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What is Legal Civil Restitution?

Richard Maloy, St. Thomas University

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I. Introduction

On Tuesday, November 29, 2011 California Judge Michael Pastor pronounced a jail sentence on Dr. Conrad Murray who a jury had previously found was guilty of involuntary manslaughter in the death of the famous entertainer, Michael Jackson. In addition to Dr. Murray being charged with a crime Prosecutor David Walgren asked the court to impose restitution in the amount of $101 million on Dr. Murray to be paid to the Jackson children and estate. Judge Pastor, acknowledging that “appropriate restitution” would be proper, set January 28, 2012 as the date on which that appropriate amount should be determined.¹ On Wednesday, Jan. 18, 2012, however Prosecutor Walgren announced to Judge Pastor that the Jackson family was withdrawing its prayer for restitution due to its opinion that Dr. Murray would be unable to pay any sum of restitution decided upon by the judge. The Jan. 28th hearing, therefore, was cancelled. What is this legal remedy known as “restitution,” which may be imposed upon defendants? Former U.S. Supreme Court Justice Sandra Day O’Connor has recently exclaimed that “I think the biggest challenge we face today in our judicial government is the lack of understanding by the public of the role of courts in our country.”² That observation prompted research into every case in which an important remedy was considered by American courts during a certain three month period of a recent year. 2011 was chosen as the year. The third quarter of that year – July 1 through and including September 30 was chosen as that three month period. Restitution was chosen as the remedy.

Westlaw reports that during that period 1605 cases mentioning restitution by federal and state courts were reported. All of those cases, except ones dealing with criminal law, those which were overruled and those in which the word appears only in the headnotes, or were mentioned by the court to reveal the assistance requested of the court by the moving party were analyzed for the preparation of this paper. Therefore 399 non-overruled, civil cases, concerning restitution, were analyzed, and appear in this study.³ After reading those cases, and many before them, it is concluded that restitution is not a cause of action, but merely a remedy, though an important one, for several causes of action,- the most important of which are unjust enrichment. and quantum meruit.⁴

³ Forty-nine different jurisdictions including 44 states, federal trial courts, federal appellate courts, the District of Columbia, the Court of Federal Claims, and the Federal Labor Relations Authority furnished, or prompted, judicial Opinions about restitution; several in addition to restitution opined about unjust enrichment and quantum meruit. The only states which did not contribute were the two Dakotas, Delaware, Montana, Rhode Island and Wyoming.
⁴ There are many causes of action in which restitution is a remedy, awarded for defendant’s wrongful retention of money and/or property, e.g. third party beneficiary, equitable estoppel, equitable subrogation, unjust enrichment, fraud in the inducement, and tortuous interference. See Washington Construction v. Sterling Savings Bank, 2011 W.L. 4043579 at *6 (Wash. App. 9/13/11). There is also an action for money
courts, as revealed in this paper, disagree with that conclusion. It would seem, however, to make sense that restitution is the remedy and unjust enrichment and quantum meruit are the causes of action.\(^5\) A court does not first find that a plaintiff is entitled to restitution and then find that the defendant was unjustly enriched. The latter continuum is the usual method used by the courts. U.S. District Court Judge Cheslen made that conclusion clear when in *Vasaturo Bros., Inc. v. Alimenta Trading-USA, LLC*\(^6\) he wrote that:

> restitution for unjust enrichment or quantum meruit is an equitable remedy, available only when there is no adequate remedy at law . . . . New Jersey courts regard the existence of a valid contract as a bar to recovery under the equitable theories of unjust enrichment and quantum meruit,

Judge Janie S. Mayeron in *Gaalswyk v. King*\(^7\) further clarified the point by stating that “under both Minnesota and Iowa law restitution is an equitable remedy, not a cause of action . . . . The doctrine of unjust enrichment serves as a ground for the remedy of restitution.”

The two causes of action, unjust enrichment and quantum meruit, are based on different principles to compensate the moving party for not having a remedy at law with which to prosecute his case. Unjust enrichment is based on the premise that the defendant has something that the plaintiff should possess and that it would be unjust for that condition to continue. Quantum meruit is based on the premise that even though there was no express contract between the parties which would furnish a cause of action for breach, an equity court will supply that deficiency by creating a quasi\(^8\) contract,\(^9\) a legal construct is created in order to furnish the plaintiff a remedy. Unless a moving party had and received, which Black’s Law Dictionary defines as: At common law, an action by which the plaintiff could recover money paid to the defendant, the money usu. being recoverable because (1) the money had been paid by mistake or under compulsion, or (2) the consideration was insufficient. . . . or for a consideration which had wholly failed. By this action the plaintiff could also recover money which the defendant had received from a third party, as when he was accountable or had attorned to the plaintiff in respect of the money, or the money formed part of the fruits of an office of the plaintiff which the defendant had usurped.” Robert Goff & Gareth Jones, *The Law of Restitution* 3 (3d ed. 1986). See also Ahmed v. Deutsche Bank, N.A 2011 W.L. 3425460 at *5 (D. Nev. 8/4/11). The principal ones, however, are unjust enrichment and quantum meruit.

\(^5\) It is improper to seek unfair enrichment and restitution, as appeared in Quackenbush v. J.P. Morgan Chase Bank, N.A.; 355711 at *3 (D. Colo. 7/12/11); Mayer v. Countrywide Home Loan, 647 F.3d 789,791 (8th Cir. (Minn.) 8/3/11); In re TFT-LCD Anti-trust Litigation, 3475408 at *1 (N.D. Cal. 8/9/11); F.T.C. v. Johnson, 2011 W.L. 3585513 at *1 (D. Nev. 8/15/11); In re TFT-LCD Anti-trust Litigation, 2011 W.L. 4345435 at *3 (N.D. N.D. Cal 8/15/11); and AnchorBank F.S.B. v. Hofer, 649 F. 3d 610, 612 (7th Cir. (Wis.) 8/18/11). Restitution is a remedy, not a cause of action.

\(^6\) 2011 W.L 3022440 at *4 (D. N.J. 7/22/11).

\(^7\) 2011 W.L. 4091858 at *17 (D. Minn. 8/2/11).

\(^8\) The Merriam-Webster dictionary defines “quasi” as having a legal status only by operation of law or construction of law and without reference to intent.

\(^9\) Black’s Law Dictionary places “quasi contract” as a subset to “contract implied in law.” It states as follows: “implied-in-law contract. An obligation created by law for the sake of justice; specif., an obligation imposed by law because of some special relationship between the parties or because one of them would otherwise be unjustly enriched. • An implied-in-law contract is not actually a contract, but instead is a remedy that allows the plaintiff to recover a benefit conferred on the defendant. — Also termed contract implied in law; quasi-contract; constructive contract. See UNJUST ENRICHMENT.”
pleads and proves the elements of the two cause of action supporting a prayer for restitution its position is nothing more than an “‘unadorned Defendant’s unlawfully harmed me’ accusation” as described by Judge Thomas E. Rogers in *Nelson v. City of Conway’s Dept. of Social Services.*

Specific areas concerning restitution are taken up by first considering restitution itself then in the following order, Defenses to restitution, Disgorgement, Trial Procedure, Bankruptcy, Effect Thereof, Police Power, Public Policy Foreclosures Statutory and Treaty Restitution, Attorneys and Other Fiduciaries, Class Actions, the causes of action Unjust Enrichment, & Quantum Meruit and lastly Defenses to Unjust Enrichment & Quantum Meruit.

II. Specific Areas of Concern

¶ A. Restitution

Black’s Law Dictionary’s definition is quite conclusive. It states:

restitution, n. (13c) 1. A body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment. See UNJUST ENRICHMENT. 2. The set of remedies associated with that body of law, in which the measure of recovery is usu. based not on the plaintiff's loss, but on the defendant's gain. Cf. COMPENSATION; DAMAGES. 3. Return or restoration of some specific thing to its rightful owner or status. 4. Compensation for loss; esp., full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation. [Cases: Damages 1; Implied and Constructive Contracts 4; Infants 224; Sentencing and Punishment 1973, 2100–2217.] — restitutionary, adj. ‘The term ‘restitution’ appears in early decisions, but general recognition probably began with the publication of the Restatement of Restitution [in 1937]. The term is not wholly apt since it suggests restoration to the successful party of some benefit obtained from him. Usually this will be the case where relief is given, but by no means always. There are cases in which the successful party obtains restitution of something he did not have before, for example a benefit received by the defendant from a third person which justly

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11 See infra ¶ A, text accompanying footnotes 25-134.
12 See infra ¶ B, text accompanying footnotes 135-147.
13 See infra ¶ C, text accompanying footnotes 148-162.
14 See infra ¶ D, text accompanying footnotes 163-184.
15 See infra ¶ E, text accompanying footnotes 185-191.
16 See infra ¶ F, text accompanying footnote 192.
17 See infra ¶ G, text accompanying footnotes 193-195.
18 See infra ¶ H, text accompanying footnotes 196-201
19 See infra ¶ I, text accompanying footnotes 202-306.
20 See infra ¶ J, text accompanying footnotes 307-352.
21 See infra ¶ K, text accompanying footnotes 353-365.
22 See infra ¶ L, text accompanying footnotes 366-435.
23 See infra ¶ M, text accompanying footnotes 436-443.
24 See infra ¶ N, text accompanying footnotes 444-447.

“‘Restitution’ is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done. Often, the result under either meaning of the term would be the same. If the plaintiff has been defrauded into paying $1,000 to the defendant, his loss and the defendant’s gain coincide. Where they do not coincide, as where the plaintiff is out of pocket more than the defendant has gained and the defendant’s conduct is tortious, the plaintiff will recover his loss in a quasi-contractual or equitable action for restitution. Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed.” John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9–23, at 376 (3d ed. 1987). © 2009 Thomson Reuters.

In more simple terms it can be described as the process by which a court of law requires a person to disgorge itself 25 of money and/or property26 for it were continue in possession of those things that person would be unjustly enriched.27

Judge Gerald E. Lynch’s scholarly description of restitution in F.T.C. v. Bronson Partners, LLC28 must be studied:

Because the term “restitution” entered the legal lexicon relatively recently, its use is often a source of confusion among courts and commentators. In

25 If the person who disgorges itself but its employee whose duty it was to transmit the subject resituated to the plaintiff that employee is very likely to be dismissed. See Oswalt c. Mississippi Dept of Corrections, 2011 W.L. at *8 (S.D. Mass 8/25 11).
26 Judge William Alsop in Deutsche Bank Nat, Trust Co. v. Llopis, 2011 W.L. 3502486 at *1 (N.D. Cal. 8/10/11), probably correctly indicates that “restitution” applies to money, whereas “possession of” applies to property. In the following cases, however, the courts refer to refer to “restitution” of “property” or “premises;” Thuyduong Nguyen v. Saxton Morg. Servicing, Inc., 2011 W.L. 2636261 at * 2 (E.D. Cal. 7/5/11); RK Mechanical, Inc. v. Travelers Property Cos., 2011 W.L. 3294921 at *9 (D. Colo. 8/1/11); Palmer v. Allen, 2011 W.L. 3484088 at *3 (Conn. Super. 8/2/11); Greenway v. Parlanti, 2011 W.L. 3587443 at ***1 (Ore. App. 8/17/11); Csepel v. Republic of Hungary W.L.. 3855862 at # passim (D. D.C. 9/11/11), Cochran v. Gilliam, 656 F.3d 300, 303 6th Cir. (Ky.) 9/2/11), In re Auto Showcase of Laurell, LLC, 2011W.L. 4054839 at # D. Md. 9/12/11), and Bisopgate v. Heiland, 2011 W.L. 4346391 at *2 (Ohio App. 9/19/11), In Phillips v. Kaiser Foundation Health Plan, Inc., 2011 W.L. 3047475 at *2 (N.D. Cal. 7/25/11) either the plaintiff or the court made a mistake of language, as the court recalled that the plaintiff sought “money damages including restitution,” rather than money damages and/or restitution.” Another such mistake was made in Thaw v. Schachar, 2011 W.L. 3112064 (Tex. App. 7/26/11), where the court at *2 referred to “unjust enrichment and restitution” and again at *3 where the court referred to “unjust enrichment or restitution,” which would indicate that unjust enrichment and restitution were co-equals, which they certainly are not.
27 Judge Bruggink of the Court of Federal Claims in Portland Gen. Elect. Co. v. the United States, 2011 W.L. 3796290 at *8 n.4 (Fed. Cl.) 8/26/11), referred to the rectification of unjust enrichment as the “unwinding of a contract.” In BKLAP, LLC v. Captec Franchise Trust, 2011 W.L. 3022441 at *14 (N.D. Ind. 7/21/11), and Domingo v. Skidmore, 2011 W.L. 4478385 at *6 (Tex. App. 8/31/11), it was referred to as “a restitution interest” that a party may possess. In Nuzzo v. Horvath 2011 WL 3795035 at *4 (N.J. Super.A.D. 8/30/11) the court, per curiam, referred to a definition sometimes given: “a principle . . . providing for indemnification of one who ‘has discharged a duty which is owed by him which as between himself and another should have been discharged by the other.’”
28 654 F. 3d 359, 370, 371 (2d Cir. (Conn.) 8/19/11).
1936, the American Law Institute adopted the Restatement of Restitution in an effort “to demonstrate that a range of seemingly disparate rights and remedies,” including equitable claims such as constructive trust and legal ones such as quasi-contract, “could in fact be explained . . . in terms of the common objective of preventing unjust enrichment.” Andrew Kull, Rationalizing Restitution, 83 Calif. L. Rev. 1191, 1192 (1995); see Restatement of Restitution (1937). FN4 Prior to the publication of the Restatement, “the common law, organized for centuries in terms of remedies rather than theories of liability, rarely acknowledged the avoidance of unjust enrichment as one of its actuating principles.” Kull, supra, at 1192. Continuing the reorientation of Anglo–American law that began with the nineteenth century treatise writers, the reporters of the Restatement thus conceived of “restitution” as a unifying theory of private-law liability akin to tort or contract—a descriptor of a class of wrongs rather than of any particular remedy.

FN4. The reporters acknowledged at the time that the term “restitution” was “indefinite in connotation and unfamiliar to the profession.” Warren A. Seavey & Austin W. Scott, Restitution, 54 L.Q. Rev. 29, 29 (1938). This choice of an unfamiliar title was consciously made, as it allowed the Institute to confer a novel, technical meaning on a term that carried the popular connotation of “the right to recover back something which one once had” but had no previous legal salience. Id.

FN5. Of course, the term “restitution” is also used to describe a particular, statutorily-authorized penalty that may flow from criminal conviction. See 18 U.S.C. § 3663A. Although conceptually related, that sense of restitution is not implicated in [any] purely civil case.

Nonetheless, in view of the fact that certain remedies, such as the constructive trust, are awarded almost exclusively in cases that sound in unjust enrichment, courts and commentators often use the term “restitution” as a metonym for the class of remedies particularly identified with that head of liability. Moreover, because the feature that distinguishes restitution from tort and contract is that liability turns on the unjust enrichment of the defendant, conceptual bleeding has led courts to apply the label “restitution” to remedies that measure recovery by the defendant's gain, even where the basis of liability is a statutory violation rather than common law principles. (citations omitted).

Grouping legal rules that focus on the benefit to the wrongdoer under a single conceptual heading is a sensible and unproblematic practice in most cases. The Supreme Court has cautioned, however, that when the district court's jurisdiction is founded on a statutory scheme that makes the historical divide between law and equity . . . salient, it is necessary to unbraid the law of restitution—to separate legal claims from equitable ones and rights from remedies. In Great–West Life & Annuity Insurance
Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), the Court considered whether a claim for monetary “restitution” pursuant to a subrogation provision in an employee health plan was barred by language in the Employee Retirement Income Security Act of 1974 (ERISA) that limits the district court's jurisdiction to actions seeking either to enjoin violations of a covered plan or to obtain “other appropriate equitable relief.” See 29 U.S.C. § 1132(a)(3)(B). Justice Scalia's majority opinion emphasized that in order to determine whether the plaintiffs' claims were properly characterized as legal or equitable, it was necessary to consider “the basis for [the] claim[s] and the nature of the underlying remedies sought.” 534 U.S. at 213, 122 S.Ct. 708 (internal quotation marks omitted).

Focusing on the first prong of the inquiry, the Court recognized that the ‘rubric of restitution’ embraces several historically distinct private-law claims, some of which evolved at law and others of which evolved in equity. Id. at 212, 122 S.Ct. 708. Broadly speaking, a claim sounding in legal restitution seeks to impose personal, monetary liability on the defendant. Id. at 213, 122 S.Ct. 708. In contrast, “for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.”

What is slightly less facile to define than restitution is what is “disgorgement,” what is “unjust enrichment,” and what is “quantum meruit.” This paper is primarily addressed to those three subjects.

There are two types of Legal Restitution, i.e. Criminal and Civil.

Criminal Restitution requires the wrongdoer to compensate the person harmed by the wrongdoer’s criminal acts, partially as punishment and partially as a condition to the criminal receiving a certain amount of probation and a certain amount of punishment. 29

There is an interesting connection between criminal penalties and bankruptcy. U.S. Supreme Court Justice Lewis Powell stated in Kelly v. Robinson: 30 “we hold that § 523(a)(7) [of the Bankruptcy Code] preserves from discharge any condition a state criminal court imposes as part of a criminal sentence” 32 He further approved the following statement made in a New York court:

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29 In Vincent v. Sitenewski 2011 WL 4552386, 1 (S.D N.Y. 2011) Damon Vincent, a New York State prisoner sued eight prison employees under 42 U.S.C. § 1983, alleging that they violated his civil rights. In addition Vincent asserted a claim that the court should declare New York Executive Law § 632–a unconstitutional, and he sought injunctive relief to prevent this law from being applied against him. Defendants’ motion to dismiss under Fed. R. Civ. P. 12(b)(6) was granted. Cases such as that have been omitted from this paper because even though it involved an incarcerated plaintiff and mentioned restitution, such mention was not germane to the object of this piece.
30 479 U.S. 36 (1986)
31 Section 523 of the Bankruptcy Code deals with exceptions to discharges of debts in bankruptcy cases.
32 Id. at 50.
A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence. A bankruptcy proceeding is civil in nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew. A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor-creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter.

Because legal civil restitution is far more complicated than criminal restitution this paper deals primarily with the former.

Legal Civil Restitution is the process by which a court of law requires a person to disgorge itself of money and/or property, for if it were continue in possession of those “ill gotten gains” which it has no right to retain, that person would be unjustly enriched. What is slightly less facile is to define what is “disgorgement,” what is “unjust enrichment,” and what is quantum meruit. As aforesaid, this paper is primarily addressed to those three issues.

At times compensatory damages are improperly characterized as “restitution.” Of course there is no prohibition against a plaintiff claiming restitution and/or money damages, including punitive damages, or as was properly pled in Estate of Hirata v. Ida for remedial damages of $150,000 or equitable relief in the form of restitution” under the usual Rules of Civil Procedure, so that the Defendant may answer the Complaint and prepare for trial. As was brought out in Winecellar Farms, Inc. v. Hibbard restitution alone may be inadequate compensation, giving rise to an award of compensatory damages, in addition to the award of restitution.

