A Proposal to Simplify Quantum Meruit Litigation.pdf

Candace Kovacic-Fleischer

Available at: https://works.bepress.com/candace_kovacic_fleischer/15/
ARTICLES

A PROPOSAL TO SIMPLIFY QUANTUM MERUIT LITIGATION*

CANDACE S. KOVACIC**

TABLE OF CONTENTS

Introduction .......................................................... 549
I. Sources of Confusion in Quantum Meruit Litigation ... 553
II. Proposed Analytic Structure ................................. 562
   A. Elements of the Framework .............................. 562
   B. Recovery Under the Framework ....................... 564
   C. Sequential Application of the Two Tiers of the
      Framework .................................................. 565
   D. Analytic Structure of the Framework ............... 568
   E. Terminology of the Framework ....................... 569
   F. Rationale for the Framework ........................... 569
III. Derivation of Two-tiered Analytic Framework .......... 571
   A. Express, Valid, Nonbreached Contract—No
      Quantum Meruit Recovery ............................... 571
      1. Courts consistently apply accepted underlying
         premise ..................................................... 571
      2. Courts inconsistently characterize and use
         quantum meruit elements .............................. 572
   B. Quantum Meruit Recovery Under Tier One .......... 575

* © 1986 Candace S. Kovacic
*** The author wishes to thank Gail Abrams, William Bloss, Gáspár deBöcskevy, Jean Love, Nell Newton, Joseph Perillo, Steve Pieczenik, and Janice Toran for reading and thoughtfully commenting on this article; Laura Shactman, Class of 1986, and Leslie Ann Gerard, Class of 1987, for their excellent research assistance; and Wilai Pitayatonakarn for her excellent and patient typing of this article. The author also wishes to thank the American University Washington College of Law Research Fund for generously assisting with this research.
1. Contracts implied in fact ........................... 575
   a. Work in addition to that provided in express contract ........................................... 575
      i. Extra work constitutes an additional agreement ...................................................... 575
      ii. Courts consistently allow recovery but inconsistently use terminology and measure recovery .............................................................. 576
      iii. Consistent application of elements ...................................................................... 578
      iv. Tier one adequate to resolve extra work cases and provide single recovery ...... 581
   b. Work performance at employer's request without express contract ............................. 582
      i. Agreement by conduct creates contract ................................................................. 582
      ii. Courts award recovery consistently but inconsistently use terminology and measure recovery .............................................................. 583
      iii. Courts apply elements inconsistently, or fail to do so altogether .................... 584
      iv. Analytic problems ......................................................................................... 586
   c. Courts can avoid problems by using tier one ......................................................... 592
2. Quasi-contracts resolved with contract implied in fact elements .................................... 594
   a. Statute of frauds ................................. 594
      i. Courts allow and measure recovery consistently ..................................................... 595
      ii. Courts perform a sparse analysis .......................................................................... 597
      iii. Analytic problems ......................................................................................... 599
          (a) Quasi-contractual nature of analysis ............................................................... 599
          (b) Inconsistency of finder's fee cases ................................................................. 600
      iv. Proposal ...................................................................................................... 601
   b. Plaintiff in breach ........................................... 604
      i. Courts provide little analysis and reach inconsistent results .................................... 604
      ii. Analytic problems ......................................................................................... 607
          (a) Lack of meaning of acceptance element when plaintiff breaches .............. 607
          (b) Confusion with respect to damages ................................................................. 607
          (c) Excessive appeals ......................................................................................... 609
          (d) Quasi-contract versus reasonable value recovery ........................................... 609
      iii. Proposal ...................................................................................................... 610
   c. Employment situation despite contract ................................................................. 612
i. Courts consistently allow recovery in quantum meruit despite discharged contract ................................ 612
ii. Lack of analysis—implied elements of request and expectation of fee ............ 613
iii. Analytic problems .................................. 614
iv. Proposal .......................................... 614

C. Tiers One and Two Used Together for Illegal Contract Cases ........................................ 615
1. Courts have no consensus allowing recovery in quantum meruit ................................ 615
   a. Cases awarding recovery apply an unjust enrichment analysis but not an unjust enrichment measurement of recovery ...... 616
   b. Cases denying recovery in quantum meruit . 619
2. Analytic problems .......................................... 621
   a. The cases awarding recovery ..................... 621
      i. Courts are analytically confused .......... 621
      ii. Confusion between theory and recovery shifts attention from real issues and causes excessive remands .......... 622
      iii. Courts awarding recovery do not consider deterrence of conduct .......... 622
   b. Cases denying recovery ...................... 623
3. Proposal ............................................. 624

D. Tier Two Used Alone—Recovery from Third Parties ........................................ 628
1. Defining third parties and identifying countervailing policies ........................ 628
2. Courts show no consensus to allow recovery in quantum meruit ................................ 629
3. Analytic problems ........................................ 635
4. Proposal .............................................. 637

E. Corroborative Support for the Two-Tiered Analysis 641

IV. Defendant in Breach—A Related Scenario .......... 643

CONCLUSION ................................................ 645

INTRODUCTION

In the 1980's, quantum meruit litigation appears to be governed by ipse dixit reasoning—the result is what the court says it is—be-

1. BLACK'S LAW DICTIONARY 743 (5th ed. 1979). The term ipse dixit means "[h]e himself said it; a bare assertion resting on the authority of an individual." Id.
cause so much confusion exists concerning quantum meruit's terminology and method of analysis. The outcomes of quantum meruit cases are often inconsistent and unpredictable. The courts' analyses are at times incomprehensible.

Quantum meruit means "as much as he deserves," and is an action brought by a plaintiff to recover payment for labor performed in a variety of situations in which that plaintiff would not be able to recover under an express contract. The quantum meruit action is by no means modern, but many modern courts have a difficult time with it. One need only read a number of quantum meruit decisions written in the 1980's to realize that confusion is widespread. Although most courts attempt to explain rather than announce their results, they cannot find useful guidance from treatises, and thus their explanations vary considerably. In fact, many courts write lengthy quantum meruit opinions that include discussions of contract implied in fact, contract implied in law, quasi-contract, unjust enrichment, and/or restitution. The abundance of terms, many of which courts and litigants misunderstand, and the variety of differing analytic approaches for the same claim prohibit consistency of analysis, and thus of result. These inconsistencies create obvious problems for the many litigants who bring quantum meruit actions.

This Article proposes a two-tiered analytic framework to simplify quantum meruit litigation and to facilitate consistency in result and remedy. The primary difference between the two tiers is the request element. The first tier cases involve defendants who had requested the plaintiff to perform services, while the second tier cases involve plaintiffs who had performed services without the defendant's request.

2. Id. at 1119.
5. See Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1226 (1973) (stating that authorities recognize need to distinguish obligations arising out of preexisting relationship between parties and those in which parties have no such relationship).
Confusion as to whether to award relief and how to measure it often arises when courts analyze cases involving requested performance as if they were cases involving unrequested performance and vice versa. In the request cases, the court should generally award recovery and measure it by the market value of the requested services, while in cases involving unrequested services, the court should determine whether the plaintiff’s unrequested labor has unjustly enriched the defendant and if so, by how much.

This two-tiered analytic framework for quantum meruit cases was derived from an analysis of recent cases and an examination of the trends that authorities have identified. The analysis divided the cases into categories based on the plaintiff’s reason for seeking recovery in quantum meruit. The analysis then identified and compared the terminology, methodology, and recovery, if any, in each case.

The comparison revealed a surprising amount of consensus among the courts as to result in most categories, a consensus consistent with the trends authorities had discussed. This comparison also revealed occasional consistency in analysis, but more often

6. See infra text accompanying note 31 (explaining how defendant benefits from receiving plaintiff’s requested services). This underlying premise indicates that at common law quantum meruit protected the worker.


8. This Article attempts to find a consistent method for analyzing quantum meruit cases. Originally it was thought that cases from a number of years would be necessary for the task. It became apparent, however, that one could derive a framework from far fewer cases. A sample of 1984 cases revealed considerable confusion and unpredictability among courts dealing with quantum meruit litigation. The cases came from a LEXIS search of “quantum meruit and date after 1983.” The search yielded 149 state and 31 federal cases. Cases from 1985, which was not then ended, were eliminated as were cases resolved on other grounds. Cases involving compensation for the services of attorneys were eliminated. The cases analyzed came from different jurisdictions, but there is no reason why quantum meruit decisions should vary considerably from jurisdiction to jurisdiction. Even within jurisdictions, courts misapply their own precedents. See infra notes 436-37 and accompanying text (illustrating confusion and courts’ inconsistent application of precedent).

Dealing with this confusion becomes a serious question, for, left alone, the confusion likely will continue, or grow worse. Dividing the cases by type did not eliminate the confusion because within each category the courts performed different analyses and at times awarded different recovery. The only trend emerging, however, was that the majority of courts consistently awarded recovery in quantum meruit. In only a few categories did the courts differ as to whether to award recovery. A larger sample was not necessary, for the authorities collecting the cases in these various categories confirmed the trend of the results. It then became the task of this author to find an analytic approach that would explain the results and attempt to provide consistency.

9. The primary authority used is the four-volume treatise by Professor George Palmer. G. PALMER, THE LAW OF RESTITUTION (1978). Others were A. CORBIN, CORBIN ON CONTRACTS (1963); D. DOBBS, REMEDIES (1973); R. GOFF & G. JONES, THE LAW OF RESTITUTION (2d ed. 1978); RESTATEMENT (FIRST) OF RESTITUTION (1937); RESTATEMENT (SECOND) OF CONTRACTS (1981); S. WILLISTON, WILLISTON ON CONTRACTS (1957).
showed substantial inconsistencies in terminology, analysis, and measurement of recovery. After identifying these inconsistencies, common factual structures of the cases within each category were sought. From these common factual structures and the areas in which courts were in agreement as to result or analysis, two sets of elements were derived that can be used in a two-tiered fashion to analyze all quantum meruit claims.10

This Article first describes the proposed two-tier structure for analyzing quantum meruit claims. After having read Part I, the reader will be able to understand and apply the analytic framework. The reader interested in greater depth will find that the remainder of the Article analyzes in detail the eight major categories of quantum meruit cases—express contract, work performed in addition to that specified in an express contract, requested work performed without an express contract, statute of frauds, plaintiff in breach, discharged contracts, illegal contracts, and third-party recoveries—to demonstrate both the derivation of the proposed framework and its application to a particular type of case.

The Article will also demonstrate that the proposed framework is consistent with accepted legal theory, and that it articulates a unified analysis for results that most courts are reaching through a variety of methodologies. The unified framework should enable courts to reach predictable and consistent results in an analytically sound manner.

10. This Article does not discuss cases involving lawyers’ services or those in which doctors provide emergency care to unconscious patients. These particular situations are both sui generis, with their own sets of rules turning on unique circumstances. For example, the client’s ability to fire a lawyer without cause and the special nature of contingency fee contracts make those cases of little precedential value to other situations. See 1 G. PALMER, supra note 9, § 5.13(b), at 659 (discussing quantum meruit recovery for lawyers’ services). In the doctor cases, the nature of the service again makes those cases unique. See D. DOBBS, supra note 9, § 4.5, at 265 (discussing quantum meruit recovery for doctors’ rendering emergency aid to unconscious patients).

The Article also does not include in the proposal the situation in which the plaintiff sues a defendant who substantially breaches an enforceable contract in restitution for defendant’s gain rather than in contract for contract damages. See infra notes 509-23 and accompanying text (discussing defendant’s gain in restitution and breach of contract scenarios).

Finally, although this Article notes when the price of an unenforceable contract can influence the amount of recovery, the remedial emphasis of this Article is to propose a framework to analyze quantum meruit cases and to distinguish between the reasonable value of the plaintiff’s services and the defendant’s gain as measurements of recovery. The Article will not discuss the much debated issues concerning whether the contract price should be admissible to prove the reasonable value of the plaintiff’s services or the defendant’s gain, or whether the contract price should impose a ceiling on recovery under either measurement. See infra note 201 and accompanying text (discussing unenforceable contracts as evidence of reasonable value of plaintiff’s services). Jurisdictions using the contract price in such a manner can superimpose it upon the proposed structure. This Article, however, does not make any recommendation on this matter.
I. SOURCES OF CONFUSION IN QUANTUM MERUIT LITIGATION

Quantum meruit litigation is confusing for three major reasons. First, the term has two different definitions, one as a contract implied in fact, the other as a contract implied in law. Courts frequently do not identify which meaning they are applying and often make the claim an amalgam of the two types. Second, one of the definitions of quantum meruit, that of a contract implied in law, is in restitution, which is an area also often misunderstood. Third, many of the major authorities on contracts or restitution do not index the term quantum meruit in their treatises. When they do so, the discussion is often brief, fragmented, or intertwined with a discussion of restitution, which requires the reader to understand restitutionary terminology.


13. Few authorities index quantum meruit by name. Although litigants frequently bring quantum meruit actions, the RESTATEMENT (SECOND) OF CONTRACTS does not index the term, and the only reference to it in the index to the RESTATEMENT (FIRST) OF RESTITUTION is "Quantum Meruit Development of, Intro. note to Part I (p. 4)." RESTATEMENT (FIRST) OF RESTITUTION, supra note 9, Index at 995. The Williston and Corbin treatises separately index quantum meruit. 8 A. CORBIN, supra note 9, at 396; S. Williston, supra note 9, at Index 567-68. These indexes reference many sections, therefore fragmenting the analysis. Many sections use restitution terminology, at times referring to quantum meruit only in a footnote, if at all, again requiring the reader to understand restitution. A few hornbooks separately index quantum meruit. The hornbooks combine quantum meruit discussions with restitution, and are necessarily brief by the nature of a hornbook. J. Calamari & J. Perillo, THE LAW OF CONTRACTS 873 (2d ed. 1977); A. Corbin, supra note 9, at 1214; D. Dobbs, supra note 9, at 1059.

Although Professor Palmer discusses the concepts of quantum meruit throughout his excellent treatise, he does so under the terminology of quasi-contract, requiring the reader to understand that terminology in order to find and appreciate the quantum meruit analysis. That courts do not cite Professor Palmer as often as he deserves in quantum meruit cases indicates that a lack of understanding of the terminology may be depriving a number of judges and litigants of the benefit of his treatise. A LEXIS search in November, 1985 revealed that only six federal and state cases after 1980 cite Palmer's treatise. See Orman v. American Ins. Co., 680 F.2d 301, 312 (3d Cir. 1982) (citing § 107 of Palmer's treatise); Thomas v. Resort Health Related Facility, 595 F. Supp. 630, 636 (E.D.N.Y. 1982) (citing Palmer for quantum meruit remedy); Camrex Ltd. v. Camrex Reliance Paint Co., 90 F.R.D. 313, 322 (E.D.N.Y. 1982) (citing Palmer for proposition that restitution is doctrine in both law and equity); Mass Transit Admin. v. Granite Constr. Co., 57 Md. App. 766, 774, 471 A.2d 1121, 1125 (1984) (citing...
The reason there are two definitions for quantum meruit may be because quantum meruit is one of the "common counts" within the old writ of assumpsit. That writ was initially used to enforce express and implied in fact contracts and was later expanded to enforce contracts implied in law, or quasi-contracts. As the writ system disappeared, the courts continued to use quantum meruit in these two different types of cases.

A contract implied in law, also known as quasi-contract, is one of the definitions for quantum meruit. It is not a contract at all, but rather is a legal action in restitution. Restitution, in turn, also is referred to as an action in unjust enrichment. The classic elements of restitution, and thus contract implied in law, are: (1) the defendant received a benefit, (2) at the plaintiff's expense, (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it. The plaintiff, however, must not

Palmer for history of law of restitution); Green Quaries, Inc. v. Raasch, 676 S.W.2d 261, 266 (Mo. App. 1984) (citing Palmer for proposition that most courts deny quasi-contract relief); Haertlein v. Riopele, 109 Wis. 2d 690, 326 N.W.2d 781 (1982).

14. See 1 A. Corbin, supra note 9, § 21, at 50-51 (discussing history and application of writ of assumpsit). The use of the common counts in quantum meruit and quantum valebat for the enforcement of both obligations tends to confuse quasi-contractual obligations with obligations based on actual contracts. 12 S. Williston, supra note 9, § 1480, at 280.

Although quantum meruit is only one of the "common counts" from the writ of assumpsit, quantum meruit is significantly different from the other common counts, therefore requiring a separate analysis. Quantum meruit involves the defendant's receipt of the plaintiff's labor, whereas the other counts involve the defendant's receipt of money or goods from the plaintiff. Unlike labor, for the most part the defendant can return goods and money. Morrison, supra note 7, at 716. That important difference affects both the court's decision to award recovery in quantum meruit and also the measurement of recovery for services rendered.

15. See 1 A Corbin, supra note 9, § 19, at 44, 46; D. Dobbs, supra note 9, § 4.2, at 235; G. Douthwaite, Attorney's Guide to Restitution § 1.1, at 5 (1977); W. Keener, supra note 11, at 14-15; G. Palmer, supra note 9; Restatement (First) of Restitution § 1, at 1-2 (1937); F. Woodward, The Law of Quasi Contracts § 4, at 6 (1913); Comment, Restitution: Concept and Terms, 19 Hastings L.J. 1167, 1188-92 (1968). Because restitution—and thus quasi-contract and quantum meruit—are rooted in principles of "justness," courts at times refer to restitution as an equitable doctrine. See, e.g., Lakeshore Fin. Corp. v. Comstock, 587 F. Supp. 426, 429 (W.D. Mich. 1984); Euramca Ecosystems v. Roediger Pittsburgh, Inc., 581 F. Supp. 415 (E.D. Ill. 1984) (deeming quantum meruit an equitable doctrine despite applicable statute). The correct use of the term equitable when referring to restitution is in terms of justness or fairness, not as technical equitable procedure. Restitution can be, and frequently is, an action at law. Restatement (First) of Restitution, supra note 9, § 1, at 1-2 (1937).

16. 1 G. Palmer, supra note 9, § 1.1, at 2.


The principle of unjust enrichment is capable of elaboration. It presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain that benefit.

R. Goff & G. Jones, supra note 9, at 13-14. Although this work is British, the authors survey American and British law, as well as law from other countries. See also Henderson, supra note 11, at 1142 (providing elements of quasi-contract); Wade, The Literature of the Law of Restitution, 19 Hastings L.J. 1087, 1095 (1968).
A contract implied in fact, on the other hand, is an actual contract. The classic elements of contract implied in fact are: (1) the defendant requested the plaintiff to perform work, (2) the plaintiff expected the defendant to compensate him or her for those services, and (3) the defendant knew or should have known that the plaintiff expected compensation. A request made with an expectation of making payment is a contractual offer accepted by performance in the expectation of payment. An implied in fact contract differs from an express contract in that the terms of the latter are expressed or implied in writing while those of the former are inferred from the parties' conduct.

Some courts exacerbate the confusion between the concepts of contract implied in law and contract implied in fact by referring to an implied contract or implied promise without specifying whether the contract is implied in fact or in law. The distinction between

---

18. See, e.g., D. Dobbs, supra note 9, § 4.9, at 298-300 (discussing restitution for gratuitous benefits conferred); 2 G. Palmer, supra note 9, § 10.1, at 359-63 (discussing restitution for gratuitous transfers).

19. The plaintiff must prove the terms of a contract implied in fact by conduct, not by express written or oral statements. See Restatement (Second) of Contracts § 5 comment a (1981) (providing that terms of promise or agreement are those expressed in language of parties or implied in fact from other conduct); 1 S. Williston, supra note 9, § 3, at 8-10 (defining implied in fact contracts as obligations arising from mutual agreement and intent to promise where parties do not express agreement and promise in words); see also 1 A. Corbin, supra note 9, § 18 (noting that implied contracts impose contractive duty by reason of promissory expression and are no different than express contracts, although in different mode of expressing assent); 3 A. Corbin, supra note 9, § 562, at 286-88 (stating that court finds and enforces implied promise by interpretation of promisor's words and conduct in light of surrounding circumstances); Morrison, supra note 7, at 712 (stating that court can find parties agree to form contract without expressly stating).

20. See Comment, Implied in Fact Contracts and Mutual Assent, 33 Harv. L. Rev. 376, 389-90 (1926) (stating that elements of contract implied in fact are action by one who intended to charge taken at request of one who intended to pay).

21. J. Murray, Murray on Contracts, § 29, at 54 (2d ed. 1974); S. Williston, supra note 9, § 36, at 101. If the request is for performance as a favor, with neither party expecting compensation, no offer to contract is made. Id. If the defendant makes the request under such circumstances that a reasonable person would infer an intent to pay for the requested services, the request amounts to an offer, and the parties create a contract by the performance of the work. Id. The parties can form a contract without a request if it is known that performance is being rendered with the expectation of payment. Id.; see also Henderson, supra note 11, at 1143 (stating that classic contract implied in fact elements do not require request but only that defendant know that plaintiff expects compensation when defendant accepts benefit).

22. See supra note 19 and accompanying text (discussing manner in which intent of parties proves existence of contract implied in fact).

these two types of quantum meruit is important because the two claims provide different recoveries. Technically, recovery in contract implied in fact is the amount the parties intended as the contract price. If that amount is unexpressed, courts will infer that the parties intended the amount to be the reasonable market value of the plaintiff’s services. Recovery in quasi-contract, or contract implied in law, however, is in restitution and thus is the amount of the defendant’s gain. The courts are often aware of the duality of remedy in quantum meruit, but do not appear to know when one or the other is appropriate, primarily because of a lack of authoritative guidance. Some of the courts applying quantum meruit award the plaintiff the amount of the defendant’s gain. More courts, however, apply quantum meruit without distinguishing between them; D. Dobbs, supra note 9, § 4.5, at 264; Henderson, supra note 11, at 1146, 1148, 1151; Note, supra note 11, at 574; Comment, supra note 20, at 383, 390-91.

24. D. Dobbs, supra note 9, § 4.5, at 264; Henderson, supra note 11, at 1146, 1148, 1151; Note, supra note 11, at 574; Comment, supra note 20, at 383, 390-91.


The concept of benefit is defined broadly. The Restatement (First) of Restitution defines benefit as when “[A] person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other’s security or advantage.” Restatement (First) of Restitution, supra note 9, § 1, comment b; see also J. Dawson, supra, at 22 (stating that there are no distinctions based on form or nature of gain received; benefit may consist of acquisition or use of chattels, services rendered, or acts performed, use of ideas, or discharge of obligation, with list not yet closed).

26. This lack of guidance is illustrated by examining the following three authorities. See Restatement (Second) of Contracts, supra note 9, § 371 comment a (stating that recovery in restitution is either reasonable value of plaintiff’s services or increased wealth to defendant’s property, and that court has considerable discretion in making choice between the two measures). The Restatement further provides that when the reasonable value of the plaintiff’s services is greater than the defendant’s gain, that measure is allowed unless it is unduly difficult to apply. Id. at comment b; see also 6 A. Corbin, supra note 9, § 1367, at 518, § 1368, at 521 (referring both to reasonable value of plaintiff’s services and defendant’s gain in same discussion without distinguishing between them); D. Dobbs, supra note 9, § 4.5, at 262 (qualifying discussion of appropriate measurements of recovery in restitution with words “should probably” and “perhaps”).

ever, award the reasonable market value of the plaintiff’s services, even when characterizing the quantum meruit claim as one in quasi-contract. Some courts award the plaintiff’s costs.

In fact, the reasonable market value of plaintiff’s services can be viewed as the correct remedy in most quantum meruit cases, even in many cases in unjust enrichment because reasonable value can be viewed as the defendant’s gain in certain situations. The value of the plaintiff’s services measures the defendant’s gain when the defendant requests the work: the defendant’s benefit is receiving what he or she requested those requested services have a market value. In recent cases, however, courts have not articulated this rationale when awarding the reasonable value of plaintiff’s services pursuant to an unjust enrichment characterization of the claim. Rather, some courts appear to recognize that the amount of the defendant’s gain is the typical remedy in a quasi-contract case and believe that they


31. See 1 G. PALMER, supra note 9, § 4.2, at 372, § 5.3, at 576-77; 2 G. PALMER, supra note 9, § 6.3, at 18, § 7.4, at 119, § 7.8(a), at 149, § 7.8(b), at 154; 6 S. WHILSTON, supra note 9, § 1976; RESTATEMENT (FIRST) OF RESTITUTION, supra note 9, § 155, comment c, illustration 1, at 614-15; F. WOODWARD, supra note 15, at 183-84; Henderson, supra note 11, at 1148. But see Beale, The Measure of Recovery upon Implied and Quasi-Contracts, 19 YALE L.J. 609, 621 (1910) (noting that in some cases defendant’s gain does not equal value of services received, suggesting that plaintiff be limited to defendant’s gain). According to Professor Perillo, however, Beale’s assertion does “not accurately state the law.” Perillo, supra note 5, at 1221.
must choose between that measure of damages and the reasonable market value of a plaintiff's services, not realizing that in some situations the two can be analytically the same.\textsuperscript{32}

If the reasonable value of the plaintiff’s services were the appropriate remedy in all quantum meruit cases, it would not be important that the analysis of quantum meruit cases is confused and does not distinguish between contracts implied in fact and contracts implied in law. Reasonable value of plaintiff’s services is not the correct remedy in all cases, however, for in some instances the only appropriate remedy in quantum meruit cases is the amount of the defendant’s gain as measured by the increased value of the assets or some other subjective value.\textsuperscript{33} Courts, however, are not sure when to use one or the other of the two remedies. Some courts will use the reasonable value of plaintiff’s services rather than defendant’s gain if the defendant’s gain is difficult to measure.\textsuperscript{34} Because the defendant’s gain is the only appropriate remedy in some circumstances, this arbitrary application of alternative remedies lacks proper legal justification.

One would expect legal analysis to determine the correct remedy. Typical legal analysis applies a set of elements to the facts of a case which, if met, will produce a remedy. Unfortunately, in analyzing quantum meruit claims, many courts do not utilize any elements.\textsuperscript{35}

\textsuperscript{32} See Hartwell Corp. v. Smith, 107 Idaho 134, 141, 686 P.2d 79, 86 (1984); Ellis Jones, Inc. v. Western Waterproofing Co., 66 N.C. App. 641, 647, 312 S.E.2d 215, 218 (1984); see also Beale, supra note 31, at 621 (legitimating this erroneous viewpoint by stating that in cases where amount of enrichment and value of services are not same, plaintiff's recovery is restricted to amount of enrichment). Beale's statement may be influenced by statements that the defendant's benefit is "not the cost of the plaintiff's performance or the extent of the plaintiff's loss." F. Woodward, supra, at 164. This latter statement means only that one should not measure the plaintiff's cost or loss. \textit{Id.} It does not mean that the reasonable value of the plaintiff's services cannot measure the defendant's gain. See supra note 31 and accompanying text (stating that reasonable value of services is also amount of defendant's gain in certain situations).

\textsuperscript{33} See 1 G. Palmer, supra note 9, § 5.8, at 577 (discussing increased economic wealth as measure of defendant's gain); 2 G. Palmer, supra note 9, § 10.9(c), at 447, 453 (noting that increased asset value can be measure of defendant's gain).

\textsuperscript{34} See Campbell v. TVA, 421 F.2d 293, 296 (5th Cir. 1969) (finding correct measure of damages to be fair market value of goods and services received rather than value of goods and services to defendant where latter measure is not susceptible of proof); see also Henderson, supra note 11, at 1147 (stating that most courts award to plaintiff the value of goods and services rendered to defendant).

When the courts do use elements, however, they do not articulate a single set of elements by which they may obtain consistent results. Instead, probably because there is little easily accessible authoritative guidance, there appears to be a grab bag of elements from which the courts draw a few. The courts variously combine some elements from a contract implied in law and some from a contract implied in fact in analyzing quantum meruit claims. Courts occasionally add one or two more, such as the defendant accepting the benefit, the defendant retaining the benefit, the defendant not rejecting the benefit, the defendant knowing of the benefit, the defendant appreciating the benefit, or the defendant acquiescing in the benefit. Some courts use a certain set of elements to analyze a contract implied in fact, while other courts use those same elements to analyze a contract implied in law. Relying on precedent often

v. Hagerott, 684 P.2d 487, 489 (Mont. 1984) (announcing recovery in quantum meruit as market value of services without stating analysis substantiating conclusion); R. Zoppo Co. v. City of Dover, 124 N.H. 666, 675, 475 A.2d 12, 18 (1984) (stating without supporting rationale that defendant's gain was appropriate amount of damages); Willis v. Russell, 68 N.C. App. 424, 429, 315 S.E.2d 91, 95 (1984) (holding, without analysis, that measure of damages in quantum meruit is reasonable value of services less benefits received).


