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A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies

George P. Roach

ARTICLES

A DEFAULT RULE OF OMNIPOTENCE: IMPLIED JURISDICTION AND EXAGGERATED REMEDIES IN EQUITY FOR FEDERAL AGENCIES[1]

George P. Roach[2]

1. Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999) ("To accord a type of relief that has never been available before—and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a 'default rule,' . . . not of flexibility but of omnipotence.").

2. George P. Roach is the founder of a Dallas litigation consulting and valuation practice, Multi Discipline Consultants, and is a Senior Advisor to the litigation consulting firm of Freeman & Mills, Inc. in Los Angeles. His background includes an M.B.A., J.D. and an A.B. in Economics. *See* www.multidisciplineconsultants.com for more information.

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I. INTRODUCTION

"In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground."[3]

Most authorities describe restitution as either a misunderstood, ignored or unknown area of the law. Those few professors who teach it find it difficult to overcome restitution's unappealing image in today's law schools.[4] Contrary to this image of a fading discipline, restitution case law has actually been growing rapidly in the federal courts. The two most important sources of this growth have been in intellectual property and claims for equitable monetary relief by federal agencies ("agencies"). Undeterred by the cobwebs and uncertainty, agencies are winning a large number of sizable claims for unjust enrichment that total in the billions of dollars per year for the U.S. Treasury.[5] The uncertainty and confusion said to be so prevalent among lawyers and

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3. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989).

4. *See* Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1195-96 (1995), stating:

> Confusion over the content of restitution carries significant adverse consequences. To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is. The subject is no longer taught in law schools, and the lawyer who lacks an introduction to its basic principles is unlikely to recognize them in practice. The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it.

Id.; *See also* Elaine Shoben, *Forum: Spinning Restitution: From Cauliflower to Coconut*, 36 LOY. L.A. L. REV. 1027 (2003).

5. *See* 31 U.S.C. § 3302 (It is not presently known what percentage of the money deposited into the U.S. Treasury is ever paid out to consumers. At present, most of the money deposited is collected in escrow for the benefit of the consumers except, for example, for recent settlement agreements between the FDA and various pharmaceutical companies relating to violations of the FDA's standards for good manufacturing practices. The Miscellaneous Receipts Act requires agencies to deposit into the Treasury monies that otherwise come into their possession during the normal course of operation.); 31 U.S.C. § 1341 (The Anti-Deficiency Act precludes a federal agency from spending any money that might otherwise come into its possession without the express authorization of Congress. The agency can hold the proceeds in escrow but cannot spend it for itself.).

courts[6] may entreat rather than discourage the agencies as their repeated claims and strained interpretations of the law in equity prevail for want of informed resistance or significant counter-pressure.

This article is an outgrowth of the author's ongoing survey of the consistency of the definition and measurement of restitutionary monetary remedies in all areas of commercial litigation. It became apparent early in the survey that the measurement of agencies' remedies under the doctrine of implied jurisdiction differs substantially both between the different agencies and in comparison to other areas of the law that measure restitution. Based on the same equitable tradition, jurisdiction and claim, agencies are securing uniquely large measures of unjust enrichment.

The Supreme Court has held that Congress intentionally implies jurisdiction in equity when an agency's enabling statutes fail to clearly preclude such jurisdiction. In effect, agencies are making claims for unjust enrichment in which federal statutes provide the basis for establishing the unjust nature of the defendant's actions. The result is presumptive jurisdiction in which agencies substitute civil litigation for administrative law,[7] and the agencies enjoy greater freedom to file a broad range of claims in equity without having to comply with specific statutory authority.

As further demonstrated in the chart in Appendix A, the average number of case opinions per year from federal courts relating to the defendant's profits has increased approximately 700% in the last 40

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6. United States *ex rel*. Taylor v. Gabelli, 2005 U.S. Dist. LEXIS 26821, at *19 (S.D.N.Y. Nov. 3, 2005) (quoting Dobbs, *Law of Remedies*, *Damages, Equity, Restitution* § 4.1(1), at 369 n. 28) (2d ED. 1993); *see also id.* § 1.1, at 5 ("Judges frequently speak of 'damages' when they mean restitution; the reader of restitutionary material is always challenged by . . . loose usage to analyze cases by their content rather than their terms."); Kull, *supra* note 4, at 1191 ("Few American lawyers, judges, or law professors are familiar with even the standard propositions of the doctrine, and the few who are continue to disagree about elementary issues of definition.").

7. Sections 13(b), providing for general jurisdiction in equity, and 19 (15 U.S.C.S. § 57b (2005)), providing for specific jurisdiction and specific remedies subject to certain administrative limitations, respectively, were enacted for the FTC at roughly the same time. Despite the specific applicability of Section 19, the FTC has generally chosen to file its claims under Section 13(b) for implied jurisdiction, thereby avoiding Section 19's statute of limitations and other administrative prerequisites. *See* Peter C. Ward, *Restitution For Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139 (1992).

years.[8] From 1965 to 2005, the federal share of federal and state case opinions increased from 50% to 80%. Given (1) the state of neglect attributed to practice in equity, (2) the increase in federal opinions and, most importantly, (3) that a handful of agencies file a disproportionately large share of the claims for implied jurisdiction, there is significant potential for this agency litigation to change the interpretation of unjust enrichment.

The traditional role of courts in equity and especially the Chancellor's Court in England was to provide a safety net to ensure justice for cases that would otherwise slip through the cracks of the system of courts at law.[9] Judges in those courts generally enjoyed greater discretion and authority to "do justice" on an exceptional basis

8. A simple survey was made on the basis of querying the LEXIS database for a listing of all case opinions that included the term "defendant profit." This listing was sorted by state civil, state criminal, federal civil and federal criminal cases. The comparison between state and federal civil cases is listed in the table below and the graph in Appendix A. The results confirm general observed trends and the magnitude of the recent increase appears significant, however inexact.

STATE AND FEDERAL OPINIONS CONTAINING 'DEFENDANT PROFIT'
ANNUAL AVERAGE

Year	1870	1875	1880	1885	1890	1895	1900
State	4.0	6.0	6.0	3.5	3.5	5.2	5.2
Federal	1.1	2.9	2.9	3.7	3.7	3.9	3.9
Year	1905	1910	1915	1920	1925	1930	1935
State	8.8	11.4	11.2	12.6	14.2	13.2	11.6
Federal	4.4	4.4	6.3	6.3	6.8	6.8	6.0
Year	1940	1945	1950	1955	1960	1965	1970
State	11.4	9.2	9.6	8.9	8.9	9.6	9.6
Federal	6.0	8.3	8.3	8.6	8.6	10.3	10.3
Year	1975	1980	1985	1990	1995	2000	2005
State	9.8	14.4	12.2	16.2	12	24.8	22.4
Federal	17.2	22.0	34.6	52.0	67.6	73.6	81.2

9. Henry Lacey McClintock, *Handbook of the Principles of Equity* § 24, at 53 (2d ED. 1948) ("[E]quity is a system for the correction of the defects in the law.").

and frequently with the benefit of a view of the legal system that today would be characterized as "outside the box." Conscripting a court in equity as the "work horse" for the administrative claims of federal agencies is at odds with such history and tradition.

Overall, this article will explore the justification for implied jurisdiction and compare how restitution is measured differently by different agencies. There will be specific focus on claims by the Securities and Exchange Commission ("SEC"), Commodity Futures Trading Commission ("CFTC"), Department of Energy ("DOE"), Federal Trade Commission ("FTC") and Food and Drug Administration ("FDA"). Some of the larger inconsistencies are analyzed and traced back to the widespread confusion about the meanings of specific terms pertaining to either remedies in equity, at law, or both.

II. CLARIFYING RESTITUTION[10]

"[G]ive a dog a bad name and hang him."[11]

In a recent ERISA opinion, the district court of Connecticut observed that one of the most important lessons in the Supreme Court's opinion in *Great-West Life & Annuity Insurance Co. v. Knudson*[12] is that labels for remedies in restitution and unjust enrichment should not be taken at face value: "[I]n *Great-West* . . . the Supreme Court made it clear that an individual cannot evade this restriction on damage claims by characterizing one's request for monetary relief as 'restitution.'"[13]

The differences between specific restitution, unjust enrichment[14]

10. In addition to the specific cites in the article, the author wishes to acknowledge the reference resource provided by Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577 (2002).

11. SEC v. MacDonald, 699 F.2d 47, 55 (1st Cir. 1983).

12. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).

13. Coan v. Kaufman, 333 F. Supp. 2d 14, 25 (D. Conn. 2004); *See also* Scholastic Corp. v. Kassem, 389 F. Supp. 2d 402, 408 (D. Conn. 2005) ("Of course, as the insurer in *Great West* learned to its chagrin, mere labels do not govern the Court's analysis. Instead, 'in determining the propriety of a remedy, [a court] must look to the real nature of the relief sought, not its label.'" (quoting Gerosa v. Savasta & Co., 329 F.3d 317, 321 (2d Cir. 2003))); Eichorn v. AT&T Corp., 2005 U.S. Dist. LEXIS 29261, at *36 (D. N.J. 2005) ("Third, the plaintiffs' efforts to cloak their damages in the garb of an 'equitable decree' does not advance their argument.").

14. As suggested by RESTATEMENT (THIRD) of RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. c (Discussion Draft, Mar. 31, 2000), the practical differences

and especially criminal restitution cause a great deal of the misunderstanding in this body of case law.[15] The confusion is compounded by the fact that some of the key cases for implied jurisdiction use and abuse the term restitution for the purposes of justifying the appropriateness of a proposed remedy.[16] Frequently, the FTC or FDA claim restitution of revenues but justify their proposed measurement of restitution with cases that advocate restitution as measured by profits.[17]

The law of restitution/unjust enrichment is based on two overlapping theories of recovery: specific restitution[18] and restitution based on unjust enrichment. According to Professor Laycock, no complete definition can exclude either form of restitution.[19] He emphasizes that the two forms of restitution are not distinct and one can enhance or extend the other. For example:

> Specific restitution of misappropriated property both restores the property to the rightful owner and deprives the misappropriator of his unjust gain. But such explanations are often indirect and

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between restitution and unjust enrichment are not sufficiently significant to warrant distinct terms for restitution and unjust enrichment for the purposes of this article. The two terms, unless qualified, are to be considered indistinguishable.

15. United States *ex rel*. Taylor v. Gabelli, 2005 U.S. Dist. LEXIS 26821, at *19 n. 7 (S.D.N.Y. Nov. 3, 2005) ("Another source of confusion is the fact that courts also give the term 'restitution' various meanings. *See,* e.g., Dobbs, Law of Remedies, § 4.1(2), at 371 ('some major ways of talking about restitution should be understood' 'because confusion has sometimes run very deep')).

16. *See* Dobbs, *supra* note 6, § 1.1, at 5.

> The law of restitution can be difficult and confusing because restitution may be identified by terms that refer to some particular form of restitution or some particular piece of remedial history. For example, some particular restitution claims may be identified as quasi-contract claims or as claims in assumpsit or quantum meruit. Claims for a constructive trust, for an equitable lien, or for subrogation are all restitutionary claims. The list goes on. So restitution today is a general term for diverse kinds of recoveries aimed at preventing unjust enrichment of the defendant and measured by the defendant's gains, but it has many specific forms, each of which must be addressed separately.

Id.

17. Among other opinions, the Courts' opinions in FTC v. Febre, 128 F.3d 530 (7th Cir. 1997) and Gem Fed. Trade Comm'n v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996) in effect use this approach, consciously or not. See the discussion in Part VII, D below for further analysis of these cases.

18. *See* RESTATEMENT OF RESTITUTION § 4 cmts. c, d (1937); *id.* § 128. The same usage appears in RESTATEMENT (SECOND) OF CONTRACTS § 372 (1981).

19. Laycock, *supra* note 3, at 1279.

> sometimes ill-fitting in more complex situations. The misappropriator is unjustly enriched whether or not the rightful owner can trace the specific property taken. Yet a plaintiff who can trace the specific property gets a far more powerful remedy than one who cannot. The conceptual basis for this remedy is plaintiff's claim to restoration of property that is still identifiable as his. Elaborate tracing rules separate the property still identifiable as plaintiff's from property that has passed into the misappropriator's general assets.[20]

As such, both sources are distinguished from compensating damages or criminal restitution, which Professor Laycock explains is mistakenly equated with restitution/unjust enrichment:

> 'Restitution' is sometimes used in a third sense—to restore the value of what plaintiff lost. The *Restatement* employs the term this way at least occasionally, and the usage is common in the statutes requiring criminals to make restitution to their victims. But restitution of the value of what plaintiff lost is simply compensatory damages. Used in this sense, 'restitution' loses all utility as a means of distinguishing one body of law from another. Restitution must be distinguished from compensation, either by its focus on restoration of the loss in kind or by its focus on defendant's gain as the measure of recovery.[21]

Confusion or juxtaposition of civil restitution and criminal restitution is so widespread among the opinions of federal district and appellate courts that comments from equally authoritative sources are provided to emphasize the point.[22] The March 31, 2000 discussion draft of the Restatement (Third) states: "Law that establishes (by statute or otherwise) the terms on which a convicted criminal may be ordered to make restitution to crime victims is not part of the law of restitution as

20. *Id.* at 1280.

21. *Id.* at 1282-83. *See also* Consumer Prot. Div. v. Morgan, 387 Md. 125, 169 (Ct. App. Md. 2005) ("'The damages recovery is to compensate the plaintiff and it pays him, theoretically, his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff but at forcing the defendant to disgorge benefits it would be unjust for him to keep . . . .'" (quoting Dobbs, *Law of Remedies* § 4.1 (1973) as quoted in Consumer Protection Div. Office of Attorney Gen. v. Consumer Pub. Co., 874 A.2d 919 (Md. 2005))).

22. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 ("Rarely will there be need for any more 'antiquarian inquiry,' (quoting *Great-West Life & Annuity*, 534 U.S. at 233-34 (Ginsburg, J., dissenting)), than consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear." (internal citation edited)).

defined by this Restatement."[23] Professor Andrew Kull, the Reporter for the Restatement (Third), lends further support:

> For many lawyers the immediate connotation of the word 'restitution' will be something else entirely: criminal sanctions requiring wrongdoers to make restitution to their victims, a topic having almost nothing to do with the subject at hand. The linguistic confusion that bedevils the law of restitution—necessitating laborious definitions before anyone can understand what you are talking about—affords an early indication that the common name of this neglected body of law was singularly ill-chosen.[24]

A simple example of the potential confusion lies in the Fifth Circuit opinion in *SEC v. Huffman* in which the court defined restitution as compensating damages or criminal restitution but labeled the remedy of unjust enrichment of profits as disgorgement, holding that "disgorgement" is different from "restitution."[25] While it is certainly accurate to distinguish restitution of profits from compensating damages, the Fifth Circuit has created further confusion by the use of generic terms for restricted meanings.[26]

One appropriate contrast between compensating damages and unjust enrichment is that the former aims to restore the plaintiff to her ex ante position while the latter aims to restore the defendant to her ex ante position.[27] Only equitable rescission attempts to restore both the

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23. RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. h (Discussion Draft, March 31, 2000).

24. Kull, *supra* note 4, at 1191-92.

25. SEC v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993).

26. *Id*.

> Despite some casual references in our caselaw to the contrary, see, for example, *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (describing disgorgement order in one isolated phrase as 'this restitution'), disgorgement is not precisely restitution. Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. Commodities Futures Trading Comm'n v. Am. Metals Exch. Corp., 991 F.2d 71, 76 (3d Cir. 1993); *Blatt*, 583 F.2d at 1335. It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does. SEC v. Commonwealth Chem. Secs., Inc., 574 F.2d 90, 102 (2d Cir. 1978). Thus, a disgorgement order might be for an amount more or less than that required to make the victims whole. It is not restitution.

Id. (internal citation edited).

27. *See* Colleen Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1625 n. 265 (2002) (quoting David Schoenbrod et al., *Remedies: Public and Private* 727 (3d ED. 2002) ("Restitution aims at the defendant's [rightful position]. Disgorgement is the key concept. By making the defendant disgorge the benefits he

plaintiff and defendant to their ex ante positions.[28] However, restoration is a questionable goal for restitution/unjust enrichment because restoration for the plaintiff generally relates to compensating damages, a remedy at law.[29]

III. MEASURING THE DEFENDANT'S BENEFIT

"[T]his is equity, not rocket science."[30]

Companies typically sell directly to their customers at a retail price or they sell to a wholesaler or a retailer at a wholesale price which is then marked up to a retail price. Assume that the company, Unjustly Enriched Inc. ("UEI"), sells its product for $50 and nets $10 per unit after paying for all direct or variable costs. After the product leaves UEI, it gets marked up 100% to $100 per unit for sale at the retail level. Therefore, the UEI's revenue per unit would be $50, its benefit or profit would be $10 per unit and assuming that the product or service provided no benefits to the customer and has no remaining asset value, the customer's loss would be $100 per unit.

Absent consideration of indirect and fixed costs, most jurisdictions would measure the UEI's unjust enrichment as $10 per unit. Unjust enrichment ignores the customer and only focuses on depriving UEI of any benefit or profit. The customer's compensating damage would be

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cannot justly retain, the law of restitution returns the defendant to the position he should, 'in equity and good conscience,' have occupied.").

28. Schoenbrod et al., *supra* note 27, at 727. Under some circumstances, specific restoration can also restore the defendant or even both parties to their ex ante positions, especially when neither party has incurred any losses or additional expenses relating to the asset before the restitution.

29. Murphy, *supra* note 27, at 1592 n. 78. *See, e.g.*, Douglas Laycock, *Modern American Remedies: Cases and Materials* 15-16, at 15 (2d ED. 1994) (writing that "'the essence of compensatory damages' is 'to restore the injured party as nearly as possible to the position he would have been in but for the wrong'"); *see also* McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 362 (1995) (stating in an employment discrimination case that "'the object of compensation is to restore the employee to the position he or she would have been in absent the discrimination'"); *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1002 (D. Mass. 1989) ("'Were the Court to accept the argument that a monetary award is restitutionary simply because it returns a party to pre-injury status, little would be left in the realm of compensatory damages.'").

30. *In re* Alpha Telecom, Inc., No. CV 01-1283-PA, 2004 U.S. Dist. LEXIS 20002, at *29 (D. Or. August 18, 2004).

$100 and, depending on the jurisdiction and nature of the claim, the applicable customer loss for the purposes of consumer redress or criminal restitution would be either $50 or $100 per unit.[31]

The remedy of unjust enrichment may not be well suited for a consumer plaintiff. If the case relates to a company selling a worthless product to a consumer, civil restitution will always be less than compensating damages. Normally the consumer would claim damages of $100 per unit compared to restitution of $10 per unit but the agencies assert the remedy of restitution in equity for the implied jurisdiction and then work to convince the court that compensating damages should be awarded as a form of equitable restitution. The consequences for consumers of choosing a remedy in equity over a remedy at law are ignored. Instead, courts often ask rhetorically why the measure of restitution requires the consumer to pay for the direct expenses of the fraudulent tortfeasor.[32] They forget that restitution focuses on the defendant's gain, not the plaintiff's loss. They also overlook that the unsuitability for consumers of the remedy elected by an agency is not the responsibility of the defendant nor is it sufficient reason to modify the standard measure of restitution from profit to revenue or consumer loss. A true damages measure can only be supported by an alternative claim at law for which there may be no implied jurisdiction.

For a company with a single product line or those companies in which the offending operation is a significant percentage of their total operations, the remedy of refunding the total amount paid by all customers ($100 per unit) is the corporate equivalent of capital punishment with prejudice. Net profit margins of ten to twenty percent are considered high in today's economy but even for such profitable companies, the remedy of disgorging revenues would amount to five to

31. FTC v. Figgie Int'l, 994 F.2d 595, 606 (9th Cir. 1993).

> Figgie also objects that the district court's order forces Figgie to pay for losses beyond its gains. Figgie does not contest the award of prejudgment interest and bases its argument instead on the role of the distributor in its marketing system. Figgie sells heat detectors for cash to distributors, who apparently have complete discretion to set their own mark-ups. Many consumer dollars therefore go into the distributors' pockets, not Figgie's. This objection may be met several ways. First, Section 19(b) [Federal Trade Commission Act § 18, 15 USC § 57b] does not limit its remedies to the amount of the unjust enrichment. Statutory remedies include "the payment of damages."

Id.

32. *See* United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 763 (6th Cir. 1999).

ten times its net profits. Disgorging five to ten times the company's cumulative profits will force the company to file for liquidation as the remedy is also likely to be non-dischargeable.[33] The 'prejudice' of the remedy lies in the personal liability that is frequently assessed against one or more individual defendants who may not be able to discharge the liability in bankruptcy or even upon death.[34] The defendants may deserve severe remedies but the refund measure of customer redress, i.e., revenue disgorgement, seems unsuited for the nature of the implied jurisdiction process and stands apart from traditional remedies in equity. Such a severe remedy would normally require a jury trial as the large punitive component of revenue disgorgement should exclude it for consideration as a traditional remedy in equity.

Furthermore, unless the unjust activity is a very minor part of a bigger operation, it seems unlikely that an agency will actually succeed in collecting the defendant's past revenues. Whether or not the defendant's costs of production and administration are legitimate offsets, they represent the vast majority of a defendant's use of her revenue. Most businesses don't accumulate enough reserves to disgorge even two years of profits. The end result of a successful claim by the FDA and FTC is likely to include the extinction of the defendant business operation, whether intentional or not.

A. Rescission and Counter Restitution

Rescission is an alternative monetary remedy which can be claimed as rescission at law or in equity. Rescission in equity is a combination of specific restitution and unjust enrichment and it aims to restore both the defendant and the plaintiff to their ex ante positions. First, a contract or transaction is rescinded by both parties returning their consideration in kind. Second, both parties are obligated to make counter-restitution to each other by disgorging any benefits derived from their temporary holding of the other party's consideration.[35] This is meant to include

33. *See* FTC v. Porcelli (*In re* Porcelli)*,* 325 B.R. 868, 871-74 (Bankr. M.D. Fla. 2005).

34. FTC v. Capital City Mortg. Corp., 321 F. Supp. 2d 16 (D.D.C. 2004). *See infra* text accompanying notes 170-71.

35. RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 13 cmt. i (Tentative Draft No. 1, April 6, 2001).

> Where an exchange transaction has been at least partially performed on both sides, the party seeking rescission as a transferor is also a transferee. By the reasoning set forth in the preceding paragraph, a rescinding plaintiff becomes subject to a duty of

interest, rent, profits, usage value and any other consequential benefits. Counter-restitution therefore tries to assure that both parties are restored to their ex ante positions, devoid of any consequential benefits to the transaction or contract for either party.[36] To get equity, both parties must do equity.[37]

While rescission has been described as a second-choice remedy for securities claims,[38] it is appropriate for claims by the FTC and FDA

> counter-restitution with respect to any benefits received in the nullified transaction. The plaintiff's restitutionary obligation is commonly expressed through the judicial formula that a party seeking rescission must, as a condition of relief, offer to restore anything of value received in the transaction that is being repudiated. The obligation of counter-restitution is not enforced equally on all rescinding parties, and a claimant who is a fraud victim may be excused from a duty of restitution that would be strictly enforced were the claimant seeking to rescind a transaction in which the other party was not at fault. *See* § 54, cmt ___.

Id. *See also* RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. e (Tentative Draft No. 3, March 22, 2004) ("Rescission is mutual: a plaintiff seeking to be restored to the status quo ante must likewise restore to the defendant whatever the plaintiff has received in the transaction. *See* § 51.").

36. Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.3 at 254 (West 1973).

37. *E.g*. Cardiac Thoracic & Vascular Surgery, P.A. Profit Sharing Trust v. Bond, 840 S.W.2d 188, 193 (Ark. 1992).

> The equitable objective of a return to the status quo as the result of a rescission is consistent with the equitable maxim 'he who seeks equity must do equity.' The practical meaning of this maxim is that whatever the nature of the remedy sought, the court will not give equitable relief to one seeking it unless he will admit and provide for all of the equitable rights, claims and demands of his adversary growing out of, or necessarily involved in, the subject matter of the controversy.

Id. *See* also Sample v. Sample*,* 466 S.W.2d 935 (Ark. 1971); Metcalfe v. Talarski, 567 A.2d 1148, 1152 (Conn. 1989) citing Ankeny v. Clark, 148 U.S. 345, 359 (1892); Harral v. Leverty*,* 50 Conn. 46, 51 (1882); Little v. Pearson*,* 24 Mass. 301, 302-03 (1828); Kavarco v. T.J.E., Inc., 478 A.2d 257, 261 (Conn. App. 1984).

> The very idea of rescinding a contract implies that what has been parted with shall be restored on both sides, and hence the general rule, which is to be reasonably applied . . . is that a party who wishes to rescind a contract must place the opposite party in status quo. 17 Am. Jur. 2d., Contracts § 512, p. 994.

Id. Rice v. Hilty, 559 P.2d 725, 726 (Colo. 1976).

> In suits involving rescission, the parties must be placed in status quo. Bankers Trust Co. v. Hall, 183 P.2d 986 (Colo. 1947). Since the Rices have already surrendered the possession of the motel to the Hiltys, the Hiltys must now return whatever consideration they received under the contract. Therefore, in addition to the $19,000 awarded by the trial court, the Rices are entitled to a return of their payments on the promissory note, and to interest on each payment from the date thereof.

Id. (citing RESTATEMENT OF RESTITUTION §§ 66 and 156; *see* 66 AM. JUR. 2d RESTITUTION & IMPLIED CONTRACTS § 166).

38. *See* Randall v. Loftsgaarden, 478 U.S. 647, 662 (1986).

relating to products or services that are fraudulent, worthless, or both. Section 19 of the FTCA specifically provides for this remedy under that independent jurisdiction.[39] While the typical case for rescission expects both parties to return what they received and gained in the contract or transaction, the requirement for specific restoration is subject to a flexible standard.[40]

B. Unjust Enrichment Not Refund

On the other hand, the FTC and FDA have avoided the requirement in rescission for the plaintiff to compensate the defendant for the value of any assets or services received by the plaintiff.[41] When the defendant to an FTC claim raises the issue of the uncompensated asset value of the product which the consumer gets to keep under the agency's remedy for consumer redress, some courts have adopted an enigmatic response, citing the Ninth Circuit's opinion in *Figgie International*:[42]

> This measure of restitution applies even if the product purchased by consumers has some value. *See* Figgie Int'l, 994 F.2d at 606 (noting that "courts have previously rejected the contention 'that restitution is available only when the goods purchased are essentially worthless.'")[43]

The clear implication of this statement is that a defendant whose product has some asset value does not need to be compensated or credited for that value in the refund approach. The reference to *Figgie* is questionable because that case concerned an FTC claim under Section 19, which has statutory authority for remedies that "may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages."[44] An opinion on appropriate remedies under Section 19 is largely irrelevant because claims under that section have explicit statutory jurisdiction separate from Section 13(b)'s implied jurisdiction. The *Figgie* opinion provides:

39. 15 USCS § 57b (2006).
40. Griggs v. E. I. DuPont de Nemours & Co., 385 F.3d 440, 448 (4th Cir. 2004). *See also* Funger v. Mayor of Somerset, 223 A.2d 168, 173-74 (Md. 1966).
41. *See* FTC v. Think Achievement Corp., 144 F. Supp. 2d 1013, 1020 (N.D. Ind. 2000).
42. FTC v. Figgie Int'l, 994 F.2d 595 (9th Cir. 1993).
43. *Think Achievement Corp.*, 144 F. Supp. 2d at 1020.
44. 15 USCS § 57b (2005).

> The district court ordered that consumers be allowed to receive full refunds for their Vanguard heat detectors, whose value, "given the misrepresentations recommended by Figgie and made by distributors to consumers, is *de minimis*." Figgie protests that the "*de minimis*" finding and the resulting full refund are inappropriate in light of the Commission's conclusive finding that heat detectors have some value. Although we agree with Figgie that the district court is not free to make this finding, we find the error harmless. Courts have previously rejected the contention "that restitution is available only when the goods purchased are essentially worthless." *FTC v. International Diamond Corp.*, 1983-2 Trade Cases Par. 65,506, (N.D. Cal. 1983) ("Diamond I").[45]

International Diamond was a case under Section 13(b), based on traditional remedies in equity. In a subsection labeled "Appropriateness of Rescission and Restitution When the Goods Are Not Essentially Worthless" the Northern District of California stated:

> Defendants' final contention—that restitution is available only when the goods purchased are essentially worthless—rests upon administrative cases which were decided prior to *Heater v. FTC*, supra. Those decisions reflect self-imposed restraints by the Commission in its efforts to develop standards under Section 5 in order to justify administratively ordered redress. The Ninth Circuit in *Heater* held that the Commission lacked authority to order administrative redress, which rendered the Commission's self-imposed [sic] standards nugatory.[46]

Restitution of revenues without offsets or counter-restitution may approximate the effect of rescission when the goods purchased are worthless so the original FTC administrative policy roughly complied with traditional equity. The Ninth Circuit's opinion in *Heater* adds an interesting background note about the original source of the 'recall' remedy:

> This refund provision is based upon and reflects a far-reaching construction of the clause in Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(b), which empowers the Commission to order a person using any unfair method or deceptive act or practice in commerce to 'cease and desist from using such

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45. *Figgie Int'l*, 994 F.2d at 595.

46. FTC. v. Int'l Diamond Corp./Full Service Import Brokers, Inc., 1983-2 Trade Cases Par. 65,506 P *13-14 (N.D. Cal. 1983).

> method of competition or such act or practice.'[47]

Therefore, the FTC developed its own administrative interpretation of restitution and instituted an internal rule that full refunds should not be applied unless the product in question was deemed worthless. The main import of the opinion is that the FTC was not empowered to issue refund orders and that whatever standards it applied previously were irrelevant as a standard for the defendant to assert in civil litigation. The case does not represent the Ninth Circuit's affirmation of the refund measure of restitution (especially when the purchased good is not worthless), a remedy originated within the FTC in the twentieth century not courts in equity in the eighteenth century.

Finally it is important to note that the remedy of ordering a defendant to provide a full refund to a consumer for the retail price has been transformed in the hands of the agencies and, eventually, in the opinions that discuss their claims. Originally, the remedy was identified as administrative redress,[48] then it developed into the refund measure of restitution,[49] and now you can find a number of opinions regarding claims by the FTC and FDA in which the remedy is called 'restitution.'[50] Semantic juxtaposition becomes court opinion as soon as the court recites the misleading 'truism' that 'restitution is an equitable remedy.'[51] Unfortunately, this sort of quasi-logic is not uncommon in case law relating to remedies in equity. Further lost in the process is any meaningful discussion of how a court should choose the appropriate remedy.

IV. EQUITABLE REMEDIES ARE BASED ON A NET CONCEPT

Most remedies included as restitution or unjust enrichment are

47. Heater v. FTC, 503 F.2d 321, 322 (9th Cir. 1974).

48. *Int'l Diamond Corp.*, 1983-2 Trade Cases Par. 65,506, *13-14 (N.D. Cal. 1983).

49. *Figgie Int'l*, 994 F.2d at 606-07.

50. FTC v. Think Achievement Corp., 144 F. Supp. 2d. 1013, 1020 (N.D. Ind. 2000)

51. The following cases represent recent opinions of circuit courts that have stated or held that "restitution is an equitable remedy." *See* Larocca v. Borden, Inc., 276 F.3d 22, 28 (1st Cir. 2002); Ellett Bros. v. United States Fid. & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001); United States v. Christopher, 273 F.3d 294, 299 (3d Cir. 2001); First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc., 960 F.2d 1546 (11th Cir. 1992); Houston Oil & Ref., Inc. v. U.S. F.E.R.C., 95 F.3d 1126, 1135 (Fed. Cir. 1996).

based on the parties' net advantage or net benefit, generally represented by profit before or after income tax. While there are variations in both the types of expenses or expenditures that can be offset against a party's gross benefit, and the circumstances in which a party can make such offsets or present claims for counter-restitution, the overwhelming tradition for such remedies at law or in equity is to assess unjust enrichment or restitution on a net basis.[52]

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52. According to the Supreme Court's analysis in Root v. Ry. Co., 105 U.S. 189 (1881), the following opinions on patent claims were all based on the plaintiff's claim for injunctive relief and an accounting. Reflecting our courts' earliest implementation of remedies in equity, they all relate to the determination of the defendant's profits: Dean v. Mason, 61 U.S. 198 (1858); Fenn v. Holme, 62 U.S. 481 (1859); Rubber Co. v. Goodyear, 76 U.S. 788, 803-04 (1869) ("In estimating the cost, the elements of price of materials, interest, expenses of manufacture and sale, and other necessary expenditures, if there be any, and bad debts, are to be taken into the account, and usually nothing else."); Mowry v. Whitney, 81 U.S. 620 (1872); Burdell v. Denig, 92 U.S. 716 (1876); Elizabeth v. Pavement Co., 97 U.S. 126, 138-39 (1877) citing Mowry v. Whitney, 14 Wall. 434 ("But one thing may be affirmed with reasonable confidence, that, if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits; the patentee, in such case, is left to his remedy for damages."); Elizabeth v. Pavement Co., 97 U.S. 126, 138-39 (1877) citing Rubber Co. v. Goodyear, 9 Wall. 788; *See also* Tilghman v. Proctor, 125 U.S. 136, 146 (1888).