The usual choses-in-action with which we are most familiar, e.g. actions for breach of contract, and actions for tort, seek recovery of money because of the harm which the defendant’s acts proximately caused the plaintiff. Restitution seeks the recovery of money not primarily because the plaintiff was damaged, but because at the expense of the plaintiff, the defendant, due to one or several of a variety of reasons, has been “unjustly enriched,” giving rise to “Unjust Enrichment,” one of the two primary choses in action

33 Id. at 46.
34 At times called “common-law restitution.” See Gamayo v. Match.com, LLC, 2011 W.L. 3739542 at *1 (N.D. Cal. 8/24/11).
35 See infra text accompanying notes 148-162.
36 Id.
37 For a description of such money or property by some courts see Soley v. Wasserman, 2011 W.L. 4352384 at *7 and *12 (S.D. N.Y 8/11/11); and J.& J. Sports Productions, Inc v. Dean, 2011 W.L. 4080052 at *2 (N.D. Cal. 9/12/11).
38 See Lockhart v. Southern Health Plan, Inc, 2011 2680430 at*3 (N.D. Ga. 7/8/11). In that case the mistake was made by the plaintiff in pro per.
40 2011 W.L. 3290404 at *1 (D Haw. 7/29/11).
43 27 A. 3d 777, 789 (N.H. 7/21/11).
offering the remedy of restitution. In that chose–in-action, though the plaintiff has been harmed, it is an indirect harm, by the defendant receiving things of value intended for the plaintiff. In restitution, benefit received by the defendant is a sine qua non of the plaintiff’s cause of action.\textsuperscript{44} Primarily, however, as stated above, the crux of unjust enrichment is the benefit the defendant received, rather than the damage the plaintiff sustained.

Most courts take the position that the remedy of restitution is an equitable one.\textsuperscript{45} The court in \textit{International Longshore & Warehouse Union v. South Gate Ambulatory Surgery Center, LLC}\textsuperscript{46} made it clear that the fact that restitutory relief takes the form of a money judgment does not remove it from the category of traditionally equitable relief. Not only is restitution thought of as being an equitable remedy, but In re Kail\textsuperscript{47} stands for the proposition that the equitable remedy of subrogation is akin to restitution, and, in fact, has been derived from it. Some doubt, however, has been cast upon the equitable aspect of restitution. Judge J. Randal Hall in Durango-Georgia Paper Co. v. H.G. Estate, LLC,\textsuperscript{48} quoting with approval from another court, wrote that:

\begin{quote}
not all relief falling under the rubric of restitution is available in equity... Specifically, the Court stated that in order for restitution to lie in equity, ‘the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant’s possession.’
\end{quote}

University of Chicago Law Professor, Richard A. Epstein, in a 1994 article\textsuperscript{49} said that restitution had its beginnings in Roman law,\textsuperscript{50} which existed long before the development of equity. It was introduced into the common law by Lord Mansfield in 1760,\textsuperscript{51} in the case of \textit{Moses v. Macferlan},\textsuperscript{52} in which Mansfield wrote:

\begin{quote}
It lies for money paid by mistake, or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff’s
\end{quote}

\textsuperscript{44} \textit{See} Stearns v. Ticketmaster Corp., 655 F. 3d 1013, 1021 n.13 (9th Cir. (Cal.) 8/22/11).
\textsuperscript{46} 2011 W.L. 4080054 at *2 (N.D. Cal. 9/12/11).
\textsuperscript{47} 2011 W.L. 2982644 at *17 (D. Vt. 7/22/11).
\textsuperscript{48} 2011 W.L. 4549413 at *6 (S.D. Ga. 9/29/11).
\textsuperscript{50} Id. at 1370.
\textsuperscript{51} Id.
\textsuperscript{52} Moses v. Macferlan, 97 Eng. Rep. 676 (K.B. 1760).
situations, contrary to the laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money.\footnote{Id. at 681.}

It can be adduced by Mansfield’s words, that even if restitution was recognized as a legal principle prior to the development of equity, good conscience and equity were the underpinnings of restitution even if the judges who used that word long ago did not refer to it in those terms.\footnote{2011 W.L. 4001115 at *4 (M.D. Tenn. 9/8/11).}

Judge John T. Nixon in *Vanderbilt University v. Pesak*\footnote{2011 W.L. 3046959 at *7 (D. Neb. 7/27/11).} takes the position that restitution can be considered either equitable or legal. He has written that:

restitution could be an equitable or legal remedy, and whether the remedy was equitable or legal depended on the basis for the claim and the relief sought. Restitution was an equitable remedy when the plaintiff sought relief in the form of a constructive trust or an equitable lien upon “particular funds or property in the defendant's possession.” . . . But when the plaintiff merely sought to impose personal liability upon the defendant to pay a sum of money—not to restore particular funds or property in the defendant's possession—the plaintiff assumed the status of a general creditor, and the restitutionary remedy he or she sought was legal rather than equitable.

It is the position of this paper that restitution is primarily an equitable remedy to give effect to the causes of action “unjust enrichment” and “quantum meruit.” Such being the case the party who seeks that remedy must be prepared to prove its equitable basis, and not emulate the moving party in *Grand Elect, LLC v. Brotherhood of Electrical Workers*,\footnote{2011 W.L. 2983582 at *2 (E.D. Mo. 7/22/11).} where it failed to address its restitution claim in either its motion or its brief. In *Suter v. Carpenter Health & Welfare Trust*\footnote{2011 W.L. 4001115 at *4 (M.D. Tenn. 9/8/11).} the defendant sought restitution from the plaintiff. The court denied that relief, however, because the defendant, in fact, sought a legal remedy. As Judge Frederick R. Buckles wrote in *Grand Elect, LLC*:

the basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to some funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents.
In 1937 the American Law Institute\textsuperscript{57} prepared the first Restatement of the law of Restitution.\textsuperscript{58} In 1983 a Second Restatement was begun and in that year and 1984 two tentative drafts of a Second Restatement were released, but the Second Restatement was abandoned.\textsuperscript{59} In 2000 the American Law Institute commenced preparation of the Third Restatement of the law of Restitution and Unjust Enrichment.\textsuperscript{60} This Restatement has been in circulation from 2011 to present as the Restatement of Restitution and Unjust Enrichment.\textsuperscript{61}

The First Restatement provided that “[t]he appropriate proceeding in an action at law for the payment of money by way of restitution is: in States retaining common law forms of action, an action in general assumpsit.”\textsuperscript{62} This refers to the fact that as the common law was practiced in medieval England the “form” of the action served more than a mere procedural function of the remedy being asserted. It was just as important, if not more so, than the substance of the claim, as a party was not permitted to remain in court unless it properly plead its cause of action. These forms were assigned names by which they were distinguished from one another. If one were damaged by force it was furnished the tort remedy of trespass vi et armis, or simply “trespass;” if without force the tort remedy of trespass on the case, or simply “case” was used.\textsuperscript{63} This tort remedy gave way to a remedy known as assumpsit,\textsuperscript{64} a contractual remedy which had a rather circuitous history,\textsuperscript{65} and

\begin{itemize}
  \item In 1923 a group of legal scholars, dissatisfied with the uncertainty and complexity of American law, formed the American Law Institute and published Restatements of the law of the following nine subjects: Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts. The subjects of the Restatements have been expanded and revised over the years. A.L.I. collaborates with the American Bar Association, resulting in the ALI-ABA publications, and with the National Conference of Commissioners on Uniform State Laws.
  \item See Westlaw: rest. resti. s. 1, and so on for the 215 sections.
  \item See Prof. Candace Saari Kovacic-Sleicher Westlaw, Quantum meruit and the Restatement (Third) of Restitution and Unjust enrichment, 27 REVLITIG 127, In 10 (FALL 2007) and Westlaw: rest. 2d resti s. 1 and so on for the 30 sections.
  \item See Westlaw: rest. 3d resti. s. 1. Incorporation of the words “and Unjust Enrichment,” were contemplated during the preparation of the First and Second Restatements, but were not used until the present version of the work. Those words emphasize the significance of the defendant’s being unjustly enriched at the expense of the plaintiff. As Prof. Charles E. Rounds, Jr., however, has expressed a logical conclusion “it is respectfully suggested that a title such as Restitution for Unjust Enrichment would better impact the idea that unjust enrichment is the wrong and restitution the primary remedy for it.” See 26 SCCHITLJ., 313, 329 (June 2010).
  \item At times the plaintiff simply claims all of the relief specified by the Third Replacement. See Braxton v. Chen Tuo Chen, 2011 W.L. 4031171 at *2 (Tex. App. 9/13/11).
  \item Westlaw: Rest. Rest. s. 5 (a). Neither the Second nor Third Restatement incorporated such provision probably because most jurisdictions have abolished procedural distinctions between actions, “in order to award adequate relief to the victim of a wrong, regardless of the form of the action.” See Am. Jur. Actions, § 8. See also Fed. R. Civ. P. 2, which provides that “[t]here shall be one form of action to be known as ‘civil action.’”
  \item In medieval England, the King, being interested primarily in himself and his coffers, did not allow the enforcement of contractual disputes among private parties.
  \item A contraction of the Latin word assumere, meaning “he undertook;” which the legal scholars extended to mean “he undertook to pay.”
  \item Even though the King eventually granted his subjects the right to contract with each other, assumpsit did not recognize complete contracting powers, but merely an express promise made by the defendant to pay what he owed the plaintiff. Later the requirement that the promise be express was modified to require only that the promise might be implied. Even later it mattered little whether the promise was express or implied. Because equitable claims for relief are not in the nature of assumpsit the courts created an action in the
\end{itemize}
ultimately became one of the so-called “common counts.” Though neither the Second nor Third Restatement contained the provision about common law forms of action the Federal Rules of Civil Procedure has adopted forms permitting the pleading of such choses-in-action in the abbreviated language of the form.

While judges of the law courts were developing the assumpsit remedy and forms which would express it in a streamlined manner, Chancellors of the courts of equity were developing a remedy to prevent a defendant from being “unjustly enriched” at the “expense” of the plaintiff. That remedy was the “quasi contract,” which though may be treated procedurally as a contract, is not a contract determined by the intent of the parties. It is a construct of the court, under principles of equity and justice, to avoid an unfair result being imposed upon a plaintiff. The quasi contract may be referred to as a contract “implied in law,” as opposed to the “express contract,” and the contract “implied in fact,” which may be enforced by the assumpsit chose-in-action. The damages recoverable by the two actions differ. Assumpsit allows a plaintiff to recover damages to the extent that the plaintiff suffers as a proximate result of the defendant’s breach. Quasi contract requires a defendant to disgorge the benefit it has received at the plaintiff’s expense; but it also may require the defendant to restore the plaintiff to that party’s pre-transactional position even though the cost of doing so may exceed the sum as to which defendant was benefited.
It can be discerned that, as Prof. Epstein contends, restitution is neither a purely legal nor a purely equitable remedy, but a hybrid of both systems. Its title is a bit of a misnomer, since the general meaning of the word “restitution” refers to a return by a defendant to the plaintiff of something of value improperly possessed by the defendant. 75 That is the meaning of restitution when used in criminal law. 76 Civil case law, however, establishes that technically a “return” is not always required when the chose-of-action is used as a civil remedy. Thus if A delivers something to B, whereas he should have delivered it to C, that person, C, may sue B for delivery (i.e. restitution), of the thing to him. Such remedy would not seek a “return” of the thing, however, because B received it from A, not from C. If A should have transferred to B money or property, but did not do so, B could sue A for restitution even though B did not give A anything – A simply improperly withheld it from B. 77

It should be made clear the restitution is not a chose-in-action. It is just one, but an important one, of a series of remedies used to undue unjust enrichment, which is a chose in action. 78 Other such remedies seeking the same relief are the constructive trust, the equitable lien, actions for quasi-contract, discharge for value, and benefit officiously conferred.

Continuing the explanation of legal, civil restitution suppose A pays B a sum of money in order that B does some work for A; but B does only half of the agreed-to work, and refuses to repay A the amount he did not earn. A has a cause of action against B in undue enrichment seeking restitution for the return of the money he did not earn. B has been unjustly enriched due to his refusal to pay A what he owes him. Another example, suppose A sues B and obtains a judgment against him for a sum of money, and B without paying A, conveys all his property to C. without receiving consideration. A would not sue B for the money as he already has a judgment against B, and B, having conveyed his property to C, probably has no assets with which to pay A. A would sue C for restitution of the property he received from B because C has been unjustly enriched by receiving that property which could have been utilized for satisfying, or partially satisfying, A’s judgment against B.

There are two meanings to the word “restoration.” There is the general, everyday, meaning of the word, and then there is the legal term “restitution.” The Merriam-Webster Dictionary (2011) defines the everyday use of the word “restitution” as an act of restoring or a condition of being restored; a making good of or giving an equivalent for some injury. It is to point out the distinction between the everyday, dictionary use of the word and its legal use that this paper uses the term “legal civil restitution,” in its title. Even the Restatement of Contracts (Second) in § 344© so used the word “restitution” in its everyday meaning. 79 Black’s Law Dictionary defines the legal use of the term as: “[t]he set of remedies associated with that body of law, in which the measure of recovery is usually based not on the plaintiff’s loss, but on the defendant's gain.” Several courts use both terms in their Opinions, often without identifying the type of restoration to which

75 See Roget’s Thesaurus, § 823.
76 See supra text accompanying note 29.
77 Northwest Ohio Bar Ass’n v. Archer, 951 N.E. 2d 78, 80 (Ohio 7/5/11). See infra text accompanying note 335 is a clear example of that point.
79 See Dynalectrict Co. of Nevada, Inc. v. Clark & Sullivan, 255 P. 3d 286, 287 n.6 (Nev. 7/14/11).
they are referring.\textsuperscript{80} Five examples of this practice are the following: (1) In \textit{Partners & Partners, II, Inc. v. Ayar Property Management, LLC}.\textsuperscript{81} the court was explaining the meaning of common law indemnification by stating that “[c]ommon law indemnification is the equitable right to restitution of [“by” probably intended] a party held liable for another’s wrongdoing.” (2) In \textit{Cleary v. Phillip Morris, Inc.}\textsuperscript{82} the court said that “[u]njust enrichment is a common–law theory of recovery or restitution that arises when the defendant is retaining a benefit to the plaintiff’s detriment and this retention is unjust.” (3) In \textit{BLT Restaurant Group, Inc. Torondel}\textsuperscript{83} the court, in explaining unjust enrichment said that “an unjust enrichment claim seeks the restitution or return of money or property unjustly conferred.” (4) In \textit{Point Intrepid, LLC v. Farley}\textsuperscript{84} the judge was explaining the taxing of court costs for expert testimony. He said: “[w]hen an expert is appointed for court-ordered work, reasonable compensation is limited to reimbursement for performance of that work only. . . . Reasonable compensation thus does not include restitution for expenses outside the court-ordered services provided by the expert, such as reimbursement for appearing at court when one is not under subpoena.” (5) In \textit{McDermott v. Caruso}\textsuperscript{85} plaintiff recovered a judgment for damages resulting from an assault. The court gave the defendant credit for “restitution” paid by the defendant to the plaintiff under a stipulation.\textsuperscript{86} In this paper the word “restitution” will be use in its legal civil

\textsuperscript{80} Examples of courts’ use of the word in this manner are contained \textit{infra} in note 86.

\textsuperscript{81} 2011 W.L. 3593996 at *4 (Mich. App. 8/16/11).

\textsuperscript{82} 2011 W.L. 3800122 at *5 (7th Cir. (Ill.) 8/25/11).

\textsuperscript{83} 2011 W.L. 3251536 at * 6 (S.D. N.Y. 7/19/11).

\textsuperscript{84} 714 S.E. 2d 797, 805 (S.C. App. 8/16/11).

\textsuperscript{85} 2011 W.L.3334735 at *2 (Conn. Super. 7/11/11).

meaning. Tatman v. Buame, although a criminal case was interesting in the civil context. There the defendant spent certain sums as court costs, and sought “restitution” of them from the plaintiff. To say that a plaintiff is unjustly enriched because a defendant incurs court costs in an effort to defend himself would appear to be a contradistinction to the usual judicial definition of restitution, but neither the parties nor the judge appear to have had any problem with it. Restitution is used in civil law, and in criminal law. In M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC Judge Thomas C. Mummert, III, stated the difference as “[t]he object of civil law is the redress of wrongs by compelling compensation or restitution.... [I]n the case of crimes, the main object of the law is to punish the wrongdoer.” Of course, as it was pointed out in Capital Times Co. v. Doyle a state might combine civil and criminal restitution in its statutes. Judge Brown made that clear with the following words:

One example of the legislature specifying a departure from accustomed process is our restitution statute, WIS. STAT. § 973.20. The statute lays out in detail how criminal courts are to deal with restitution. Yet, despite this, the legislature expressly allowed civil suits to be maintained apart from this procedure. Section 973.20(8) states as follows: ‘Restitution ordered under this section does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil action.’ This example shows that the legislature knows it can depart from its carefully thought out scheme and specifically allow citizens to use an alternative means of seeking redress.

The major thrust of this paper is to examine the civil law cases, rather than the criminal law cases. The surest way in which to know how the modern courts define legal civil restitution is to look at recent cases.

Arizona
In Cestro ex rel. Cestro v. LNV Corp. Judge Neil V. Wake, quoting with approval from a case wrote that:

under Arizona law, although Plaintiff’s incompetence permits her to rescind the loan transaction, it does not free her from obligation to return the balance due on the loan. . . . a defrauded incompetent need not make restitution in order to rescind a transaction entered into as a result of the fraud, but it does not relieve the incompetent of restitution requirements where the party to be restored did not perpetrate the fraud.

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87 2011 W.L. 2966702 at *1 passim (N.D. Ind. 7/20/11).
89 2011 W.L. 4467642 at *7 n.3 (Wis. App. 9/28/11)
90 2011 W.L. 3292574 at*5 (D. Ariz. 8/1/11).
California

It was said in *Huck v. Pfizer, Inc.*\(^91\) that there are but two methods of being compensated for unfair competition – restitution and the injunction. In *Manantan v. Nat'l. City Mortg. Co.*\(^92\) Judge Claudia Wilken opined that:

There are at least two potential bases for a cause of action seeking restitution: (1) an alternative to breach of contract damages when the parties had a contract which was procured by fraud or is unenforceable for some reason; and (2) where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct and the plaintiff chooses not to sue in tort but to seek restitution on a quasi-contract theory.

. . . [T]he law implies a contract, or quasi-contract, without regard to the parties' intent, to avoid unjust enrichment.

*Aurora, S.A. v. Poizner*\(^93\) established that if a court awards restitution, but that award is reversed on appeal, and the case is remanded, the trial court has the authority to reinstate the award, if the facts justify such action. In *Clerkin v. MyLife.com, Inc*\(^94\) Judge Claudia Wilken said that:

> [t]here are at least two potential bases for a cause of action seeking restitution: (1) an alternative to breach of contract damages when the parties had a contract which was procured by fraud or is unenforceable for some reason; and (2) where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct and the plaintiff chooses not to sue in tort but to seek restitution on a quasi-contract theory. (citation omitted). In the latter case, the law implies a contract, or quasi-contract, without regard to the parties' intent, to avoid unjust enrichment. . . .

Another view is that a cause of action for unjust enrichment exists and its elements are receipt of a benefit and unjust retention of the benefit at the expense of another.

In *Sharma v. Wachovia*\(^95\) Judge Howard R. Lloyd wrote that: “Courts in this state and district diverge on whether unjust enrichment functions as an independent claim or is instead an effect that must be tethered to a distinct legal theory to warrant relief. . . . Under both views, the effect of unjust enrichment is remedied with some form of restitution.” *California Ass’n of Professional Firefighters v. Bauman*\(^96\) established that an order of restitution may be ordered even after a default judgment has been entered against the defendant. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*\(^97\) after recognizing that

\(^{91}\) 2011 W.L. 3176432 at *11 (S.D. Cal. 7/25/11), that there are but two methods of being compensated for unfair competition – restitution and the injunction.

\(^{92}\) 2011 W.L. 3267706 at *6 (N.D. Cal. 7/28/11).

\(^{93}\) 130 Cal. Rptr. 3d 305, 309 (Cal. App. 8/8/11).

\(^{94}\) 2011 W.L. 3607496 at *8 (N.D. Cal. 8/16/11).

\(^{95}\) 2011 W.L. 3795092 at *5 (N.D. Cal. 8/26/11).

\(^{96}\) 2011 W.L. 3818350 at *3 (S.D. Cal 8/24/11).