These added elements rarely are meaningful in quantum meruit cases in which the defendant cannot return the services performed, and should therefore be abandoned. See infra text accompanying note 58 (recommending abandonment of spurious elements). BLACK'S LAW DICTIONARY adds to the confusion by combining the elements as follows:

Essential elements of recovery under quantum meruit are: (1) valuable services were rendered or materials furnished, (2) for person sought to be charged, (3) which services and materials were accepted by person sought to be charged, used and enjoyed by him, and (4) under such circumstances as reasonably notified person sought to be charged that plaintiff, in performing such services, was expected to be paid by person sought to be charged.

BLACK'S LAW DICTIONARY, supra note 1, at 1119. The first two elements are elements of both contract implied in fact and contract implied in law. The third element is a non-useful variation of an unjust enrichment element; the last element encompasses two elements: that the plaintiff expect payment, which is an element of both a contract implied in law and a contract implied in fact; and that the defendant know of this expectation, which is a contract implied in fact element. BLACK'S characterizes the claim as solely a contract implied in law, but then calls it an equitable doctrine. Id. Two 1984 cases use these elements almost word for word. TVL Assoc. v. A & M Constr. Corp., 474 A.2d 156 (D.C. 1984); Prairie Valley Indep. School Dist. v. Sawyer, 665 S.W.2d 606 (Tex. Ct. App. 1984).

compounds the problem because prior cases are frequently confused or misapplied due to confusion with the terminology.\textsuperscript{39}

In fact, many quantum meruit cases are contract implied in fact cases,\textsuperscript{40} but most courts, no matter which elements they use, characterize all quantum meruit cases as contracts implied in law.\textsuperscript{41} By not recognizing contracts implied in fact, courts often make their analysis unduly confused by unnecessarily introducing the concept of defendant's gain. The reasonable market value of the plaintiff's services is the only remedy necessary.\textsuperscript{42} Furthermore, in cases in which express contracts are unenforceable, the contract implied in fact elements of request and expectation of payment are present and can be viewed as a subset of unjust enrichment elements.\textsuperscript{43} The reasonable value of the plaintiff's services can measure the defendant's gain in those cases,\textsuperscript{44} leaving the subjective measurement of defendant's gain to those few cases in which the defendant did not request the plaintiff's labor. The courts, however, appear to vacillate between the two remedies, unsure as to which is appropriate.

This confusion creates a number of problems for courts and litigants. First, courts and litigants use quantum meruit terminology inconsistently, which has deprived the terminology of much of its usefulness.\textsuperscript{45} Second, because courts and litigants are unclear as to


\textsuperscript{40} See 3 A. CORBIN, supra note 9, § 566, at 306-08 (discussing reasons for courts' confusion in quantum meruit cases). Professor Corbin said that:

A party receiving the benefit of the plaintiff's requested service is regarded as unjustly enriched by them if he pays nothing. This may well be held to be a sufficient basis for a non-contractual obligation, while at the same time justifying the inference of a promise in fact. In many specific cases, the courts have found it unnecessary to draw a fine distinction between these two bases of obligation to pay the reasonable value of services so rendered and received.


\textsuperscript{42} See supra text accompanying note 31.

\textsuperscript{43} See infra Part II.B (discussing contract implied in fact as subpart of restitution).

\textsuperscript{44} See supra text accompanying note 31.

\textsuperscript{45} Perillo, supra note 5, at 1223 (discussing problems in terminology, caused by conflicts in theory). Court decisions paying lip service to the unjust enrichment theory but in fact not carrying out that theory have "an unsettling effect on the law, giving the sensitive a feeling
the elements of the claim, a court may prematurely end analysis by inappropriately focusing on one element that is missing in the case.\textsuperscript{46} Third, if the case proceeds to a remedy, the measurement of that remedy is unpredictable. Because quantum meruit can describe either a contract implied in fact or implied in law, and because the recovery for those two claims can be different, the mere use of the term quantum meruit can produce one of two recoveries. Although recovery should depend upon which theory is appropriate, courts do not consistently distinguish between the two. The inconsistencies are not always fair. Courts award some people who do work in addition to their contract at defendant's request the reasonable value of that work,\textsuperscript{47} while they award some employees who work without contract but at defendant's request either a lesser amount of defendant's gain\textsuperscript{48} or the reasonable value of their work.\textsuperscript{49} Fourth, because the appropriate remedy is not clear, many courts may undervalue or overvalue recovery.\textsuperscript{50} Fifth, by attempting to clarify the

of lawlessness, the logician a feeling of irrationality and the average lawyer a feeling of confusion." \textit{Id.} When theory and practice conflict, the contrary pulls of dogmatic prescriptions and the inherent requirements of individual cases produce tension. \textit{Id.} (quoting A. Von Mehren & D. Trautman, The Law of Multistate Problems 78 (1965)). It is very difficult to predict in a given case which of the competing vectors will prevail. \textit{Id.} Professor Perillo also quotes Confucius to illustrate the importance of precise use of terminology.

Now, if names of things are not properly defined, words will not correspond to facts. When words do not correspond to facts, it is impossible to perfect anything. Where it is impossible to perfect anything, the arts and institutions of civilization cannot flourish. When the arts and institutions of civilization cannot flourish, law and justice do not attain their ends; and when law and justice do not attain their ends, the people will be at a loss to know what to do. \textit{Id.} (quoting Confucius, \textit{The Analects}, xiii, 3); \textit{see also} Comment, supra note 15, at 1188-97 (discussing major problems with unjust enrichment terminology).


dual nature of quantum meruit, the courts may miss the real issue in the case or reach an erroneous result. Finally, because the proper analysis is not clear, there is a high probability that trial and appellate courts will not agree on result, creating unnecessary remands and unpredictable litigation.

II. PROPOSED ANALYTIC STRUCTURE

Eliminating or reducing the confusion in quantum meruit terminology, analysis, and recovery would simplify quantum meruit litigation and conserve judicial and litigant resources. This Article proposes to eliminate the confusion by merging the theories of implied in fact and implied in law contracts into a two-tiered framework. Two tiers are necessary because one set of elements will not resolve all cases. Analytically the framework is in restitution. A single framework is necessary because two theories or remedies existing independently invite confusion. Quantum meruit cases are so closely related that one can easily mistake an implied in fact contract case for a quasi-contract case. With a single framework the courts do not have to guess which theory or remedy is appropriate.

A. Elements of the Framework

The elements of the first tier are those of contract implied in fact: (1) the defendant requested the plaintiff's work, (2) the plaintiff expected compensation for the services, and (3) the defendant knew or


— See infra Part III.B (discussing proposal's restitutory approach to quantum meruit in greater detail).
should have known that the plaintiff expected compensation. The elements of the second tier are those of contract implied in law, or quasi-contract: defendant’s benefit, at plaintiff’s expense, which is unjust to retain and not gratuitously rendered. The second tier also includes the element of the plaintiff’s expectation of compensation because in unjust enrichment cases, the plaintiff cannot gratuitously give his services.

The framework does not include the element of defendant’s “acceptance” of a benefit because this element is irrelevant in cases in which the defendant requested the performed services and is not meaningful in cases in which the defendant could not have returned or stopped unrequested services. When the defendant requests services, the plaintiff’s performance constitutes acceptance of the requesting party’s offer. The requesting party does not need to accept the acceptance. Once there is a request, mutual expectation of payment, and performance, the defendant can reject the benefit only if plaintiff is in breach. In the case of unrequested services, “acceptance” is an important factor in determining whether the defendant had a benefit in a case in which the defendant could have rejected the benefit. The defendant’s inability to prevent the plaintiff from conferring a gain, however, should not necessarily end the case in the defendant’s favor. When the defendant could not have prevented or returned the services, acceptance is meaningless, but other factors can be relevant for a determination of the “unjustness” of defendant’s uncompensated benefit.

55. See supra text accompanying note 20 (setting forth elements of contract implied in fact as defendant’s request of work from plaintiff, plaintiff’s expectation of payment, and defendant’s knowledge of plaintiff’s expectation). This Article frequently refers to these elements in a shorthand manner, with the first element termed simply the request element. The second and third elements are frequently referred to together as the mutual expectation of compensation (or payment) elements. Since one also can find a contract implied in fact without a request if the defendant knows the plaintiff expects compensation, supra note 21 and accompanying text, one can use the first tier with the request element. This, however, might create the confusion this proposal hopes to eliminate by enabling courts to distinguish between requested and nonrequested performance.

56. See supra text accompanying notes 17-18 (setting forth quasi-contract or contract implied in law elements of defendant’s benefit, at plaintiff’s expense, which benefit it is unjust for the defendant to retain without payment).

57. See Henderson, supra note 11, at 1143.

58. See 1 G. Palmer, supra note 9, § 5.1, at 570-72, § 5.14, at 675, 679-80, 682 (stating that acceptance element irrelevant where owner cannot refuse improvements to property); see also 5A A. Corbin, supra note 9, § 1126, at 26-27 (finding acceptance meaningless where only means of refusing performance is to abandon property).

59. See infra text accompanying notes 428 and 492 (discussing factors second tier may consider in determining whether defendant unjustly retains benefit). It is, however, beyond the scope of this Article to suggest all the myriad considerations possible within a second tier analysis.
The framework separates the "request" cases from the "nonrequest" cases to enable the courts to see that the request cases are relatively simple—it is just that the defendant pay for requested services. The nonrequest cases require a different analysis, one that weighs the conduct and hardship of the parties and compares forfeiture with forced purchase. The courts' current analysis generally follows no such guidelines.

The elements in these two tiers do not draw precise boundaries around quantum meruit theory. Since much of quantum meruit is based in restitution, whose own boundaries are not clearly delineated,\textsuperscript{60} such a task would be beyond the scope of this proposal. Accordingly, the proposed framework provides a uniform method of quantum meruit analysis, but also provides room for flexibility and expansion.

B. Recovery Under the Framework

Recovery under the first tier is the reasonable value of plaintiff's services, not the defendant's gain when the defendant's gain is the enhanced value of his or her property or some other subjective value.\textsuperscript{61} The defendant's gain can be evidence, however, of the reasonable value of the plaintiff's services because the quality of the plaintiff's labor is relevant to the computation of the reasonable value of his services. In the first tier, which has the request element, one can view the reasonable value recovery as the defendant's gain by defining benefit as receiving that which was requested. The value of that benefit is the market value of the requested work.\textsuperscript{62} The premise underlying the remedy of the reasonable value of the plaintiff's services, whether characterized as the expectation of the contract implied in fact or as the defendant's gain, is that it is fair and just for one to pay the reasonable market value for requested services.

Recovery under the second tier is the amount of the defendant's

\textsuperscript{60} See Nicholas, Unjustified Enrichment in the Civil Law and Louisiana Law, 36 Tul. L. Rev. 605, 607 (1962) (finding that principal problem faced in evolving restitution doctrine is precisely that of defining limits within which it operates); Oesterle, supra note 17, at 338 (stating that cardinal outlines of this branch of law are in dispute); see also 1 G. Palmer, supra note 9, Preface (expressing doubt as to whether truly comprehensive treatment of restitution is possible).

\textsuperscript{61} See D. Dobbs, supra note 9, § 4.5, at 264 (discussing problems in subjectively measuring defendant's gain); see also supra note 25 and accompanying text (discussing nature of defendant's benefit). This Article, however, does not discuss how to prove the reasonable value of the plaintiff's services.

\textsuperscript{62} See supra text accompanying note 31 (discussing those cases where defendant's gain is same as reasonable value of services performed).
gain as defined in unjust enrichment cases. Defendant's gain frequently is measured by the increased value to the defendant's property or by some other subjective measurement. The defendant's gain could be the reasonable value of the plaintiff's services if that is the amount by which the plaintiff's work tangibly benefited the defendant. In setting an amount for the plaintiff's recovery under either tier, the court should subtract any payments the defendant has already made to the plaintiff to prevent the plaintiff from recovering twice for the same work.

C. Sequential Application of the Two Tiers of the Framework

One should apply the two tiers in sequence, beginning with the first tier and progressing to the second tier only if the case does not meet the elements of the first tier. There are two reasons for this sequential application. One, the first tier is easier to apply, both in terms of elements and recovery. Request and mutual expectation of payment are easier to define and prove than is "unjustness." The reasonable market value of plaintiff's services is the preferred recovery because it, too, is easier to prove than is the broad concept of defendant's gain. It is possible that this ease of calculation is what is prompting most modern courts to award the plaintiff the market value of his services regardless of the theory the court says it is applying. Thus, application of the first tier not only provides an analytically sound rationale for the result most courts already reach, but also avoids unnecessary appeals and remands about the appropriate

63. See supra text accompanying note 25 (explaining why defendant's gain is appropriate remedy in quasi-contract cases).

64. See D. Dobbs, supra note 9, § 4.5, at 264.

65. See Friedmann, Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504, 504-05 (1980) (discussing difficulties in defining unjustness in remedial context). Unjust enrichment has on occasion been regarded as too indefinite and vague to be recognized as a general legal principle, with persons expressing concern that its adoption might undermine legal stability, confuse legal thinking, and jeopardize clear, systematic organization of the law. Id.; see also R. GOFF & G. JONES, supra note 9, at 11 (expressing opinions that principle of unjust enrichment is too vague to be of practical value); RESTATEMENT (SECOND) OF RESTITUTION, § 1 (Tent. Draft No. 1, 1983) (noting that courts' wide generalizations about restitution, for mere statement of principle about unjust enrichment, cannot serve as precise guide to decisions).

Most scholars believe there is no more vagueness in this concept than many other legal concepts and that courts can develop precision in the case law. See, e.g., R. GOFF & G. JONES, supra note 9, at 11 (suggesting unjust enrichment no more vague than tort principles of negligence); Hand, Restitution or Unjust Enrichment, 11 Harv. L. Rev. 249, 250-57 (1898) (noting that indefinite standards are common in law); Seavey & Scott, Restitution, 54 Law Q. Rev. 29, 36-37 (1988) (referring to restitution as organism merely growing with principles causing it to exist); Williams, Language and the Law, 11, 61 Law Q. Rev. 179, 193 (1945) (discussing necessary reliance on case by case interpretations).

66. See TVL Assoc. v. A & M Constr. Corp., 474 A.2d 156 (D.C. 1984) (finding that court cannot determine defendant's gain absent evidence of quality of services rendered); see also supra text accompanying note 25 (acknowledging broad definition of defendant's gain).
recovery. Two, many courts appear to find quantum meruit cases confusing. Those courts do not recognize that they can resolve most quantum meruit cases by applying only the elements of the first tier, request and mutual expectation of payment, and by awarding the plaintiff the reasonable market value of his services. Recognizing this (or applying those elements) would save courts much time.

There are two types of tier one cases. First are the true contract implied in fact cases, which most courts do not recognize. Those cases involve work performed in addition to that provided for in an express contract and requested work done without an express contract. Among those cases, in only one in 1984 did the court analyze the quantum meruit claim as a contract implied in fact.

The second type of tier one cases are quasi-contract cases that a court can resolve by applying the contract implied in fact elements and recovery of tier one. These cases involve express contracts that are unenforceable because the contract violates the statute of frauds, or because the plaintiff is in breach, or because of impossibility or mutual mistake. These cases also involve some express contracts that are invalid because they violate some other statute. These cases cannot be classified as contracts implied in fact cases because the parties have an express contract, albeit an invalid one, and two contracts governing the same transaction, one express and one implied in fact, cannot exist simultaneously. These cases, however, do contain the elements of request and mutual expectation of payment. Analytically, one can separate the fact of the request from the terms of the unenforceable express contract. If the request itself is valid, it is analytically sound for the plaintiff to recover the reasonable market value of the plaintiff’s services. For example, the defendant’s request for plaintiff’s services can be found to be in good faith despite noncompliance with a competitive bid-
QUANTUM MERUIT

According to the statute, one justifies reasonable market value recovery under a contract implied in law analysis by the theory that one benefitted when one received what one had validly requested, and the value of the benefit is the reasonable market value of the work the defendant requested and received.73

The second tier, containing the more difficult unjust enrichment elements and defendant's gain measurement of recovery, need only be applied in those cases not involving either a request for services or a mutual expectation of compensation. These fewer cases requiring a second-tier analysis involve recovery from a third party or contracts that violate statutes where there is an invalid request or where the plaintiff does not expect payment.74

Some cases involving mistake are found in tier one, others in tier two. Tier one quasi-contract cases involve parties who both initially think there is a contract, satisfying the request and expectation of payment elements, but who rescind the contract because of a mutual mistake. Tier two quasi-contract cases involve one party who mistakenly believes that there is a contract when in fact the defendant did not request the plaintiff's services.75

These tiers also provide a hierarchy in the amount of recovery. In the contract implied in fact cases of tier one, the quantum meruit recovery is the reasonable value of plaintiff's services because that is the expectation remedy of the contract, even though the contract is implied. In an expectation remedy, the defendant's gain is irrelevant. The plaintiff, therefore, cannot recover the amount of the defendant's gain if that amount exceeds the reasonable value of the plaintiff's services. Similarly, the plaintiff's recovery is not limited to the defendant's gain should it be less than the value of the plaintiff's services. The defendant's gain is relevant in these contract implied in fact cases only as an alternative remedy to an expectation remedy for plaintiff when the defendant breaches a valid and enforceable contract.76

73. See supra note 31 and accompanying text (stating that reasonable value of plaintiff's services can be appropriate measure of damages in contract implied in law).

74. See infra Part III.C.2.b., III.D (discussing those cases requiring second-tier analysis).

75. See infra Part III.D (discussing quasi-contract recovery against third parties).

76. In the defendant in breach cases, the plaintiff may have the option of seeking the highest remedy, which might be the defendant's gain, but as a restitutionary theory separate from quantum meruit. Recovery of the defendant's gain in that circumstance is based on the defendant's breach rather than on quantum meruit. The ability to recover as an alternative remedy the defendant's gain if higher than the expectation remedy has been criticized and questioned. See D. Laycock, Modern American Remedies 522-25 (1985); Mather, Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller, 92 Yale L.J. 14 (1982). At times the authorities characterize this alternative remedy as one in quantum meruit. See 12 S. Williston, supra note 9, § 1459A, at 100 (saying that plaintiff can waive the contract and sue upon quantum meruit). In that discussion, however, recovery was the reasonable value of
The recovery in the quasi-contract cases of the first tier, as opposed to the contract implied in fact cases of that tier, is also the reasonable value of plaintiff's services because that amount is the market value of the defendant's requested gain.\(^7\) If the defendant's tangible gain is less than the reasonable value of plaintiff's services, the plaintiff should not be limited to recovering the amount of that gain. The defendant should pay the reasonable value for services requested because he benefitted by receiving what he requested. If the defendant's tangible gain is greater than the reasonable value of the plaintiff's services, the plaintiff cannot recover the gain because the plaintiff seeks to enforce an unenforceable contract. Thus the alternative remedy for defendant's breach of an enforceable contract is inapplicable. That leaves plaintiff with recovery only in quantum meruit. Since quantum meruit recovery in contract implied in fact cases is the reasonable value of plaintiff's services, the plaintiff seeking to recover under an unenforceable contract should not receive more than that. The plaintiff should not be in a better position through quantum meruit than if the contract were enforceable.

In tier two, the plaintiff's recovery should be no more than the defendant's actual gain. The measure of recovery cannot be the reasonable value of plaintiff's services, if greater than defendant's gain, because the defendant did not request those services. If the defendant's gain is greater than the reasonable value of plaintiff's services, however, the plaintiff should still recover no more than the reasonable value of the services, for the plaintiff was either a wrongdoer or conferred an unrequested benefit on the defendant. The plaintiff should not be in a better position as a wrongdoer or donor than he would be if he had delivered his services at the defendant's request.\(^8\) Thus, these tiers take the guess work out of the measurement of the recovery.

D. Analytic Structure of the Framework

Analytically, this proposal views the entire framework as one in restitution, not in contract, and thus makes all quantum meruit claims restitutionary. Tier two clearly is restitutionary; tier one can be as well, for one can view a contract implied in fact as a subpart of restitution. From a restitutionary point of view, in a contract im-

\(^7\) See supra note 31 and accompanying text (stating that reasonable value of plaintiff's services is appropriate measure of damages in contract implied in law).

\(^8\) See infra text following note 494.
plied in fact the defendant benefits by getting requested services, the plaintiff's expense is his or her work, and it is unjust for the defendant not to pay the plaintiff for those requested services. The recovery in tier one is therefore the reasonable market value of the plaintiff's services. While one can view that recovery as a contract recovery in the sense that the court infers that the parties, by their conduct, intended the price term of the contract to be the reasonable market value of the plaintiff's services, the recovery is also the defendant's gain in the sense that the defendant is benefited by obtaining the requested services. Because there are no express contract terms for a court to enforce, it does not have to substitute a different restitutionary recovery for a contract recovery. Thus, the separate analytic principles do not conflict.

E. Terminology of the Framework

The proposal recommends abandoning in quantum meruit cases the confusing terminology of contract implied in fact, contract implied in law, implied contract, quasi-contract, restitution, and unjust enrichment in favor of the single term quantum meruit, which is the one term now consistently in use. This abundance of terminology is creating confusion rather than providing insight into analysis. When terminology confounds rather than explains, it is not serving its function.

F. Rationale for the Framework

One consolidated analytic framework with two tiers encompassing implied in fact and implied in law contract elements will assist courts in differentiating between the two separate theories of quantum meruit. Courts now choose one method of analysis or the other or both, but generally they seem unsure why they are choosing one.

79. See D. Dobbs, supra note 9, § 4.5, at 264.
80. See supra note 31 and accompanying text. Professor Perillo would analyze all cases here classified as tier one cases as contractual to avoid courts' limiting recovery to the defendant's gain. Perillo, supra note 5, at 1222-23. This proposal avoids that harm. Professor Perillo says contractual characterization also aids in determining Tucker Act, 28 U.S.C. § 1346(a)(2) (1970), jurisdiction, statute of frauds, and other such questions. Id. at 1225. Since tier one cases use contractual elements and remedy, for purposes of the Tucker Act and other such concerns, one would treat these cases as contract cases. See also infra text accompanying note 285 (stating that statute of frauds and non-binding agreement cases should be treated as implied in fact contracts).
81. The proposal will refer to the terminology in explaining the derivation and analytic basis of the two tiered framework.
82. See Comment, supra note 15, at 1171 n.41, 1184 (discussing cases illustrating courts' confusion over quantum meruit analysis).
approach over another. Unsure as to the appropriate recovery, courts risk reaching an incorrect result. For example, a court may limit the plaintiff's recovery to the amount of the defendant's gain when it would be more fair to award the plaintiff the reasonable value of the plaintiff's services. As another example, a court may fail to complete the case analysis by focusing only on the request element and ignoring the second tier. Some plaintiffs will lose when the request element is not met, even though the defendant unjustly benefitted at the plaintiff's expense.

Instead of requiring the courts to determine whether to label a case as quasi-contract or contract implied in fact, or to determine whether to use the reasonable value of the plaintiff's services or the defendant's gain as a measure of remedy, the two-tiered analysis requires the court to focus only on the elements. Providing a single framework with a required order of analysis and with specified remedies, would enable courts to perform a proper and complete analysis.

The first tier of the framework resolves most quantum meruit cases. Only when it cannot will courts need to apply the second tier. Using the tiers in sequence will save the courts and the litigants much time and effort in trying to figure out which quantum meruit claim to apply.

The purpose of the proposed framework is to create a rule of law. One formulates typical legal rules by identifying the elements that compose the rule. When a fact pattern meets all the elements, the court applies the rule. The court can then treat similarly all other cases exhibiting the same elements. In the 1980's, because the courts are confused about quantum meruit, excessive appeals and remands; lengthy, confusing and unnecessary analyses; and a higher degree of unpredictability of result than should be tolerable in our legal system are occurring. Whatever benefits there are of having two theoretically distinct structures are being outweighed by these difficulties. Thus this Article proposes the creation of a rule

83. See supra text accompanying notes 34-44 (discussing reasons for courts' confusion in dealing with quantum meruit and in determining appropriate measure of recovery).
85. See supra note 45 and accompanying text (discussing cases in which court prematurely ends analysis).
86. There is, of course, much debate and discussion as to whether there really are normative rules and whether application of such rules can really achieve consistency of result because of the infinite variety of factual situations and the difficulty of defining the meaning of words. This Article will not comment upon this debate because, although rules of law do not guarantee predictability of result, application of what purports to be a rule, but is not, guarantees unpredictability of result.
for quantum, emphasizing elements, so that a threshold level of consistency of analysis and result can be achieved. Quantum meruit should be not a catch word to justify any result. Nor need it be.

III. DERIVATION OF TWO-TIERED ANALYTIC FRAMEWORK

A. Express, Valid, Nonbreached Contract—No Quantum Meruit Recovery

1. Courts consistently apply accepted underlying premise

In one area of quantum meruit, the courts consistently apply a settled rule providing that when there is a valid, express contract which has not been breached and which governs the same subject matter for which quantum meruit recovery is being sought; the terms of the contract will provide the exclusive remedy. It is a rule that prohibits quantum meruit recovery. In 1984, courts denied recovery in quantum meruit in eight cases, holding that a valid contract governed the same subject matter, and therefore that the contract terms controlled. There were no cases with contradictory holdings.

These cases are important because they demonstrate that it is possible to have consistent results in at least one area of quantum meruit litigation. In order to derive an analysis that will lead to more consistent results in other areas of quantum meruit litigation, it is important to determine why these cases are consistent.

A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain. . . . A person is not entitled to compensation on the ground of unjust enrichment if he received from the other that which it was agreed between them the other should give in return.

Id. comment a; see also 3 A. CORBIN, supra note 9, § 564, at 292-93 (where parties have made express contract, court should not find different one by implication concerning same subject matter).

One answer is that the premise underlying the rule, that parties voluntarily assume risks when they make bargains, has wide acceptance. If upon discovering that he or she had made a bad bargain, one party unilaterally could alter the bargain, this would impair the ability to rely upon contracts, and make personal and commercial planning difficult. Some courts articulated this underlying premise directly or referred to it metaphorically.

When a legal rule has a universally accepted underlying premise, that premise provides a reason for the rule. That reason in turn will provide incentive for predictable analysis that yields predictable results. To formulate other quantum meruit rules this derivation considers whether other universal principles underlie the remaining aspects of quantum meruit litigation.

2. Courts inconsistently characterize and use quantum meruit elements

Although the express contract cases agree on the result and the underlying premise, they vary as to the quantity and nature of the court’s analysis of quantum meruit. This variation indicates the confusion surrounding the term quantum meruit, even when it is being applied or, more accurately, rejected pursuant to a settled rule.

89. RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, § 54, comment a. A contracting party takes the risk of most supervening changes in circumstances, even though changes upset basic assumptions and unexpectedly affect the agreed exchange of performances. Id. Only an extreme hardship will justify relief on the ground of impracticability of performance or frustration of purpose. Id.; see also 6 A. CORBIN, supra note 9, § 1354 (stating that whenever parties make promises, there is always some degree of uncertainty that promise will be performed).

90. Industrial Lift Truck Serv. Corp. v. Mitsubishi Int’l Corp., 104 Ill. App. 3d 357, 360-61, 433 N.E.2d 999, 1002 (1982). The general rule is that no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests. (citations omitted). The reason for this rule is not difficult to discern. When parties enter into a contract they assume certain risks with an expectation of a return. Sometimes, their expectations are not realized, but they discover that under the contract they have assumed the risk of having those expectations defeated. As a result, they have no remedy under the contract for restoring their expectations. In desperation, they turn to quasi-contract for recovery. This the law will not allow.