> The infringer is liable for actual, not for possible gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages.

Id. Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co., 225 U.S. 604, 621-22 (1912); Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 400 (1940) ("Prior to the Copyright Act of 1909, there had been no statutory provision for the recovery of profits, but that recovery had been allowed in equity both in copyright and patent cases as appropriate equitable relief incident to a decree for an injunction."); Tull v. United States, 481 U.S. 412 (1987) (citing Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946)).

> The Government contends, however, that a suit enforcing civil penalties under the Clean Water Act is similar to an action for disgorgement of improper profits, traditionally considered an equitable remedy. It bases this characterization upon evidence that the District Court determined the amount of the penalties by multiplying the number of lots sold by petitioner by the profit earned per lot. Tr. of Oral Arg. 27. An action for disgorgement of improper profits is, however, a poor analogy. Such an action is a remedy only for restitution a more limited form of penalty than a civil fine.

The norm in remedies for restitution/unjust enrichment is to seek profits but not proceeds, as the defendant disgorges a net amount rather than a gross amount.[53] Defendants under claims from the SEC, CFTC and DOE are all allowed to deduct the cost of their securities, commodities or energy supplies before they make restitution. In most cases, they are also generally allowed to offset a few additional operating or administrative expenses. There are only three areas of substantive law that may not require the plaintiff to make counter-restitution to the willful defendant: (1) intentional trespass to minerals, (2) the recovery of stolen goods, and (3) mistaken improvements.[54] These cases both relate to the legal traditions for the misappropriation or trespass of tangible property which is unique.

Although the tradition is sometimes overridden by statutes regarding misappropriation or misuse of intellectual property, it is nevertheless true that the defendant's profits are only awarded to a plaintiff when the plaintiff can prove that the defendant acted with knowledge.[55] While Laycock has shown that a defendant's culpability and 'directness' can influence a court's determination of how much of the defendant's profits should be disgorged, if any, his important point does not apply to the difference between restitution of profits and

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> Restitution is limited to "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.

Id.

53. *See* Commodities Futures Trading Comm'n v. Am. Metals Exch. Corp., 991 F.2d 71, 77 n. 10 ("Appellant argues that the measure of disgorgement should be unlawful 'profits.' Appellees argue that the measure should be unlawful 'proceeds.' The term most frequently used in reported decisions appears to be 'profits.'").

54. *See* further discussion in Part VII. The net effect of the remedy can also resemble revenue restitution due to procedural issues such as the denial of offsets for a defendant that fails to substantiate the offsets or even the denial of jurisdiction to the defendant whose actions reveal unclean hands or other facts not worthy of a remedy in equity. *See* Andrew Kull, *Private Law, Punishment, and Disgorgement: Restitution's Outlaws*, 78 CHI.-KENT L. REV. 17 (2003).

55. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT 1, cmt. c (Discussion Draft, Mar. 31, 2000); 2 cmt. d ("Restitution in a proper case may strip a defendant of all profits gained in a transaction with the plaintiff . . . . Such a result is permissible only against a defendant whom the law treats as a conscious wrongdoer."); *id.* 3 cmt. c ("Liability to disgorge profits is ordinarily limited to instances of conscious wrongdoing . . . . As an exception to this general rule, trustees and other fiduciaries may be made liable for profits realized even as the result of an unintentional breach of fiduciary duty.").

restitution of revenues.[56]

The Supreme Court has held that awards of unjust enrichment against willful defendants face the limit of actual profits:

> Petitioners stress the point that respondents have been found guilty of deliberate plagiarism, but we perceive no ground for saying that in awarding profits to the copyright proprietor as a means of compensation, the court may make an award of profits which have been shown not to be due to the infringement. That would be not to do equity but to inflict an unauthorized penalty.[57]

Consider the opinion in *Farnum v. Silvano*, in which a 90 year old woman, suffering from a brain disease, was fraudulently induced by a close friend into selling her home for half of its value. Within six months of the transaction, the woman was also diagnosed as suffering from dementia and was committed to a nursing home. Eventually, the court ordered the sale of the house to be rescinded but not without the victim making restitution to the defendant for any real estate taxes paid or necessary repairs made. A remedy in equity is expected to be conducted in manner to achieve complete equity.[58]

The assessment of penalties or the application of punitive statutory provisions are not remedies in equity but rather remedies at law.[59] Judge Posner argues in *Reich v. Cont'l Cas. Co.* that the plaintiff's claim for reimbursement rather than the defendant's profit is evidence of the fact that the claim is actually a claim at law, not in equity:

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56. Laycock, *supra* note 3 at 1289.

> Courts sometimes award plaintiff all the profits produced by defendant's use of the property, but sometimes they award only the market value. The Restatement and Professor Palmer explain such distinctions partly in terms of culpability and partly in terms of directness. The more culpable defendant's behavior, and the more direct the connection between the profits and the wrongdoing, the more likely that plaintiff can recover all defendants' profits.

Id.

57. Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 400 (1940).

58. Farnum v. Silvano, 540 N.E. 2d 202 (Mass. App. Ct. 1989).

59. Tull v. United States, 481 U.S. 412, 420 (1987), citing Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946). ("First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties."); SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002) ("SEC v. Clark assumed, but without discussion, and we think erroneously, that civil penalties in SEC cases are not a form of legal relief.").

> But was the Department of Labor seeking restitution? It was seeking not a profit, but merely a receipt, an insurance premium, net of some expenses; to call this a 'profit,' it could be argued, would convert every suit for the price of a contract into a suit for restitution, contrary to the law.[60]

It would be an overstatement to conclude that all restitutionary remedies that seek the defendant's revenue (as opposed to the defendant's profit) are remedies at law, but it does seem reasonable to conclude that remedies for revenue are suspect as remedies in equity.

V. AN ANALYSIS OF IMPLIED JURISDICTION IN EQUITY

A. Conceptual Outline

As a simplified overview, a federal agency's complaint that normally enjoys implied jurisdiction includes a claim for injunctive relief and an ancillary monetary remedy. Asserted by itself, however, either the relief or remedy can be sufficient.

Implied jurisdiction is available as long as the court does not conclude:

> (1) That the equitable claim or relief would be adverse to the legislative purpose of the agency's statutory scheme;[61]
> (2) That the agency's statutory scheme is sufficiently specific to exclude the equitable relief claimed;[62] or
> (3) That the language of the statute specifically precludes the claimed relief.[63]

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60. Reich v. Cont'l Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994) (citing 1 Dobbs, *supra*, § 4.1(2), p. 559).

61. Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974) holding only

> [t]hat in a renegotiation case the contractor is obliged to pursue its administrative remedy and, when it fails to do so, may not attain its ends through the route of judicial interference. The nature of the renegotiation process mandates this result, and, were it otherwise, the effect would be that renegotiation, and its aims, would be supplanted and defeated by an FOIA suit.

Id.

62. Meghrig v. KFC W., Inc., 516 U.S. 479, 485 (1996) ("That RCRA's citizen suit provision was not intended to provide a remedy for past cleanup costs is further apparent from the harm at which it is directed.").

63. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) Relying on *Mertens*, the Supreme Court noted that Great-West's claim could be brought under ERISA only if the relief it was seeking fell within those categories of relief that were typically available in equity.

Assuming that implied jurisdiction is available, the specific complaint is entitled to implied jurisdiction in any one of the following three cases:

(1) In the absence of a claim for injunctive relief,[64] the agency's claim is determined to be compatible with traditional claims in equity,[65] or

(2) The injunctive relief and claims for monetary remedies are both compatible with traditional equitable relief[66];[67]or

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64. Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990).

> In this case, the only remedy sought is a request for compensatory damages representing backpay and benefits. Generally, an action for money damages was 'the traditional form of relief offered in the courts of law.' *Curtis v. Loether*, 415 U.S. 189, 196 (1974). This Court has not, however, held that 'any award of monetary relief must necessarily be legal relief.'

Id. (Emphasis added). *See also Granfinanciera*, *supra*, at 86, n. 9 (White, J., dissenting). ("Nonetheless, because we conclude that the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable, we find that the remedy sought by respondents is legal.").

65. *Great-West,* 534 U.S. at 212. The Court stated that,

> [s]econd, petitioners argue that their suit is authorized by § 502(a)(3)(B) because they seek restitution, which they characterize as a form of equitable relief. However, not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity.

Id.

66. Grupo Mexicano De Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) ("Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789, 1 Stat. 73 (1789)." A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928); "The substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction." 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2941 at 31 (2d ED. 1995). We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity."); *see also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975):

> We turn, therefore, to the Court of Appeals' conclusion that respondent's claim was not to be judged according to traditional equitable principles, and that the bare fact that petitioner violated the Williams Act justified entry of an injunction against him. This position would seem to be foreclosed by Hecht Co. v. Bowles, 321 U.S. 321 (1944).

Id.

67. *Great-West*, 534 U.S. at 210 ("Here, petitioners seek, in essence, to impose

(3) The injunctive relief is compatible with traditional equitable relief; the claims for monetary remedies are more compatible with traditional claims at law; but the nature of the injunctive[68] and monetary relief are such that the 'clean-up' doctrine[69] would allow such ancillary remedies at law.[70]

In most cases the second set of conditions collapses into two considerations: is the monetary remedy compatible with traditional equitable remedies or is the injunctive relief sufficiently significant to warrant the 'clean up' doctrine that permits ancillary remedies at law?

Implied jurisdiction is based on the assumption that if Congress intended to preclude a district court's jurisdiction in equity relating to a specific statutory scheme, Congress would have done so with specific language. A lesser known corollary to this analysis is that if Congress wanted a court's jurisdiction in equity to vary from traditional jurisdiction in equity, it would have said so in the statute.[71] In the last ten years the Supreme Court has emphasized traditional remedies in

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personal liability on respondents for a contractual obligation to pay money -- relief that was not typically available in equity. A claim for money due and owing under a contract is 'quintessentially an action at law.'").

68. *Id.* at 210-11.

> First, petitioners argue that they are entitled to relief under § 502(a)(3)(A) because they seek 'to enjoin an act or practice'—respondents' failure to reimburse the Plan—'which violates . . . the terms of the plan.' But an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity.

Id. *See also*, *e.g.*, 3 RESTATEMENT (SECOND) OF CONTRACTS § 359 (1979).

69. Medtronic, Inc. v. Intermedics, Inc., 725 F.2d 440, 442-43 (7th Cir. 1984).

> There are, however, two relevant limitations to the equity clean-up doctrine. The first, which is absolute, is that the plaintiff must have a good case in equity if he wants the equity court to award him legal relief as well; otherwise a plaintiff could bypass the law court and litigate a purely legal claim in equity. *See* 1 Pomeroy's Equity Jurisprudence § 237d n. 5 (Spencer W. Symons, ed., 5th ED. 1941) (1881). In other words, the invocation of equity jurisprudence must not be frivolous. But there is no indication of that here. The second limitation, discretionary rather than absolute, is more problematic in this case. If the equitable relief sought was merely incidental to the legal relief sought, the equity court might refuse to entertain the suit and the plaintiff would then have to bring his suit in the law court and abandon his incidental equity claim.")

Id. (internal citations altered).

70. Tull v. United States, 481 U.S. 412, 420 (1987) ("First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties." *See* Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946)).

71. *See* Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944).

equity as a limit to current court remedies awarded in implied jurisdiction.

The Supreme Court's opinions in *Porter v. Warner Holding Co.*[72] and *Mitchell v. Robert Demario Jewelry, Inc.*[73] established the doctrine of implied jurisdiction in two stages. First, *Porter* held that if a statutory scheme provided for injunctive relief, a district court is presumed to have jurisdiction for the full range of equitable relief in the absence of preclusive language in the statutes.[74] Second, *Mitchell* held that a statutory scheme did not need to provide for any equitable remedies; Congress presumptively implied the full range of equitable remedies in the absence of preclusive language.[75]

The Court's opinion in *Hecht*,[76] which preceded *Porter*, provides necessary background. Like *Porter* the opinion in *Hecht* addressed the powers of the Price Administrator under the Emergency Price Control Act of 1942. The "Price Administrator" sought for the court to enjoin the store's charging excessive prices and to order restitution of the store's unjust enrichment. Section 205(a) of that Act provided jurisdiction for the Price Administrator to obtain injunctive relief and the Act was later amended to provide penalty provisions under Section 205(e). No mention is made in either section of other equitable monetary remedies.

The holding in *Hecht* confirmed a court's equitable discretion to deny any relief, even if the defendant has violated the statute, when the court believes that rules of fairness or equity preclude such relief.[77]

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72. 328 U.S. 395 (1946).

73. 361 U.S. 288, 291 (1960).

74. *Porter*, 328 U.S. at 398 ("Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.").

75. *Mitchell*, 361 U.S. at 291-92 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.").

76. *Hecht*, 321 U.S. at 330.

77. *Id.*

> We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. We do not think the history or language of § 205 (a) compel it. It should be noted, moreover, that § 205 (a) governs the procedure in both federal and state courts. For § 205 (c) gives the state courts concurrent jurisdiction with federal district courts of civil enforcement proceedings. It is therefore even more compelling to conclude that, if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made

Specifically, the Supreme Court affirmed the district court's holding that the defendant's violations were technicalities, inadvertent and adequately resolved by the defendant's remedial measures. The Court stated that a district court that hears a case based on implied jurisdiction presides as a court in equity and operates in the manner of a traditional court in equity. The traditional equitable discretion of a judge sitting in equity was sufficient authority for the *Hecht* opinion to deny the remedy claimed by the Price Administrator.

The Court's opinions in *Porter* and *Mitchell* share circumstances that have confused subsequent opinions regarding implied jurisdiction and equitable remedies. First, neither opinion held that the monetary remedies at issue were remedies in equity. Both opinions state that the proposed remedies may better resemble remedies at law, but that the remedies were sufficiently ancillary to legitimate claims for injunctive relief. This 'clean-up' doctrine, or doctrine of complete relief, precluded the need to evaluate the proposed remedies.[78]

The second common characteristic relates to a coincidence in the calculation of monetary remedies. For both back pay and excess rents, the plaintiffs' loss was equal to the defendants' benefit. Furthermore, in both cases the defendants' net benefit was equal to its gross benefit because neither defendant incurred any additional expenses to produce the unjust benefits. The result is that both cases can be held out to support a claim for the plaintiffs' losses, the defendants' gross benefit (which is otherwise known as revenue disgorgement) or the defendant's net benefit.[79]

At times, the Court's opinion in *Porter* has been misinterpreted to stand for the assertion that the restoration of the plaintiff to his ex ante position by refund or reimbursement provides a remedy in restitution, presumably even an equitable remedy in restitution. Restitution is

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> its desire plain.

Id.

78. *Porter*, 328 U.S. at 399.

> It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. To be sure, such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available.

Id.

79. According to the Seventh Circuit, however, *Porter* holds for profits disgorgement. SEC v. Cherif, 933 F.2d 403, 414 & n.11 (7th Cir. 1991) (Posner, J.), *cert. denied*, 502 U.S. 1071 (1992).

limited to "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant."[80] The context of the essential *Porter* quote was that the Court was distinguishing the proposed restitutionary remedy from the damage provisions in Section 205(e) to show why that subsection did not exclude the remedy of restitution.[81] As Professor Murphy points out, restoring the plaintiff to status quo and compensating damages have a great deal in common.[82]

B. Limits for Implied Equitable Remedies

While some courts have recognized limits or boundaries to the range of appropriate remedies applicable to implied jurisdiction, most of the heavy lifting in this area has been undertaken by the Supreme Court in its opinions on general jurisdiction in equity and under ERISA.[83] Combined, the opinions in *Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc.*[84] and *Great-West Life & Annuity Insurance Co. v. Knudson*,[85] tend to emphasize the traditional limits to the Court's holding in *Mitchell* which states that in the absence of any relevant language in the statutory scheme, a district court is free to infer the full extent of traditional authority and jurisdiction in equity. The Court's opinion in *Grupo* shows how a district court should determine the full range of traditional jurisdiction in equity and the Court's opinion in

80. Tull v. United States, 481 U.S. 412, 424-25 (1987) (quoting *Porter*, 328 U.S. at 402).

81. *See* Murphy, *supra* note 27, at 1610.

> Later decisions have read the *Porter* language of 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant' as a definition that distinguishes restitution from compensatory damages. Such an interpretation pulls the language out of context. The Court in *Porter* had no occasion to distinguish compensatory damages from restitution, but rather was faced with deciding whether monetary relief incidental to an injunction could be awarded without circumventing the scheme of treble damages and attorney's fees set forth in section 205(e). Furthermore, 'restoration of a loss to the plaintiff' does not distinguish restitution from compensation or damages when the loss is that of money. The Court's language should not be read as providing a meaningful distinction between restitution and compensation.

Id.

82. *See* Murphy, *supra* note 27.

83. *See* Murphy, *supra* note 27, at 1619. Judge Posner's opinions, especially that in *Reich,* appear to have greatly influenced some of Justice Scalia's more recent opinions; Employee Retirement Income Security Act, 29 U.S.C. § 1132 (2000).

84. 527 U.S. 308 (1999).

85. 534 U.S. 204 (2002).

Great-West provides (1) some needed guidelines on the distinctions between remedies in equity and remedies at law and (2) an example of how relevant language limits the range of available remedies for statutory claims in ERISA.

The test for whether a remedy is a traditional remedy in equity[86] was confirmed by Justice Scalia's opinion in *Grupo*,[87] in which he shows that the remedy must have been in general practice in the courts in equity in England in 1789. The specific issue in that case was whether a district court has the authority to issue a preliminary injunction to freeze some or all of the defendant's assets.

> Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act. . . . We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity.[88]

While this conceptually-simple test reflects many previous Supreme Court opinions,[89] the dissenting opinions in *Great-West* decry the difficulty of determining the typical practice of courts in equity in eighteenth century England. Indeed, such objections and complaints of needless inflexibility for such a "static"[90] standard were raised by other justices in their dissent.[91]

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86. *See* Newby v. Enron Corp., 188 F. Supp. 2d 684, 702 (S.D. Tex. 2002) ("Deciding whether a plaintiff has properly stated a claim for equitable relief requires an examination, in accordance with *Grupo Mexicano,* of the equitable claims historically available.").

87. *See Grupo*, 527 U.S. at 318-19.

88. *Id.* (internal citations omitted).

89. *See* Fenn v. Holme, 62 U.S. 481 (1859); Root v. Ry Co., 105 U.S. 189, 212 (1881).

> This firm and indisputable doctrine of the English chancery has been recognized and declared by this [C]ourt, in *Hipp v. Babin* (19 How. 271), to be part of the system of equity jurisprudence administered by the courts of the United States, founded not only upon the legislative declaration in the Judiciary Act of 1789, 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law,' but also upon the intrinsic distinctions between the different jurisdictions of law and equity.

Id.

90. *See Grupo*, 527 U.S. at 336 (Ginsburg, J., dissenting).

91. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 221-34 (2002) (Stevens & Ginsburg, JJ., dissenting).

The Court's opinion in *Great-West*[92] related to a claim by an insurance company under ERISA[93] against a beneficiary. The beneficiary suffered a severe auto accident, which required extended medical care. Prior to the personal injury litigation filed by the beneficiary, the insurance company funded all of the victim's medical expenses, but then sued the beneficiary for reimbursement after she settled her personal injury claim. The key problem for the insurance company was that the proceeds of the settlement were paid directly into a trust for the future medical care of the beneficiary. The key issue for the Supreme Court was whether the insurance company's claim against the beneficiary was permitted under the ERISA statutory scheme which restricts civil claims under ERISA to equitable remedies.[94]

Some circuit courts have previously assumed that remedies based on either unjust enrichment, restitution, or both, were similar to remedies in equity. Thus the Supreme Court was observed to have made a change in direction[95] in *Great-West* by holding that restitution can be a remedy at law or a remedy in equity.[96] Furthermore, there can be at least four sources of jurisdiction for a remedy in restitution: as a remedy at law for a claim of assumpsit; as a remedy at law for a tort which is waived in favor of assumpsit; as a remedy in equity; and as a remedy at law that is ancillary to traditional relief in equity.[97] Justice Scalia's majority opinion emphasized the distinctions between claims for remedies that are related to a specific asset or res which are remedies in equity[98] and cash remedies that better resemble claims in assumpsit

92. *Great-West*, 534 U.S. at 204.

93. 29 U.S.C. § 1132 (2000).

94. *See infra* note 101 for the statutory language.

95. *See Great-West*, 534 U.S. at 214-15 ("Admittedly, our cases have not previously drawn this fine distinction between restitution at law and restitution in equity, but neither have they involved an issue to which the distinction was relevant.").

96. However, this was not the first time that the Supreme Court distinguished restitution at law from restitution in equity. In *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990), the Court addressed this issue. *See supra* note 64.

97. *See infra* notes 202-206 and accompanying text for an example of how a claim for trespass to minerals has been pled under different sources of jurisdiction. For further explanation of the different sources of jurisdiction for unjust enrichment, see George P. Roach, *How Restitution/Unjust Enrichment Can Enrich a Corporate Claim* REV. LITIG. (forthcoming 2007).

98. Zarycki v. Mount Sinai/NYU Health, 02 Civ. 6236, 2005 U.S. Dist. LEXIS 28104, at *31-32 (S.D.N.Y. Nov. 4, 2005).

Even though the plaintiff in Nechis sought restitution, the Second Circuit affirmed the which are restricted to courts at law.[99]

This opinion should be viewed from the perspective that it perceived the statutory provision under Section 502(a)(3)(B)[100] as a restriction on the jurisdiction normally accorded matters regarding trusts and fiduciary duties. Historically, such issues were resolved predominately by courts in equity as trusts and fiduciaries were regarded as creations of courts in equity. The key logic of the Court's opinion relates to the import of the phrase "to obtain other appropriate equitable relief" under Section 502(a)(3)(B).[101]

> As we explained in *Mertens*, "'equitable' relief must mean something less than all relief." Mertens v. Hewitt Assocs., 508 U.S. 248, 258, note 8 (1993). Thus, in *Mertens* we rejected a reading of the statute that would extend the relief obtainable under § 502(a)(3) to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority). Such a reading, we said, would "limit the relief not at all" and "render the . . . modifier ['equitable'] superfluous." *Id.* at 257-258. Instead, we held that the term "equitable relief" in § 502(a)(3) must refer to "those categories of relief that were typically available in equity . . . ." *Id.* at 256.[102]

The *Great-West* opinion also provides further guidance on the

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> district court's decision to dismiss the claim because the plaintiff could not show that the defendant was under an obligation to segregate or that it did in fact segregate the funds he was seeking into a separate account.

Id. (Referring to Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 103-04 (2d Cir. 2005)).

99. Eichorn v. AT&T Corp., Civ. No. 96-3587, 2005 U.S. Dist. LEXIS 29261, at *37 (D. N.J. Nov. 22, 2005)

> While plaintiffs disclaim any resort to equitable relief, their purported 'equitable decree' is on all fours with the type of 'legal restitution' that the *Great-West* case held was not recoverable under Section 502(a)(3). Thus, plaintiffs' calling the award of back pay-type damages an equitable decree will not save their claim. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (holding "although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages. . . .").

100. 29 U.S.C. § 1132.

101. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002).

> Section 502(a)(3) authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan."

Id. (quoting 29 U.S.C. § 1132(a)(3) (1994 ED.).

102. *Id.* at 209-10 (emphasis deleted) (internal citations altered).

necessary elements to qualify for ancillary jurisdiction for a legal remedy in equity. It reinforces the policy that the injunctive relief that is requested by a plaintiff and that is offered as the source of the ancillary jurisdiction must conform to traditional standards, that the proposed injunction must be scrutinized for mere artful pleading designed to bypass the jurisdictional restrictions. However, the opinion does not preclude ancillary jurisdiction nor does it preclude the traditional opinion that most matters relating to trusts or fiduciaries have traditional jurisdiction in courts in equity.[103]

C. How Much Authority is Implied?

Underlying the Supreme Court's opinions in *Grupo* and *Great-West* is a concern that traditional or implied authority is subject to abuse and needs to be better defined and more clearly limited:

> We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief. To accord a type of relief that has never been available before—and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a 'default rule,' *post*, at 342 (Ginsburg, J., dissenting), not of flexibility but of omnipotence. When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy.[104]

The *Grupo* opinion was not focused on implied jurisdiction, but the Court's general intent to restrict jurisdiction in equity is clear. Therefore, implied jurisdiction may be just one example of a default rule that has been poorly applied**.**

One possible explanation for the seeming willingness of some courts to accommodate the agencies' proposed remedies beyond the point of traditional remedies in equity is that the courts show great sympathy for the goals and responsibilities of the agencies. Historically, a court in equity was expected to solve problems and provide a safety

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103. Both the majority opinion and Ginsburg's dissent agree that ancillary jurisdiction can be appropriate occasionally. *See id.* at 215 (quoting Reich v. Cont'l Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994)).

104. Grupo Mexicano De Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999).

net for problems in the system of courts at law as well as protect the public as a whole. In addition to a court's equitable discretion, some courts appear to infer the subject matter jurisdiction necessary to assist the agency and, for example, protect the consuming and investing public from crooks, swindlers and other unjustly enriched defendants. This can lead to a court's justifying its opinion for appropriate remedies on the basis of the needs of the agency to function properly.

These grand aspirations evolved from a humble origin. For example, the Ninth Circuit's statement in *FTC v. H.N. Singer, Inc.* was limited to a traditional remedy in equity:

> We hold that Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.[105]

This quote has been passed from opinion to opinion, steadily veering away from the limit of traditional remedies in equity, and was recently repeated as "[t]his grant of permanent injunctive power gives the court broad equitable authority to 'grant any ancillary relief necessary to accomplish complete justice.'"[106]

Other opinions justify the proposed remedy on the basis of the agency's need:

> The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits. As Judge Waterman said in *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971): "It would severely defeat the purposes of the Act if a violator of Rule 10b-5 were allowed to retain the profits from his violation." *Accord*, SEC v. Giaconda

105. 668 F.2d 1107, 1113 (9th Cir. 1982). *See id.* at 1111.

> It is clear that, because the district court has the power to issue a permanent injunction to enjoin acts or practices that violate the law enforced by the Commission, it also has authority to grant whatever preliminary injunctions are justified by the usual equitable standards and are sought in accordance with Rule 65(a).

Id.

106. FTC v. Five-Star Auto Club, Inc., 97 F. Supp. 2d 502, 533 (S.D.N.Y. 2000) (quoting *H.N. Singer*, 668 F.2d at 1113 (9th Cir. 1982). *See also* FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1024-26 (7th Cir. 1988); FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1433-34 (11th Cir. 1984); *but see* FTC v. Sw. Sunsites, Inc., 665 F.2d 711, 718 (5th Cir. 1982), *cert. denied* 456 U.S. 973 (1982).

> Mining Co., 327 F. Supp. 257, 259 (S.D.N.Y.1971). We hold that it was appropriate for the district court to order appellants to disgorge the proceeds received in connection with the Manor offering.[107]

Recently, the justification of the agency's need has evolved into the need to improve consumer confidence:[108]

> Restitution that reimburses consumers who paid for unapproved drugs, and may have been defrauded or deceived about their effectiveness, restores aggrieved parties to the same economic position they enjoyed before the Act was violated. This strengthens the financial protection offered to the public by the FDCA and enhances consumer confidence in the drug market. Whether or not Congress specifically contemplated restitution under the FDCA, the ability to order this remedy is within the broad equitable power granted to the district courts to further the economic protection purposes of the statute.[109]

The Third Circuit misses the point: the key issue is whether 'restitution that reimburses consumers' is a traditional remedy in equity. Congress' contemplations can only restrict the range of traditional remedies in equity applicable to implied jurisidiction.

Comments similar to that of the Third Circuit rarely attract a response. To be fair, some of this language can be attributed to a court's need to confirm that the claim is compatible with the purpose of the statutory scheme. However, in light of the courts' expansive measure of an agency's remedy as compared to traditional remedies in equity, the courts' justification on the basis of their seeming enthusiasm for the goals of the agencies seems misplaced and irrelevant.[110]

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107. SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1104 (2d Cir. 1972). *See also* SEC v. Sekhri, 98 Civ. 2320, 2002 U.S. Dist. LEXIS 13289 (S.D.N.Y. July 22, 2002); Crude Co. v. FERC, 923 F. Supp. 222 (D.D.C. 1996), *aff'd* 135 F.3d 1445 (Fed. Cir. 1998); and United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1447-48 (E.D.N.Y. 1988), *aff'd on other grounds*, 879 F.2d 20 (2d Cir. 1989).

108. Wright v. Scotton, 121 A. 69 (Del. Ch. 1923). *See also* Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950, 954 (Tex. 1960).

109. United States v. Lane Labs-USA, Inc., 427 F.3d 219, 229 (3d Cir. 2005).

110. *See* SEC v. Unioil, 951 F.2d 1304, 1306 (D.D.C. 1991).

> Since disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power only over property causally related to the wrongdoing. The remedy may well be a key to the SEC's efforts to deter others from violating the securities laws, but disgorgement may not be used punitively. Therefore, the SEC generally must distinguish between legally and illegally obtained profits.

D. Four Limiting Issues for Implied Jurisdiction

Following the opinions in *Porter* and *Hecht*, four substantial issues have developed to limit the nature of remedies that are appropriate under implied jurisdiction: the applicability of the clean-up doctrine; the nature of traditional remedies in equity; the punitive nature of the proposed remedy and personal liability of the defendant.

1. Clean-Up Doctrine

To apply the clean-up doctrine, a court needs to confirm that:

(1) The injunctive relief sought is traditional injunctive relief;

(2) That the relationship between the injunctive relief and the proposed ancillary monetary relief is appropriate; and

(3) That there is no other alternative legal relief which could otherwise resolve the plaintiff's claim.[111]

A substantial portion of the case law on the clean-up doctrine relates to the right to a jury trial. In 1962, the Supreme Court held that the clean-up doctrine was not applicable to jury trial issues, i.e. that a party's right to a jury trial must not be overridden by the doctrine.[112] At the same time, the Court did not preclude other applications of the doctrine and therefore case law regarding the right to jury trials may not be directly applicable to the doctrine for non-jury issues.

Id.; *and* CFTC v. Am. Metals Exch. Corp., 991 F.2d 71, 78 (3d Cir. 1993).

> On the other hand, an award of damages in the amount of investor losses may go beyond the scope of a Commodity Exchange Act enforcement proceeding. Absent a hearing to calculate ill-gotten gains, the disgorgement ordered in an amount equal to investor losses could be a penalty assessment. If investors wish to seek recovery of their losses as a remedy, they are free to do so in an independent civil action against defendants. The hardship of investor losses should not, however, be used as an excuse to impose a remedy under circumstances in which the scope of relief falls outside that remedy's recognized parameters.

Id.

111. Tull v. United States, 481 U.S. 412, 424 (1987).

> Finally, the Government was free to seek an equitable remedy in addition to, or independent of, legal relief. Section 1319 does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separately authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of Subsection (d), which provides only for civil penalties. In such a situation, if a "legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact."

Id. (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974).

112. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

Second, the necessary or appropriate relationship between the injunctive relief and monetary remedy may vary by jurisdiction as that jurisdiction's interpretation of the clean-up doctrine varies. A Delaware Chancery Court has the discretion to hear such a claim in equity with ancillary relief at law.[113] The necessary relationship in the Seventh Circuit[114] is that the equitable nature of the overall claim must be 'non-inconsiderable' while the First and Second Circuits[115] require the equitable relief to dominate the claim. Much of the recent opinions from the Supreme Court has related to their rejection of the plaintiff's injunctive relief because the relief was either not traditional injunctive relief or the remedy at law was determined to be the dominant issue in the case,[116] perhaps reflecting the Supreme Court's preference for the "dominant" criterion rather than the "non-inconsiderable" criterion of the Seventh Circuit.[117]

Third, the Supreme Court requires that the injunctive relief conform to traditional relief in equity:

> We turn, therefore, to the Court of Appeals' conclusion that respondent's claim was not to be judged according to traditional equitable principles, and that the bare fact that petitioner violated the Williams Act justified entry of an injunction against him. This position would seem to be foreclosed by Hecht Co. v. Bowles, 321

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113. *Wright*, 121 A. at 76. *See also Weatherford Oil Tool*, 340 S.W.2d at 954.

114. Medtronic, Inc. v. Intermedics, Inc., 725 F.2d 440, 442-43 (7th Cir. 1984) (According to Judge Posner, a "good case in equity is required" but a court has the discretion to reject the application of the doctrine if the claim in equity is only 'incidental' to the remedy at law).

115. USM Corp. v. GKN Fasteners, Ltd., 574 F.2d 17 (1st Cir. 1978); Schine v. Schine, 367 F.2d 685, 688-70 (2d Cir. 1966) (Friendly, J., concurring).

> So long as Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S. Ct. 310, 79 L. Ed. 440 (1935), and Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 63 S. Ct. 163, 87 L. Ed. 176 (1942) stand, federal appellate courts will necessarily have difficulty in determining whether an appeal is attracted by the rule of those cases or the contrary one of City of Morgantown v. Royal Ins. Co., Ltd., 337 U.S. 254, 69 S. Ct. 1067, 93 L. Ed. 1347 (1949) and Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 182-185, 75 S. Ct. 249, 99 L. Ed. 233 (1955), when a complaint seeks both legal and equitable relief. The best solution of an essentially insolvable problem appears to be the dominant purpose test, with any fair doubt being resolved against the claim that the action was predominantly one at law.

Id.

116. *Tull*, 481 U.S. at 424-25.

117. *Medtronic*, 725 F.2d at 442-43.

U.S. 321 (1944).[118]

Subsequently, the Court rejected the claim for implied jurisdiction in *Tull* due to the facts that the defendant had stopped the activities that led to the complaint and that the EPA's claim for $22 million of penalties dominated the claim.[119] In *Grupo*, the plaintiff's claim for temporary injunctive relief was rejected based on the conclusion that such a form of relief was not awarded in the English courts of equity in the late eighteenth century.[120] Finally, the Supreme Court's opinion in *Great-West* held that the injunctive relief claimed by the plaintiff amounted to a court order to the defendant to comply with contract payment provisions and was not a traditional form of injunctive relief.[121]

A seasoned opinion of the Delaware Supreme Court provides some historical background on the clean-up doctrine which indicates that the clean-up doctrine may have been practiced in the Courts of Chancery before 1789 and before the Lord Cairns Act was passed in 1858:

Before the passage of that act, it was held in numerous cases that such power existed in Courts of Chancery, and would be exercised if the peculiar or particular circumstances of the case required it to do full justice. The following cases may be mentioned: Jesus College v. Bloom, (1745) 3 Atk. 262, 26 Eng. Rep. 953; Louden v. Nash, (1747) 3 Atk. 512, 26 Eng. Rep. 1095; _______ v. White, (1818) 4 Swanst. 107, Eng. Reprint. 792; Ferguson v. Tadman, (1877) 1 Sim. 530, 57 Eng. 676; Nelson v. Bridges, (1838) 2 Beav. 239; Prothers v. Phelps, (1855) 7 Deg. M. & G. 734.[122]

118. Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).

119. *Tull*, 481 U.S. at 424-25 ("A potential penalty of $22 million hardly can be considered incidental to the modest equitable relief sought in this case.").

120. Based on the Judiciary Act of 1789, the United States formally adopted the courts in equity as they existed at that time. Justice Scalia's opinion in *Grupo Mexicano*, as an extension of several earlier Supreme Court opinions, held that the proponent must prove that the claimed relief was traditionally awarded by English courts in equity in 1789. *See also* Root v. Ry. Co., 105 U.S. 189, 207-15 (1882); Fenn v. Holme, 62 U.S. 481 (1859); Hipp v. Babin, 60 U.S. 271 (1857).

121. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 211 (2002); s*ee also* Amschwand v. Spherion Corp., 2005 U.S. Dist. LEXIS 21007, p*21 (S.D. TX 2005) ("This request for an injunction is simply an indirect attempt to recover from Defendants what she cannot recover directly--the value of the life insurance proceeds. Plaintiff cannot obtain the relief she seeks under ERISA § 502(a)(3), and her § 502(a)(3) claim must therefore be dismissed."). *See also* Callery v. U.S. Life Ins. Co., 392 F.3d 401 (10th Cir. 2004).

122. Wright v. Scotton, 121 A. 69, 76 (Del. Ch. 1923).

From 1850 to 1880, the clean-up doctrine, as applied to patent claims for injunctive relief and an accounting in equity, was frequently discussed in Supreme Court opinions. These opinions, as well as other lower court opinions, analyzed the impact on implied jurisdiction for an accounting in equity when the injunctive relief claimed for a violation of a patent was denied. Does the denial of the injunctive relief necessarily dictate that the case be transferred to a court at law?[123] What if the plaintiff's claim for injunctive relief was reasonable on the date of claim but subsequent events warranted the denial of the injunction?[124]

An opinion from the Seventh Circuit in 1932 provides a useful summary of these opinions. The court breaks the analysis down into three parts: when the patent has already expired before the claim is filed and no injunctive relief can be afforded the court has no jurisdiction;[125] when there is a small amount of time remaining on the patent after the claim is filed, jurisdiction is discretionary with the court;[126] and when the claim for injunctive relief is a subterfuge to gain jurisdiction in equity, the court should transfer the case to a court at law.[127] The key concept appears to be that under most circumstances, the plaintiff's jurisdiction is discretionary with the court.[128]

Professor Murphy's article makes a case that the irreparable injury doctrine applies in the area of the clean-up doctrine. She notes that there are exceptions to this conclusion, especially relating to claims on trusts or fiduciary duties[129] but she has assembled impressive support from

123. *See* SEC v. Commonwealth Chem. Secs., Inc., 574 F.2d 90, 102-03 (2d Cir. 1978) (holding that the denial of an injunction does not preclude the remedy at law).

124. Busch v. Jones, 184 U.S. 598, 599 (1902) (holding that equitable jurisdiction must be determined by the conditions existing at the time the bill is filed, and not by conditions which come into existence after the commencement of the suit).

125. King Mechanism & Eng'g Co. v. W. Wheeled Scrapper Co., 59 F.2d 546, 547 (7th Cir. 1932); *Root*, 105 U.S. at 189; Bourne v. Goodyear, 76 U.S. 811 (1869); Le Roy v. De Vry Corp., 16 F.2d 18 (2d Cir. 1926); Wright's Automatic Tobacco Packing Mach. Co. v. Am. Tobacco Co., 220 F. 163 (D.C. Va. 1915).

126. *King Mechanism & Eng'g Co.* at 547; *See also* Clark v. Wooster, 119 U.S. 322 (1886); Rice & Adams Corp. v. Lathrop, 278 U.S. 509 (1929); *Le Roy*, 16 F.2d at 18; W.W. Sly Mfg. Co. v. Cent. Iron Works, 201 F. 683 (7th Cir. 1912).

127. *Id.* at 548 citing *Root*, *supra* note 120; Hayward v. Andrews, 106 U.S. 672 (1883); Goldschmidt Thermit Co. v. Primos Chem. Co., 216 F. 382 (D. Pa. 1914); Diamond Stone-Sawing Mach. Co. v. Seus, 159 F. 497 (S.D.N.Y. 1908).

128. *Root*, 105 U.S. at 215-16.

129. Murphy, *supra* note 27, at n.124; *see* 1 John N. Pomeroy, A Treatise on Equity Jurisprudence 181, at 257 (5th Ed. 1941).

Hence, there developed the practice that claims against fiduciaries, including claims many of the traditional experts on the topic.[130] For example, the Supreme Court's opinion in *Granfinanciera v. Nordberg*[131] states that "even if the checks respondent seeks to recover lay untouched in petitioners' offices, legal remedies would apparently have sufficed."[132] Justice Marshall's opinion in *Tull* echoed the Court's opinion in *Dairy Queen* and rejected the use of the clean-up doctrine to impinge on the right to a jury.[133] In addition, *Root v. Ry. Co.*[134] reviews many of the Supreme Court opinions in the nineteenth century that analyzed the application of the clean-up doctrine to patent claims and strongly supports Murphy's assertion that the clean-up doctrine was not intended to be applied if there existed a sufficient alternative remedy at law.

However, current case law regarding the FTC would seem to contradict this position. The FTC statute has two specific provisions that provide jurisdiction for the agency's claims. Section 13(b) provides for injunctive relief and Section 19 provides for specific remedies. The more specific provision for jurisdiction has been held to neither constrict nor preclude the FTC's jurisdiction because the statute specifically says that Section 19 was not intended to limit any other jurisdiction that the FTC might have under any other sections.[135]

The irreparable injury rule seems unreliable in light of the facts that (a) the holding in *Tull* related to the defendant's right to a jury, (b) the isolated nature of the cases that actually dismissed cases because an

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> for restitution, were asserted in equity. *See* RESTATEMENT OF RESTITUTION, 160 cmt. e, at 645 ("Even though what is transferred is money . . . the payor or transferor is entitled to maintain a proceeding in equity for specific restitution if the payment or transfer was procured by an abuse of a fiduciary or confidential relation.").

Id.

130. Murphy, *supra* note 27, at 1603 n. 126.

131. Granfinanciera v. Nordberg, 492 U.S. 33 (1987).

132. *Id.* at 49 n. 7; *See also Dairy Queen*, 369 U.S. at 478 ("The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in Beacon Theatres, the absence of an adequate remedy at law.").

133. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 229 (2002).

134. Root v. Ry. Co., 105 U.S. 189, 212 (1881).

135. FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).

> However, § 19(e) provides: Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law. Thus, there is no necessary or inescapable inference, or, indeed, any inference, that Congress intended to restrict the broad equitable jurisdiction apparently granted to the district court by § 13(b).

Id.

adequate legal remedy exists, and (c) the lasting impression of Professor Laycock's conclusion that the irreparable injury rule is mainly applied as an excuse for some other unspoken issue.[136] Though strongly supported by legal theory and 19th century case law, the irreparable injury rule a valid cause for today's courts to deny jurisdiction, but not predictably so and it therefore remains an additional source of the heightened variability of remedies in equity.

2. Identifiable Assets or Funds Traceable to the Defendant

Many of the remedies for unjust enrichment that force a defendant to disgorge her benefit or unjust profit are actually claims in assumpsit, which are claims at law. "However, not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity."[137] A verdict of a court in equity was accompanied by an order from the court to transfer title to a specific asset or surrender control of a segregated account or trust.

Actual possession of the relevant property was one of the key determinants of the *Great-West* opinion:

> In cases in which the plaintiff 'could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,' the plaintiff had a right to restitution at law through an action derived from the common law writ of assumpsit. Dobbs, *Law of Remedies, Damages, Equity, Restitution* § 4.2(1), at 571; *see also* Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 Iow L. rev. 1, 37 (1995). In such cases, the plaintiff's claim was considered legal because he sought 'to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.' Restatement (First) of Restitution § 160, cmt. A (1937). Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).[138]
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> . . . .

136. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

137. *Great-West*, 534 U.S. at 212.

138. *Id*. at 213 (internal citations edited).

> But where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].' Restatement (First) of Restitution, *supra, § 215*, cmt. a (1937). Thus, 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.[139]

To secure jurisdiction on the basis of the clean-up doctrine, the plaintiff attempted to disguise his claim within the language of a claim for injunctive relief to order the insurance beneficiary to pay the contract obligation. The artful pleading for injunctive relief failed:

> The basis for petitioner's 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.[140]

In her dissent, Justice Ginsburg makes a valid point about the importance of possession of the relevant assets. She asserts that if the insurance company chose to sue the needs trust rather than the beneficiary of the trust, the logic of the majority opinion would demand that such a claim be deemed a claim in equity.[141] To generalize a statement by Professor Dobbs on constructive trusts, courts in equity

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139. *Id.* at 213-14 (alterations to internal citations added) (textual alterations in original).

140. *Id.*, *see* Williams Elecs. Games, Inc. v. Garrity, 366 F.3d 569, 577-78 (7th Cir. 2004); *See supra* text accompanying note 65.

141. *Great-West*, 534 U.S. at 224-26 (Ginsburg, J., dissenting).

> That Congress did not intend to strap § 502(a)(3) with the anachronistic rules on which the majority relies is corroborated by the anomalous results to which the supposed legislative 'choice' leads. Although the Court recognizes that it need not decide the issue . . . its opinion surely contemplates that a constructive trust claim would lie; hence, the outcome of this case would be different if Great-West had sued the trustee of the Special Needs Trust, who has 'possession' of the requested funds, instead of the Knudsons, who do not.

Id. (internal citation omitted).

focus more on assets than liability.[142]

Chief Justice Roberts recently handed down a unanimous opinion that succeeds *Great-West* and emphasizes Justice Ginsburg's point.[143] In that case, the defendant agreed with the plaintiff to segregate the funds in dispute. Under those circumstances the court affirmed the Fourth Circuit and the district court in their holding that such a claim for a particular fund could proceed.[144]

Interestingly, however, this unanimous opinion either made a mistake or has introduced a substantial change in the analysis detailed in *Grupo* and endorsed in *Great-West*. To distinguish between remedies at law and remedies in equity, Chief Justice Roberts states that "we examined cases and secondary legal materials to determine if the relief would have been equitable 'in the days of the divided bench.'"[145] Given the pinpoint cite, Chief Justice Roberts is referring to the statement in *Great-West* that "[i]n the day of the divided bench, restitution was available in certain cases at law, and in certain others in equity."[146] Later in the *Great-West* opinion, Justice Scalia stated the reference point for distinguishing remedies in equity from remedies at law:

> Rarely will there be need for any more 'antiquarian inquiry' . . . than consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear. It is an inquiry, moreover, that we are accustomed to pursuing, and will always have to pursue, in other contexts. *See*, *e.g.*, *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.,* 527 U.S. 308, 318 (1999) (discussing the powers of federal courts under the Judiciary Act's grant of jurisdiction over "all . . . suits in equity"); *Curtis* v. *Loether,* 415 U.S. 189, 192 (1974) (discussing the scope of the Seventh Amendment right to jury trial "in suits at common law").[147]

The cite to *Grupo* is a reference to the inquiry of whether the equitable remedy was within implied jurisdiction in equity or whether the remedy

142. *See* Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 251 (2000) ("*See e.g.*, RESTATEMENT OF RESTITUTION ch. 7, Introductory Note, p. 522 (1937)"); Dobbs, *supra* note 6, at 597 ("The constructive trust is based on property, not wrongs.").

143. *See* Sereboff v. Mid Atl. Med. Servs., Inc., 126 S. Ct. 1869, 1874 (2006).

144. *Id.*

145. *Sereboff,* at 1874 (quoting *Great-West*, 534 U.S. at 212).

146. *Great-West*, 534 U.S. at 212.

147. *Id.* at 217 (internal citation omitted) (alterations to internal citations added).

had been devised and was being administered by the English Court of Chancery at the time of the separation of the American colonies and England.[148]

In subsequent cases relating to ERISA claims, the Supreme Court's opinion was followed closely by most lower courts. Some of the Circuit Courts have acknowledged the need to revise prior opinions that were not in agreement with the *Great-West* opinion, indicating the significance of the Supreme Court's 'revision.'[149] In *Scholastic Corp. v. Najah Kassem*,[150] the Connecticut district court states that the Fourth, Fifth, Seventh and Tenth Circuits largely follow the same basic test:

> These circuits apply a three-part test for determining whether a remedy sought by a plan, and labeled as a constructive trust or equitable lien, is typically equitable. Though first developed by the Seventh Circuit in *Administrative Committee of Wal-Mart Stores, Inc. v. Varco*, 338 F.3d 680, 686-88 (7th Cir. 2003), the three-part test was succinctly summarized by the Fifth Circuit in *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer* as follows: "Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary?"[151]

The Second Circuit may be applying the *Great-West* opinion further than intended.[152] The case facts relate to claims against the officers and directors of a financially distressed corporation for breaches of fiduciary duty unrelated to ERISA. The Second Circuit acknowledges the fact that *Great-West* overturned its opinion in *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999):

> On appeal, defendants challenge the court's characterization of the relief as equitable. They emphasize that, because they never possessed the funds in question and thus were not unjustly enriched, the remedy sought against them cannot be considered equitable. Rather, according to defendants, the remedy sought was legal and

148. *See* Grupo Mexicano De Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (2002).

149. *See, e.g.,* Pereira v. Farace, 413 F.3d 330, 340 (2d Cir. 2005); Coop. Benefit Adm'rs, Inc. v. Ogden, 367 F.3d 323, 327 (5th Cir. 2004).

150. Scholastic Corp. v. Kassem, 389 F. Supp. 2d 402 (D. Conn. 2005).

151. *Id.* at 408 (quoting Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, 354 F.3d 348, 356 (5th Cir. 2003)).

152. *Pereira*, 413 F.3d at 339-40.

> thus they were entitled to a jury trial. We agree.
>
> We have to concede that our decision in [*Strom*], points to a contrary result. In *Strom*, we characterized as equitable the monetary relief sought by plaintiff for defendant's alleged breach of fiduciary duty even though the defendant did not actually possess the funds in question. *Id*. at 144.[153]

The standard in *Great-West* is directly applicable to the Second Circuit's opinion in *Strom*[154] as both cases relate to ERISA claims, but the standard for the claim in *Periera*, relating to corporate governance, could still allow for the clean-up doctrine. Furthermore, if the claim in *Periera* is one for breach of fiduciary duty, a claim for a remedy at law unaccompanied by injunctive relief might lie in a court in equity, which was the traditional jurisdiction for claims of breach of fiduciary duty.[155] Of course, in the absence of other considerations, the Court's distinctions between remedies at law and in equity would be directly applicable in the review of a claim that was neither ancillary to appropriate injunctive relief nor was otherwise subject to special consideration as a traditional claim in the courts in equity. For example, jurisdictional disputes relating to relief or nominal defendants should be guided by the *Great-West* standard.

As a final note on the possession of assets, it may be useful to point out that the relevant assets in the defendant's possession does not include the economist's figurative asset of opportunity cost or otherwise what might have been an asset to the plaintiff. Basically, economic concepts of opportunity cost do not apply or, perhaps more appropriately, can not be used to bootstrap a plaintiff's loss or damage

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153. *Id.* at 339.

154. *See* Amschwand v. Spherion Corp., Civil Action No. H-02-4836, 2005 U.S. Dist. LEXIS 21007, at *16 (S.D. Tex. Aug. 24, 2005).

> Thus, Plaintiff argues, the term "equitable relief" includes "the recovery from a fiduciary of any direct monetary losses caused by the fiduciary's breach of its duties". This is precisely the argument that the United States Secretary of Labor advanced, and the Tenth Circuit Court of Appeals rejected, in *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004).

Id. (internal citations omitted); Callery v. United States Life Ins. Co., 392 F.3d 401, 409 (10th Cir. 2004) (stating that, "though the issue is close, we must adhere to the Supreme Court's rather emphatic guidance and therefore conclude that in a suit by a beneficiary against a fiduciary, the beneficiary may not be awarded compensatory damages as 'appropriate equitable relief' under § 502(a)(3) of ERISA.").

155. SEC v. Lipson, 278 F.3d 656, 663 (7th Cir. 2002).

into an identifiable asset. "*Callery* is persuasive for the proposition that monetary damages equal to the benefits a beneficiary would have received but for the fiduciary's breach do not constitute 'equitable relief' and are therefore unavailable under ERISA § 502(a)(3)."[156]

3. Is the Remedy Punitive?

Traditional remedies in equity do not include punitive damages. Justice Scalia's majority opinion and Justice White's dissenting opinion in *Mertens v. Hewitt Associates* seem to agree on this point.[157] Justice Scalia further points out, however, that exceptions have begun to appear in the last twenty years.[158]

Many cases state that a remedy in excess of profits is punitive. The Second Circuit's opinion in *SEC v. Manor Nursing Centers, Inc.* is a good example:

> Having held that ordering the refunding of the proceeds was a proper exercise of the district court's equity powers, we hold that the court erred in ordering appellants to transfer to the trustee all the profits and income *earned on such proceeds*. As we noted in *SEC v. Texas Gulf Sulphur Co*., supra, 446 F.2d at 1308, the SEC may seek relief other than injunctive relief, "so long as such relief is remedial relief and is not a penalty assessment."[159]

Similarly, the Fifth Circuit held that in some fact patterns, the failure to offset certain expenses would be punitive: "Disgorgement is

156. *Amschwand*, 2005 U.S. Dist. LEXIS 21007, at *20 (citing Callery v. United States Life Ins. Co., 392 F.3d 401 (10th Cir. 2004)).

157. Mertens v. Hewitt Assocs., 508 U.S. 248, 255 n. 5, 259 n. 7 (1993); *see also* Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 587 (1990) (Kennedy, J., dissenting); Tull v. United States, 481 U.S. 412, 422, 423 n.7 (1987); Stevens v. Gladding, 58 U.S. 447, 454-55 (1855); Livingston v. Woodworth, 56 U.S. 546, 559-60 (1854); Beals v. Wash. Int'l, Inc., 386 A.2d 1156, 1158 (Del. Ch. 1978).

> In order to determine whether this Court has jurisdiction to award punitive damages, therefore, it is first necessary to ascertain whether the high court of chancery in England had such jurisdiction in 1776. Defendants rely heavily on *Colburn v. Simms*, 2 Hare 543, 67 Eng.Rep. 224 (1843) where the Court held that the high court of chancery in England did not have jurisdiction to order penalties or forfeitures.

Id.

158. *See Mertens*, 508 U.S. at 259 n.7 (citing Dan B. Dobbs, Handbook on the Law of Remedies, § 3.9, at 211 (1973)).

159. SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1104 (2d Cir. 1972); *see also* CFTC v. Vartuli, 228 F.3d 94, 113 (2d Cir. 2000).

remedial and not punitive. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment."[160] Equally relevant are the securities cases that have held that equitable rescission cannot restore the plaintiff to a better position than she would have had before the unjust act.[161]

The remedy of restitution can punish in one of two ways: the remedy can include statutory or discretionary penalties or it can deny a party's access to offsets or counter-restitution. Professor Kull recently explored the latter concept in a recent article about "Restitution's Outlaws": "[R]estitution does not punish, but it punishes negatively: not by imposing liability on disfavored parties, nor by enhancing the liability to which disfavored parties are subject, but by denying a restitutionary claim (or counterclaim) to which the disfavored party would otherwise be entitled."[162] Kull describes a group of plaintiffs with unclean hands who violated the spirit or the letter of the legal system but, when their schemes failed, they were surprised to discover that the law rejects their claims in equity to salvage anything out of their unjust schemes. Thus a party that bribes a judge should not expect a court to order the judge to return the bribe money; the bribing party has unclean hands and will be denied access to a court in equity.[163] Similarly, the willful trespasser to another's minerals or timber is denied counter-restitution or offsets for their expenditures.

Revenue disgorgement is far more punitive than profit disgorgement; without a specific finding, it denies the possibility that the victim received anything of value from the defendant. As penalties or disguised fines, disgorgement orders are not part of traditional equitable remedies and the federal district courts have no jurisdiction to hear

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160. SEC v. Blatt*,* 583 F.2d 1325,1335 (5th Cir. 1978); *see also* SEC v. Thomas James Assocs., Inc., 738 F. Supp. 88, 94 (W.D.N.Y. 1990).

> The SEC further argues, however, that the amount to be disgorged by defendants is the entire amount of excessive markups, because the measure of disgorgement is the injury to the market, and because only the gross profits, unadjusted for expenses, adequately reflect such injury. The SEC's argument simply misconstrues both the nature and extent of the equitable power of the Court to order disgorgement.

Id.

161. *See* Smith v. Fahnestock & Co., 2002 U.S. Dist. LEXIS 3411, at *10 (S.D.N.Y. Feb. 28, 2002) (quoting Rolf v. Blyth, 570 F.2d 38, 50 n. 22 (2d Cir. 1978)).

162. Andrew Kull, *Symposium: Private Law, Punishment and Disgorgement: Restitution's Outlaws*, 78 CHI.-KENT L. REV. 17, 18 (2003).

163. *See* Womack v. Maner, 301 S.W.2d 438, 439 (Ark. 1957).

claims for such remedies.[164] Originally, the Supreme Court in *Porter* justified jurisdiction for a restitutionary claim on the basis that the proposed remedy was not a damage award or penalty and would merely restore the parties to their original position. Orders for the disgorgement of revenue rarely restore any parties to their original position and the plaintiff may be restored to a position superior to ex ante, especially if the plaintiff received some services or was allowed to retain an asset of some significant value without offset or counter-restitution.

4. Personal Liability

There are few examples of specific holdings against a remedy on the basis of personal liability.[165] In holding that *Great-West* sought legal restitution, the majority contrasted imposition of personal liability on the defendant, which it said was more typical of a legal remedy, with imposition of a constructive trust or equitable lien on particular property held by the defendant, which it said was an equitable remedy.[166]

According to *Great-West*, a restitution claim was considered legal when a plaintiff "could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him."[167] In such a case, the plaintiff sought "to obtain a

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164. *See* Kull, *supra* note 162, at 29 ("The result of this approach is that the claimant obtains profits without deduction of the expense of producing them, and the defendant is liable in excess of net enrichment. Such an outcome is punitive.").

165. *But see* Coop. Benefit Adm'rs, Inc. v. Ogden, 367 F.3d 323, 328 (5th Cir. 2004).

> As noted, CBA's complaint alleged two alternative bases for jurisdiction: (1) a statutory claim for equitable relief under § 502(a)(3), and (2) a federal common law claim of unjust enrichment. As CBA conceded that it could not maintain its claim for equitable relief under § 502(a)(3), we need not address it except to note that, in seeking to impose personal liability on Ogden to enforce her 'contractual reimbursement obligation under the LTD Plan and the Reimbursement Agreement,' CBA was requesting precisely the kind of 'legal' remedy that the Supreme Court has held to be beyond § 502(a)(3)'s jurisdictional grant.

Id.

166. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002) (quoting Dan B. Dobbs, Law of Remedies, § 4.2(1), at 571 (2d ED. 1993)). This position should not be mistaken for the statement that there can be no personal liability for a defendant in a claim in equity. Personal liability for the defendant can arise from a claim of breach of fiduciary duty vis-à-vis an express or constructive trust.

167. *Id*.

judgment imposing a merely personal liability upon the defendant to pay a sum of money," which is "essentially [an] action[] at law for breach of contract (whether the contract was actual or implied)."[168] Where 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, however, plaintiff could seek restitution in equity—ordinarily in the form of a constructive trust or an equitable lien.

In the process of considering the relationship between personal liability and a remedy in equity, it may be useful to consider the nature of the personal liability that the agencies seek. The FTC has asserted and courts have affirmed that (a) the defendant's personal liability was not dischargeable in bankruptcy[169] and (b) personal liability could attach to the defendant's estate and survive his demise.[170] The court's logic in the latter case seems particularly strained and at odds with *Grupo* and *Great-West*:

> In this case, the FTC alleges that Defendants failed to take written applications or collect required information, thus making it more difficult for it to determine whether Capital City was discriminating against credit applicants based on their race, national origin, sex, marital status, or age. By failing to provide credit applicants with notice of adverse action and/or by providing inaccurate notices, as alleged, Defendants also ensured that rejected loan applicants were not properly informed of their rights under the ECOA and did not learn which federal agency to contact for assistance if they suspected a violation of those rights. Thus, Defendants' alleged violations clearly present the harm of permitting discriminatory conduct against individual consumers to go undetected and unremedied. Defendants should not avoid liability for such violations. Accordingly, the Court concludes that the ECOA civil penalties sought by the FTC are remedial in nature and thus may be pursued against the Relief Defendants. . . . Permitting the beneficiaries of the Nash Estate to

168. *Id*. (internal quotations omitted). *Compare* RESTATEMENT FIRST: RESTATEMENT OF RESTITUTION, § 160(i) (1937) ("A constructive trust does not arise unless there is property on which the constructive trust can be fastened, and such property is held by the person to be charged as constructive trustee."), *and* RESTATEMENT OF RESTITUTION, § 160, at 642 (1937) (noting that the chief difference between quasi contract and constructive trust is that, "the plaintiff in bringing an action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property").

169. *See* FTC v. Porcelli (*In re* Porcelli), 325 B.R. 868 (Bankr. M.D. Fla. 2005).

170. FTC v. Capital City Mortg. Corp., 321 F. Supp. 2d 16 (D.D.C. 2004).

> retain the profits of Nash's allegedly illegal activity would "utterly frustrate" the purposes of the ECOA.[171]

In the *Capital City Mortgage* case, the causal relationship between the defendant's unjust act—failing to comply with various notification requirements—and identifiable assets in the defendant's estate seems insufficient to justify a constructive trust. The defendant did not misappropriate any specific assets or segregated cash accounts. There was no evidence presented that the corporation made large cash dividends or paid cash bonuses to the defendant. The mere allegation that he may have benefited was deemed sufficient to justify the preliminary injunction. Even though there is no specific proof that the defendant's unjust actions actually resulted in any additional assets in the defendant's estate, the court granted the petition for a preliminary petition to freeze the assets of the deceased defendant's estate pending the litigation against the corporate co-defendant and the estate as a co-defendant. Without identifiable assets, the presumption of benefit seems insufficient to warrant a claim in equity, but none of these issues were raised in the opinion. Also overlooked is the fact that the FTC has no claim for injunctive relief against the deceased or his estate relating to any future violations of the ECOA, further attenuating the FTC's claim to implied jurisdiction.

E. Response from Non-ERISA Cases

Outside of ERISA cases, the court's opinion in *Great-West* is acknowledged but few opinions attempt to analyze the equitable nature of a proposed remedy. The opinion in *SEC v. Buntrock* affirmed the SEC's jurisdiction to claim a remedy for disgorgement and specifically held that generic 'disgorgement' is an equitable remedy.[172] The SEC's claims in this case were for the defendants' ill gotten gains and statutory penalties equal to three times those gains.

> Given this analytical framework, we agree with the SEC that the disgorgement remedy it seeks is equitable in nature and, therefore, an acceptable form of relief. As the SEC has accurately stated, disgorgement has historically been viewed as an equitable remedy employed against those who profit by abusing positions of trust. In

171. *Id*. at 23 n. 5 (internal citation omitted).

172. SEC v. Buntrock, 2004 U.S. Dist. LEXIS 9495, at *7-9 (N.D. Ill. May 25, 2004).

> essence, it deprives a wrongdoer of ill-gotten gains. Compensation is not an element of the claim. In fact, the Supreme Court has held, in the ERISA context, that disgorgement is a viable equitable remedy to recover improperly received profits.[173]

This and other unjustified, broad statements about disgorgement are surprising in light of *Buntrock's* acknowledgement not only of the *Great-West* opinion but also of the key concept that remedies can be either legal or equitable:

> The key to the Court's holding was a discussion regarding the legal and equitable nature of the restitution remedy. If the remedy sought under Section 502(a)(3) of ERISA was one that was traditionally available in equity, then it was permissible. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002). However, if the remedy sought was essentially legal in nature, then it fell outside the scope of Section 502(a)(3).[174]

The best example of the opinion's tendency to make unjustified generalizations is the following:

> Furthermore, virtually every federal court of appeals has recognized disgorgement as an appropriate equitable remedy under the securities laws. *See, e.g., SEC v. Lipson*, 278 F.3d 656, 662-63 (7th Cir. 2002); *SEC v. Infinity Group Co.*, 212 F.3d 180 (3d Cir. 2000); *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90 (2d Cir. 1978).[175]

The Seventh Circuit opinion in *Lipson* is the most relevant precedent on the list as it is the only decision handed down after *Great-West*. Seemingly, *Lipson* contradicts *Buntrock*:

173. *Id.* at *7-8.

