840 F.2d 1319 (7th Cir. 1988). See also an earlier appeal in the same case reported at 686 F.2d 498 (7th Cir. 1982).

[19] Fuller and Perdue, "The Reliance Interest in Contract Damages (Part I)", 46 *Yale L.J.* 52, 53, 54 (1936); Henderson, "Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts," 57 *Va.L.Rev.* 1115, 1141 (1971).

[20] Judge Posner is one of the leading figures in law and economics and was a member of the law faculty at the University of Chicago for many years before his appointment to the bench by President Reagan.

[21] 712 F.2d 1112 (7th Cir. 1983).

[22] If Joe Fisher wanted to buy one map and had no preference between plaintiff and defendant but happened to choose the defendant, then awarding the plaintiff the defendant's profit on the sale to Joe plus the profit that the plaintiff would have made had Joe bought from him is equivalent to saying that Joe would have bought two maps, both from the plaintiff.

with the trial court's approach was in the simple measurement of the defendant's gain and the plaintiff's loss.

To calculate the plaintiff's losses the trial court took the average of the plaintiff's gross revenues from sales of the affected maps for the two years when the plaintiff held the copyrights but there had been no infringement and then assumed that this average would have continued until the initiation of the lawsuit, a total of about five years. During the period in question the plaintiff had some revenues from the sale of the maps in question, and these revenues were subtracted from the projected total. This method produces, at best, a rough estimate of revenues, not profits. Without taking into account the direct and indirect[23] costs of sale it is impossible to determine what, if anything, the plaintiff would have gained from sales of the maps during the relevant period. Furthermore, as Judge Posner stated, "*post hoc ergo propter hoc* is a naive theory of causation." That the plaintiff sold an average of $X worth of maps in two years tells us very little about the plaintiff's prospects for sales of those maps in the ensuing five years. One needs to know a great deal more about the market for the product, about competitive products, about the plaintiff's relative competitive position and about market activity in general during the relevant period. Some of this information may come from direct examination of the plaintiff or the plaintiff's employees and some may come from cross examination of the defendant.[24] In a case involving substantial sums of money it is likely that the plaintiff would present testimony by expert business witnesses or economists on these issues.[25]

The defendant sold 150 different maps. There were three copyrighted maps involved, or 2% of the defendant's total offerings. To determine the defendant's gain the trial judge took 2% of the defendant's total gross profits from map sales as shown on the defendant's tax returns for the years in question. The errors in this approach are stark. First, a US federal tax return is often a poor source of information for the calculation of losses and profits in a lawsuit. The determination of gross profits for tax purposes may be very different from the determination of gross profits for general accounting purposes because of the tax regulations and statutory provisions that govern the calculations made

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[23] It might be difficult to make a precise allocation of indirect costs. The plaintiff had indirect costs anyway and making a proper per unit allocation of those costs to the maps in question might have been an almost impossible task. In a complicated, integrated business it also may be difficult to make an accurate determination of unit direct costs.

[24] In one unusual case the defendant's own statements about profits from the sales of counterfeit handbags were recorded surreptitiously by an undercover agent. This recording provided a sufficient basis for a recovery by the owners of the trademarks on the handbags. *Louis Vuitton, S.A.* v. *Spencer Handbags Corp.*, 597 F. Supp. 1186 (E.D.N.Y. 1984), aff'd., 765 F.2d 966 (2d Cir. 1985).

[25] The defendant is likely to counter with his own experts. This requires the lawyers for each side to become fully conversant with the business that is involved and with the economics of the situation.

on returns.[26] Second, there was no evidence about relative sales of the various maps. There was nothing to indicate that the 150 maps each sold for the same price and that all were equally popular. Thus there was no basis for concluding that maps representing 2% of the portfolio's variety accounted for 2% of the revenues from map sales. Finally, the figure derived from this calculation was about one-sixth the amount derived from the projection of the plaintiff's lost sales opportunities. Even taking into account that the defendant sold a less expensive, lower quality map than the plaintiff, the gross disparity between the two figures should have put the trial court on notice that something was wrong with one calculation or the other.

By summing the two figures—the one for the plaintiff's loss and the one for the defendant's gain—the trial court compounded its technical errors in calculation by awarding a windfall double recovery to the plaintiff. The goal is to do justice to the plaintiff but the goal is not necessarily to impose a punitive fine on the defendant. Judge Posner's solution to this problem was to take into account the relative efficiencies of the parties. If the infringer is more efficient than the plaintiff and derives a greater profit from the infringement than the losses of the plaintiff, then the plaintiff can recover the defendant's full gain. Although this punishes the defendant for his relative efficiency, it is to discourage infringement, a wrongful act that, in a larger sense, may generally discourage efficiency by limiting the rewards available for creativity and exploitation of that creativity.