Most courts did not try to define the quantum meruit claim or classify it either as a contract implied in fact or a contract implied in law (quasi-contract). They merely referred to the claim as one in quantum meruit and held the claim barred by the existence of an express contract, citing one or more cases.93

Three of these eight courts, however, did characterize quantum meruit as a quasi-contract, contract implied in law, or unjust enrichment claim.94 In Sharp v. Laubersheimer,95 the court characterized quantum meruit somewhat equivocally, stating that "the trial court's award of compensation under a quasi-contract or an unjust enrichment theory . . . in essence amounted to an award in quantum meruit."96 The court's use of the term "in essence" revealed the court's uncertainty with the terminology, as did its ambiguity over whether it viewed quasi-contract and unjust enrichment as synonymous or as two theories.

The other two cases discussed at length the doctrine of quantum meruit as a quasi-contract. In Euramca Ecosystems, Inc. v. Roediger Pittsburgh, Inc.,97 the court noted that a quantum meruit claim arises independently of any agreement or consent and is premised upon the notion that one should not be enriched unjustly at the expense of another.98 Although the court held that the terms of the express contract governed the case,99 the court alternatively stated that the plaintiff had not contemplated a fee at the time the services in question were rendered, noting that the defendant must share that contemplation.100 The court's confusion with quantum meruit thus becomes apparent. The defendant's expectation of making payment

95. 347 N.W.2d 268 (Minn. 1984) (en banc).
96. Id. at 271.
98. Id. at 422.
99. Id.
100. Id. The court identified other elements for a quantum meruit implied in law claim by stating that one can defeat the claim by showing that the plaintiff officiously or gratuitously conferred the benefit; rendered services in order to gain a business advantage; did not contemplate a fee at the time he rendered services; or that the defendant could not have reasonably believed that the plaintiff expected a fee. Id.
is a contract implied in fact element. Thus, the court merged into a discussion of unjust enrichment one of the elements of a contract implied in fact.\textsuperscript{101} In \textit{Euramca} the court also said that an implied in law contract is equitable in nature, without clarifying the use of the term equitable.\textsuperscript{102} If the court meant equitable in the sense of fairness, it was correct; if it meant equitable in the procedural sense, it was incorrect.\textsuperscript{103}

In \textit{Mass Transit Administration v. Granite Construction Co.},\textsuperscript{104} the court summarized the unjust enrichment doctrine in its discussion of quantum meruit. The court listed three necessary elements for an unjust enrichment claim:

1. The plaintiff must confer a benefit upon the defendant;
2. The defendant demonstrates an appreciation or knowledge of the benefit; and
3. The defendant accepts or retains the benefit under such circumstances as to make it inequitable for the defendant to do so without payment.\textsuperscript{105}

These elements vary from the classic unjust enrichment elements by requiring defendant to appreciate or know of the benefit and to accept or retain it. These elements correctly did not include the de-

\textsuperscript{101} The plaintiff’s expectation of payment is an element applicable to both theories. See \textit{supra} text accompanying note 57 (stating compensation element of both contracts implied in fact and in law).


\textsuperscript{103} \textit{RESTATEMENT (FIRST) OF RESTITUTION, supra} note 9, § 1, at 1-2 (discussing meaning of term “equitable” in restitution cases).


\textsuperscript{105} \textit{Id.} at 775, 471 A.2d at 1125. The court distinguished between contract implied in fact and in law, noting that in the latter, the measure of the recovery is the defendant’s gain, not the plaintiff’s loss. \textit{Id.} at 776, 471 A.2d at 1126.
fendant’s contemplation of payment element that the court in Euramca identified for the same claim.

Thus one can see from examining only a few cases that courts demonstrate little understanding and little consistency in analysis of quantum meruit and its dual nature. These three cases of the eight express contract cases containing quantum meruit analysis are compared below:

<table>
<thead>
<tr>
<th>Name</th>
<th>Claim</th>
<th>Characterization of Quantum Meruit Claim</th>
<th>Elements (dicta)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sharp</td>
<td>quantum meruit</td>
<td>“in essence” quasi-contract or unjust enrichment</td>
<td>none</td>
</tr>
<tr>
<td>Euramca</td>
<td>quantum meruit</td>
<td>contract implied in law, unjust enrichment</td>
<td>(1) plaintiff expects compensation</td>
</tr>
<tr>
<td>Mass Transit</td>
<td>quantum meruit</td>
<td>unjust enrichment, contract implied in law</td>
<td>(2) defendant has reason to</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>believe plaintiff expects a fee</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(3) defendant accepts or</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>retains benefit, circumstances make</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>it inequitable to retain and not pay</td>
</tr>
</tbody>
</table>

B. Quantum Meruit Recovery Under Tier One

1. Contracts implied in fact

a. Work in addition to that provided in express contract

i. Extra work constitutes an additional agreement

There are obvious limitations to the rule that there can be no recovery in quantum meruit if an express contract governs the same subject matter. The major limitation is in determining what constitutes “the same subject matter.” This limitation is most apparent when the parties make additional agreements.109 A factual issue

106. Sharp v. Laubersheimer, 347 N.W.2d 268 (Minn. 1984) (en banc).
109. But see Restatement (Second) of Contracts, supra note 9, § 213, comment a (stating additional agreements unenforceable if prior or contemporaneous to integrated, final
then arises, for the court must determine whether the express contract terms still encompass the additional work. If at the defendant's request the plaintiff performs work not mentioned in the contract, the court might find that the express contract and its payment term govern all possible work, or the court might find that the contract does not govern because the plaintiff did not assume the risk of additional work when entering into the contract. If the latter, then a separate agreement governs the additional work.\textsuperscript{110}

An analytic problem in quantum meruit arises when conduct, and not express oral or written terms, creates these additional agreements. Under technical contract principles one should label such an agreement a contract implied in fact.\textsuperscript{111} Where the parties have not expressed the terms of the agreement, courts normally infer that the parties agreed that the defendant would pay the plaintiff reasonable compensation, usually measured by the reasonable market value of the plaintiff's work.\textsuperscript{112} Courts, however, generally do not recognize that these extra work situations constitute contracts implied in fact. Apparently because of the confused terminology in quantum meruit, many courts see a quantum meruit claim and, knowing that quantum meruit is a quasi-contract, apply that analysis. The court does not recognize that quantum meruit also can be a contract implied in fact. In addition, the court may apply an amalgam of the elements of quasi-contract and implied in fact contract in its analysis, creating a number of problems.\textsuperscript{113}

\begin{itemize}
  \item[ii.] \textbf{Courts consistently allow recovery but inconsistently use terminology and measure recovery}
\end{itemize}

The four cases in 1984 involving this extra work situation agreed that the plaintiff should recover under quantum meruit.\textsuperscript{114} The ac-

---

\textsuperscript{110} See supra note 9 and accompanying text (discussing conduct of parties can create contract in fact).

\textsuperscript{111} See Restatement (Second) of Contracts, supra note 9, § 204; 1 A. Corbin, supra note 9, § 97; 3 A. Corbin, supra note 9, § 567, at 315-16; D. Dobbs, supra note 9, § 4.5, at 264.

\textsuperscript{112} See supra notes 45-53 and accompanying text (discussing sources of confusion in quantum meruit and resulting problems courts face).

cord, however, ended there. One would expect the rationale in such situations to be uniform. It was not. These cases ought to be classic contract implied in fact cases, applying those elements and awarding the reasonable value of plaintiff's services. The analysis and result should be simple and straightforward. It was not. There was no consistency of terminology or measurement of recovery. Surprisingly, there was some consistency as to elements, but the elements were not correlated correctly with the terminology used.

In one of these four extra work cases, the court referred to the quantum meruit claim as a contract implied in law, but then awarded the plaintiff the reasonable value of the services, which is either the typical contract implied in fact recovery or the contract implied in law recovery where the court measures the defendant's gain as receiving requested services. Another court referred to the claim only as one in quantum meruit, but then remanded the case for a determination of the amount of the defendant's unjust enrichment, which is the technical recovery for a contract implied in law. A third court noted that the trial court instructed the jury as to contract implied in law liability with contract implied in fact damages, but then held that the reasonable value of the plaintiff's services would be the correct recovery under either theory. The


116. R. Zoppo Co. v. City of Dover, 124 N.H. 666, 674, 475 A.2d 12, 18 (1984). Although the court in Zoppo did not discuss how to measure the unjust enrichment, in the case the court relied upon, Petrie-Clemons v. Butterfield, 122 N.H. 120, 441 A.2d 1167 (1982), the court measured recovery by the increased market value of the defendant's property after the plaintiff erroneously improved the property. Id. at 1172. The court in Petrie-Clemons did not use the reasonable value of the plaintiff's services to measure recovery. Id.

117. Ellis Jones, Inc. v. Western Waterproofing Co., 66 N.C. App. 641, 646-47, 312 S.E.2d 215, 218 (1984). Ellis Jones also illustrates that courts have long discussions about the distinctions between the theories of contract implied in law and contract implied in fact, concluding only that the distinctions make no difference in outcome. Id. at 645-47, 312 S.E.2d at 217-18. Thus, in some of the express contract cases, courts unnecessarily devote much time to this analysis, presumably because the area is so unclear that some discussion seems warranted. These discussions, however, rarely provide clarity, for courts give no guidance for distinguishing between the theories.

The fact that there were two possible theories and recoveries caused the appeals in the Ellis Jones case. If there were not two different possible recoveries, the fact that the trial judge had instructed on quasi-contract liability and contract implied in fact damages would not have instigated an appeal. Although the court in Ellis Jones said that under either theory the result in this case would be the same, id., it also said that "there will be cases where the reasonable value of plaintiff's services ... will vary significantly from the reasonable value of plaintiff's services that are accepted by and that benefit defendant ... this is not such a case." Id. at 646-47, 312 S.E.2d at 218. The court reasoned that the defendant accepted the plaintiff's service and thus should pay the reasonable value for those services. Id. at 646-47, 312 S.E.2d at 219. The court did not say which of the two theories, contract implied in fact or in law, the court should have used, nor did the court provide any criteria for distinguishing between the two theories. Since this was an extra work case involving a defendant's request and a mutual expectation of
fourth case characterized the claim as one in quantum meruit without specifying whether the claim was in fact or in law and also did not specify how it had measured the plaintiff's recovery.\textsuperscript{118} Obviously, consistency is not at a premium. None of the courts provided any explanation as to why a claim is either quasi-contract or contract implied in fact, or why recovery is the reasonable value of the plaintiff's services or the defendant's gain. The following chart illustrates this confusion in terminology and recovery:

### CHART II. EXTRA WORK CASES

<table>
<thead>
<tr>
<th>Name</th>
<th>Extra Work Claim</th>
<th>Characterization of Claim</th>
<th>Measurement of Recovery</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Concord</strong>\textsuperscript{119}</td>
<td>quantum meruit</td>
<td>contract implied in law</td>
<td>reasonable value of services performed</td>
</tr>
<tr>
<td><strong>Zoppo</strong>\textsuperscript{120}</td>
<td>quantum meruit</td>
<td>none</td>
<td>amount defendant was unjustly enriched</td>
</tr>
<tr>
<td><strong>Ellis-Jones</strong>\textsuperscript{121}</td>
<td>quantum meruit</td>
<td>trial court mixed contract implied in law and in fact—court of appeals let both stand</td>
<td>reasonable value of services (in fact) is equivalent to reasonable value of services accepted (in law)</td>
</tr>
<tr>
<td><strong>Pro-Metal</strong>\textsuperscript{122}</td>
<td>quantum meruit</td>
<td>none</td>
<td>recovery for plaintiff affirmed—measurement of recovery unspecified</td>
</tr>
</tbody>
</table>

### iii. Consistent application of elements

The three courts in the extra work cases that discussed elements of quantum meruit used some form of the contract implied in fact elements, although only one court characterized the claim as such. The courts in \textit{Concord} and \textit{Pro-Metal} found that (1) plaintiff did the work at the defendant's request\textsuperscript{123} or direction\textsuperscript{124} and that (2) the payment, it was really a contract implied in fact case; neither the trial court nor the appellate court should have had to concern themselves with the defendant's gain. Thus, this existence of two distinct theories and recoveries creates excess litigation.


\textsuperscript{124} Pro Metal Bldg. Sys., Inc. v. T.E. Driskell Grading Co., 170 Ga. App. 127, 128-29,
defendant expected or knew that the plaintiff expected the defendant to pay. The court in Concord characterized the claim as a contract implied in law while the court in Pro-Metal failed to characterize it at all. In the third case in which the court discussed elements, Ellis Jones, the court said that the quantum meruit claim could be either in fact or in law. The court described a contract implied in fact as one in which conduct of the parties demonstrates the agreement, and in which the plaintiff agrees to work and the defendant agrees to pay. The defendant's request and his knowledge of plaintiff's expectation of payment is implicit in these elements.

In the fourth extra work case, R. Zoppo Co., the court remanded the case for a determination of how much the plaintiff had unjustly enriched the defendant, because the trial court erroneously found that an express contract covered the extra work that the plaintiff performed. The appellate court used a quasi-contract recovery. The court did not characterize the claim, nor did it discuss the elements.

The only court discussing the quasi-contract elements, Ellis-Jones, did so in dicta because the court found it unnecessary to apply those elements. The court stated that for a claim to be a contract implied in law: (1) the defendant must be enriched, (2) at the plaintiff's expense, (3) under circumstances that, in equity and good conscience, call for an accounting by the wrong doer, and (4) that defendant knowingly and voluntarily accepts the plaintiff's services and the concomitant benefit. The first three elements are classic unjust enrichment elements. The court also added the "acceptance" element which, as this Article will show, generally is not

316 S.E.2d 574, 576 (1984) (finding defendant directed plaintiff to perform work outside original area covered by contract).
128. Id.
129. Id. at 645-46, 312 S.E.2d at 217. In fact, the jury instruction in Ellis Jones included the element that there be "no showing that services were gratuitously given," which means that at least the plaintiff expected compensation. Id.
131. Id.
133. Id.
The consistency among the cases is that all of the three cases that discussed elements, discussed elements of request and expectation of payment. Thus in the extra work cases, the courts demonstrate a greater consensus as to the elements of a quantum meruit claim than do the courts in the express contract cases. The cases this Article has discussed up to this point present the following variations in the analysis of quantum meruit:

### Chart III. Comparison of Express Contract and Extra Work Cases

<table>
<thead>
<tr>
<th>Name</th>
<th>Type of Case</th>
<th>Characterization of Quantum Meruit Claim</th>
<th>Measurement of Recovery</th>
<th>Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sharp</td>
<td>express</td>
<td>in essence, quasi-contract or unjust enrichment</td>
<td>no recovery</td>
<td>none</td>
</tr>
<tr>
<td>Euramca</td>
<td>express</td>
<td>contract implied in law, unjust enrichment</td>
<td>no recovery</td>
<td>plaintiff expects payment, defendant knows plaintiff expects fee</td>
</tr>
<tr>
<td>Mass Transit</td>
<td>express</td>
<td>unjust enrichment, contract implied in law</td>
<td>no recovery</td>
<td>defendant enriched, defendant appreciates benefit, defendant accepts benefit, circumstances require payment</td>
</tr>
<tr>
<td>5 additional cases</td>
<td>express</td>
<td>none</td>
<td>no recovery</td>
<td>none</td>
</tr>
<tr>
<td>Concord</td>
<td>extra</td>
<td>contract implied in law</td>
<td>reasonable value of services</td>
<td>defendant requests work, defendant expects that plaintiff expects fee</td>
</tr>
</tbody>
</table>

---

134. See infra note 315 and accompanying text (stating that acceptance is not meaningful where defendant cannot return work).

135. See supra Part III.A.2 (discussing courts' inconsistent use of quantum meruit elements in express contract cases).

136. Sharp v. Laubersheimer, 347 N.W.2d 268 (Minn. 1984) (en banc).


iv. Tier one adequate to resolve extra work cases and provide single recovery

Under the two-tier approach, the courts would find their analysis of these extra work cases simplified. In these cases a court should use the first tier contract implied in fact elements and award the plaintiff the reasonable value of the plaintiff’s services. In most cases, the courts would achieve the same results as they do now, but would do so with less confusion and complexity.

---

<table>
<thead>
<tr>
<th>Case</th>
<th>Additional Work</th>
<th>Characterization</th>
<th>Type of Services Equivalency</th>
<th>Reasonable Value of Services</th>
<th>Recovered Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro Metal</td>
<td>extra work</td>
<td>none</td>
<td>recovery not characterized</td>
<td>defendant directs work, defendant knows plaintiff expects fee</td>
<td>defendant is none recovery not defendant directs work, defendant knows plaintiff expects fee</td>
</tr>
<tr>
<td>Ellis Jones</td>
<td>extra work</td>
<td>contract implied in law or in fact</td>
<td>reasonable value of services equivalent to reasonable value of service accepted</td>
<td>contract implied in fact: plaintiff agrees to work defendant agrees to pay; contract implied in law: defendant enriched at plaintiff’s expense, good conscience should account, defendant knowingly and voluntarily accepts benefit</td>
<td>reasonable value of services equivalent to reasonable value of service accepted</td>
</tr>
<tr>
<td>Zoppo</td>
<td>extra work</td>
<td>none</td>
<td>amount defendant unjustly enriched</td>
<td>none</td>
<td>none</td>
</tr>
</tbody>
</table>

---

144. See 12 S. WILLISTON, supra note 9, § 1459A, at 98-99 (stating that appropriate recovery for one providing construction services at owner’s request should be reasonable value of work performed). Williston’s discussion of cases points out cases in which the courts award reasonable value of the plaintiff’s services. Id. at 97-108. At least one case, however, characterized the recovery as a contract implied in law. Id. at 102; see also 4 S. WILLISTON, supra note 9, § 591, at 206.
145. Under the two-tiered analysis the court in Concord would have reached the same result without having to use the quasi-contract characterization. The litigants in Ellis Jones might have avoided an appeal if the trial judge had instructed on the request and expectation of payment elements. In that case it would not matter whether the judge recognized a contract implied in fact, for the label would be unimportant, and analysis of the elements would provide the recovery. The decision in Pro Metal might well remain unchanged because the court used contract implied in fact elements. Even though it did not characterize the recovery, it might well have awarded reasonable value. The decision in Zoppo definitely would change if analyzed under the two-tier framework. There, the court remanded for a determination of the defendant’s gain, relying upon a tier two-type case, with a tier two remedy of the increase in the value of the defendant’s property. R. Zoppo Co. v. City of Dover, 124 N.H. 666, 674, 475 A.2d 12, 18 (1984). That recovery is unduly difficult for a court to measure and is also unduly restrictive. In Zoppo, unlike the precedent the court relied upon, see supra note 116, the defendant made a request which would make the reasonable value of the plaintiff’s services an...
For a number of reasons, it is probably no accident that in these extra work situations most courts award the reasonable value of the plaintiff's services rather than the defendant's gain, despite the way in which the courts characterize the claim. First, once there is a request with a subsequent expectation of payment, the defendant makes a contractual offer which the plaintiff accepts by performing the requested work. Since the extra work cases are contract cases, courts should use the contract remedy, expectation damages. Because the courts infer in a contract implied in fact that the parties intended the unmentioned price term to be a reasonable one,\footnote{See supra notes 24, 112 and accompanying text (discussing how contract principles virtually require imposing reasonable price term where unmentioned in contract).} that reasonable price becomes the measure of the expectation damages.

Second, it is easier to measure the reasonable market value of services than to measure the value of the defendant's gain. Defendant's gain is a broad concept\footnote{See supra note 25 (discussing broad nature of benefit and defendant's gain).} and involves valuation difficulties inherent in comparing property values before and after an event. Third, the major principle underlying the rule providing the plaintiff with the reasonable value of his or her services when the elements of request and mutual expectation of compensation are present is that it is just to pay the market value for a requested service.\footnote{See supra note 31 and accompanying text (stating that defendant should pay for those requested services).} Because these elements exist in the extra work cases, it makes sense for the courts to award the reasonable value of the plaintiff's services even if they do not realize that they are resolving contract implied in fact cases.

\textit{b. Work performance at employer's request without express contract}

\textit{i. Agreement by conduct creates contract}

In the extra work cases, the courts did not discuss why they characterized those cases as quasi-contracts or why the recovery for the most part was the reasonable value of the plaintiff's services. Whatever the reason, one would expect a similar analysis and recovery, or at least consistent analysis and recovery, in cases where employees work for an employer at his or her request but without an express contract. Both the extra work and no contract cases involve employment or independent contractor situations and both involve the defendant's request, and the defendant's knowledge that the

---

\footnote{See supra note 24, 112 and accompanying text (discussing how contract principles virtually require imposing reasonable price term where unmentioned in contract).}
\footnote{See supra note 25 (discussing broad nature of benefit and defendant's gain).}
\footnote{See supra note 31 and accompanying text (stating that defendant should pay for those requested services).}
plaintiff-worker expects compensation for his efforts. One's expectations would be wrong.

In 1984, plaintiffs sought relief in six quantum meruit cases where there was no express contract. Generally the parties lacked an express contract because they were unable to finalize the terms of the agreement. The parties did, however, clearly contemplate an agreement since the plaintiffs worked for the defendants under circumstances in which both expected that the defendant would pay the plaintiff.

The fact that the parties failed to agree to express terms does not preclude a court from finding that their conduct demonstrated an agreement to some reasonable terms, that is, a contract implied in fact. Case analysis would be easier if courts and litigants recognized that the no express contract cases are contract implied in fact cases, with the resulting simple, straightforward analysis and results. Unfortunately most of these no contract cases are not analyzed simply, as shown in the following discussion.

ii. Courts award recovery consistently but inconsistently use terminology and measure recovery

The courts agree that in the no express contract cases the plaintiffs should recover in quantum meruit. The courts do not agree, however, as to how they should measure quantum meruit recovery, nor do they present a rationale supporting their method of mea-


150. See 12 S. WILLISTON, supra note 9, § 1480, at 291 (stating that where defendant agrees to pay for certain services, but parties have not agreed upon amount, plaintiff can recover for such services under quantum meruit, with action on implied in fact contract since it rested on mutual agreement); see also Comment, supra note 20, at 386-88, 390-91. Some no express contract cases may be viewed as quasi-contracts on the theory that the contract terms are too vague to create an enforceable contract. In these cases, the courts still award the reasonable value of the plaintiff’s services, so that "it then becomes unnecessary to determine whether the defendant in reality promised to pay a reasonable price. If he did so promise, the court is enforcing his express promise. If he did not, the duty to pay is described as quasi-contract, but it is identical in result." 1 A. CORBIN, supra note 9, § 99, at 445. Conduct can give an agreement certainty and make it enforceable where the original agreement may have been too indefinite for enforcement. 4 S. WILLISTON, supra note 9, § 623, at 806.

Although the Article discusses these cases in the contract implied in fact section of tier one, they also could be covered under tier one quasi-contract because the result is the same for each category. The confusion described in this footnote is one of the reasons the proposal advocates dropping the classic terminology to concentrate on the elements.
measurement. In two of the six no express contract cases found in the sample of cases, courts awarded the defendant’s gain as recovery, with one court categorizing the claim as quasi-contract and the other as unjust enrichment. Both characterizations are restitutio-
nary.

Three courts awarded the plaintiff the reasonable value of the plaintiff’s services. One labeled the case a contract implied in fact; the second, an unidentified “implied contract;” while the third used no label. In the final no contract case, the court, somewhat mysteriously in light of the fact that there was no contract, awarded expectation damages without any characterization of the quantum meruit claim. Again, the courts did not explain why they used one classification or one recovery as opposed to another.

iii. Courts apply elements inconsistently, or fail to do so altogether

In three of the six cases, the court did not discuss the elements of the claim at all. In three others, the courts did, but each court used a different set of elements in its analysis. In the three cases in which the court did not discuss elements, the courts awarded the three different types of recovery—the defendant’s gain, and the reasonable value of the plaintiff’s services, and what appeared to be the plaintiff’s loss, or expectation—basically without

152. George v. Double D Foods, Inc., 155 Cal. App. 3d 36, 46, 201 Cal. Rptr. 870, 878 (1984). In George the court discussed recovery in terms of the reasonable value of the employee’s services to the defendant, combining the concepts of defendant’s gain and reasonable market value. Id. at 45-46, 201 Cal. Rptr. at 876-78.
154. See supra text accompanying notes 11-16.
157. Blye v. Colonial Corp. of Am., 102 A.D.2d 297, 476 N.Y.S.2d 874 (1984). Although the court in Blye v. Colonial Corp. of Am. did not characterize the claim, it did refer to an implied promise and an implied obligation. As with Willis, the Blye court did not specify whether the claim constituted an implied in fact contract or a quasi-contract. Id. at 299, 476 N.Y.S.2d at 876.
Of the courts discussing quantum meruit elements, two did so explicitly. One listed the elements of a contract implied in fact, while the other listed the elements of a contract implied in law. In *Eaton*, the court used the classic contract implied in fact elements to award the plaintiff the contract implied in fact damages of the reasonable value of the plaintiff's services. Notably, the court also said that the defendant's gain was irrelevant, thus demonstrating a clear understanding of contract implied in fact. The elements in *Hartwell*, derived from the trial court's unjust enrichment instruction, were the classic elements of unjust enrichment, and correspondingly, relief was the defendant's gain.

Although the court in *Blye* did not discuss the quantum meruit elements as such, it held that evidence of employment would warrant the court's implying the defendant's promise to pay to the plaintiff the reasonable value of the plaintiff's services. Since an employment relationship includes a request by the defendant and mutual expectations of plaintiff's compensation, the court in *Blye* used, although it did not articulate, a contract implied in fact analysis. Chart IV compares the quantum meruit analyses of the courts in these no express contract cases.

---

163. Tinney v. W.J. Tessier Realtors, Inc., 447 So.2d 1099, 1101 (La. Ct. App.), cert. denied, 452 So.2d 179 (La. 1984). In *Tinney* the court did not discuss elements but provided a rationale for the type of recovery in quantum meruit that sounded like unjust enrichment. Because the defendant profited from the plaintiff's sales, the defendant should compensate the plaintiff for his efforts. *Id.* The recovery, however, was not the defendant's gain, but plaintiff's commission, which, as noted, looks like an expectation recovery. This result is odd because the court said that there was no contract. *Id.*


166. See *Eaton v. Engelcke Mfg., Inc.*, 37 Wash. App. 677, 681, 681 P.2d 1312, 1315 (1984). The court said "The (trial) court found that Eaton's services in designing the prototype were rendered at Engelcke's request. The findings demonstrate that the services were rendered 'under such circumstances as to indicate that the person rendering them expected to be paid therefore, and that the recipient expected, or should have expected, to pay for them,'" 37 Wash. App. at 681, 681 P.2d at 1315 (citing *Johnson v. Nasi*, 50 Wash. 2d 87, 91, 309 P.2d 380, 383 (1957)) (emphasis added).

167. *Id.*

168. *Id.*

169. See *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App. 1984) (instructing jury to find for plaintiff when employer receives benefit that unjustly enriches and in fairness and good conscience should not be retained).

170. *Id.*

### Chart IV. Request Without Express Contract Cases

<table>
<thead>
<tr>
<th>Name</th>
<th>Type of Case</th>
<th>Characterization of Quantum Meruit Claim</th>
<th>Measurement of Recovery</th>
<th>Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>George</td>
<td>no express contract</td>
<td>quasi-contract</td>
<td>reasonable value of services to defendant</td>
<td>none</td>
</tr>
<tr>
<td>Tinney</td>
<td>no express contract</td>
<td>none</td>
<td>commissions (expectancy)</td>
<td>because defendant profited, plaintiff should recover</td>
</tr>
<tr>
<td>Hartwell</td>
<td>no express contract, not agree to later terms</td>
<td>unjust enrichment</td>
<td>benefit bestowed on defendant</td>
<td>employer received benefit; employer unjustly enriched; fairness and good conscience, not retain benefit</td>
</tr>
<tr>
<td>Eaton</td>
<td>no express contract, no agreement on price, time and manner of performance</td>
<td>contract implied in fact</td>
<td>reasonable value of services rendered (defendant’s gain irrelevant)</td>
<td>request, plaintiff expects to be paid, defendant expects to pay</td>
</tr>
<tr>
<td>Willis</td>
<td>no express contract if not accept express agreement</td>
<td>“implied contract”</td>
<td>reasonable value of services less benefits received</td>
<td>none</td>
</tr>
<tr>
<td>Blye</td>
<td>no express contract on compensation term</td>
<td>none (implied promise, obligation)</td>
<td>reasonable compensation</td>
<td>services rendered, fact of employment</td>
</tr>
</tbody>
</table>

### iv. Analytic problems

The substantive problems caused by the confusion with terminology and analysis continue to become apparent. Courts use the same terminology, for the most part contract implied in law terminology, and yet reach different results. While most of the extra work cases awarded the reasonable value of the plaintiff’s services, two of the no express contract cases awarded the defendant’s gain. That quasi-contract analysis or recovery causes confusion is demonstrated by the fact that those two cases had serious analytic problems as did the case awarding expectation damages pursuant to a defendant’s benefit rationale. Possibly, courts could minimize problems and incon-

---

sistencies if they applied the request and expectation of compensation elements.