174. *Id.* at *7 (internal citation edited).

175. *Id.* at *8. This statement represents semantic juxtaposition that is regrettably commonplace in case law relating to restitution and unjust enrichment. The opinion asserts that "disgorgement has historically been viewed as an equitable remedy." *Id.* at *7. There are only eleven cases in federal and state case law that were published between 1800 and 1960 that use the term 'disgorgement' in any context. Since disgorgement can be just another term for restitution, any historical analysis in this case was conducted on cases claiming restitution which does have extensive history. Yet, the Supreme Court's opinion in *Great-West* literally precludes such a blanket statement on restitution and requires that a court determine whether the remedy is restitution in equity or at law.

> Disgorgement is another name for restitution, as Judge Friendly noted in *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978) and restitution, as we have noted in several non-SEC cases, is both a legal and an equitable remedy. *Clair v. Harris Trust & Savings Bank*, 190 F.3d 495, 498 (7th Cir. 1999); *Health Cost Controls of Illinois*, *Inc. v. Washington*, 187 F.3d 703, 710 (7th Cir. 1999); *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994).[176]

Buntrock ignores the Seventh Circuit's implied conclusion that, like restitution, disgorgement can be either a remedy at law or in equity.

In essence the Northern District of Illinois identified three different types of remedies: restitution in equity, restitution at law and disgorgement. Rather than define the exact nature of disgorgement and identify the key characteristics of disgorgement that qualify it as a remedy in equity, the opinion attaches a label and effectively assumes away the issue.[177]

The Northern District also leaves the issue of the claimed statutory penalties unexplored. The court's opinion in *Lipson* clearly states that it is error to hold that civil penalties in SEC cases are not a form of legal relief.[178] Given that the civil penalties in *Buntrock* can be as much as three times the amount of the disgorgement remedy, the civil penalty is directly determined by the amount of the disgorgement remedy, and that disgorgement remedies are not necessarily remedies in equity, it would seem that the equitable nature of the SEC's claim would require some further explanation and discussion.

This criticism of the process or substance of the *Buntrock* opinion does not necessarily mean that the final opinion was wrong, only that the court failed to undertake the analysis established in *Great-West*. Given the absence of any significant analysis or discussion of the SEC's proposed disgorgement and of any explanation of why the legal claim for statutory penalties does not overwhelm the claim for disgorgement, one is left with the impression that the opinion is based on generalized notions of the remedies and fails to examine the substance underneath the labels, flouting the Supreme Court's message in *Great-West*.

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176. SEC v. Lipson, 278 F.3d 656, 663 (7th Cir. 2002) (internal citation edited).

177. *See Buntrock*, 2004 U.S. Dist. LEXIS 9495.

178. *Lipson*, 278 F.3d at 662 ("SEC v. Clark, 915 F.2d 439, 442 (9th Cir. 1990), assumed, but without discussion, and we think erroneously, that civil penalties in SEC cases are not a form of legal relief.").

VI. WHICH DISGORGEMENT?

"*Restitution does not generally impose forfeitures*."[179]

At most, the term 'disgorgement' is a synonym for the civil remedy of restitution. While it adds little to the analysis of restitution, it could perform a useful role if it helps avoid the mistaken juxtaposition of civil and criminal restitution. So far, however, the synonym has increased, rather than reduced, confusion because some courts have been misled to conclude that disgorgement is somehow different from that of civil restitution.

As applied in any context, 'disgorgement' was used in less than a dozen federal or state case opinions from 1800 to 1960. Perhaps more startling is the fact that the term was used so often between 1960 and 2000 even though the first proposed definitions only began to appear around 2000. The term was not used or defined in the Restatement First and was only defined in a draft of the Restatement Third as of 2000. Black's Law Dictionary only offered a definition after 2000 and, while many of the foundation articles on restitutionary remedies have mentioned the term, few ascribe any consensus to its meaning.

Presumably, the term evolved from the verb form which has been used in American case law for the last 100 years as an alternative superior to 'make restitution,''give up,' and, especially, to 'cough up.' Increasingly after 1960, courts began to refer to disgorgement as the object of the verb: literally, disgorgement was what was disgorged. So far, however, the term has not added any additional or new meaning to the body of law of restitution or unjust enrichment.

None of this necessarily means that the term is meaningless. 'Disgorgement' is simply a new name for an old remedy but, until

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179. Kull, *supra* note 162, at 27.

> Restitution does not generally impose forfeitures. Even within the context of restitution for wrongs - where the defendants are malefactors by definition - standard remedies in restitution devote considerable effort to measuring the extent of the defendant's enrichment at the claimant's expense. Where the defendant's enrichment derives from multiple sources - partly from an unlicensed interference with the claimant's interests, partly from the defendant's own contributions - the ordinary methods of restitution include an accounting designed to identify that portion of the disputed assets constituting net unjust enrichment. An accounting that omitted an item from the defendant's side of the ledger would overstate net enrichment, resulting in a liability that, to the extent of the excess, might fairly be described as punitive.

Id.

recently, no one has offered to say which old remedy. The Restatement Third defines disgorgement as a specific kind of restitution: "a remedy against a willful or knowing defendant whose benefit or advantage exceeds the plaintiff's loss or damages."[180] Many authorities such as Judge Posner[181] and Professor Murphy[182] equate it to restitution.

Disgorgement is currently being used in at least five different contexts:

(1) Disgorgement of profits;[183]
(2) Disgorgement of legal fees;[184]
(3) Disgorgement of revenues;[185]

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180. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT, § 3 cmt. b (Discussion Draft 2000). (The discussion draft defines disgorgement:

Where the defendant has acted in conscious disregard of the plaintiff's rights, the whole of any resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed both (i) the measurable injury to the plaintiff, and (ii) the reasonable value of a license authorizing the defendant's conduct.

Id.

181. *Lipson*, 278 F.3d at 663.

182. Murphy, *supra* note 27, at 1625.

183. Tull v. United States, 481 U.S. 412, 424 (1987).

184. Brown v. Luker (*In re* Zepecki), 277 F.3d 1041, 1045-46 (8th Cir. 2002) (finding that bankruptcy court had jurisdiction, pursuant to 11 U.S.C. §§ 105 and 329, to act *sua sponte* to take jurisdiction to order disgorgement of attorney's fees and did not abuse its discretion by ordering disgorgement of portion of fees).

185. *See* Warren v. Century Bankcorporation, Inc., 741 P.2d 846 (Okla. 1987); A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554 (1977). In addition, a number of agency cases hold that disgorgement of revenues is a remedy in equity. *See* Buntrock, 2004 U.S. Dist. LEXIS 9495 at *7-9 (N.D. Ill. 2004); Fed. Trade Comm'n v. Think Achievement Corp., 144 F. Supp. 2d 1013, 1019 (N.D. Ind. 2000) ("In determining the amount of equitable monetary relief, the amount of restitution equals the amount paid by the consumer victims of an illegal scheme, less any amounts previously returned to the victims."); Fed. Trade Comm'n v. Magui Publishers, Inc., No. 89-3818 RSWL(GX), 1991 U.S. Dist. LEXIS 20452 (C.D. Cal. 1991); Fed. Trade Comm'n v. Silueta Distribs., Inc., No. C 93-4141 SBA, 1995 U.S. Dist. LEXIS 22254, at *17-18 (N.D. Cal. 1995) ("Under Section 13(b) of the FTC Act, plaintiff requests a permanent injunction, restitution and disgorgement. With regard to the amount of restitution, plaintiff requests $169,339.35, as 3,853 consumers paid $43.95 for the product."); Fed. Trade Comm'n v. Peoples Credit First, LLC, No. 8:03-cv-2353-T-TBM, 2005 U.S. Dist. LEXIS 38545 at *28 (M.D. Fla. 2005).

> Although Section 13(b) does not expressly authorize courts to award monetary equitable relief, the unqualified grant of statutory authority to issue an injunction thereunder carries with it the full range of equitable remedies, including the power to order equitable monetary relief for redress through remedies such as restitution or disgorgement.

(4) Restitutional disgorgement under Section 17203 of the California Business and Professional Code;[186] and

(5) Generic disgorgement (and any or all of the above).

In the context of revenue disgorgement and generic disgorgement, the term 'disgorgement' adds the most confusion. The generic term as a noun causes confusion when it misleads a court into believing that revenue disgorgement is as customary and traditional a remedy as profit disgorgement because in both contexts, the practice is just referred to as 'disgorgement.'

Revenue disgorgement is somewhat more complicated because revenue disgorgement is not a traditional remedy in equity.[187] The award of revenue disgorgement is the same as for the award of restitution or unjust enrichment when the award is made without crediting the defendant for any normal offsets or other forms of counter-restitution. There are some isolated causes of action or specific circumstances that justify such a harsh remedy but most of them relate to courts at law rather than courts in equity. However, there are a limited number of scenarios in which the net effect of a restitutionary remedy might give the appearance of revenue disgorgement. These circumstances can be grouped into five categories:

CATEGORY I: Specific Restitution. This group includes claims in which the plaintiff seeks the return of his real assets or personal property

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Id. (citing Fed. Trade Comm'n v. Gem Merch. Corp., 87 F.3d 466, 468-70 (11th Cir. 1996)); Fed. Trade Comm'n v. Verity Int'l, Ltd., 335 F. Supp. 2d 479, 501 (S.D.N.Y. 2004) ("The appropriate monetary relief is the full amount lost by consumers. The FTC seeks disgorgement from defendants in the amount of $16 million for payments made during the AT&T Period."); *see also* United States v. Lane Labs-USA, Inc., 427 F.3d 219, 229 (3d Cir. 2005) ("The court went on to find that 'even accepting the references to legislative concerns . . . these concerns are far from a clear statement of Congress's intent to exclude restitution, recalls, disgorgement, or any other traditional form of equitable relief.'" (quoting United States v. Universal Mgmt. Servs., 191 F.3d 750, 762 (6th Cir. 1999))).

186. Watson Lab., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1121 (C.D. Cal. 2001).

187. According to Dan B. Dobbs, *Dobbs Law of Remedies: Damages–Equity–Restitution*, § 4.1(4), at 379-80 (2d ED. 1993), there are five main options for the measurement of the defendant's benefit in unjust enrichment, none of which approach restitution of revenues: (1) the defendant's increased assets; (2) the market value of goods or services provided to the defendant; (3) the use value of goods or services provided to the defendant; (4) the gains realized by the defendant upon sale of an asset received by the defendant; or (5) collateral or secondary profits earned by the defendant from the use of the plaintiff's asset.

(including detachable minerals) and pursuant to which the knowing or willful defendant may be denied counter-restitution against the rightful owner of land or minerals for improvements or operating costs.[188] In none of these cases does the case law call for the per se revenue disgorgement of the defendant.

CATEGORY II: Unjust Enrichment of Fiduciaries. This group includes cases in which a fiduciary is required to disgorge all of his fees and compensation without any credit or offset for individual contribution or incidental expenses. A special type of this general case includes the disgorgement required of public officials for accepting bribes. Frequently this type of remedy is unrelated to the plaintiff's loss or damages, if any.

CATEGORY III: Revenue Disgorgement By Procedural Default. This category includes those cases in which the defendant fails or refuses to meet her burden of proof to substantiate appropriate offsets or apportionments. In such circumstances, the court has authority to deny any offsets.[189] Some courts have also awarded revenue disgorgement against a defendant that violates a court order, although many courts have held that such a sanction should include only profits, but the great weight of case law opinion limits sanctions to the disgorgement of profits.[190] Restitution's 'Outlaws,' as defined by Kull,[191] could also be included in this category as well as some miscellaneous holdings that awarded restitution of revenues as sanctions.

CATEGORY IV: Government Disgorgement Orders. These government claims depend on the federal jurisdiction attributed to traditional equitable remedies. The government claims, frequently referred to as disgorgement orders, sometimes specifically assert the right to revenue disgorgement directly (like the SEC) or indirectly (like

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188. RESTATEMENT (FIRST) OF RESTITUTION & UNJUST ENRICHMENT § 158 cmts. b and c (1937).

189. Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940).

190. *See* Fed. Trade Comm'n v. Kuykendall, 371 F.3d 745, 765 (10th Cir. 2004); Bailey v. Outdoor Media Group, No. E030836, 2002 Cal. App. LEXIS 11364, at *20 (2002). *But see* Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 456 (1932) (holding that a remedy measured in the form of unjust enrichment of profits is appropriate in a court in equity as an alternative to a sanction); Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd., 885 F.2d 1, 15 (2d Cir. 1989); Connolly v. J.T. Ventures, 851 F.2d 930, 932-33 (7th Cir. 1988); Lindy Pen Co., v. Bic Pen Corp., 982 F.2d 1400, 1407 (9th Cir. 1993); Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1519 (11th Cir. 1990); *and* Nat'l Merch. Corp. v. Leyden, 348 N.E.2d 771, 775-76 (Mass. 1976).

191. Kull, *supra* note 161.

the FTC). The FTC's claims for disgorgement based on fraud frequently exclude any consideration for any value of the subject product.

CATEGORY V: Exceptional or Outlying Cases. This group of state cases, though few in number, is frequently cited as justification for the existence of revenue disgorgement. By and large, they are justified with Category I cases which are applied well outside of any comparable substantive law. It would also be fair to observe that in each of the two principal cases in this category, the court appears to have been upset about the defendant's litigation tactics and demeanor and wanted to apply an additional degree of deterrence on the defendant.

CATEGORY I

Category I includes three separate areas of substantive law: mistaken improvements, conversion of personal property, trespass to minerals and some miscellaneous cases.

MISTAKEN IMPROVEMENTS. It is a traditional remedy of courts in equity to order the transfer of title as well as, or in addition to, control of real property to its rightful owner.[192] If the defendant has made improvements to the land when she was aware or should have been aware that someone else was the rightful owner of the land, the defendant can be denied the right to receive or even seek compensation or restitution for the expenditures that contributed to the improvements. Subject to the specific provisions of various state 'betterment' statutes, however, the defendant is normally entitled to reimbursement or restitution for reasonable repairs and tax payments made on the property.[193]

If the plaintiff has retained legal title to the real property, she could alternatively sue in a court at law for ejectment. Mr. McCorkle's treatise on mistaken improvements concludes that the defendant is more likely to be awarded offset or counter-restitution in an action in equity as compared to an action at law. Subject to a number of qualifications and conditions, he compares the two sources of relief:

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192. C. R. McCorkle, Annotation, *Compensation For Improvements Made or Placed On Premises of Another by Mistake*, 57 A.L.R.2d 263 (1958).

193. RESTATEMENT (FIRST) OF RESTITUTION & UNJUST ENRICHMENT § 158, cmts. b and c (1937).

> At common law, emphasis is placed upon the right of the owner of land to control and use it as he sees fit, and it is considered that he is under no obligation, either legal or moral, to pay for improvements made or placed thereon without his knowledge or consent, even though he may derive benefit therefrom [versus] [i]n equity, the mistaken improver may be entitled to relief by way of compensation under the rule or maxim that he who seeks equity must do equity, or under the doctrines of unjust enrichment or estoppel.[194]

CONVERSION OF PERSONAL PROPERTY. According to property law, the tortious conversion of personal property does not transfer title either to the tortfeasor or any subsequent transferees. Hence, the remedy for such a tort does not allow for any offsets or counter-restitution on either or both of the following: the basis that the defendant has no right to the property or the defendant has unclean hands and therefore the court has no jurisdiction to hear his claim. If the property has been sold and is not available for specific restitution, the tortfeasor or a subsequent transferee with knowledge is generally held liable for the greater of the value of property at the time of the conversion or upon the sale even if the property has been improved by the tortfeasor.[195] The result is the same under Section 40 of the Restatement (Third) of Restitution & Unjust Enrichment (Tentative Draft No. 4, April 8, 2005). Subsection (2)(a), "Trespass and Conversion," states that "A conscious wrongdoer, or one who acts despite a known risk that the conduct in question violates the rights of the claimant, will be required to disgorge all gains (including consequential gains) derived from the wrongful transaction."[196] Similarly, Section 128 of the Restatement (First) of Restitution, "Conversion and Other Tortious Dealings with Chattels," shows that the same approximate results occur under either actions at law for assumpsit or actions in equity for a constructive trust. Remedies for specific

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194. McCorkle, *supra* note 192, at *2.

195. RESTATEMENT (SECOND) OF TORTS § 927(2)(a) (1979). *See also id*. cmt. b.

> The rule stated in this Section applies in all actions at law, whether the action is one primarily seeking damages, as the action for trespass or conversion, or is one that primarily seeks a return of the subject matter, as the actions of replevin or detinue, if damages are given as an alternative to specific restitution. It also applies to proceedings in equity in which damages are given in lieu of specific restitution.

Id.

196. For an example of a result that resembles revenue disgorgement, *see* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 40, cmt. d, illus. 11 (Tentative Draft No. 4, 2005) (noting that illustration 11 is based on Welch v. Kosasky, 24 Mass. App. Ct. 402 (1987)).

restitution or approximating specific restitution have evolved from property law, tort law and the law of restitution and unjust enrichment. Those remedies resemble the same effect as revenue disgorgement.

TRESPASS TO MINERALS. One explanation for the remedy for trespass to minerals traces the remedy to claims in equity for stolen goods. The Supreme Court's 1882 opinion in *Wooden-Ware*, a landmark opinion with respect to willful trespass to minerals, justifies its holding by referring to English case law:

> The doctrine of the English courts on this subject is probably as well stated by Lord Hatherley in the House of Lords, in the case of Livingstone v. Rawyards Coal Co., 5 App. Cas. 25, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement."[197]

Based on this and similar rationale, state courts have ordered defendants to disgorge any minerals that the defendant knowingly misappropriated from the rightful owner as a form of specific restitution. The exact definition of the applicable minerals can vary by state but it generally includes oil, natural gas, timber, coal and sometimes other mineral deposits like gravel and topsoil. The defendant is generally ordered to disgorge the actual minerals or their monetary equivalent value at a

197. Wooden-Ware Co. v. United States, 106 U.S. 432, 434 (1882) (citing Livingstone v. Raywards Coal Co., 5 App. Cas. 25 (1880)). *See also* United States v. Wyoming, 331 U.S. 440, 458 (1946).

> An agreed premise is found in the rule that one who 'willfully' or 'in bad faith' trespasses on the land of another, and removes minerals, is liable to the owner for their full value computed as of the time the trespasser converted them to his own use, by sale or otherwise, but that an 'innocent' trespasser, who has acted 'in good faith,' may deduct from such value the expenses of extraction. It is also clear that when suit is brought for the value of minerals wrongfully removed from the plaintiff's land, and the trespass and conversion are established, the burden of pleading and proving good faith is on the defendant. The 'good faith' contemplated by these rules is something more than the trespasser's assertion of a colorable claim to the converted minerals.

Id. (Citations omitted)

specified point in the production or refining process that varies by state and can include the time when the minerals are brought to surface, when the minerals are sold or when the minerals are consumed for the defendant's own use.[198] If the defendant's trespass is conducted with knowledge, she is generally not entitled to any offsetting credits for the costs of developing, marketing or shipping the minerals. If the defendant acted without knowledge, the defendant is generally entitled to some form of offsetting credit or the remedy is limited to the value of the minerals *in situ* (still in the ground). From the perspective of the knowing defendant that has sold the minerals, the value of the minerals as assets and the revenues from their sale will generally be approximately the same amount. Confusing the specific restitution of the assets with perceived disgorgement of revenue has lead some courts to justify applying the remedy in such non-similar cases as misappropriation of intellectual property or minority shareholder oppression.

Attempts have been made to compare this remedy to claims relating to misappropriation or conversion of property, especially intangibles. Such analyses suffer from the fact that the common law does not generally treat tangible and intangible property in a similar manner.[199] Furthermore, the remedy for trespass to minerals is strongly rooted in property law which frequently leads the common law to hold that trespass to the landholder's precious minerals like coal, oil or timber warrant a different measure of remedy than the same trespass to one's gravel, top-soil or other less detachable mineral.[200]

The claim for intentional trespass to minerals also suffers as a

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198. R. A. Vinluan, *Measure of Damages For Wrongful Removal of Earth, Sand, or Gravel From Land*, 1 A.L.R.3d 801; V. Woerner, *Right of Trespasser to Credit for Expenditures in Producing, As Against His Liability For Value of , Oil or Minerals*, 21 A.L.R.2d 380.

199. HM A-G v. Blake, [2000] E.M.L.R. 949 (H.L.). Lord Nicholls concluded that the difference in remedies for intellectual property and tangible property is a happenstance of history:

> Considered as a matter of principle, it is difficult to see why equity required the wrongdoer to account for all his profits in these cases, whereas the common law's response was to require a wrongdoer merely to pay a reasonable fee for use of another's land or goods. In all these cases rights of property were infringed. This difference in remedial response appears to have arisen simply as an accident of history.

Id. at 960.

200. *See generally* 53A Am. Jur. 2d § 7 Mines & Minerals (2006).

precedent for traditional equitable remedies because the nature of the unjust enrichment remedy can vary with the source of that cause of action's source of jurisdiction. A successful plaintiff can be awarded unjust enrichment by at least five different routes:[201] by statute;[202] a cause in action for *assumpsit*;[203] a cause in action for the tort of conversion or trespass but in which the plaintiff waives the tort and sues in *assumpsit*;[204] ancillary jurisdiction for a matter that justifies jurisdiction in a court of equity under the clean-up doctrine;[205] and a cause of action for conversion (among other causes of action) in a court sitting in equity.[206] Of all five options, only those opinions from the fifth option necessarily reflect remedies in equity while opinions from the fourth option may reflect remedies at law or in equity.

CATEGORY II

BREACH OF FIDUCIARY DUTY.[207] Many state courts hold that the

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201. Woerner, *supra* note 197, at 1.

> The question dealt with in this annotation has arisen in actions for ejectment, of trespass to try title, for conversion of minerals produced by the trespasser, for an injunction to restrain continuing trespass and production of minerals in connection with which an accounting was sought for the value of minerals previously produced, and in separate actions for an accounting for the value of such minerals produced by trespasser, in addition to actions in trespass.

Id.

202. United States v. Standard Oil Co., 21 F. Supp. 645 (D. Cal. 1937); Strathmore Coal Mining Co. v. Bayard Coal & Coke Co., 116 A. 570 (Md. 1921).

203. RESTATEMENT (FIRST) OF RESTITUTION § 128 cmt. 1 (1937).

204. Phillips Petroleum Co. v. Cowden, 241 F.2d 586, 592 (5th Cir. 1957) (relating to geophysical data).

205. Mason v. United States, 260 U.S. 545, 558 (1923).

206. Pan Am. Petroleum and Transp. Co. v. U.S., 273 U.S. 456, 506 (1927); *See also* United States v. Wyoming, 331 U.S. 440, 440 (1947).

207. Frank Snepp, *Irreparable Harm* 357 (U. Kan. Press) (1999). At times the *Snepp* case is treated as an outlier or even as an 'outlaw' type of case, more suitable for Category V, because it is said that Frank Snepp was forced to disgorge all of his book royalties for his breach of fiduciary duty. In fact, the Supreme Court remanded the case to the district court to supervise a constructive trust. In his book on the litigation, Snepp reveals that the district court did allow him to offset his federal income taxes (approximately $56,000 of the $200,000 in total royalties) which is unusual given that that expense is generally the most likely expense for a defendant to lose as an offset. *See* United States v. Snepp, 456 F. Supp. 176 (E.D. Va. 1978); *aff'd in part, rev'd in part,* 595 F.2d 926 (4th Cir. 1979); *rev'd,* 444 U.S. 507 (1980) (holding that state taxes and expenses were not allowed to be offset). Accounting for a defendant's unjust

remedy against an unfaithful or disloyal fiduciary agent is for the agent to disgorge all agency fees received since the agent betrayed her duty. The order for an agent to disgorge her fees can be mistaken for revenue disgorgement.[208] However, the Restatement First has many provisions which ensure that even a disloyal agent is reimbursed for necessary expenditures. An agent who buys an asset in violation of the agent's duty to buy the asset on behalf of her principal is specifically allowed reimbursement for purchase of the asset.[209] An agent that usurps a corporate opportunity and leases an asset for herself is specifically allowed reimbursement for her lease payment.[210]

In addition, there are two corollaries to this doctrine that have been misunderstood and misstated. The Second Circuit's opinion in *Sheldon v. Metro-Goldwyn*, a highly regarded foundation case for calculating unjust enrichment remedies, states that comment d to Section 158 of the Restatement (First) of Restitution shows that a willful tortfeasor, as constructive trustee, is often denied credit for his expenses.

> Indeed a constructive trustee, who consciously misappropriates the property of another, is often refused allowance even of his actual expenses and although this harsh rule, which would charge the defendants with the whole gross receipts, has been softened, a plagiarist may not charge for his labor in exploiting what he has taken. A fortiori he should not be allowed for the currency which his

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enrichment presents a court with an interesting conundrum when the plaintiff is the U.S. government, i.e., representing itself. Against any other plaintiff, the court might refuse to offset the income tax payments on the basis that the plaintiff did not necessarily benefit from the defendant's expenditures. In the unusual case of the U.S. government as plaintiff, the plaintiff in its IRS persona received the tax payments directly from the defendant and therefore the defendant has a strong argument that he was not unjustly enriched by the income tax payment. This may or may not have been the logic of the district court's decision in allowing Snepp's federal income tax payments for offset but denying offset for state income taxes paid.

208. Ellison v. Alley, 842 S.W.2d 605 (Tenn. 1992); Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999) ("It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation."). *But see* Boston Children's Heart Found., Inc. v. Bernardo Nadal-Ginard, 73 F.3d 429, 435 (1st. Cir. 1996) (noting that courts have the discretion to allow the agent to retain a portion of her compensation if the agent can show that their conduct was not egregious and they have met their burden of establishing the value of the agent's services rendered).

209. RESTATEMENT (FIRST) OF RESTITUTION § 194 cmt. b (1937).

210. RESTATEMENT (FIRST) OF RESTITUTION § 195 cmt. e (1937).

> reputation may have given to the combined product.[211]

On the other hand, comment d to Section 158, "Improvements and Additions," states:

> The common law rules with reference to the conversion of chattels, however, made no allowance to the willful converter for additions made, while protecting the innocent converter. Where the conduct of the recipient was tortious although not intentionally wrongful, normally would be entitled to restitution of his expenditures to the extent that they increased the value of the subject matter if this is land.

The Second Circuit opinion confuses expenditures with expenses. Comments b and c of this section of the Restatement First state that even an intentionally fraudulent defendant is entitled to compensation for payment of real estate taxes and necessary repairs except under extraordinary circumstances that 'require the imposition of a penalty.' Therefore, even the intentional defendant is entitled to credit for his necessary expenses unless the court wishes to impose a penalty that case law and statutes generally forbid as a part of remedies in equity.[212] By confusing operating expenses with expenditures for improvements, the Second Circuit strengthened the myth that revenue disgorgement is some times applicable as a remedy in equity.

On the other hand, there is a provision in the Restatement (Second) of Agency that specifically provides for the disgorgement of a defendant's revenues which most courts have chosen to ignore.[213] Section 403, comment c, provides that a disloyal agent who profits improperly may not deduct the amount of any expenses that the agent

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211. Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45 (2d Cir. 1939) *aff'd,* 309 U.S. 390, 399 (1940). *See* Softel, Inc. v. Dragon Med. & Scientific Commc'ns, 891 F. Supp. 935, 941-42 (S.D.N.Y. 1995); Kamar Int'l, Inc. v. Russ Berrie & Co., 752 F.2d 1326, 1331 (9th Cir. 1984); ZZ Top v. Chrysler Corp., 70 F. Supp. 2d 1167, 1169 (W.D. Wash. 1999); and Warren v. Century Bankcorporation, Inc., 741 P.2d 846, 852 (Okla. 1987) ("A constructive trustee who consciously misappropriates the property of another is often refused allowance even of his actual expenses.") (quoting misstatement favorably).

212. Estate of Corriea, 719 A.2d 1234, 1240 (D.C. 1998) ("[T]he remedy of disgorgement, much like that of a constructive trust, is meant 'to provide just compensation for the wrong, not to impose a penalty.'" (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940)).

213. RESTATEMENT (SECOND) OF AGENCY § 403 cmt. c (1958).

incurred in acquiring the profit:

> An agent who receives a bribe or otherwise profits improperly cannot, in an action by the principal to recover it or its value, deduct the amount of expense to which he has been put in acquiring it . . . [l]ikewise, if an agent is one of a group of conspirators which receives a profit as a result of a violation of the agent's duty of loyalty, he is subject to liability for the entire amount although he receives none or only a portion of it.

This suggested rule has been widely followed in bribery cases, particularly the bribery of government officials.[214] Otherwise, most courts have chosen to allow offsets because revenue disgorgement appears too harsh and a penalty rather than an equitable remedy:

> But we think that save in exceptional cases such a rule is top harsh: it imposes a naked penalty, based more on retribution than on the equities of the situation. Stern though the law is in requiring an agent to repay secret profits, it is not as harsh as to say that a principal may recover more than the agent has profited. This is the reasoning of a number of cases which declare that the net rather than the gross profit realized by an agent should be the measure of recovery. That is the reasoning we think we should adopt here.[215]

CATEGORY III

Courts commonly hold that, in a claim for restitution or unjust enrichment, the plaintiff has the duty to establish the defendant's benefit

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214. Driscoll v. Burlington-Bristol Bridge Co., 86 A.2d 201 (N.J. 1952), *cert. denied*, 344 U.S. 838 (1952); S. T. Grand, Inc. v. New York, 298 N.E.2d 105 (N.Y. 1973). *But see* Williams Elecs. Games, Inc. v. Garrity, 366 F.3d 569, 576 (7th. Cir. 2004) ("The victim of commercial bribery can obtain either his damages or the profits that the bribe yielded. The total profits equal the amount of the bribe plus the revenues generated by the bribe minus the cost of goods sold any other variable costs incurred in making the sales.").

215. Jay v. Gen. Realties Co., 49 A.2d 752, 755 (D.C. 1946) (citing Anderson Cotton Mills v. Royal Mfg. Co., 20 S.E.2d 818 (N.C. 1942); Sawyer v. Issenhuth, 141 N.W. 378 (S.D. 1913); Willis v. Van Woy, 20 So.2d 690 (Fla. 1945); Schwarting v. Artel, 105 P.2d 380 (Cal. Ct. App. 1940); Dutton v. Willner, 52 N.Y. 312 (N.Y. 1873); Judevine v. Hardwick, 49 Vt. 180 (Vt. 1876); *see also* United States v. Wight, 839 F.2d 193, 197 (4th Cir. 1987); Burg v. Miniature Precision Components, Inc., 330 N.W.2d 192 (Wis. 1983). *But see* Raymond Farmers Elevator Co. v. Am. Surety Co., 290 N.W. 231 (Minn. 1940) (agreeing with Restatement (First) of Agency and disallowing truck operating costs but allowing the cost of grain in grain sale revenue).

or revenues related to the unjust act and the defendant must at least initially carry the burden of establishing either apportionment, offsetting expenses that should be debited against the revenue credits, or, if applicable, both. Federal statutes relating to misappropriation or misuse of copyrights or trademarks specifically maintain this schema for the burden of proof.

Should the defendant fail to meet this burden, the court is entitled to deny the defendant any offsets against the revenues established by the plaintiff. Only the Second Circuit has specifically held that even when the defendant fails to meet her burden of proof, the court should still attempt to estimate the defendant's costs of goods sold to reduce the revenues.[216] Out of approximately 116 opinions, the court held the defendant in default and ordered her to disgorge her revenues in 73 opinions.[217] In the remaining 43 opinions,[218] the court acknowledged the default rule but approved an alternative estimate or rule of thumb to establish the defendant's benefit, generally measured by an estimate of the defendant's gross profit.

