Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment.pdf

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I. INTRODUCTION

Thirty years ago, Professor Graham Douthwaite said that restitution can “arise in a bedazzling variety of situations.”1 He also said that practitioners usually are not aware of “the restitutionary implications or potential” of their clients’ problems.2 Over 50 years ago, Professor John Dawson said that “[i]t is doubtful even now whether most lawyers have an adequate conception of the range and resources of the remedy.”3 About twenty years ago, I said of Professor Dawson’s statement, “It is doubtful whether the situation has much improved in the last thirty years.”4 Unfortunately, I can still repeat that concern.

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*Professor of Law, American University Washington College of Law. I would like to thank Douglas Laycock for inviting me to speak at the Remedies Workshop of the American Association of Law Schools Annual Meeting, January, 2007. I would also like to thank the Dean’s Fund of the Washington College of Law for generously supporting my scholarship.

1. GRAHAM DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION § 1.1, at 3 (1977).
2. Id. § 1.1, at 2.
3. JOHN P. DAWSON, UNJUST ENRICHMENT 22 (1951).
I attribute the lack of understanding of this field to "a great deal of confusion in terminology" and "that its application has at times been confused and inconsistent." I also attribute the confusion to the age of the Restatement of Restitution, which was published in 1937. It has been hailed as a major work tying together concepts about restitution and unjust enrichment that had previously not been organized into a coherent whole. It is not always cited today; instead, a great array of terminology continues in often confusing usage. As one recent court notes, "Courts generally treat actions brought upon theories of unjust enrichment, quasi-contract, contracts implied in law, and quantum meruit as essentially the same. In fact, this 'terminology' is generally employed interchangeably, often within the same opinion."

The American Law Institute is in the process of drafting a new Restatement of Restitution and Unjust Enrichment, the Restatement (Third), with Professor Andrew Kull as its Reporter. This immense undertaking should make the field much more accessible to the modern lawyer. Professor Kull has the advantage, and the overwhelming task, of examining and selecting from 70 years of writings by lawyers and scholars, since the last Restatement.

The Third Restatement that is emerging is bringing clarity and precision to the field of restitution and unjust enrichment. This paper has evolved from a brief talk I gave at the Remedies Workshop of the American Association of Law Schools Annual Meeting in January, 2007. At this workshop, I focused on the clarity that the Third Restatement is bringing to the confusing area known as quantum

5. *Id.*
6. *Id.* at 769.
10. A Restatement (Second) of Restitution was begun in 1983, but was never finished.
11. Dare I say "kulling"?
meruit. About 20 years ago, I wrote an article analyzing quantum meruit cases because I had found them confusing in both my Contracts and Remedies texts. Reading more cases led me to conclude that the area of quantum meruit was confused. This paper will describe some of the confusion that existed, and continues to exist, in quantum meruit litigation. It will then discuss how the Third Restatement’s approach should eliminate much of the confusion.

II. CONFUSION WITH QUANTUM MERUIT

A. Reasons for Confusion

As I described in my article of 20 years ago, there were a number of reasons for confusion in the area of quantum meruit. One source of confusion is that quantum meruit is a cause of action in two fields: restitution and contract. Another is that in those two fields, quantum meruit has many synonyms. When quantum meruit is an action in restitution, it can also be referred to as a “contract implied in law” or a “quasi-contract.” When it is an action in contract, it can be referred to as a “contract implied in fact.” Not surprisingly, references were not always properly applied; nor are they 20 years later. For example, a court in 2004 classified unjust enrichment and quantum meruit actions as two different quasi-contract actions. None of these distinctions would be important, however, if the remedy for all were the same. But it is not—another reason for the confusion.

A contract implied in fact is a contract, but not an express contract. Its elements are typically described as a request by the defendant for plaintiff’s services (an offer), which are performed (the acceptance) under circumstances in which the parties expect the plaintiff to be compensated (consideration). It is not an express contract because a term has not been discussed. Often it is the price term. When that is the case, if payment is contested after the work has

13. Id. at 549–62.
15. Kovacic[-Fleischer], supra note 12, at 555.
16. Id.
been performed, the court or jury can infer that the price the parties intended to govern their contract was the reasonable market value of plaintiff's services.\textsuperscript{17} That inferred price will be the measurement of recovery.