The three cases in which the court used an implied contract analysis, although not necessarily that terminology, and awarded the reasonable value of the plaintiff's services, *Eaton*,\(^{178}\) *Willis*,\(^ {179}\) and *Blye*,\(^ {180}\) demonstrated no analytical problems. The court in *Eaton* correctly identified its analysis as that in contract implied in fact, distinguishing lucidly and concisely among an express oral contract, a contract implied in fact, and a contract implied in law or quasi-contract.\(^ {181}\) The court found no express contract based upon the trial court's finding that while the plaintiff had agreed to design an electric game for the defendant, the parties had not agreed to the terms of price, time, and manner of performance.\(^ {182}\) The parties' failure to agree to express terms did not, however, preclude the court from finding a contract implied in fact with the elements of the defendant's request, an expectation that the defendant would pay for the work, and the defendant's awareness that the plaintiff expected payment.\(^ {183}\) The court noted that a contract implied in fact is a true contract; the difference between it and an express contract is one of proof.\(^ {184}\) When the defendant argued that the plaintiff should recover nothing since the defendant had received nothing of value from the plaintiff,\(^ {185}\) the court held that the defendant's gain is relevant only in contract implied in law, based on unjust enrichment, and not in contract implied in fact.\(^ {186}\)

*Willis* was short and straightforward. The appellate court in *Willis* remanded the case so that the trial court could determine whether the parties' conduct created an express contract when the plaintiff began the requested work.\(^ {187}\) In that case, the plaintiff could recover his prospective profits. If the parties had not created an express contract, the appellate court directed that the jury award the reasonable value of the plaintiff's services under quantum meruit.\(^ {188}\)

---

182. *Id.* at 681, 681 P.2d at 1315.
183. *Id.*
184. *Id.* at 680, 681 P.2d at 1314.
185. *Id.* The plaintiff produced only 90% of the game. *Id.*
186. *Id.* at 681, 681 P.2d at 1315.
188. *Id.* at 428, 315 S.E.2d at 95. There are not enough facts given in the opinion for one to know why the court found the parties had not formed an express contract. There may have been a failure to agree to precise terms.
In Blye, the trial court granted the defendant’s motion to dismiss plaintiff’s suit for a finder’s fee for failure to comply with the statute of frauds.\textsuperscript{189} The appellate court reversed, finding sufficient a writing describing all terms except the price term.\textsuperscript{190} In the absence of an express price term, the court held that one can imply from the fact of employment the obligation to pay a reasonable price.\textsuperscript{191}

Those no express contract cases in which courts did not award the reasonable value of the plaintiffs’ services,\textsuperscript{192} however, exhibited analytic problems. In George, the court reached an apparently unjust result, undervaluing the plaintiff’s work by limiting the plaintiff’s recovery to the defendant’s gain.\textsuperscript{193} Despite the presence of the request and expectation of payment elements, the court did not consider the contract implied in fact theory; rather, the court merely stated that the action was in quasi-contract and the remedy was the value of the employee’s services to defendant.\textsuperscript{194} The court did not explain why it would not use a contract implied in fact analysis or why the proper measure of the defendant’s benefit was not the reasonable value of plaintiff’s services.\textsuperscript{195}

The court in George apparently did not recognize that the facts of the case indicated either that the parties had an express oral agreement or had failed to agree to express terms. The facts did not indicate an invalid agreement. The defendant had signed a contract, but had never presented it to the employee.\textsuperscript{196} Depending upon the intent of the parties, the offer and acceptance could have occurred before the execution of the written memorial, creating an express oral agreement with the terms of the written document.\textsuperscript{197} The statute of frauds for a contract longer than one year presented no problem because the defendant signed the alleged agreement.\textsuperscript{198} If,

\begin{itemize}
\item \textsuperscript{189} Blye v. Colonial Corp. of Am., 102 A.D.2d 297, 300, 476 N.Y.S.2d 874, 875 (1984).
\item \textsuperscript{190} Id. The court specifically did not say that the absence of the price term prevented the formation of the express contract, but the trial court had characterized the correspondence as merely ongoing negotiations. Id.
\item \textsuperscript{191} Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} See id. at 46, 201 Cal. Rptr. at 875 (referring only to contract as unenforceable).
\item \textsuperscript{197} Id. at 40, 201 Cal. Rptr. at 874. The plaintiff was the employee’s representative since the employee had died. Id.
\item \textsuperscript{198} See 1 A. CORBIN, supra note 9, § 30, at 98-99 (stating that contracts will be consummated if parties’ expressions convince court that they intended to be bound without formal document).
\end{itemize}
however, the plaintiff could not prove an express oral contract because the parties had not been able to agree to all the terms, he still could have a contract implied in fact evidenced by conduct, implying agreement to reasonable terms, as in Eaton, Willis and Blye. There was clearly a request and expectation of payment since the employee had worked as a food service executive for the defendant for twenty-eight months. If the court had used those elements, it would have awarded the reasonable value of the employee’s services. Instead, the court limited the plaintiff’s recovery to the amount of the defendant’s gain, which appears to have been less than the reasonable value of the plaintiff’s services.

In a no express contract case, limiting the plaintiff’s recovery to the party to be charged. Restatement (Second) of Contracts, supra note 9, § 131; see 2 A. Corbin, supra note 9, § 524, at 774 (stating that if either party to contract signs otherwise sufficient memorandum it is enforceable against him as party to be charged).

199. See D. Dobbs, supra note 9, § 4.5, at 264.


201. In George, the trial court permitted the plaintiff to introduce the unenforceable contract as evidence of the value of the employee’s services to the defendant. Id. at 43, 201 Cal. Rptr. at 875. The appellate court also permitted use of the unenforceable contract, but only to the extent that it contained statements of an agreed price. Id. Because of that limitation the appellate court reversed the trial court, holding that the trial court should not have admitted a stock option plan in the document because it was not the sum certain of an agreed price. Id. at 44, 201 Cal. Rptr. at 876. In discussing why the stock option purchase plan was not admissible, the court revealed the rationale justifying the admissibility of any part of an unenforceable contract. See id. at 43-44, 201 Cal. Rptr. at 875-76 (stating that stock option plan “sheds no light whatsoever on the value of the decedent’s services to defendant”). Thus the court would use the rest of the document as evidence of proof of the value of the plaintiff’s services to the defendant. The agreed-to price limitation does not make sense, even assuming that limiting the employee’s recovery to the defendant’s gain is appropriate. If the defendant measured plaintiff’s worth in part with a stock option plan with a subjective value, the plaintiff’s worth still had some value as measured by that subjective value—not zero value—to the defendant. Even when the court finds that subjective value difficult to measure, difficulty of measurement does not prevent recovery. See Edmund J. Flynn Co. v. LaVay, 431 A.2d 543, 549 (D.C. 1981) (holding that plaintiff need prove damages only with reasonable certainty based on all relevant data).

Some courts use unenforceable contracts as evidence of the reasonable value of the plaintiff’s services. See, e.g., Rice v. Insurance & Bonds, Inc., 366 So.2d 85 (Fla. Dist. Ct. App. 1979) (holding that oral contract may be sufficient basis for proof in lawsuit not seeking its enforcement); Bennett Leasing Co. v. Ellison, 15 Utah 2d 72, 387 P.2d 246 (1963) (holding that court can consider unsigned rental agreement as some evidence of rental value of automobile); Cochran v. Bise, 197 Va. 483, 90 S.E.2d 178 (1955) (holding that express oral agreement for services unenforceable under statute of frauds is pertinent evidence tending to show value parties placed on services). See also 2 A. Corbin, supra note 9, § 328, at 171-72 (stating that courts generally permit proof of oral agreement to aid in determination of value received by defendant); 5 A. Corbin, supra note 9, § 1113, at 601 (asserting that agreed-to contract price is admissible to show reasonable value of performance); Restatement (Second) of Contracts, supra note 9, § 143 (stating that statute of frauds does not make unenforceable contract inadmissible in evidence for any purpose other than its enforcement in violation of statute); 3 S. Williston, supra note 9, § 536, at 836-39 (stating that courts generally permit proof of oral agreement to aid in determination of value received by defendant). Courts have criticized, however, the use of the unenforceable contract as evidence of value. See, e.g., Bennett Leasing Co. v. Ellison, 15 Utah 2d 72, 75-78, 387 P.2d 246, 249-50 (Henriod, C.J., dissenting); Perlberg v. Germinder, 20 N.J. Super. 448, 89 A.2d 448 (1952) (holding that where
the defendant's gain is not fair. Since the defendant requested the plaintiff's work and the defendant received what he or she requested, it is just that he or she pay the reasonable value of that work.

In *Hartwell*, the court also measured recovery by the defendant's gain. In *Hartwell*, however, it was clear from the facts that there was no express contract.\(^{202}\) *Hartwell* is a classic case of the plaintiff working at defendant's request with expectation of compensation even though the parties had not agreed to express terms. The correct analysis is contract implied in fact with its recovery of the reasonable value of the plaintiff's services. The appellate court, however, while noting that quantum meruit recovery is the reasonable value of plaintiff's services and unjust enrichment recovery is the defendant's gain, held that since the trial judge instructed the jury in unjust enrichment,\(^{203}\) the recovery must be in unjust enrichment not the reasonable value of plaintiff's services, which the jury might have awarded. The court then discussed at length the confusion between the two theories, noting that although the result is often the same under both theories, it was not in this case, without saying why not. The appellate court remanded the case for reconsideration at the trial level, distinguishing between the "benefit unjustly retained" and the "benefit bestowed" upon the defendant by the plaintiff.\(^{204}\)

The real problem with the jury's award in *Hartwell* was not that those two values were different—that the plaintiff's services were worth less to the defendant than they would have been to another real estate company; rather, the problem was that the jury had not made it clear whether it had taken into account in computing the award the amount the defendant had already paid to the plaintiff.\(^{205}\) That information is relevant whether one measures the reasonable value of the plaintiff's services or the value of his services to the defendant. Under both theories, the jury subtracts from the award the benefits the plaintiff already had received from the defendant.\(^{206}\)

\(^{202}\) Hartwell Corp. v. Smith, 107 Idaho 134, 137, 686 P.2d 79, 82 (1984). The defendant employer hired the plaintiff as a real estate salesman and manager with a written agreement providing for a salary of $700 per month for three months with an agreement to recompute a salary and commission arrangement after that. *Id.* Further agreement was never reached, but Smith kept working until he chose to leave. *Id.*

\(^{203}\) *Id.* at 139-40, 686 P.2d at 84-85.

\(^{204}\) *Id.* at 141-42, 686 P.2d at 86-87.

\(^{205}\) See *id.* at 140, 686 P.2d at 85 (stating that court could never know what jury did in computing award).

\(^{206}\) See Willis v. Russell, 68 N.C. App. 424, 430, 315 S.E.2d 91, 95 (1984) (noting that measure of damages in implied contract and quantum meruit is reasonable value of services less benefits received).
The appellate court’s dual theory of recovery thus had nothing to do with the problem in the case. If the trial court applied tier one and instructed the jury that it should measure recovery by the reasonable value of the plaintiff’s services less benefits received from the defendant, the court might have avoided this appeal.

*Tinney* is analytically the most confusing of the no express contract cases. The court did not characterize the plaintiff’s quantum meruit claim but it did justify the plaintiff’s recovery on the ground that the defendant profited from the plaintiff’s services. This looks like quasi-contract rationale. Instead of awarding the defendant’s gain, however, the court awarded the plaintiff his commissions.

The plaintiff, a real estate salesman, sued the real estate company for commissions of 60% from rents that had accrued after the company fired him. The court’s award of the plaintiff’s commissions is analytically odd in that the award is an expectation remedy, and contract expectations, of course, require a contract. The court, however, applied quantum meruit, apparently because the court found no contract. Presumably the parties had an express oral contract with respect to the 60% commission during employment, for without a contract, there could have been no arrangement for the plaintiff to receive that commission. Most likely, however, there was no express term with respect to commissions accruing after termination. Thus, the court should have determined the parties’ intent in their express contract with respect to this silent term, rather than analyzing the problem as if no contract existed.

If the court in *Tinney* had focused on quantum meruit elements under either theory, unjust enrichment or contract implied in fact, it probably would have reached a different result. By applying the re-


208. *Id.* at 1102.

209. *Id.* at 1100.

210. *See id.* The defendant had argued that there was no express oral or written contract. The court noted that there was no employment contract between plaintiff and defendant and that plaintiff was self-employed real estate salesman. The fact that the plaintiff was self-employed does not mean that there could not be an express contract between him as an independent contractor (real estate salesman) and the brokerage firm.

211. *See* RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, § 204, at comment d (stating that where parties have omitted essential contract term court should supply term comporting with community standards of fairness and policy). In *Tinney* the defendant argued that the firm’s and the real estate business’ practice was that commissions accruing after termination were retained by the firm. *Tinney v. W.J. Tessier Realtors, Inc.*, 477 So.2d 1099, 1101 (La. Ct. App.), cert. denied, 452 So.2d 179 (La. 1984). The court ignored this statement although, if true, those facts could have been evidence of the intent of the parties with respect to the silent term. Presumably the court ignored this argument because the court was working on the assumption that there was no contract, therefore, there would be no need to determine the intent of the parties.
quest and expectation of payment elements, the court would then have asked whether commissions accruing after termination were necessarily the reasonable value of services performed before termination. The real estate company may have reasonably compensated those services by commissions at the time, unless the reasonable market value included lifetime commissions from rental property. The court would have to look at customary business practice in the field to determine the reasonable market value of plaintiff’s service. Evidence of such business practice with respect to commissions accruing after termination would also be relevant if the court used unjust enrichment analysis. It is true that the defendant benefitted from the commissions and that plaintiff performed the work. It would not be unjust for the defendant to retain the commissions, however, if it were the intent of the parties, perhaps evidenced by business practices, that the firm retain the commissions. This analysis returns to the principle that parties assume the risks of their bargains, and that quantum meruit will not be a tool for rewriting those bargains. The trial court therefore was correct in dismissing the case, while the appellate court’s failure to understand quantum meruit and the related contract principles caused an erroneous result on appeal.

c. Courts can avoid problems by using tier one

Most of the courts in the extra work cases awarded recovery in the amount of the reasonable value of plaintiff’s services, which is the correct result, although at times the cases either applied the wrong contract implied in law terminology or did not mention that the reasonable value of the plaintiff’s services was also the defendant’s gain. Some courts in no-contract cases awarded the defendant’s gain under quasi-contract, a technically correct application of the term, but the wrong result for these cases.

The real problem with these cases is that courts do not articulate why one remedy is preferable to another. As demonstrated, simply declaring that the case is one in quantum meruit or contract implied in law does not give the reader insight into the rationale for the court’s choice of remedy. Thus, results are unpredictable, incon-

---

212. See supra note 89 and accompanying text (stating premise that parties voluntarily assume risks of their bargains so that courts will not affect agreed-to promise).
213. See supra notes 114-22 and accompanying text (discussing recovery in extra work cases).
214. See supra notes 151-58 and accompanying text (discussing recovery in no-contract cases).
sistent, and sometimes unfair. For example, some people who perform work in addition to their contract are entitled to the reasonable value of that work, while those who work without a contract are sometimes limited to defendant's gain but sometimes able to recover the reasonable value of their work.

All of these cases should be easy. They all contain the elements of defendant's request and plaintiff's expectation of payment. These are the elements of a contract implied in fact for which recovery is the reasonable value of plaintiff's services. In fact, these are contract implied in fact cases.

A contract implied in fact analysis and recovery makes sense in these cases. The underlying principle of tier one is that it is fair for an employer who requests work and receives that work to pay the reasonable market value of the labor unless the parties contract otherwise. This principle makes sense whether the reasonable value of the plaintiff's services is less than, equal to or greater than defendant's gain. Of course, when the defendant's gain is equal to the reasonable market value of the plaintiff's services, no problems arise.

If the reasonable value of plaintiff's services is greater than the defendant's gain, the defendant's gain is not the appropriate recovery. A defendant who asked for work and received that work should not have to pay less than the reasonable market value of that work unless he negotiated to do so. The worker should not have to work for less than the reasonable value of his services when the defendant benefits by receiving that requested work.

If the defendant's gain is greater than the market value of the plaintiff's work, and if the defendant's gain were the appropriate remedy as it would be under true quasi-contract analysis, then certain questions would arise. Why should the plaintiff recover the defendant's entire gain even though the plaintiff expected fair market compensation, not a windfall? Why should the defendant, who expected to pay the reasonable value of requested work, now pay more than that reasonable value?


216. See supra note 61 and accompanying text (setting forth rationale for reasonable value measure of recovery).

217. See infra text accompanying notes 271-72 (discussing why certain transactions with contract implied in fact elements are quasi-contracts and not contracts implied in fact).

218. See supra note 25 and accompanying text (discussing defendant's gain as measure of value in quasi-contract).

219. One possible answer to this question is that by not paying, the defendant is in breach and the plaintiff can seek restitution of the defendant's gain as an alternative to the contrac-
Using the two-tiered quantum meruit analysis avoids unjust results by avoiding analytic confusion. Courts could resolve all of these cases by applying the first tier and awarding the reasonable value of the plaintiff's services except when an express contract governs. The defendant's gain is properly irrelevant because the defendant got what he requested, but the courts may use the defendant's gain as evidence of the reasonable value of the plaintiff's work.\(^220\)

2. **Quasi-contracts resolved with contract implied in fact elements**

   a. **Statute of frauds**

   The statute of frauds bars enforcement of certain oral agreements against a party to the agreement who has not signed a memorandum evidencing the terms of the agreement.\(^221\) The types of agreements covered by statutes of frauds vary from state to state; typical categories include agreements involving real property, agreements that the parties cannot perform within one year, agreements of sureties and administrators personally guaranteeing the debts of the debtor or estate, and agreements involving the sale of goods for more than five hundred dollars.\(^222\) In addition, many states require agreements to pay brokerage or finder's fees to be in writing.\(^223\)

   The original purpose of the statute of frauds was to prevent fraudulent testimony concerning the existence of an agreement.\(^224\) The English enacted the statute of frauds in 1677, a time when defects in the system of trial by jury and the law of evidence made more possible the enforcement of fraudulently claimed, nonexistent oral agree-

tual remedy. See infra Part IV (discussing defendant in breach situation). The contractual remedy in quantum meruit, however, is the reasonable value of the plaintiff's services.

\(^220\) Cf. Hartwell Corp. v. Smith, 107 Idaho 134, 140, 686 P.2d 79, 85 (Idaho Ct. App. 1984) (inferring defendant's benefit from fact that defendant did not fire plaintiff). If plaintiff is a subaverage worker, then the market value for that plaintiff simply is less than the average. After all, the remedy is the reasonable value of the plaintiff's services, not the reasonable value of an average worker's services.

The courts possibly could use written memoranda as evidence of the reasonable value of the plaintiff's services. This Article, however, takes no position on that practice. See supra note 201 (discussing controversy over allowing parties to introduce written materials for evidentiary purposes).

\(^221\) 2 A. CORBIN, supra note 9, § 279, at 19-23; RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, §§ 110, comment d; 3 S. WILLISTON, supra note 9, § 527, at 709-25.

\(^222\) RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, § 110(1); 3 S. WILLISTON, supra note 9, §§ 449-450.

\(^223\) 2 G. PALMER, supra note 9, § 6.9, at 75 n.1. In 1978 the following states had statutes requiring that contracts for the employment of real estate brokers must be in writing: Arizona, California, Hawaii, Idaho, Indiana, Kentucky, Michigan, Montana, New Jersey, New Mexico, New York, Oregon, Rhode Island, Texas, Utah, Washington, and Wisconsin. Id.; see also 2 A. CORBIN, supra note 9, § 321, at 156 (noting that certain statutes prevent real estate broker from recovering commission unless he has written contract).

\(^224\) 3 S. WILLISTON, supra note 9, § 450, at 429.
ments. Because of the enormous changes in procedure since the seventeenth century, commentators roundly criticize the statute of frauds, particularly as parties can use it to prevent enforcement of actual agreements. Despite the arguments for its abolition, the statute of frauds remains viable. In response, the courts have developed a variety of means to minimize its abuse. For example, the court may find a signed memorandum in an assortment of documents. Another method is for the court to apply to the contract the "full performance" exception, which provides that when a plaintiff has fully completed his or her portion of certain contracts, the statute of frauds will no longer bar enforcement of the defendant's promise. The full performance exception allows a plaintiff to recover the usual breach of contract remedies. Finally, the court may acknowledge that the statute of frauds prohibits enforcement of an agreement, but then allow recovery in quantum meruit.

i. Courts allow and measure recovery consistently

When a plaintiff uses quantum meruit to obtain recovery when the

225. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 389 (1924). See generally 2 A. CORBIN, supra note 9, § 275, at 9 (discussing history of statute of frauds); Willis, The Statute of Frauds—A Legal Anachronism, 3 Ind. L.J. 427, 429 (1928) (noting reasons for development of statute of frauds).

226. See Willis, supra note 225, at 431-32 (1928) (submitting that statute of frauds is no longer justified because of changes in legal system).

227. See, e.g., Lamborn v. Watson, 6 Har & J 252, 255, 14 Am. Dec. 275, 276 (Md. 1824) (noting that statute of frauds probably generates as many frauds as it prevents); 6 W. HOLDSWORTH, supra note 225, at 394-97; Burdick, A Statute For Promoting Fraud, 16 COL. L.R. 273 (1916).

228. See Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 110 N.E.2d 551 (1953) (holding that unsigned memorandum and initialed records constituted written memorandum sufficient to satisfy statute of frauds where all essential terms evidenced); RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, § 132 (stating that memorandum may consist of several writings if at least one is signed and writings clearly indicate that they relate to same transaction).

229. See 2 G. PALMER, supra note 9, § 6.10 (stating that when one party fully performs services, full performance doctrine makes contract enforceable); RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, § 130, comment d (stating that one-year provision of statute of frauds does not apply to contracts fully performed by one party); id. at § 138, comment c (noting that court may enforce contracts invalid under statute of frauds where denial of enforcement would be unjust because of part or full performance by aggrieved party); 3 S. WILLOTT, supra note 9, § 504 (noting that full performance by one party within one year takes contract out of statute of frauds when performance was not intended to take place in year).

230. RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, § 130.

231. See 2 A. CORBIN, supra note 9, § 331 (noting that restitution may allow payment for part performance in contract unenforceable for statute of frauds); 2 G. PALMER, supra note 9, § 6.10 (noting that one who performs services under unenforceable agreement can recover value of those services under quasi-contract); RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, § 130, comment e (stating that court should compensate party in partial performance for benefit conferred on party refusing to pay); 2 S. WILLOTT, supra note 9, § 534 (stating that one who partly performs agreement and who is not in default should be compensated for any benefit furnished to party refusing to perform).
statute of frauds otherwise would deny recovery, modern courts with one exception allow recovery and are consistent in measuring recovery when the plaintiff has performed services for the defendant.\textsuperscript{232} The one exception is for the more modern requirement that agreements to pay brokerage or finder’s fees be in writing.\textsuperscript{233} Where courts do allow recovery, the universal recovery is the reasonable value of services performed.\textsuperscript{234}

In 1984 there were five cases in which the courts invalidated agreements because of the statute of frauds.\textsuperscript{235} All courts held that quantum meruit recovery was available and that recovery was the value\textsuperscript{236} or reasonable value\textsuperscript{237} of the plaintiff’s services. The court in one 1983 case,\textsuperscript{238} refused to award quantum meruit in a statute of frauds case;\textsuperscript{239} as one could expect, the statute involved a finder’s fee.\textsuperscript{240}

In \textit{Clark v. Coats & Suits Unlimited},\textsuperscript{241} the plaintiff agreed to manage a clothing store in exchange for $40,000 and ten percent of the profits for the first year, a 20% ownership interest at the beginning of the second year, and additional compensation in succeeding years.\textsuperscript{242} An unsigned, typewritten memorandum contained these provisions.\textsuperscript{243} The trial court held that the statute of frauds barred the plaintiff’s claim for the 20% ownership interest because the parties would not perform the agreement within one year.\textsuperscript{244} The court of appeals remanded for a determination whether the typewritten memorandum satisfied the statute, but also said that even if the statute of frauds were not satisfied, the plaintiff could recover under

\textsuperscript{232} See 2 G. Palmer, supra note 9, § 6.1, at 3 (stating that plaintiff seeking to enforce promise unenforceable because of statute of frauds nearly will always be able to obtain restitution when conferring benefit on plaintiff); see also id. § 6.10, at 81 (noting universal agreement that one who performs services under unenforceable agreement can recover value of services under quasi-contract where fault lies with defendant).

\textsuperscript{233} See supra note 223 and accompanying text (listing those states requiring brokerage fee contracts to be in writing).

\textsuperscript{234} Id.; 2 G. Palmer, supra note 9, § 6.3, at 18.


\textsuperscript{239} Id., 195 Cal. Rptr. at 887.

\textsuperscript{240} Id., 195 Cal. Rptr. at 885.


\textsuperscript{242} Id. at 91, 352 N.W.2d at 351.

\textsuperscript{243} Id.

\textsuperscript{244} Id. at 94, 352 N.W.2d at 353.
quantum meruit for the value of his services. The court stated that the memorandum of the "void" agreement might be admissible as proof of the value of the plaintiff's services, but failed to say under what circumstances. In addition, the court said that the plaintiff could recover the value of the stock if he could show that to be the proper estimate of his damages. Again, the court did not say what that showing would be.

*Huff & Morse, Inc. v. Riordon* involved a Wisconsin statute requiring written estimates for automobile repairs. Despite the fact that the shop had given no written estimate, the court held that the repair shop could recover in quantum meruit the reasonable value of its services, but limited recovery to no more than the agreed-to price.

Interestingly, in both *Clark* and *Huff* one measurement of the reasonable value of plaintiff's services could be the expectation recovery under the invalid contract. In *Clark* the court stated that the agreement's terms might be admissible to prove reasonable value. In *Huff* the agreed-to price imposed a ceiling on the award, which means that the trial court may find the contract price admissible, and award it to the plaintiff.

Both *Cliche v. Fair* and *Cheeseman v. Grover* involved plaintiffs who had performed services for relatives in exchange for an oral promise to convey or will real property. In both cases the courts noted that an award of the reasonable value of plaintiff's services was not an enforcement of the contract. In the fifth case the appellate court reversed the trial court's dismissal of the quantum meruit claim as barred because an express contract claim had also been pleaded.

**ii. Courts perform a sparse analysis**

In neither *Clark* nor *Huff* did the court awarding quantum meruit
characterize the claim. The court in *Clark* did not discuss any elements, but the facts clearly show a request and expectation of payment because there was a contract, albeit an unenforceable one. The court in *Huff* discussed elements, although it did not so identify them. That court permitted recovery in quantum meruit if the customer "consented to" and "authorized" the repairs—items similar to the request element. In discussing the defendant's argument that he should not have to pay at all, the court specifically mentioned one frequently observed element of a contract implied in fact that "the repairs may be made as requested." The facts of the *Huff* case certainly showed that the garage owners expected the customer to compensate them for their work. Thus, both cases contain the request and expectation of payment elements, both courts awarded the reasonable value of the plaintiff's services, and in both cases the contracts were unenforceable because of the statute of frauds. Neither court used an unjust enrichment analysis or measured the recovery by the defendant's gain.