> By preventing infringers from obtaining any net profit it makes any would-be infringer negotiate directly with the owner of a copyright that he wants to use, rather than bypass the market by stealing the copyright and forcing the owner to seek compensation from the courts for his loss.[27]

However, if the infringer is less efficient than the plaintiff, which appeared to be the case in *Taylor* based on the figures derived by the trial court (although they may have been grossly inaccurate), then Judge Posner concluded that justice and the goal of deterrence are both served by an award that equals the diversion of profits from the plaintiff. More than that would be a double recovery and unduly punitive for the inefficient infringer.[28] The recovery would make the plaintiff whole by providing

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[26] Depending on the industry and the product involved, the result could just as likely favour one party as another. Accuracy, not favouritism, is the issue. As Judge Posner wrote, somewhat sarcastically:

> If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits.

712 F.2d at 1122.

[27] Id. at 1120.

[28] On the other hand, if the infringer is so inefficient that he loses money the plaintiff should not bear the risk of his inefficiency. To avoid that possibility one court awarded the plaintiff 15% of the defendant's proven sales of an infringing product during the relevant time period despite the defendant's actual losses on those sales. The court reasoned that 15% was a reasonable profit margin and that the defendant should not be excused by reason of his inefficiency. *Otis Clapp & Son Inc.* v. *Filmore Vitamin Co.*, 754 F.2d 738 (7th Cir. 1985).

the plaintiff with the monetary equivalent of what he would have had but for the infringement and would be a disincentive to the infringer because he would have to give up his gains plus the additional cost of his inefficiency.[29]

This approach should work much the same way in a case arising from a failed contract. Assume that A and B have a contract for A to sell a chattel to B for $2000. A's basis in the chattel is $1000, and he expects to gain $1000 from the sale. B anticipates a resale to C for $3000 for a net gain to B of $1000. A learns of C's interests and breaches the contract with A to sell directly to C for $3000. B's claim against A for breach of contract is $1000 based on the traditional contract-market formula.[30] From an unjust enrichment perspective the portion of A's gain that is "unjust" is $1000 because, had he performed, he and B would each have gained $1000. An award of $1000 would make B whole and would not punish A. This would preserve A's "right" to break a contract subject to liability for ordinary contract damages and would be consistent with the general theory of efficient breach.[31] There should not be any greater recovery for B (other than for transaction costs) unless A's conduct has been, in some sense, wrongful and subject to punishment in order to deter others from acting similarly.

C. Trademark Infringement: A Statutory Model of Restitution

The remedies available in a particular action often define the underlying goals. This is especially clear in trademark infringement cases. In general, these represent a classic form of unjust enrichment.[32] One party misappropriates property of another (a trademark) and uses it for his own benefit. The infringer should be held to account for the gain received from the wrongful taking. American statutory law takes the restitution remedy a step further. The Lanham Act,[33] a federal law that prohibits trademark infringement, provides that upon proof of an infringement and

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[29] An unarticulated concern implicit in Judge Posner's opinion is the conservation of resources. A small amount of money was at issue in the *Taylor* case. Even the rough calculations of the trial court came up with only $19,300 in plaintiff loss and $3,300 in defendant gain. It might not be worth the effort when the stakes are that low to do the studies necessary to make an accurate determination of the losses and gains. A rough approximation might be far better.

[30] See, e.g., UCC sections 2-708(1) and 2-713.

[31] For discussions of the theory of efficient breach see, e.g., Posner, *Economic Analysis of the Law* 88-90 (1977); Barton, "The Economic Basis of Damages for Breach of Contract," 1 *J. Legal Stud.* 277 (1972); Birmingham, "Breach of Contracts, Damage Measures, and Economic Efficiency", 24 *Rutgers L. Rev.* 273 (1970); Craswell, "Contract Remedies, Renegotiation and the Theory of Efficient breach", 61 *So. Calif. L. Rev.* 630 (1988).

[32] One court described the remedial sections of the Lanham Act (the trademark infringement statute) as an explicit borrowing from the "equitable concepts of restitution and unjust enrichment". *Maier Brewing Company* v. *Fleischmann Distilling Corpp.*, 390 F.2d 117, 121 (9th Cir. 1968). "[T]he infringer has taken the plaintiff's property as represented by his trade-mark and has utilized this property in making a profit, and that if permitted to retain the profit, the infringer would be unjustly enriched." *Id.*, citing *Monsanto Chemical Co.* v. *Perfect Fit Products Mfg. Co.*, 349 F.d 389 (2d Cir. 1965).

[33] 15 U.S.C. section 1051 et seq.