\(^{97}\) 2011 W.L. 4345435 at *3 (N.D. Cal. 9/15/11).
In California there are two schools of thought as to whether restitution is a cause of action, or merely a remedy of the unjust enrichment cause of action, Judge Susan Illston opined that:

“[t]here is no freestanding cause of action for ‘restitution’ in California,” but [citation omitted stated] that “a typical cause of action involving such remedy is ‘quasi-contract’ ”[citation omitted] (allowing cause of action to proceed because “[a]lthough their Eighth cause of action is entitled ‘unjust enrichment’ it is clear that plaintiffs are seeking restitution”);(citation omitted) (“The Court notes that even if there is disagreement as to whether there is a claim for ‘restitution,’ the disagreement turns in large part on the label that is attached to the claim on which restitution is sought; while some courts refer to claims for ‘restitution,’ others label these claims according to the underlying theory attached to the claim.”); (citation omitted) (“Whether Plaintiffs' unjust enrichment cause of action is construed as a claim for restitution as in the McBride case or is considered to be an independent cause of action as in the Lectrodryer and First Nationwide cases, the allegations are sufficient to state a claim under California law.”); see also (citation omitted) (recognizing that “[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another” but affirming dismissal of unjust enrichment claim based upon public policy implications); (citation omitted) equating unjust enrichment with restitution, but concluding that cause of action for restitution was barred because the plaintiff had breached its fiduciary duties).

**Colorado**

In Bullock v. Daimler Trucks North America, LLC. the court discussed the collateral source rule as it relates to restitution. Judge William J. Martinez said that:

§ 13–21–111.6 ... applies to payments from a collateral source independent of any alleged tort liability.... [Thus, payments from tortfeasors are] not collateral sources [and] § 13–21–111.6 is inapplicable to [such payments].” (citations omitted). stating, ‘ § 13–21–111.6 does not require a reduction from the damages owed by remaining tortfeasors where a joint tortfeasor entered into a settlement’). Therefore, the Court will not reduce any damage award to Plaintiff in this action based on any restitution payments made to Plaintiff from [the defendant].

**Connecticut**

In Family Garage, Inc. v. Comm. of Motor Vehicles an automobile repair shop sought review of a decision of Department of Motor Vehicles, requiring the shop to pay restitution and civil penalty for charging improper “steering fees” for the release of

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98 2011 W.L. 4501923 at *5 (D. Colo. 9/28/11).
99 23 A. 3d 752, 758 (Conn. App. 7/26/11).
vehicles that it had towed to its place of business. The judgment was affirmed. In *K & A Enterprises v. Faiello* Judge Edward E. Burke wrote the following:

In an important category of disputes over failure of performance, one party asserts the right to payment on the ground that he has completed his performance, while the other party refuses to pay on the ground that there is an uncured material failure of performance ... A typical example is that of the building contractor who claims from the owner payment of the unpaid balance under a construction contract. In such cases it is common to state the issue, not in terms of whether there has been an uncured material failure by the contractor, but in terms of whether there has been substantial performance by him. This manner of stating the issue does not change its substance, however, and . . . [i]f there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages. If there has not been substantial performance, the building contractor has no claim for the unpaid balance, although he may have a claim in restitution.

In *Wells Fargo Ban v. Cornelius* Judge Sullivan wrote that:

> [o]ur case law, while infrequently addressing this issue, indicates that the filing of a satisfaction of judgment does not render appeals moot because of the possibility of restitution or reimbursement. In [a cited decision] our Supreme Court denied a motion to erase, holding that satisfaction of a judgment did not render an appeal of that judgment moot because if the judgment was erroneous, the defendant could secure reimbursement. In [a cited decision] our Supreme Court noted: ‘[A]n order of execution, in the absence of a stay, does not moot the justiciability of a pending appeal. If a judgment has been satisfied before it is reversed ... the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost; and the mode of proceeding to effect this object must be regulated according to circumstances.

Washington Investment Partners v. *The Securities House* established that prejudgment interest may be ordered to be paid in addition to restitution. In *Ofili v. Sullivan* the Connecticut Department of Insurance revoked the license of an insurance agency and ordered it to pay restitution to its customer. The court affirmed the revocation of license, but reversed the restitution award because the applicable statute authorizing discipline did not authorize restitution, and the court pointed out that the legislature was capable of authorizing such provision when it intended to.

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100 2011 W.L. 3891002 at *4 (Conn. Super. 7/28/11).
101 26 A.3d 700,702,703 (Conn. App. 9/6/11).
104 § 38a-774.
District of Columbia

As was pointed out in *Estate of Doe v. Islamic Republic of Iran*\(^1\) the District of Columbia has enacted the Death Penalty Act of 1996, a part of which is the Mandatory Victims’ Restitution Act.

Georgia

City of *Atlanta v. Bnestor*\(^2\) was an action seeking restitution of the overpayment of water fees.

Hawai’i

In *Au v. Republic State Mortg. Co.*\(^3\) U.S. District Judge Michael Seabright specifically referred to restitution as a “remedy.”

Maryland

In *Proctor v. Metropolitan Money Store, Inc.*\(^4\) it was held that a restitution judgment may be entered jointly and severally, with, however, this caveat: “but with the maximum liability of any defendant limited to the amount of the judgment entered against him, her, or it in this case.”

Massachusetts

*In re Nurruntin Marketing and Sales*\(^5\) established that where a parent corporation sues for restitution damages, subsidies need not be parties plaintiff.

Michigan

In *Timmons v. Robinson*\(^6\) the court found that the plaintiff’s complaints against the defendant, if actionable at all for restitution were de minimus, and hence entered summary judgment for the defendant.

Nebraska

In *Gonzalez v. Union Pac. R.R. Co.*\(^7\) a child was killed by one of the defendant railroad company’s trains. The child’s mother for a consideration of $15,000 signed a release. She later recanted and sued the railroad, for wrongful death damages. The defendant, inter alia, defended on the ground that the mother’s suit was barred by her not having tended return of the $15,000. The court disagreed with the defendant railroad on that point.

Nevada

In *Hanson v. Johnson*\(^8\) Judge Gloria M. Navarro wrote that:

> [T]he basis for indemnity is restitution; one person is unjustly enriched when another discharges liability that it should be his responsibility to pay. Because ‘[a]ctive wrongdoers should bear the consequences of their injurious actions,’ equitable indemnity ‘is only available so long as the indemninee is free from active wrongdoing regarding the injury to the plaintiff.’

\(1\) 2011 W.L. 3585963 at *1 (D. D.C. 8/16/11).

\(2\) 714 S.E. 2d 109, 113 (Ga. App. 7/6/11).

\(3\) 2011 W.L. 3422780 at *3 (D. Haw. 8/4/11).

\(4\) 2011 W.L. 4368003 at *3 (D. Md. 9/15/11).

\(5\) 2011 W.L. 4026804 at *8 (D. Mass 8/31/11).


\(7\) 2011 W.L. 3629422 at *47 passim (Neb. 8/19/11).

\(8\) 2011 W.L. 3847203 at *2 (D. Nev. 8/30/11).
Diversified Concrete Cutting, Inc. v. Trustees,\textsuperscript{113} established that a defendant having received funds as the result of a mistake, alone, will not justify restitution. There must be shown that equity favors restitution. In Lund v. Harborview Mortg. Loan Co.,\textsuperscript{114} it was established that a loan company can obtain a Writ of Restitution requiring a borrower to vacate its home.

New Mexico

Ecker Bros v. Rehders\textsuperscript{115} involved a conflict between a general contractor and a subcontractor in the construction of a building. The subcontract did some work for which it was paid. Subsequently it performed more services, for which it was not paid and then stopped work on the project. When litigation ensued the trial court, using equitable law, denied the subcontractor’s claim, and entered judgment in favor of the general contractor for work it performed due to the sub’s having stopped work, and some allegedly negligent services performed by the sub. The appellate court reversed on the ground that while restitution, which is a remedy for unjust enrichment, is usually thought of as an equitable remedy it is at times a legal one. In the context of whether damages may be allowed to offset compensatory damages it is a legal issue, in which equity may “intervene.”

New York

Western Estates, LLC v. Uzzle\textsuperscript{116} established that restitution may be awarded after a trial in another court has been concluded. Learning Annex Holdings, LLC V. Rich Global, LLC\textsuperscript{117} held that the court decides the award of restitution after the jury decides the facts that require equity or lack of good conscience. In KTV Media Intern., Inc. v. Galaxy Group, LA LLC\textsuperscript{118} Judge Judith M. Barzilay wrote that:

Rescission amounts to the unilateral unmaking of a contract for a legally sufficient reason [and] . . . is generally available as a remedy or defense for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions.

Matter of Polanco v. Dilone\textsuperscript{119} established that awards of restitution are recognized in domestic relations courts. Bankruptcy Judge Helen L. Gropper in In re Awal Bank\textsuperscript{120} announced the bankruptcy rule of “Discharge for Value” in the following words:

a creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

\textsuperscript{113} 2011 W.L. 2633189 at *5 (D. Nev. 7/5/11)
\textsuperscript{114} 2011 W.L. 4344003 at *1 (D. Nev. 9/14/11).
\textsuperscript{115} 2011 W.L. 4467701 at *1 Passim (N. Mex. App. 8/2/11).
\textsuperscript{116} 2011 W.L. 2715375 at *1 (N.Y. Sup. App. 7/7/11).
\textsuperscript{117} 2011 W.L. 2732550 at *1 (S.D. N.Y. 7/11/11).
\textsuperscript{118} 2011 W.L. 2748659 at*8 (S.D. N.Y. 7/14/11).
\textsuperscript{119} 2011 W.L. 3557068 at *4 (N.Y. Dom. Rel. Ct. 8/3/11)
\textsuperscript{120} 455 B.R. 73, 99 (Bankr. S.D. N.Y. 8/4/11)
In *Mcquigan v. Local 295*\(^{121}\) in its ruling that restitution, like other equitable remedies such as injunctions and mandamus, would yield no compensatory damages, made it clear that, at least in New York, restitution is not considered a cause of action, but rather, a remedy. A ruling of a U.S. District Court for the Southern District of New York in *In re Beacom Associates, Litigation*\(^{122}\) indicates that an award of restitution may be reduced in proportion to the wrongful conduct of persons other than the defendant. In that case the defendant plead an affirmative defense to that effect. The plaintiff’s motion to strike was denied. It was pointed out in *F.T.C. v. Consumer Health Benefits Ass’n*\(^{123}\) that the Federal Trade Commission Act specifically permits an award of restitution. Judge Bernard J. Friedman in *Mutual Benefits Offshore Fund v. Zeltzer*\(^{124}\) opined that “[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” In *Soley v. Wasserman*\(^{125}\) Judge Kimba M. Wood said that “[w]hen the remedy sought is restitution the plaintiff need only show that the breach was a “substantial factor” contributing to the plaintiff’s injury.”

**Ohio**

*Penn v. Prospect Business Development Corp.*\(^{126}\) held that one may bring an action for restitution for one’s self and derivatively. In *Hummer v. Hummer*\(^{127}\) Judge Sean S. Gallagher wrote

> If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.

**South Carolina**

In *Jasdip Properties, S.C., LLC v. Estate of Richardson*\(^{128}\) Judge Konduras said that

Restitution is a remedy designed to prevent unjust enrichment.” . . . Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff.”). The terms ‘restitution’ and ‘unjust enrichment’ are modern designations for the older doctrine of quasi-contracts.” . . . [Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy.

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\(^{121}\) 2011 W.L. 3421318 at *4 (E.D. N.Y. 8/4/11).

\(^{122}\) 2011 W.L. 3586129 at *5 n.8 (S.D. N.Y. 8/11/11).

\(^{123}\) 2011 W.L. 3652248 at *11 (E.D. N.Y. 8/18/11).

\(^{124}\) 2011 W.L. 4031516 at *8 (N.Y. Sup. Ct. 9/7/11).


\(^{126}\) 2011 W.L. 3204723 at *1 (S.D. Ohio 7/27/11).

\(^{127}\) 2011 W.L. 3275614 at *4, n.7 (Ohio App. 7/29/11).

\(^{128}\) 2011 W.L. 3803564 at *3 (S.C. App. 8/24/11).
Texas
In re R.L.\textsuperscript{129} established that sovereign immunity prevents imposition of restitution against state agencies.

Utah
The court in HSBC Bank, U.S.A. \textit{v. Southwick}\textsuperscript{130} entered a judgment for damages and restitution, revealing that the two types of awards are not mutually exclusive.

Virginia
In \textit{Farkas v. National Union Fire Ins. Co.}\textsuperscript{131} Judge Leonie M. Brinkema clearly pointed out why an insured would not be entitled to any equities when she exclaimed:

National Union correctly responds that Farkas has not established that the balance of equities tips in his favor. . . . National Union has already advanced $930,000 for Farkas's defense. Farkas's assets have been frozen and he faces significant forfeiture and restitution orders, which are likely to deplete all his financial resources, leaving National Union with little realistic chance to recover any funds that it has already paid for Farkas's defense costs. For these reasons Farkas has failed to establish that the balance of equities tips in his favor.

The same Judge in \textit{Barrett v. Dept of Social Services},\textsuperscript{132} held that in Virginia there is no statutory or inherent authority for a court to order restitution of child support. \textit{Helton v. A.T. & T., Inc.}\textsuperscript{133} noted that restitution is a remedy “typically available in equity.”

Washington
Judge Ronald B. Leighton in \textit{Denton v. Department Stores Nat. Bank}\textsuperscript{134} found that restitution is a remedy, but not a “claim,” He wrote that:

plaintiff's restitution `claim` is actually a remedy, not a separate claim. . . Restitution is an alternative remedy to damages for breach of contract. The purpose of restitution is to prevent unjust enrichment of the defendant by restoring to the plaintiff any benefit conferred on the defendant.”). For that reason, if plaintiff's breach of contract claim survives, she may pursue restitution as an alternate remedy but not as a claim.

\section*{B. Defenses to Restitution Claims}

It goes without saying that unless the claimant proves its allegations of fact the Complaint is subject to dismissal. \textit{Poquez v. Subcor Holdings}\textsuperscript{135} is an example of such a dismissal. \textit{Insoftvision, LLC v. MB Financial Bank, N.A.}\textsuperscript{136} is an example of restitution

\begin{footnotes}
\item[129] 2011 W.L. 4089260 at *3 (Tex. App. 9/14/11).
\item[130] 261 P. 3d.107 at ¶ 2 (Utah App. 8/25/11).
\item[131] 2011 W.L. 2838167 at *3 (E.D. Va. 7/14/11).
\item[132] 2011 W.L. 3074782 at *12 (Va. App. 7/26/11).
\item[133] 2011 W.L. 4369054 at *14 (E.D. Va. 9/16/11).
\item[134] 2011 W.L. 3298890 at *6 (W.D. Wash. 8/1/11).
\item[135] 2011 W.L. 4351612 at *6 (N.D. Cal. 9/15/11).
\item[136] 2011 W.L. 4036130 at **2, 6 (N.D. Ill 9/12/11).
\end{footnotes}
being claimed in a counterclaim, but dismissed. *Coca Cola Bottlers’ & Services, LLC v. Novelis Corp.*\(^{137}\) is an example of a defendant’s counterclaim for restitution in a breach-of-contract suit being held moot because of dismissal of another part of its counterclaim. *Atlantis Information Technology, GmbH v. CA, Inc.*\(^{138}\) is an example of a counterclaim in a breach-of-contract main action being accepted.

Defenses are of utmost importance, particularly when a plaintiff is attempting to plead a restitution claim; but pleading them will not determine what may be recovered by the plaintiff. As Judge Holly M. Kirby said in *Ellis v. Minder Music Ltd.*\(^{139}\):

> Courts usually say that damages may be ascertainable . . . even when the parties dispute the underlying liability or the facts on which damages are based. The fact that the defendant raises a defense, counterclaim or set-off, does not prevent ascertainment of damages under this rule. . . . It is the character of that original claim that counts, not the vicissitudes of the lawsuit.”

**Arizona**

*Sourcecorp v. Norcutt*\(^{140}\) established that a defendant’s defense of homestead exception can be waived by selling one’s home and using the proceeds for restitution payments.

**California**

*Dipaola v. J.P. Morgan Chase Bank*\(^{141}\) stands for the proposition that a defense to a restitution claim is meaningless where the moving party has an alternative raison d’être.

**Missouri**

*In re Bisphend-A (BPA) Polycarbonate Plastic*\(^{142}\) noted that some courts reduce the amount of restitution awarded the plaintiff by the amount of damage suffered by the defendant.

**New Jersey**

Judge Linares in *F.T.C. v. Millennium Telecard, Inc.*\(^{143}\) explained the voluntary payment doctrine in the following words:” [t]he voluntary payment doctrine is a corollary to the mistake of law doctrine and, in its general formulation, holds that a person who voluntarily pays another with full knowledge of the facts will not be entitled to restitution.” In *Vasaturo Bros., Inc. v. Alimenta Trading-USA, LLC*\(^{144}\) the court noted that where there is a contract between the parties, restitution is not a viable remedy. It was stated in *Shakib v. Back Bay Restaurant Group, Inc.*\(^{145}\) that: “in the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing. . . Plaintiff's claim for breach of the covenant of good faith and fair dealing and common law restitution is therefore not cognizable.”

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\(^{137}\) 2011 W.L. 2641269 at *1 (Ga. App. 7/7/11).


\(^{139}\) 2011 W. L.3848627 at *6 (Tenn. Ct. App. 8/31/11).

\(^{140}\) 105 P.3d 281, 283, 284 (Ariz. App. 8/2/11).

\(^{141}\) 2011 W.L. 3501756 at *5 (N.D. Cal. 8/10/11).

\(^{142}\) 276 F.R.D. 336, 344 (W.D. Mo. 7/15/11).

\(^{143}\) 2011 W.L. 2745963 at *4 (D. N. J. 7/12/11).

\(^{144}\) 2011 W.L. 3022440 at *4 (D.N.J. 7/22/11).

\(^{145}\) 2011 W.L. 4594654 at *6 (D. N.J.9/30/11).
Pennsylvania

Reieber v. Pima Community College\textsuperscript{146} concerned a plaintiff seeking restitution of one’s reputation and the re-establishment of a career. While the court disposed of the case on other grounds the terse Opinion reflects the judge’s not being favorably disposed to such relief. 

Sher v. Upper Moreland Tp. School Dist.\textsuperscript{147} established that while mental and physical injury are causes justifying certain claims, restitution is not one of them.

¶ C. Disgorgement

Black’s Law Dictionary defines disgorgement as \[t\]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.

The word should be used as a term describing the act of giving up something of value, usually money, to the plaintiff. Van Cook v. S.E.C.\textsuperscript{148} made clear that it is not used exclusively with restitution. Some courts, however, refer to it with the same deference as restitution.\textsuperscript{149} It is improper for the plaintiff to pray for “restitution, disgorgement,”\textsuperscript{150} or restitution and disgorgement,”\textsuperscript{151} as such phrasing could be interpreted as an equality of the two procedures. It is more proper to pray for “disgorgement on [or under] the theory of unjust enrichment.”\textsuperscript{152}

When a person disgorges money or property it is usually transferred to the person to whom it rightfully belongs, often a person, or even an agency, of the federal\textsuperscript{153} or state\textsuperscript{154} government.

California.