*Cliche*, *Cheeseman* and *Harmon* all characterized the quantum meruit claim as restitutionary. *Cliche* referred to it as a quasi-contract, *Cheeseman*, as an implied promise to pay based on restitutionary principles, and *Harmon* as a contract implied in law. None discussed elements, but *Cheeseman* held that the oral contract was admissible to show that the services were not gratuitous. Such a showing contains a request and expectation of payment.

In *Tenzer v. Superscope, Inc.*, the 1983 case denying recovery, the court characterized the claim as either quantum meruit or an unspecified implied contract. Although the court viewed these as two separate theories, it did not differentiate between them, barring recovery under either theory. The court used no elements; its analysis merely referred to brokerage fee case precedents in which courts denied a quantum meruit recovery.

The statute of fraud case comparison follows:

---

256. Huff and Morse, Inc. v. Riordan, 118 Wis. 2d 1, 10-12, 345 N.W.2d 504, 508-10 (Ct. App. 1984).
257. *Id.* at 10, 345 N.W.2d at 508 (emphasis added).
263. *Id.* 195 Cal. Rptr. at 887.
264. *Id.*
## Chart VI. Statute of Fraud Cases

<table>
<thead>
<tr>
<th>Name</th>
<th>Type of Case</th>
<th>Characterization of Quantum Meruit Claim</th>
<th>Measurement of Recovery</th>
<th>Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clark</td>
<td>statute of frauds (longer than one year)</td>
<td>none</td>
<td>value of plaintiff's services</td>
<td>none</td>
</tr>
<tr>
<td>Huff</td>
<td>statute of frauds (mechanic's)</td>
<td>none</td>
<td>reasonable value of plaintiff's services</td>
<td>request by plaintiff, authorization and consent by plaintiff</td>
</tr>
<tr>
<td>Cliche</td>
<td>statute of frauds (real property)</td>
<td>quasi contract</td>
<td>reasonable value of plaintiff's services</td>
<td>none</td>
</tr>
<tr>
<td>Cheeseman</td>
<td>statute of frauds (real property)</td>
<td>implied promise to pay and on restitutionary principles</td>
<td>reasonable value of plaintiff's services</td>
<td>none (oral agreement admissible to show services not gratuitous)</td>
</tr>
<tr>
<td>Harmon</td>
<td>statute of frauds (real property)</td>
<td>contract implied in law</td>
<td>reasonable value of plaintiff's services</td>
<td>none</td>
</tr>
<tr>
<td>Tenzer</td>
<td>statute of frauds (finder's fee)</td>
<td>quantum meruit or implied contract</td>
<td>none</td>
<td>none</td>
</tr>
</tbody>
</table>

### iii. Analytic problems

(a) **Quasi-contractual nature of analysis**

Request and expectation of payment are, of course, the elements of a contract implied in fact. The reasonable value of plaintiff's services is the recovery of a contract implied in fact. Analytically there is a problem. It is one thing, as in the cases discussed in Part II.B above, to find a contract implied in fact from conduct when the parties had not agreed or were unable to agree to express terms but had begun to work. Their conduct showed that they had one agreement, a contract implied in fact, and no other. In each statute of frauds case, however, there is an express oral contract that is unenforceable because of the statute of frauds.\[^271]\ A court facing this sit-

\[^266\] Huff and Morse, Inc. v. Riordan, 118 Wis. 2d 1, 345 N.W.2d 504 ( Ct. App. 1984).
\[^271\] See Huff and Morse, Inc. v. Riordan, 118 Wis. 2d 1, 10, 345 N.W.2d 504, 508 ( Ct. App. 1984) (acknowledging specifically that failure to comply with statute of frauds invalidates express oral contract as matter of law).
uation might wish to imply a contract in fact; to do so, the court would have to say that two contracts exist, an invalid express contract and a valid implied in fact contract. The result is, of course, illogical, for parties come to one agreement about a subject at a time. If the parties were to make two different agreements about the same subject at the same time, it would be difficult to argue that there was one meeting of the minds. Furthermore, if the court found the two agreements to be the same, and enforced one, the court effectively would nullify the statute of frauds.

(b) Inconsistency of finder's fee cases

The finder's and broker's fees cases do not allow recovery in quantum meruit. At least one authority gives two possible rationales for this result. First, in the typical case of rendering services pursuant to an oral contract, the plaintiff performs the services in a manner that evidences the defendant's request and expectation of payment because the defendant is aware that the plaintiff is performing services. In a finder's fee case, however, the defendant may be unaware of the broker's work and thus the mere fact of the work does not evidence the defendant's request and expectation of payment elements. This distinction is not persuasive because in some cases not involving brokerage fees the defendant may not be aware that the plaintiff is performing the requested work. Conversely, there may be brokerage fee cases in which the plaintiff can prove the existence of a nonfraudulent agreement, perhaps through the defendant's admission. The evidentiary presumption therefore disappears.

The second rationale is that awarding quantum meruit recovery in brokerage fees cases nullifies the statute of frauds. This rationale also is not compelling, for courts award quantum meruit recovery in other statute of frauds cases where doing so risks nullifying the statute. The court in Huff addressed the nullification issue by emphasizing the difference between reasonable value recovery and contract price recovery. In the court's view, it is more difficult and expensive

272. See generally Comment, supra note 20, at 392-93 (observing that "[w]hether it is a violation of the Statute of Frauds to enforce an implied in fact contract, instead of a quasi contract, may be arguable" but at least one court did) (discussing Fabian v. Wasatch Orchard Co., 41 Utah 404, 125 Pac. 860 (1912)).

273. See supra text accompanying note 233 (noting this exception to general rule).

274. See G. PALMER, supra note 9, § 6.9, at 77-78 (stating that mere performance of services in procuring buyer or seller is scant evidence of performance at defendant's request and pursuant to promise of compensation, since defendant may be unaware such services were being performed).

275. Id. § 6.9, at 78.
to prove reasonable value, often requiring the plaintiff to introduce expert testimony to establish what the services are reasonably worth.\textsuperscript{276} Thus, the oral agreement itself would not be enforced and the difficulty in proving quantum meruit recovery would encourage compliance with the statute.

Awarding the contract price indicates judicial hostility to the statute of frauds. The court in Huff even characterized the customer’s argument as one that would enable the customer to avoid payment if his authorization did not comply with each “technical prerequisite” under the code.\textsuperscript{277} Thus, the court dismissed the need for a written authorization as merely technical. One authority justifies restitutionary recovery in nonbrokerage fee statute of frauds cases by saying “otherwise, [plaintiff] would be left without any remedy despite the enrichment of the party at fault.”\textsuperscript{278} Certainly, one may consider the plaintiff’s failure to procure a signed writing from the defendant as a “fault.” Thus, the policies of the statute of frauds, except for the broker’s fee statutes, seem not to weigh heavily.

\textit{iv. Proposal}

Because of the analytic problems with substituting an implied in fact contract for an invalid one,\textsuperscript{279} courts must, and some do, analyze quantum meruit in statute of frauds cases as claims of unjust enrichment, which do not depend upon the existence of an agreement, not as a contracts implied in fact. Thus, the proper recovery is the defendant’s gain. Courts, however, do not always apply contract implied in law analysis and never award the defendant’s gain as recovery. Instead the courts award the reasonable value of the plaintiff’s services, a contract implied in fact recovery, and do not mention that this is an alternative measurement of the defendant’s gain. If one were to suggest that courts label recovery under unjust enrichment contract implied in law analysis as the defendant’s gain, there is a danger that cases that now are being handled consistently, predictably, and without excessive and confusing commentaries could, as in the no express contract cases, become inconsistent, unpredictable, lengthy, and confusing.\textsuperscript{280} There is an old saying, “if it ain’t broke, don’t fix it.”

\textsuperscript{276} Huff and Morse, Inc. v. Riordan, 118 Wis. 2d 1, 10, 345 N.W.2d 504, 509 (Ct. App. 1984).
\textsuperscript{277} Id. at 11, 345 N.W.2d at 508.
\textsuperscript{278} See 2 G. Palmer, supra note 9, § 61, at 3.
\textsuperscript{279} See supra text accompanying note 272.
\textsuperscript{280} See supra notes 159-212 and accompanying text (discussing courts’ confusion in no express contract cases).
Today, quantum meruit achieves consistent results in the statute of frauds cases. Most courts award the reasonable value of plaintiff's services while in only one category, the finder's and broker's fee cases, do the courts award nothing. The premise underlying this uniformity of result is the sense that it is fair and just for one requesting work to pay for that work and that the reasonable market value is the fair compensation for the plaintiff's work.\textsuperscript{281} One might also attribute this result, in part, to the courts' dislike of the statute of frauds.

The first tier of the proposed framework analytically supports those courts consistently awarding quantum meruit recovery as the reasonable value of the plaintiff's services.\textsuperscript{282} The first tier justifies this result in two different ways. First, one can recognize the difference between the fact of the defendant's request and the terms of the agreement or contract between the plaintiff and the defendant. One then applies the request element, but not the express agreement,\textsuperscript{283} and the mutual expectation of payment elements as a contract implied in law, not a contract implied in fact. Thus, one disregards the contract implied in fact label and applies the elements and recovery of tier one under unjust enrichment. The unjustness is in the defendant requesting but not paying for work for which both parties expected the defendant to pay the plaintiff. The plaintiff's expense is his or her labor. The defendant's gain is the reasonable value of what he or she asked for and received, the reasonable value of the plaintiff's services.\textsuperscript{284} Therefore, the fact that the defendant requested the plaintiff to perform work is important, and is unrelated to the terms of the express but invalid oral agreement.

A second method of justifying reasonable value recovery is to argue that even these cases are contract implied in fact cases. One would consider the contract unenforceable \textit{ab initio}, from the beginning, because until there is a writing it cannot be enforced. One can then analyze the cases as if there were no contract at all, analogously to the no express contract cases in which the parties never reached a final express agreement or in which vague contract terms prevented a binding express agreement. Since those situations do not fore-

\textsuperscript{281} See supra text accompanying notes 31 & 62.
\textsuperscript{282} See supra text accompanying note 234 (stating that universal restitution recovery for services rendered is reasonable value of services performed).
\textsuperscript{283} But see supra note 201 (discussing fact that some jurisdictions allow court to use contract as evidence of reasonable value of plaintiff's services). This Article does not analyze that practice.
\textsuperscript{284} See supra Part II.B.
close finding a contract implied in fact,\textsuperscript{285} neither, it could be argued, should the statute of frauds.

The broker's fee cases awarding no recovery can fit into this analysis if one redefines the term request. In order not to nullify the purpose of the statute of frauds, one would argue that in order for the court to infer a valid request the plaintiff must corroborate his testimony by evidence other than that testimony. In nonfinder's fee cases, a plaintiff could corroborate his testimony by showing work done for the defendant, such as managing the defendant's store or repairing the defendant's car. Finder's services may not provide such corroboration.\textsuperscript{286} Under this approach, the court's denial of recovery is not inconsistent with recovery in other cases because the courts apply the request, which must be valid, and mutual expectation of payment elements, yielding different results only because the corroborating facts are different.

This distinction may not be compelling because the plaintiff may actually be able to prove a nonfraudulent agreement. These may simply be cases in which the courts may deem forfeiture the appropriate penalty and deny recovery even if defendant admitted the existence of the oral agreement and thus corroborated the request and expectation of payment elements.

More persuasively, one could argue that the courts have wrongly decided brokerage fees cases because the courts do not perceive correctly the distinction between the contractual percentage recovery under the oral agreement and the reasonable value of the plaintiff's services.\textsuperscript{287} The contractual percentage recovery is an expectancy recovery that the court need not award under the unenforceable contract.\textsuperscript{288} A recovery of the reasonable value of the plaintiff's services would not nullify the statute of frauds because this amount, perhaps the hourly value of plaintiff's services, may be considerably lower than a percentage figure, and its availability is consistent with those quantum meruit statute of fraud cases in which the plaintiff proves the request and mutual expectation of payment elements.

---

\textsuperscript{285} See Perillo, supra note 5 (arguing that the rationale for classifying statute of frauds recovery as quasi-contractual is outmoded and that the recovery should be classified as contractual).

\textsuperscript{286} See supra text accompanying note 274 (noting that broker's performance of work is not evidence of defendant's request or expectation of payment).

\textsuperscript{287} This second approach acknowledges that the legislature may not have determined forfeiture to be the correct penalty for violating the statute of frauds.

\textsuperscript{288} The courts may feel this is the appropriate and thus the only possible award, since many courts in other statute of frauds quantum meruit cases use the unenforceable agreement as evidence of reasonable value of plaintiff's services. But see supra note 201 (discussing use of unenforceable agreement as evidence of reasonable value of plaintiff's services).
If one uses the first approach, the court’s determination that the plaintiff cannot recover the reasonable value of plaintiff services need not end the analysis, for the court may proceed to tier two. Recovery under tier two is the defendant’s gain, not the reasonable value of the plaintiff’s services. Defendant’s gain in a brokerage case could be the amount the defendant saved by not performing the work himself or herself, possibly calculated by the defendant’s hourly rate. The court would consider, by balancing a number of factors discussed below, whether it would be unjust for defendant to retain the benefit of plaintiff’s work.

b. Plaintiff in breach

A person who has contracted to perform work but who has substantially breached that contract so as to discharge the other party can nonetheless recover in some jurisdictions. Recovery cannot be pursuant to the contract because the defendant no longer has any contractual obligations. Plaintiffs can bring suit under quantum meruit when the value of the work performed exceeds the defendant’s damages. Damages for incomplete work generally are measured by the cost to complete the work that exceeds the contract price. Damages for unsatisfactory work generally are measured as the cost to repair or the difference in values as promised and as actually performed.

i. Courts provide little analysis and reach inconsistent results

Two cases in 1984 dealt with a breaching plaintiff’s quantum meruit claim. In Richard v. Bourda, a homebuilder did not com-
plete work on the owner's home. Although the court did not characterize the quantum meruit claim or discuss quantum meruit elements, it held that the homebuilder was entitled to recover the reasonable value of his services. The homeowner had suffered no damages because after paying the builder the reasonable value of his services and paying someone else to complete the home, the owner had paid less than the original contract price negotiated with the breaching plaintiff.

In the other case, *Morello v. J.H. Hogan, Inc.*, a masonry subcontractor stopped work after completing only thirty percent of the work. The court characterized the subcontractor's claim as one in quasi-contract and referred to an implied promise to pay, but denied recovery, basing its refusal on the acceptance element. The court refused to imply the plaintiff's acceptance of the defendant's work from the mere retention of possession of real property, and thus refused to imply a promise to pay.

The following chart demonstrates the courts' analysis in the plaintiff in breach cases:

<table>
<thead>
<tr>
<th>Name</th>
<th>Characterization of Quantum Meruit Claim</th>
<th>Measurement of Recovery</th>
<th>Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richard</td>
<td>none</td>
<td>reasonable value</td>
<td>none</td>
</tr>
<tr>
<td>Morello</td>
<td>quasi contract, implied promise to pay</td>
<td>none</td>
<td>mere inaction not acceptance when work performed on land and cannot be returned</td>
</tr>
</tbody>
</table>

The disparate results of these two cases reflect courts' disparate treatment of this situation. In some jurisdictions a breaching party can recover, but not in others. Within jurisdictions allowing re-

295. *Id.* at 200. The court noted that the progress payments to the homebuilder exceeded the reasonable value of his services and therefore that he was entitled to no more than that reasonable value. *Id.* The home owner had not sought the excess. *Id.*

296. *Id.*


298. *Id.* at 468 A.2d at 1249.

299. *Id.* at 468 A.2d at 1250.

300. *Id.* The court first noted that when one retains goods, one impliedly promises to pay for them because they could be returned.


303. See generally 1 G. PALMER, *supra* note 9, § 5.15, at 683-84 (indicating courts' lack of consistency in decisions involving plaintiff's breach); 12 S. WILLISTON, *supra* note 9, § 1473, at 220 n.1 (providing examples of cases in which jurisdictions reach differing holdings on restitution actions).
covery, courts may apply different rules depending upon the type of transaction. In most jurisdictions an employee who quits cannot recover\textsuperscript{304} although there is a strongly held minority view.\textsuperscript{305} Most jurisdictions allow a builder deviating from building specifications to recover in restitution,\textsuperscript{306} while fewer allow a builder to recover if he did not finish the work.\textsuperscript{307}

Courts are tending, however, to view a breach by a party who provides a contract performance not as an absolute bar to restitution, but rather as a factor to be taken into account on the issue of unjust enrichment.\textsuperscript{308} Jurisdictions denying restitution to breaching plaintiffs appear to go out of their way to find the plaintiff in substantial performance so that he or she may recover under the contract.\textsuperscript{309} The problem with this contrivance is that the plaintiff can then re-

\textsuperscript{304}. See 1 G. Palmer, supra note 9, § 5.13, at 649-51 (describing this as majority view); 12 S. Williston, supra note 9, § 1477, at 254 (setting forth common law refusing recovery).

\textsuperscript{305}. See Britton v. Turner, 6 N.H. 481, 26 Am. Dec. 713 (1834) (approving recovery for quitting employee); see also 1 G. Palmer, supra note 9, § 5.13, at 652 (harmonizing minority view based on bad faith breach); 12 S. Williston, supra note 9, § 1477, at 251 n.4 (discussing cases following Britton). Professor Corbin is of the opinion that the Britton view is the majority view. 5A A. Corbin, supra note 9, § 1127, at 81-32. He states that

[i]t is believed that modern labor legislation and the attitude displayed by the courts in interpreting and applying it are now strongly in support of allowing recovery as was done more than a century ago in Britton v. Turner. The dearth of modern cases on either side is eloquent evidence that the mores of today would not countenance decisions denying a restitutionary remedy.

\textsuperscript{Id.}.

\textsuperscript{306}. 1 G. Palmer, supra note 9, § 5.14, at 674-75; see also 5A A. Corbin, supra note 9, § 1125, at 18 n.20 (indicating that courts grant quantum meruit when benefit conferred exceeds damages); 12 S. Williston, supra note 9, § 1475, at 245-46 (stating that substantially performing builder has right to recover).

\textsuperscript{307}. See 5A A. Corbin, supra note 9, § 1125, at 20 (indicating that courts will deny restitution to builder voluntarily refusing to complete performance); 1 G. Palmer, supra note 9, § 5.14, at 671-74 (discussing judicial reluctance to grant restitution where builder does not complete performance); 12 S. Williston, supra note 9, § 1475, at 240 n.6 (listing cases denying recovery for builder's willful breach). Jurisdictions not awarding restitution to a builder who does not complete the work will do so nonetheless if the amount of work is substantial enough in order to avoid a substantial forfeiture. 1 G. Palmer, supra note 9, § 5.14, at 666-67.

\textsuperscript{308}. 1 G. Palmer, supra note 9, § 5.13, at 666 & § 5.15, at 684. Judicial attitudes towards employees who quit their jobs are changing, id., § 5.13, at 651, with more courts finding a contract divisible or awarding restitution where the breach is in good faith. Id.; see also 5A A. Corbin, supra note 9, § 1127, at 33-34 (discussing divisibility of employment contracts); 12 S. Williston, supra note 9, § 1477, at 261 (suggesting that employee's good faith in breaching contract might encourage courts to award restitution). Professor Palmer argues that the courts should pay more attention to the employee's reasons for leaving. 1 G. Palmer, supra note 9, § 5.13, at 666; see also 12 S. Williston, supra note 9, § 1477, at 260-61 (indicating that employee terminating employment in good faith may recover). When the promise involves lifetime care of another in exchange for an inheritance, however, Professor Palmer suggests that the focus of the court's inquiry should not be upon determining who is at fault. See 1 G. Palmer, supra note 9, § 5.13, at 656 (finding serious injustice in case denying recovery to someone caring for others for 18 years). In addition, the statutes requiring periodic payments to employees indicate that social attitudes themselves are changing. See 1 G. Palmer, supra note 9, § 5.13, at 653 (stating that requiring such periodic payments limits restitution claims).

\textsuperscript{309}. See 1 G. Palmer, supra note 9, § 5.14, at 667-68 (noting judicial willingness to find substantial performance in order to avoid hardship).
cover profits under the contract after subtracting the defendant's damages.\textsuperscript{310} Because of the trend toward recovery in restitution, and because of the confusion in the plaintiff in breach cases, a consistent analytic framework should be useful.\textsuperscript{311}

\textit{ii. Analytic problems}

\textit{(a) Lack of meaning of acceptance element when plaintiff breaches}

\textit{Morello} is the first case in this Article in which a court denied recovery because of a lack of acceptance.\textsuperscript{312} The court correctly pointed out that work done upon land is not returnable.\textsuperscript{313} The court then said that mere retention of work or mere inaction is not acceptance,\textsuperscript{314} but did not say what constituted acceptance. To be meaningful, acceptance must include an opportunity to reject the services. Because a defendant cannot return work done upon his or her land, acceptance in the context of nonreturnable work is meaningless.\textsuperscript{315} Because most quantum meruit cases involve work that a defendant cannot return, this court's holding would reduce substantially the number of quantum meruit recoveries.\textsuperscript{316}

\textit{(b) Confusion with respect to damages}

In \textit{Morello}, the plaintiff performed $9,411 worth of the total contract between plaintiff and defendant of $44,000. Subsequently, the defendant paid $54,356 to complete the work. The trial court awarded plaintiff the value of his work, $9,411, and had awarded the defendant $10,356 in damages, the difference between the contract price and the cost to complete the work. Thus the defendant's net recovery was only $945. The court of appeals reversed the award to

\textsuperscript{310} Id. § 5.14, at 658.

\textsuperscript{311} See infra notes 323-35 and accompanying text (advocating restitutionary recovery under tier one).


\textsuperscript{313} Id.

\textsuperscript{314} Id.

\textsuperscript{315} See 1 G. Pal\textsuperscript{erm}, supra note 9, § 5.1, at 570-72, § 5.14, at 675, 679-80, 682 (noting that property owner has no choice but to accept improvements to property); see also 5A A. Cor\textsuperscript{bin}, supra note 9, § 1126, at 26-27 (stating that abandoning property is defendant's only means to refuse performance).

\textsuperscript{316} For example, in the \textit{Richard} case, if nonpassive acceptance were a necessary element the court could not have let the plaintiff retain almost $12,000. In the \textit{Morello} case, which denied relief because mere retention of work is not acceptance, what if the cost to complete had been $25,000 instead of $54,000? In that case the owner would have obtained masonry for which it was expecting to have paid $44,000 for $25,000, resulting in savings of $19,000. The builder would have forfeited $9,000 worth of his work. Perhaps, however, one could argue that the owner "accepted" the builder's work in the hypothetical situation because the new subcontractor was able to use the builder's work. The new subcontractor in the actual situation, however, might also have used the builder's work, without which he would have charged $65,000.
the plaintiff. The trial court in Morello clearly was wrong in awarding the nonbreaching defendant net damages of $945 when he suffered out-of-pocket losses of more than $10,000.

In this case the trial court did not know how to relate a quantum meruit recovery to a damages recovery. The rule is that a breaching plaintiff can recover in quantum meruit only after subtracting defendant's damages. The converse is not true. The court should not subtract the restitutionary award from the defendant's damages; the defendant is entitled to all of his damages. In fact, the plaintiff can recover only as much as will enable the nonbreaching defendant to pay no more than the contract price when the defendant pays both the plaintiff and the person who completed the work. Thus, the plaintiff can recover all of the reasonable value of his work only if the cost to complete is that much lower than the contract price. The formula should be that the defendant pays the plaintiff if the cost to complete + value of plaintiff's work ≤ contract price, or to say the same thing in a different way by rearranging the formula, the plaintiff can recover if the value of the plaintiff's work ≤ contract price - cost to complete.

In Morello, the value of plaintiff's work, $9,000, was greater than the contract price, $44,000, minus the cost of completion, $54,000 (−$10,000). Thus, the plaintiff could not recover. One can see from this analysis of damages another reason why acceptance is an irrelevant element. Failure to recover in Morellia should have had nothing to do with whether the defendant accepted the plaintiff's work; rather, it should have been based on the fact that the defendant...

317. See supra text accompanying note 291 (discussing damages measurement for incomplete work).

318. For example, take a situation in which the contract price is $10,000 and the value of the plaintiff's work is $4,000. If the cost to complete is $10,000, the defendant has no damages only if he or she does not have to pay or has not yet paid the plaintiff. If he has paid the plaintiff he is damaged by $4,000 and entitled to that money back. The defendant is entitled to get the work for the contract price of $10,000.

If the cost to complete is $11,000, then the defendant is damaged by $1,000 if he paid the plaintiff nothing, and by $5,000 if he paid the plaintiff for the work. In neither situation can the plaintiff recover. It makes no sense to subtract the defendant's damages from the plaintiff's award because the plaintiff's award in this situation is part of the damage. If, however, the cost to complete is $6,000, the defendant is not damaged if he pays the plaintiff $4,000 for the work, since the defendant expected to pay $10,000. If he does not pay the plaintiff, he is enriched by $4,000. If, however, the cost to complete is $8,000, then the defendant is not damaged only if he pays the plaintiff $2,000, but not more.

This formulation of damages works the same way for an employee who quits if cost to complete is replaced with cost to replace worker. In addition, one can add damages caused by inadequate work to the cost to replace figure. Similarly, for defective work, the cost to replace figure would be replaced by cost to repair or other appropriate measurement.

319. The negative figure in the formula determines whether the breaching party can recover. In this example the figure indicates that the non-breaching party has damages of $10,000.
ant’s damages prevented him from being enriched. In determining whether or not to allow a breaching plaintiff to recover, the relevant question thus becomes whether forfeiture is the appropriate penalty for a breach of contract where the defendant is not damaged.320

(c) Excessive appeals

Courts’ confusion over the proper measurement of damages causes excessive appeals. In both Morello and Richard, the trial and appellate courts differed with respect to damages. In Morello the trial court awarded the plaintiff quantum meruit recovery although the defendant’s damages exceeded that amount.321 The court of appeals reversed.322 In Richard, the trial court awarded the plaintiff his lost profits under the contract,323 not recognizing that a breaching plaintiff cannot recover under the contract, but can recover only in quasi-contract. The court of appeals then held that the plaintiff’s appropriate recovery was the reasonable value of his service.324

(d) Quasi-contract versus reasonable value recovery

As with the statute of frauds cases, there is an analytic problem in using a contract implied in fact award of the reasonable value of the plaintiff’s services in a case where the breaching plaintiff seeks recovery. When a breaching plaintiff seeks recovery, an express contract already exists. Two contracts, one express and one implied in fact, cannot exist simultaneously.325 An additional analytic problem arises in that the plaintiff is the breaching party and thus cannot recover under any contract—express or implied in fact—because the substantial breach discharges the defendant’s contractual duties.326 Thus, the court should base recovery in unjust enrichment, the amount of the defendant’s gain.327 The Richard court, however, used the reasonable value of

---

320. See infra notes 331-32 and accompanying text (discussing suitability of forfeiture).
322. Id.
324. Id.
325. See supra text accompanying note 272.
326. See supra text accompanying notes 290-92 (discussing breaching party’s recovery).
327. 1 G. PALMER, supra note 9, § 5.3, at 577. The measure of recovery should be the defendant’s gain, “an addition to the defendant’s wealth so that he is better off economically as a result of the plaintiff’s performance,” id., or the lesser of “the value of the benefit to the defendant less the damages resulting from the breach; or the contract price less the damage resulting from the breach.” Id. § 5.3, at 579. As noted before, this Article does not address the questions as to when the contract price can be substituted for either the reasonable value of plaintiff’s work or the defendant’s gain. See supra note 220. When Professor Palmer illustrated, with an example, the application of this rule with respect to measuring damages by the
the plaintiff’s services.  

iii. Proposal

This proposal recommends that one use the first tier with its reasonable value recovery in the plaintiff in breach cases, based on the elements of request and mutual expectation of compensation. Since the plaintiff has breached, the court cannot use the express contract, but can separate the request from the express contract, as in the statute of frauds cases.