A contract implied in law, or a quasi-contract, is not a contract, but an action in restitution in which the defendant received a gain at plaintiff's expense under circumstances that make it unjust for the defendant to keep the gain. Measuring gain is a little trickier than measuring the reasonable value of plaintiff's services. One measurement of the gain can be the same as the measurement for a contract implied in fact—the reasonable value of plaintiff's services. That measure is appropriate when the defendant requested the plaintiff’s work on the theory that the defendant benefits by receiving what he or she asked for. Another measurement in a quantum meruit restitution action is the value the defendant received from the plaintiff’s work, unrelated to the market value of the work or plaintiff’s cost in performing the work.\textsuperscript{18} The \textit{Third Restatement} notes that “[t]he possibility of competing measures of enrichment accounts for much of the complexity of the rules . . . .”\textsuperscript{19}

The confusion as to how to measure a remedy in quantum meruit remains current. The Illinois court, referred to above, which classified quantum meruit and unjust enrichment actions as distinct quasi-contract actions, distinguished them by remedy, saying “In a \textit{quantum meruit} action, the measure of recovery is the reasonable value of work and material provided, whereas in an unjust enrichment action, the inquiry focuses on the benefit received and retained as a result of the improvement provided by the contractor.”\textsuperscript{20} This is an odd statement because it assumes that there are two quasi-contractual actions with separate remedies, one of which is the remedy for contracts implied in fact. By definition, however, a quasi-contract is not a contract. A contract implied in fact, as the label implies, is a contract. The implied in fact contractual remedy of reasonable value may be a quasi-contractual remedy, but only if the defendant validly requested the plaintiff’s services. If not, the quasi-contractual remedy

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 556.
\item \textsuperscript{18} \textit{Id.} at 557–58.
\item \textsuperscript{19} \textit{RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT} § 49 cmt. c (Tentative Draft No. 5, 2007).
\item \textsuperscript{20} Hayes Mech., Inc. v. First Indus., L.P., 812 N.E.2d 419, 426 (Ill. App. Ct. 2004).
\end{itemize}
is defendant’s unjust enrichment. Thus, while contracts implied in fact or implied in law are distinct from each other, the remedies for a contract implied in law may include the remedy for a contract implied in fact, but the contract implied in fact remedy cannot include unjust enrichment.

B. Consequences of Confusion

When courts are inconsistent in deciding whether a quantum meruit action is one in contract or restitution, they may dismiss a case for lack of an element that was really not necessary for the case or dismiss a case although an appropriate element was present. When courts are unsure how to measure the remedy, cases may have inconsistent results. One of the more practical problems of these confusions is that when “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.” When cases are unpredictable, not only in outcome of liability but also in outcome of remedy, settlement negotiations are particularly difficult. When parties want to settle a case because of uncertainty in outcome, but are also uncertain as to how recovery would be measured if it were obtained, it may be hard for parties to know where to start negotiations.

For example, imagine one scenario with three possible remedial outcomes. Assume a builder grades a parcel of land. After having graded the land, the builder envisions that the land increased in value by $125,000 because it is zoned for development. That value becomes irrelevant, however, because the builder graded the wrong parcel, which is zoned for farming. In Scenario A, make three assumptions: (1) the reasonable value of the builder’s services is $100,000, while the increased value of the farmer’s land from those services is $50,000; (2) although $50,000 is the increased value of the land, $100,000 is clearly the amount of recovery if the builder should win; but, (3) the circumstances of the mistake are such that the builder and landowner

22. Id. at 623–24.
23. Id. at 636–37.
24. Id. at 562; see also id. at 609, 622, 629 (discussing how court confusion over the proper measurement of damages causes excessive appeals, excessive remands, and a general lack of consensus regarding whether or not to permit recovery in quantum meruit).
each have a 50% chance of winning. With those assumptions the parties might “split the difference” and settle at $50,000 to avoid litigation costs and the risk of loss.

In Scenario B, change assumption (2) as follows: although the reasonable value of the plaintiff’s services is $100,000, $50,000 is clearly the amount of recovery if the builder should win. The parties still have an equal chance of winning. The parties might compromise at $25,000 for the same reasons they compromise in Scenario A. In Scenario C, however, change assumption (2) again, this time so that the maximum amount of recovery is either $100,000 or $50,000 regardless of which party wins. A “split the difference” of $75,000 for the risk of losing the case would be greater than either settlement where the method of measuring recovery were certain. This might cause one or both of the parties to go to trial, hoping that they will win and that the measure of recovery that favors them will be used. As a second step, if “split the difference” were applied again, this time to account for both the risk of losing the case and the risk of an unfavorable measure of recovery, the settlement would be $37,500. Now the settlement result is less than either settlement if the recovery were certain. Again, the parties might be more likely to go to trial, hoping for a favorable outcome on both liability and recovery, than if the method of measuring recovery were certain.