"subject to the principles of equity"[34] the plaintiff may recover the defendant's profits from an infringement *plus* any damages suffered by the plaintiff *plus* the costs of the action.[35] In applying this statutory provision courts have gone even further to allow an open ended kind of recovery. The federal Court of Appeals for the Ninth Circuit stated:

> If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.[36]

The purpose of the Lanham Act is to do more than to restore a lost opportunity to the plaintiff. The remedies defined by the Act include a punitive element that deters and punishes trademark infringement. In adopting that statutory scheme, however, Congress followed the basic pattern of restitutionary remedies. The Act sums the possibilities that might exist absent the statute but the statutory law is based directly upon the judicially developed remedies for the cure of an unjust enrichment. Trademark infringement cases also reinforce the theory of unjust enrichment as the basis for claims in restitution and, at the same time, restate the close ties between equity and restitution. A federal court in Florida focused on the profits that a defendant had made from a trademark infringement and stated:

> Account for profits is an equitable remedy. It is often justified under an unjust enrichment theory where the defendants' infringement, as here, was deliberate and willful. . . . Courts have also said that the accounting serves to deter future infringement, and is thus appropriate even where the plaintiff and defendant are not in direct competition. . . . The plaintiff need not demonstrate any actual damages in order to obtain an accounting for profits.[37]

Accounting is an equitable remedy. Its use in this situation is an example of the intermixture of law and equity in many American cases. In most jurisdictions the courts of law and equity were merged many years ago, and many judges have concluded that there is little practical reason to continue to draw a distinction between the two traditions.[38] The accounting remedy also imposes the burden on the defendant to

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[34] Equity enters directly here through a specific statutory phrase that applies equitable principles of fairness to an action that essentially sounds in law. This illustrates the looser use by American lawyers of the terms of equity to refer to general standards of fairness.

[35] 15 U.S.C. section 1117. There is also a trebling provision that acts as a form of punitive damages.

[36] *Maier Brewing Company* v. *Fleischmann Distilling Corp.*, 390 F.2d 117 (9th Cir. 1968).

[37] *Playboy Enterprises* v. *P. K. Sorren Export Co.*, 546 F. Supp. 987, 997 (S.D.Fla. 1982) citing *Quabaug Rubber Co.* v. *Fabiano Shoe Co., Inc.*, 567 F.2d 154, 161, n. 15 (1st Cir. 1977). The court went on to state that the defendant had the burden of proving costs associated with the sale of the infringing goods in order to determine profits. The defendant could not deduct a ratable share of costs without proof that the sales of infringing goods actually did increase costs. Id. at 998. See also *Maltina Corp.* v. *Cawy Bottling Co.*, 613 F.2d 582 (5th Cir. 1980).

[38] One factor may be quite important. In general, the parties are entitled to trial by jury in an action arising at law but not in one that sounds in equity.

prove the defendant's revenues, costs and profits. The plaintiff is free to challenge or to supplement this information, but it often is a substantial advantage to the plaintiff for this evidentiary burden to be placed on the defendant.

D. Misappropriation of Trade Secrets

In cases that involve conversion of trade secrets there is a mixture of approaches from both case law and statutory law although there is no comprehensive statutory protection for trade secrets as there is for trademarks. Broadly defined, a trade secret is anything that a firm wants to keep confidential. More particularly, the term applies to ideas, procedures, or information such as customer lists on which it is not possible or feasible to obtain a patent or copyright. There is a recognized property interest in trade secrets and unauthorized disclosure may be a trespass to property or a conversion if the wrongdoer uses the information to his own advantage. Measuring the injury to the plaintiff or the gain to the defendant in a trade secret case can be difficult.

If the defendant discloses a trade secret widely then it is in the public domain and no longer a secret. The loss to the plaintiff is total and the proper measure of damage is the value of that secret to the plaintiff. In such a case the gain to the defendant is likely to be minimal because he has little or no advantage from the wrongful act once the information is public and available to all competitors. Stating the basic proposition—that the recovery should reflect the total loss of the value of the secret to the plaintiff—is simple. Proving that value may be extremely difficult. A court should take into account the development costs of the secret, the competitive advantage derived from its use and the comparative benefits of its use secretly and its possible use now that it is a matter of public knowledge.[39] In a complicated, integrated business enterprise it may be impossible to segregate accurately the development costs of a particular trade secret or the gains derived from use of that secret. If the stakes are high enough, the plaintiff might employ an expert witness to examine the situation, but essentially the exercise is a sophisticated guessing game.[40]

In the more common scenario the defendant uses the trade secret but does not disclose it publicly. The total value approach to measuring the plaintiff's loss is incorrect because there has not been a total loss.[41] The plaintiff only shares the secret with the defendant. The damage to the plaintiff is the loss of the competitive edge vis-a-vis the defendant. This may not be substantial, and, in most cases, it will be hard to prove

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[39] The information may continue to be useful even if it does not provide a specific competitive advantage.

[40] See, e.g., *Precision Plating* v. *Martin Marietta*, 435 F.2d 1262 (5th Cir. 1970), cert. denied, 404 U.S. 1002 (1971).