There are two problems associated with whether or not to award recovery to a plaintiff in breach: whether the recovery damages an innocent defendant and whether a breaching plaintiff should have any rights. If a court properly calculates damages, it will not harm an innocent defendant. In all instances, the plaintiff cannot recover if the defendant has costs, or damages, in excess of the contract price. In addition, the requirement that the breaching plaintiff carry the burden of proof can also protect the defendant.

The second problem, whether a plaintiff in breach should have any rights, involves the issue whether forfeiture is the appropriate penalty for a breach of contract in addition to payment of damages. Under generally accepted contract theories, parties have a right to breach contracts so long as they pay compensatory damages. Punitive damages are not appropriate in contract cases. A forfeiture in addition to damages is contrary to those theories.

Having determined that a breaching plaintiff may obtain recovery in restitution, one must decide which tier of the analytic framework is suitable. Although tier two, with its elements of unjustness and recovery of defendant’s gain might appear appropriate, contract
principles permit a party to breach a contract and pay damages. The
breaching plaintiff’s conduct, therefore, does not necessarily
need to be weighed against standards of justice.

A tier one analysis works well in these cases. Since a contract
once existed, there had been a request and mutual expectation of
payment. In fact, Professor Palmer uses these elements as the
grounds for awarding restitution to a plaintiff in breach.

When restitution is granted to a party who has breached his con-
tract, we see more sharply than in any other part of the law of
restitution that this is based squarely on the prevention of unjust
enrichment. The enrichment must of course be present, but as we
have seen, this alone is not a sufficient reason for relief. Retention
of the enrichment without compensation must appear to be unjust
and here the ‘ground’ can only be described in very broad terms
indeed: the benefit was conferred at the defendant’s request not as
a gift but rather in the shared expectation that it was to be paid for
through furnishing some form of consideration. This serves to
mark off the cases from those in which the benefit was
unsolicited.\footnote{\textsuperscript{334}}

Reasonable value of the plaintiff’s services is a workable and per-
haps the only workable measurement for recovery.\footnote{\textsuperscript{335}} Since the
plaintiff can recover only if the defendant’s cost to complete is less
than the contract price, then the plaintiff may really receive the
defendant’s gain, which presumably is the value of the plaintiff’s work
that the new worker was able to use. While the recovery could be
measured by the value of the plaintiff’s work to the new worker,
without reference to the amount of labor the plaintiff put in, the
difference between these measurements might be nonexistent or, if
different, not significantly different. The defendant’s gain is more
subjective and thus more difficult to measure. Since the plaintiff can
never recover if the amount the defendant pays to the plaintiff and
the new worker exceeds the original contract price, the plaintiff’s

\footnote{\textsuperscript{334} \textsuperscript{1} G. PALMER, \textit{supra} note 9, § 5.1, at 573 (footnote omitted, emphasis added).}
\footnote{\textsuperscript{335} \textit{See} Richard v. Bourda, 451 So.2d 198, 200 (La. Ct. App. 1984); \textsuperscript{1} G. PALMER, \textit{supra} note 9, § 5.3, at 579 (using reasonable value measurement even when speaking of net gain to
defendant’s wealth as proper measure of recovery where plaintiff is in breach).}
recovery has a built-in limitation that should prevent the recovery from exceeding the defendant's gain by any more than an insignificant amount. Where tier one produces much the same result as tier two, but with clearer and easier analysis, it makes sense to use the first tier.

Thus, if the two plaintiff in breach cases had applied this proposal, the appellate courts would reach the same result but with clear reasoning and possibly without incorrect results from the trial courts.

c. Employment situation despite contract

i. Courts consistently allow recovery in quantum meruit despite discharged contract

The previous section of this Article involved applying tier one when the defendant is discharged due to plaintiff's breach. This section involves cases in which both parties are discharged because of impossibility of performance, frustration of purpose,336 or mutual mistake.337 Courts uniformly have permitted the party performing labor to recover in these situations,338 consistently measuring recovery as the reasonable value of the plaintiff's services.339

336. See 2 G. PALMER, supra note 9, § 7.1, at 98-99, § 7.8, at 146 (discussing discharge of contractual relations due to events affecting performance). This Article does not discuss what constitutes impossibility or frustration of purpose sufficient to discharge a contract. For such a discussion, see 6 A. CORBIN, supra, note 9, §§ 1320 (impossibility), 1333 (unexpected difficulties and unprofitableness), 1338 (destruction of subject matter); RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, §§ 261 (supervening impracticability), 265 (supervening frustration).

337. 3 A. CORBIN, supra note 9, § 599, at 592-602; 2 G. PALMER, supra note 9, § 10.9, at 450; 3 G. PALMER, § 15.11, at 447-56; RESTATEMENT (SECOND) CONTRACTS, supra note 9, § 152.

338. See 2 G. PALMER, supra note 9, § 7.1, at 99, 101 (indicating courts will always grant restitution to employee prevented from full performance), § 7.3, at 114-15 (basing restitution on employer's unjust enrichment), § 7.7, at 136-37 (indicating restitution universally granted in personal service contract impossibility), § 7.8, at 146-47 (excusing executory contract because performance of one party impossible), § 10.9, at 450 (indicating the general rule is that the worker is entitled to restitution when contracts rescinded for mutual mistake); 18 S. WILLISTON, supra note 9, § 1972, at 224-25 (advocating restitution recovery for partial performance); see also RESTATEMENT (SECOND) OF CONTRACTS, supra note 9, § 158, comment b (suggesting money recovery to extent of benefit conferred); § 272. In a few jurisdictions recovery is not permitted for a builder whose work is destroyed. 2 G. PALMER, supra note 9, § 7.1, at 101; 18 S. WILLISTON, supra note 9, § 1964, at 182-83, § 1975, at 249. But see 6 A. CORBIN, supra note 9, § 1369, at 522 (denying quantum meruit recovery for destroyed work). Until changed by statute, the early English rule for impossibility left the losses where they fell.

339. 2 G. PALMER, supra note 9, § 7.1, at 99, § 7.4, § 7.8, at 147 n.8, 148-49, 155; § 15.11, at 488; S. WILLISTON, supra note 9, § 1972, at 226, § 1976, at § 250-51, § 1977, at 254-55. Although Professor Corbin spoke of the right to restitution in impossibility and frustration cases as based on plaintiff's "performance [that] has so far enriched the defendant that failure to make restitution would be unjust," 6 A. CORBIN, supra note 9, § 1367, 518, he also said that "[i]f . . . the defendant received goods or services, the plaintiff can get judgment for their reasonable value." Id. § 1368, at 521. Professor Corbin does not distinguish between these two values. In speaking of mutual mistakes in general, Professor Corbin appears to alternate between remedies without noting any difference. He states that when the parties intend different things there is no contract but the owners will be required to pay reasonable value in
there were contracts before the discharging incident occurred, the elements of request and expectation of payment are present.  

\[ \text{ii. Lack of analysis—implied elements of request and expectation of fee} \]

In 1984, one case, *Kenneth D. Collins Agency v. Hagerott*, involved an employee whose recovery was not tied to a contract although he had been working pursuant to one. The court awarded the reasonable value of plaintiff's services in quantum meruit but did not characterize quantum meruit as either a contract implied in fact or in law. Neither did the court discuss the elements of quantum meruit.

Implicit in the facts of the case were the defendant's request and the plaintiff's expectation of payment. In *Collins*, the plaintiff was an architect hired by the defendant to prepare plans for a housing development. The plaintiff was to pay him 5% of the costs. When the project as contemplated was never constructed, the architect plaintiff sued under both the contract and quantum meruit and recovered in quantum meruit the reasonable value of his time.  

Although the court did not explain why the contract did not govern in this instance, presumably a contingency, frustration of purpose or impossibility discharged the contract.

One can visualize the *Collins* case as follows:

**Chart V. Employment Despite Discharged Contract Case**

<table>
<thead>
<tr>
<th>Name</th>
<th>Type of Case</th>
<th>Characterization of Quantum Meruit Claim</th>
<th>Measurement of Recovery</th>
<th>Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Collins</em></td>
<td>in spite of contract</td>
<td>none</td>
<td>market value of plaintiff's services</td>
<td>none</td>
</tr>
</tbody>
</table>

quasi-contract. He then says that when the parties misunderstand each other, recovery, also in quasi-contract, will generally be based upon the value of benefits actually recovered by the other party.  

340. Professor Palmer's rationale for recovery in material mistake cases contains the first tier elements of request and expectation of payment. *See* 2 G. Palmer, *supra* note 9, § 10.9, at 450 ("there is no doubt that the builder will be entitled to recover in quasi-contract, since the owner solicited the benefit and expected to pay for it").

342. *Id.*
343. *Id.* at 488.
344. *Id.*
345. *Id.*
346. *Id.* at 489.
347. Possibly the five percent fee was contingent upon the completion of the project.
iii. **Analytic problems**

Once again the duality of quantum meruit theories caused confusion. In *Collins*, the trial court reduced the architect's recovery from $18,000, based on the number of hours that the architect worked and his hourly rate, to $10,000 "due to the value of his services to the project,"\(^{349}\) apparently focusing on the defendant's gain. The court of appeals reinstated the $18,000 amount on the ground that "[t]here was no evidence to show any lesser value."\(^{350}\) In a tier-one analysis, a focus on defendant's gain would be irrelevant regardless of the evidence. If the trial court applied the two-tiered approach, the case might have avoided an unnecessary appeal.\(^{351}\)

iv. **Proposal**

Tier one is appropriate in these cases since the request and expectation of compensation elements are present from the discharged contract.\(^{352}\) Analytically, the reasonable value recovery is in quasi-contract because a discharged express contract cannot exist simultaneously with a contract implied in fact.\(^{353}\) One must again separate the request from the express contract.\(^{354}\)

The courts have "almost universally adopted" the reasonable value of the plaintiff's work as the "bargained for concept of benefit" in the impossibility and frustration cases\(^ {355}\) as well as in the rescission for mutual mistake cases when the courts do not use the contract price.\(^ {356}\) A theory enabling the courts to continue to act consistently without having to worry about the difference between

\(^{349}\) *Id.* at 489.

\(^{350}\) *Id.*

\(^{351}\) Some confusion exists even as to how to measure the reasonable value of the plaintiff's services. The majority in *Collins* used the number of the architect's hours and the "reasonable amount per hour," which the court said was the architect's own hourly rate, *id.*, at 490, for "there was no evidence to show any lesser value." *Id.* at 489. The dissent, however, believed that the architect's hourly rate was not the "market value" and would have remanded the case to establish proof of that value. *Id.* at 491 (Haswell, J., concurring and dissenting).

\(^{352}\) See 2 G. PALMER, supra note 9, § 7.1, at 102 (noting that in impossibility and frustration of purpose cases, general basis for restitution is that one party to an agreement has transferred a benefit in justified expectation of receiving an agreed exchange that has not been and will not be received—failure of consideration).

\(^{353}\) See supra note 336 and accompanying text (discussing discharge due to impossibility).

\(^{354}\) See supra note 283 and accompanying text (differentiating between request and express contract terms).

\(^{355}\) 2 G. PALMER, supra note 9, § 7.4, at 119 (defining reasonable value of plaintiff's work as bargained-for concept of benefit); see also 18 S. WILLISTON, supra note 9, § 1977, at 254 (valuing benefit as fair value of services rendered). Professor Williston uses a percentage of the contract price as the measurement of recovery. *Id.*

\(^{356}\) 3 G. PALMER, supra note 9, § 15.1 (discussing mutual mistake as grounds for rescission). The courts generally use reasonable value to measure recovery even when the object of the contract has been destroyed and the defendant received no tangible benefit. *Id.* § 7.1, at 101, § 7.3, at 115-16, § 7.8, at 146-47.
the defendant's gain and "bargained for concept of benefit" should facilitate analysis and prevent unnecessary appeals. Tier one provides that framework.

C. Tiers One and Two Used Together for Illegal Contract Cases

Courts generally will grant no relief based on illegal agreements.\textsuperscript{357} A contract is illegal when it violates a statutory or constitutional provision; is declared illegal by the common law; is against public policy; or where its purpose is to commit a crime or tort.\textsuperscript{358} In some circumstances, however, a plaintiff can recover in quantum meruit for work done pursuant to a contract that is invalid because of a statutory violation. The most typical situations involve work done despite violation of competitive bidding statutes or licensing statutes.\textsuperscript{359}

I. Courts have no consensus allowing recovery in quantum meruit

With the exception of the cases involving a plaintiff in breach, of the categories of cases examined thus far—those involving express contracts, extra work, request without an express contract, statute of frauds, and discharged contracts—the courts have been consistent in whether or not to allow quantum meruit recovery. They have been inconsistent, however, in their characterization of the claim, application of elements, and measurement of recovery. The cases involving express contracts and statutes requiring written contracts for finder's and broker's fees denied quantum meruit recovery; the rest awarded it.

In the illegal contract cases, however, modern courts do not achieve consistent results. This lack of consensus illustrates the difficulties the courts have in balancing the strong competing policies of deterring illegality and avoiding forfeiture.\textsuperscript{360} With respect to the

\textsuperscript{357} See Restatement (Second) of Contracts, supra note 9, § 178, at 6-7; 14 S. Williston, supra note 9, § 1630A, at 15-16, 18-19.

\textsuperscript{358} 6A A. Corbin, supra note 9, § 1374; 14 S. Williston, supra note 9, § 1628; 17 Am. Jur. 2d Contracts § 216, at 586-87 (1964); 17 C.J.S. Contracts § 190 (1963).

\textsuperscript{359} See infra text accompanying notes 359-83. The courts will not allow recovery in quantum meruit if the service the plaintiff provides is criminal. See 6A A. Corbin, supra note 9, § 1536 (suggesting denial of restitution if plaintiff participates in illegal transaction involving moral turpitude); 2 G. Palmer, supra note 9, § 8.4, at 189-90 (noting court will disallow restitution if purpose involves serious wrongdoing).

\textsuperscript{360} See Restatement (Second) of Contracts, supra note 9, § 197 Introductory Note, at 70 (noting conflicting policies). As Professor Palmer succinctly noted "[t]he central problem is whether the policy against permitting retention of an unjust enrichment is overbalanced by the policies lying behind the condemnation of a transaction as illegal." 2 G. Palmer, supra note 9, § 8.1, at 174; see also 6A A. Corbin, supra note 9, § 1534, at 818 (discussing factors court weighs in evaluating appropriateness of restitution); Wade, Restitution of Benefits Acquired Through Illegal Transactions, 95 U. Pa. L. Rev. 261, 302 (1947) (discussing courts' leeway in
latter, a number of questions arise. If a contract is void because of illegality, but the plaintiff has performed the work, should the plaintiff lose the value of his or her labor? That may be the appropriate punishment for such a violation, but where the statute provides for a specific penalty, forfeiture might constitute an excessive penalty. Where there is mutual fault, as when the plaintiff violates a competitive bidding statute, should the court punish only one party? At the same time, should the court permit the other party to retain a benefit?

The courts need a theory that considers these competing policies to aid not only in determining in which of these illegal contract cases the court should award quantum meruit recovery, but also, to assist in determining the proper measurement of recovery.

a. Cases awarding recovery apply an unjust enrichment analysis but not an unjust enrichment measurement of recovery

In 1984 there were four cases in which plaintiffs sought recovery in quantum meruit because an illegal contract barred a contract recovery. In two cases the courts awarded quantum meruit recovery; in two they did not. One case involved failure to obtain a brokers license, while the other three involved failure to comply with competitive bidding statutes. In two of the latter, the courts found the failure to comply to be in good faith, while in the third case the court found evidence of fraud.

In two cases, courts awarded recovery in quantum meruit when the plaintiffs committed good faith violations of competitive bidding statutes. Since these are quasi-contract cases, analytically it might

---

361. Professors Palmer and Corbin, the RESTATEMENT (SECOND) OF CONTRACTS and the RESTATEMENT (FIRST) OF RESTITUTION all provide criteria to consider in determining whether the plaintiff should recover despite an illegal contract. See infra notes 423-25 and accompanying text (discussing these factors in detail). Courts, however, are not referring to these factors in awarding relief.

362. One could put the statute of frauds cases in this category, but with the exception of the brokerage fee provisions, it is best analyzed separately, because the statute is unique both in terms of its age and its disfavored status. One can also completely analyze the statute of frauds cases in tier one. If one does not analyze the brokerage fee cases in the first tier, one can analyze them in the second tier. Tier one is not sufficient for analyzing the illegal contract cases.


have made sense for the courts to analyze the cases in unjust enrichment and measure recovery by the defendant’s gain.\textsuperscript{365} The courts’ analyses were nominally in unjust enrichment, but the recoveries were not.

Both courts characterized the claim as one in unjust enrichment, using some unjust enrichment elements, although each court used different elements. In \textit{A. V. Smith Construction Co. v. Maryland Casualty Co.},\textsuperscript{366} the plaintiff was a contractor doing construction work on a school pursuant to a contract with the school board. After that contract was signed, the plaintiff and the school board orally agreed that the plaintiff would repair damage to a building caused by a subsequent fire.\textsuperscript{367} The trial court assessed the school board the cost of repairs on an implied contract theory, although the court did not specify whether the contract was implied in fact or in law.\textsuperscript{368} The court of appeals rejected the implied contract theory on the ground that the contract would have violated public bidding laws,\textsuperscript{369} thus treating the trial court’s decision as one founded in a contract implied in fact analysis. The court of appeals held, however, that because the plaintiff performed the work in good faith, the plaintiff could recover in quantum \textit{meruit}.\textsuperscript{370} To arrive at this decision the court applied the five elements of unjust enrichment in the Louisiana civil code: an enrichment, an impoverishment, a connection between the enrichment and impoverishment, an absence of justification for the enrichment or impoverishment, and the absence of another legal remedy.\textsuperscript{371}

Despite using an unjust enrichment theory, the court did not focus on the amount of the defendant’s gain; rather, the court measured the plaintiff’s recovery by its actual costs, but characterized the recovery as reasonable value recovery.\textsuperscript{372} The court then reduced the plaintiff’s costs by the amount it had gained through a

\textsuperscript{365} See \textit{supra} text accompanying notes 271-72.
\textsuperscript{367} Id. at 40.
\textsuperscript{368} Id. at 40-41.
\textsuperscript{369} Id.
\textsuperscript{370} Id. at 42.
\textsuperscript{371} Id. Although worded differently, those elements are the same as the common law elements used in the other states with the exception that the common law does not require “the absence of any other remedy at law” as does Louisiana. Cf. 1 G. PALMER, \textit{supra} note 9, § 1.6, at 33, § 4.7, at 427-28 (stating that restitution in states other than Louisiana is not limited to situations in which damages are inadequate). The defendant’s gain element is the same in both Louisiana and common law states; Louisiana’s impoverishment and connection between impoverishment and enrichment elements correspond with the plaintiff’s expense element and Louisiana’s absence of justification element corresponds with the unjustness element.
\textsuperscript{372} A.V. Smith Constr. Co. v. Maryland Casualty Co., 450 So.2d 39, 41 (La. Ct. App. 1984). The court did so by saying that the plaintiff could recover under unjust enrichment as
settlement with a subcontractor whose negligence allegedly had caused the fire.\textsuperscript{373} In dicta, the court indicated that it could even award profit and/or overhead, the plaintiff's expectation remedy.\textsuperscript{374}

In \textit{Township of Ridley v. Pipe Maintenance Services, Inc.},\textsuperscript{375} the court also characterized the claim as one in unjust enrichment\textsuperscript{376} and did not award the defendant's gain. In \textit{Ridley}, the plaintiff had a written contract to maintain and repair the township's sewer for no more than $26,620.\textsuperscript{377} The court allowed the plaintiff to recover over $100,000 in quantum meruit for the fair and reasonable value of the extra labor and materials supplied at the request of the township to correct a flooding problem.\textsuperscript{378} The court held that the plaintiff could not recover under a contract since the parties had not complied with the public bidding laws, but that quantum meruit recovery was appropriate.\textsuperscript{379}

The court discussed a melange of quasi-contract and contract implied in fact elements. The court noted that (1) the city must have the authority or power to make the contract; (2) there must be no evidence of subterfuge or fraud; (3) the contracts must not assume the risk of extra work; and (4) the defendant either had ample opportunity to reject or voluntarily accepted and retained the benefits.\textsuperscript{380} The court also emphasized the importance in this case of the defendant's assent that the plaintiff do the work and the defendant's intention to pay for that work.\textsuperscript{381}

The defendant's assent to plaintiff's query about performing the much "as he reasonably deserves" for his services and the time and labor required for them. \textit{Id.}

\textsuperscript{373} \textit{Id.} at 42.
\textsuperscript{374} See \textit{id.} at 41 (noting that plaintiff asked only for costs even though recent cases allowed quantum meruit recovery for profit and/or overhead expenses attributable to project).
\textsuperscript{376} See \textit{id.} at 425, 477 A.2d at 612 (saying nothing to contrary about plaintiff's characterization of claim as one in unjust enrichment).
\textsuperscript{377} Id. at 426, 477 A.2d at 611.
\textsuperscript{378} Id. at 427, 477 A.2d at 612.
\textsuperscript{379} Id. at 428, 477 A.2d at 612.
\textsuperscript{380} Id. at 428-29, 477 A.2d at 612.
\textsuperscript{381} Id. at 429-30, 477 A.2d at 613. The defendant had relied upon Hazle Township v. City of Hazleton, 45 Pa. Commw. 370, 407 A.2d 893 (1979), a case in which the city of Hazleton constructed a sewer along its boundary line with Hazle Township and sued the township for a share of the cost of construction on a quantum meruit theory. \textit{Id.} at 371-72, 407 A.2d at 894. There was, however, no agreement between the municipalities regarding the repairs, as required by statute, and the township had neither assented to the construction of the sewer nor indicated any intention to contribute to its cost. \textit{Id.} at 373, 407 A.2d at 894. The court held that in the absence of any agreement, express or implied, to share the construction costs, the city could not recover. \textit{Id.} at 374, 470 A.2d at 895. The court in \textit{Ridley} distinguished \textit{Hazleton} on the basis that there was a written contract between the township and the plaintiff to perform maintenance and repairs on the town's sewer system, and an oral agreement for the restoration work. Township of Ridley v. Pipe Maintenance Serv., Inc., 83 Pa. Commw. 425, 429-30, 477 A.2d 610, 613 (1984).
work is a request by affirmation. A defendant’s request and intention to pay are, of course, contract implied in fact elements. The first three elements the court mentioned also are contract implied in fact elements. In emphasizing the fact that the city had authority to contract for this type of work and that there was no subterfuge, the court was saying that the city was capable of making a request and that the request was untainted by fraud. The third element is an express contract element because it looks to see if the plaintiff assumed the risk for the extra work in the express contract. The last elements the court mentioned, opportunity to reject and accepting and retaining the benefits, are variations of unjust enrichment elements. Acceptance is not a contract implied in fact element, for once the parties contract, only the plaintiff’s breach justifies the defendant’s non-acceptance of the plaintiff’s work.

In light of the unjust enrichment elements, one might expect the court to measure recovery by the value to the defendant of the benefits conferred. In Ridley, however, the court awarded the fair and reasonable market value of the labor and material supplied. The court thus characterized the claim as one in unjust enrichment, applied both unjust enrichment and contract implied in fact elements, and awarded contract implied in fact damages.

b. Cases denying recovery in quantum meruit

In one case involving failure to obtain a license, Lakeshore Financial Corp. v. Comstock, and another involving fraud, Kunkle Water & Electric, Inc. v. City of Prescott, courts denied quantum meruit recovery. Neither court characterized the quantum meruit claim as either a contract implied in fact or in law although the court in Lakeshore said, incorrectly, that the claim was equitable. In Kunkle, a water company negotiated a contract to repair the city’s water system at an hourly rate, estimating that the work would cost approximately

---

382. Township of Ridley v. Pipe Maintenance Serv., Inc., 83 Pa. Commw. 425, 427, 477 A.2d 610, 612 (1984). In its opinion the court relied upon and quoted from Luzerne Township v. Fayette County, 330 Pa. 247, 199 A. 327 (1938). One could read this case as characterizing the plaintiff’s recovery as the amount of the defendant’s gain. In that opinion, the court said that a plaintiff who furnishes labor or material, thereby conferring a benefit on the defendant, may recover compensation for that benefit. Id. at 253, 199 A. at 330. The basis for recovery in Ridley therefore is not entirely clear; characterizing the recovery as the defendant’s gain does not preclude measuring the benefit as the reasonable value of the plaintiff’s labor if that is also the value of the defendant’s gain.


385. 347 N.W.2d 648 (Iowa 1984).

$3500. The final bill exceeded $10,000, violating the competitive bidding statute. Kunkle sued under both contract and quantum meruit to recover its costs. The court found that the plaintiff’s conduct in deliberately underestimating the amount of necessary repairs constituted fraud. The court also found that the plaintiff had not enriched the city because the water system remained faulty after the repairs. The court relied on precedent in denying recovery, stating that “our cases consistently have rejected quantum meruit recoveries when there had been violations of the competitive bidding statute.” In dicta the court said that if there had been no fraud and if the plaintiff enriched the defendant, the plaintiff might be able to recover to the extent of the defendant’s gain despite the plaintiff’s failure to follow formal statutory procedures.

Lakeshore involved a broker who sought to recover a finder’s fee for his role in the merger of two banks pursuant to an oral agreement with one of the banks. The district court found that the statute of frauds did not bar the agreement, but the broker could not recover because he did not hold a broker’s license as required by statute. The court’s rationale for denying recovery was that there can be no quantum meruit recovery because an agreement to collect a commission in violation of a statute is void as being against public policy. The court did not discuss the defendant’s possible enrichment.

Thus, the analysis of the 1984 illegal contract cases is charted below:

387. Kunkle Water & Elec., Inc. v. City of Prescott, 347 N.W.2d 648, 651 (Iowa 1984). When the city discovered problems with its water system, it called on Kunkle, with whom it had a prior working relationship, to assess the damage. Id. After inspecting the water plant, Kunkle provided the city with an estimate of $3500. Id. Shortly thereafter, a written contract was provided to and signed by the city which involved costs of over $3200 for materials and an unspecified amount for labor to be paid at a rate of $34/hour. Id.

388. Id.

389. In assessing the fraud charge, the court noted with interest that Kunkle had on 32 occasions over the past five-year period estimated projects at below the competitive bidding threshold. Each of those projects later exceeded the $10,000 trigger, with Kunkle then subdividing the work into individual contracts to avoid exceeding the threshold. Id. at 653. Kunkle employed the same tactic in the instant case, leading the court to the inference that Kunkle had engaged in a pattern of disguise and deception. Id.

390. Id. at 654.

391. Id. at 656.

392. Id. at 657.


394. Id. at 429.

395. Id. at 429.
## QUANTUM MERUIT

### CHART VIII. ILLEGAL CONTRACT CASES

<table>
<thead>
<tr>
<th>Name</th>
<th>Type of Case</th>
<th>Characterization of Quantum Meruit Claim</th>
<th>Measurement of Recovery</th>
<th>Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Smith</td>
<td>illegal contract competitive bidding</td>
<td>unjust enrichment not “implied contract”</td>
<td>costs minus reimbursement from third party (dicta—would award profit)</td>
<td>enrichment, impoverishment (with connection between these elements), absence of justification, no other remedy</td>
</tr>
<tr>
<td>Ridley</td>
<td>illegal contract competitive bidding</td>
<td>unjust enrichment</td>
<td>fair and reasonable value</td>
<td>city had authority, no subterfuge, extra work not in contract, defendant accepted benefit or failed to reject benefit, defendant assented and intended to pay</td>
</tr>
<tr>
<td>Lakeshore</td>
<td>illegal contract brokers license</td>
<td>none (equitable)</td>
<td>none</td>
<td>against public policy</td>
</tr>
<tr>
<td>Kunkle</td>
<td>illegal contract competitive bidding</td>
<td>none</td>
<td>none (dicta-defendant’s gain)</td>
<td>none (dicta-good faith, enrichment)</td>
</tr>
</tbody>
</table>

2. **Analytic problems**

There are analytic problems in the cases in which the courts award recovery and in those in which the courts do not award recovery.