If the law were clear as to when the reasonable value of plaintiff’s services is the appropriate remedy and when the value to the defendant is the appropriate remedy, then settlements might be more likely. Eliminating some excess litigation would save resources both of the parties and the judicial system.

C. Proposal to Clarify Confusion

In my 1986 quantum meruit article, I recommended that whether an action were labeled “in fact” or “in law” was not important.25 After analyzing a number of cases, I concluded that the important distinction was whether the defendant had requested the benefits or not.26 I recommended that if the plaintiff’s services were validly requested—requested without malum prohibitum—the reasonable value of plaintiff’s services was an appropriate measurement

25. Id. at 556–58.
26. Id. at 645.
either as a contractual remedy or as a measurement of defendant’s gain, on the theory that the defendant benefited by receiving what he or she asked for.\textsuperscript{27} When the defendant did not request plaintiff’s services, I recommended not that the action be dismissed, but that courts consider whether it would be unjust for the defendant to retain the enrichment.\textsuperscript{28} In determining unjustness I recommended that courts consider the conduct of the parties as well as the plaintiff’s ability to pay either at the time of trial or later after imposition of a lien.\textsuperscript{29} The \textit{Third Restatement} adopts much of this approach.

III. THE \textit{THIRD RESTATEMENT} AND QUANTUM MERUIT

\textbf{A. Problems in Measuring Defendant’s Benefit}

Part III (Remedies) of the \textit{Restatement (Third) of Restitution and Unjust Enrichment} states that a basic premise of the law of unjust enrichment is measuring “the extent of the defendant’s unjust enrichment at the expense of the claimant” rather than measuring the amount of plaintiff’s loss as is done in tort or contract actions.\textsuperscript{30} The \textit{Restatement} identifies three problems that are involved in measuring unjust enrichment: (1) the difficulty of determining the defendant’s benefit when the defendant has received services or property from the plaintiff in a nonconsensual exchange; (2) the difficulty of adjusting the amount of recovery depending upon the conduct of the defendant, whether innocent, negligent, or worse; and (3) the difficulty of determining when secondary enrichment is appropriate.\textsuperscript{31}

Addressing the first difficulty, how to measure nonmonetary benefits, § 49(2) identifies four different possible measurements: “(a) the value of the benefit in advancing the purposes of the recipient; (b) the cost to the claimant of conferring the benefit; (c) the market value of the benefit; or (d) a price fixed by agreement between the claimant and the recipient.”\textsuperscript{32} Throughout much of Part III is an assumption that

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at 602.
\item \textsuperscript{28} \textit{Id.} at 639.
\item \textsuperscript{29} \textit{Id.} at 638–41.
\item \textsuperscript{30} \textit{RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT} pt. 3, ch. 7, topic 1, introductory note (Tentative Draft No. 5, 2007).
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.} § 49(2).
\end{itemize}
the value of the types of measurement are listed in ascending order of value, from (a) to (d). The *Restatement* says that "'value to the recipient' is usually the most restrictive (and therefore the most favorable to the defendant) of the available measures of enrichment." The largest measurement of the benefit, the disgorgement remedy, is described in § 51 as the "net profit attributable to the underlying wrong."

Sections 49, 50, and 51 together address the second and third problems: determining the amount of recovery, including the addition of secondary gain, based upon the degree of innocence or wrongdoing of the recipient of the benefit. The *Restatement* moves from the least restrictive measurement to the largest recovery based on the degree of innocence or culpability of the recipient of the benefit. As it says, "[T]he enrichment of a wrongdoer (conscious or otherwise) is not less than the market value of the benefits wrongfully obtained; whereas an innocent recipient will not be liable for market value of unrequested benefits whose value in advancing the recipient's purposes is