[41] There may be a total loss if the plaintiff and defendant form a duopoly in the relevant market and the secret has little or no utility outside that market.

without speculation. The tendency is to focus on the defendant's gain, "the benefits, profits or advantages gained by the defendant in the use of the trade secret."[42] There are three ways that courts go about calculating the defendant's gain.

If the defendant's actual profits from the use of the trade secret are reasonably subject to proof, they provide the measure of recovery. The plaintiff has the burden of proving an infringement by the defendant and that the defendant made profits after the infringement. The burden then shifts to the defendant to prove that the profits derived from something other than the infringement.[43]

If the defendant does not have actual profits from the misappropriation of the trade secret, the defendant may be held to pay the "value" of what was taken in the mistaken belief that the wrongful taking would benefit the defendant.[44] To make this determination courts try to ascertain what the expected value of the secret was to the defendant at the time of the misappropriation. Almost invariably this requires some form of expert testimony. The purpose is to impose the risk of failure to profit on the defendant rather than on the plaintiff although it is necessary to show that the defendant did adopt and use the trade secret.[45]

A common alternative is the "reasonable royalties" method, which is used when it is difficult to prove profits or contemplated profits. This seems to mean one of two things. The first is the more obvious: what the defendant would have paid the plaintiff in a freely negotiated contract for use of the secret.[46] This might be called an implied sale of use value. This method of measurement gives the defendant credit for the defendant's added value in subsequent use. The second, and somewhat more common method, is to determine the "actual value of what has been appropriated."[47] This includes more than the use value and comes close to being the same as the "total value" in the case of a public disclosure. This may be characterized as a royalties approach to measurement but this method involves more than royalties for use value.

Sometimes courts have based an award on the plaintiff's development costs. This may be a simple method of calculation that avoids the uncertainties that surround a recovery based on hypothetical royalties or a speculative market value. In general, the recovery of development costs is insufficient, because there is no consideration for the commercial context or the value of the secret as applied within a competitive marketplace. A process or idea may turn out to have less value than

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[42] *International Industries Inc.* v. *Warren Petroleum Corp.*, 248 F.2d 696, 699 (3d Cir. 1957).

[43] See generally, *Sheldon* v. *MGM Pictures Corp.*, 309 U.S. 390 (1939).

[44] *In re Cawood Patent*, 94 U.S. 695 (1877).

[45] See generally *University Computing Co.* v. *Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974); *Official Airlines Schedule Information Service Inc.* v. *Eastern Airlines*, 333 F.2d 672 (5th Cir. 1964).

[46] *Egry Register Co.* v. *Standard Register Co.*, 23 F.2d 438 (6th Cir. 1928).

[47] *Vitro Corporation of America* v. *Hall Chemical Co.*, 292 F.2d 678, 683 (6th Cir. 1961).

its cost of development, but if the secret is of sufficient importance to the plaintiff to justify legal action it is more likely to have a value in excess of the raw development costs. The recovery of development costs might well be a remedial floor. If that is the limit of recovery, then there might be little or no disincentive to stealing trade secrets.

Perhaps the leading misappropriation of trade secrets case is *University Computing Co.* v. *Lykes-Youngstown Corp.*, a decision of the Court of Appeals for the Fifth Circuit from 1974.[48] The adversaries formed a joint venture to offer computer services in the southeastern United States. Within a few months there was a serious falling out. The lawsuit that resulted was essentially a breach of contract action with additional claims for misappropriation of trade secrets. A misappropriation was found and this was treated as an unjust enrichment. The problem before the Court of Appeals was the method to be used to measure the unjust enrichment. After considering the various methods discussed above, the court reached its own conclusion about the proper approach to take. It is worth quoting from the court's opinion at some length because it demonstrates the pervasive influence of Legal Realism in American judicial reasoning. It also illustrates the willingness of American courts to use remedies to define the theoretical basis for providing relief.

> Our review of the case law leads us to the conclusion that every case requires a flexible and imaginative approach to the problem of damages[49] . . . . [W]e believe that the cases reveal that most courts adjust the measure of damages to accord with the commercial setting of the injury, the likely future consequences of the misappropriation, and the nature and extent of the use the defendant put the trade secret to after misappropriation. Naturally in some cases the damages will be subject to exact measurement, either because the parties had previously agreed on a licensing price . . ., or because some industry standard provides a clear measure. Where the damages are uncertain, however, we do not feel that uncertainty should preclude recovery; the plaintiff should be afforded every opportunity to prove damages once the misappropriation is shown.
>
> If the defendant enjoyed actual profits, a type of restitutionary remedy can be afforded the plaintiff—either recovering the full total of defendant's profits or some apportioned amount designed to correspond to the actual contribution the plaintiff's trade secret made to the defendant's commercial success. Because the primary concern

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[48] 504 F.2d 518 (5th Cir. 1974). Candor compels the disclosure that the author was an associate with Hansell & Post, the law firm that represented Lykes-Youngstown, at the time that the litigation took place. The author, however, was in a separate department of the firm and had no personal involvement with the case. Any comments on the case in this paper are strictly those of the author and, except coincidentally, do not represent the positions or views of Lykes-Youngstown, nor of Hansell & Post.