- **The cases awarding recovery**
  - **Courts are analytically confused**

The courts in illegal contract cases awarding recovery use unjust enrichment analysis but contract implied in fact recovery or costs. In one case, *Ridley*, the court included contract implied in fact elements in its unjust enrichment analysis. This confusion makes it difficult to know how to analyze a quantum meruit claim.

---

ii. Confusion between theory and recovery shifts attention from real issues and causes excessive remands

In *A.V. Smith*, the trial court characterized the plaintiff's suit against the school board as one in implied contract and awarded the plaintiff its costs.\(^{401}\) Although the trial court did not state what type of implied contract analysis it applied, the appellate court treated the district court's reasoning as a contract implied in fact analysis by saying that the trial court was incorrect because a contract, and thus a contract implied in fact, would have violated public bidding laws.\(^{402}\) The appellate court then awarded the plaintiff's costs under an unjust enrichment theory.\(^{403}\) The only difference between the trial court's award and the appellate court's award was that the appellate court deducted the settlement the plaintiff recovered from his subcontractor.\(^{404}\) As in *Hartwell*,\(^{405}\) the court should have deducted this recovery from the plaintiff's award regardless of which quantum meruit theory the court applied because the plaintiff should not be compensated twice.\(^{406}\) Again, as in *Hartwell*, concern with the duality of quantum meruit shifted attention from the real issue and caused an unnecessary appeal.

iii. Courts awarding recovery do not consider deterrence of conduct

The courts awarding recovery prevented forfeiture but did not discuss whether the recovery would adequately deter the conduct the statute prohibited. For example, the court in *A.V. Smith* awarded the plaintiff's costs and even would have awarded profits and overhead.\(^{407}\) One would assume that the reasonable market value of work is the more appropriate measure in a case where the plaintiff violates public bidding statutes because the plaintiff might not have been the most efficient worker. A recovery limited to reasonable

---

402. *Id.*
403. *Id.* The court noted that because the parties acted in good faith the contract was merely void. *Id.* Because the conduct was not "malum in se," the plaintiff could recover under an unjust enrichment theory pursuant to the Louisiana Civil Code. *Id.*
404. *Id.* at 42.
405. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (1984). In *Hartwell*, the deduction was the payment the defendant gave the plaintiff, and was thus a setoff. *Id.* at 142, 686 P.2d at 87.
market value protects the city's interest in not having to pay the higher cost. Protecting against excessive costs from inefficiency or fraud is one of the interests that the public bidding laws are designed to protect.408

The court in Ridley awarded the reasonable value of plaintiff’s services,409 an award that helps to protect against awarding inefficient contracts. A reasonable market value recovery, rather than costs, provides some deterrence, but obviously not as much deterrence as no recovery. Collusive agreements are therefore still possible. The lack of subterfuge or fraud thus becomes crucial in deterring the collusive and fraudulent conduct the competitive bidding statutes prohibit.

b. Cases denying recovery

The cases denying recovery are problematical because the courts deny recovery with no analysis or with a statement that awarding recovery, even in quantum meruit, violates public policy.410 If one denies recovery in illegal contract cases on the grounds of public policy without further rationale, one should deny recovery in all of these cases because all statutes are statements of public policy. One should also deny recovery in cases where contracts do not comply with the statute of frauds because the statute of frauds is also a policy statement. The courts, however, award recovery in these cases.

The courts denying recovery also do not consider whether the defendant received a gain or whether the defendant’s retention of the gain was an unnecessary and thus unjust forfeiture by the plaintiff. Such a forfeiture may be necessary to deter conduct and thus be the appropriate penalty for violating the statute. But analysis by silence

408. See generally, 6A A. Corbin, supra note 9, § 1468, at 572-74 (discussing tactics and unfavorable results of illegal bidding practices). Perhaps inability to measure the enrichment caused the court to use the plaintiff’s costs to measure recovery. The court suggested that the defendant was enriched because the school board needed the repairs done before the autumn opening of the school. A.V. Smith Constr. Co. v. Maryland Casualty Co., 450 So.2d 39, 42 (La. Ct. App. 1983). It would be difficult to measure that sort of enrichment. Perhaps inability to measure the market value of the plaintiff’s work caused the court to use the plaintiff’s costs. The court set forth this alternative measure of recovery, however, without comment or explanation. A lack of evidence as to value does not explain why the plaintiff should recover profits or overhead, especially as these items may not be as easily proved as costs.


410. Lakeshore Fin. Corp. v. Comstock, 587 F. Supp. 426 (W.D. Mich. 1984); Kunkle Water & Elec., Inc. v. City of Prescott, 347 N.W.2d 648 (Iowa 1984); see 2 G. Palmer, supra note 9, § 8.1, at 171 (criticizing cases denying recovery). Professor Palmer finds that public policy prohibiting enforcement of a contract is not a sufficient reason for allowing one party to retain an unjust enrichment at the expense of the other. Id. Such a retention is warranted only when restitution is in conflict with overriding policies. Id.
is not the best precedent, nor is forfeiture always appropriate.411

3. Proposal

Again, as in the statute of frauds cases, the courts awarding recovery do not measure relief by the defendant's gain. The courts award reasonable value or even expectation, both of which are remedies for actions with the request and expectation of payment elements. Using these elements, this Article structures an analysis to determine in which of the illegal contracts cases the court should award a reasonable value recovery.

The two-tier analysis takes into account the two competing policies of deterring conduct and preventing unjust forfeiture. The court can apply tier one when it finds that the plaintiff did not engage in wrongful conduct of the sort the statute meant to deter. In that situation there is no need for the plaintiff's forfeiture and the reasonable value of plaintiff's services can be awarded.412 If the court does find wrongful conduct, then the court should proceed to the second tier to consider explicitly the forfeiture issue under the unjustness element.413 Thus, this is the first set of cases in which the court may have to apply both tiers.

A court can use the first tier only if the plaintiff's conduct was not seriously wrongful because the request must be valid. A request tainted by fraud cannot be valid. Thus, the element of good faith shown in both of the cases in which the court awarded the reasonable value of the plaintiff's services is a necessary part of the first tier. A determination that the request is valid is also a determination that the plaintiff's conduct was not so serious as to warrant forfeiture as a deterrent to others.414 In the illegal contract competitive bidding cases in which the courts awarded recovery, the

411. See supra note 360 and accompanying text (noting that deterring illegal conduct and avoiding forfeiture are competing interests that court must balance).

412. See supra notes 61-62 and accompanying text (discussing appropriate recovery under first tier).

413. In applying the first tier to an invalid contract situation it is certainly open to a court to hold as either a matter of law or fact that there can be no such thing as an untainted or valid request. Presumably this is the way courts would resolve the first tier in jurisdictions that follow the general rule with respect to suits against municipalities that no recovery can be had on an implied contract, even though the municipality receives the benefits of the contract. 10 E. McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 29.41, at 328 (3d ed. 1981). Not all jurisdictions, however, follow that rule. Id. This does not take into account the forfeiture issues. An examination of whether there is a valid request and expectation of payment and, secondarily, whether there had been a disproportionate forfeiture, however, might provide a more useful analysis by weighing the competing policies of deterring conduct and avoiding forfeiture.

414. Cf. 2 G. Palmer, supra note 9, § 8.4(c), at 192 (noting that deterrence factor will often have little force where parties are equally at fault because while potential plaintiff might be deterred if recovery is not allowed, potential defendant might be encouraged).
courts found the conduct to have been in good faith,\textsuperscript{415} while the court denying recovery found the conduct to have been fraudulent.\textsuperscript{416} Those courts awarding recovery already are doing what the first tier recommends.

The reasonable value recovery of tier one is not available in cases involving fraud because there will not be a valid request. A recovery under tier one also is not available in cases involving incapacity because a person without authority cannot make a valid request\textsuperscript{417} nor in cases when the request is for illegal conduct.\textsuperscript{418}

The expectation of payment element also helps predict in which of these cases the court should award a reasonable value recovery. Courts frequently deny recovery when the plaintiff does not comply with a licensing statute.\textsuperscript{419} In these situations, the person seeking recovery is also the person who knows whether or not he or she is licensed. Presumably if he or she is not licensed, his or her expectation of payment is unreasonable. Of course, if the person in good faith thinks he or she is licensed or thinks that a license from another state is valid, the court could find the expectation of payment element met and grant reasonable value recovery, as has been the case.\textsuperscript{420}

If the case does not show the elements of request and expectation of payment, only then need the court apply a tier two, unjust enrichment analysis. It is important that the court do so, for if it denies recovery without considering tier two, it does not address the forfeiture issue. In looking at the tier two elements a court considers whether the defendant received a benefit at plaintiff's expense that it is unjust for the defendant to retain. Under the unjustness ele-

\textsuperscript{415} A.V. Smith Constr. Co. v. Maryland Casualty Co., 450 So.2d 39, 41 (La. Ct. App. 1984); Township of Ridley v. Pipe Maintenance Serv., Inc., 83 Pa. Commw. 425, 430-31, 477 A.2d 610, 613 (1984). In Ridley, the court noted that although there was some evidence suggesting conscious ignorance of the statute and self-dealing, the evidence was not so clear as to compel the inference that the conduct was conspiratorial or fraudulent. \textit{Id.}

\textsuperscript{416} Kunkle Water & Elec., Inc. v. City of Prescott, 347 N.W.2d 648, 654 (Iowa 1984).

\textsuperscript{417} \textit{See generally} \textit{Restatement (Second) of Contracts}, supra note 9, \S 12 (stating that courts release from contractual obligations those without full legal capacity). The importance of authority to contract especially is evidence in Ridley, in which the court stressed the fact that the city had the authority, or capacity to enter into a contract. Township of Ridley v. Pipe Maintenance Serv., Inc., 83 Pa. Commw. 425, 428, 477 A.2d 610, 612 (1984).

\textsuperscript{418} \textit{See} 2 G. Palmer, \textit{supra} note 9, \S 8.1, at 173 n.12, \S 8.8, at 189-90 & nn.5-10; \textit{see also} 6A A. Corbin, \textit{supra} note 9, \S 1536.

\textsuperscript{419} \textit{See} Lakeshore Fin. Corp. v. Comstock, 587 F. Supp. 426, 427 (W.D. Mich. 1984); \textit{see also} 2 G. Palmer, \textit{supra} note 9, \S 8.3, at 181-82 (noting that policy is to protect public from unqualified people). Professor Palmer also noted that the importance of the protection changes as the worker's occupation changes. \textit{Id.} In addition, legislatures design some licensing statutes more as revenue measures than for protection of the public, \textit{id.} at 182 n.8, so recovery might be appropriate. Tier two with its balancing requirements adequately can take these factors into account.

\textsuperscript{420} 2 G. Palmer, \textit{supra} note 9, \S 8.3, at 182-83.
ment, the court can consider many factors, such as comparing the plaintiff's conduct with the defendant's conduct and the plaintiff's loss with the defendant's gain. The court thus determines whether forfeiture is the appropriate penalty for the plaintiff's conduct and whether the defendant can and should pay for the benefit he has received. Under the second tier, recovery may or may not be warranted, but the analysis takes into account more concerns and provides more useful precedent than the vague phrase "against public policy."

In the illegal contract cases, again as in the statute of frauds cases, the first tier cannot be labeled a contract implied in fact because an express, but invalid, contract exists. There are two possible rationales for using the elements of the first tier in analysis. First, the court can distinguish the express contract from the request and the first tier elements, viewing the reasonable value recovery as one permitted in a quasi-contract analysis. Second, the court can view the illegality as voiding the express contract, making these cases analogous to the no contract cases in which the court could use a contract implied in fact analysis.421

Under the proposed analysis, the court in Ridley might award the same reasonable value recovery as it awarded, but with different analysis. The township's request for sewer repairs was valid because the township had the authority to request the work and there was no fraud. The defendant's acceptance or failure to reject the benefit would be irrelevant. The court in A.V. Smith, however, would not award costs or profits. The court might have to use the second tier because, while there was a valid, nonfraudulent request, the plaintiff expected reimbursement from its insurance company, not from the school board.422 The school board may not have planned on incurring the expense. The court, therefore, would compare the conduct of the two parties and consider whether the school board should pay for its enrichment. The court might find, of course, the value of the enrichment to be the reasonable value of the work requested and received.

The court would reach the same result in Kunkle because tier one is inapplicable due to fraud and tier two is inapplicable because the defendant had no gain. In Lakeshore, the court might reach the same result, but it would have to analyze the forfeiture issue rather than

421. See supra note 150 and accompanying text (discussing implied in fact contract analysis in context of no-contract cases).
rely solely on public policy. The first tier does not apply, assuming the plaintiff knew he was unlicensed and thus could not reasonably expect a fee. Under the unjustness element of the second tier the court might consider the plaintiff's conduct, why the plaintiff had not procured the license, and whether the bank should be able to obtain the benefits of the merger without having to pay to the plaintiff what it saved by not having to pay someone in its organization to perform the same services.

The two-tier analysis may be more workable in quantum meruit cases involving illegal contracts than are criteria other authorities present, which are subjective and were not cited by these courts. In addition, the authorities do not provide a guide for determining whether the recovery should be the reasonable value of plaintiff's services or the defendant's gain. The two-tiered analysis does

---

423. The Restatement (Second) of Contracts has three alternative rules for recovery in restitution for performance rendered under a contract unenforceable because it violates public policy. The Restatement allows recovery (1) if "denial of restitution would cause disproportionate forfeiture," Restatement (Second) of Contracts, supra note 9, § 197, or (2) if the plaintiff was "excusably ignorant of the facts or of legislation of a minor character" or "not equally in the wrong," id. § 198, or (3) if "he did not engage in serious misconduct and . . . he withdraws from the transaction before the improper purpose has been achieved." Id. § 199; see also 6A A. Corbin, supra note 9, §§ 1537-39, 1541 (supporting use of these factors as legitimate conditions for recovery). It should be noted that the Restatement does not distinguish between services and other contractual performance. According to the Restatement unenforceability on grounds of public policy covers contracts or promises which are in restraint of trade, which impair family relations, or which interfere with duties owed to individuals. Restatement (Second) of Contracts, supra note 9, § 178, introductory note to Chapter 8, at 3. The Restatement notes that other judicially developed policies include those involving restraints on the alienation of property, leasing of premises for illegal purposes, and certain assignments of contractual rights, as well as policies implemented by the courts because they have been manifested by legislation. Id.

The factors the Restatement's comment suggests a court consider under disproportionate forfeiture are the party's deliberate involvement in any misconduct, the gravity of that misconduct, and the strength of the public policy underlying the statute making the contract unenforceable. Id. § 197, comment b, at 72. A finding of good faith request, one not tainted or induced by fraud or other wrongdoing would be a finding that the misconduct was not deliberate or grave and that a recovery in quantum meruit would not defeat public policy. With respect to the other Restatement rules, it is unlikely that a court would characterize a competitive bidding statute as one of "minor character." While the finding of good faith is clearly a finding that there has not been serious misconduct, the concept of withdrawing from a transaction is inapplicable to someone who has already performed the work pursuant to a request that did not comply with bidding requirements.

Professor Palmer would have courts consider four factors: (1) the seriousness of the illegality, (2) the nature of the plaintiff's participation, (3) the injustice of the specific enrichment, and (4) whether a judgment depriving the defendant of that enrichment subverts the policy underlying the rule of law making the transaction illegal. 2 G. Palmer, supra note 9, § 8.1, at 174. A finding of a valid request and expectation of payment is a finding that plaintiff's conduct is in good faith and that such good faith does not require deterrence. The second tier addresses the forfeiture issue and balances it against the need to deter conduct.

424. 2 G. Palmer, supra note 9, § 8.4, at 192 (stating that for unlicensed builders court can measure recovery as either fair market value of labor and materials or as enhanced value of land); supra text accompanying note 26 (discussing recovery in restitution under Restatement).
provide such guidance. Where the first tier elements are met, then the court can award a quantum meruit reasonable value recovery. Where the first tier elements are not met, the second tier requires the court to weigh the public policy issues and determine whether there has been a disproportionate forfeiture.\textsuperscript{425} If so, the court awards recovery in the amount of the defendant's gain, the enhanced value of the property.

\textbf{D. Tier Two Used Alone—Recovery From Third Parties}

1. Defining third parties and identifying countervailing policies

As in cases involving contracts that violate a statute, the courts inconsistently provide recovery in cases involving third parties. Third parties are people who have not requested the plaintiff's services, such as people not parties to the contract under which the plaintiff worked. The plaintiff may seek recovery from a third party when the plaintiff cannot recover from the party with whom he originally contracted, often due to that party's insolvency or bankruptcy. The plaintiff also may seek recovery from a third party when the plaintiff repairs property, mistakenly thinking it was his or hers or when the plaintiff mistakenly thinks that he or she has a contract with the third party.

In third-party cases the court must balance the countervailing considerations of the unjustness of permitting forfeiture against the hardship of making one pay for work that he or she did not ask for and perhaps did not want and could not afford.\textsuperscript{426} While the first tier cannot be used because the defendant did not request the work, the second tier analysis enables courts to focus on these concerns and perhaps reach fairer and more consistent results. Currently, the courts tend to grant or deny restitution without weighing these concerns. They make their judgment on incomplete quantum meruit analysis.\textsuperscript{427} Using the quantum meruit framework, courts who terminate analysis because third-party cases contain no request or acceptance elements would be aware of another level of analysis, focusing on whether the defendant received a benefit and, if so, comparing the conduct and hardships of the plaintiff and defendant to achieve a just result.

The second tier would not award the reasonable value of the

\begin{footnotes}
\item[425] See \textit{Restatement (Second) of Contracts}, supra note 9, § 197 (permitting restitution if denial of such would cause disproportionate forfeiture).
\item[426] 1 G. Palmer, supra note 9, § 10.9, at 447, 449.
\item[427] See infra notes 476-77 and accompanying text (criticizing incomplete analysis employed by courts in third-party cases).
\end{footnotes}
plaintiff's services since without a request, the defendant cannot benefit by getting what he requested. The defendant, however, might have gained at the plaintiff's expense. The court could determine if justice requires the defendant to disgorge the gain.

2. Courts show no consensus to allow recovery in quantum meruit

Of the four 1984 cases in which plaintiffs sought recovery from a third party, two allowed recovery, one did not, and one reversed the lower court's award of recovery because of insufficient proof. One court awarding recovery merely characterized the claim as an implied contract without specifying the type. Another court, this one reversing the lower court's award for lack of proof of the defendant's gain, characterized the claim as either an implied contract or quasi-contract without distinguishing between the two. The other two courts, one granting and one denying recovery, both characterized the claim as one in unjust enrichment. Of those, one court characterized the claim as "quasi contract for unjust enrichment," stating that "a claim for unjust enrichment is somewhat different from a claim for quantum meruit." The court did not differentiate the claims, but did say that both were measures of recovery in quasi-contract and that the same rule applies to both. Unfortunately, the court did not mention what "this same rule" was nor say how two quasi-contract claims are different. As previously seen, the courts' unnecessary and confusing statements as to terminology seem to be a characteristic of quantum meruit cases, indicating the uncertainty with which the courts approach that litigation.

428. See supra text accompanying note 31 (noting that defendant benefits by getting that which he requested).
437. Id. at 655. To support its assertion that unjust enrichment and quantum meruit are "somewhat different," id. at n.4, the court cited Peavey v. Pellandini, 97 Idaho 855, 551 P.2d 610 (1976). The court in Peavey drew this distinction by defining quantum meruit as a contract implied in fact claim and not as a restitutionary contract implied in law claim. Id. at 659, 661, 551 P.2d at 614, 616. The court in Idaho Lumber therefore is incorrect in relying on Peavey when it asserts that both quantum meruit and unjust enrichment are measures of recovery in quasi-contract. Idaho Lumber, Inc. v. Buck, 710 P.2d 647 (Idaho Ct. App. 1984). Again, this shows the extent of the courts' confusion, for one court does not understand the terminology—and thus the precedent—of its own courts.
One of the two third-party cases in which the court awarded recovery, *Prairie Valley Independent School District v. Sawyer*, is really a simple contract implied in fact case, although the court characterized it as an unspecified implied contract case and did not analyze it as a case in which the defendant had requested the plaintiffs’ services. In *Prairie Valley* three subcontractors continued to work for the defendant school district after the general contractor abandoned its contract with the school district. The subcontractors sued to recover the reasonable and customary value of their labor and materials from the school district for the time after the general contractor abandoned the contract and before the school district retained a new general contractor.

As in *Ridley*, one of the illegal contract cases, the court in *Prairie Valley* used a melange of quasi-contract and contract implied in fact elements. The court said that the necessary elements of quantum meruit were: 

1. valuable services were rendered or materials furnished,
2. for the person sought to be charged,
3. which services and materials were accepted by the person sought to be charged, used and enjoyed by him,
4. under such circumstances as reasonably notified the person sought to be charged that the plaintiff was expecting to be paid by the person sought to be charged.”

The element focusing on the defendant’s acceptance of a benefit is a variation of a quasi-contract element, while the last element, defendant’s knowledge of plaintiff’s expectation of payment, is a contract implied in fact element.

The court in *Prairie Valley* did not list the defendant’s request, the other contract implied in fact element, as an element, although the court did mention facts indicating that a request had been made by the defendant. Thus, with facts of request and expectation of payment, the court could have analyzed the case as a contract implied in fact. Indeed, the court measured recovery in contract implied in fact fashion, finding recovery to be the reasonable market

---

439. *Id.* at 608.
440. *Id.* at 609.
441. *Id.* at 610 (citing Garza v. Mitchell, 607 S.W.2d 593, 600 (Tex. Civ. App. 1980); City of Ingleside v. Stewart, 554 S.W.2d 939, 943 (Tex. Civ. App. 1977)). These are the same elements used in TVL Assoc. v. A & M Constr. Corp., 474 A.2d 156 (D.C. 1984), the case that reversed the trial court’s award of defendant’s gain for insufficient proof. These are also the quantum meruit elements listed in *BLACK’S LAW DICTIONARY*, supra note 1, at 1119.
442. See supra text accompanying notes 15-18, 36-38.
443. See supra text accompanying note 20.
444. *Prairie Valley Indep. School Dist. v. Sawyer*, 665 S.W.2d 606, 610 (Tex. Civ. App. 1984). The court noted that the school superintendent and a member of the building committee encouraged one plaintiff to continue working, and that the building committee member directed plaintiffs at their work and implied forthcoming payment. *Id.*
value of the plaintiff’s services.\textsuperscript{445}

The other case that awarded recovery was a true third-party case because the third party did not request the plaintiff’s services. In \textit{Idaho Lumber, Inc. v. Buck},\textsuperscript{446} a contractor sought to recover from the owner of the premises the remainder of the contract price for remodeling a funeral home into a restaurant.\textsuperscript{447} The contractor had not contracted with the owner, but with the owner’s lessee who defaulted on both the lease and the contract and subsequently was discharged in bankruptcy.\textsuperscript{448} The contractor sued the owner on a quasi-contract theory for unjust enrichment.\textsuperscript{449}

The court analyzed the claim as a contract implied in law, with classic unjust enrichment language that the defendant’s basis for liability was the unjustness of allowing the defendant to retain a benefit received from the plaintiff.\textsuperscript{450} The court used, however, two elements not included among the three traditional unjust enrichment elements. The court listed the following three elements: “A benefit conferred upon the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof.”\textsuperscript{451} An unjust enrichment analysis does not require the elements of appreciation and acceptance of the benefit. Except in limited circumstances

\textsuperscript{445} Id. at 610-11. The court reversed the lower court’s award to the plaintiff supplier because there was no evidence that the school district had notice that that supplier expected to be paid by the school district, \textit{id.} at 611, thus denying recovery because a contract implied in fact element was missing. The court did not discuss whether the school board obtained any benefit from this supplier’s work or supplies.

\textsuperscript{446} 710 P.2d 647 (Idaho Ct. App. 1984).

\textsuperscript{447} \textit{Id.} at 649.

\textsuperscript{448} \textit{Id.} at 650. This probably indicates that a former funeral home is not the best site for a restaurant.

\textsuperscript{449} \textit{Id.} The owner claimed that the plaintiff could not recover because there was an express contract with someone else. \textit{Id.; see also} 66 Am. Jur. 2d Restitution and Implied Contracts § 59 (1973) (stating that third person, even where benefitted by work, cannot be sued on implied assumpsit to pay for that benefit where work performed under special contract with another). The court held that this rule did not apply, however, because the lessee’s bankruptcy ended the contract. \textit{Idaho Lumber, Inc. v. Buck}, 710 P.2d 647 (Idaho Ct. App. 1985). The court also said, inexplicably, that that a plaintiff can plead an express contact and quantum meruit in the alternative. \textit{Id.} at 655-57. That statement, however, does not make the rule set forth in Am. Jur. inapplicable.

\textsuperscript{450} \textit{Id.} The court also quoted from Paschall's Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150 (1966). The court in \textit{Paschall's} stated that “where a materialman or subcontractor furnishes labor or materials which benefit the property of a person with whom there is no privity of contract, an action on quantum meruit may lie against the landowner to recover the reasonable value of said labor and materials so furnished.” \textit{Id.} at 155, 407 S.W.2d at 55.

The court in \textit{Idaho Lumber} noted that because enrichment must be unjust, there would be no recovery if plaintiff had not exhausted his remedies against the person with whom he had contracted. \textit{Idaho Lumber, Inc. v. Buck}, 710 P.2d 647, 655 (Idaho Ct. App. 1985).

\textsuperscript{451} \textit{Id.} at 655.
these elements do not assist analysis and can even limit analysis.\textsuperscript{452} In \textit{Idaho Lumber}, the court found the defendant’s acceptance in a convoluted manner, using the fact that the plaintiff performed work on request, albeit not the defendant owner’s request, as one of the steps of its reasoning.\textsuperscript{453} The court held that the contractor was not a volunteer because he had worked at the request of the lessee, the lease authorized the lessee to make the request, and the owner knew that the lessee would make the improvements and in fact, acquiesced to those improvements.\textsuperscript{454} As this was the only discussion of the acceptance element, the court obviously assumed that the defendant’s acquiescence constituted acceptance.

There are some problems with this analysis. Normally, the term acceptance implies that one has an opportunity to reject.\textsuperscript{455} No facts in \textit{Idaho Lumber} indicated that the landlord had the authority to reject or stop improvements authorized in the lease. In addition, the court found that the scope of the remodeling and the cost of the work greatly exceeded the amount either party contemplated when they negotiated the lease.\textsuperscript{456} The original plan called for $40,000 worth of remodeling. The lessee’s repeated changes increased the cost to $106,000.\textsuperscript{457} Thus it is hard to believe that the owner acquiesced to improvements so far beyond those contemplated when he authorized the original plan.

Again, the trial and appellate courts disagreed on the measurement of recovery. The trial court awarded to the plaintiff the percentage of defendant’s enhanced value of the property that corresponded with the percentage of plaintiff’s costs the bankrupt lessee had not paid.\textsuperscript{458} The court of appeals, however, awarded all costs not shown unreasonable, limited by the defendant’s gain. The defendant’s gain did not limit recovery in \textit{Idaho Lumber} because the

\textsuperscript{452}See infra III.D.3 (discussing how element of acceptance may not be useful to or appropriate in analysis).
\textsuperscript{454}\textit{Id.} at 655.
\textsuperscript{455}2 G. Palmer, supra note 9, § 10.7, at 418, 421 (stating that heir needs opportunity to reject will); § 10.10, at 456-61 (discussing significance of recipient’s acceptance of unsolicited benefit).
\textsuperscript{457}\textit{Id.} at 650.
\textsuperscript{458}Id. at 657. The trial court awarded the contractor 37% of defendant’s gain, the increased value of his property. That increased value from the plaintiff’s work was $57,500, so the plaintiff’s recovery totalled $21,275, although his unpaid costs were $40,000. \textit{Id.} The 37% came from the fact that 37% of the plaintiff’s costs were unpaid. His total bill for his remodeling work was $106,000. \textit{Id.}
gain exceeded the unpaid costs.\textsuperscript{459}

In \textit{Dalton v. Bundy},\textsuperscript{460} a contractor installed vinyl siding on a house pursuant to a contract with the Bundys. He learned, when he tried to collect his fee, that the Bundy's twelve-year-old daughter owned the house, and that the parents were bankrupt.\textsuperscript{461} The contractor sued the daughter in quantum meruit for the enhanced value of the house. The court denied the claim because the court found no evidence that the child knowingly accepted or requested the benefit.\textsuperscript{462} Although the court presumed that she lived in the house,\textsuperscript{463} the court apparently required more in the way of acceptance than merely owning and residing in the house. The court did not state what would constitute acceptance.