33. *Id.* § 49 cmt. d.
34. *Id.* § 51(3).
35. This paper's analysis of the *Restatement*’s treatment of quantum meruit actions addresses only the situation where the value of the benefit to the recipient is less than any other measurement of its value, including the reasonable value of plaintiff’s services that conferred the benefit. The situation in which the plaintiff’s services created a benefit to the defendant greater than the value of the services is beyond the scope of this paper. So too is the analysis of the degree of culpability of defendants in those situations. *Compare* Maglica v. Maglica, 78 Cal. Rptr. 2d 101, 105 (Ct. App. 1998) (not discussing the defendant’s culpability, but saying, “the threshold requirement [in quantum meruit claims] that there be a benefit from the services can lead to confusion, as it did in the case before us. It is one thing to require that the defendant be benefited by services, it is quite another to measure the reasonable value of those services by the value by which the defendant was ‘benefited’ as a result of them. Contract price and the reasonable value of services rendered are two separate things; sometimes the reasonable value of services exceeds a contract price. And sometimes it does not.”) (internal citations omitted), *with* Kovacic-[Fleischer], *supra* note 4 (discussing the culpability of defendants in cases involving allegations of discrimination in denying partnership and recommending disgorgement of defendant’s net profit); *cf.* *Restatement (Third) of Restitution and Unjust Enrichment* § 49 cmt. f, *cross-referencing* § 28 illus. 11 (Tentative Draft No. 5, 2007) (discussing unmarried co-habitants, and suggesting that restitution can only be recovered to the amount of fair market value of services unless acquired by fraud).
something less.” The Restatement explains that “the potential inefficiency of most nonconsensual transactions” is why “cost or market value often exceeds value to the recipient.”

B. Identification of Quantum Meruit

The Restatement uses the term quantum meruit only once. It says, “Liability in restitution for the market value of goods or services is the remedy traditionally known as quantum meruit.” Although speaking of quantum meruit in a restitutionary action, the Restatement identifies quantum meruit with contract implied in fact elements, saying that quantum meruit “is the usual measurement of enrichment in cases where the benefits conferred were requested by the recipient, absent a valid agreement as to price.” Whether the Restatement is discussing quantum meruit in terms of restitution or contract implied in fact does not matter, however, because the Restatement identifies only one method of valuation. Because the Restatement is viewing quantum meruit as an action in which the defendant has requested plaintiff’s services, it says

Because benefits that the recipient has requested are presumed to have value to the recipient at least equal to their market value (assuming no valid agreement otherwise), the restitutionary liability of an innocent recipient of requested benefits is not reduced by a showing that the benefits in question were ultimately unprofitable to the recipient in a particular case.

Thus, what the Restatement identifies as important for quantum meruit is not the terminology surrounding it or even its relationship to contract law. The Restatement does not mention quasi-contract, contract implied in law, or contract implied in fact. What it does say is that the measurement of recovery for requested services is the reasonable value of plaintiff’s services. “Where the recipient has

37. Id. § 49 cmt. d.
38. Id. § 49 cmt. f.
39. Id.
40. Id.
request the benefits in question, without specifying a price, the presumptive measure of enrichment is the market price.”

C. Quantum Meruit Analyzed, but Not Identified

Many courts do not restrict the use of quantum meruit to actions to recover requested benefits. Many courts also identify actions in which a plaintiff seeks to recover benefits from a defendant who had not requested them as those in quantum meruit. Although the Restatement does not refer to quantum meruit after its one mention in terms of benefits requested by the defendant, it describes other scenarios in which courts have invoked quantum meruit and describes how to measure those benefits. In cases in which the recipient of the benefit did not request it and was not responsible for its creation, the Restatement limits recovery to “the measure that yields the smallest liability in restitution.” For example, the Restatement says that if a contract for the sale of land is rescinded for no fault of the seller and the buyer had made improvements, “liability for such improvements is measured by the purchaser’s cost or the resulting value to the vendor, whichever is less.”

D. Valuation of Requested and Unrequested Benefits

The Restatement uses the distinction between benefits that were requested by the recipient and those that were unsolicited as one measure of the innocence of the recipient. While innocent recipients are given the most protection by the Restatement, the measurement of their benefit differs depending on whether those recipients requested the benefits or not. Specifically, § 50(2) states the following:

41. Id. § 49 cmt. d.
42. See Kovacic[-Fleischer], supra note 12, at 571–75 (observing that most courts demonstrate little understanding and little consistency in analyzing quantum meruit).
43. See id. at 628 (noting the recognition of quantum meruit actions against third party defendants who have no contract or other binding relationship with the plaintiff); see also Hayes Mech., Inc. v. First Indus., L.P., 812 N.E.2d 419 (Ill. App. Ct. 2004) (contractor seeking recovery in quantum meruit from building owner for work done at request of tenant).
44. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 50(2)(a) (Tentative Draft No. 5, 2007).
45. Id. § 49 cmt. e.
If a nonmoney benefit is susceptible of valuation by more than one . . . measure[], the unjust enrichment of an innocent recipient is normally determined (a) in the case of unrequested benefits, by the measure that yields the smallest liability in restitution; or (b) in the case of benefits conferred at the valid request of the recipient, either by market value or by a price fixed by agreement. 46