[49] This statement alone is a rejection of formalism and a wholesale adoption of equity's attempt to do justice in a particular case.

in most cases is to measure the value to the defendant of what he actually obtained from the plaintiff, the proper measure is to calculate what the parties would have agreed to as a fair price for licensing the defendant to put the trade secret to the use the defendant intended at the time the misappropriation took place.[50]

The court went on to suggest four factors to consider in calculating a hypothetical licensing price: (1) resulting or forseeable changes in the parties respective competitive positions; (2) total value of the secret to the plaintiff including the plaintiff's development costs and the importance of the secret to plaintiff's business; (3) prices past purchasers or licensees may have paid for this or similar secrets; and (4) the nature and extent of the use the defendant intended. Finally, the court concluded that it should take into account "whatever other unique factors in the particular case which might have affected the parties' agreement, such as the ready availability of alternative processes."[51]

In effect the court followed a quasi-contractual approach. Awarding a hypothetical licensing price is the same as applying a quasi-contractual model to imply a contract for the sale of a trade secret where no contract exists. This approach makes a great deal of sense when it is truly a substitute for a contract, but it is sometimes less useful when liability is based on acts that are not contractual in nature. The misappropriation of a trade secret is more akin to a tortious taking than to a failed contract. The defendant is unjustly enriched, and to a large extent one can remove the "unjustness" by making the defendant pay a market price for the enrichment as if there had been a legitimate contract. This payment fails to take into account, however, the culpability of the defendant or the extent of the defendant's gain from the wrongdoing. The plaintiff may not have been willing to part with the trade secret for any price, especially if the defendant was a competitor. The value of the trade secret to the defendant may be substantially greater than the putative market licensing price.[52] Requiring the defendant to pay the licensing price may compensate the plaintiff for the loss of the market value of one sale of the trade secret but it does not compensate the plaintiff for loss of control of the trade secret. Now there is a competitor in the market for additional sales of the secret. Furthermore, it does not cause the defendant to disgorge profits obtained from the wrongdoing, and, to this extent, fails to provide any real deterrence to this kind of behavior. If a party will not part with a trade secret, then a willing buyer need only steal the secret. The price will be the same as if he had purchased the secret in a negotiated deal, and, with a little luck he may not be sued (and therefore get the secret

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[50] 504 F.2d at 538-539.

[51] Id. at 539.

[52] It should be true in most contracts that the value to the buyer equals or exceeds the contract price or that the buyer anticipates that the value will increase substantially.

for his theft transaction costs) or, if sued, he may be able to reach an out of court settlement for less than the putative market price.[53]

E. Insider Trading in the Stock Market

Somewhat similar remedial problems arise in cases involving insider trading in shares of public companies. Insiders (persons with access to information that is not publicly known about a company) who knowingly trade on the basis of undisclosed material information are required by federal law to disgorge profits made from such trading.[54]

Securities and Exchange Commission v. *McDonald*,[55] a 1983 decision of the Court of Appeals for the First Circuit, is a typical insider trading case. Mr. McDonald was the Chairman of a real estate investment trust. It had suffered from the recession of 1974 and its stock was not doing especially well. McDonald knew in December 1975, however, that the company was going to acquire a major office building in Cincinnati that was likely to increase the firm's profitability. Before making this information public McDonald and his wife purchased 9600 shares of stock in the company at roughly $4.65 per share. The public announcement was made on Christmas Eve and there was no trading for a couple of days, but by December 27 the stock was trading at $5.50 per share in response to the announcement. It rose to $5.75 by December 31. The McDonalds held their shares until 1977 and then sold at an average of $10.00 per share. In an action brought by the SEC to compel the repayment of profits the trial court ordered them to pay back to the sellers from whom they bought the 9600 shares in December 1975 their entire profit from the 1977 sales, or about $5.35 per share. The court reasoned that all the transactions were tainted by misuse of inside information, and, therefore, that the McDonalds should not be allowed to retain any of the gain. The court analogized the recovery to the imposition of a constructive trust. The sellers did not regain the shares of stock, but they did get the full benefit as if they had held them until 1977.

The Court of Appeals rejected the trial court's approach and ordered the case to be remanded to provide for a recovery based on the difference between the McDonalds' purchase price and the market price of the shares

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[53] There are risks. There will be transaction costs, including a possible loss of reputation within the business community as well as attorney's fees in the event of litigation. There is also the risk that a court will focus on the gain derived from the misappropriation rather than the hypothetical market value. If the defendant's actions are particularly reprehensible there is also the danger of a punitive damages award.