Category III can also include Professor Kull's Restitution Outlaws—generally defendants with unclean hands who have no right for offsets or counter-restitution. In some cases, the net effect of the monetary equivalent of rescission could also resemble revenue disgorgement. In a fact situation wherein the defendant has fraudulently sold a worthless product or service, the process of equitable rescission would resemble that of a mass refund or revenue disgorgement. As the asset is worthless and the plaintiff received no benefit, the plaintiff owes no counter-restitution to the defendant and a defendant is not allowed to offset any of her expenses of production against the sales revenues.

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216. Murphy Door Bed Co. Inc. v. Interior Sleep Systems, Inc., 874 F.2d 95 (2d Cir. 1989).

217. Stenograph L.L.C. v. Bossard Assocs., 144 F.3d 96 (D.C. Cir. 1998); Am. Honda Motor Co. v. Two Wheel Corp., 918 F.2d 1060 (2d Cir. 1990); Alameda Films v. Authors Rights Restoration Corp., 331 F.3d 472 (5th Cir. 2003) (These cases are examples of typical federal appellate court opinions.).

218. Blackman v. Hustler Magazine, Inc., 800 F.2d 1160, 1163 (D.C. Cir. 1986); Sammons v. Colonial Press, Inc., 126 F.2d 341 (1st Cir. 1942); Murphy Door Bed Co. Inc. v. Interior Sleep Systems, Inc., 874 F.2d 95 (2d Cir. 1989); Banjo Buddies, Inc. v. Renosky, 399 F.3d 168 (3d Cir., 2005) (typical opinions from federal appellate courts).

CATEGORY IV

Disgorgement orders will be addressed in Part VII.

CATEGORY V

This group of case opinions is a group of disparate claims decided generally in state courts. At times, discussion of the two principal cases of *Warren v. Century Bankcorporation* and *A & M Records* is accompanied by discussion of *Berg Lumber*.[219] Of the three cases, only *A & M Records* has spawned a line of related cases (state claims for misappropriation of intellectual property).

Part of the unusual nature of these cases may be due to the court's clear disapproval of the defendant's actions. The court in *A & M Records* condemns some of the defendant's trial tactics and his repeated breach of the court's injunction; the language in *Berg Lumber* approaches the level of bombast[220] and the calculation of the remedy represents double and possibly triple counting for measuring damages.[221] The court in *Warren v. Century Bankcorporation* also seems offended by the defendant's underlying acts. [222]

Warren was a derivative action by minority shareholders for breach of fiduciary duty and shareholder oppression. The opinion states in bold capitalized capital letters that "[t]he award of damages in an amount equal to 'all income' from the diverted loan business was neither clearly contrary to the weight of the evidence nor to the applicable principles of

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219. Cross v. Berg Lumber Co., 7 P.3d 922 (Wyo. 2000).

220. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 40, illus. 15 (Tentative Draft No. 4, 2005) ("Measurement of the grader's use value at $75,000 is a response to egregious misconduct; a more restricted measure of use value would be appropriate against a less culpable defendant.").

221. *Cross,* 7 P.3d at 935-36 (quoting Warren v. Century Bankcorporation, Inc., 741 P.2d 846, 852 (Okla. 1987)) ("The remedy in restitution rests on the ancient principle of disgorgement. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to 'disgorge' his gains."). The remedy included applying a high monthly rental rate for an extended period of twenty-seven months for a road grader. The road grader was ordered to be returned to the plaintiff and all deferred maintenance was to be funded by the defendant despite the high monthly rate that generally included wear and tear. In all, the defendant paid $78,800 of unjust enrichment and returned the road grader when the court acknowledged that the machine was initially purchased for $19,700.

222. Warren v. Century Bankcorporation, Inc., 741 P.2d 846 (Okla. 1987).

equity jurisprudence."[223] Thus the award of revenue disgorgement was intentional but ill-conceived as the court stated that the object of restitution "is to put the parties back into the position in which they were before the tainted transaction occurred."[224] After this remedy, the position of the plaintiffs was enhanced and the position of the defendants was clearly inferior to its position *ex ante*.[225]

Warren cites a number of authorities which are either not on point or whose support is equivocal. For example, the opinion in *Tull* supports disgorgement of profits, not revenues.[226] Similarly, the support from *Porter* is equivocal as the excess rents were not identified as the defendant's revenues.[227] The Oklahoma Supreme Court also repeats the error made in the Second Circuit's opinion in *Sheldon* regarding Section 158 of Restatement (First) of Restitution that has been previously discussed. The *Warren* opinion also cites the bribery case opinion of *Driscoll v. Burlington-Bristol Bridge Co.*[228]

Perhaps the weakest part of the *Warren* opinion occurred when the court stated that "[t]his is not an action at law for conversion. Rather, it was an equity suit for restitution to minority shareholders who sought 'disgorgement' of their ill-gotten gains made through the diverted loan business."[229] The opinion then proceeds to mix up its discussion of disgorgement of profits with disgorgement of revenues. The court's most important justification appears to be that "[w]here a wrongdoer is shown to have been a conscious, deliberate misappropriator of another's commercial values, gross profits are recoverable through a restitutionary remedy."[230] This rationale has two deficiencies: generally defendants do not even disgorge their profits unless the plaintiff can prove that the defendant's acts were willful and intentional.[231] The consciousness or

223. *Id.* at 851.
224. *Id.* at 852.
225. *Id.* at 851-52.
226. Tull v. United States, 481 U.S. 412, 423 (1987), rev'g, 769 F.2d 182 (4th Cir. 1985).
227. *See infra* Part V.A.
228. Driscoll v. Burlington-Bristol Bridge Co., 86 A.2d 201, 233-34 (N.J. 1952).
229. *Warren,* 741 P.2d at 852.
230. *Id.*
231. *See, e.g.,* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2, cmt. d (Discussion Draft, Mar. 31, 2000) ("Restitution in a proper case may strip a defendant of all profits gained in a transaction with the plaintiff . . . . Such a result is permissible only against a defendant whom the law treats as a conscious wrongdoer."); *Id.* at § 3, cmt. c ("Liability to disgorge profits is ordinarily limited to instances of

deliberateness of a defendant's actions does not trigger the right to escalate the remedy from restitution of profits to restitution of revenue. Second, the misappropriation of some forms of real property may be afforded the extra deterrence of denying the defendant any offsets or counter-restitution, an historical oddity that does not necessarily apply to commercial intangible assets.

The Oklahoma court's discussion of case law regarding intentional trespass to minerals is accurate:

> When a bad-faith trespasser enters upon the land of another in the willful disregard of the rights of others and produces and takes oil and gas from the premises, the measure of damage is the *full value* of the property at the time of the conversion *without* deduction for the cost of drilling and development.[232]

The intentional trespass to minerals, largely remedied with specific restitution for converted property, is not relevant to a claim for shareholder oppression.

The opinion in *A & M Records, Inc. v. Heilman*[233] was also cited in *Warren v. Century Bankcorporation*. The defendant and his company sold more than $4.3 million worth of tapes that were copied from pirated recorded performances. It was established that the unauthorized copies generated at least $729,337 in revenue attributable to performances pirated from A & M Records.

The claim was brought for conversion in a state court because the copyright act did not apply to these particular recordings. The plaintiff's claim of conversion was endorsed by the court, treating the conversion of intangible assets as though it were the same as conversion of minerals or a knowing improvement to someone else's land:

> On this basis the trial court entered judgment against Heilman in an amount equal to the gross proceeds attributable to the sale of recorded performances which were the property of A & M Records. One who misappropriates the property of another is not entitled to deduct any of the costs of the transactions by which he accomplished his wrongful conduct. When one acquires proceeds from the sale of property belonging to another the imposition of a constructive trust

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conscious wrongdoing . . . . As an exception to this general rule, trustees and other fiduciaries may be made liable for profits realized even as the result of an unintentional breach of fiduciary duty.").

232. *Warren,* 741 P.2d at 846.

233. A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554 (1977).

> on the proceeds is a proper remedy.[234]

The opinion's key assertion is that "[o]ne who misappropriates the property of another is not entitled to deduct any of the costs of the transactions by which he accomplished his wrongful conduct." The opinion's citation to *Ward v. Taggert* is inapposite since that opinion does not stand for disallowing all expenses, but rather only those expenses directly related to the illegal or wrongful activity as some expenses in that case were disallowed on the basis that the defendant had not adequately substantiated the expenditures.[235] For example, if the defendant violated the plaintiff's copyright or trademark in a volume of the defendant's magazine, only the costs of actually misappropriating the trademark or copyright would be disallowed, not the normal out-of-pocket expenses of editing, printing and distributing the magazine.[236] The Category I case law to which the opinion loosely refers is also better explained by the application of specific restitution or property law rather than revenue disgorgement.

It is problematic that the remedy in *Ward* was made on the theory of quasi-contract. The plaintiff in that case claimed a tort, but the California Supreme Court held that the plaintiff's failure to prove damages precluded a remedy on that theory. Then, the Court held that on the basis of Section 2224 of the state Civil Code (as well as, or in addition to, common law), the defendant would not be allowed to be unjustly enriched from his misdeeds. However structured or rationalized, the claim and remedy remained in the court at law.

In direct contrast, however, A & M Records sought injunctive relief and was awarded the remedy of a constructive trust from the trial court sitting as a court in equity. The defendant was found liable for having competed unfairly with A & M Records (under Section 3369 of

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234. *Id.* at 570 (internal citations omitted).

235. Ward v. Taggart, 336 P.2d 534 (Cal. 1959). The case of *Ward v. Taggart* involves a real estate agent who obtained a secret profit from the sale of his clients' property. In response to the defendant's particular concerns about offsetting expenses, the court indicated that the defendant had failed to satisfactorily substantiate the need for them in the absence of his otherwise fraudulent actions. *Id.*

> Since it is entirely speculative whether the commissions paid to Thomsen and Dawson and the cost of the second escrow would have been paid by plaintiffs or Sunset had the transaction been a legitimate one, it would be inequitable to permit Taggart to deduct any of these expenses from plaintiffs' recovery.

Id. at 539:

236. *Id.*

California Civil Code) and was assessed damages. The court in equity measured the constructive trust remedy to include both damages and punitive damages. While it is true that a court in equity has jurisdiction to award damages for claims ancillary to injunctive relief, such a remedy would not constitute a constructive trust. Ignoring the issue of the constructive trust, however, the opinion—shaky at best—would reflect a holding at law on an ancillary matter before a court in equity that relies on precedent from opinions of other courts at law.

This interpretation, which ignores the issue of the constructive trust, offers no precedent for remedies in equity. The specific holding of measuring the remedy as the defendant's revenues without offset for expenses is further undercut by the defendant's failure to meet his burden of proof of establishing expenses for offset:

> Since the court found that defendants "failed to carry their burden of proof with respect to such costs and expenses," such costs and expenses would be entirely speculative. It would therefore be inequitable on this basis as well to permit Heilman to deduct them from A & M Records' recovery.[237]

In light of this statement, the holding in *A & M Records* should be restricted to the case facts.

Citation to the opinion in *Church v. Bailey*[238] also lends little support as it largely provided an analysis of the liability of a constructive trustee and the consequences of a trustee intermingling his property with that of his trust.[239] Neither opinion provided any support for the implicit theory that the common law treats the misappropriation of intangible assets in the same manner as stolen goods or willful trespass to minerals.

Finally, *A & M Records* offers no precedential value because of the defendant's litigation tactics. The opinion mentions that one of the two principal reasons for denying the defendant any offsetting credits was the defendant's failure to produce sufficient supporting evidence.[240] Furthermore, the court details the specific violations of the defendant in his litigation demeanor:

> The evidence in this case shows a continuous and intentional pattern of misappropriation of property owned by others. (Compare Pen.

237. *A & M Records,* 75 Cal. App. 3d. at 569.
238. Church v. Bailey, 90 Cal. App. 2d 501 (1949).
239. *Id.* at 504-05.
240. *A & M Records,* 75 Cal. App. 3d. at 570 n.11.

> Code, 653h.) It also shows contempt of court, hindered discovery, and an attempt to evade the injunctions of courts of this state as well as those issued by courts of Wisconsin. Under such circumstances a grant of punitive damages is clearly proper.[241]

The award of punitive damages does not necessarily mean that revenue disgorgement was awarded as a part of the punitive damages or that the two decisions were entirely separate. However, the defendant's default in failing to produce documents or data and its violations of the court's injunctions are sufficient to eliminate any precedential value for this opinion.

There have been subsequent cases in California state courts and the Ninth Circuit that have affirmed the claim of misappropriation of intangible assets for intellectual property outside the protection of federal statutes, citing *A & M Records* favorably. One such subsequent case, *Lone Ranger Television, Inc. v. Program Radio Corp.,*[242] granted the remedy of revenue disgorgement because the defendant failed to contest the remedy.

VII. AGENCY CLAIMS FOR UNJUST ENRICHMENT

"'Plaintiff,' the tobacco companies protested, 'apparently believes that the more confusing he makes the law of restitution and indemnity appear, the higher his likelihood of success.'"[243]

The principal focus of this section on agency claims (SEC, CFTC, DOE, FTC and FDA) for unjust enrichment is on the issue of whether certain items are allowed to be offset. The article will not specifically address issues relating to how the defendant's revenue or credits should be calculated. Given this distinction, two general issues are prominent.

(1) Inconsistency With Other Remedies In Equity

A district court's jurisdiction is limited to traditional remedies in equity for federal agency claims of unjust enrichment. Yet when the

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241. *Id.* at 571.

242. Lone Ranger Television, Inc. v. Program Radio, Corp., 740 F.2d 718 (9th Cir. 1984).

243. Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement,* 33 GA. L. REV. 847, 868 (1999).

opinions that discuss how the defendant's unjust enrichment should be measured, there is little to no mention of the abundant case law that is available in other areas of the substantive law. Largely ignored is the body of case law for claims relating to trade secrets, breaches of fiduciary duty, conversion, fraud and misappropriation that can offer helpful analogies for remedies in equity and as well as mixed claims for violations of trademarks[244] or copyrights.[245] Totally ignored is the body of case law for claims and remedies at law relating to claims for torts and quasi-contrast which offer useful contrasts to analyze whether either the claim, remedy, or both, would be more appropriate for a court at law or a court in equity.

Only by ignoring this comparable case law could courts render some of the existing opinions on measuring unjust enrichment in equity. By restricting their attention only to cases relating to the implied claims of federal agencies, some courts now regularly reject any offsets or counter-restitution for the defendant when measuring unjust enrichment. Other than the AVCO opinion in the Second Circuit and the Southern District of New York,[246] most of the remaining opinions only grudgingly allow the defendant to offset some incidental direct costs to measure the defendant's profit to be disgorged to the agency plaintiff. Administrative costs and variable or fixed overhead are not allowed for defendants against claims from the SEC and most other agencies. No other body of case law exaggerates unjust enrichment in such a manner, especially as interpreted by a court in equity.

To date, more than 240 federal and state cases (from both courts at law and in equity) have been surveyed, comparing case opinions on the deductibility of a proposed expense for the measurement of the defendant's unjust enrichment. Within the total group, 130 cases held that one or more type of expense was deductible, 61 cases held that

244. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 3, cmt. d (Discussion Draft, Mar. 31. 2000) (offering two illustrations for disgorgement, including a copyright case, *Taylor v. Meirick,* 712 F.2d 1112 (7th Cir. 1983)).

245. *See* 15 U.S.C. § 1117(a) (stating clearly that in regards to the violation of trademarks the award of profits or damages is "subject to the principles of equity." *See also* Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 369 (5th Cir. 2000). For a discussion of equitable foundations of copyright and patent law, see Root v. Ry. Co., 105 U.S. 189 (1882) and Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940).

246. CFTC v. Avco Fin. Corp., 1998 U.S. Dist. LEXIS 12996, at *3-4 (S.D.N.Y. 1998).

certain items were not deductible and 50 cases held that some items were deductible and others were not deductible.[247]

The following three tables confirm that a large body of case opinions has accumulated for a variety of jurisdictions and covering a variety of issues that allow the deduction or offset of most expenses for production and administration. A significant number of cases have even supported the minority position for deducting infringing expenses and income taxes.

TABLE 1
FEDERAL AND STATE CASES RELATING TO OFFSETS FOR DEFENDANT'S BENEFIT

COURT	DEDUCTIBLE	NON-DEDUCTIBLE
1st Circuit	11	5
2d Circuit	46	32
3d Circuit	19	14
4th Circuit	7	3
5th Circuit	15	3
6th Circuit	8	6
7th Circuit	14	8
8th Circuit	11	6
9th Circuit	29	20
10th Circuit	11	7
11th Circuit	3	5
Fed. Circuit	4	4
Supreme Court	7	5
Total	185	118

247. At best the sampling methods were informal. No claim is made that the group of cases is necessarily representative of any particular group or sub-group.

Table 2 shows the distribution of cases that allow or reject the deduction of various types of expenses by category of expense:

TABLE 2
FEDERAL AND STATE CASES THAT ALLOW OR REJECT DEDUCTION OF EXPENSES

CATEGORY OF EXPENSE	DEDUCTIBLE	NON-DEDUCTIBLE
Administrative	38	17
Bad Debt	7	8
Depreciation	11	6
Distribution	2	10
Infringing	13	22
Interest	22	3
Losses	6	11
Overhead	63	50
Production	97	19
Income Tax	31	24

Finally, Table 3 summarizes the number of state and federal cases in the geographical confines of the Second Circuit that have approved or rejected the deduction of various categories of expense. A second data field shows the year of the most recent opinion in that group:

TABLE 3
FEDERAL & STATE CASES IN THE 2D CIRCUIT THAT APPROVE OR REJECT EXPENSE DEDUCTIONS

CATEGORY OF EXPENSE	DEDUCTIBLE Last Opinion	DEDUCTIBLE Opinions	NON-DEDUCTIBLE Last Opinion	NON-DEDUCTIBLE Opinions
Administrative	2003	16	1985	3
Bad Debt	1987	2	1949	2
Depreciation	1944	2	1985	1
Infringing	1981	2	1996	8
Interest	1944	4	1944	2
Overhead	2003	26	1995	16
Production	1998	18	1990	3
Income Tax	1994	9	1989	7

At present, most opinions that address the issue of measuring the defendant's unjust enrichment approve the deduction of all direct or variable costs that are related to the relevant revenue. There are disagreements among some courts and the federal circuits are somewhat split over whether (a) fixed overhead can be allocated, (b) both willful and non-willful defendants can offset some form of overhead or administrative costs, and (c) the defendant's income taxes should be deductible. The overall point, of course, is that most courts, including the same courts that have heard most of the relevant federal agency cases, permit the deduction of most of the defendant's operating expenses in measuring a defendant's unjust enrichment.

For example, the Second Circuit is among the most liberal circuits in allowing expenses to be deducted to measure unjust enrichment. The Second Circuit has been a leading advocate of the deductibility of income taxes[248] and of allocating fixed overhead.[249] The Second Circuit is unique among the circuits in advocating that a court should estimate the defendant's gross profit if the defendant fails or is unable to produce relevant accounting data rather than hold the defendant in default and award the defendant's revenues as unjust enrichment.[250] Yet the Second

248. For cases affirming the deduction of the defendant's income taxes, *see* Stromberg Motor Devices Co. v. Zenith Detroit Corp., 73 F.2d 62, 65 (2d Cir.1934), Champion Spark Plug Co. v. Sanders, 108 F. Supp. 674, 678-79 (C.D.N.Y. 1952), W.E. Bassett Co v. Revlon, Inc., 435 F.2d 656 (2d Cir. 1970), Murphy Door Bed Co. Inc. v. Interior Sleep Systems, Inc., 874 F.2d 95 (2d Cir. 1989), *and* In Design v. K Mart Apparel Corp., 13 F.3d 559, 567 (2d Cir. 1994). For opinions denying the deduction of the defendant's income taxes, *see* Harris v. Miller, 57 U.S.P.Q. (BNA) 103 (S.D.N.Y. 1943), John B. Stetson Co. v. Stephen L. Stetson Co., 58 F. Supp 586, 592 (C.D.N.Y. 1944), McNamara v. Powell, 52 N.Y.S. 2d 515 (Sup. 1944), Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 106 (2d Cir. 1951), Stuart v. Collins, 489 F. Supp. 827 (S.D.N.Y. 1980), *and* Mfr. Tech., Inc. v. Cams, Inc., 728 F. Supp. 75, 84 (D. Conn. 1989).

249. Hamil Am., Inc. v. GFI, 193 F.3d 92, 106 (2d Cir. 1999) ("Sheldon's approach has been consistently applied by this Court. In subsequent cases, we have assumed that general overhead expenses were deductible and reviewed only the sufficiency of the nexus between the expense and the infringing product . . . ."); U.S. Media Corp. v. Edde Entm't, Inc., 1998 U.S. Dist. LEXIS 10985, at *33 (S.D.N.Y. 1998) ("Fixed and other overhead may be counted as a deductible expense provided that it 'actually contributed to' supplying the product, even if the expense would still have been borne by the defendant absent the infringement.").

250. *See Murphy Door Bed,* 874 F.2d at 103 ("Even if Zarcone does not offer evidence of his costs (as he has not heretofore), the court should estimate them based on the evidence before it.").

Circuit denies these deductions to defendants for agency claims over the same time period according to traditional remedies in equity.

State court opinions also have precedential or persuasive authority. In a case filed by the Consumer Protection Division of Maryland against three individuals, the Court of Appeals of Maryland held the following:

> The Division also should deduct the payments Shpritz made to the purchasers, albeit those payments were not in accordance with the law. In so ruling, we do not condone the unlawful transactions, but instead apply the rules for restitution rather than impose civil or criminal penalties. By seeking to compel Shpritz to pay these amounts again, the Division forsakes unjust enrichment for what are in effect punitive damages . . . [a]ccordingly, the Division must recalculate its restitution order to exclude the actual costs incurred by Shpritz.[251]

Agency remedies are also inconsistent between the different agencies. The five agencies can be sorted into two groups: claims against one or a series of transactions and claims against an ongoing business operation.

The transactional group includes claims made by the SEC, CFTC and Department of Energy that various defendants engaged in transactions or a series of transactions that violated their statutes. With a minimum of dispute all such agencies allow the most important offset: the purchase price of the securities, commodity investment or hydrocarbon that the defendant resold in an unjust manner. It is a given that the agencies seek at most the defendants' gross profit, not their literal revenue or cash inflow. Various defendants sought to offset smaller, related transaction costs and various forms of administrative expenses but were generally denied all but some ancillary transactional costs. In contrast, agencies like the FTC and the FDA generally seek the equivalent of the defendants' gross revenue and oppose any proposed offsets requested by the defendants.

One possible explanation for the differences among agencies is that the case law for each agency may follow a form of a 'learning curve.' Thus it appears that courts begin to narrow the definition of the plaintiff's remedy only after a significant number of cases have passed that establish the agency's basic right to implied jurisdiction. This may be true for the legal staff of the agency and even for the firms that represent various defendants against the agencies but a court's

251. Consumer Prot. Div. v. Morgan, 387 Md. 125, 171 (Ct. App. Md. 2005).

experience in one area of the substantive law should be cumulative with the rest. The overall explanation may also lie with the fact that as long as the defendant disputes the agency's fundamental right to a claim for implied jurisdiction, the court and the process is distracted from the cumulative case law. Defense counsel has limited time and credibility with the court; if counsel pursues the basic jurisdiction for the agency (which in the last five years has been a consistently losing position except in relation to RICO and RCRA), she may have insufficient time or credibility to dispute the agency's measure of restitution.

(2) Jurisdiction in Equity

The court sits in equity to hear an agency's claim, but it appears that sometime during the trial, the agency enlists the aide and sympathy of the court to join the agency in achieving the goals of the agency's statutory scheme. Reading the case opinions in the FTC and FDA cases seem to indicate an increasing inclination of the court to devise remedies, equitable or not, that will help the deceived consumer the most.

The main purpose of the agency's statutes in implied jurisdiction is to determine whether Congress limited the agency's implied jurisdiction to only certain remedies and to provide a basis to determine whether the defendant's enrichment was unjust.

The essential contradiction in most of the case law relating to implied jurisdiction is that the agencies opt for the advantages of jurisdiction in equity, but resist the concomitant obligation to conform their remedies to traditional remedies in equity. In their discussion of the appropriate measure of a defendant's benefit or profit, the courts frequently forget that a plaintiff is not even entitled to a defendant's unjust enrichment unless the plaintiff can establish that the unjust acts were conducted willfully or knowingly. In the absence of establishing such intent, the plaintiff would be entitled to, at most, a market rate of rent or interest for the use of her asset. Similarly, the right of the defendant to offset expenses or to claim counter-restitution is not conditioned by the nature of the defendant's unjust actions.

Perhaps the increasing awareness of the need to distinguish restitution at law from restitution in equity will reverse this pattern as courts are forced to conform to the Supreme Court's opinions in *Grupo* and *Great-West*. Claims filed by the SEC, CFTC and the DOE largely seek disgorgement of un-segregated cash; these claims are increasingly likely to be challenged for failing to meet the standard set in *Great-West* for identifiable or segregated assets or funds of cash. Furthermore, the agency's claim will be evaluated as a whole such that if the agency seeks personal liability for the defendant or proposes to calculate the restitution in a manner suggesting punitive relief, the claim is even less likely to found compatible with traditional restitution in equity.

The agencies can still claim that their claims are merely ancillary to the requested injunctive relief and that the clean-up doctrine would allow jurisdictions to provide complete relief. However, the previous parts of the article have shown that courts are increasingly willing to challenge the appropriateness of the injunctive relief and increasingly unwilling to accept the labels asserted for causes of action at face value. Another key issue will relate to the Supreme Court's holding in *Tull* that a claim for $22 million and other injunctive relief should be viewed as a remedy at law for $22 million with the injunctive relief added merely for cover.[252]

Agencies like the FTC and FDA largely seek a different type of remedy and they are likely to experience a similar but less intense set of problems. While the FTC and FDA use a number of different labels for their proposed remedies, they seek rescission which is less at odds with the standard for equitable relief in *Great-West*. However, the FTC and FDA have sought a version of rescission that omits the counter-restitution that is normally required in equitable rescission.

Implied jurisdiction claims do have some significantly positive attributes. They offer class-action type relief that could take less time and provide greater efficiency for consumers and investors who would otherwise find little recourse for their legitimate claims of fraud and misrepresentation. Over time, it will be interesting to see if agency lawyers avoid the inherent dangers of conflicts-of-interest in such a setting or if they just end up straddling other types of conflicts between the interest of the consumer and the interest of the government or agency.

A. Securities and Exchange Commission

While the courts probably consider as many or more ERISA cases than SEC cases, the SEC seems to be regarded as the "trail blazer" for

252. *See also* King Mechanism & Eng'g Co. v. W. Wheeled Scrapper Co., 59 F.2d 546, 547 (7th Cir. 1932).

agencies in the area of implied jurisdiction.[253] Much of this image may be owed to the early SEC cases relating to *Texas Gulf Sulphur* and its progeny that first established a federal district court's jurisdiction for securities claims.[254] Cases relating to implied jurisdiction for the SEC have frequently been cited for other agencies.

The SEC is a powerful advocate for its view of the law in equity as it 'prosecutes' a large number of cases each year that relate to restitution/unjust enrichment. Given the confusion that prevails about the subject, this voice is likely to gain influence, regardless of the accuracy of its message. Consider the following description of the SEC's litigation tactics from the Securities Enforcement Manual from the A.B.A. Business Law Section that was quoted by the Southern District of New York:

> The SEC often takes a broad view as to what constitutes illicit profits. Thus, in negotiating a disgorgement remedy with the staff, counsel may find that the staff argues for a very broad loss causation concept, refuses to recognize the fairness of netting profits and losses from allegedly illegal transactions, and resists the deductibility of various expenses. In contrast, the courts tend to take a more realistic approach as to what constitutes 'illegal' profits, and have accepted the propriety of netting gains against losses.[255]

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253. CFTC v. Am. Metals Exch. Corp., 991 F.2d 71, n.9 (3d Cir. 1993).

> Section 27 of the Securities Exchange Act grants the courts equitable powers to enforce that Act. Though the Commodity Exchange Act has no provision similar to Section 27, courts have found support for disgorgement in CFTC actions by relying on the general equity power of the federal courts. Moreover, the rationale supporting disgorgement in actions under the securities laws - that allowing a violator to retain the profits from his violations would frustrate the purposes of the regulatory scheme, *see e.g.*, *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971)—holds true in the context of the Commodity Exchange Act.

Id.

254. *Texas Gulf Sulpher*, 446 F.2d at 1307 ("[E]ven though no specific statutory authority exists" which granted the SEC the power to authorize the appointment of receivers under the Exchange Act, the courts of appeals have nonetheless upheld the exercise of such equity power by the district courts."). *See also* SEC v. Dibella, 409 F. Supp. 2d. 122, 130-31 (2d. Cir. 2006) (noting that despite amending the securities laws significantly in 1995 and 2002, Congress nevertheless declined to limit or eliminate the SEC's exercise of implied jurisdiction in seeking and obtaining disgorgement orders. In fact, Congress recognized the practice as both necessary and important.)

255. SEC v. McCaskey, 2002 U.S. Dist. LEXIS 4915, at *24 n.10 (S.D.N.Y. 2002) (citing The Securities Enforcement Manual, A.B.A. Business Law Section at 197

Like the CFTC and the DOE, the SEC generally does not claim revenue disgorgement as it measures the defendant's benefit or profit net of the cost of the securities sold. For example, suppose a defendant bought 1,000 shares of stock for $10 per share and thereafter committed acts that violated the securities statutes which resulted in the sale of those same shares for $50 per share or $50,000. The SEC would claim unjust profits of about $40,000, not $50,000.

In 1990, the Western District of New York's opinion in *SEC v. Thomas James Associates, Inc.* attempted to clarify the central issue of the limits to the court's jurisdiction or authority:

> In fixing the measure and amount of disgorgement, I may not invoke the equitable power of the court in order to inflict a penalty or effect forfeiture; the amount to be disgorged must be "causally related to the wrongdoing." Such amount, however, need not be figured with perfect precision; "disgorgement need only be a reasonable approximation of profits causally connected to the violation."[256]
>
> The SEC further argues, however, that the amount to be disgorged by defendants is the entire amount of excessive markups, because the measure of disgorgement is the injury to the market, and because only the gross profits, unadjusted for expenses, adequately reflect such injury. The SEC's argument simply misconstrues both the nature and extent of the equitable power of the Court to order disgorgement.[257]

The court held that it has the discretion to allow some types of expenses to be deducted or offset in the unjust enrichment calculation. Compared to the Second Circuit's holding in *Murphy Door Bed*, this

(1997)).

256. 738 F. Supp. 88, 94 (quoting SEC v. First City Financial Corp., 890 F.2d 1215, 1230 (1989)).

257. *In re* Alpha Telecom, Inc., 2004 U.S. Dist. LEXIS 20002, at *26-27 (D. Or. 2004) (citing Thomas James, 738 F. Supp. at 92-94 ("Disgorgement may not exceed the amount by which the agent was unjustly enriched, plus interest.")); Hateley v. SEC, 8 F.3d 653 (9th Cir. 1993); SEC v. Softpoint, Inc., 958 F. Supp. 846, 867 (S.D.N.Y. 1997) ("Any further sum would constitute a penalty assessment."); SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) ("To the extent an agent necessarily and reasonably incurred expenses to earn the commissions he must now disgorge, a setoff may be appropriate in some instances. Otherwise, disgorgement might exceed the amount by which the agent was unjustly enriched.").

opinion seems a tame statement of the law.[258]

Perhaps with the encouragement of the SEC, a couple of subsequent opinions took strong objection to the Southern District's statement:

> In support of this proposition, Defendants rely primarily on *SEC v. Thomas James Associates, Inc.*, in which the court held that a court ordering disgorgement "may consider as an offset the expenses incurred by defendant in garnering such unjust enrichment." The Court agrees with the SEC that this case does not reflect the "overwhelming weight of authority holding that securities law violators may not offset their disgorgement liability with business expenses."[259]

Even though the SEC gained the support of the District Court of the District of Columbia and the Fifth Circuit[260] for the position that no direct incidental expense should offset the measure of defendant's profits, it appears that the trend has turned against the view recently. In 2002, the Southern District handed down two opinions that may settle this. First, the Southern District disputed the SEC's assertion about the "overwhelming weight of authority," at least within the Southern District, as "[c]ourts in this Circuit consistently hold that a court may, in its discretion, deduct from the disgorgement amount any direct transaction costs, such as brokerage commissions that plainly reduce the wrongdoer's actual profit."[261] Later in 2002, the SEC conceded that its authority is not overwhelming. Seemingly in response to the defendant's claims for a larger number of offsets, the SEC claimed that it was widely acknowledged that only certain kinds of expenses could be offset, as "[t]he SEC cit[ed] a number of cases for the proposition that in disgorgement cases (as opposed to civil penalty cases) only certain expenses, such as brokerage commissions, may be deducted from the amount to be disgorged."[262]

The impact of this opinion still only relates to direct incidental expenses and specifically proscribes administrative expenses or any

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258. Murphy Door Bed Co. Inc. v. Interior Sleep Systems, Inc., 874 F.2d 95 (2d Cir. 1989).

259. SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15-16 (D.D.C. 1998) (internal citations omitted).

260. SEC v. United Energy Partners, Inc., 88 Fed. Appx. 744, 746 (5th Cir. 2004).

261. *McCaskey*, 2002 U.S. Dist. LEXIS 4915, at *14.

262. SEC v. Credit Bancorp, Ltd., 2002 U.S. Dist. LEXIS 20597, at *8 (S.D.N.Y. 2002).

allocations of overhead. This position of the Southern District is at odds with other Southern District opinions for other areas of the law that litigate the definition of "profit" for the purposes of calculating unjust enrichment.[263] Only two years later, the same jurisdiction ruled that the CFTC's measure of the defendant's unjust enrichment should include administrative and overhead expenses.[264]

As plaintiffs for unjust enrichment, the agencies, especially the SEC, FTC and FDA, secure profit definitions that are much more favorable to the plaintiff than would be found in other areas of the substantive law. Three main issues, however, remain to restrain the agencies' restrictive measures:

(1) The district courts enjoy wide discretion in how unjust enrichment or benefits or profits should be defined;[265]
(2) Courts acknowledge the need to distinguish between legally and illegally obtained profits;[266]
(3) Disgorgement awards should not be punitive.[267]

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263. Hamil Am., Inc. v. GFI, 193 F.3d 92, 106 (2d Cir. 1999).

> Sheldon's approach has been consistently applied by this Court. In subsequent cases, we have assumed that general overhead expenses were deductible and reviewed only the sufficiency of the nexus between the expense and the infringing product . . . . In Design v. K Mart Apparel Corp., 13 F.3d 559, 567 (2d Cir. 1994), for example, concerned a copyright holder's challenge to the district court's conclusion that certain overhead expenses (including rent, advertising, payroll, shipping, and store supplies) were deductible from gross profits.").

Id. (internal citations added).

264. CFTC v. Avco Fin. Corp., 1998 U.S. Dist. LEXIS 12996, at *3-4 (S.D.N.Y. 1998).

265. SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996), *cert. denied,* 522 U.S. 812 (1997) ("The district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged.").

266. SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("Since disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power only over property causally related to the wrongdoing."); SEC v. MacDonald, 699 F.2d 47 (1st Cir. 1983); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 (2d Cir. 1972); SEC v. Bilzerian, 814 F. Supp. 116, 121 (D.D.C. 1993) ("'The court may exercise its equitable power only over property causally related to the wrongdoing.' *First City Fin.,* 890 F.2d at 1231. As such, 'the loss complained of must proceed directly and proximately from the violation claimed and not be attributable to some supervening cause.'"); SEC v. Sekhri, 2002 U.S. Dist. LEXIS 13289 (S.D.N.Y. 2002).

267. *First City Fin.,* 890 F.2d at 1230 ("In fixing the measure and amount of disgorgement, I may not invoke the equitable power of the court in order to inflict a

For cases of implied jurisdiction, the offsets that the SEC has objected to on an individual basis include the following:

(1) TRANSACTION COSTS. Until recently, the SEC objected to even incidental transaction costs underlying the unjust activities, including broker fees and transfer taxes. In disputes, this item is the most likely for courts to approve as an offset.[268]

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penalty or effect a forfeiture; the amount to be disgorged must be 'causally related to the wrongdoing.'"); SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) ("Disgorgement is remedial and not punitive. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment."); SEC v. World Gambling Corp., 555 F. Supp. 930, 931 (S.D.N.Y. 1983).

> Sroka properly argues that disgorgement serves somewhat different purposes from those served by joint-tortfeasor liability. While disgorgement functions primarily to prevent a party's unjust enrichment and thereby to deter improper conduct, joint liability serves primarily to make whole the injured party, and in the process to punish if necessary any one legally responsible. To the extent that joint liability requires payment of a sum greater than the profits unlawfully gained by the fraudulent transactions, it is a penalty and is therefore improper.

Id.; *See also* Litton Indus., Inc. v. Lehman Bros., Inc., 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990), *rev'd on other grounds*, 967 F.2d 742 (2d Cir. 1992); SEC v. Shah, 1993 U.S. Dist. LEXIS 10347, at *14 (S.D.N.Y. 1993).

> Allowing a deduction for reasonable brokers' commissions incurred in making insider trades is consistent with the view in the Second Circuit that disgorgement is not a penalty assessment, but merely a means of divesting a wrongdoer of ill-gotten gains. [Defendant] has already paid the commissions to his broker. Requiring him now to disgorge an amount equal to those commissions would penalize him by compelling him to pay the commissions twice.

Id.

268. Herrmann v. Steinberg, 812 F.2d 63, 66 (2d Cir. 1987) (noting that incidental transaction expenses incurred in purchasing stock are deductible from defendant's disgorgement of short-swing profits under Section 16(b)); Oliff v. Exch. Int'l Corp., 669 F.2d 1162, 1168 (7th Cir. 1980), *cert. denied,* 450 U.S. 915 (1981); SEC v. Alliance Leasing Corp., 28 Fed. App'x 648 (9th Cir. 2001); *Litton Indus.,* 734 F. Supp. at 1077 (S.D.N.Y. 1990), *rev'd on other grounds,* 967 F.2d 742 (2d Cir. 1992) ("To require disgorgement of all fees and commissions without permitting a reduction for associate expenses and costs constitutes a penalty assessment and goes beyond the restitutionary purpose of the disgorgement doctrine."); *Shah,* 1993 U.S. Dist. LEXIS 10347, at *14; SEC v. McCaskey, 2002 U.S. Dist. LEXIS 4915, at *14 ("Courts in this Circuit consistently hold that a court may, in its discretion, deduct from the disgorgement amount any direct transaction costs, such as brokerage commissions, that plainly reduce the wrongdoer's actual profit."); SEC v. Thomas James Assocs., Inc., 738 F. Supp. 88, 94 (W.D.N.Y. 1990); Alpha Telcom, Inc., 2004 U.S. Dist. LEXIS 20002, at *18 (D. Or. 2002). *But see* SEC v. Great Lakes Equities Co., 775 F. Supp.

(2) OTHER DIRECT EXPENSES. This category is meant to include other direct costs of production underlying the unjust activities. The SEC continues to object to these expenses generally on the basis that they should be regarded as infringing expenditures and as such should not be offset as a matter of public policy.[269]

(3) INFRINGING EXPENSES. While there is a line of cases that hold that certain items of infringing expenses should not be offset against revenues, that distinction has generally been narrowly drawn and largely restricted to the compensation of the business owners. To date, the agencies have convinced the courts to broaden this category to most or all of the proposed offsets in any one case.[270]

(4) GENERAL BUSINESS EXPENSES. This category includes direct or variable administrative expenses and allocated overhead. Most courts do not measure profit in SEC cases by deducting expenses for variable administrative expenses to calculate unjust enrichment for other areas of the law and some permit allocated overhead.[271]

211, 214-15 (E.D. Mich. 1991) (rejecting deductions from the disgorgement amount for overhead, commissions, and other expenses).

269. SEC v. Rosenfeld, 2001 U.S. Dist. LEXIS 166, at *6 (S.D.N.Y. 2001) ("A court may in its discretion, deduct from the gross profits certain expenses incurred while garnering the illegal profits, including correspondence and related expenses and transaction costs, such as brokerage commissions."); SEC v. Bocchino, 2002 U.S. Dist. LEXIS 22047, at *6-7 (S.D.N.Y. 2002) (noting that the court has discretion to deduct certain expenses incurred while garnering the illegal profits, including correspondence and related expenses, and transaction costs such as brokerage commissions).

270. SEC v. TLC Inv. & Trade Co., 179 F. Supp. 2d 1149 (C.D. Cal. 2001) (noting that defendant is not entitled to offset expenses in carrying out a fraudulent scheme); SEC v. Cavanagh, 2004 U.S. Dist. LEXIS 13372, at *102 (S.D.N.Y. 2004) ("Defendants are not entitled to deduct costs associated with committing their illegal acts.").

271. SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 214-15 (E.D. Mich. 1991) (rejecting deductions from the disgorgement amount for overhead, commissions, and other expenses; criticizing *Thomas James* for equating disgorgement with restitution); SEC v. McCaskey, 2002 U.S. Dist. LEXIS 4915, at *16 n.6 (S.D.N.Y. 2002); ("Commissions should be distinguished from general business expenses, such as overhead expenses, which should not reduce the disgorgement amount."); SEC v. World Gambling Corp., 555 F. Supp. 930, 934-35 (S.D.N.Y. 1983) (offsetting "transfer taxes" but not overhead costs), *aff'd,* 742 F.2d 1440 (2d Cir. 1983), *cert. denied,* 465 U.S. 1112 (1984); SEC v. Credit Bancorp, Ltd., 2002 U.S. Dist. LEXIS 20597, at *8

(5) INCOME TAXES. Most courts do not permit this expense to be offset. Outside of implied jurisdiction, the circuits have split over this issue although recently the Federal Appeals Circuit handed down an opinion against offsetting income taxes that may resolve some of the dispute.[272]

(6) SETTLEMENTS WITH OTHER PARTIES. Other than the purchase price of stock sold, settlements with other parties may be the largest single potential offset for any one case. The issue can sometimes be confused with the fact question of whether the proposed offset represents a settlement on the existing unjust act or practice. Assuming that the settlement is related, the majority opinion is that settlements can be offset. [273]

(S.D.N.Y. Oct. 29, 2002) ("Moreover, general business expenses may not be subtracted from the amount to be disgorged.").

272. *Credit Bancorp, Ltd.,* 2002 U.S. Dist. LEXIS 20597, at *9 (S.D.N.Y. Oct. 29, 2002) ("Brandon finally argues that the $254,523.35 figure should be reduced by $84,180.85 paid in taxes. This argument ignores the clear dictate of the statute that the gross amount of pecuniary gain be paid and thus must be rejected."); *Alpha Telcom, Inc.,* 2004 U.S. Dist. LEXIS 20002, at *31 ("The agents request a setoff for taxes paid on the income they are now being required to disgorge. That request is denied. It is a matter between the agents and the IRS (or state officials). The court will not interfere."); *see also* Nike Inc. v. Wal-Mart Stores, 138 F.3d 1437, 1448 (Fed. Cir. 1998) (citing Schnadig Corp. v. Gaines Mfg. Co., 620 F.2d 1166, 1169-71 (6th Cir. 1980)).

273. SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1450 (2d Cir. 1996), *cert. denied,* 522 U.S. 812 (1997) (holding that a settlement in separate class action is offset for calculation of unjust enrichment.); SEC v. Chem. Trust, 2000 U.S. Dist. LEXIS 19786, at *34 (S.D. Fla. 2000) ("Likewise, funds that the FBI seized from ACC, $26,940.28, pursuant to a seizure warrant issued in a parallel criminal investigation may inure at a later time to the benefit of the defrauded investors herein. To the extent those funds do inure to the benefit of investors, they should be credited against ACC's accounting."); *Alpha Telcom, Inc.,* 2004 U.S. Dist. LEXIS 20002, at*32-33 ("Many agents say they are being sued by former clients, and contend they should not also be liable for disgorgement. I disagree. The injuries sustained by the former clients are entirely distinct from the commissions that the agent received. The agent can be liable for both."). *But see* Hateley v. SEC, 8 F.3d 653, 655 (9th Cir. 1993). ("Appellants should not be allowed to keep ill-gotten gains merely because the investors recovered some of the money from Alliance in the bankruptcy proceeding."); SEC v. Alliance Leasing Corp., 28 Fed. App'x 648, 652 (9th Cir. 2001) ("Appellants argue that the district court should have reduced the disgorgement by the amounts investors recovered from Alliance in the bankruptcy proceeding. Disgorgement prevents unjust enrichment, requires return of ill-gotten gains and is independent of other remedies."); SEC v. Penn

(7) UNPROVEN EXPENSES. Throughout litigation on remedies in equity, there is almost unanimous agreement that the plaintiff must carry the burden of proving the defendant's revenues (subject to the willingness of the defendant to produce internal financial statements) and that the defendant must first carry the burden of proving suitable offsets and apportionments. Should the defendant default and fail to substantiate the offsets, most jurisdictions award the defendant's revenues by default. Recently, the Second Circuit has suggested a departure from this tradition to the effect that the Court should still try to estimate the defendant's costs of goods sold. However, that remains a minority position.[274]

A number of precedents can be cited to support the view that infringing expenditures should not be offset. One of the earlier opinions in this area was in the Supreme Court opinion in *Callaghan v. Myers*,[275] in which the court held that the salaries of the two owners of the company infringing a copyright should not be offset because of their infringing activities. It should be noted that the opinion did not hold that all salaries, or even all executive salaries, were ineligible. In other areas

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Central Co., 425 F. Supp. 593, 599 (E.D. Pa. 1976) ("It is analogous to a malpractice claim against a surgeon. He may be required to refund the amount paid for the surgery and also be liable for any injury sustained by the patient.").

274. SEC v. Bilzerian, 814 F. Supp. 116, 122 n.16 (D.D.C. 1993) ("Defendant has merely asserted a bald figure and has made no attempt to substantiate it."); SEC v. Benson, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) (noting that a CEO who fraudulently diverted corporate funds for personal use was ordered to disgorge the money he stole. The court denied a setoff for expenses incurred in perpetrating the fraud, such as payments made to co-conspirators. The CEO also argued that he should be required to return only the money still in his possession; he had donated some to his favorite charities, and spent some to expand his stamp collection. The court understandably denied that request.); SEC v. U.S. Envtl., Inc., 2003 U.S. Dist. LEXIS 12580, at *78 (S.D.N.Y. 2003) ("Such compensation is more appropriately considered as a general business expense, than an indirect transactional expense incurred in connection with the trading of USE securities." The court also refused deduction of expenses insufficiently substantiated); SEC v. Breed, 2004 U.S. Dist. LEXIS 7336 (S.D.N.Y. 2004) (noting that a court has discretion to deduct certain business expenses but the defendant in that case failed to provide sufficient substantiation of the expenses under consideration).

275. 128 U.S. 617, 663-64 (1888); *see also* City of Elizabeth v. Am. Nicholson Pavement Co., 97 U.S. 126, 139 (1877) (showing that the case stands on a different footing from that of the salaries of the managing officers of a corporation, as in Rubber Company v. Goodyear, 76 U.S. 788 (1869)).

of the substantive law, courts continue to deny infringing activities for offset, but the infringing activities are generally defined narrowly and largely relate to salaries for the key offending parties or the owners of the defendant business.[276]

For example, if a magazine violates the copyright by including a protected photograph or series of photographs in a small portion of one issue, not all production costs of that issue are regarded as infringing activities. In one such case, *Sygma Photo News, Inc. v High Society Magazine, Inc.*, the Second Circuit held that only the costs of making the copyright violation more difficult to discover should be disallowed as an infringing expense. [277]

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276. For a case that approved the deduction of some or all of the defendant's infringing expenses, *see Rubber Co.,* 76 U.S. at 803-804. *See also* Sammons v. Larkin, 38 F. Supp. 649 (C.D. Mass. 1940); John B. Stetson Co. v. Stephen L. Stetson Co., 58 F. Supp. 586 (C.D.N.Y. 1944); Champion Spark Plug Co. v. Sanders, 108 F. Supp. 674, 678-79 (C.D.N.Y. 1952); MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981); East & West Coast Serv. Corp. v. Papahagis, 344 Pa. 183 (1942); Stromberg Motor Devices Co. v. Detroit Trust Co., 44 F.2d 958 (7th Cir. 1930); Aladdin Mfg. Co. v. Mantle Lamp Co., 116 F.2d 708 (7th Cir. 1941); McGaffee v. McGaffee, 58 N.W.2d. 357 (Iowa 1953); Health Indus., Inc. v. European Health Spas, 489 F. Supp. 860, 869 (D.S.D. 1980); Aitken, Hazen, Hoffman, Miller, P. C. v. Empire Constr. Co., 542 F. Supp. 252 (C.D. Neb. 1982); Luce v. Hanrahan, 2005 Cal. App. LEXIS 2775 (Cal. Ct. App. 2005); and Burger King Corp. v. Mason, 710 F.2d 1480 (11th Cir. 1983). *But see* City of Elizabeth v. Am. Nicholson Pavement Co., 97 U.S. 126, 142 (1877); Callaghan v. Myers, 128 U.S. 617 (1888); Sammons v. Larkin, 38 F. Supp. 649 (C.D. Mass. 1940); Harris v. Miller, 57 U.S.P.Q. (BNA) 103 (S.D.N.Y. 1943); McNamara v. Powell, 52 N.Y.S.2d 515 (Sup. Ct. 1944); Champion Spark Plug Co. v. Sanders, 108 F. Supp. 674 (C.D.N.Y. 1952); W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656 (2d Cir. 1970); Elnicky Entert., Inc. v. Spotlight Presents, Inc., 213 U.S.P.Q. (BNA) 955 (S.D.N.Y. 1982); Sygma Photo News, Inc. v. High Soc'y Magazine, Inc., 778 F.2d 89, 91 (2d Cir. 1985); Dolori Fabrics, Inc. v. Limited, Inc., 662 F. Supp. 1347 (S.D.N.Y. 1987); Project Strategies Corp. v. Nat'l Commc'ns Corp., 42 U.S.P.Q.2d (BNA) 1156. (E.D.N.Y. 1997); Duro Co. of Ohio v. Duro Co. of New Jersey, 56 F.2d 313, 315 (3d Cir. 1932); Dickinson v. O. & W. Thum Co., 8 F.2d 570. (6th Cir. 1925); Ellison v. Alley, 842 S.W.2d 605 (Tenn. 1992); Durbin Brass Works, Inc. v. Schuler, 532 F. Supp. 41 (E.D. Mo. 1982); Wolfe v. National Lead Co., 272 F.2d 867 (9th Cir. 1959); S. C. Johnson & Son, Inc. v. Drop Dead Co., 210 F. Supp. 816 (S.D. Cal. 1962); Aalba-Dent, Inc. v. Certified Alloy Prods, Inc., 203 U.S.P.Q. (BNA) 326 (N.D. Cal 1979); Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505 (9th Cir. 1985); Julius Hyman & Co. v. Velsicol Corp., 233 P.2d 977 (Colo. 1951).

277. Sygma Photo News, Inc. v. High Soc'y Magazine, Inc., 778 F.2d 89, 93-94 (2d Cir. 1985) (noting that the Second Circuit held that the trial court properly allowed an expense deduction for the entire $42,882 spent on photograph separations). The court said that of this amount, $1,280 was attributable to the cost of readying the infringing

Overall, while there have been some opinions adverse to the court's discretion to allow deductions and those that have rejected proposed deductions because of the particular nature of the expense,[278] the majority of the opinions appear to be divided between those that hold that the court has the discretion to allow deductions or that the court must allow appropriate deductions.[279]

Some cases have also allowed deductions or offsets for certain other types of expenditures or payments. Most important to the defendant is the issue of credit for payments or settlements made on the same issue. Most disgorgement orders provide credit for payments or reimbursements. While the District Court in Oregon did affirm similar credit, it stated that such payments should generally be considered separate from a calculation for unjust enrichment:

cover photo for publication in the infringer's sex-oriented magazine, but that a similar amount would have to have been spent to prepare any cover photo for reproduction. The Second Circuit further held that the trial court erred in not allowing a deduction for any portion of the retouching expenses, which totaled $20,266 for the entire magazine. The court said that expenses incurred in order to make an infringement more difficult to discover—as opposed to those that the infringer incurs in altering an original for some other purpose but that have the incidental effect of concealing—are not reasonable expenses and are therefore not deductible. Noting that the trial court apparently found that the infringers retouched the background of the copyrighted photograph in order to defeat the copyright owner's rights, and that the record indicated that this was a finding to which it was appropriate to defer, the appellate court concluded that it was therefore proper to disallow 20% of retouching expenses. *Id.*

278. SEC v. Benson, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) (noting that in Benson, a CEO who fraudulently diverted corporate funds for personal use was ordered to disgorge the money he stole.) The court denied a setoff for expenses incurred in perpetrating the fraud, such as payments made to co-conspirators. The CEO also argued that he should be required to return only the money still in his possession; he had donated some to his favorite charities, and spent some to expand his stamp collection. The court understandably denied that request. *Id.* *See also* SEC v. Cavanagh, 2004 U.S. Dist. LEXIS 13372, at *102 (S.D.N.Y. 2004) ("Defendants are not entitled to deduct costs associated with committing their illegal acts."); SEC v. TLC Inv. & Trade Co., 179 F. Supp. 2d 1149 (C.D. Cal. 2001) (holding that defendant was not entitled to offset expenses in carrying out a fraudulent scheme); *Bilzerian,* 814 F. Supp. at 122 n.16 ("Defendant has merely asserted a bald figure and has made no attempt to substantiate it.").

279. Litton Indus., Inc. v. Lehman Bros., Inc., 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990); SEC v. Shah, 1993 U.S. Dist. LEXIS 10347, at *5 (S.D.N.Y. 1993); SEC v. McCaskey, 2002 U.S. Dist. LEXIS 4915, at *14 (S.D.N.Y. 2002).

> Many agents say they are being sued by former clients, and contend they should not also be liable for disgorgement. I disagree. The injuries sustained by the former clients are entirely distinct from the commissions that the agent received. The agent can be liable for both. It is analogous to a malpractice claim against a surgeon. He may be required to refund the amount paid for the surgery, and also be liable for any injury sustained by the patient.[280]

The court's point that a plaintiff's damages and payments made to others by the defendant are separate is sound, but disgorgement is not based on damages, rather it is based on the defendant's unjust enrichment.

There are numerous examples in which the Southern District of New York makes different holdings in implied jurisdiction cases than it has in most other opinions relating to equitable remedies. It has held that income taxes would not be an appropriate offset[281] in implied jurisdiction (contradicting its position in copyright or trademark cases[282]), and the *McCaskey* opinion distinguished transactional expenses which were appropriate for deduction and general business expenses, like overhead, which were not allowed[283] (contradicting its

280. *In re* Alpha Telcom, 2004 U.S. Dist. LEXIS 20002, at *33 (D. Or. 2002) (internal citations omitted).

281. SEC v. Credit Bancorp, Ltd., 2002 U.S. Dist. LEXIS 20597, at *9 (S.D.N.Y. Oct. 29, 2002).

282. For a case approving the deduction of the defendant's income taxes, see Stromberg Motor Devices Co. v. Zenith Detroit Corp., 73 F.2d 62, 65 (2d Cir. 1934). *See also* Champion Spark Plug Co. v. Sanders, 108 F. Supp. 674, 678-79 (C.D.N.Y. 1952); W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656 (2d Cir. 1970); Murphy Door Bed Co. v. Interior Sleep Systems, Inc., 874 F.2d 95 (2d Cir. 1989); In Design v. K Mart Apparel Corp., 13 F.3d 559, 567 (2d Cir. 1994). *But see* Macbeth Evans Glass Co. v. L.E. Smith Glass Co., 23 F.2d 459, 463 (3d Cir. 1927); Harris v. Miller, 57 U.S.P.Q. (BNA) 103 (S.D.N.Y. 1943); *Stetson Co.,* 58 F. Supp. at 592; McNamara v. Powell, 52 N.Y.S.2d 515 (Sup. Ct. 1944); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 106 (2d Cir. 1951); Stuart v. Collins, 489 F. Supp. 827 (S.D.N.Y. 1980); Mfrs. Techs., Inc. v. Cams, Inc., 728 F. Supp. 75, 84 (D. Conn. 1989).

283. *McCaskey,* 2002 U.S. Dist. LEXIS 4915, at *16 n.6 ("Commissions should be distinguished from general business expenses, such as overhead expenses, which should not reduce the disgorgement amount."). *See, e.g.,* SEC v. Rosenfeld, 2001 U.S. Dist. LEXIS 166 (S.D.N.Y. 2001); *Benson,* 657 F. Supp. 1122, 1133-34; SEC v. World Gambling Corp., 555 F. Supp. 930, 934-35 (S.D.N.Y. 1983), *aff'd,* 742 F.2d 1440 (2d Cir. 1983), *cert. denied,* 465 U.S. 1112 (1984) (offsetting "transfer taxes" but not overhead costs); *Credit Bancorp, Ltd.,* 2002 U.S. Dist. LEXIS 20597, at *8 ("Moreover, general business expenses may not be subtracted from the amount to be disgorged."); SEC v. U.S. Envtl., Inc., 2003 U.S. Dist. LEXIS 12580, at *78 (S.D.N.Y. 2003) ("Such compensation is more appropriately considered as a general business expense, than an

position on allocating overhead as an offset for copyright or trademark calculations for unjust enrichment).[284] The Southern District even established a new form of expense or offset; the Court in *SEC v. Credit Bancorp, Ltd*. distinguished expenditures and "pass throughs" which it approved for deduction.[285]

B. Department of Energy

Perhaps forgotten is the considerable success that the Department of Energy enjoyed in asserting claims for unjust enrichment relating to violations of the Economic Stabilization Act of 1970. In fact, the very success of that campaign has lead to its greatest problem: how to distribute the large amount of awards and settlements that the defendants disgorged. The Economic Stabilization Act of 1970 ("ESA") authorized the President to stabilize prices, rents, wages, and salaries, and to establish priorities for use and allocation of petroleum products.[286] Pursuant to this Act, the executive branch established a multi-tiered structure for the pricing of oil, which provided a much higher price for newly discovered oil than for proven reserves. The gap between the two prices provided sufficient incentive for substantial cheating by petroleum opportunists who increased the value of their holdings by 'converting' cheaper old oil into new oil.

The problem was that the litigation gained more in awards than could be reasonably distributed in restitution to the consumers who could be identified as deserving re-payment. First, Congress passed the "Warner Amendment"[287] which gave the DOE authority to disburse unclaimed funds to various state agencies. Thereafter, in 1986, Congress passed another statute to distribute the excess accumulation:

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indirect transactional expense incurred in connection with the trading of USE securities."). The . . . court also refused the deduction of expenses that were not sufficiently substantiated. *Id.*

284. *See supra* note 249 and accompanying text.

285. *Credit Bancorp,* 2002 U.S. Dist. LEXIS 20597, at *6-7.

> The other funds were never intended to pay Brandon, nor did he have any control over those funds. He did not choose whether to pay the CBL employee's salary, the CBL rent or the expenses. Instead, CBL made those decisions and Brandon was a mere conduit for paying CBL's bills. As a result, these three categories cannot contribute to Brandon's gross pecuniary gain.

Id.

286. Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (1970).

287. Warner Amendment of 1982, Pub. L. No. 97-377, § 155, 96 Stat. 1830 (1982).

> Reflecting the increasing accumulation of escrow funds, the Warner Amendment was superseded by the Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"). In enacting PODRA, Congress referred to the billions of dollars that had accumulated and for which restitution to the persons injured was not possible. PODRA requires the DOE to reserve sufficient funds to make restitution to those who suffered the actual losses, and to pay the excess to federal and state treasuries "as indirect restitution".[288]

In turn, this led to the situation that a government agency was collecting billions of dollars in unjust enrichment awards against defendant oil companies even though less than twenty percent of the awards were actually paid in restitution to the victims of the unjust acts.

The case of *Texas American Oil Corp. v. United States Department of Energy*[289] involved a defendant that was found unjustly enriched for having violated the pricing structure but that filed for bankruptcy protection before the government was able to collect the award. The specific case related to the priority of the unjust enrichment award in relation to the debtor's other creditors. The Federal Circuit held that any form of restitution that either exceeds the plaintiff's losses, flows to the government rather than the victims of the unjust act, or does both, is considered a penalty, not an equitable remedy, and therefore deserves a lower priority in bankruptcy than the claims of creditors that actually lost money.[290]

This opinion is based on the fundamental and mistaken assumption that the 'restitution' provided for in Section 209 of ESA was the same as that for criminal restitution or compensating damages.[291] It contradicts the definition stated by the Temporary Emergency Court of Appeals: "The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of any damage."[292]

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288. Tex. Am. Oil Corp. v. U.S. DOE, 44 F.3d 1557, 1567 (Fed. Cir. 1995) (internal citations omitted).

289. *Id.*

290. *Id.* at 1571.

291. *Id.* at 1569. ("Restitution is an equitable remedy whereby the wrongdoer is required to restore the injured person to the situation that prevailed before the wrong was committed. There must be some relationship between the person injured and the recipient of the recovery.") (citations omitted).

292. United States v. Exxon Corp., 561 F. Supp. 816, 854 (D.D.C. 1983), *aff'd,* 773 F.2d 1240 (Temp. Emer. Ct. App. 1985) (quoting Citronelle-Mobile Gathering, Inc. v.

In passing, it is interesting to note the opinions in two cases on this form of revenue disgorgement. First, unjust enrichment was calculated on the basis of the defendant's gross profit: revenues less the purchase price for the oil. In a related area of natural gas regulation, the Fifth Circuit held that disgorgement without offsetting the purchase price of the natural gas sold would be an intolerable penalty:

> We can see no way to characterize the "disgorgement" remedy in the present case as anything other than a penalty. Refunding to FGT all of the revenues from Coastal's intrastate sales exceeds both the injury to FGT's interstate customers and the unjust enrichment of Coastal. Coastal not only forfeits all of its profits, but it is also denied any payment whatsoever for the gas, including the recoupment of costs.[293]

The second case relates to whether the DOE's claim against the defendant should be $711,352,450.17 or $210,736,532.92 and which method of calculation would be appropriate:[294]

> As a result of the defendants' crude oil purchase and sale policies and practices of miscertification, profits were realized by the defendants of $210,736,532.92. This sum of $210,736,532.92 allows the defendants credit for sales of uncontrolled (stripper or foreign) crude oil as well as some other crude oil which defendants sold for substantially less per barrel price than it paid, which was brought about principally by the tier price averaging scheme . . . .[295]

For the defendant Robert Sutton, who owned and controlled the company, the bad news of the opinion was in the second issue of the case, wherein he was held personally liable.

Congress passed additional legislation to create the Department of Energy, which now specifically provides for the agency to file civil actions for the defendants to make restitution. A recent case demonstrates that confusion over the term 'restitution' allows the DOE to combine the advantages of restitution at law and restitution in equity. In *Houston Oil & Refining, Inc. v. United States Federal Energy*

Edwards, 669 F.2d 717, 722 (Temp. Emer. Ct. App. 1982)).

293. Coastal Oil & Gas Corp. v. FERC, 782 F.2d 1249, 1253 (5th Cir. 1986). *See also* Cox v. FERC, 581 F.2d 449 (5th Cir. 1978); Mesa Petroleum Co. v. Fed. Power Comm'n, 441 F.2d 182 (5th Cir. 1971).

294. United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986).

295. *Id.* at 1062-63.

Regulatory Commission,[296] the Federal Circuit, sitting in place of the defunct TECA, ruled that the defendant was not entitled to a jury trial because restitution is an equitable remedy. The statute does not specify whether the agency is entitled to claim restitution at law or in equity, but restitution in equity is probably most compatible with the other relief authorized for the DOE. Yet the same court contradicted traditional case law in equity by ruling that the DOE did not need to prove the specific causation between the company's alleged unjust enrichment and that of the company's owner and CEO to establish the personal liability of the owner. The DOE claimed that the causation was self evident given the defendant's ownership of the co-defendant company. The Federal Circuit agreed with the DOE's assertion that the defendant owner had to carry the burden of proof to show that the unjust enrichment that reached the company did not enrich him.[297] This holding contradicts the *Great-West* opinion that eschews personal liability and requires identifiable funds or assets for remedies in equity.