Scholken v Wash. Nat. Bank\textsuperscript{155} has identified disgorgement as an equitable remedy. Nelson v. Dollar Tree Stores, Inc.\textsuperscript{156} appears to discourage one’s seeking profits under a claim for disgorgement. It defined disgorgement of defendant’s profits as “nonrestitutionary monetary relief.” At times a plaintiff will treat disgorgement as a separate remedy with equal stature as restitution, as was done in Alley v. Aurora Loan Services, LLC.\textsuperscript{157} There is, however, a quite apparent difference, as was explained in Luxpro Corp. v. Apple Inc.\textsuperscript{158} Judge Jeffrey S. White opined that:

\begin{itemize}
\item \textsuperscript{146} 2011 W.L. 3665131 at *1 passim (W.D. Pa. 8/19/11).
\item \textsuperscript{147} 2011 W.L. 3652474 at *14 (E.D. Pa. 8/19/11).
\item \textsuperscript{148} 653 F.3d 130, 144 (2d Cir. (N.Y.) 8/8/11).
\item \textsuperscript{149} See California ex rel Brown v. Villalobas, 453 B.R. 404, 412 (D. Nev. 7/1/11); Scottsdale Ins. Co. v. Riverbank, 2011 W.L. 3920296 (D. Minn. 9/7/11) and In re Lewis L., 2011 W.L. 4585573 at *1 (Ill. 9/30/11).
\item \textsuperscript{150} As was done in Tosh-Surryhne v. Abbott Laboratories, Inc., 4500880 at *1 (E.D. Cal. 9/27/11); and In re Lewis, 2011 W.L. 4585573 at *1 (N.D. Ill. 9/30/11).
\item \textsuperscript{151} As was done in U.B.S. Financial Services, Inc. v. West Virginia, 660 F. 3d 643, 653 (2d Cir. (N.Y.) 9/22/11).
\item \textsuperscript{152} As was done in Cobalt Multifamily Investors 1, LLC, v. Arden, 2011 W.L. 4542734 at *2 (S.D. N.Y, 9/30/11).
\item \textsuperscript{153} See Hicks v. C.I.R., 2011 W.L. 3240843 at * 1 passim (U.S. Tex Ct. 7/28/11).
\item \textsuperscript{154} See City of San Antonio v. Lower Colorado Water Authority, 2011 W.L. 3307509 at *6 (Tex. App. 7/29/11).
\item \textsuperscript{155} 2011 W.L. 2940293 at *7 (N.D. Cal 7/20/11).
\item \textsuperscript{156} 2011 W.L. 3568498 at *5 (E.D. Cal. 8/15/11).
\item \textsuperscript{157} 2011 W.L. 3799035 at *3 (D. Colo. 7/21/11).
\item \textsuperscript{158} 2011 W.L. 3566616 at *7 (N.D. Cal. 8/12/11).
\end{itemize}
An order for “restitution” is an order that compels a “defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person.” (citations omitted) (goal of restitution is to restore plaintiff to status quo ante). In contrast, “disgorgement” is a broader remedy. ‘Disgorgement’ may include a restitutionary element, but it is not so limited’ An order for ‘disgorgement’ is defined as an order: (1) ‘compel[ling] a defendant to surrender all money obtained through an unfair business practice even though not all is to be restored to the person from whom it was obtained or those claiming under those persons,’ or (2) compelling a defendant ‘to surrender ... all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.’

New York
Judge Theodora H. Katz described disgorgement in *Pure Power Boot Camp, Inc. v. Warrior Fitness,* using the following words:

New York courts generally find disgorgement of profits or restitution is appropriate only in ‘a straightforward case in which an employee makes a profit or receives a benefit in connection with transactions conducted by him on behalf of his employer.’ . . . an employee who makes a profit or receives a benefit in connection with transactions conducted by him on behalf of his employer is under a duty to give such profit or benefit to his employer, whether or not it was received by the employee in violation of his duty of loyalty.... [W]hen such benefit is not turned over, the employer has a choice of remedies, one among them being an action for restitution.

In *S.E.C. v. Razmilovic,* Judge Feuerstein wrote:

Disgorgement contemplates total recovery from the wrongdoer, not recovery that may be * * * subject to a compromise of actual damages. * * * To the extent that defendants have made restitution, the amounts paid would serve to offset part or all of a judgment for disgorgement.”) It is within the district court’s discretion to give a defendant credit for the money he paid to reimburse the victims of his fraud and to require him to disgorge the rest of his profits.

Pennsylvania
In *Black v. J.P. Morgan Chase Co.*, it was revealed that the plaintiff pled disgorgement as a cause of action, which it isn’t.

159 2011 W.L. 4035751 at *24 (S.D. N.Y. 9/12/11)
160 2011 W.L. 4629022 at *30 (E.D. N.Y. 9/30/11).
161 2011 W.L. 3940236 at *21 (W.D. Pa. 8/25/11).
Utah
Judge Dale A. Kimball in *F.T.C. v. LoanPointe, LLC*\(^\text{162}\) said that “disgorgement is generally used to deprive a wrongdoer of unjust enrichment and to deter others from violating ... laws by making violations unprofitable. . . . The primary purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains.”

¶ D. Trial Procedure

Arkansas
It was pointed out in *Travelers Cas. And Sur Co. of America*\(^\text{163}\) that those successful parties being awarded restitution are, as all successful parties known as “judgment creditors.”

California
It was established in *Harris v. Walker*\(^\text{164}\) that a defending party has a right to a hearing before restitution is imposed, but not as to the amount. *Beard v. Martel*\(^\text{165}\) and *Saibu v. Cask*\(^\text{166}\) pointed out that an appellate court has the power to modify a restitution award: *J. & J. Sports Productions, Inc. v. Ruiz*\(^\text{167}\) revealed that a request for restitution may be made in a Counterclaim, or a Crossclaim. In *Howl v. Bank of America, N.A.*\(^\text{168}\) the Plaintiff sued his lender to rescind his loan and restitute the money he had paid pursuant to the loan\(^\text{169}\) The court dismissed the Complaint because under the state Rule of Procedure he failed to allege his claim with particularity.

Connecticut
*Bauch v. Vachon*\(^\text{170}\) established that probate courts have jurisdiction to require probate estates to pay restitution.

District of Columbia
In *R.D.P. Technologies, Inc. v. Cambi AS*\(^\text{171}\) the Court considered the ripeness of restitution claims. In *Burke v. Groover, Christie & Merritt, P.C.*\(^\text{172}\) Judge Ruiz wrote the “[t]he obligation to pay interest is intertwined with the obligation to make restitution.”

Georgia
*Coca Cola Bottlers’ Sales & Services, LLC v. Novellis Corp.*\(^\text{173}\) revealed that a claim for restitution may be brought in a Counterclaim.

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\(^\text{162}\) 2011 W.L. 4348304 at *11 (D. Utah 9/16/11).
\(^\text{163}\) 2011 W.L. 3444063 at *5 n.4 (E.D. Ark. 8/8/11).
\(^\text{164}\) 2011 W.L. 3681565 at *19 (C.D. Cal. 7/12/11).
\(^\text{165}\) 2011 W.L. 3439166 at *1 (E.D. Cal. 8/5/11).
\(^\text{166}\) 2011 W.L. 3475388 at *2 passim (S.D. Cal. 8/8/11).
\(^\text{167}\) 2011 W.L. 3555799 at *1 (E.D. Va. 8/11/11).
\(^\text{168}\) 2011 W.L. 3610745 at *1 passim (N.D. Cal. 8/17/11).
\(^\text{169}\) See Hartwig Transit, Inc. v. RBS Citizens, N.A., 2011 W.L. 3651316 at *3 (N.D. Ill. 8/18/11) and Campanella v. Aurora Loan Servicing, 2011 3798787 at *1 (N.D. N.Y. 8/25/11) for the same type (rescission and restitution) of case.
\(^\text{170}\) 2011 W.L. 3587464 at *5 (Conn. Super. 7/20/11).
\(^\text{171}\) 2011 W.L. 3319443 at *6 (D. D.C. 8/2/11).
\(^\text{172}\) 26 A. 3d 292, 306 (D.C. 7/21/11).
\(^\text{173}\) 2011 W.L. 2641264 at *7 (Ga. App. 7/7/11).
Hawai‘i
In Fieldstein v. Hawai‘i Dept. of Attorney General, the plaintiff sought restitution against “the defendant and any others” without explaining how the court could grant such relief. The court noted such discrepancy with disfavor.

Iowa
Beaulieu v. I.R.S. established that a pro se Complaint seeking restitution will be accepted by the court, providing it properly pleads the requirements of that remedy.

Massachusetts
Arrigo v. Scholarship Storage, Inc. established that even though a plaintiff probably usually alleges a specific amount of money it seeks, such specificity is not always required, as long as the request is for money due the plaintiff from the defendant.

New Jersey
Queens West Development Corp v. Honeywell established that if restitution is pled as an alternative remedy, its viability should not be ruled upon until that of the other requests for relief have been determined.

New York
New York v. U.S. Capital Funding, LLC established that restitution can be ordered under a consent decree.

Ohio
Mountaineer, Invest, LLC v. Performance Home Buyers, LLC established that a Writ of Execution for restitution is a final, appealable order, reviewable by an appellate court unless it is moot.

Pennsylvania
The court will strike a Count to the extent it seeks equitable remedies (such as restitution), and compensatory damages. Prayers for relief of such nature should be separated into separate Counts. See Jenkins v. Union Labor Life Ins. Co., Inc.

Texas
U.S. Commodity Futures Trading Com’n v. Yancy established that orders awarding restitution may be via consent decrees. In Amlin Corporate Member, Ltd. v. Logistics Group Intern., Inc. Judge Lee H. Rosenthal wrote that:

The purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal. A judgment debtor who wishes to appeal may use the bond to avoid the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal. At the same time, the bond secures the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal.

175 2011 W.L. 4343807 at *3 (Iowa App. 9/8/11).
176 2011 W.L. 3584715 at *2 (D. Mass. 8/10/11).
178 2011 W.L. 3489914 at *8 (E.D. N.Y. 8/9/11).
179 2011 W.L. 2976934 at *1 (Ohio App. 7/22/11).
180 2011 W.L. 3919501 at *7 (E.D. Pa. 9/7/11).
181 2011 W.L. 3455844 at *6 (S.D. Tex. 7/17/11).
182 2011 WL 3271335 at *11 (S.D. Tex. 7/28/11).
Billiteri v. Securities America, Inc. stands for the proposition that restitution claims may be settled among the parties.

West Virginia

Harwood v. Batts is a case revealing a defendant’s pleading guilty to monetary restitution as well as a prison penalty.

¶ E. Bankruptcy, Effect Of

While the word “restitution” per se is not a part of the U.S. Bankruptcy Code, that remedy is used by the Bankruptcy Judges where applicable, as revealed in the following cases.

Kansas

In In re Lyons the Bankruptcy Judge noted that a state court improperly imposed the assessment of attorney’s fees instead of imposing restitution.

New Hampshire

In In re Financial Resources Mortg., Inc Bankruptcy Judge Michael Deasy opined the following sage advice:

The Court notes . . . that there are cases that . . . hold that each investor in a fraudulent investment scheme has a claim for fraudulent inducement against the debtor which entitles the investor to restitution of its principal investment, with the restitution claim constituting antecedent debt and therefore value within the meaning of § 548(d)(2)(A) [of the Bankruptcy Code]. See Madoff, 445 B.R. at 226–27 (“[I]nnocent investors who reasonably believed that they were investing in a legitimate enterprise are entitled to claims for restitution.”); . . . Courts have reasoned that because a Ponzi investor immediately obtains a claim for restitution against the debtor upon making an investment by virtue of the debtor's fraud, the claim constitutes a debt owed to the investor. However, any such claim requires the investor to be an “innocent” investor. Madoff, 445 B.R. at 225–26. Such a determination may only be made on the evidentiary record established at a trial. Courts also have held that “when investors invest in a Ponzi scheme, any payments that exceed their principal investments are not made for reasonably equivalent value and can be recovered by the [t]rustee [in Bankruptcy] as fraudulent conveyances.” . . . payments in excess of the amounts individuals have invested are voidable and recoverable by the trustee as fraudulent conveyances.
New York

In *In re Bernard L. Madoff Investment Securities, LLC*\(^{187}\) the Trustee for a substantively consolidated liquidation, under Securities Investor Protection Act (SIPA), of New York and the Bankruptcy Code, against Madoff’s so-called investment company (BLMIS) and its principal (Bernard M. Madoff), brought an adversary proceeding\(^{188}\) against principal Madoff’s brother, two sons, and a niece, asserting claims to avoid and recover alleged preferential and fraudulent transfers under the Bankruptcy Code and New York law, claims to disallow and equitably subordinate the defendants’ claims filed in SIPA proceeding, and common-law tort claims. The Trustee’s Complaint plead breach of fiduciary duty, negligence, conversion, unjust enrichment, constructive trust, and accounting. The defendants moved to dismiss. U.S. Bankruptcy Judge Burton L. Lifland overruled their motion to dismiss Count 15 which sought restitution from the relatives because “equity and good conscience require full restitution of the monies received by [defendants] from BLMIS.”\(^{189}\)

Virginia

In *In re Hadley*\(^{190}\) established that debts for restitution are not dischargeable in bankruptcy when the court stated: “11 U.S.C. Section 1328(a)(4) excepts from a completion of plan discharge debts ‘for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.’”

Wisconsin

In *In re Haukaas*\(^{191}\) the Bankruptcy Court held that when the President of an insolvent corporation assigns corporate property to secure a preexisting debt that the President had guaranteed, a creditor of the corporation is entitled to restitution.

¶ F. Police Power

Nevada

The court in *California ex rel Brown v. Villalobas*\(^{192}\) proclaimed that punishment for past conduct is part of a government’s police power. In the form of a civil penalty restitution serves a public, rather than a pecuniary purpose.

¶ G. Public Policy

Maine

It was held in *Scovil v. FedEx Ground Package System, Inc.*\(^{193}\) that if a contract is void, as against public policy, and the defending party has performed as specified by the contract the moving party may not recover restitution.

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188 An “adversary proceeding” under bankruptcy law is a proceeding brought by or against the debtor, seeking relief other than what is entailed in the administration of the bankruptcy estate.
189 Section 1328(a)(4) deals with a debtor’s discharge in a Chapter 11 (Reorganization) proceeding.
190 2011 W.L. 3664746 at *11 (Bankr. E.D.Va.  8/19/11).
191 2011 W.L. 3236107 at *4 (Bankr. W.D. Wis.  7/27/11).
192 453 B.R. 404, 412 (D. Nev.  7/1/11).
193 2011 W.L. 2968350 at *2 (D. Me.  7/21/11).
New York

*Matter of Fitzgerald v. Corps.*\(^{194}\) announced that in New York there is a strong public policy against restitution or recoupment of support payments.

Pennsylvania

The court in *Schwartzmann v. Talking Waters, LLC*\(^{195}\) opined that public policy dictates that a likely loss of millions of dollars recovered by defrauded investors receiving restitution from a ponzi scheme outweighs whatever inconvenience it may cause non liable defendants.

¶ H. Foreclosures

In this era of world economic crisis, which has not escaped the United States, foreclosures of mortgages on homes due to inability of the borrower to make the agreed-to payments, have become a regular activity in the practice of law. Whether a lender is seeking possession of mortgaged premises or a borrower is seeking to retain or regain possession, the order of the court for repossession is entitled a “Writ of Restitution,”\(^ {196}\) or as it is at times called a “General Judgment of Restitution.”\(^ {197}\)

Connecticut

In *Citibank v. Lindland*\(^ {198}\) a case in which the borrower sought to set a foreclosure aside and the return (restitution) of the money he paid on a mortgage to which he objected, the court ruled that once title vests in the successful bidder at the foreclosure sale it lacks jurisdiction to set the foreclosure aside.

Florida

In *Henggeler v. Wells Fargo Bank, N.A.*\(^ {199}\) a borrower who was ruled against in a mortgage foreclosure case in state court, failed to take an appeal, but filed in federal court to set the foreclosure decree aside, and for restitution of the amount he paid the mortgagee - $690,000. The federal court dismissed the case on the basis of the Booker-Feldman doctrine\(^ {200}\) which forbids a federal court from reviewing a prior state court rulings on state law issues.

Ohio

In *Washington Mutual Bank, N.A v. Wallace*\(^ {201}\) Judge Powell wrote about foreclosures as follows: “although the property has been sold and the sale confirmed, a successful appellant will have the remedy of restitution because the proceeds of the sale are still held under the jurisdiction and control of the court.”

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\(^{194}\) 926 N.Y.S. 2d 917, 918 (N.Y. App. Div. 7/19/11).

\(^{195}\) 2011 W.L. 3497762 at *6 (E.D. Pa. 8/9/11).


\(^{197}\) *See* Glover v. Wachovia Equity Servicing, LLC, 2011W.L. at *3 (D. Ore. 7/18/11).

\(^{198}\) 27 A. 3d 423, 434 (Conn. App. 9/27/11).

\(^{199}\) 2011 W.L. 436872 at *2 (M.D. Fla. 9/19/11).


\(^{201}\) 957 N.E. 2d 92, 96 (Ohio App. 8/22/11).
H. Statutory & Treaty Restoration

The courts usually leave up to a legislature’s (federal or state) discretion whether or not to provide the award of restitution damages in a statute. The parties’ judgment as revealed by treaties is also held in high regard.

Arizona

Woods v. BAC Home Loans Servicing LP involved an attempt by borrowers to vacate the sale of their home under a foreclosure, despite that adherence to an Arizona statute requiring the obtaining of an injunction prior to the foreclosure on the ground of unjust enrichment. The plaintiffs asserted that their failure to follow the statute “[i]n the interest of justice and due process, . . . should never preclude a homeowner from acting in his defense within the legal system to save his home and obtain restitution.” Judge G. Murray Snow wrote in response:

Unfortunately for Plaintiffs, that is exactly what the statute does at least insofar as it relates to allowing the Plaintiffs to now contest the sale of their home. (Citation omitted) (holding that we “give effect to the plain meaning of the statute” and that by Plaintiff’s failure to seek an injunction pursuant to Rule 65 before the sale was held, “she waived any defense or objection to the sale.”). This court does not make and cannot alter state law, rather it applies it. The law in question does not provide leeway for self-representing homeowners who claim ignorance of their rights. Thus, no arguments or assertions raised by Defendant, even if true, can be used to contest the non-judicial foreclosure of the subject property. Therefore, to the extent that Plaintiffs asserts any claim to quiet title to the subject property (fourth cause of action) or a declaratory claim to invalidate the sale, (first cause of action) those claims are dismissed.

In State ex rel Horne v. Auto Zone, Inc. the court opined that an Arizona statute, the Arizona retail pricing statute, though not a criminal statute, can result in significant reputational and financial penalties such as restitution and disgorgement.

California

California’s Unfair Competition Law (UCL) specifically authorizes an award of restitution. See Cardenas v. Mc Lane Food Services, Inc. which held that in order to

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202 While the statutes must be researched before filing a Complaint seeking restitution to ascertain whether they authorize the bringing of such a claim, the Rules of Civil Procedure are also of supreme importance. See Rasheed v. D’Antonio, 2011 W.L. 4382097 at *23 (D. Mass. 8/1/11), which stressed that the function of a complaint seeking restitution as well as any relief is to give the adverse party adequate notice of the claim asserted so as to enable the defendant to answer and prepare for trial. To the same effect see Mayer v. Countrywide Home Loans, 647 F. 3d 789, 792, 793 (8th Cir. (Minn.) 8/3/11).


206 2011 WL 2746310 at *2 (D. Ariz. 7/15/11).


209 2011 W.L. 2714430 at *1 (C.D. Cal. 7/8/11).
pursue that statute the moving party must comply with the court’s scheduling orders. In order to recover restitution under a state’s consumer protection Act one must prove that he, she or it, was exposed to allegedly wrongful business practices. Judge Dolly M. Gee in Cross v. Home Loan Mortg. See Fairbanks v. Farmers’ New World Life Ins. Co Corp. observed that “[p]revailing plaintiffs under the UCL ‘are generally limited to injunctive relief and restitution and may not receive damages, much less ... attorney fees.’” In re Apple and AT & T iPad Unlimited Data Plan Litigation Judge Ronald M. Whyte discussed two of California’s statutes authorizing restitution by stating:

The UCL and FAL (the False Advertising Law) limit standing to individuals who suffer losses . . . that are eligible for restitution. . . . restitution ‘requires both that money or property have been lost by [the] plaintiff, on the one hand, and that it have [sic] been acquired by [the] defendant on the other. . . . Where the economic injury . . . involves a loss by plaintiff without any corresponding gain by defendant’ there is an ‘absence of any basis for restitution.’’