Comment d to § 50 explains, however, that “[i]f the recipient is not responsible for the transaction, liability in restitution is limited to the lesser amount [of either market value or value to the recipient].” 47 Comment e further protects recipients of unrequested benefits, saying that if “the value of a benefit exceeds the cost of conferring it, the restitutionary liability of an innocent recipient will not exceed the amount required to indemnify the claimant.” 48 In other words, the innocent recipient will be liable only for cost.

Finally, the Restatement provides practical protection for innocent recipients of unrequested benefits. The Restatement considers “the possibility of prejudice if the recipient of unrequested, nonmoney benefits is required to pay for them in cash.” 49 The Restatement notes that if the benefit is nonmonetary, the recipient cannot use it to pay a judgment without liquidating it. Requiring immediate liquidation of the benefit would “subject the innocent recipient to a forced exchange.” 50 So as not to prejudice an innocent recipient who is not “demonstrably enriched,” the Restatement suggests “postponing the effectiveness of the remedy” by allowing restitution “only when realized on a subsequent sale” or by the imposition of an equitable lien. 51

46. Id. § 50(2) (emphasis added).
47. Id. § 50 cmt. f.
48. Id. § 50 cmt. e.
49. Id. § 49 cmt. i.
50. Id. § 50 cmt. f.
51. Id.; see also Kovacic[-Fleischer], supra note 12, at 639 (“In determining unjustness in a third-party situation where the [innocent] defendant could not return or prevent the benefit, the court should first inquire into the conduct of the parties. For example, did the plaintiff [contractor who improved tenant’s premises at request of the tenant but without permission of the owner] assume the risk that the [tenant] would not be able to pay? Was plaintiff negligent in incurring the costs? In [another case,] was the plaintiff negligent in mistaking the authority of the contracting party? Could
IV. RECOMMENDATIONS

Given the amount of confusion the term quantum meruit elicits, the Reporter of the Restatement might want to add a paragraph specifying that a number of the scenarios in Part III are those which lawyers and courts label quantum meruit. The Reporter might specifically suggest that the term be dropped in favor of an analysis of whether defendant's benefits were requested or not.

There are a few categories in which I would suggest alterations in recovery. When a plaintiff seeks to enforce a contract unenforceable for malum prohibitum, I would suggest that he or she should be awarded the least possible recovery—"the value of the benefit in advancing the purposes of the recipient"—on the theory that the defendant's request for plaintiff's services cannot be a valid request. I would also suggest reducing the amount of recovery to a plaintiff seeking to recover under a contract invalid under the statute of frauds. Rather than awarding the contract price, which might interfere with the policies of the statutes of frauds, I would suggest that the plaintiff recover the reasonable value of his or her services if that value is less than the contract price.

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.

52. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 49(2)(a) (Tentative Draft No. 5, 2007).

53. Compare id. § 49 (limiting recovery under contracts unenforceable due to malum prohibitum to claimant's cost to perform to penalize the transaction but avoid forfeiture), with Kovacic[-Fleischer], supra note 12, at 625–26 (suggesting that a court consider many factors before determining "whether forfeiture is the appropriate penalty" when claimant is seeking recovery under an "illegal contract").

54. Compare id. § 49 cmt. g (noting that with a contract "unenforceable solely because of a formality," such as the statute of frauds, "the value of the performance is presumptively equal to the price the recipient agreed to pay for it.").
V. CONCLUSION

The Third Restatement should make the field of restitution and unjust enrichment far more accessible to lawyers and judges. It identifies the different ways the "defendant's gain" remedy can be measured, and includes in that measurement an option for the reasonable value of plaintiff's services. The Restatement then provides a detailed plan for the application of each of the different measurements based on whether the benefits were requested or not and based on the amount of responsibility, if any, the defendant had in receiving the benefit. The logical structure for limiting or expanding the liability of the defendant for the value of benefits received will provide guidance that has been lacking. This guidance should enable lawyers to survey all possible recoveries for their clients and enable them to more accurately predict the risks of litigation. Thus they should realize the bedazzling nature of the field.