One aspect of the DOE that has not received much attention is the issue of the applicability of the clean-up doctrine. According to the background provided by the Federal Circuit, the President's authority under the EPAA expired on September 30, 1981 although "savings provision in the EPAA provided that expiration of the President's authority did not affect pending enforcement proceedings or enforcement proceedings, such as in the present case, based upon acts committed or liability incurred prior to the expiration date."[298] It therefore seems unlikely that any claim for injunctive relief would be relevant unless that claim were filed prior to September 30, 1981. In such event, the clean-up doctrine would not apply and any such claim by the DOE would have to comply with the statutory provision for

296. Houston Oil & Ref., Inc. v. FERC, 95 F.3d 1126, 1136 (Fed. Cir. 1996).

297. *Id.* at 1138.

> In sum, Imparato's solely owned corporation collected almost $58 million in overcharges, and there is no evidence as to where those funds went. The inescapable inference is that Imparato personally benefited from the overcharges. If the overcharges remained in the accounts of his wholly owned corporation, Imparato would have directly benefited by the increased value of the corporation. On the other hand, if the funds were distributed as salary or dividends to the sole shareholder, Imparato also would have directly benefited. In the event that Imparato otherwise distributed the funds, for example by directing them to other corporate employees in the form of increased compensation or perhaps by making corporate charitable contributions, Imparato would still have benefited, albeit indirectly.

Id.

298. *Id.* at 1130.

'restitution' or as a remedy in equity according to *Great-West*.[299]

C. Commodity Futures Trading Commission

On the whole, case opinions relating to claims from the CFTC best approximate the existing practice of measuring unjust enrichment. For example, the opinion in *CFTC v. Am. Metals Exch. Corp.*, the Third Circuit concluded that the majority position held that profits, not proceeds, of the defendant should be disgorged.[300] In that opinion, the Third Circuit remanded the case because the trial court awarded customer losses as a proxy for the defendant's unjust enrichment without holding a hearing to determine the ease with which the defendant's profits might be calculated or compared to the customer losses:

> Until the amount of unjust enrichment has been established by a hearing, there will have been no showing of the relationship of all the defendants' gains to investor losses. The reason why this relationship has to be established is because . . . in designing remedies under the Commodity Exchange Act or the Securities Exchange Act, the courts have considered disgorgement to serve primarily to prevent unjust enrichment. For this reason a "court may exercise its equitable power only over the property causally related to the wrongdoing." SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989). In *First City*, the court pointed out that this rule required the SEC to distinguish between "legally and illegally obtained profits." *Id.* We conclude this rule would similarly require a correlation between investor losses and unlawful gains as long as the former is to be used as the measure for disgorgement. This determination is consistent with the concept that "disgorgement may not be used punitively."[301]

The key point is that it is beyond the district court's equitable powers to award more than the defendants' unjust profits.

The court re-emphasizes the distinction between cases in which the losses are greater than or less than the defendant's unjust enrichment:

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299. *See supra* notes 123-128 and accompanying text.

300. CFTC v. Am. Metals Exch. Corp., 991 F.2d 71, n.10 (3d Cir. 1993) ("Appellant argues that the measure of disgorgement should be unlawful 'profits.' Appellees argue that the measure should be unlawful 'proceeds.' The term most frequently used in reported decisions appears to be 'profits.'"). *See, e.g.,* CFTC v. Am. Bd. of Trade, 803 F.2d 1242, 1252 (2d Cir. 1986); SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989).

301. *Am. Metals Exch. Corp.*, 991 F.2d at 79.

> On remand, the district court, in reconsidering disgorgement, should also keep in mind that any reliance on the decision in *Am. Bd. of Trade*, ordering disgorgement in the full amount of the investors' losses, may present a problem in the present case which did not arise in *Am. Bd. of Trade*. There, the customers' losses were less than one third of the CFTC's "conservative" analysis of the defendants' profits. Therefore, the amount of disgorgement measured by investor profits did not exceed the amount of unlawful gains. Here, however, according to the appellant's calculations, the total losses may be twenty times or more the amount of Maxwell's unlawful gains. Moreover, there is no indication in the record of the amount of the unlawful gains of the other defendants nor is there any indication that the district court considered whether there would be difficulty in establishing that amount. Maxwell argues that computing the unjust enrichment is a prerequisite of any disgorgement order. We agree that the district court must hold a hearing either to determine the amount of unjust enrichment or to establish that that amount cannot be reasonably approximated.[302]

It was standard practice for the SEC or CFTC to use the victim's losses as a proxy for the defendant's unjust enrichment in the absence of the agency's ability to reasonably estimate the defendant's unjust enrichment. In the opinion quoted above, the Third Circuit is only saying that the district court erred by allowing the use of the victim's losses before the agency established its inability to measure the defendant's unjust enrichment. Therefore, the agencies may have been entitled to implied jurisdiction but the disgorgement remedy, based on losses, better resembles compensating damages and not a remedy in equity.

In a separate case, the Southern District of New York opined that it was more appropriate to order only the disgorgement of the defendant's profits, allowing various business expenses, including overhead, to be offset:

> While AVCO's gross sales revenue from the Recurrence program was $4,148,572, the evidence at trial indicated that AVCO incurred substantial expense to generate the gross sales revenues. Those expenses included large amounts of money in advertising, as well as substantial overhead costs for rent, utilities, telephone systems, postage, etc. AVCO's and Vartuli's 1993-1997 tax returns indicate that combining AVCO's taxable income with Vartuli's taxable income from AVCO shows that the cumulative profit generated by

302. *Id.* (internal citations omitted).

> AVCO over the period was $701,534 . . . . Accordingly, keeping in mind that disgorgement is a nonpunitive equitable remedy meant to deprive wrongdoers of "ill-gotten gains," the Court reduces the amount of disgorgement for which Vartuli and AVCO are jointly and severally liable to $701,534.[303]

It remains unexplained why the Southern District would go so far in allowing offsets for a claim of the CFTC but not for claims by the SEC.

D. Federal Trade Commission

"The hardship of investor losses should not, however, be used as an excuse to impose a remedy under circumstances in which the scope of relief falls outside that remedies recognized parameters."[304]

The FTC's application of implied jurisdiction is unusual for the breadth of cases that it reaches. For example, even though the Federal Reserve is considered the governing body for the Truth in Lending Act ("TILA"), the FTC is free to enforce those regulations under the FTC umbrella. Perhaps because of this breadth of coverage, the FTC uses a wider range of labels for its remedies against unjust enrichment: consumer redress, reimbursement, refund, restitution and disgorgement.

The analysis of FTC disgorgement claims is complicated by the fact that the FTC's statutes include two key applicable provisions that have been used to justify claims for disgorgement. Section 13(b) provides the FTC with authority to secure injunctions and therefore relies on the district court's implied jurisdiction for traditional remedies in equity. Section 19 authorizes the FTC to make more specific remedial claims, including claims based on damages to the victims or customers of the defendants. It appears that the FTC makes claims under Section 13(b) more frequently and even for cases that would clearly relate to the specific remedial system envisioned in Section 19.[305] Peter Ward makes

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303. CFTC v. Avco Fin. Corp., 1998 U.S. Dist. LEXIS 12996, at *3-4 (S.D.N.Y. Aug. 20, 1998).

304. *Am. Metals Exch. Corp.*, 991 F.2d 71.

305. Inexplicably, a number of opinions about the FTC's claims under Section 13(b) are justified in part by citing the Ninth Circuit's opinion in FTC v. Figgie Int'l, 994 F.2d 595 (9th Cir. 1993), which was a case based on jurisdiction under Section 19. *See* FTC v. Munoz, 17 Fed. App'x 624, 626 (9th Cir. 2001); FTC v. Bay Area Bus. Council, Inc., 2004 U.S. Dist. LEXIS 6192, at *38 (N.D. Ill. Apr. 9, 2004); FTC v. AmeriDebt, Inc., 373 F. Supp. 2d 558, 564 (D. Md. 2005); FTC v. Think Achievement Corp., 144 F.

a case that the FTC's access to the full range of equitable remedies, as implied by Section 13(b)'s authority to seek preliminary and permanent injunctions, is limited and may be precluded by Section 19, which resembles a Congressional remedial structure for the FTC and does not include restitution.[306] This argument has been litigated and all courts have found that specific exculpatory language in Section 19 avoids that necessary conclusion.[307]

Ward points out that claims under Section 13(b) are easier to make because, otherwise, Section 19 would require the FTC to complete administrative proceedings before initiating civil litigation and provide the FTC with larger claims that it would otherwise be able to make under Section 19 as a result of that section's three year statute of limitations. More importantly, Section 19 provides jurisdiction for the FTC to seek remedies not otherwise available under the constraints of traditional remedies in equity. Of course, the result has been for the FTC to prefer litigation under Section 13(b) than a combination of administrative law and litigation under Section 19. According to a FTC statement on its website, most of the FTC's consumer protection enforcement activities are conducted in litigation rather than administrative proceedings.[308]

Preliminary data show that the FTC filed an average of roughly one hundred new claims each year from 2001 to 2005 as compared with an

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Supp. 2d 1013, 1019 (N.D. Ind. 2000); FTC v. Commonwealth Mktg. Group, Inc., 72 F. Supp. 2d 530, 544 (W.D. Pa. 1999) and FTC v. Cyberspace.com, L.L.C., 2002 U.S. Dist. LEXIS 25565 (W.D. Wash. July 10, 2002).

306. Peter C. Ward, *Restitution For Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1191-92 (1992).

307. FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).

> However, § 19(e) provides: Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law. Thus, there is no necessary or inescapable inference, or, indeed, any inference, that Congress intended to restrict the broad equitable jurisdiction apparently granted to the district court by § 13(b).

Id.

308. FTC, Office of the Gen. Counsel, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority (2002), http://www.ftc.gov/ogc/brfovrvw.htm (last visited December 10, 2006) ("The courts have uniformly accepted the Commission's construction of Section 13(b), with the result that most consumer protection enforcement is now conducted directly in court under Section 13(b), rather than by means of administrative adjudication.").

average of about fifty between 1990 and 1995. Total new civil claims filed in federal district courts increased 12.8% over the same period. Interestingly, the pattern of FTC filings among the various federal district courts offer some support for the theory that the FTC may be selecting in which district court to file its complaints in a deliberate manner (see the description of the preliminary data in Appendix B).

FTC cases mainly relate to claims of fraud.[309] After liability is established, the key issue in such cases is whether the measure of the remedy should include any of the defendant's reasonable product expenses and any credit for the asset or use value that the consumer gained by using or owning the product. The FTC strongly urges a court to award a refund of the purchase amount without offset or counter-restitution. Despite the FTC's claim that such an approach is the only appropriate measure for a claim of unjust enrichment, there is a significant body of case law that requires counter-restitution.

The case law can be sorted into four groups of case circumstances and actions of the court that affect this issue:

(1) The court grants an offset or allows for counter-restitution in the amount of the approximate value of the consideration received by the plaintiff;[310]

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309. Under the Act the FTC must establish that a "person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce." 15 U.S.C. § 45(b) (2006).

310. *See* FTC v. Solomon Trading Co., 1994 U.S. Dist. LEXIS 19696, at *16-17 (D. Ariz. June 28, 1994); FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 572 n.7 (7th Cir. 1989).

> It was unclear how many customers who actually took trips were dissatisfied with their vacations. The difficulties involved in determining how much relief should be given to dissatisfied customers prompted the magistrate to limit the relief to those customers who received nothing of value for the price of the vacation passport. Customers, satisfied or unsatisfied, who took trips were excluded from the computation of relief and that decision is not at issue on this appeal.

Id. See also FTC v. Renaissance Fine Arts, 1995 U.S. Dist. LEXIS 21040 (N.D. Ohio Aug. 10, 1995); FTC v. Spectrum Res. Group, Inc., 1997 U.S. App. LEXIS 4077, at *5-6 (9th Cir. Mar. 6, 1997); FTC v. U.S. Oil & Gas Corp., 1987 U.S. Dist. LEXIS 16137, at *65 (S.D. Fla. July 10, 1987).

> Also, the Court determines that the amounts invested by customers who won one or more leases through the companies should be deducted from the companies' liability, since these customers realized returns on their investments through assets obtained directly through success in the lottery, whether through lease sales or warranty payment from the companies.

Id. FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991).

> The monetary equivalent of rescission is the difference between the amount paid for

(2) The court provides discussion that concludes that the consideration received by the plaintiffs was worthless;[311]

(3) Defendants procedurally default in their obligations to produce evidence or to respond to filings made by the FTC and the court finds the FTC's evidence uncontroverted;[312]

(4) The court makes no finding about the consideration received by the plaintiff but orders the defendant to make payment in the amount of the payment made by the plaintiff, i.e., a full refund.[313]

The key opinions in the group of cases that fully support the FTC position include *Febre*[314] and *Gem*[315] that sometimes are cited alone as sufficient justification for calculating disgorgement/restitution as customer losses.[316] First, it is clear that none of these cases comply with the process envisioned in *Grupo* or *Great-West*. No attempt is made to determine if the proposed remedies are traditional remedies in equity and no attempt is made to determine whether the proposed restitution is at law or in equity. Whether the remedy is labeled as restitution,[317] disgorgement,[318] consumer redress,[319] refund,[320] or reimbursement,[321]

> the property and its current market value. To adhere to the model of true rescission, where the property is returned on the judgment date, the monetary value of the property should be determined as of the judgment date or the date of the disclosure of the fraud.

Id.

311. *See Amy Travel Service*, 875 F.2d at 570.

312. FTC v. Febre, 128 F.3d 530, 536 (7th Cir. 1997); FTC v. Silueta Distribs., 1995 U.S. Dist. LEXIS 22254, at *18 (N.D. Cal. Aug. 10, 1995).

313. *See* FTC v. Slimamerica, Inc., 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999); FTC v. Figgie Int'l, 994 F.2d 595, 606 (9th Cir. 1993).

314. *Febre*, 128 F.3d 530.

315. FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996).

316. FTC v. Medicor, L.L.C., 217 F. Supp. 2d 1048, 1057 (C.D. Cal. 2002).

> Plaintiff presents the declaration of an accountant indicating that refunds, charge backs, and returns have been deducted to obtain the disgorgement amount. The amount represents Medicor's net sales. Section 13(b) of the FTC Act permits the Court to order disgorgement regardless of the amount of the defendant's profits.

Id. See also FTC v. AmeriDebt, Inc., 373 F. Supp. 2d 558, 562 (D. Md. 2005); FTC v. Citigroup Inc., 239 F. Supp. 2d 1302, 1305 (N.D. Ga. 2001); and FTC v. Bay Area Bus. Council, Inc., 2004 U.S. Dist. LEXIS 6192, at *39 (N.D. Ill. Apr. 9, 2004).

317. FTC v. Think Achievement Corp., 144 F. Supp. 2d 1013, 1020 (N.D. Ind. 2000).

318. FTC v. Medicor, L.L.C., 217 F. Supp. 2d 1048 (C.D. Cal. 2002).

319. FTC v. Atlantex Ass'n., 1987 U.S. Dist. LEXIS 10911, at *37 (S.D. Fla. 1987).

> The purpose of consumer redress is to remedy the monetary injury to consumers. It is

the remedies remain either restitution of revenues, compensating damages, or both. At most, the cases in this area recite that disgorgement or restitution is an equitable remedy and fail to look beneath the label.

The court's opinion in *Febre* seems to offer very weak precedential value because of the circumstances of the case. The defendants defaulted in their obligations to contest the factual claims of the plaintiff, resulting in the Court's *per se* acceptance of the FTC's remedy calculations.[322]

One of the most predominate problems with both opinions is that that they juxtapose disgorgement of revenues with disgorgement of profits. In both opinions, the circuit courts defend the decision of the district court to equate the remedy to the customer payments for all units sold, revenue disgorgement, by discussing characteristics of disgorgement of profits and cite cases for support of those statements. The majority of the cases cited, however, either awarded a measure of disgorgement of profits or equitable rescission. For example, three cases are frequently cited as support for a remedy of revenue disgorgement:

(1) *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). This case affirmed an award of the monetary equivalent of rescission which credited the defendant for the approximate value of the coins remaining in the possession of the customers. For a description of the remedy, see *FTC v. Security Rare Coin & Bullion Corp.*, 1989 U.S. Dist. LEXIS 15958, at *46-47 (D. Minn. 1989).

(2) *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). In this case, the court determined that travel certificates that had been used would be excluded from the remedy calculation[323] but that the remaining unused travel certifications were worthless.[324] These two key points

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> an appropriate remedy authorized by this Court's equitable powers to require the individual and corporate Defendants to pay consumer redress in the form of a cash refund measured by amounts previously paid less any amounts returned to consumers who invested in the oil and gas partnerships or the Teen Disco partnerships.

Id.

320. FTC v. Int'l Diamond Corp., 1983 U.S. Dist. LEXIS 15504, at *13-14 (N.D. Cal. 1983).

321. United States v. Lane Labs-USA, Inc., 427 F.3d 219, 231 (3d Cir. 2005).

322. FTC v. Febre, 128 F.3d 530, 535 (7th Cir. 1997).

323. *Id.* at n.7.

324. *Id* at 570.

effectively transform the remedy from restitution to a reasonable approximation of the monetary equivalent of rescission.

(3) *SEC v. Cherif*, 933 F.2d 403, 414 & n.11 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992). As explained in Part V infra, the Supreme Court's opinions in *Porter* and *Mitchell* are equivocal between supporting a profits or revenue basis for restitution or disgorgement. According to the Seventh Circuit, however, *Porter* holds for profits disgorgement.

Otherwise, both opinions relay heavily on cases holding for disgorgement of profits to justify statements made about disgorgement that are presumably meant to imply statements about revenue disgorgement. A minor example includes this interpretation of the Seventh Circuit's position on burden of proof from the Court's opinion in *Febre*: "The Commission must show that its calculations reasonably approximated the amount of customers' net losses, and then the burden shifts to the defendants to show that those figures were inaccurate."[325] Both of the cases cited relate to disgorgement of profits and both state that the plaintiff has the burden of establishing the defendants' profits. Then, the burden shifts to the defendants. The burden of proving the defendant's profits is based on the requirement that the plaintiff must specifically identify the sales of the defendant that generates unjust profits, but that since the defendant has the best access to its own accounting records, the defendant carries the burden of proof for establishing legitimate expenses or adjustments to the plaintiff's claim. This scheme does not operate in reverse, as the defendant has no access to information regarding the plaintiff's losses.

The Eleventh Circuit also justifies disgorgement of revenues with cites from cases that hold for disgorgement of profits:

> Accordingly, disgorgement, the purpose of which "is not to compensate the victims of fraud, but to deprive the wrongdoer of his ill-gotten gain" is appropriate. *SEC v. Blatt*;[326] *see, e.g., SEC v. First*

325. *Id.* at 535 (citing SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); HUD v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995)).

326. SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) (citing SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978)).

> The trial court acted properly within its equitable powers in ordering Pullman to disgorge the profits that he obtained by fraud. This restitution merely forces the defendant to give up to the trustee the amount by which he was unjustly enriched. The purpose of disgorgement is not to compensate the victims of the fraud, but to

> *City Fin. Corp.,* 890 F.2d 1215, 1230 (D.C. Cir. 1989) (permitting disgorgement and observing that "disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws")[327]; *CFTC v. Co Petro Mktg. Group, Inc*., 680 F.2d 573, 583-84 (9th Cir. 1982) (permitting disgorgement and recognizing its deterrent effect).[328] We conclude that section 13(b) permits a district court to order a defendant to disgorge illegally obtained funds.[329]

Inexplicably, each of the three cases cited by the Eleventh Circuit held for disgorgement of profits and most of the three cases could well be said to oppose disgorgement of an amount greater than profits as punitive. Footnotes with extended quotes from those cases cited are provided for individual review.

The Seventh Circuit's cite to *Rowe v. Maremont* in *Febre* is similarly inapposite: "This court has held that disgorgement is designed to be remedial and not punitive."[330] *Febre's* cite to *CFTC v. Hunt* is

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> deprive the wrongdoer of his ill-gotten gain.

Id. (internal citations omitted)

327. SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989).

> Since disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power only over property causally related to the wrongdoing. The remedy may well be a key to the SEC's efforts to deter others from violating the securities laws, but disgorgement may not be used punitively. Therefore, the SEC generally must distinguish between legally and illegally obtained profits.

Id. (internal citations omitted).

328. CFTC v. Co Petro Mktg. Group, Inc., 680 F.2d 573, 583-84 (9th Cir. 1982).

> We have not previously considered the propriety of ancillary relief under section 6c of the Act; The Commodity Exchange Act contains no provision similar to section 27 of the Securities Exchange Act, but neither does it have any provision restricting the equitable power of the district court. *Porter* and *Mitchell* Indicate that the latter fact is a sufficient basis for concluding that a district court possesses the authority to order restitution pursuant to the Commodity Exchange Act. Further, as the Second Circuit noted in the Securities Exchange Act context, to allow a violator to retain the profits from his violations would frustrate the purposes of the regulatory scheme. Thus we conclude that a district court may compel a violator of regulations promulgated under the trading limit provisions of the Commodity Exchange Act to disgorge his illegally obtained profits.

Id. (internal citations omitted).

329. FTC v. Gem Merch. Corp., 87 F.3d 466, 466 (11th Cir. 1996).

330. Rowe v. Maremont Corp., 850 F.2d 1226, 1241 (7th Cir. 1988).

> Deterrence is an important consideration in allowing disgorgement, but disgorgement is remedial and not punitive. To make Maremont pay back profits that it would have made even if it told the truth is harsh and punitive. Equity requires only that a defendant give up its unjust enrichment. The district court did not err in rejecting full disgorgement as a measure of damages.

also irrelevant: "Disgorgement does not penalize, but merely deprives wrongdoers of ill-gotten gains."[331]

In addition to the problematic research, this opinion hides behind a label. Neither case cited, however, discussed or awarded disgorgement of revenue so that the court's comment is, at best, irrelevant. Given the substance of the case opinions, they appear inapposite.

But there are more serious errors in both *Febre* and *Gem*. As is true of most opinions in this area of the law, both opinions take great pains to explain the extensive and seemingly unbounded nature of the district court's authority to formulate remedies. In support for its assertion of authority to formulate remedies, the Eleventh Circuit cites *FTC v. Amy Travel Service, Inc.*;[332] *FTC v. H.N. Singer, Inc*;[333] and *FTC v. Southwest Sunsites, Inc.*,[334] all of which discuss the authority of a district court's jurisdiction within the limits of traditional remedies in equity.

Id. (internal quotations and citations omitted).

331. FTC v. Febre, 128 F.3d 530, 537 (7th Cir. 1997).

> Disgorgement of illegally obtained profits has been ordered in a number of Securities Exchange Commission judicial enforcement proceedings. In these cases, disgorgement was ordered despite the fact that there was no specific, express authority for this remedy in the Securities Exchange Act. Further, the Second Circuit in these cases explicitly rejected the objection that disgorgement is a penalizing rather than a remedial, equitable device, correctly reasoning that disgorgement does not penalize, but merely deprives wrongdoers of ill-gotten gains.

Id. (citing CFTC v. Hunt, 591 F.2d 1211, 1222 (7th Cir. 1979)).

332. FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 571-72 (7th Cir. 1989).

> In *Singer*, the Ninth Circuit found that because section 13(b) gives a court authority to grant a permanent injunction, the statute by implication gives authority "to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference."

Id. (quoting FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).

333. *Singer*, 668 F.2d at 1112-13.

> We hold that Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference. In particular, Congress thereby gave the district court power to order rescission of contracts. Hence § 13(b) provides a basis for an order freezing assets.

Id.

334. FTC v. Sw. Sunsites, Inc., 665 F.2d 711, 717-19 (5th Cir. 1982), *cert. denied*, 456 U.S. 973 (1982) ("Section 13(b) permits courts to exercise full range of traditional equitable remedies. Specifically, we held that a district court may order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible.").

Then, the opinion fails to show how the proposed remedy in *Gem* complies with this boundary. Both opinions rely heavily on *Porter* for the often-repeated notion that the district court is allowed to pursue any remedy or the full range of remedies to provide complete relief. In light of the Seventh Circuit's opinion in *SEC v. Cherif*, the court in *Febre* is ignoring a contradictory interpretation:

> Language about the importance of granting complete equitable relief, however, must be read in context. Usually the language advocates that all equitable powers residing in the district court be visited upon the defendant or violator before the court . . . . *Porter,* cited by the SEC . . . is not dissimilar. *Porter* involves a statutory provision in the Emergency Price Control Act of 1942 similar to the remedies provision in the Exchange Act. The Supreme Court wrote broadly about the equitable power residing in a district court adjudicating an action brought under the Emergency Price Control Act, but it held only that disgorgement of illegally obtained profits could be sought from a violator.[335]

Both opinions state that remedies under Section 13(b) are not precluded from including elements of punitive or exemplary damages:

> *Figgie* involved a different statutory provision, Section 19(b) of the FTCA, which expressly precluded an award of exemplary or punitive damages. 15 U.S.C. § 57b(b). In contrast, Section 13(b) has no such limitation. See 15 U.S.C. § 45. *Febre's* and *Ace's* reliance on *Figgie* is misplaced.[336]

Even before the opinions in *Grupo* and *Great-West* were decided, the majority position held that implied jurisdiction must not award remedies that include punitive or exemplary damages.[337] This basic difference in perspective on remedies could easily explain why these opinions support revenue disgorgement as opposed to profits disgorgement. If the two opinions applied the position that restitution in excess of the defendant's profits is impermissibly punitive, they would need to withdraw their support for the restitution of revenues.

The *Febre* opinion makes two other inexplicable statements. First,

335. SEC v. Cherif, 933 F.2d 403, 413 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992) (quoting Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 HARV. L. REV. 1779, n.10 (1976)).

336. *Febre*, 128 F.3d at 537; FTC v. Gem Merch. Corp., 87 F.3d 466, 469-70 (11th Cir. 1996).

337. SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989).

the opinion challenges the defendants' assertion that profits are the usual measure of disgorgement. Second, the opinion decries the defendants' failure to provide an explanation or support for this statement. Hopefully, Judge Bauer is not serious in this assertion. He cites seven cases in his opinion that hold for disgorgement of profits,[338] including *CFTC v. Am. Metals Exch. Corp.,*[339] which held that profits, not proceeds, are the majority position for disgorgement. Discussing the appropriateness of eventually disgorging some or all of the remedy to the U.S. Treasury, Judge Bauer asserted that "disgorgement to the United States Treasury does not transform compensatory damages into punitive damages."[340] It seems fair to infer that the remedy in *Febre* is viewed as compensating damages. Indeed, the single biggest objection to the use of customer losses is that it would transform disgorgement into a proxy for compensating damages that is not a traditional remedy in equity.

These last points emphasize the issue of how far the clean-up doctrine has been stretched to accommodate remedies at law as ancillary to injunctive relief for the purposes of qualifying the claim for implied jurisdiction. This doctrine demands that a court that contemplates ancillary jurisdiction evaluate the remedy as a whole especially in terms of the total dollar amount of the remedy sought and the relative importance of the injunctive relief. Second, the remedy must comply with traditional forms of relief in equity. Opinions like *Febre* are at odds with relief in equity because, as its advocates have openly acknowledged, a remedy measured by gross customer expenditures, without any offsets or counter-restitution, can be described as any or all of the following:

(1) Is designed to include punitive or exemplary damages;
(2) Closely resembles compensating damages;
(3) Cannot be deemed similar to any other comparable remedies except for those awarded to the FTC or FDA.

F. Food and Drug Administration

The FDA has big plans for implied jurisdiction. The FDA intends to continue to make claims for restitution against defendants that offer

338. *Febre*, 128 F.3d at 536.
339. 991 F.2d 71, 77 (3rd Cir. 1993).
340. *Id.*

unapproved products as well as seek claims against established pharmaceutical companies for "significant violations of current good manufacturing practice ("CGMP") requirements."[341] Given the approval that many others have received for their similar claims for implied jurisdiction, the FDA's claims for unapproved products are not surprising, but claims and substantial consent decrees (Abbott, $100 million; Wyeth, $30 million; Schering-Plough, $500 million),[342] for violation of CGMP seems to advance the application of claims in restitution to administrative law to a more 'intense' level.

Claims for Unapproved Products

The FDA's basic claim against Universal Management Services, Inc. was:

> As part of their business, Defendants sell and distribute a product known as the Stimulator, and also a product that connects to the Stimulator known as the Xtender. The Stimulator is essentially a piezo-electric gas grill igniter, marketed as a pain relieving device. To produce the Stimulator, Defendants purchase gas grill igniters and outfit them with finger grips. A user then places the tip of the Stimulator on his body, presses with his thumb on a plunger, and an electric current passes into that part of the body.[343]

The device was not approved for medical use by the FDA and the defendants sold 800,000 units at a retail price of $88.30, while the cost of buying the grill igniters was about $1 per unit.[344]

The district court measured the remedy as total consumer purchases less any refunds. No credit for the value of the device or its use was

341. Eric M. Blumberg, *Restitution and Disgorgement Find Another Home at the Food and Drug Administration,* 58 FOOD & DRUG L.J. 169, 170 (2003). Mr. Blumberg offers the following justification of a claim for the violation of CGMP:

> 21 U.S.C. §§ 351(a)(2)(B) and 351(h) provide, respectively, that drugs and medical devices that have not been manufactured in accordance with CGMP are "deemed" adulterated. To establish a violation of these provisions, FDA need not show that a product is in fact deleterious in any respect. The failure to follow appropriate procedures causes the product to be adulterated.

Id. at n.12 (internal citations omitted).

342. *Id.* at 170.

343. United States v. Universal Mgmt. Servs., Inc., 999 F. Supp. 974, 976 (N.D. Ohio 1997).

344. United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 753 (6th Cir. 1999).

discussed. Instead, the court was trying to decide between awarding disgorgement and restitution:

> While numerous district courts have ordered the equitable remedy of disgorgement in a variety of FTC cases, neither the parties nor the court could find an FDA case where disgorgement of profits was ordered. While the lack of previous use of the equitable remedy of disgorgement of profits in FDA cases is not necessarily fatal to Plaintiff's request for such a remedy, such non-utilization does cast some doubt on the appropriateness of disgorgement in this matter. While the court will not order disgorgement of profits in this case, the court does find that restitution is both available and appropriate. Such remedy will ensure that the public interest is protected by providing each person who purchased Defendants' adulterated product the opportunity to receive his money back.[345]

The district court appears to conclude that either disgorgement of profits or restitution of revenues could be an appropriate remedy, but it fails to explain why it chose restitution of revenues over disgorgement of profits. In searching for controlling or persuasive precedent, the court limits its research regarding 'disgorgement of profits' to FDA cases yet the court's precedents for restitution of revenues relies on cases relating to the FTC and other agencies. The large body of cases on traditional remedies in equity also remains overlooked.

On the basis of a quote from *Gem*[346] that refers to *Porter*, the district court 'borrows' its key supposition: "As *Porter* makes clear, absent a clear command to the contrary, the district court's equitable powers are extensive. Among the equitable powers of a court is the power to grant restitution and disgorgement."[347] And after confirming that the FDCA includes no restrictive language on remedies, the district court arrives at its opinion:

> The court is convinced that not only is ordering restitution within its power in this matter, but that such remedy is appropriate. Such a remedy will send a message to both Defendants and others engaged in similar behavior that if they violate the law, they will not be able to keep the proceeds from such illicit activity, but instead will have to refund all customers the purchase price of the adulterated

345. *Universal Mgmt.,* 999 F. Supp. at 980.
346. FTC v. Gem Merch. Corp., 87 F.3d 466, 469 (11th Cir. 1996).
347. *Universal Mgmt.*, 999 F. Supp. at 981 (internal citations omitted).

> goods.[348]

The court decided that its overriding purpose is to protect the public health and chose a harsh remedy to send a deterring message to all would-be infringers of the FDCA.

The court seems carried away with its 'authority' at the expense of its responsibility to act within its jurisdiction in equity. The court does not explain how disgorgement and restitution differ or how a refund of retail revenues conforms to traditional remedies in equity. Of the five relevant cases cited, only the Eleventh Circuit's opinion in *Gem* awards revenue disgorgement, the remaining award profit disgorgement or rescission.