[54] See Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. section 240.10b-5 (1986). Well-known insider trading cases include *Dirks* v. *SEC*, 463 U.S. 646 (1982); *Chiarella* v. *United States*, 445 U.S. 222 (1980); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir.), cert. denied, 394 U.S. 976 (1968).

[55] 699 F.2d 47 (1st Cir. 1983).

a reasonable time after announcement of the material inside information about the new office building acquisition. The McDonalds paid current market price for the shares when they acquired them; they did not "steal" the shares. What they misused was information that might affect the value of the shares.[56] That information was disclosed on December 24 and by late December it had been absorbed by the market. An investor seeking to take advantage of the market could have bought shares after the announcement at $5.50-5.75 and have thereafter enjoyed the market increase to $10 that occurred between early 1976 and early 1977. Even if a person who sold to the McDonalds at $4.65 chose not to reinvest in the firm, that seller had the investment use of the proceeds of sale for the intervening period. The value of the information traded on by the McDonalds was reflected in the market rise from $4.65 to $5.75. Many other factors influenced the subsequent increase in the value of the shares. The "unjust" portion of the enrichment resulting from the illegal actions of the McDonalds was the increase represented by the market's reaction to the information and not the entire subsequent market rise.

This careful approach to measuring the unjust portion of the enrichment recognizes that restitutionary remedies are meant to be restorative and not punitive. At the same time it limits the disincentive for insider trading although one has to take into account the other remedial powers of the SEC and the risk of criminal prosecution that accompanies various kinds of illicit stock transactions. It is entirely possible that the firm's stock might have fallen after an initial favourable reaction to the announcement. If, for instance, it had risen to $5.75 by December 31, 1975, but subsequently dropped to $3.00, the McDonalds would still be liable for the increase directly attributable to the market's reaction to the disclosure of the material inside information. Subsequent losses would be the market risk of the McDonalds and would not be attributed to the sellers who claimed relief against the McDonalds for insider trading.

Although the insider trading cases arise within the context of a complex regulatory scheme, they provide useful analogies for other cases that may involve the misuse of information. The defendant's total enrichment may be the result of a number of factors. It is the tainted or "unjust" portion that is to be given up. Requiring the defendant to do more would be punitive. A case that involves the misappropriation of an opportunity might be different because all the gain from the opportunity would bear the taint of the original misappropriation.

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[56] There seems little doubt that trading on inside information may affect the price of shares in a publicly traded corporation. Easterbrook, "Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information", 1981 *Sup. Ct. Rev.* 309; Gilson and Kraakman, "The Mechanisms of Market Efficiency", 70 *Va.L.Rev.* 549 (1984).

F. The "Unjust" Enrichment and Added Value

The McDonalds were allowed to retain the gains that they enjoyed from normal market activity. They had to give up only those gains directly related to their abuse of inside knowledge. This result recognizes that the unjust enrichment claimant really has a claim for nothing more than the amount of enrichment that is unjust. The extra gain received by the McDonalds was the result of external market factors, but often there is an additional gain that results from value added by the defendant. If the defendant has violated some basic duties of care or responsibility and is a particularly blameworthy character (a car thief, for example) a court usually will not allow the defendant any credit for value added.[57] But if the defendant is unjustly enriched by reason of mistake, breach of contract, or some behaviour that is not especially blameworthy, there may be good reason to allow him some credit for value added. The lengthy and complex judgments of the New South Wales Court of Appeal and the High court of Australia indirectly address this issue in the case of *U.S. Surgical Corp.* v. *Hospital Products International Pty Ltd.*[58]

That case involved a dispute between an American company and an American individual who, through an Australian company that he controlled, became the Australian distributor for the American company's products, certain items used in hospital procedures. The Australian distributor used the distributorship as a means to establish a separate competitive business in Australia. The Court of Appeal concluded that the Australian distributor was a fiduciary for the American company and that there had been a violation of a fiduciary duty.[59] To rectify the situation the Court of Appeal imposed a constructive trust on the assets of the Australian firm for the benefit of the American company. The Court did note, however, that in a proper case the defendant should be allowed to prove value added by reason of separate, legitimate activity. If the separate value added were commingled with the wrongfully acquired property, then a constructive trust might be inappropriate, but a plaintiff could assert an equitable lien on the property.

The High Court reversed on the fundamental issue. The High Court concluded that the case involved a claim for breach of contract rather than a claim for breach of a fiduciary duty.[60] Damages, not a constructive

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[57] No court would allow a car thief to recover the value of a tune-up that he performed on a stolen vehicle while it was in his possession.

[58] [1983] 2 N.S.W.L.R. 157, reversed 156 C.L.R. 41.

