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Restitution in the Second *Restatement of Contracts*

Joseph M. Perillo*

The rules governing restitution in the *Restatement (Second) of Contracts* combine outworn dogma with audacious innovation. The new *Restatement's* unified coverage of the topic is an important improvement on its predecessor's treatment of the subject; the first *Restatement's* chapter on restitution dealt with restitution primarily in three contexts: as a remedy for a defendant's breach; as relief in favor of a defaulting plaintiff; and as compensation for a performance rendered under a contract unenforceable because of noncompliance with the Statute of Frauds.¹ In the *Restatement (Second)* the topic expands to encompass also restitution following avoidance of contract on grounds of fraud, duress, mistake, and the like, and following discharge because of impracticability, frustration of purpose, and similar circumstances.² Surprisingly, restitution in certain other contract-related contexts is not treated.³ The *Restatement of Restitution* is cited for restitution as compensation for a performance under an agreement too indefinite to enforce the performing party's expectation interests, and for performances rendered in the course of unsuccessful negotiations.⁴ The *Restatement (Second)* also fails to mention restitution in other contractual contexts, such as performance under an agreement invalid because an agent overstepped his authority⁵ and performance under an agreement that dissolves because the parties have different reasonable understandings of its meaning.⁶

Despite its failure to cover the full range of restitutionary situations, the new *Restatement* improves upon its predecessor pragmatically and analytically, by covering a wider range of restitutionary circumstances in a unified manner. It

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1. Restatement of Contracts, ch. 12, topic 3, introductory note (1932) [hereinafter cited as Restatement].

2. Restatement (Second) of Contracts, ch. 16, topic 4, introductory note (1981) [hereinafter cited as Restatement (Second)].

3. Certain additional restitutionary problems are covered or alluded to in both the first and second restatements in chapters other than the chapter on Remedies. For example, restitution for performances under agreements that are illegal or that violate public policy are dealt with in chapter 18 of the first Restatement and chapter 8 of the second. Restitution following an agreement to rescind is the subject of § 409 of the first Restatement and § 283(2), and comment c thereto, of the second.

4. Restatement (Second) ch. 16, topic 4, introductory note.

5. See, e.g., *Campbell v. Tennessee Valley Auth.*, 421 F.2d 293 (5th Cir. 1969).

6. *Estok v. Heguy*, 43 W.W.R. (n.s.) 167 (B.C. 1963); *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909); *Shapiro v. Solomon*, 42 N.J. Super. 377, 126 A.2d 654 (App. Div. 1956). For a recent case recognizing the intimate relationship between restitutionary recovery and the contract upon which it is based, see *Hastoupis v. Gargas*, Mass. App. Ct. Adv. Sh. 43, 398 N.E.2d 745, appeal denied, Mass. Adv. Sh. 519 (1980).

succeeds pragmatically by providing the profession with a unified treatment of related material, and analytically by supporting the thesis urged several years ago that restitution in the context of failed agreements should be classified as a contractual remedy rather than as an appendage of a separate body of law known as Quasi-Contracts, or an even grander one known as Restitution.⁷ While the new *Restatement* neither accepts nor rejects this thesis, unified treatment of additional contract-related restitutionary situations may further expose its logic.

I. RESTITUTIONARY RATIONALE: RESTITUTION *and* RELiance OR RESTITUTION *versus* RELiance?

One of the advantages of reclassifying restitution in the context of failed agreements as a contractual remedy should be to clarify the rationale for restitutionary recovery. Since Keener's trail-blazing treatise on quasi-contracts⁸ was published in 1893, much academic orthodoxy has tied restitutionary remedies at law to the monistic concept of "unjust enrichment."⁹ Within a generation, however, the equation of unjust enrichment and quasi-contractual relief had come to appear inexact. Although granting that unjust enrichment was a significant underlying policy, Professor Woodward, in his text on quasi-contracts, found the term "enrichment" to be "unsatisfactory in that it connotes an actual increase of the defendant's estate."¹⁰ Woodward offered, instead, the concept of "receipt of a benefit."¹¹ The first *Restatement of Contracts* adopted Woodward's terminology and carefully avoided the unjust enrichment rationale.¹² The *Restatement (Second)* ignores the conflict between the rationales of "unjust enrichment" and "receipt of benefit," frequently basing its rhetoric upon the former¹³ while grounding its operative rules primarily on the latter. When a proper case for restitution is advanced, the *Restatement (Second)* usually allows recovery for benefits conferred whether or not the defendant has been enriched in estate.¹⁴

One of the comments to the *Restatement (Second)* casually employs the language of a third rationale in stating that "[t]he objective is to return the

7. Perillo, *Restitution in a Contractual Context*, 73 Colum. L. Rev. 1208 (1973). For a brief summary of and commentary on this thesis, see C. Knapp, *Problems in Contract Law* 948-49 (1976).