Guifu Li v. A Perfect Franchise, Inc. held that Section 17200 of the California Business and Professional Code permits restitutionary and injunctive relief, but not damages. The court further pointed out that equitable relief is not barred automatically simply because Plaintiffs are otherwise granted legal relief. It is conceivable, observed the court, that Plaintiffs could be awarded restitution, and could also require an injunction. For example, should Plaintiffs prove past and continuing wrongful actions taken by Defendants, an injunction may be required to prevent further wrongful behavior. In TFT-LCD (Flat Panel) Antitrust Litigation the plaintiff in a California court brought an action for restitution under the antitrust, consumer protection and unfair competition laws of California and twenty other states. In Senaca v. First Franklin Financial Corp. the plaintiff borrower, brought an action seeking restitution and injunctive relief under the California Business & Professional Code. The court dismissed the claim on the basis that to bring a claim under the UCL, Plaintiff must allege that Defendants engaged in an “unlawful, unfair or fraudulent business act or practice [or] unfair, deceptive, untrue or misleading advertising [or] any act prohibited by the aforementioned Code.” The defendants argued that the plaintiff’s claim was inadequately pled in that it was supported only by “conclusory” allegations and allegations of conduct. The Defendants

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210 Id. at *11.
211 128 Cal. Rptr 3d 888, 904 (Cal. App. 7/13/11).
212 2011 W.L. 2784417 at *2 (C.D.Cal. 7/13/11).
213 2011 W.L. 2847418 at *5 (N.D. Cal. 7/18/11).
214 2011 W.L. 2971046 at *5 (N.D. Cal.7/21/11).
215 The court in Luxpro Corp. v. Apple Inc, 2011 W.L. 3566616 at*7 (N.D.. Cal. 8/12/11), agreed, and clarified that disgorgement is permitted under § 17200 of the Business and Professional Code only to the extent it constitutes restitution, i.e., profits unfairly obtained to the extent they represent money in which the plaintiff has an ownership interest. (citation omitted). (a plaintiff can seek money or property as restitution where such “money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession”) (citation omitted).
216 2011 W.L. 3268649 at *1 (N.D. Cal. 7/28/11).
217 2011 W.L. 3235647 at *4 (S.D. Cal. 7/28/11).
218 Section 17203.
further argued that the Plaintiff has not alleged an entitlement to a form of relief permissible under the UCL— that was restitution or injunctive relief. The court agreed and dismissed the claim. In *Hsu v. UBS Financial Services, Inc.* an action for restitution was brought under the Investment Advisors’ Act Judge William Alsup observed that “such an implied right of action to seek affirmative relief must be deemed subject to a limitations period of some sort.” He applied the two and five year limitations periods of the 2002 Sarbanes-Oxley Act. In *Brecher v. Citigroup Global Markets, Inc.* Judge Anthony J. Battagler, writing about the UCL said that “ineligibility for restitution is not a basis for denying standing under the UCL. That a party may ultimately be unable to prove a right to damages . . . does not demonstrate that it lacks standing to argue for its entitlement to them,” which appears to be a right of questionable value. In *City of Colton v. American Promotional Events, Inc.* a city brought an action under the federal Comprehensive Environmental Response, Compensatory and Liability Act (CERCLA) and the federal Resource Conservation and Recovery Act (RCRA). Judge Wendy K. Henandez explained the latter statute by stating:

a court can issue ‘a mandatory injunction, i.e., one that orders a responsible party to ‘take action’ by attending to the cleanup and proper disposal of toxic waste,’ or a court can issue ‘a prohibitory injunction, i.e., one that ‘restrains' a responsible party from further violating RCRA.’ Id. What is not available, however, is ‘the award of past cleanup costs, whether these are denominated as ‘damages' or ‘equitable restitution.’ (citation omitted (explaining that Congress included certain remedies in CERCLA—such as cost recovery and contribution—but omitted such remedies from RCRA).’

In *Bartolino v. Wachovia Mortg., FSB* the plaintiff brought an action under California Business and Professional Code, but the court dismissed the Complaint for elder abuse, unfair competition, breach of implied covenant of good faith, unfair dealing, negligent misrepresentation and unfair debt collection practices under state law, because those causes have been preempted by federal law. In *Delarosa v. Boiron, Inc.* the court observed that restitution under the California Unfair Competition Law (UCL) is identical to damages under the California Legal Remedies Act (CLRA). In *Joyce v. Ford Motor Co.* the court pointed out that under California’s Song-Beverly Consumer Warranty Act if a

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219 2011 W.L. 3443942 at **3, 4 (N.D. Cal. 8/5/11).
222 2011 W.L. 3475299 at *7 (S.D. Cal. 8/8/11).
223 2011 W.L. 3501833 at *4 (C.D. Cal. 8/9/11).
226 2011 W.L. 3473527 at *7 (N.D. Cal. 8/9/11).
227 Section 17200.
228 275 F.R.D. 582, 589 (C.D. Cal. 8/24/11).
229 131 Cal Rptr. 3d 548, 555, 556 (Cal. App. 9/6/11).
manufacturer is unable to service or repair a new motor vehicle the manufacturer shall promptly either replace the vehicle or promptly make restitution, however the buyer shall be free to elect restitution in lieu of replacement and in no effect shall the buyer be required by the manufacturer to accept a replacement vehicle. *International Longshore & Warehouse Union v. South Gate Ambulatory Surgery Center, LLC.* stands for the proposition that where a defendant agrees to an equitable lien if ruled against, and the plaintiff seeks restitution and the lien, the equitable provisions of ERISA apply.

**Connecticut**

In *All Phase Builders, LLC v. New City Restaurants* Judge Burke gratuitously offered a party the suggestion of a statute in which that party might have a cause of action for restitution. *F.T.C. v. Bronson Partners, LLC* was an action under the Federal Trade Commission Act. The court opined that in such actions the defendant is usually alleged to have violated specific provisions of the Act. Because the basis of such liability is statutory the Commission has no need to rely on common law theories of unjust enrichment.

**District of Columbia**

In *Banner Health v. Sebelius* a case involving the restitution provision of The Medicare Act Judge Coleen Koller-Kotelly voiced her disagreement with the plaintiffs’ application of restitution with the following words:

Plaintiffs first claim that they are entitled to ‘restitution’ and, in a wild leap of logic, contend that the exclusion of restitution-related proceeds from the scope of the statute somehow requires the Secretary to pay them an unspecified amount of restitution. However, by its unambiguous terms, the statute concerns only the Managing Trustee's responsibilities in transferring monies to the Trust Fund—no more and no less. . . . . When read in its context, all the exclusionary language does is limit the scope of the Managing Trustee's transfer responsibilities: whereas the Managing Trustee must transfer the bulk of penalties and damages to the Trust Fund, he need not transfer ‘funds awarded to a relator, for restitution or otherwise authorized by law.’ . . . Meanwhile, the provision is completely silent on the proper use and disposition of monies that are not transferred by the Managing Trustee to the Trust Fund, including those ‘funds awarded to a relator, for restitution or otherwise authorized by law.’ The upshot is this: this provision cannot possibly be read as entitling anyone, let alone Plaintiffs, to a payment of restitution.

*M.C.I. v. Communications Services, Inc.* is a case under the Financial Institution Reform, Recovery and Enforcement Act of 1984. It held that the

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231 2011 W.L. 4080054 at *2 (N.D. Cal. 9/12/11).
232 Specifically § 502(a)(3).
233 2011 W.L. 3483368 at *6 (Conn. Super 7/12/11)
234 654 F. 3d 359, 371 (2d Cir. (Conn.) 8/19/11).
words of the statute “actual direct compensatory damages” entitles the claimant to restitution.

Federal Labor Relations Authority

In *National Treasury Employees Union v. Federal Labor Relations Authority*, the U.S. Court of Appeals, Fourth Circuit, held that even though a federal statute (the Federal Service Labor-Management Relations statute) did not specifically mention “restitution”, a federal employees’ union could seek a form of restitution, albeit in the nature of a monetary award against the government as to which the government had waived immunity.

Florida

*F.T.C. v. 1st Guaranty Mortg. Corp.*, an anti-trust case, involved several statutes, one of which (15 U.S.C. § 45) contained restitution as a specific remedy.

Illinois

In *In re Lewis L*, an Illinois court interpreted a Colorado statute in the following words, written by Judge Robert M. Dow, Jr.:

Under the Colorado Consumer Protection Act (CCPA), the attorney general for the State of Colorado has enforcement authority to bring civil prosecutions for deceptive trade practices. C.R.S. § 6–1–103. The attorney general may obtain an injunction, restitution, and disgorgement. C.R.S. § 6–1–110(1). Moreover, the CCPA authorizes the attorney general to ‘bring a civil action on behalf of the state to seek the imposition of civil penalties.’ C.R.S. § 6–1–112(1). Finally, the attorney general also is entitled to costs and attorney fees for successful enforcement of the CCPA. C.R.S. § 6–1–113(4). As a bankruptcy court in Colorado observed, the restitution or disgorgement awarded to the State of Colorado under the CCPA is payable to a governmental unit and there is no requirement that the state forward the funds to consumers. (citation omitted) (‘A state's interest in enforcing consumer protection laws is such an ‘important’ state interest.’). The court also observed: ‘A primary purpose of the CCPA is to deter and punish deceptive trade practices. Its enforcement also serves to protect the public at large, not just particular victims. Accordingly, Plaintiffs' interests here are sufficiently focused on the State's interest in deterrence, punishment, and protection of the public at large, rather than the victim's desire for compensation such that the restitution obligation operates for the benefit of the State and thus places the restitution order within the scope of § 523(a)(7).’

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240 647 F. 3d 514, 518 n.2 (4th Cir. (FLRA) 7/26/11).
242 2011 W.L. 2650216 at *4 (S.D. Fla. 7/6/11).
243 2011 W.L. 4585573 at **5, 6 (N.D. Ill. 9/30/11).
**Indiana**

Some statutes specifically authorize recovery of restitution. One of the most prominent examples of this type of approving the use of a remedy is the Employee Retirement Income Security Act of 1974 (ERISA). Judge William C. Lee in *Biglands v. Rautheon Employee Retirement Income Security Act of 1974 (ERISA)*, explained the difference between § 1132(a)(1)(B) and § 1132(a)(3) of that Act. He wrote that:

ERISA’s civil enforcement provisions are “carefully integrated,” providing “strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.” . . . Section 1132(a)(1)(B) “specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims.” . . . In contrast, § 1132(a)(3) is a “catchall” for other ERISA violations that acts “as a safety net, offering appropriate equitable relief for injuries caused by violations that Section 1132 does not elsewhere adequately remedy.” Id. The true purpose of § 1132(a)(3) is to authorize individual equitable relief, not where plan administrators have made a mistake on an individual benefits determination, but where ERISA’s other provisions do not afford adequate relief. . . . One of the main rationales justifying this sharp demarcation between (a)(1)(B) claims and (a)(3) claims is that the latter provision calls for “appropriate” equitable relief. This term has been construed to mean that Congress did not provide additional remedies for the same injury where an adequate one was already provided elsewhere in the statute.”

**Kansas**

The court in *F.T.C. v. Affiliate Strategies, Inc.* held that to obtain consumer redress (such as restitution), under the Federal Trade Commission Act against an individual the Federal Trade Commission (FTC), must show that consumers actually relied on the entity’s deceptive acts or practices to their detriment. To raise a presumption of reliance, the FTC must show: (1) the business entity made material misrepresentations likely to deceive consumers, (2) those misrepresentations were widely disseminated, and (3) consumers purchased the entity’s products.

**Maryland**

*Carter v. Huntington Title & Escrow, L.L.C.* established that a legislature may provide for damages and/or restitution instead of revocation of license or suspension from being permitted to pursue one’s chosen trade. The Fourth Federal Circuit in *Mitchell Tracey v. United Gen. Title Ins. Co.* found that Maryland’s Insurance Code gives authority to grant administrative remedies, including restitution, for any overcharge by an

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244 2011 W.L. 2709893 at *3 (N.D. Ind. 7/12/11). See the similar California case, Warehousemens’ Union v. Sharp Surgery Center, Inc., 2011 W.L. 2748644 at *1 (N.D. Cal. 7/13/11).
245 2011 W.L. 3111948, at *27 (D. Kan. 7/26/11)
247 24 A. 3d 722, 740 (Md. 7/19/11).
248 2011 W.L. 3288202 at *3 (4th Cir. (Md.) 8/2/11).
249 § 4-113(b), (d)(1)-(2).
insurance company. In *First American Title Ins. Co. v. Western Sur. Co.*\(^{250}\) the Fourth Circuit held that Virginia’s Insurance Code\(^{251}\) provides for certain penalties, restitution, and other actions to be taken by the licensing authorities against agents who fail to comply with its provisions.

**Massachusetts**

*In re Neurontin Marketing and Sales Practices*\(^{252}\) is an example of a federal District Court in Massachusetts entering a judgment of restitution for fraudulent business practices under California’s Unfair Competition Law (UCL). In *Goodwin v. British Airways PLC*\(^{253}\) Judge Bowler explained the treaty, which the parties agreed governed their case, as follows:

> The Montreal Convention, which ‘unifies and replaces’ the Warsaw Convention, attempts to ‘balance the interests of air carriers and potential plaintiffs.’ It achieves this purpose ‘by limiting air carriers’ potential liability to predictable, non-catastrophic damages and also by preserving a plaintiff’s right to recover its losses up to a certain amount.’ ... The preamble expressly recognizes ‘the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.’

In a later edition of the *Neurontin* case, *In re Neurontin Marketing and Sales Practices*\(^{254}\) the Federal court in awarding $65,418,419 and $95,286,518 in restitution under the California UCL instructed attorneys that a plaintiff may recover restitution against a defendant even though the plaintiff purchased a product\(^{255}\) from a person other than the defendant because the goal of restitution is to restore the status quo as nearly as possible,\(^{256}\) realizing that the award of restitution must not be “arbitrary and capricious,” there must be some support in the record for a restitution award;\(^{257}\) and prejudgment interest is a recoverable component of a UCL action.\(^{258}\) *Kenney v. State Street Corp.*\(^{259}\) confirmed that seeking restitution under ERISA\(^{260}\) requires that the plaintiff allege and prove that it seeks to restore to the plaintiff particular funds or property in the defendant’s possession.

**Minnesota**

In *Capitol Records, Inc. v. Thomas-Rasset*\(^{261}\) Judge Michael J. Davis wrote that:

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\(^{250}\) 2011 W.L. 3288195 at *2 (4th Cir. (Md.) 8/2/11).

\(^{251}\) Section 6.1–2.27.


\(^{253}\) 2011 W.L. 3475420 at *3 (D. Mass. 8/8/11).

\(^{254}\) 2011 W.L. 3852254, (D. Mass. 8/31/11).

\(^{255}\) In this case drugs.

\(^{256}\) *Id.* at *60.

\(^{257}\) *Id.* at *59.

\(^{258}\) Specifically § 502(a)(3).

\(^{259}\) 2011 W.L. 4344452 at *7 (D. Mass. 9/15/11).

\(^{260}\) 2011 W.L. 3211362 at *7 (D. Minn.7/21/11).
[S]tatutory damages for copyright infringement are not only ‘restitution of profit and reparation for injury,’ but also are in the nature of a penalty, designed to discourage wrongful conduct. ‘The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.’

Missouri

Willhite v. Missouri Dept. of Social Sciences\textsuperscript{262} stands for the proposition that if a person sues state officials pursuant to the Civil Rights Act (42 U.S.C. § 1983) there is no qualified immunity to protect the defendants from an award of restitution.

Nevada

Nevada v. Bank of America Corp.\textsuperscript{263} established that a Nevada statute\textsuperscript{264} affords restitution to consumers. State Tax Comm. v. American Home Shield of Nevada, Inc.\textsuperscript{265} provided that one seeking restitution for over payment of taxes under a state statute\textsuperscript{266} (N.A.S 680B.120) must strictly follow the statutory directives. In Kaufman v. Union Life Ins. Co. of America\textsuperscript{267} a disabled doctor sued his insurer under the Employee Retirement Income Security Act of 1974 (E.R.I.S.A.). The insurer counterclaimed for restitution of overpayments of disability payments. The court held that under the applicable statute restitution is not permitted without evidence of particular funds or property in the adverse party’s possession.

New Jersey

In Zanger v. Bank of America, N.A.\textsuperscript{268} Judge Kugler wrote that:

NJ RICO\textsuperscript{269} includes a civil remedies provision that permits a party to sue for restitution and damages . . . ‘To state a claim under NJ RICO’s civil remedies provision, a plaintiff must allege: (1) that the defendant committed an NJ RICO violation; and (2) that the ‘plaintiff's harm was proximately caused by the NJ RICO predicate acts alleged, i.e., that there was a direct relationship between plaintiff's injury and defendant's conduct.’ . . . ‘This requires a showing not only that the offender’s alleged NJ RICO violation was the ‘but for’ cause of the plaintiff's injury, but also that the violation was the proximate cause.’

The court in Allstate Ins. Co. v. Simone\textsuperscript{270} held that the New Jersey Insurance Fraud Prevention Act (I.F.P.A.)\textsuperscript{271} is intended “to confront aggressively the problem of

\textsuperscript{262} 2011 W.L. 2884919 at *15 (W.D. Mo. 7/14/11).
\textsuperscript{263} 2011 W.L. 2633641 at *5 (D. Nev. 7/5/11).
\textsuperscript{264} Section 598.0993.
\textsuperscript{265} 254 P. 3d 601, 606  (Nev. 7/7/11).
\textsuperscript{266} N.A.S 680B.120.
\textsuperscript{267} 2011 W.L. 2923698 at *3 (D. Nev. 7/18/11).
\textsuperscript{268} 2011 W.L. 3501867 at *3 (D. N.J. 8/10/11).
\textsuperscript{269} N.J. Stat § 26:41-1, et seq.
\textsuperscript{270} 2011 W.L. 3611355 at *6 (N.J. Super. A.D 8/19/11).
\textsuperscript{271} N.J.S. 17:33 A 1-30.
“insurance fraud” by “facilitating the detection of insurance fraud, eliminating the occurrence of such fraud through the development of fraud prevention programs, requiring the restitution of fraudulently obtained insurance benefits, and reducing the amount of premium dollars used to pay fraudulent claims.” In Board of Trustees of Plumbers & Pipefitters Local Union No. 9 Welfare Fund v. Drew the court held under ERISA a Fund may seek restitution and that the New Jersey auto insurance and collateral source statutes do not limit the Fund’s ability to seek that remedy.

New York

Bodden v. Kean pointed out that New York’s statute of limitation (CPLR 213) provides that a cause of action to impose a constructive trust is governed by a six-year statute of limitations, which begins to run upon the occurrence of the wrongful act giving rise to a duty of restitution. In In re Digital Music Antitrust Litigation Judge Loretta a. Preska explained restitution under antitrust statutes in the following words:

In contemporary United States common law, restitution based upon unjust enrichment takes at least two forms”; it may be ‘autonomous’ or ‘parasitic.’ . . . Parasitic claims are ‘[w]here the unjust enrichment is based upon a predicate wrong, such as a tort, breach of contract or other wrongful conduct such as an antitrust violation.’ . . . ‘Conversely, unjust enrichment may provide an independent ground for restitution, and this is known as ‘autonomous’ restitution.’ . . . Autonomous claims in an area ‘regulated by an independent body of law’ are more problematic than parasitic claims because the ‘premise for such a claim must be that, even if the defendants’ conduct is blameless under the substantive requirements of federal and state antitrust statutes and state consumer protection statutes, the plaintiffs nevertheless can still obtain restitution.’