[59] The Court adopted a broad definition of fiduciary—"a person who undertakes to act in the interest of another." The Court cited for this definition: *Walden Properties Ltd.* v. *Beaver Properties Pty. Ltd.* [1973] 2 N.S.W.L.R. 815; *Whichcote* v. *Lawrence* (1798) 30 E.R. 1248; Scott, "The Fiduciary Principle", 37 *Calif.L.Rev.* 539, 540 (1949); Sealy, "Fiduciary Relations", [1962] C.L.J. 69.

[60] For example, in his judgment Justice Mason stated:

> [I]t is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms

trust, was the proper remedy. In his judgment Justice Mason also reflected on the value added problem. He noted that "the wrongdoer's underlying liability is to account for the gain that he has made."[61] The wrongdoer does not have to account for gains derived from his own, legitimate efforts. He was concerned that the Court of Appeal's use of the constructive trust remedy failed to allow for the defendant's own contributions and would fail to distinguish the just from the unjust enrichment.

The well known American case of *Matarese* v. *Moore-McCormack Lines, Inc.*[62] is an example of a refusal to give credit for added value because of the taint that attached from the outset to the misappropriation of an idea. The plaintiff, a relatively poor and uneducated worker, came up with an idea to improve efficiency and safety in the handling of cargo on harbor docks. He described it to a representative of the defendant who promised him one third of the savings if the defendant adopted and used the idea successfully. The defendant did so but failed to make any payments. The court awarded the plaintiff a sum based on the total value of the plaintiff's idea to the defendant plus the value of the plaintiff's services to the defendant. The court gave no consideration to the value added by the defendant in actually putting the idea into work and testing it out.

F. Expanding the Claim Beyond an Existing Relationship

Many courts refuse to entertain a claim for restitution when an express contract governs the relationship between the parties.[63] Sometimes a claim in restitution will be permitted when it is based on extra work or on matters incidental to the main transaction. That was the situation in the case of *Rodgers* v. *Roulette Records, Inc.*[64] A singer sued to recover royalties and to obtain an accounting from the record company that produced and sold his recordings. He had an express contract with the defendant. A suit for an accounting was somewhat unusual; a suit for breach of contract would have been the expected action. More to the point was the claim for royalties based on a theory of unjust enrichment. If the defendant sold records and failed to pay the appropriate royalties, that was a breach of contract or a tortious conversion. In either event

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[60] *continued*

> to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

156 C.L.R. at 97.

In another portion of his judgment Justice Mason states: "A preferable approach to an artificial narrowing of the fiduciary relationship—the gateway to relief in specie—is to define and delimit more precisely the circumstances in which the remedy by way of constructive trust will be granted." 156 C.L.R. at 100. This was a casual statement unnecessary to the result, but it suggests a willingness to explore a more flexible approach to remedies that is perhaps not as loose but that is similar to the approach suggested by the US federal Court of Appeals for the Fifth Circuit in the *Lykes-Youngstown* case discussed above.

[61] 156 C.L.R. at 115.

[62] 158 F.2d 631 (2d Cir. 1946).

[63] See *supra* note 6.

[64] 677 F. Supp. 731 (S.D.N.Y. 1988).

the singer had a claim for damages. The court agreed and would not allow the claim for royalties to proceed under the rubric of unjust enrichment. The court, however, allowed the plaintiff's unjust enrichment claim based on the performance of services beyond those covered by the contract and based on the allegation that the record company produced and distributed other items that were rightfully his property[65] and for which he received no compensation. The court relied on evidence of "industry trade and practice"[66] to determine whether there was a reasonable claim, and, if so, the amount of that claim.

Goodell v. *Rehrig International, Inc.*[67] involved an interesting interplay between family issues and commercial law. Goodell, an executive with a successful firm, was enticed to leave that employment and to join Rehrig International by the principal shareholder and CEO of Rehrig, who was Goodell's father-in-law. The evidence adduced at trial indicated that Goodell's father-in-law said something such as, "Come work at Rehrig and one day it will belong to you and Julie." (Julie was Goodell's wife.) Goodell joined Rehrig and rose to a top management position. Apparently he worked hard and the firm profited from his efforts. He never received any equity interest in the firm, but he was paid a fair salary. All was well for about nine years, and then Goodell and his wife were divorced. Shortly thereafter Goodell's father-in-law caused Goodell to be fired from his position with Rehrig. Goodell sued and tried to assert a claim for an equity interest in Rehrig based on the representations made by his former father-in-law some years earlier. He was unsuccessful on several theories of action but the court allowed him to try to prove a quantum meruit claim for the difference between the value of his service to the company and the actual compensation that he received. He was permitted to try to show either: (i) that he performed work beyond the usual that was not covered by his salary or (ii) that there was an express promise to deliver an equity interest in the firm in return for his work, regardless of his compensation package. The court's argument for allowing Goodell to make his claim shows some of the confusion that arises in this murky area of the law, and it also identifies the justice principle that underlies restitution claims.