Although the court characterized the case as one in unjust enrichment, the request element used is a contract implied in fact element, while the acceptance element is not one of the three classic unjust enrichment elements. The court omitted other elements of both theories and did not discuss whether other circumstances in the case would make it unjust for the defendant to retain and not pay for the benefit.

In \textit{TVL Associates v. A \& M Construction Corp.},\textsuperscript{464} a construction company rendered services to a developer because the construction company mistakenly thought it had a contract to manage the developer's condominium project. The trial court found that although both parties acted in good faith both were at fault.\textsuperscript{465}

The court in \textit{TVL Associates} used the same elements as did the court in \textit{Prairie Valley},\textsuperscript{466} but discussed only the defendant's benefit element.\textsuperscript{467} Because the plaintiff did not prove the value of the defendant's gain, the court refused to allow the plaintiff to recover. The plaintiff had suggested corrections on the defendant's plans, had helped locate a demolition contractor, and had provided the defendant with an executed contract so that the defendant could obtain a loan.\textsuperscript{468} Although the court did not mention whether the defendant requested these services, one may presume that it did.

\begin{footnotes}
\item[459] \textit{Id.} at 658-59.
\item[460] 666 S.W.2d 443 (Mo. App. 1984).
\item[461] \textit{Id.} at 444.
\item[462] \textit{Id.} at 445. The court found the daughter's minority irrelevant for the quantum meruit claim, saying that the holding would be the same were she an adult. \textit{Id.}
\item[463] \textit{Id.} at 444.
\item[464] 474 A.2d 156 (D.C. 1984).
\item[465] \textit{Id.} at 158.
\item[466] \textit{Id.} at 159; \textit{see supra} note 37 (giving definition of quantum meruit as set out in \textit{BLACK'S LAW DICTIONARY}).
\item[468] \textit{Id.}
\end{footnotes}
However, this cannot be a tier one case because, since the defendant did not think that it and the plaintiff had contracted, the defendant did not know that the plaintiff expected compensation. Presumably a construction company renders such services in the hope that the defendant will execute a contract. This is therefore a tier two case and the trial court correctly applied the tier two recovery, the amount of the defendant’s gain. That court did encounter problems in measuring the gain. Using the reasonable value of the plaintiff’s services as a starting point, the trial court computed damages by taking the value that plaintiff claimed its time was worth, $13,000, and discounted it to $2,500 on a theory of comparative fault, finding plaintiff three or four times more at fault than the defendant.\textsuperscript{469} The appellate court reversed, rejecting the use of the $13,000 figure because there was no specific testimony about the reasonableness of that amount.\textsuperscript{470} The court rejected evidence as to the hours spent by the plaintiff because there was no testimony indicating the value to TVL of such actions by A & M.\textsuperscript{471}

Thus, the picture of the analysis of these cases is as follows:

\textsuperscript{469} Id. at 158.
\textsuperscript{470} Id. at 160.
\textsuperscript{471} Id. at 159-60.
### Characterization of Quantum Meruit Claim

<table>
<thead>
<tr>
<th>Name</th>
<th>Characterization of Quantum Meruit Claim</th>
<th>Measurement of Recovery</th>
<th>Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prairie Valley</strong>472</td>
<td>implied contract</td>
<td>market value labor and materials</td>
<td>services rendered by plaintiff; defendant accepts and enjoys services; defendant knew plaintiff expected payment; (facts indicate request)</td>
</tr>
<tr>
<td><strong>Idaho Lumber</strong>473</td>
<td>quasi-contract for unjust enrichment, unjust enrichment different from quantum meruit; quantum meruit and unjust enrichment are both measures of recovery in quasi-contract</td>
<td>trial court—percentage of defendant's gain appellate court—costs limited by defendant's gain</td>
<td>unjust to retain benefit received from another; request of lessee, lease authorized lessee to make request; owner knew and acquiesced in improvements; benefit from plaintiff to defendant; defendant appreciates benefit; defendant accepts benefit; circumstances make it inequitable to retain benefit without paying for it no request; no acceptance of benefit</td>
</tr>
<tr>
<td><strong>Dalton</strong>474</td>
<td>unjust enrichment</td>
<td>none (plaintiff seeking defendant's gain, enhanced value of house)</td>
<td>services rendered by plaintiff; for defendant; defendant accepts and enjoys services; defendant knew plaintiff expected payment</td>
</tr>
<tr>
<td><strong>TVL</strong>475</td>
<td>implied contractual or quasi contractual duty</td>
<td>reasonable value to defendant of services performed (insufficiently proved)</td>
<td>services rendered by plaintiff; defendant accepts and enjoys services; defendant knew plaintiff expected payment</td>
</tr>
</tbody>
</table>

### 3. Analytic problems

One problem in the third-party cases is that when the court denies recovery, it often does so after incomplete analysis. For example, in *Prairie Valley* the court of appeals reversed one plaintiff's recovery because he did not prove a contract implied in fact element of expectation of payment. The court failed to inquire, however, as to whether the plaintiff benefitted the defendant and whether it was fair and just for the defendant to obtain the benefit without paying

---

for it.\textsuperscript{476} In \textit{Dalton}, the court focused on lack of the request or acceptance elements, but then failed to discuss whether the plaintiff benefitted the defendant or whether it was unjust for her to retain the benefit without payment.\textsuperscript{477}

Use of the defendant's acceptance of the benefit element is problematical. As one can see from these cases, it is difficult to determine what constitutes acceptance because the courts' interpretations vary widely. In \textit{Idaho Lumber}, the fact supporting the acceptance element was the defendant's before-the-fact permission to the lessee that enabled the lessee to contract for improvements.\textsuperscript{478} In \textit{Dalton}, the court defined acceptance only by what it was not, finding that ownership and presumed residence in a house at the time the plaintiff was making improvements did not constitute acceptance of those benefits.

Thus when one compares these two cases, which are from different jurisdictions but in an area of the law that should not vary significantly by jurisdiction, one sees inconsistent results. One sees one court awarding recovery against a landlord who was not in control of the property at the time the improvements were made and another court denying recovery to an owner and occupant of the house who presumably could have ordered that the plaintiff not make improvements. Both courts used the acceptance element in arriving at their decisions. In \textit{Dalton}, the defendant likely had greater opportunity to reject the improvements than did the defendant in \textit{Idaho Lumber}, but the latter court ordered the defendant to pay, while the former court did not. \textit{Idaho Lumber} shows how anything can be found to be an acceptance. \textit{Dalton} shows how anything can be found not to constitute acceptance.

Another major problem is whether the court should measure recovery by the defendant's gain, the reasonable value of the plaintiff's services, the plaintiff's costs, or some combination of the three. In \textit{Dalton}, the plaintiff, although ultimately recovering nothing, sought the defendant's gain, the enhanced value of the house.\textsuperscript{479} In \textit{TVL Associates}, the trial court awarded to the plaintiff the defendant's gain but the court of appeals reversed, not because it was the improper type of measurement, but because the plaintiff

\textsuperscript{476} See supra text accompanying notes 444-45 (discussing court's decision in \textit{Prairie Valley} in more detail).

\textsuperscript{477} See supra text accompanying notes 460-63 (discussing court's decision in \textit{Dalton} in greater detail).

\textsuperscript{478} See supra text accompanying notes 453-54 (discussing court's rationale for finding defendant's acceptance of benefit).

\textsuperscript{479} Dalton v. Bundy, 666 S.W.2d 443, 445 (Mo. App. 1984).
did not sufficiently prove his case.\textsuperscript{480} In \textit{Prairie Valley}, a case using the same elements as \textit{TVL Associates}, the plaintiffs received the reasonable value of their services.\textsuperscript{481} Finally, in \textit{Idaho Lumber} the trial court awarded to the plaintiff a percentage of the defendant's gain while the state supreme court awarded the plaintiff's reasonable costs as limited by the defendant's gain, if necessary.\textsuperscript{482} This diversity again indicates the lack of clarity in this area of law. This lack of clarity, in turn, causes an excessive number of appeals.

Courts have inadequate rationales for their awards. For example, the court in \textit{Idaho Lumber} rationalized awarding the plaintiff his costs and limiting him to the defendant's gain, if necessary, by finding that

At the most, the plaintiff will recover his cost since he can have no legitimate expectation of recovering more, regardless of the value of the benefit to the defendant. On the other hand, if the value of the benefit is less than the cost to the plaintiff, the maximum recovery is the value of the benefit. Under such circumstances, it is unjust to require the defendant to pay more because the remedy is directed only at recovery of the unjust enrichment.\textsuperscript{483}

The courts' use of the unjust enrichment theory explains why plaintiff can recover no more than defendant's gain. The court's statement, however, does not explain why the plaintiff can recover his costs or why the plaintiff cannot recover the entire gain. The court spoke about the plaintiff's legitimate expectation, but failed to recognize that the plaintiff's expectations are irrelevant in unjust enrichment. Contracts implied in law are not true contracts,\textsuperscript{484} and only true contracts protect the plaintiff's expectations and limit the plaintiff's recovery to his expectation. Thus, this court's unsatisfactory rationale illustrates that restitution and the concept of defendant's gain are more difficult concepts than the reasonable value of plaintiff's services, and may be confusing even apart from quantum meruit.

\textbf{4. Proposal}

Courts could analyze more easily the third-party cases with the proposed two-tiered analysis. For example, in \textit{Prairie Valley}, by using the framework, a court would recognize the significance of the re-

\begin{itemize}
\item \textsuperscript{480} TVL Assoc. v. A & M Constr. Corp., 474 A.2d 156, 159-60 (D.C. 1984).
\item \textsuperscript{482} Idaho Lumber, Inc. v. Buck, 710 P.2d 647 (Idaho Ct. App. 1985).
\item \textsuperscript{483} \textit{Id.} at 659.
\item \textsuperscript{484} \textit{See supra} note 15 and accompanying text (discussing nature of quasi-contract).
\end{itemize}
quest and mutual expectation of payment elements. It could award the reasonable value of the plaintiff's services under tier one and avoid the difficult unjust enrichment elements and the remedy of the defendant's gain.

If a case lacks one of the request or mutual expectation of payment elements, then the court's analysis should move on to the second tier. In most third-party cases the request element is absent, so the courts will apply the second tier analysis. That tier, which is used second because it involves concepts that are more difficult and because the first tier can resolve sensibly many quantum meruit cases, uses the three classic unjust enrichment elements: (1) did the defendant obtain a benefit; (2) did the defendant obtain the benefit at the plaintiff's expense; and, (3) is it unjust that the defendant retain the benefit without paying the plaintiff for it.

Neither tier uses the acceptance of benefit element as a primary element of analysis. That element is irrelevant to the first tier because, once there is a request, a mutual expectation of payment, and performance, the defendant can reject the benefit only if plaintiff is in breach. Acceptance is relevant in the second tier under only two circumstances. First, it is relevant if the court defines acceptance as the opportunity to reject or stop the benefit. That definition assists the court in determining whether the defendant actually benefitted, for if the defendant stopped or returned the work, he did not benefit. Second, acceptance is relevant in determining unjustness. If the defendant had an opportunity to reject or stop the work and did not do so, the court would use this fact in determining whether it is unjust for the defendant to retain and not pay for that which he or she could have rejected.

In most second tier quantum meruit cases, however, most of the defendants cannot return or stop the benefits from the plaintiff's labor. Third parties may not know that the plaintiff is performing the work, or may not be aware that the plaintiff expects compensation for that work. Where the defendant cannot return or stop the work, the concept of acceptance is not useful and often prematurely ends the court's analysis, foreclosing further discussion of unjust enrichment. The court's use of the concept of acceptance of a

485. See supra text accompanying notes 65-67 (discussing functional utility of two tier test).
486. See supra text accompanying note 56 (discussing elements of second tier).
487. See supra text accompanying notes 58-59.
488. With respect to a third person, often that person is not in a position to stop the work. See Idaho Lumber, Inc. v. Buck, 710 P.2d 647 (Idaho Ct. App. 1985). For illegal contracts, the work may be done before the illegality is known, as in the case of a failure to comply with a licensing statute, or where there is fraud on the part of the worker.
benefit when the defendant cannot return or prevent the benefit is not useful because the same facts can yield opposite results. One could say either that the defendant accepted the benefit because he actually had the benefit\footnote{See Idaho Lumber, Inc. v. Buck, 710 P.2d 647 (Idaho Ct. App. 1985).} or that he did not accept the benefit because he did not request the benefit.\footnote{See Dalton v. Bundy, 666 S.W.2d 443 (Mo. App. 1984).} Thus, the courts should not focus on acceptance or a lack of acceptance, and, where finding a lack of acceptance, should not end the analysis.

Before ruling for the defendant, a court should consider whether it is just for a defendant to retain a benefit without payment. In determining unjustness in a third-party situation where the defendant could not return or prevent the benefit, the court should first inquire into the conduct of the parties. For example, did the plaintiff in Idaho Lumber assume the risk that the restauranteur would not be able to pay? Was plaintiff negligent in incurring the costs? In Dalton, was the plaintiff negligent in mistaking the authority of the contracting party? Could the defendant, however, have stopped the work? Second, the court should determine whether the defendant is in a position to pay. How liquid is the benefit? Would it be a hardship for the defendant to pay for it? Could the court impose a lien on the property? Can the defendant afford to pay for the benefit? Does the plaintiff’s loss outweigh the hardship to defendant in having to pay? The courts do not ask these questions, yet the defendant’s possible inability to pay is a major reason that the courts do not award restitution.\footnote{See infra text accompanying note 507.}

If a court determines that a defendant should disgorge his gain, it must decide how to measure that gain. When the defendant’s gain is the same as the reasonable value of the plaintiff’s services the court has no problem in measuring recovery. When the defendant’s gain is less than the reasonable value of plaintiff’s services, the defendant’s gain is the appropriate measurement since recovery is only possible in unjust enrichment, which measures recovery as the defendant’s gain. The court can no longer view the reasonable value of the plaintiff’s services as the defendant’s gain because the second tier does not contain the expectation of payment elements; therefore one cannot benefit by getting what one requested.\footnote{See supra text accompanying note 31 (discussing fact that defendant benefits by receiving requested services).} When the defendant’s gain is more than the reasonable value of the plaintiff’s services, one must consider the nature of the two-tiered approach to understand why the court should limit recovery to the
reasonable value of the plaintiff's services. The second tier is the
disfavored alternative to first-tier analysis.494 The plaintiffs are
either guilty of some wrongdoing or negligence, or the defendants
have been unwillingly or unknowingly benefitted. For the disfa-
vored analysis to provide better recovery than the first, favored tier
does not make sense and certainly does not facilitate a sequentially
ordered two-tiered analysis. Thus, recovery in the second tier
should be in the amount of the defendant's gain, but not to exceed
the value of the plaintiff's services.495

When applying this analysis to Idaho Lumber one contrasts the
plaintiff's possibly negligent conduct with the defendant's presuma-
ble inability to stop the work. If these factors could weigh in plain-
tiff's favor,496 the court would base recovery on the increased
market or rental value of the property due to the improvements.497
The court did not discuss the defendant's financial ability to pay for
the benefit, although this factor is relevant. If the property's rent
increased, the defendant realized an actual monetary benefit from
plaintiff's work, which could easily be disgorged. Another possibil-

494. See supra text accompanying notes 65-67 (discussing reasons why one should apply
tier one first in quantum meruit cases).

495. This measurement of recovery is consistent with the trend of modern cases. For
example, Professor Palmer notes that in cases in which recovery currently is being awarded to
a mistaken improver, the recovery is the enhanced value of the property, with a lien, with
flexibility to permit the removal of the improvement as an alternative remedy. 2 G. PALMER,
supra note 9, § 10.9, at 445-49. The recovery is not the reasonable value of the plaintiff's
services.

Professor Palmer proposes that courts grant recovery more frequently than they now do in
third-party cases. Id. § 10.3, at 370, § 10.9, at 443, 455. This would be the case, for example,
when someone protects the property of another, id. § 10.3, at 370, mistakenly improves an-
other's property, id. § 10.9, at 443-44, or chattels, id. § 10.9, at 455, or is mistaken as to an
agent's authority. Id. § 10.9, at 450-51.

Professor Palmer also notes that if a plaintiff mistakenly pays money to or on behalf of a
third party, so long as the plaintiff was not officious, courts are in agreement that the plaintiff
should recover the money in restitution. Id. § 10.9, at 435-36. If the mistake involves
nonreturnable services, however, courts are reluctant to award restitution and create for the
defendant a new monetary obligation he or she did not ask for and perhaps cannot afford. Id.
§ 10.1, at 363; § 10.3, at 369; § 10.7, at 416-17, 424-27; § 10.9, at 438. Despite this, Profes-
sor Palmer noted that courts will award restitution in certain situations, as for example, where
a third party knowingly permits the plaintiff to build. Id. § 10.9, at 441, 452. There is, he
said, the beginning of a modern trend to give recovery to the mistaken improver even without
that qualification. Id. § 10.9(c), at 444-46. Professor Palmer also noted, however, that courts
generally will not award recovery against an owner if the plaintiff contracted with the owner's
lessee or prime contractor, id. § 10.7(b), at 422-25; again, where an owner knew the work was
being performed, and wanted it, and can be protected against double liability, Professor
Palmer believed that the court should permit plaintiff to recover. Id. § 10.9, at 452; § 10.10,
at 462 n.22.

496. See id. § 10.7, at 422-23, 423 n.21 (stating that according to cases in area, most courts
would deny recovery).

tioned the existence of evidence of the rental value of the property after the improvements,
but failed to say what that value was, or to use that information in its decision.
ity could be a lien satisfied upon the defendant's eventual sale of the property.

It is not clear that the plaintiff should not have recovered in Dalton. First, the defendant might have been able to stop the work. In addition, the court did not compare the conduct of the parties or discuss their relative hardships. Use of the second tier would enable the court to determine whether the defendant was unjustly retaining a benefit.

Finally, the court in *TVL Associates* denied recovery because of lack of proof. Plaintiffs had introduced evidence of the reasonable value of their time. If they were aware that defendant's gain was the relevant measurement, they might have introduced other proof. The framework would have guided their evidentiary efforts.

E. Corroborative Support for the Two-Tiered Analysis

Professor Dobb's excellent and frequently cited hornbook, *Remedies*, implicitly supports this proposal to allocate recoveries between the two tiers. Professor Dobbs notes a variety of ways to measure a quantum meruit recovery. He notes that quantum meruit can refer to both contract implied in fact and quasi-contract claims and that recovery under a contract implied in fact is the reasonable value of plaintiff's services. He then states that for restitution claims there are three possible measurements of recovery: the reasonable value of the plaintiff's services, the increased market value to the defendant's estate, and the subjective value to the defendant. The court's choice among these measures of restitution depends on the reasons for granting restitution, and to some extent upon the defendant's personal situation. Although Professor Dobbs gives examples of when to use the various remedies, understandably he qualified the discussion with terms such as "perhaps" and "should probably" because, as this Article has demonstrated, the courts are far from consistent in how or why they measure recovery.

The presence of a defendant's request distinguishes Professor

---

498. See 2 G. Palmer, supra note 9, § 10.9, at 452-53 (noting the opportunities for fraud on the part of the landowner if restitution is denied to workers who contract with relatives of the landowner under the mistaken belief that the relative has the authority to contract).


500. Id. §§ 4.2, 4.5 at 237, 261.

501. Id. § 4.2, at 237.

502. Id. § 4.5, at 264.

503. Id.

504. Id. § 4.5, at 261.

505. Id. § 4.5, at 262.
Dobb's examples of when the court should award the reasonable value of the plaintiff's services from his examples of the other two methods of measurement. In the three quasi-contract situations in which Professor Dobbs identified the reasonable value of plaintiff's services as "perhaps" the appropriate remedy, the defendant requested the services. When the defendant did not request the plaintiff's services, Professor Dobbs advocated the use of either the increased market value of the land or a subjective value to the defendant.

The two-tiered analysis fits Professor Dobbs' suggested remedies. 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

506. Id. § 4.5, at 263-65. The first situation involves a landowner who seeks improvements and bargains for them, eventually creating a contract. Id. § 4.5, at 263. The defendant gets his bargained-for improvements, but the contract is later rescinded for mistake or fraud. Id. In this situation the defendant may be charged with the reasonable value of the goods and services he bargained for, even though this value exceeds the increase in his land's value. Since he has asked for these services and goods, one may fairly assume, at least in many cases, that the defendant puts a value on the services that may well be independent of the economic value they contribute to his land. Id. The other two situations also involve requests, although Professor Dobbs did not discuss the request aspect. He notes that a plaintiff who works pursuant to a contract unenforceable under the statute of frauds and a plaintiff who works pursuant to a contract that is later rescinded are both entitled to recover the reasonable value of their services even if their services did not produce a tangible benefit to the defendant. Id. § 4.5, at 265. Both of those situations involve the request and mutual expectations of payment resulting from the express but unenforceable contract.

It is interesting to note that Professor Dobbs does not appear persuaded that the reasonable value of plaintiff's services is the correct remedy in the statute of frauds cases. See id. § 4.5, at 264 (stating that different answer arguably should be given in statute of frauds cases for if defendant received no economic benefit from services rendered, any award against him looks suspiciously like enforcement or partial enforcement of contract). If one focuses, however, on the benefit as being the receipt of what the defendant requested, the analytic difficulty with the award of the reasonable value of the plaintiff's services, but not the contract price, in a quasi-contract case diminishes or disappears.

507. See id. § 4.5, at 262 (discussing objective and subjective measures of restitution when land value is increased). For example, if the plaintiff improves land thinking that it was his or that he had a contract to purchase it from the defendant, but the contract was rescinded due to mutual mistake, Professor Dobbs suggests that the increased value of the land, limited by the defendant's subjective gain, if any, is the appropriate measurement of recovery. Id. In another example, if the contract for the improved land as unenforceable due to the statute of frauds, Professor Dobbs suggested that the plaintiff should be able to recover the increased value to the land, and that if the contract were induced by fraud that the plaintiff should be able to choose between either the increased value of the land or the defendant's subjective gain. Id. In no situation did Professor Dobbs recommend that the plaintiff recover the reasonable value of his or her services, nor in any did the defendant ask for the services. Professor Dobbs highlighted the significance of the lack of a request in these situations, saying that it is inappropriate to charge an innocent defendant with receiving the value of labor and supplies that he did not want, did not ask for, and whose value he did not in any meaningful sense receive. Id. § 4.5, at 263.
IV. DEFENDANT IN BREACH — A RELATED SCENARIO

Restitution is an alternative remedy for a plaintiff suing a defendant who has substantially breached the contract. The remedy is the defendant's gain, which the court can measure by the reasonable value of the plaintiff's services under the theory that the defendant benefits by receiving requested services, or can measure by the increased value of the defendant's property. Cases of defendant's breach, while not inconsistent with the two-tiered analysis, are not part of it. Although the cases clearly present the tier one elements because of the express contract, the remedial limitations of either the first or second tier are not applicable.

In the first tier, the cases involving contracts implied in fact award a remedy that measures the reasonable value of the plaintiff's services because that is the price term that the parties inferred by their conduct. Under that theory, the plaintiff is not entitled to the defendant's gain if it is higher than the reasonable value of plaintiff's services because that would not be plaintiff's expectation. If that plaintiff chooses to sue under restitution because the defendant's gain is greater than the reasonable value of the plaintiff's services, then the plaintiff uses the defendant in breach analysis, which is different from the services rendered analysis. In the quasi-contract tier one cases, the reasonable value of plaintiff's services is the appropriate remedy because the defendant's gain is the defendant receiving what he or she asked for. If, however, in those quasi-contract cases the value of the defendant's property increases by more than the reasonable value of the plaintiff's services, this proposal suggests that plaintiff should not receive that additional increase, for the plaintiff should not be in a better position than if there were no

508. This Article, however, does not subdivide recoveries under tier two or determine which measurement of defendant's gain the court should use.

509. See Diversified Commercial Developers v. Formrite, 405 So.2d 533 (Fla. Ct. App. 1984); In re U.S. Air Duct Corp. v. E.W. Tompkins Co., 38 Bankr. 1008 (1984); see also 5 A. Corbin, supra note 9, § 4.1; id. § 1102; 1 G. Palmer, supra note 9, § 4.1; Restatement (Second) of Contracts, supra note 9, § 370, introductory note, at 199; 12 S. Williston, supra note 9, § 1457.

510. 5 A. Corbin, supra note 9, § 1107; 1 G. Palmer, supra note 9, § 4.2; Restatement (Second) of Contracts, supra note 9, § 371 comment a; 12 S. Williston, supra note 9, § 1482.

511. See supra text accompanying note 76 (discussing fact that reasonable value of plaintiff's services is proper remedy for quantum meruit).

512. This would include the cases where contracts are unenforceable because of the statute of frauds; discharge due to impossibility, frustration, or mutual mistake; illegality; or the plaintiff's breach.
contract flaws or problems with the plaintiff's performance.\footnote{513}

Similarly, this proposal suggests that recovery in the tier two cases, defendant's gain in the traditional restitution sense, should not exceed the reasonable value of the plaintiff's services. This is proper because the tier two cases involve the plaintiff conferring benefits upon a defendant who did not ask for them, or benefits conferred pursuant to illegal conduct.\footnote{514} A plaintiff certainly should not be better off in these cases than if the defendant had requested the work and the plaintiff's conduct were proper.

When the defendant breaches an enforceable contract, however, these remedial limitations do not apply, for the defendant asked for the work and subsequently breached the contract. The law long has permitted the plaintiff the option of seeking restitution as an alternative to contract damages.\footnote{515} If the defendant's gain is higher than the reasonable value of the plaintiff's services or the contract price, nothing in this two-tier analysis suggests that the court should limit the plaintiff to the lesser amount.\footnote{516}

Because the rule awarding restitution against the defendant in breach of an enforceable contract is longstanding and straightforward and because it is the plaintiff and not the court that chooses the remedial option, this Article does not analyze the defendant in breach cases. In passing, however, one should note that even in this area the terminology creates confusion. In \textit{Industrial \& Textile Piping}
v. Industrial Rigging, the trial court awarded the counterclaim plaintiff subcontractor the reasonable value of his work under quantum meruit when the counterclaim defendant general contractor breached its express oral agreement. The court of appeals reversed and remanded for a determination of the subcontractor's lost profits by subtracting actual and future expenses from the contract price. The court said that quantum meruit is an appropriate measure of damages only for breach of an implied contract. It would not imply a contract where an express contract covers the same subject matter. Since the trial court properly found that an express contract existed, the appellate court said that it had erred in awarding damages based on quantum meruit. This statement is appropriate where neither party breaches the express contract, but the plaintiff seeks to recover a payment different from or in excess of the contract price for the work specified in the contract. In that case the terms of the express contract limit the plaintiff and quantum meruit will not be used to rewrite the contract. But where the defendant breaches, restitution is an alternative action. Under that action the remedy is the defendant's gain, which the court can measure by the reasonable value of the plaintiff's services. Perhaps the court in Industrial & Textile Piping would have recognized that fact if it had used the terminology of restitution rather than the terminology of quantum meruit.

CONCLUSION

The term quantum meruit is misused and confused. A simple focus on elements that distinguishes between requested and unrequested services and provides specific remedies for specific elements, as demonstrated in this Article, could eliminate much of the confusion and facilitate predictable, just results.

518. Id. at 50.
519. Id. at 50-51.
520. Id. at 50.
521. Id.
522. See supra note 87 and accompanying text (discussing rationale for rule that express contract must govern even where one sues for restitution).
523. See supra notes 509, 515 and accompanying text (setting forth cases and authorities supporting restitution as alternative remedy for defendant in breach).