In Bergerson v. New York State Office of Mental Health, Central New York Psychiatric Center the U.S. Court of Appeals for the Second Circuit, without mentioning the word “restitution,” held that an award of backpay for a Title VII (Civil Rights Act of 1964), claim includes what the employee himself would have earned had he not been discharged. In re CCT Communications, Inc. stands for the proposition that even though the statute sued upon does not specifically authorize an award of restitution, though a contract between the parties may authorize such an award. In Faber v. Metropolitan Life Ins. Co. Judge B. D. Parker wrote about fiduciaries in the following words: “[o]btaining restitution or disgorgement under ERISA requires that a

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272 2011 W.L. 4152308 at *5 (3d Cir. (N.J.) 9/16/11).
273 Specifically § 502(a)(3).
275 2011 W.L. 2848195 at *14 (S.D. N.Y. 7/18/11).
276 652 F.3d 277 (2d Cir (N.Y.) 7/21/11).
277 It was mentioned, however, in the headnotes to the case.
279 2011 W.L. 3023501 at ** 16, 18 (Bankr. N.Y. 7/22/11).
280 In this case 47 U.S.C. §§ 151 et seq.
281 648 F.3d 98, 102 (2d Cir. (N.Y.) 8/5/11).
282 See infra text accompanying notes 345-352 for consideration of fiduciaries, other than attorneys.
plaintiff satisfy the strictures of constitutional standing by demonstrating individual loss; to wit, that they have suffered an injury-in-fact.” In *New York v. Adamowicz*, the State of New York successfully brought an action pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) and the state common law theories of nuisance and restitution, for the recovery of cleanup costs incurred and to be incurred at an applicable site.

**North Carolina**

In *Cobb v. Penn Life Ins. Co.*, the court said that North Carolina statutes 58-63-15 and 58-3-100 provide for civil penalties or restitution.

**Ohio**

In *Sherman v. Holder*, it was opined by Judge Solomon Oliver, Jr. that a tax refund suit and a private suit for restitution are sufficiently similar for a court to apply the Irwin principle, by which in 1990 the U.S. Supreme Court announced that as a general rule, “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.”

**Oregon**

A federal District Court in California (see *In re TFT-LCD Antitrust Litigation*) interpreted an Oregon antitrust statute as providing equitable relief, and such that is not limited to “restitution and disgorgement.”

**Pennsylvania**

In *Perelman v. Perelman*, the plaintiff brought a suit against the trustees and administrators of an E.R.I.S.A. plan, alleging that they probably will be unable to make payments under the plan. The defendants moved for summary judgment on the ground of plaintiff’s lack of standing. They also moved for a stay of discovery pending the court’s ruling on their summary judgment motion. The court permitted discovery to proceed concerning defendants’ ability to pay, but denied all other discovery until further order of the court. In *Renfro v. Unisys Corp.*, litigation under E.R.I.S.A., the court held that 29 U.S.C. § 1132(a)(3) does not authorize suits against nonfiduciaries charged solely with participating in a fiduciary breach. *Com v. TAP Pharmaceutical Products, Inc.* held that the Pennsylvania Unfair Trade Practices and Consumer Act was designed to provide restitution to consumers, not sophisticated persons.

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283 2011 W.L. 4073894 at *1 (E.D. N.Y. 9/13/11).
285 715 S.E. 2d 541, 551 (N.C. App. 9/6/11)
288 2011 W.L. 2790179 at *2 (N.D. Cal. 7/12/11).
289 646.775(1)(a).
291 2011 W.L. 3630121 at *8 (3d Cir. (Pa.) 8/19/11).
292 See infra text accompanying notes 307-357.
295 See Com, 2011 4056170 at *1, in which for the third time the court considered this case and on Petition For Judgment Non Obstante Verdicto held inter alia that pharmaceutical companies’ marketing to doctors by promoting profitability of the drugs was not protected commercial First Amendment speech.
South Carolina

In Ross Development Corp. v. Fireman's Fund Ins. Co., Judge Margaret B. Seymour quoted prior South Carolina authority with approval holding: “[a] direct action against an insurer cannot be maintained under South Carolina law unless one of two criteria is satisfied: (1) privity of contract between the claimant and the insurer; or (2) an express statutory grant of the right to restitution.” In South Carolina v. LG Display Co., Ltd., the State of South Carolina brought an action pursuant to its Antitrust Act seeking restitution in state court, but subsequently removed to federal court. That court remanded the case to state court, finding that the real parties in interest were the individuals for whom the action was brought. The state being only a nominal party, diversity of citizenship was lacking.

Texas

Brown v. Continental Airlines, Inc. held that 29 U.S.C. § 1056(d)(3)(D)(i), (ERISA) does not allow a retirement plan administrator to seek restitution of benefits that were paid to a plan participant's ex-spouse pursuant to a domestic relations order such as a divorce decree, if the administrator subsequently determines that the domestic relations order is based on a “sham” divorce. The reason for the ruling was that the statute does not authorize an administrator to consider or investigate the subjective intentions or good faith underlying a divorce.

Utah

A California court in Utah v. McKesson Corp. held that the Utah statute of limitations which applies to “all statutes” would apply to a state statute - the Utah False Claims Act (UFCA), which authorizes a claim for restitution.

Virginia

In Helton v. AT & T, Inc. Judge Gerald Bruce Lee noted that even if the redress sought by a beneficiary under ERISA § 502(a)(3) is a classic form of equitable relief, it must be appropriate under the circumstances.” . . . ‘For example, such relief is not “appropriate”

equitable relief where Congress elsewhere provided adequate relief for a beneficiary's injury and there is no need for further equitable relief.’

In Rust v. Electrical Workers’ Local No. 26 it was made clear that the party seeking restitution must attempt to recover “equitable relief” and not simply money damages, if it

297 2011 W.L. 4344074 at *3 (D. S.C. 9/14/11).
298 S.C. Code § 39-3-130.
300 South Carolina v. AU Optronics, 2011 W.L. 4344079 (D. S.C. 9/14/11) was virtually the same case with different parties.
301 647 F.3d 221, 223 (5th Cir. 7/18/11).
302 2011 W.L. 2884922 at *1 (N.D. Cal. 7/19/11).
303 26-20-9.5 et seq.
304 2011 W.L. 3702400 at *7 (E.D. Va. 8/10/11).
is moving under ERISA. Even then there must be a showing that the funds sought to be recovered had, at some time, been in the other party’s possession.

¶ J. Attorneys And Other Fiduciaries

1 Attorneys

Of course attorneys are often fiduciaries, but since many of the cases involving restitution concern attorneys, in this paper, a separate paragraph is devoted to them. At times the attorney is subject to criminal sanctions, as well as restitution. Some courts do not impose restitution unless a concerned person asks for it, but it has been said, per curiam that “[t]he practice of law is not a right, and our Rules of Professional Conduct demand the highest standards of conduct from those in our profession... [The attorney in this case] engaged in offenses that undermined the integrity of the legal profession and indicated a selfish indifference to his professional obligations.” As will be seen, below, the degree of punishment for recalcitrant attorneys differs among the states, but they are generally in agreement that the aggravating factors in all include an indifference, of the attorney to restitution, and a mitigating factor includes the willingness to make restitution. Alaska

In re McGrath, the attorney failed to keep in touch with his client because of a move from Alaska to Florida, but voluntarily paid the client restitution of sums she had paid him, but he did not earn. He was suspended from the practice of law in Alaska for three years and ordered to make mandatory quarterly reports to the Bar on law office management and other requirements for two years after reinstatement.

Connecticut

The court in Office of Chief Disciplinary Counsel v. Silverstein found that the attorney did not intend to defraud the Public Defender’s Office, though the complaint filed against him did predate his prior disciplinary problems. He admitted that he failed to supervise a subordinate nine years past and took responsibility for said failure. He apologized to the court for his actions. He has paid restitution as determined by the Public Defenders Office. His punishment was simply a reprimand. The court in Peck v. Glucksman revealed that the Connecticut statute involving attorney discipline includes the following sanctions: reprimand; restitution; assessment of costs; an order that the

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306 Specifically § 1132(a)(3).
307 Not only individual practicing attorneys are affected by claims for restitution, but law firms may also be held so accountable for such claims. See South Shore Neurological Associates, P.C. v. Ruskin Moscou Faltichek, 928 N.Y. S. 2d 449, 454 (N.Y. Sup. Ct. 7/12/11).
308 Disciplinary Proceedings Against Schoenecker, 2011 W.L. 2735022 at *2 (Wis. 7/15/11).
309 Id. at *5.
311 As is health and related problems. See In re Dahle, 713 S.E. 2d 617, 620 (S.C. 7/25/11).
312 2011 W.L. 3307474 at *1 passim (Ak. 7/29/11).
313 Though not touched upon by the court, since that attorney had left Alaska, his being required to keep in touch with the Alaska Bar was probably an intended inconvenience for him, taken into consideration by the Alaska Bar and the court.
315 2011 W.L. 4953898 at *2 (Conn. Super. 9/30/11).
respondent return the client's file; and various sanctions associated with attending legal education, resolving fee disputes, monitoring the respondent's office accounting practices, and undertaking treatment for health issues. Notice of a reprimand shall be published in the Connecticut Law Journal.

Florida

In The Florida Bar v. Letwin\(^{316}\), the attorney sent over 900 letters to prospective clients soliciting their retaining her to represent them in a class action. The letters contained numerous inaccuracies, including, but not limited to a statement that unless they retained her they would be unable to protect their rights. The court ordered restitution in the amount of $1,600 to one client and a suspension of one year.

Georgia

In In re Evans\(^{317}\) “indifference” of an attorney making restitution to his client was noted to be cause for disbarment. Mitigating factors have been found to be: Absence of a prior disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; timely good faith efforts to make restitution or to rectify consequences of misconduct; full and free disclosure to a disciplinary board or cooperative attitude toward proceedings; inexperience in the practice of law; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions; remorse; and finally, remoteness of prior offenses.\(^{318}\)

Indiana

In In re Baggerly\(^{319}\) the attorney, after receiving a check made payable to the client lost possession of it and for 10 or 11 years ignored the client’s demand for payment, although ultimately repaying the client restitution, plus additional sums. The court, accepting consent punishment suspended the attorney for 30 days.

Kansas

In re Johanning,\(^{320}\) involved an attorney who represented a client charged with a crime, and being ordered to pay $1,300 restitution to the person he harmed. The client had given the money to his attorney in cash. Instead of depositing that money in his trust account the attorney claimed that he placed it in an envelope in the client’s file, causing the client to be two days late in delivering the restitution money to the court. The attorney received an indefinite suspension from the practice of law.

Kentucky

In Kentucky Bar Ass’n v. Mitchell,\(^{321}\) a lawyer handled the probate of a $150,000 estate for which he charged his client $37,922, without ever having reduced his fee arrangement to writing or having kept his client informed of the progress of his work. The court disbarred him and required restitution of $17,500, representing that portion of the fee paid to the lawyer by the client, but not having been earned.

\(^{316}\) 70 So. 3d 578, 580 (Fla. 9/1/11).
\(^{317}\) 2011 W.L. 4008327 at *1 (Ga. 9/12/11).
\(^{318}\) Attorney Grievance Com’n of Maryland v. Tauber 26 A.3d 967, 973, 974 (Md. 8/19/11). The same court, however, the same day, found that the mitigating factors will not save an attorney from disbarment where the offenses were so egregious as to warrant that sanction. See Attorney Grievous Comm. of Md. v. Kieziner, 2011 W.L. 3629181 at *19 (Md. 8/19/11).
\(^{319}\) 954 N.E. 2d 447, 447 passim (Ind. 9/30/11).
\(^{320}\) 254 P.3d 545, 555 (Kan. 7/15/11).
\(^{321}\) 348 S.W.3d 764, 764 , passim (Ky. 8/25/11).
Louisiana

In re Gaston\textsuperscript{322} established that an attorney’s “indifference” to making restitution to his client is an aggravating factor in the extent of his punishment. In re Spears\textsuperscript{323} involved an attorney who had difficulty keeping his trust account accurate, so that many checks were returned for insufficient funds. Due to a mitigating factor of timely good faith efforts to make restitution to his clients he was given a suspension of one year and a day, after completion of a two year period of supervised probation. In In re Bairnfather\textsuperscript{324} the court accepted consent discipline, which included restitution to the client.

Maryland

Attorney Grievance Com’n of Maryland v. Tauber\textsuperscript{325} found that mitigating factors will save an attorney from being disbarred. The same court, however, the same day, found that the mitigating factors will not save an attorney from disbarment where the offenses were so egregious as to warrant that sanction. See Attorney Grievous Com’n of Md. v. Kieziner.\textsuperscript{326}

Massachusetts

In re Scola,\textsuperscript{327} involved an attorney who overdrew his trust account, accidentally due to errors involved in not keeping tract of his two client accounts. Though he voluntarily made restitution he was given a 6 months’ suspension

Nevada

In re Discipline of Anderson,\textsuperscript{328} was a divorce case in which the attorney filed a lis pendens, claiming that his client had an interest in a house. When he retained a $20,000 deposit made by a title company, even after the court dismissed his case and dissolved the lis pendens, the court ordered him by way of restitution to the title company to satisfy the judgment obtained by it.

New York

Anders v, Verizon Services Cor.\textsuperscript{329} established that an offer, by the attorney, of substituted counsel does not excuse restitution of the unearned portion of the fee after being discharged by the client. In re Rockind\textsuperscript{330} involved an attorney who neglected post appellate proceedings. He was publicly reprimanded and ordered to pay restitution to his client. In re Hill\textsuperscript{331} in which even though the attorney paid the governmental sums he withheld from his employee, he was disbarred. The court found that he retained the sum, and should have timely made restitution to the government. In re Munson-Kinsey\textsuperscript{332} involved an attorney who represented a client in the purchase of 4 parcels of property after he had been suspended from the practice of law. He tendered his resignation which

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65 So.3d 1239 *12 (La. 7/1/11).
72 So. 3d 819, 822 (La. 9/2/11).
2011 W.L. 4357311 at **1 (La. 9/2/11).
26 A.3d 967, 973, 74 (Md., 8/19/11).
2011 W.L. 3629181 at *19 (Md. 8/19/11).
950 N.E. 2d 389, 392 (Mass. 7/15/11).
2011 W.L. 2685601 at *2 (Nev. 7/11/11).
2011 W.L. 2671532 at *3 (S.D. N.Y. 7/6/11).
\end{flushright}
the court accepted, requiring him to pay restitution to the Lawyers’ Fund. In *In re Przygoda*, the court made it clear that in accepting a lawyer’s voluntary resignation from the bar that “restitution” concerned sums repaid to clients, whereas funds paid to a fund for the protection of clients was “reimbursement.”

**Minnesota**

While acknowledging that restitution is a mitigating factor in attorney discipline the court in *In re Disciplinary Actions Against Fairbain* held that misappropriation of clients’ funds warrants suspension for 18 months plus supervision after reinstatement.

**Ohio**

In *Northwest Ohio Bar Ass’n v. Archer* an attorney withheld from his secretary’s salary certain amounts of money for government withholding tax purposes, but failed to turn the money over to the government. His having at a later time paid the money, in restitution, to the government, was considered a mitigating factor, in the Bar’s suspending him for only one year. In *Columbus Bar Ass’n v. Troxell* the court held that the unnecessary withholding of $15,000 for medicare expenses, after a contingent fee case was settled, warranted an indefinite suspension from the practice of law. In *Toledo Bar Assn. v. Scott* the court found the following aggravating factors: (1) the submission of false evidence and false statements during the disciplinary process (2) submission of false evidence and statements implied a dishonest or selfish motive. The court found the following mitigating factors: (1) no prior disciplinary record (2) the attorney acknowledged his wrongful conduct. (3) a timely good-faith effort to make restitution and (4) a cooperative attitude after acknowledging the fabricated record. The court suspended the attorney from practicing law in Ohio for two years. In *Disciplinary Counsel v. Dundon* the attorney took a $10,000 retainer to handle an estate, but by the time the client had secured new counsel he had accomplished only half his agreed work. He refused to refund his unearned portion of the fee, but later restituted it. The court reprimanded him publicly. In *Disciplinary Counsel v. Cantrell* the Court took the mitigating factors (including restitution), into account in indefinitely suspending the attorney, instead of disbaring him. In *Lake City Bar Ass’n v. Troy* the Ohio Supreme Court held that an indefinite suspension, with restitution to the clients, was appropriate sanction for attorney's misconduct in neglecting two divorce matters in which he had been retained, making false statements to the client, failing to maintain professional liability insurance with which to pay a malpractice judgment against him, and failing to cooperate in disciplinary investigation.

**Oklahoma**

In *re Reinstatement of Whitworth* pointed out that the Oklahoma Rules of Reinstatement to the Bar specifically provides that restitution may be considered when an attorney is applying for reinstatement.

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334 2011 W.L. 4056183 at **10, 11 (Minn. 9/14/11).
335 951 N.E. 2d 78, 80 (Ohio 7/5/11).
336 950 N.E. 2d 555, 557 (Ohio 7/6/11).
337 2011 W.L. 3760002 at *1 passim (Ohio,8/25/11).
338 2011 W.L. 3862427 at *1 passim (Ohio 8/30/11).
339 2011 W.L. 4107433 at *2 (Ohio 9/14/11).
340 955 N.E. 2d 1007, 1008 (Ohio 9/29/11).
341 261 P. 3d 1173, 1174 (Okla. 9/20/11).
South Carolina
In *In re Pennington*\(^{342}\) the restitution to be paid was specified to be paid to the client “and/or to third parties.” In *In re Walker*\(^{343}\) the attorney was disbarred, with no reinstatement until he had completed his prison term and paid restitution.

Wisconsin
In *In re Disciplinary Proceedings v. Mutschler*\(^{344}\) it was brought out that at times the court will order that restitution be paid to a Fund for Client Protection, rather than to clients, who have been reimbursed by the Fund.

2. Other Fiduciaries

California
In *Kauai Scuba Center, Inc. v. PADI Americas, Inc.*\(^{345}\) Judge David O. Carter, discussing restitution, wrote that: “in order to plead a cause of action for breach of fiduciary duty, there must be shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. . . . A lack of any of these elements is fatal.”

Illinois
In *Tipsword v. I.F.D.A. Services, Inc.*\(^{346}\) District Judge Murphy wrote that:

> [i]t is a fundamental rule in the law of restitution that ‘[a] third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary.’ Recognition of this salutary principle has resulted in the imposition of constructive trusts on benefits obtained by third persons through their knowledge of or involvement in a [trustee's] breach of fiduciary duty.

Massachusetts
*McGrath v. Braney*\(^{347}\) stood for the proposition that a fiduciary’s acts may violate principles of equity and morality for which recovery may be received by the plaintiff. This, however, is not technically unjust enrichment because “the crux of an unjust enrichment claim is unjust enrichment of one party and unjust enrichment to the other party.”

New York
In *Faber v. Metropolitan Life Ins. Co.*\(^{348}\) Judge B. D. Parker wrote about fiduciaries in the following words:

\(^{342}\) 713 S.E. 2d 261, 263 (S.C. 7/11/11).
\(^{343}\) 713 S.E. 2d 264, 267 (S.C. 7/11/11).
\(^{344}\) 804 N.W. 2d 680, 682 (Wis. 7/19/11).
\(^{345}\) 2011 W.L. 2711177 at *6 (C.D. Cal. 7/13/11).
\(^{347}\) 2011 W.L. 4424068 at *4 (Mass. Super. 7/12/11).
\(^{348}\) 648 F.3d 98, 102 (2d Cir. (N.Y.) (8/5/11).
a plaintiff “may have Article III standing to obtain injunctive relief related
to ERISA’s ... fiduciary duty requirements without a showing of individual
harm,” whereas “[o]btaining restitution or disgorgement under ERISA
requires that a plaintiff satisfy the strictures of constitutional standing by
demonstrating individual loss; to wit, that they have suffered an injury-in-
fact.” . . . “[The] fiduciary duties contained in ERISA create in [plaintiff]
certain rights, including the right[ ] . . . to have [defendant] act in a
fiduciary capacity. Thus, [plaintiff] need not demonstrate actual harm in
order to have standing to seek injunctive relief requiring that [defendant]
satisfy its statutorily-created . . . fiduciary responsibilities.