> Unjust enrichment is an equitable doctrine that arises in this case in the context of quasi contract . . . It will be noted, however, that

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[65] It is common for a variety of souvenir items to be produced and sold in connection with the distribution of a popular music album.

[66] 677 F. Supp. at 740. After reading a decision such as this one might question the utility of contract as a risk allocation device if one party, disappointed in how a contract turns out, is free to seek to recover what other contractors, who struck better deals, might have received had he had their deal. Compare, e.g., *Gordon* v. *Matthew Bender & Co.*, 562 F. Supp. 1286 (N.D.Ill. 1983) where the court stated at page 1298:

> If the parties enter into an agreement, they choose to be bound by its terms. The failure to provide for other terms may be intentional, or may be due to oversight. But in any case . . . [a]n action sounding in quasi-contract will not lie.

[67] 683 F. Supp. 1051 (E.D.Va. 1988).

the issue is framed here as one of quantum meruit, not one of the value of a benefit conferred on Rehrig International, because Goodell's claim is based on personal services.[68]

The first sentence confuses equity and law, a common occurrence in American cases. Law and equity have been merged for so long in most jurisdictions that courts rarely think in terms of the historical distinctions between the two traditions except in terms of remedies or, sometimes, in connection with the role of a jury. Courts and litigants often refer to "equity" or "equitable principles" when they are talking about general concepts of fairness and justice. The reference may or may not be correct in terms of the historical functions and powers of the courts of equity.[69]

What is particularly interesting is the attempt to distinguish between quantum meruit as a measure of the value of the personal services rendered and the notion of a benefit conferred. If one reads the case carefully, the claim Goodell made was that he had considered the original promise of his father-in-law for a share of the equity in the firm to be part of his compensation and that he worked diligently not just for his salary but to build up the company that would one day belong to him and to his wife. There was no enforceable express contract nor was there any indication that his salary was out of line with what would have been paid to an unrelated manager in a similar position. Goodell wanted a portion of the company itself or the monetary equivalent because his work helped to increase that value.[70] Despite the court's language the crux of the issue from Goodell's perspective was that the firm was more valuable because of his efforts and therefore that he should share in that increase in value. His theory aimed at a recovery based on the defendant's gain derived from his efforts. While allowing that claim to go forward, the court reconceived the claim to be one for the market value of the plaintiff's services, which was an altogether different approach to valuation and one that does not withstand close scrutiny. There was a contract (perhaps it was implied in fact, but it was a contract) for Goodell's work and salary. If there was such a contract, then Rehrig performed and Goodell would be hard pressed to explain why he should recover more for his services without proving that they were substantially beyond the normal.[71]

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[68] Id. at 1056.

[69] Consider the following: "[T]he concept of unjust enrichment—basically an equitable premise—structurally forms the basis for theories of quasi contract." *Phoenix Canada Oil Co. Ltd.* v. *Texaco Inc.*, 560 F. Supp. 1372, 1384 (D.Del. 1983) cited with approval in *Phoenix Canada Oil Co. Ltd.* v. *Texaco Inc.*, 842 F.2d 1466, 1474 (3d Cir. 1988).

[70] In truth, he wanted a share in the company because he thought that it had been promised to him, but that promise was not enforceable as such and so his alternative was a claim sounding in restitution.

[71] It may be possible to recover additional compensation in quantum meruit when there is an express contract, but only if it can be proven that the additional compensation is for work outside the scope of the express contract. A court has to decide whether in fact the work was extra and whether in fact the contract does not make provision for extra work. This is a matter of contract interpretation

H. Conclusion

The key to most restitution cases is unjust enrichment and the objective is to require the defendant to pay for or to return a benefit. Once liability has been established, measurement is the most difficult problem. It is easy for all the participants in a case, the judge included, to become confused among an array of remedial possibilities. Tying the remedy to the underlying goal helps to distinguish restitution cases from contract and tort cases, but the practical problems of proof remain. In the American system these difficulties often are aggravated by the casual intermingling of legal and equitable principles and remedies.

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[71] *continued*

and thus an issue for decision by the judge rather than an issue of fact for submission to the jury. *Infra-Pak (Dallas), Inc.* v. *Carlson Staples & Shippers Supply Inc.*, 803 F.2d 862, 865, n. 1 (5th Cir. 1986) citing *Black Lake Pipe Line Co.* v. *Union Construction Co.*, 538 S.W.2d 80, 86 (Tex. 1976). But *contra* see *Borowski* v. *DePuy Inc.*, 850 F.2d 297 (7th Cir. 1988) where the court stated, at page 301:

> An action in quasi-contract does not exist in Illinois just because a specific subject matter is not covered in the express contract . . ., "a plaintiff may not state a claim for unjust enrichment when a contract governs the relationship between the parties." citing *First Commonwealth Traders Inc.* v. *Heinold Commodities Inc.*, 766 F.2d 1007, 1011 (7th Cir. 1985).