On appeal, the Sixth Circuit confirmed the demise of a prior holding from the Ninth Circuit,[349] which held that the FDA did not have the jurisdiction for equitable monetary remedies since the FDCA did not specifically authorize such remedies.[350] The Sixth Circuit rejected the Ninth Circuit opinion, i.e., that a district court is free to award remedies unless they are precluded by specific language in the applicable statute.

The Sixth Circuit then tacitly acknowledged that implied jurisdiction is limited in part to the traditional forms of equitable relief:

> Moreover, even accepting the references to legislative concerns relied upon by the Parkinson and C.E.B. Products line, these concerns are far from a clear statement of Congress's intent to exclude restitution, recalls, disgorgement, or any other traditional form of equitable relief. Finally, as *DeMario* instructs, we must presume that Congress is cognizant of the scope of equity, knows what it is doing when it provides for general equitable relief in a regulatory statute, and can use that knowledge to clearly and explicitly limit the scope of a court's equitable powers under any particular regulatory structure in which such an authorization lies.[351]

Unfortunately, however, the opinion then fails to define what it means by restitution, recalls, or disgorgement or how those three remedies compare to traditional remedies in equity.

Given that the district court chose the remedy of restitution

348. *Id.*
349. United States v. Parkinson, 240 F.2d 918 (9th Cir. 1956).
350. United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 761 (6th Cir. 1999).
351. *Id.* at 762 (referencing Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, 292 (1960)).

(although that opinion also failed to define the term) the Sixth Circuit defends the district court's choice:

> To circumvent the law by marketing illegally without approval is to deceive the public both as purchasers and users of the device. In such cases, restitution exists to make the consumer whole. Because restitution seeks to remedy the type of economic harm to consumers contemplated by the FDCA, it serves goals of the FDCA that are encompassed within the section the FDA charges Appellants violated.[352]

Apparently relying on criminal restitution, the court emphasizes that restitution exists to make the consumer whole. Such a remedy is therefore based on compensating damages and does not resemble a remedy in equity.

The Sixth Circuit responds to the defendants' charge that the remedy was inappropriately punitive with quotes and cites for the proposition that restitution by definition is not punitive and falls into the 'label' trap decried by the Supreme Court in *Great-West*. The Circuit Court is no more successful at responding to the second charge of the defendants:

> Appellants also claim that restitution is punitive because, unlike disgorgement which removes ill-gotten gain by forcing surrender of profits, restitution requires a return of the entire purchase price, included in which are costs and profits. See Sec. Exch. Comm'n v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) ("The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain."). See also Sec. Exch. Comm'n v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978). Simply because disgorgement and restitution are different, however, does not make restitution punitive. See SEC v. World Gambling Corp., 555 F. Supp. 930, 934 (S.D.N.Y.), *aff'd*, 742 F.2d 1440 (2d Cir. 1983) ("While disgorgement has been said to serve more important interests than the compensation of investors, that principle is a far cry from the proposition that restitution is an improper end." (internal citation omitted)). Appellants, who disobeyed the law, should not have his expenses covered by consumers. To say that restitution is unavailable is to say that consumers must cover the costs of Appellants' production, advertising, and illegal distribution. Instead, the district court should have the discretion in a case such as this to make the consumers

352. *Id.* at 763 (internal citations omitted).

> whole rather than allow the illegal activities to stand uncorrected to the consumer's detriment.[353]

By now, the cases cited in the Court's defense should be easily recognized as well as it is easy to recognize that the three cases are either irrelevant or inapposite. It is also difficult to reconcile the Sixth Circuit's opinion with a prior opinion in *SEC v. Blavin* wherein it measured an SEC claim for disgorgement in terms of profits, not revenue.[354]

However, the Court has arrived at the true problem in the case: the remedy of disgorgement/restitution is not well suited to these particular case facts. The remedy of equitable rescission could have achieved the aims of the FDA and it would have provided the defendants an opportunity to establish the use value of their device. The Court could have ordered the plaintiff and defendants to return each other's consideration. In the absence of the customers' ability to return the igniter, the Court could hear testimony as to either the value of the igniter, its use value, or both. Note also that the use of equitable rescission would preclude the need for the clean-up doctrine.

The key problem in these two cases may lie with the two courts' sympathy or willingness to assist the agencies in carrying out their responsibilities. The courts were sitting as courts in equity; otherwise the courts would have had no subject jurisdiction. The basic relevance of regulatory statutes is to assist the court in deciding if the defendants' enrichment has been unjust. When the regulatory and administrative law issues are thus reduced to their proper proportion, the courts would be free to realize that they are sitting in equity just as they would for any other agency claim, most fiduciary or trust claims and closely approximating how they sit for most issues of misused or misappropriated intellectual property. Equally important is the realization that the relevant statutes cannot add to the possible remedies or increase the court's authority or implied jurisdiction; the statutes can only reduce that authority and jurisdiction. If a court proposes to use a 'consumer redress' remedy that seizes the defendant's assets or recalls the defendant's products, the court needs to show that comparable remedies were awarded in English courts in equity in 1790.

The defendants in *Lane Labs-USA, Inc.* are alleged to have acted as unjustly as those in *Universal*. The FDA alleges that the defendants and

353. *Id.* at 764.
354. SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985).

their company produced health products, including BeneFin, a powder that contains shark cartilage that the company marketed and advertised as helpful to the cure of medical disorders including cancer.

Fairly early in the opinion, the Third Circuit applies *Porter* and *Mitchell* to defeat the defendants' objection to restitution as a remedy. Of course, neither *Porter* nor *Mitchell* specifically addressed the remedy of revenue disgorgement which is what the Third Circuit refers to as "restitution." Then the Circuit compounds its semantic confusion by citing to the usual collection of cases that affirm profit disgorgement as an appropriate remedy.

> See FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (finding disgorgement to be appropriate under the Federal Trade Commission Act and Porter); SEC v. First City Fin. Corp., 281 U.S. App. D.C. 410, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (relying on Porter to award disgorgement under the Securities Exchange Act of 1934); Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc., 680 F.2d 573, 583-84 (9th Cir. 1982) (permitting disgorgement under the Commodity Exchange Act); Interstate Commerce Comm'n v. B&T Transp. Co., 613 F.2d 1182, 1184-85 (1st Cir. 1980) (applying Porter and Mitchell to permit restitution under the Motor Carrier Act); Commodity Futures Trading Comm'n v. Hunt, 591 F.2d 1211, 1222-23 (7th Cir. 1979) (holding that Porter authorized disgorgement under the Commodity Exchange Act).[355]

Regrettably, most of the opinion is spent in response to the defendants' irrelevant arguments. Clearly, the defendants were trying to win the whole case by establishing that the District Court did not have jurisdiction to award a remedy of restitution. The defendants first argued that restitution "does not further the purpose of the FDCA." This argument missed its own point that restitution of revenue was inappropriate, but restitution of profits was not. The Third Circuit's response also reveals the close relationship between reimbursement and compensating damages:

> Restitution that reimburses consumers who paid for unapproved drugs, and may have been defrauded or deceived about their effectiveness, restores aggrieved parties to the same economic position they enjoyed before the Act was violated.[356]

355. United States v. Lane Labs-USA, Inc., 427 F.3d 219, 225 (3d Cir. 2005).
356. *Id.* at 229.

Thereafter, the Court wastes its time and the Defendants waste their credibility by debating the relevance of *Meghrig v. KFC Western, Inc.*,[357] and *United States v. Phillip Morris*,[358] both of which held that the relevant claim was not included in implied jurisdiction. RCRA and RICO, the underlying statutory schemes, may be subject to debate but the implied jurisdiction of the principal regulatory agencies was settled in the SEC and CFTC cases more than ten years ago.

Eventually, the Third Circuit tries to return to the key issue:

> Also, we view amicus and the commentators as making a fundamental error in analyzing whether restitution is available: they view this primarily as a question of what remedies are provided by the FDCA rather than, as we have emphasized, a question of the scope of the express legislative grant of equitable power under § 332(a). The District Court did not "discover" an implied remedy, but rather exercised the equitable power that Congress explicitly granted to it under the FDCA.[359]

The Court hopes to seal the opinion with what is now the classic finish for most such opinions that overstates implied jurisdiction: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."[360]

The Seventh Circuit (Posner, J.) disputed this interpretation of *Mitchell* in its opinion in *SEC v. Cherif*,[361] relating to the issue of relief or nominal defendants. In response to the SEC's claims that jurisdiction over a non-party to the litigation was "necessary and appropriate pursuant to Fed. R. Civ. P. 19(a) because Sanchou's participation will enable the court to grant complete relief," the opinion states:

> 15 U.S.C. §§ 78u(d) and (e) also cannot aid the SEC since the statute is not so broadly written as the SEC contends. The statute has been construed to allow the granting of "any form of ancillary relief . . . where necessary and proper to effectuate the purposes of the statutory scheme." Language about the importance of granting

357. Meghrig v. KFC Western, Inc., 516 U.S. 479, (1996).
358. United States v. Phillip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir. 2005).
359. *Lane Labs*, 427 F.3d at 235.
360. *Id.* at 235-36 (citing Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960)).
361. 933 F.2d 403, 414 & n.11 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992).

> complete equitable relief, however, must be read in context. Usually the language advocates that all equitable powers residing in the district court be visited upon the defendant or violator before the court.[362]

Apparently, in contemplation of a victory lap, the Third Circuit opinion then makes a major mistake in the sign off:

> The arguments and analysis of Appellants and the commentators are creative and forceful, but, for now, are merely arguments as to why the Supreme Court should draw finer lines around a court's authority to fashion specific remedies within a broad statutory grant of equitable power. Until the Court overrules *Porter* and *Mitchell*, we are bound by the reasoning of those cases. Given the breadth and open-ended nature of § 332(a), and the direct correlation between the language of that provision and the directives in *Porter* and *Mitchell*, we hold that the District Court here did have the power to grant restitution. We will therefore AFFIRM its order.[363]

Even though this case was argued in June of 2005 and even though the opinion makes reference to the *Great-West* opinion,[364] the opinion closes with a suggestion for the Supreme Court to provide some finer guidelines for the fashioning of remedies in implied jurisdiction. Yet the Third Circuit fails to follow the guidelines in *Great-West*: it fails to show how the remedy in question resembles a traditional remedy in equity, it fails to meaningfully distinguish restitution in equity from restitution at law, and it fails to suggest how the clean-up doctrine can accommodate such a blatant remedy at law (by definition, remedies based on the plaintiffs' loss cannot be remedies in equity except in the case of specific restitution which includes identifiable assets and money in separated accounts).

It is also regrettable that the defendants did not ask the Third Circuit how it would propose to reconcile its holding in *Lane Labs* with *Am. Metal Exch. Corp*.[365] In the latter opinion, the Third Circuit held that: "Appellant argues that the measure of disgorgement should be

362. *Id.* at 413. (internal citations omitted).

363. Porter v. Warner Holding Co., 328 U.S. 395, 403 (1946).

364. *Lane Labs*, 427 F.3d at 231 ("Restitution is properly sought in equity where 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." (quoting Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002)).

365. CFTC v. Am. Metals Exch. Corp., 693 F. Supp. 168 (D.N.J. 1988).

unlawful 'profits.' Appellees argue that the measure should be unlawful 'proceeds.' The term most frequently used in reported decisions appears to be 'profits.'"[366] The Circuit's earlier opinion holds that customer losses are not a standard measure for disgorgement and that they can only be used in case it is especially difficult for the plaintiffs to prove the defendants' profits:

> On the other hand, an award of damages in the amount of investor losses may go beyond the scope of a Commodity Exchange Act enforcement proceeding. Absent a hearing to calculate ill gotten gains, the disgorgement ordered in an amount equal to investor losses could be a penalty assessment. If investors wish to seek recovery of their losses as a remedy, they are free to do so in an independent civil action against defendants. The hardship of investor losses should not, however, be used as an excuse to impose a remedy under circumstances in which the scope of relief falls outside that remedy's recognized parameters.[367]

All courts need to be held accountable for the fact that their opinions in one area of implied jurisdiction are applied to most other areas, including non-agency cases relating to remedies in equity. Until then, the case law among the agencies and between implied jurisdiction and other areas of remedies in equity will not approach a minimum level of consistency.

The Third Circuit opinion in Amer. Metal Exch. makes it clear that a remedy in equity cannot be justified by the need to the agency to grant complete relief or even to execute its responsibilities. This sort of jurisdiction by necessity is based on consumer hardship or the court's perception that it needs to assist the agency. The courts can't add remedies that Congress omitted or remedies incompatible with traditional remedies in equity.[368]

Claims for Violation of CGMP

In his article, Blumberg, Deputy Chief Counsel for Litigation of the

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366. CFTC v. Am. Metals Exch. Corp., 991 F.2d 71 (3d Cir. 1993).

367. *Id.* at 79.

368. *Id.* at 78 ("The hardship of investor losses should not, however, be used as an excuse to impose a remedy under circumstances in which the scope of relief falls outside that remedy's recognized parameters.").

U.S. Food and Drug Administration (FDA)[369] informally alludes to some strained views of how the FDA may assert its claims for CGMP. Most importantly, these views run roughshod over the causation standards in litigating claims for restitution. Seemingly, Blumberg agrees with the view that the violation of CGMP is somewhat vague and that the calculation of the defendant's benefit might be difficult, stating that "the courts have not been reluctant to order equitable monetary awards merely because calculations are extremely difficult" and that a "manufacturer that violates the law should not be entitled to any profits on illegal products."[370] Eventually, Blumberg suggests that the defendant must bear the initial burden of proof when the claim is vague and the benefit difficult to prove, stating "[i]f King and Walsh are correct and the profits are in fact 'impossible to quantify' in CGMP cases,[371] the companies must bear the risk of imprecision and may well be required to forfeit the gross proceeds derived from the sale of unlawful, adulterated products."[372]

It is clear that if a defendant fails to cooperate in the discovery process or, once the plaintiff has established the defendant's relevant revenues, fails to substantiate his claims for offsets, the defendant may suffer consequences including, in an extreme case, an order to disgorge the applicable revenues.[373] At the other extreme lies equitable discretion, which holds that not every violation of a statute warrants restitution of the defendant's profits.[374] Furthermore, some courts are

369. *See* Blumberg, *supra* note 341. In his article, Mr. Blumberg states that the article does not represent the views of the FDA. While there is no reason to doubt his assertion, in the absence of a FDA approved position paper, Mr. Blumberg's article is being used as a statement of the FDA on litigating claims for GCMP.

370. *See* Blumberg, *supra* note 341, at 188.

371. Erika King and Elizabeth M. Walsh, *The Authority of a Court to Order Disgorgement for Violations of the Current Good Manufacturing Practices Requirement of the Federal Food, Drug, and Cosmetic Act*, 58 FOOD & DRUG L.J. 149, 154 (2003).

372. *Id.* at n.195; *see also* FTC v. Febre, 128 F.3d 530, 535 (7th Cir. 1997). (stating that "lawful gains cannot be distinguished from the unlawful without incurring inordinate expense, it is well within the district court's power to rule that the measurement of disgorgement will be the more readily measurable amount of losses incurred by the defendants' customers in the unlawful transactions") (quoting *Am. Metals Exch. Corp.*, 991 F.2d at 77 (emphasis added)).

373. *See supra* Part VI, discussion of Category II cases.

374. CFTC v. Sidoti, 178 F.3d 1132, 1138 (11th Cir. 1999).

> The CFTC contends Sidoti's failure to register as a principal of Trinity provides the nexus for deeming illegal all profits received by him in connection with Trinity.

beginning to demand that the plaintiff show some effort to establish only the defendant's relevant revenues.[375]

Within the spectrum of claims for restitution, there are a number of types of claims that do not generally warrant the full remedy of restitution which has resulted in the use of alternative remedies such as awarding the defendant's use value or savings as an attempt to recognize that it would be inequitable to award full restitution but that the nature of the claim does warrant some measure of benefit.[376]

Finally, Blumberg and the FDA appear to believe that the only appropriate remedy is the restitution or disgorgement of revenues. In relation to the FDA's claims against unapproved products, especially fraudulent or non-functional products, the remedy of revenue disgorgement would be approximately realized by a claim for equitable rescission. After proving that the unapproved product had no use or asset value to the consumer, the net effect of a claim for the plaintiffs would be revenue disgorgement. Violations of CGMP, however, would not appear to warrant the rescission model. A defendant might be able to show that such a claim is unrelated to the defendant's profits and the proceeds of the claim would be paid only to the U.S. Treasury. Therefore, such a claim best resembles an administrative fine or penalty, which is contrary to the nature of a claim in equity.

G. Fair Housing Act

While the Fair Housing Act is not included in the range of statutory schemes covered by this article, a claim for restitution under the Fair Housing Act provides an example of how far the remedy has been

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> Sidoti asserts the district court should not have ordered disgorgement from him at all because his failure to register as a principal, by itself, does not justify disgorgement. We agree.

Id.

375. Taylor v. Meirick, 712 F.2d 1112, 1122 (7th Cir. 1983).

> It was not enough to show Meirick's gross revenues from the sale of everything he sold, which is all, really, that Taylor did. If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits.

Id.

376. *See* Tlighman v. Proctor, 146 S. Ct. 894, 899 (1888); Deltak, Inc. v. Advanced Systems, Inc., 767 F.2d 357, 360 (7th Cir. 1985); Olwell v. Nye & Nissen Co., 173 P.2d 652, 654 (Wash. 1946).

applied.[377] The government's motion for summary judgment was denied[378] and there have been no further opinions filed. The case relates to a federal subsidized housing project to provide special housing opportunities for an ethnically mixed group of applicants. The government alleged that most or all of the housing was provided to white residents, breaching the agreement between the project and the government, and betraying the project's fiduciary duty to the government:

In proposing its constructive trust theory, the government argues that federally funded homes that should have been awarded on first come first served basis to a mix of applicants that included blacks, Hispanics and whites were instead diverted to the pre-selected white purchasers. Accordingly, a constructive trust should be imposed on these homes, which the government proposes to provide to minority families, as part of the Fair Housing Act remedy in Village.[379] No proof of wrongdoing is necessary. An innocent party may be unjustly enriched if he holds "property 'under circumstances that in equity and good conscience he ought not to retain . . . .'"[380]

On the basis of equitable remedies implied merely by the absence of Congressional expressed opposition to such remedies, the government is claiming the right to take away the houses from the residents whether or not those residents were knowing co-conspirators of the developers or other parties responsible for the housing project. The allegations recite a terrible injustice being conducted by the housing project and the legal concepts mesh as they have been laid out, but the concept seems extreme and harsh for the unknowing homeowners.

VIII. CONCLUSIONS

"Most generalizations about restitution are trustworthy only so long as they are not very meaningful and meaningful only so long as they are not very trustworthy."[381]

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377. United States v. Village of Island Park, 888 F. Supp. 419 (E.D.N.Y. 1995).
378. *Id*.
379. *Id*. *See also* United States v. Nagelberg, 772 F. Supp. 120, 122 (E.D.N.Y. 1991) (quoting United States v. Rivieccio, 661 F. Supp. 281, 293 (E.D.N.Y. 1987)).
380. *Island Park*, 888 F. Supp. at 455-56 (quoting *Nagelberg*, 772 F. Supp. at 123 (quoting *Rivieccio*, 661 F. Supp. at 292)).
381. Dan B. Dobbs, Law of Remedies § 4.1 (2d ED. 1993).

Why do federal agencies win revenue disgorgement and other remedies based on uniquely favorable measures? Under implied jurisdiction, an agency is entitled only to traditional equitable remedies, the same as any other plaintiff in traditional jurisdiction in equity. Federal statute may provide separate jurisdiction apart from implied jurisdiction, but the statute can only restrict the full implied jurisdiction, such as in the *Great-West's* holding that ERISA claims are restricted by specific statutory language. Any special need of the agency for non-traditional remedies are irrelevant under implied jurisdiction, as an agency's needs cannot enlarge a court's jurisdiction.

The agencies' right to revenue disgorgement must therefore rest on the fact that the remedy conforms to traditional remedies in equity or on the application of the clean-up doctrine. Revenue disgorgement is not a traditional remedy—federal and state case law, authoritative commentaries and the Restatement of Restitution support only specific restoration or profit restitution for this type of claim. Depending on the facts and circumstances of the case, the clean-up doctrine may allow for the occasional award of an ancillary remedy at law. The applicability of the clean-up doctrine, however, needs to include a consideration of factors generally overlooked, including personal liability, the punitive nature of the remedy and the availability of alternative remedies at law.

A remaining concern is why it has been so easy for the agencies to convince a significant segment of the legal community that the remedy of revenue disgorgement should be awarded. Authorities on restitution, such as Professors Dobbs, Laycock and Kull, among others, have published warnings for years that the discipline of restitution needs more attention from the legal community. In particular, Kull has warned that in the absence of this needed attention, the discipline could devolve from a 'peninsula' of doctrine into an archipelago of isolated islands of specific issues or claims.[382]

The success of the agencies' claims and their ability to distort the nature of traditional equitable remedies suggests an alternative downside

382. Kull, *supra* note 4 at 1196.

> No legal topic can long survive this degree of professional neglect. Unless the means are found to revive it, restitution in this country may effectively revert to its pre-Restatement status, in which problems of unjust enrichment were treated in isolation, classified only by transactional or remedial setting: Mistake, Indemnity, Trustees, Subrogation. The loss to American law, measured in terms of its ability to yield coherent and reasoned adjudication, has already been very great, and the outlook is not encouraging.

Id.

scenario. Without the willingness of the legal community to engage in the process suggested by Dobbs[383] (to address each form of restitution separately) and later prescribed by the Supreme Court in *Great-West*, the agencies will continue to select bits and pieces of the law in equity and combine them with incompatible 'pieces' from the common law and even administrative rulings.

Absent substantial effort to carefully examine the shaky foundations of the agencies' claims for revenues, it seems inevitable that plaintiffs with claims in other areas of substantive law will cite the agency case law to justify larger monetary remedies in equity. Case opinions from the Third Circuit in *Lane Labs*, the Fifth Circuit in *United Energy Partners, Inc.*, the Seventh Circuit in *Febre*, the Eleventh Circuit in *Gem Merchandising* and the D.C. federal district court in *Capital City Mortgage*, among others, could provide substantial precedent for a wide range of remedies that do not resemble traditional equitable remedies. Absent the willingness of trial courts to improve their overall understanding of the law in equity and to reject labels in favor of analysis, only the Supreme Court remains to challenge this progression.

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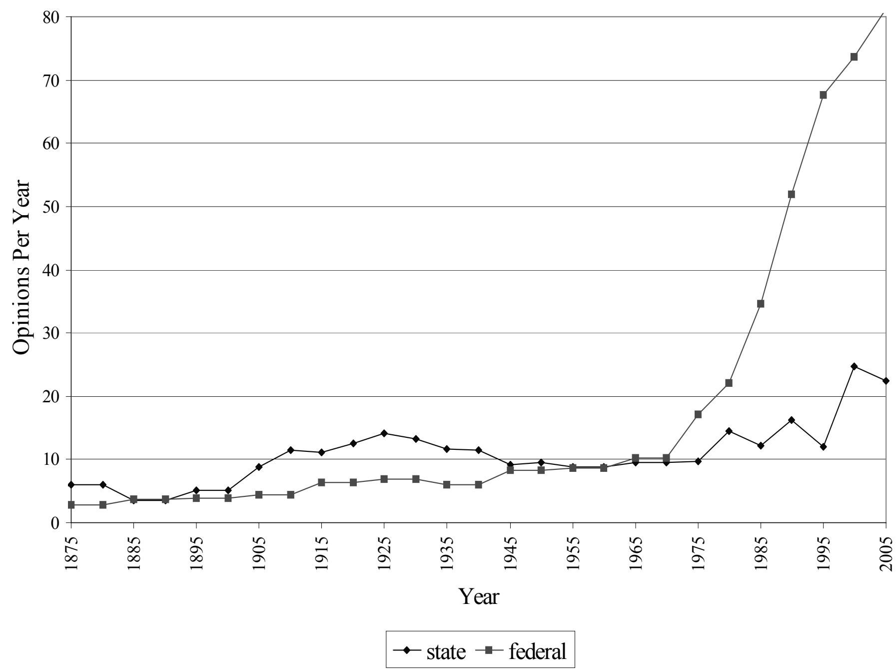
383. *See* Dobbs, *supra* note 381, at § 4.1 ("So restitution today is a general term for diverse kinds of recoveries aimed at preventing unjust enrichment of the defendant and measured by the defendant's gains, but it has many specific forms, each of which must be addressed separately.").

APPENDIX A: FEDERAL VERSUS STATE OPINIONS REGARDING DEFENDANT PROFITS



APPENDIX B: SELECTED DATA ON FTC VENUE STATISTICS

While the preliminary data does not necessarily lead to the conclusion that the FTC has engaged in forum shopping, the data does suggest some non-random factor may have a significant influence on the FTC's choice of venue. Two sets of data were generated and compared for the years 1990, 1995 and 2000 through 2005: FTC filings by district and all new claims filed in each district court. First, the absolute numbers show that the FTC filings have increased more rapidly than the group of all civil claims in federal district court.

TABLE 1
NEW FTC AND ALL OTHER CLAIMS FILED IN ALL DISTRICT COURTS

New Filings	1990	1995	2000	2001	2002	2003	2004	2005
FTC	43	55	123	106	117	103	94	87
All District Courts	112,317	129,224	130,805	126,410	147,155	128,319	155,077	132,204

Each district's share of FTC filings was then compared with the share of all new civil claims filed in that district. The ten district courts with the largest average shares for the last five years were California (central district); Florida (southern district); Illinois (northern district); Washington D.C.; Florida (middle district); Washington (western district); Nevada; California (northern district); Arizona; and Georgia (northern district). Note that none of the districts of New York, Texas or Pennsylvania are ranked in the top ten. Equally enigmatic is the fact that the eastern district of New York had a larger share than the southern district and the western district of Texas had the largest share of FTC filings in the state. Both relationships contradict that state's relative share of claims filed in the federal courts in those states.

TABLE 2
PERCENTAGE SHARE OF FTC CLAIMS AND ALL CIVIL CLAIMS BY SELECTED DISTRICT[384]

St.	District	Filings	1990	1995	2000	2001	2002	2003	2004	2005	5 Yr. Avg.
			(All shares expressed as percentages)								
CA	Central	All Civil	4.2	4.1	6.4	5.6	4.8	5.0	5.1	5.0	5.1
CA	Central	FTC	7.0	14.5	22.0	11.3	11.1	11.0	16.0	17.2	13.5
CA	Eastern	All Civil	1.1	1.4	1.8	1.7	1.5	1.8	1.6	1.7	1.7
CA	Eastern	FTC	0.0	0.0	0.0	0.9	1.7	0.0	0.0	0.0	0.5
CA	Northern	All Civil	2.1	2.1	2.2	2.5	2.6	2.3	2.1	2.2	2.3
CA	Northern	FTC	4.7	18.2	6.5	3.8	0.9	1.9	0.0	5.7	2.5
CA	Southern	All Civil	0.9	1.2	1.1	1.0	1.0	1.1	1.0	1.1	1.1
CA	Southern	FTC	16.3	0.0	2.4	2.8	1.7	1.9	1.1	1.1	1.7
DC		All Civil	1.5	1.1	1.3	1.2	1.0	1.1	0.9	1.1	1.0
DC		FTC	11.6	7.3	11.4	5.7	5.1	4.9	5.3	3.4	4.9
DE		All Civil	0.4	0.3	0.5	0.4	0.7	0.5	0.6	0.4	0.5
DE		FTC	0.0	0.0	0.0	1.9	0.0	0.0	0.0	0.0	0.4
FL	Middle	All Civil	2.0	2.2	2.7	2.7	2.3	2.7	2.6	2.8	2.6
FL	Middle	FTC	14.0	1.8	4.1	1.9	6.0	5.8	5.3	4.6	4.7
FL	Northern	All Civil	0.5	0.7	0.6	0.6	0.6	0.6	0.5	0.6	0.6
FL	Northern	FTC	0.0	0.0	0.0	0.9	0.0	0.0	1.1	1.1	0.6
FL	Southern	All Civil	2.3	2.1	3.2	3.6	2.7	2.8	2.4	2.8	2.9
FL	Southern	FTC	0.0	0.0	6.5	6.6	10.3	7.8	9.6	12.6	9.4
GA	Northern	All Civil	1.6	1.6	1.7	1.8	1.7	1.8	1.7	1.7	1.7
GA	Northern	FTC	2.3	1.8	1.6	4.7	0.9	5.8	3.2	0.0	2.9
IL	Northern	All Civil	3.7	3.2	3.4	4.1	3.7	4.0	3.4	3.2	3.7
IL	Northern	FTC	2.3	0.0	1.6	2.8	9.4	11.7	9.6	10.3	8.8
NV		All Civil	0.8	0.9	0.9	0.9	0.9	1.0	0.9	1.0	0.9
NV		FTC	0.0	1.8	1.6	0.9	6.8	4.9	2.1	4.6	3.9
NY	Eastern	All Civil	2.1	2.2	3.3	3.3	2.8	2.7	2.1	2.5	2.7
NY	Eastern	FTC	0.0	1.8	2.4	1.9	2.6	2.9	3.2	1.1	2.3
NY	Southern	All Civil	4.0	4.1	4.0	4.7	4.5	4.2	3.9	4.5	4.4
NY	Southern	FTC	2.3	3.6	4.1	1.9	1.7	2.9	2.1	1.1	2.0

384. Judicial Facts and Figures, Civil Cases Filed by District, Table 4.2, http://www.uscourts.gov/judicialfactsfigures/table402.pdf. FTC filings are based on data retrieved from a PACER key word search.

Table 2 (cont'd) (All shares expressed as percentages)

St.	District	Filings	1990	1995	2000	2001	2002	2003	2004	2005	5 Yr. Avg.
PA	Eastern	All Civil	4.1	3.4	3.3	3.0	4.6	4.5	5.4	6.5	4.8
PA	Eastern	FTC	2.3	0.0	2.4	3.8	0.9	0.0	1.1	0.0	1.1
TX	Eastern	All Civil	1.4	1.4	1.2	1.2	1.1	1.4	1.2	1.2	1.2
TX	Eastern	FTC	0.0	0.0	0.0	0.0	0.9	1.9	0.0	0.0	0.6
TX	Northern	All Civil	2.3	2.0	2.4	2.1	2.0	2.3	1.9	1.9	2.0
TX	Northern	FTC	16.3	0.0	4.1	2.8	3.4	1.9	0.0	0.0	1.6
TX	Southern	All Civil	2.7	5.1	2.8	2.7	2.8	3.1	2.9	2.8	2.9
TX	Southern	FTC	0.0	0.0	1.6	0.9	0.9	2.9	1.1	1.1	1.4
TX	Western	All Civil	1.5	1.3	1.2	1.3	1.2	1.3	1.2	1.5	1.3
TX	Western	FTC	0.0	0.0	0.0	1.9	5.1	3.9	0.0	2.3	2.6
WA	Western	All Civil	1.0	1.1	1.2	1.2	1.3	1.7	1.4	1.3	1.4
WA	Western	FTC	0.0	5.5	4.1	4.7	6.0	3.9	2.1	4.6	4.3

At most, the data raises or justifies some questions. The data is preliminary and reflects none of the adjustments that may be necessary to fairly evaluate the entire picture. The data for northern districts of Texas and California is included to acknowledge the fact that the data is quite variable and may reflect certain campaigns on the part of the FTC unrelated to favorable venues. On the other hand, it would be equally remiss to ignore the fact, perhaps coincidental, that the districts with some of the largest shares of recent FTC filings are some of the same districts that have published opinions in FTC cases at variance with traditional remedies in equity and that have accepted the FTC arguments and positions without careful scrutiny or in accordance with the standards set or endorsed by the Supreme Court.

Finally, even if the data conclusively supported the conclusion that the FTC actively engages in forum shopping, not everyone would condemn such a practice. Few plaintiff's attorneys choose the less 'friendly' forum and many justify thinly disguised forum shopping on the basis of wanting to provide the plaintiff with the most experienced judge or the expediency of a 'rocket docket.' On the other hand, the issue of forum shopping in addition to other tactical choices of the FTC in litigation, raise the basic issue of accountability. The FTC was created as an administrative agency, not a plaintiff's attorney. As such, its recent surge of litigation is the result of a manipulated loophole in federal case law on jurisdiction, not as the result of explicit Congressional authorization.