In In re Beacon Associates Litigation Judge Sand wrote that: “a fiduciary is liable
for the total aggregate loss of all breaches of trust and may reduce liability for the net loss
of multiple breaches only when such multiple breaches are so related that they do not
constitute separate and distinct breaches. In Soley v. Wasserman Judge Frank Maas
wrote that “when the remedy sought is restitution so that the fiduciary is not unjustly
enriched by his ill-gotten gain, the plaintiff need only show that the breach was a
’substantial factor’ contributing to the plaintiff’s injury.” That same statement was quoted

Pennsylvania

In Renfro v. Unisys Corp. litigation under E.R.I.S.A. the court held that 29 U.S.C. §
1132(a)(3) does not authorize suits against nonfiduciaries charged solely with
participating in a fiduciary breach.

¶ K. Class Actions

Restitution can be granted in class actions.

Califoirnia

In Brown v. Ralph’s Grocery Co. the plaintiff brought an action under the
California Attorney Generals Act (PAGA), seeking restitution against her employer. The
court ruled that while restitution is the primary object of most class actions the plaintiff’s
theory of her action was incorrect. The PAGA was not intended to permit claims for
restitution, but to deputize citizens as private attorneys to enforce the labor code. In
Saincome v. Truly Nolen of America, Inc. a case in which a former employee sued his
former employer seeking damages and restitution as a class action, and the employer
denied that the employee was entitled to bring a class action for such relief on the ground
that he had signed a pre-employment contract agreeing to arbitration. The court referring

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352 2011 W.L. 3630121 at *8 (3d Cir. (Pa.) 8/19/11).
354 128 Cal Rptr. 3d 854, 860 (Cal. App. 7/12/11).
to a U.S. Supreme Court case said that a party “may not be compelled under the FAA [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” In other words, under this rule, parties must affirmatively authorize class arbitration in order for such a procedure to be applied. In *O’Shea v. Epson America, Inc.*\(^{357}\) an action seeking class action for substandard printers in which the alleged misrepresentation justified restitution under Federal Rule of Civil Procedure 23(b)(3),\(^{358}\) the court held that the plaintiff failed to show that “all persons in the United States who purchased Epson NX series of printer during the class period suffered an injury which was caused by Epson’s alleged misrepresentation. And which is likely to be redressed by a decision in plaintiff’s favor.” The class certification, therefore, was denied.

**Florida**

*Tire Kingdom, Inc. v. Dishkin*\(^{359}\) authorized the prayer for both “damages and restitution” in a class action.

**Hawai‘i**

In *Donkerbrook v. Title Guar. Escrow Services, Inc.*\(^{360}\) where the plaintiff in a class action requested multiple relief, e.g., “all unpaid wages and other damages; injunctive relief; any available penalties, including liquidated damages, threefold damages, punitive damages, and restitution; any statutory penalties, interest, and attorneys’ fees and costs; and any other appropriate relief,” the court opined that a settlement amount must be “fair, reasonable and adequate” as to all parties in the class.

**Louisiana**

In *Abene v. Jaybar, LLC*\(^{361}\) investors brought an action against advertisers and sellers of securities, asserting claims arising out of the sale of allegedly fraudulent securities. Another investor intervened as a plaintiff, and asserted claims for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA). The intervener’s attempt to allege a class action was dismissed, because a federal statute had amended RICO so as to emasculate the intervener’s claim. The LUTPA Claim was dismissed on a limitation ground. The court took the position that fees allowed in class actions are restitutionary.\(^{362}\)

**Massachusetts**

*Zimmerman v. Epstein*\(^{363}\) established that before a class action for restitution may be maintained the representative party must satisfy the class requirements.

**Texas**

In *Morrow v. Washington*\(^{364}\) motorists who had individually been stopped by city police, arrested or detained, had their vehicles searched, and had property confiscated, under a city drug interdiction program, which allegedly targeted drivers and passengers who were, or appeared to be, members of racial or ethnic minority groups. The purpose of the procedure was allegedly to enrich the city and its officials by seizing and

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\(^{357}\) 2011 W.L. 4352458 at *1¶ 66 (C.D. Cal. 9/19/11).

\(^{358}\) Federal Rule of Civil Procedure 23 regulates class actions.

\(^{359}\) 2011 W.L. 3311742 at *6 (Fla. 3d DCA 7/6/11).

\(^{360}\) 2011 W.L. 3649539 at *12 (D. Haw. 9/18/11).

\(^{361}\) 2011 W.L. 2847436 at *7 (E.D. La. 7/14/11).

\(^{362}\) In re Voxx Products Liability Litigation 760 F. Supp. 2d 640, 649 (E.D. La. 2010), clearly so noted.

\(^{363}\) 2011 W.L. 4390053 at *85 (1st Cir. (Mass.) 9/22/11).

\(^{364}\) 2011 W.L. 3847985 at *32 (E.D. Tex. 8/29/11)
converting cash and other valuable personal property during allegedly illegal traffic stops. A putative class action was filed against city officials claiming violations of the Fourth and Fourteenth Amendments. Plaintiffs moved for class certification, claims for monetary relief, including restitution. The court denied the certification because under Fed. Rule of Procedure 23(b)(2) the defendant’s acts must be uniformly directed against all plaintiffs, not simply diverse actions in various circumstances. In Stott v. Capital Financial Services, Inc. the Representative Plaintiff asserted that Capital Financial had failed to perform proper due diligence on certain securities, i.e. they sold the securities that contained material misrepresentations, hence breached its duties to investors in selling the securities to them. The investors sought restitution of the lost funds on behalf of a class of investors who bought Provident Securities through the defendant Capital Financial. The court certified the class.

¶ L. Unjust Enrichment.

Unjust Enrichment is a cause of action which must be established in a case before restitution can be ordered. The various jurisdictions in the country are not in harmony as to exactly what is “unjust enrichment.” Generally it is considered to be of equitable nature. The best manner in which to know more about it is to take a look at how Black’s Law Dictionary defines it and review the various cases which have dealt with it.

Black’s Law Dictionary defines unjust enrichment as follows: unjust enrichment. (1897) 1. The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected. . . . 2. A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense. 3. The area of law dealing with unjustifiable benefits of this kind. The First Restatement said that “one is unjustly enriched if his retention of a benefit would be unjust.”

California

In Thuyduong Nguryen v. Saxon Mortg. Servicing, Inc. Judge Anthony W. Ishii proclaimed that unjust enrichment was not a cause of action or even a remedy, but rather a principle underlying various legal doctrines and remedies, with which we disagree. In Lyons v. J.P. Morgan Chase Bank it was opined that some California courts take the position that it is not a cause of action or even a remedy, but a general principle underlying various legal doctrines or remedies; other courts say it is a cause of action with elements of receipt of a benefit and unjust retention at the expense of another. This U.S. District Court took no position in the matter as it found that the plaintiff did not state a claim. In Frison v. Accredited Home Lenders, Inc. a U.S. District Court took the position that it was not a cause of action, just a restitution claim. In Kauai Scuba Center,

365 2011 W.L. 4047666, at *29 (N.D. Tex. 9/12/11).
367 See §1 Comment c, quoted in Matador Holdings, Inc. v. Hopo Realty, 2011 W.L. 3375658 at *6 (Ala. 8/5/11).
368 2011 W.L. 2636261 at *4 (E.D. Cal. 7/5/11).
369 2011 W.L. 2709907 at **5, 6 (N.D. Cal. 7/12/11).
370 2011 W.L. 2729241 at *5 (S.D. Cal 7/13/11).
Inc. v. PADI Americas, Inc. Judge David A. Carter wrote that in order to establish a case in money had and received one must

allege unjust enrichment of the wrongdoer, and in order for plaintiff to recover in such action she must show that a definite sum, to which she is justly entitled, has been received by defendant. A plaintiff must plead that the defendant is indebted to the plaintiff in a certain sum for money had and received by the defendant for the use of the plaintiff.

In Wine Group, LLC v. USA California Fengshiya Wine Group, Ltd., the Plaintiff claiming that Defendant infringed and counterfeited its trademarks and trade dress by purchasing, marketing, and selling California wine through its subsidiary in China based its claim on a variety of claims, e.g. trademark infringement, trade dress infringement, trademark counterfeiting, trade name infringement, and restitution based on unjust enrichment. In Matracia v. J.P. Morgan Chase Bank, N.A., a U.S. District Judge stressed the fact that one person is enriched if that person receives a benefit at another’s expense. In Ramirez v. Right-Away Mortg., Inc., U.S. District Judge William Alsop opined that “unjust enrichment is not a theory of recovery but instead is a result thereof.” In McFadden v. Deutsche Bank Nat. Trust Co., it was emphasized that the benefit conferred on the defendant must be at the plaintiff’s expense. In Sharma v. Wachovia, Judge Howard R. Lloyd wrote that: “Courts in this state and district diverge on whether unjust enrichment functions as an independent claim or is instead an effect that must be tethered to a distinct legal theory to warrant relief. . . . Under both views, the effect of unjust enrichment is remedied with some form of restitution.” In Dorado v. Shea Homes Ltd. Partnership Judge Oliver W. Wanger wrote that

‘[U]njust enrichment is not a cause of action[,] rather it is a general principle underlying various doctrines and remedies[,]’; T[here is no cause of action in California for unjust enrichment[,]’[t]he phrase ‘Unjust Enrichment’ does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.”

In In re TFT-LCD (Flat Panel) Antitrust Litigation Judge Susan Illston opined that:

Unjust enrichment is an equitable remedy, and thus by its very nature is a flexible doctrine. Restatement (Third), Restitution, § 1, cmt. a (noting the
‘inherent flexibility of the concept of unjust enrichment’). As a cause of action based in equity, ‘the requirements of proof of unjust enrichment are neither technical nor complicated.’ . . . The plaintiff need only allege and show that the defendant holds money which in equity and good conscience belongs to the plaintiff . . . In addition, defendants’ focus on the lack of a ‘direct relation between plaintiffs and defendants in [sic] misplaced. Rather than looking at the relationship between the parties, courts typically focus on the relation between the plaintiffs’ injury and the defendants’ conduct.

**Colorado**

In *Zimmer Spine, Inc. v. E.B.I., LLC*[^380^] U.S. District Judge Lewis T. Babcock opined that “[t]o state a claim for unjust enrichment under Colorado law, a plaintiff must allege that (1) at their expense, (2) defendants received a benefit, (3) under circumstances that would make it unjust for them not to make restitution”

**Connecticut**

*Deutsche Bank Nat. Trust Co. v. Balizaire*,[^381^] established that it is the court which determines whether the defendant’s treatment of the plaintiff was unfair, and the jury determines whether the defendant was benefited by that treatment. In *Generation Partners, L.P. v. Mandell*[^382^] Judge Alfred J. Jennings, Jr. wrote that

[u]njust enrichment applies wherever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract ... A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another ... With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard ... Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy ... Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefitted, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment.”

*Paradigm Contract Management Co., Inc. v. Paul Fire & Marine Ins. Co.*[^383^] established that because unjust enrichment is “grounded in restitution” the amount of damages recoverable is the amount of benefit retained by the defendant, not the amount of loss suffered by the plaintiff. Breach of contract damages are not recoverable.

[^380^]: 2011 W.L. 4089535 at *9 (D. Colo. 8/14/11).
[^381^]: 2011 W.L. 3586487 at *40 (Conn. Super. 7/13/11).
[^382^]: 2011 W.L. 3671966 (Conn. Super. 7/22/11).
[^383^]: 2011 W.L. 4348132 at *6 (D. Conn. 9/15/11).
District of Columbia

In the *United States v. Honeywell Intern., Inc.*\(^{384}\) case Judge Richard W. Roberts wrote that “[u]njust enrichment must be determined by the nature of the dealings between the recipient of the benefit and the party seeking restitution, and those dealings will necessarily vary from one case to the next.” Judge Richard W. Roberts in *United States v. Toyobo Co., Ltd.*\(^{385}\) said that “[unjust enrichment must be determined by the nature of the dealings between the recipient of the benefit and the party seeking restitution, and those dealings will necessarily vary from one case to the next.”

Florida

In *Fito v. Attorney’s Title Ins. Fund, Inc.*\(^{386}\) Judge Emas wrote that “[t]he elements of a cause of action for unjust enrichment are: (1) plaintiff conferred a benefit upon the defendant, who has knowledge of that benefit; (2) defendant accepts and retains the conferred benefit; and (3) under the circumstances, it would be inequitable for the defendant to retain the benefit without paying for it. He added: “At the core of the law of restitution and unjust enrichment is the principle that a party who has been unjustly enriched at the expense of another is required to make restitution to the other.” Judge Cecilia M. Altonaga in *Williams v. Wells Fargo Bank, N.A.*\(^{387}\) opined that

[t]o state a claim for unjust enrichment, a plaintiff must show: ‘(1) plaintiff has conferred [a] benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff.’ When a defendant has given adequate consideration for the benefit conferred, a claim of unjust enrichment fails.

Judge Atonaga added that: “just because the benefit conferred by Plaintiffs on Defendants did not pass directly from Plaintiffs to Defendants—but instead passed through a third party—does not preclude an unjust-enrichment claim.\(^{388}\) Indeed to hold otherwise would be to undermine the equitable purpose of unjust enrichment claims.”\(^{389}\)

Illinois

In *Stone v. Washington Mut. Bank*\(^{390}\) the plaintiff sued for unjust enrichment under 42 U.S.C. § 1983. Judge Matthew F. Kennelly found the underlying claim deficient, prompting him to say that: “[t]he underlying claim may be one for damages or restitution, but “[w]hen an underlying claim . . . is deficient, a claim for unjust enrichment should also be dismissed.”

Indiana

Judge Barnes in *Wilson v. Sisters of St. Frances, Inc.*\(^{391}\) wrote about unjust enrichment in the following words:

\(^{386}\) 2011 W.L. 3477019 at *2 (Fla. D.C.A. 8/10/11).
\(^{387}\) 2011 W.L. 4368980 at *8 (S.D. Fla. 9/11/11).
\(^{388}\) See supra text between notes 76-77, concerning this principle.
\(^{390}\) 2011 W.L. 3678838 at *12 (N.D. Ill. 8/19/11).
\(^{391}\) 952 N.E. 2d 793, 793 (Ind. 7/27/11).
A claim for unjust enrichment ‘is a legal fiction invented by the common law courts in order to permit a recovery ... where the circumstances are such that under the law of natural and immutable justice there should be a recovery....’ . . . ‘A person who has been unjustly enriched at the expense of another is required to make restitution to the other.’ To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant’s retention of the benefit without payment would be unjust.

Lady DI’S, Inc. v. Enhancement Services Billing\(^{392}\) stands for the proposition, not exactly accurate, that unjust enrichment is also referred to as “quantum meruit,” “contract implied at law,” “constructive contract,” or “quasi contract.” That under the law of “natural and immutable justice” there should be a recovery. In Hughes v. Chattem, Inc.\(^{393}\) Judge Sarah Evans Parker wrote “where it is not obvious that “natural and immutable justice” dictates restitution, unjust enrichment is not available.

Maryland

In Stewart Title Guar. Co. v. Sanford Title Services, LLC\(^{394}\) Judge Ellen Lipton Hollander wrote that:

the unjust enrichment variety of equitable lien is imposed for reasons that, in principle, are the same as those that warrant the constructive trust, and it works in substantially the same way... . . The difference . . . is that restitution is measured differently. Where the constructive trust gives a complete title to the plaintiff, the equitable lien [of the unjust enrichment restitution] only gives him a security interest in the property, which he can then use to satisfy a money claim.

Decohen v. Abbasi\(^{395}\) stands for the proposition that unjust enrichment may not be brought where an express contract existed between the parties. In Ahmad v. Eastpines Tennessee Apts.\(^{396}\) Judge Woodward wrote that “an unjust enrichment claim that seeks the remedy of restitution for money is a claim at law.”

Massachusetts

In Katz v. Pershing\(^ {397}\) U.S. District Court Judge Stern wrote that: To prove unjust enrichment, a plaintiff must show: “(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention of the benefit by the defendant under circumstances which make

\(^{392}\) 2011 W.L. 3629727 at *6 (7th Cir. (Ind.) 8/16/11).

\(^{393}\) 2011 W.L. 3877120 at *11 (S.D. Ind. 8/31/11).

\(^{394}\) 2011 W.L. 2681196 at *4 (D. Md. 7/8/11).

\(^{395}\) 2011 W.L. 3438625 at *5 n.10 (D. Md. 7/25/11).

\(^{396}\) 28 A. 3d 1, 9 (Md. App. 9/1/11).

such acceptance or retention inequitable.” In *Foley v. Yacht Management Group, Inc.* Judge J. Casper opined that:

> [u]nder the doctrine of unjust enrichment, a plaintiff seeks restitution of a benefit conferred on another whose retention of the benefit at plaintiff’s expense would be unconscionable.” . . . A contractual relationship need not be present to recover for unjust enrichment. . . . It “is an equitable remedy, and ‘it is a basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law.

**Missouri**

In *Emerson Electric Co. v. March & McKlenan* the rather unusual hyphenated term “disgorgement-restitution” was used, stating that it is a remedy to a claim of unjust enrichment. In *Garrett v. Cssity* Judge E. Richard Webber said that “there is no requirement for an unjust enrichment claim that the plaintiff conferred a benefit directly on the defendant.” He added that a claim for unjust enrichment requires:

1. that the defendant was enriched by the receipt of a benefit;
2. that the enrichment was at the expense of the plaintiff; and
3. that it would be unjust to allow the defendant to retain the benefit. (citation omitted) If the plaintiff has entered into an express contract for the very subject matter for which he seeks recovery, unjust enrichment does not apply, for the plaintiff’s rights are limited to the express terms of the contract.

**Mississippi**

In *In re B.C. Rogers Poultry, Inc.* is a bankruptcy case in which Bankruptcy Judge Edward Ellington wrote that: “[t]he doctrine of unjust enrichment is based on a promise, which is implied at law, that one will pay a person what he is entitled to according to equity and good conscience.”

**Nebraska**

*Paltani v. Limited Fill Corp.* established that the issue of whether a court’s finding of unjust enrichment is a question of fact.

**Nevada**

In *Ahmed v. Deutsche Bank, N.A.* apparently the plaintiff ignored the rule that unjust enrichment cannot stand when, there are express, written contracts extant between the parties, because the court, per Judge Gloria M. Navarro, stated the following:

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399 2011 W.L. 3890550 at *1 n.3 (Mo. App. 9/6/11).
400 3235633 at *9 (E.D. Mo. 7/28/11).
401 2011 W.L. 3664445 at *35 (Bankr. S.D. Miss. 8/19/11).
a claim for unjust enrichment cannot stand when, as here, there are express, written contracts—such as the deed of trust and promissory note—that govern the relationships between the parties. . . . Plaintiff entered into an express contract with Washington Mutual to pay certain amounts of money per month. It cannot now try to recoup the money it paid to Washington Mutual pursuant to the contract via an unjust enrichment cause of action.

Judge Robert C. Jones wrote in *Roeder v. Atlantic Richfield Co.*[^roeder] that in Nevada, the elements of an unjust enrichment claim or “quasi contract” are: “(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the defendant; and (3) acceptance and retention of the benefit by the defendant (4) in circumstances where it would be inequitable to retain the benefit without payment.” He added that an indirect benefit will support an unjust enrichment claim, and that it is an equitable substitute for a contract, and an action for unjust enrichment therefore cannot lie where there is an express written agreement governing the relationship at issue. *Snider v. Lithia Real Estate, Inc.*[^snider] proclaimed that unjust enrichment is an equitable remedy which will not be enforced if a contract existed between the parties.

**New Jersey**

In *Hughes v. Panasonic Consumer Electronics, Inc.*[^hughes] a U.S. District Court opined that there must be a direct connection between the parties or there must be a mistake on the part of the person conferring the benefit.

**New York**

*Georgia Malone & Co., Inc. v. Ralph Rieder*[^malone] held that unjust enrichment is a quasi contract theory of recovery. While privity is not required, it must be established that there was a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff’s part. In *Di Maria v. Goor*[^di-maria] District Judge John Gleason wrote that to recover under a theory of quasi contract, a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff.

In *Learning Annex, LLC v. Rich Global, LLC*[^learning-annex] District Judge Shira A. Scheindlin wrote that a plaintiff must show unjust enrichment before it can recover under quantum meruit, and that quantum meruit plus unjust enrichment together form a single quasi contract claim. The same judge in *Buckman v. Calyon Securities(U.S.A.), Inc.*[^buckman] stated the elements of unjust enrichment in the following words: “A claimant seeking relief

[^snider]: 2011 W.L. 4062375 at *1 (D. Nev. 9/12/11).
[^hughes]: 2011 W.L. 2976839 at *27 (D. N.J. 7/21/11).
[^learning-annex]: 2011 W.L. 3586138 at **1, 2 (S.D. N.Y. 8/12/11).
[^buckman]: 2011 W.L. 4153429 at *7 (S.D. N.Y. 9/13/11).
under a theory of unjust enrichment in New York must demonstrate (1) that the defendant benefited; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution.” The judge added that:

New York courts have refused to impose liability on a quasi-contractual theory, such as unjust enrichment, where the “plaintiff had no contractual right to a bonus and was clearly apprised of, and acknowledged in writing that he understood, the company policy that the payment of bonus compensation was purely discretionary

Judge Tucker M. Melançon in Martal Cosmetics, Ltd. v. Int. Beauty Exchange, Inc. wrote: ‘To prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution. In Coactiv Capital Partners, Inc. v. Hudson Converting, Inc. Judge Lawrence E. Kahn wrote: “the standard for award of damages in an unjust enrichment claim is restitution, requiring the defendant to “return the money or property to the plaintiff, such that doing so will put the damaged party in a place as if the unjust enrichment had not occurred. “ Judge Gasser in Government Employees Ins. Co. v. Hollis Medical Care P.C. wrote that “[t]o prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution.” Judge Bernard J. Friedman in Mutual Benefits Offshore Fund v. Zeltzer opined that: “[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” In Lexington Ins. Co. v. Tokio Marine Judge Deborah A. Batts said that

Under New York law, a plaintiff may prevail on a claim for unjust enrichment by demonstrating: ‘(1) that the defendant benefited; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution. It is important to note that, “[t]he theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement’

Judge John G. Koeltl in Republic of Bnin v. Mezel wrote that

[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. . . . To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at

\[412\] 2011 W.L. 3876181 at *1 (N.D.N.Y.8/31/11).
\[413\] 2011 W.L. 4012441 at * 4 (E.D.N.Y.9/1/11).
\[414\] 2011 W.L. 4031516 at *8 (N.Y. Sup. Ct. 9/7/11).
\[415\] 2011 W.L. 3962641 at *2 (S.D. N.Y. 9/7/11).
\[416\] 2011 W.L. 4373921 at *7 (S.D. N.Y. 9/20/11).
that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be. . . . A claim for unjust enrichment or restitution must be proven by the claimant by a preponderance of the evidence.

In *Amusement Industry, Inc. v. Midland Avenue Associates, LLC* 417 Judge Lewis A. Kaplan counseled that:

Under New York law, a plaintiff has stated a claim for unjust enrichment when it alleges ‘1) that the defendant benefited; 2) at the plaintiff's expense; and 3) that equity and good conscience require restitution.’ . . . ‘The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.’ . . . The ‘essence’ of an unjust enrichment claim is that ‘one party has received money or a benefit at the expense of another.’ . . . ‘a defendant is enriched at the expense of a plaintiff when the defendant receives a benefit of money or property belonging to the plaintiff.’

In *Landesbank Baden-Wurttemberg v. Goldman, Sachs & Co.* 418 Judge William H. Pauley, III observed that it is well settled under New York law that the:

‘existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.’ Since Landesbank alleges that the securities were sold pursuant to a purchase agreement, . . . recovery under a theory of unjust enrichment is precluded. . . . The enrichment which was allegedly unjust was simply the payment of a bargained-for sales price for the securities which were in fact delivered to the Funds .... The law is clear that the payments made pursuant to the express terms of a contract cannot be recovered via unjust enrichment theory. . . . Even assuming there was no purchase agreement, Landesbank fails to state a claim for unjust enrichment. To establish unjust enrichment, a plaintiff must allege ‘(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution.

In *Employees' Retirement System of Government of Virgin Islands v. Morgan Stanley & Co., Inc.* 419 Judge Barbara S. Jones opined that:

[t]o state a claim for unjust enrichment under New York law, a plaintiff must adequately allege ‘(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require

419 2011 W.L. 4526045 at *9 (S.D. N.Y. 9/30/11).
Because unjust enrichment is a common law claim that does not require proof of scienter,

North Mariana Islands
In *Olatman v. Emran* Chief Judge Demapan said that the marital waste theory is rooted in a person’s duty of good faith. He added that both unjust enrichment and marital waste share a common factual predicate, i.e. if the person accused never handled the disputed funds he or she could not possibly have been unjustly enriched. Further, “[e]mbedded in any unjust enrichment claim is a requirement that the alleged enriched individual receive a benefit.”

Ohio
In *National Strategies, LLC v. Naphcare, Inc.* Judge David W. Dowd, Jr. wrote about New York law. He said that “an unjust enrichment claim in New York lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement.”

Pennsylvania
In *Best v. Romec* Judge John P. O’Boyle opined that:

 unjust enrichment” is essentially an equitable doctrine. . . . The elements of unjust enrichment are: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; (3) and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. . . . The most important factor to be considered in applying the doctrine is whether the enrichment of the defendant is unjust. . . . Where unjust enrichment is found, the law implies a contract, referred to as either a quasi contract or a contract implied in law, which requires that the defendant pay to plaintiff the value of the benefit conferred. In short, the defendant makes restitution to the plaintiff in quantum meruit.

*Finley v. City of Philadelphia* held that unjust enrichment will not lie where a contract exists between the parties. The court’s major attention was directed at quantum meruit.

 Judge Baylson opined in *Boenarems v. LA,Intern, L.L.C.* that:

 to state a claim for unjust enrichment under Pennsylvania law, the plaintiff must allege ‘benefits conferred on one party by another, appreciation of such benefits by the recipient, and acceptance and retention of these benefits under such circumstances that it would be inequitable [or unjust] for the recipient to retain the benefits without payment of value.’ . Unjust enrichment is a ‘quasi-contractual doctrine’

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420 2011 W.L. 2680507 at **4, 5 (N. Mariana Islands 7/7/11).
421 The “Marital Waste Theory” may be applied when one party to a marriage spends significant marital funds on non-marital pleasures. In cases involving marital waste, a court has the power to add the funds back to the marital pot. See Robert Z. Dobrish, Aspitor, 2009 W.L. 543664.
423 2011 W.L. 3206828 at *7 (M.D. Pa. 7/28/11).
424 2011 W.L. 3875371 at *6 (E.D. Pa. 8/31/11).
425 See infra text accompanying note 436-443.
426 2011 W.L. 4048512 at *6 (E.D. Pa. 9/12/11).
that does not apply in cases where the parties have a written or express contracts.

**South Carolina**

In *Scurmont LLC v. Firehouse Restaurant Group, Inc.* 427 District Judge R. Bryan Harwell said that:

> [u]njust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff. To recover on a theory of restitution, the party pleading unjust enrichment must establish: (1) conferral of a non-gratuitous benefit on the opposing party; (2) the opposing party realized some value from the benefit; and (3) it would be inequitable for the opposing party to retain the benefit without paying its value.

**Tennessee**

*Arvest Bank v. Byrd*428 lumped unjust enrichment with “money had and received,” and quasi contract as being the same cause of action.

**Texas**

*Aguire v. Powerchute Sports, LLC*429 stated clearly that in Texas unjust enrichment is thought by some courts to be merely a “legal principle,” whereas others consider it a an independent cause of action. *Compass Bank v. Villarreal*430 clarified the above statement to some extent by stating that “money had and received” is a cause of action which “belong” to the “doctrine” of unjust enrichment. *Berry v. Indianapolis Life Ins Co.*431 did not clarify Texas’ position by saying that unjust enrichment and restitution are synonymous. In *Chapman v. Commonwealth Land Title Ins. Co.*432 Judge Sam A. Lindsay opined that:

> ‘unjust enrichment is not an independent cause of action, but instead a theory upon which an action for restitution may rest.’ . . . Although the Texas Supreme Court has referred to ‘unjust enrichment claims,’ those opinions do not characterize unjust enrichment as a separate cause of action from money had and received. The opinions consider it to be a general theory of recovery for an equitable action seeking restitution.

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428 2011 W.L. 3844189 at *18 (W.D. Tenn. 8/26/11).
430 2011 W.L. 3515913 at *4 (S.D. Tex. 8/10/11).
432 2011 W.L. 3880480 at *7 (N.D. Tex. 9/1/11).
Utah

Judge Tena Campbell in *Fort Lane Village, L.L.C. v. Travelers Indem. Co. of America*[^433] wrote that:

A claim for unjust enrichment is an action brought in restitution, and a prerequisite for recovery on an unjust enrichment theory is the absence of an enforceable contract governing the rights and obligations of the parties relating to the conduct at issue.

Washington

*Culpepper v. First American Title Co.*[^434] stands for the proposition that unjust enrichment has no application where an actual contract existed between the parties. The only contractual arrangement between the parties that a court will consider is an implied one. In *Washington Construction, Inc. v. Sterling Savings Bank*[^435] it was held that if A contracts with B, who performs negligently, conferring benefit on C, A cannot recover restitution from C, even though it is unjust for C to retain the benefit. It further held that recovery for the value of the recipient’s unjust gain is measured by the cost of the benefit provided by the increase in value to the property or interests of the recipient, and that the conclusion that retention without restitution would be unjust is a conclusion of law, rather than a finding of fact. Judge Quinan Brintnall wrote that:

*[g]enerally, ‘a person who has conferred a benefit upon another, by the performance of a contract with a third person, is not entitled to restitution from the other merely because of the failure of performance by the third person.’ . . . But this rule is not absolute. To establish a contract implied in law (1) one party must confer a benefit on another, (2) the recipient must appreciate or know of the benefit, and (3) the recipient ‘must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value.*

¶ M. Quantum Meruit

Quantum meruit is, as is unjust enrichment, a cause of action, in which restitution is used as a remedy. Black’s Law Dictionary defines quantum meruit as [Latin “as much as he has deserved”] (17c) 1. The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship. 2. A claim or right of action for the reasonable value of services rendered. [Cases: Implied and Constructive Contracts 30.] 3. At common law, a count in an assumpsit action to recover payment for services rendered to another person. • Quantum meruit is still used today as an equitable remedy to provide restitution for unjust enrichment. It is often pleaded as an alternative claim in a breach-of-contract case so that

[^434]: 2011 W.L. 2848785 at *6 (Wash. App. 7/19/11).
[^435]: 2011 W.L. 4043579 at **12, 13 (Wash. App. 9/13/11).

the plaintiff can recover even if the contract is unenforceable. See implied-in-law contract under CONTRACT.

Connecticut

*Generation Partners, L.P. v Mandell*436 involved an obligation to pay back to a partnership sums that a partner was overpaid. When the partner refused the partnership sued him. The defense was to the effect that the money he received from the partnership was for services rendered it. Judge Alfred J. Jennings gave a good disquisition on quantum meruit He said that:

Quantum meruit is a theory of contract recovery that does not depend upon the existence of a contract, either express or implied in fact ... Rather, quantum meruit arises out of the need to avoid unjust enrichment to a party, even in the absence of an actual agreement ... Quantum meruit literally means as much as he has deserved ... Centered on the prevention of injustice, quantum meruit strikes the appropriate balance by evaluating the equities and guaranteeing that the party who has rendered services receives a reasonable sum for those services.” (Citations omitted; ‘A determination of a quantum meruit claim requires a factual examination of the circumstances and of the conduct of the parties.’)

*Wilson v. Piorkowski*437 established that if there is an express contract or an implied contract recovery in quantum meruit is not permitted. If the facts establish unjust enrichment the court may find that it exists even though the moving party does not style it as such. Judge Robert E. Young wrote that “quantum meruit is a form of the equitable remedy of restitution by which a plaintiff may recover the benefit conferred on a defendant in situations where there is no express contract.” In *Gianetti v. Riether*438 Judge T.R. Melville wrote that:

Quantum meruit is a theory of contract recovery that does not depend upon the existence of a contract, either express or implied in fact ... Rather, quantum meruit arises out of the need to avoid unjust enrichment to a party, even in the absence of an actual agreement ... Quantum meruit literally means as much as he has deserved ... Centered on the prevention of injustice, quantum meruit strikes the appropriate balance by evaluating the equities and guaranteeing that the party who has rendered services receives a reasonable sum for those services.” (Citations omitted) ‘A determination of a quantum meruit claim requires a factual examination of the circumstances and of the conduct of the parties.’

Florida

Judge Stephan P. Mickle said in *Walton Const. Co., LLC v. Corpus Bank*439 that

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436 2011 W.L. 3671966 at *7 (Conn. Super. 7/22/11).
437 2011 W.L. 3891019 at *4, 5 (Conn. Super 7/26/11).
438 2011 W.L. 4347211 at *4 (Conn. Super. 8/24/11).
439 2011 W.L. 2938366 at *5 (N.D. Fla. 7/31/11).
[t]o adequately plead a quantum meruit claim: (1) the Plaintiff must have conferred a benefit on the Defendants; (2) the Defendants must have had knowledge of the benefit and either accepted or received it; and (3) the circumstances must make it unjust for the Defendants to retain the benefit without compensation.

**Illinois**

In *Patrick Engineering, Inc. v. City of Naperville*[^440] Justice Schostok wrote that:

Quantum meruit is an equitable theory under which a party can obtain restitution for the unjust enrichment of the other party, and it is often pleaded as an alternative to a breach of contract claim so that the plaintiff can recover the value of its work even if the trial court finds that the plaintiff cannot recover under the contract.

**Kentucky**

In *MidAmerican Distribution, Inc. v. Clarification Technology, Inc.*[^441] Judge David L. Bunning explained the difference between unjust enrichment and quantum meruit in the following words:

For Plaintiff to prevail under unjust enrichment, it must establish three elements: ‘(1) benefit conferred upon defendant at plaintiff’s expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value.’. . . To recover under quantum meruit, in turn, Plaintiff must prove: ‘(1) that valuable services were rendered, or materials furnished; (2) to the person from whom recovery is sought; (3) which services were accepted by that person, or at least were received by that person, or were rendered with the knowledge and consent of that person; and (4) under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person.’ . . . the elements of the two claims are “similar,” but to prove quantum meruit, Plaintiff must establish that Defendant was sufficiently notified of Plaintiff’s expectation of being paid.

**New Jersey**

Judge Dennis M. Cavanaugh in *Brant Screen Craft, Inc. v. Waterman Grafics, Inc.*[^442] said that:

one asserting quantum meruit must establish that one had a legitimate expectation that the beneficiary would be the party paying; and, (2) the beneficiary had notice that the creditor was expecting that payment. . . .

[^441]: 2011 W.L. 3489963 at *32 (E.D. Ky. 8/10/11).
the party conferring a benefit does so pursuant to a contract with a third party, then non-performance by the other party to the contract does not entitle the party conferring the benefit to repayment from the recipient on a theory of restitution or unjust enrichment. . . . District Courts have analyzed claims under this equitable theory of recovery by looking at the objective expectations of liability for payment for performance. . . . Further, the remedy is not appropriate for simply substituting one debtor or promise for another.

Pennsylvania

In *Finley v. City of Philadelphia*443 Judge Surrick wrote that:

Quantum meruit is an equitable remedy to provide restitution for unjust enrichment in the amount of the reasonable value of services. (citation omitted). It is well settled under Pennsylvania law that an action for unjust enrichment will not lie where a written contract exists between the parties. (citation omitted). (‘The doctrine of unjust enrichment is clearly inapplicable when the relationship between the parties is founded on a written agreement or express contract.’).

¶ N. Defenses to Unjust Enrichment and Quantum Meruit

Kansas

In *Butler Nat. Service Corp. v. Navegante Group, Inc.*444 Judge John W. Lungstrun, quoting with approval wording from a prior Kansas case wrote: “Courts applying Kansas law have concluded that quantum meruit and restitution are not available theories of recovery when a valid, written contract addressing the issue exists.”

Kentucky

In *MidAmerican Distribution, Inc. v. Clarification Technology, Inc.*445 Judge David L. Bunning announced that “[t]he law in this Commonwealth is clear that where one person does a service that benefits both that person and another, there can be no recovery by the person against the other under the unjust enrichment or quantum meruit doctrines, because the service is ordinarily performed without the expectation of payment.”

New York

In *Landesbank Baden-Wurttemberg v. Goldman, Sachs & Co.*446 Judge William M. Pauley wrote that:

It is well settled under New York law that the ‘existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.’ Since Landesbank alleges that the securities were sold pursuant to a purchase agreement, . . . recovery under a theory of

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443 2011 W.L. 3875371 at *6 (E.D. Pa. 8/31/11).
444 2011 W.L. 4361649 at *3 (D. Kan. 9/19/11).
445 2011 W.L. 3489963 at *35 (E.D. Ky. 8/10/11).
446 2011 W.L. 4495034 at *8 (S.D. N.Y. 9/28/11).
unjust enrichment is precluded. . . . The enrichment which was allegedly unjust was simply the payment of a bargained-for sales price for the securities which were in fact delivered to the Funds . . . . The law is clear that the payments made pursuant to the express terms of a contract cannot be recovered via unjust enrichment theory. Even assuming there was no purchase agreement, Landesbank fails to state a claim for unjust enrichment. To establish unjust enrichment, a plaintiff must allege (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution.

**Pennsylvania**

*G. & T Conveyor Co., Inc. v. Allegheny County*\(^{447}\) held that the existence of a contract between the parties rules out a cause of action for unjust enrichment.

### III. Legal Civil Restitution’s Coda

One of the difficulties in understanding restitution is the Complaints in cases which are drawn in proper person. *Johnson v. Verizon*\(^{448}\) is an example. There the plaintiff, pro se, submitted a Complaint which sought “full restitution\(^{449}\) of all back wages consisting of salary, commissions, bonuses, and awards in the amount of $203, 934.00,” as well as “$1,000,000.00 for pain and suffering, medical bills, mental anguish, harassment, discrimination, and public humiliation.” Even Complaints drawn by professionals at times contain single Counts containing multiple causes of action, and Counts alleging a remedy rather than a cause of action, etc. or just too many prayers for relief.\(^{450}\) Then there is just the absolutely confusing language as one finds in *Howard v. Ferrellgas Partners, L.P.*\(^{451}\) which proclaimed that: “unjust enrichment and restitution, or quantum meruit as it is also called, are synonymous terms for the doctrine of quasi contract . . . . [A] quasi contract is no more than a legal device to enforce noncontractual duties;” or that found in *Garrett v. Cassity*\(^{452}\) where the court referred to “making restitution under an assumpsit theory.” In addition to confusing language used in reference to restitution, there is the use of other words for restitution, rather than the word, itself. As an example, in the recent case, *Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.*\(^{453}\) the words “frontpay” and “backpay” were used in place of “restitution.”

Hopefully, after referring to the 399 cases decided in the third quarter of 2011, reviewed above, those who deal with restitution will understand it better than they did before reading about them.

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\(^{447}\) 2011 W.L. 2634161 at *4 (W.D. Pa. 7/5/11).

\(^{448}\) 2011 W.L. 4352405 at *1 (S.D. W. Va. 8/25/11).

\(^{449}\) The word “restitution” used here may be used in its everyday meaning (see supra text accompanying notes 79-86), but a judge might conceivably interpret it in its legal meaning.


\(^{451}\) 2011 W.L. 3299689 at *8 n.6 (D. Kan. 8/1/11).

\(^{452}\) 2011 W.L. 3420606 at *2 (E.D. Mo. 8/3/11).