8. W. Keener, *A Treatise on the Law of Quasi-Contracts* (1893).

9. Professor Keener did not invent the concept of unjust enrichment. It derives from Roman law and was used from time to time by English and American courts and writers. His contribution was in turning much of what had passed as "contracts implied in law" into a coherent system based on unjust enrichment. For a brief history, see Perillo, *supra* note 7, at 1208-13.

10. F. Woodward, *The Law of Quasi Contracts* 9 (1913).

11. *Id.*

12. One reference to the concept of "unjust enrichment" in the restitution chapter occurs in a discussion of restitution as an alternative remedy to tort. *Restatement* § 347 comment a.

13. See, e.g., *Restatement (Second)* § 345 (c), (d); § 344 comments a & d.

14. See *Restatement (Second)* § 370 comment a & illustration 3. For a puzzling deviation, see § 373 illustration 11, which disallows restitution despite the fact that the services rendered are the services bargained for. The illustration appears to reintroduce the idea of enrichment into the concept of benefit. An enrichment rationale also appears in some of the comments and illustrations concerning the measure of recovery. See text accompanying notes 51-55 *infra*.

parties, as nearly as is practicable, to the situation in which they found themselves before they made the contract."¹⁵ Such language, which speaks of restoring the status quo ante, summarizes much sound case law and academic criticism of the older and more orthodox rationales.¹⁶ When the rationales of conferral of benefit and restoration of the status quo ante conflict, the tension centers upon whether the plaintiff's reliance interest will be protected.¹⁷ When the plaintiff has expended funds, rendered services, or otherwise diminished his own estate in performing or preparing to perform an agreement that has since failed, but has not conferred a benefit on the defendant, the cutting edge of the case law has allowed recovery of these expenses.¹⁸ Often courts have accomplished this by legal alchemy, transmuting reliance damages into "benefits conferred" simply by so labelling them.¹⁹ Other courts have, with greater candor, expressly protected the reliance interest in restitution actions.²⁰

Because the drafters were aware of, and sympathetic to, the scholarship and cases that supported greater protection for the reliance interest,²¹ one would have expected the *Restatement (Second)* to recognize these authorities, if not to endorse allowing reliance damages in restitution actions. Rather than do either, however, the drafters took two radical steps: one was dramatically conservative, the other startlingly innovative. First, with some exceptions noted below, they

15. Restatement (Second) § 384 comment a. This is an example of the common confusion of status quo ante language with Woodward reasoning. See, e.g., M. Hill, H. Rossen & W. Sogg, *Smith's Review—Legal Gem Series—Contracts* 179 (3d ed. 1976).

16. Perillo, *supra* note 7, at 1221-23.

17. Restoring the status quo is an ambiguous concept. If the plaintiff has relied to his detriment, but has not conveyed any benefit to the defendant, it is impossible to return both parties to the position they occupied before either had acted. Thus, there are three conceivable responses: leaving the parties just as they are, returning the plaintiff to his former status by forcing the defendant to pay reliance damages, or a compromise between these two extremes. Only when either the second or third alternative is chosen does restoring the status quo accurately describe protection of a reliance interest.

18. Such recovery is not appropriate in all cases, but is frequently granted where the defendant is more responsible for the contractual failure than the plaintiff is. See, e.g., *Kearns v. Andree*, 107 Conn. 181, 139 A. 695, 59 A.L.R. 599, noted in 26 Mich. L. Rev. 942 (1928); *Albre Marble & Tile Co. v. John Bowen Co.*, 338 Mass. 394, 155 N.E.2d 437 (1959), *aff'd on rehearing*, 343 Mass. 777, 179 N.E.2d 321 (1962).

19. Both in 1920 and in 1924, Williston noted that the reliance interest frequently received covert protection in restitution cases. 1 S. Williston, *The Law of Contracts* § 536 (1920); 3 S. Williston, *The Law of Contracts* § 1977 (1924). While Patterson described this tendency in 1936 as "Pickwickian," Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 Mo. L. Rev. 223, 230 (1936), Fuller and Perdue were constructing a more extensive comment on it. Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 2), 46 Yale L.J. 373, 394 (1937). In 1936 and 1938, Williston and Thompson reiterated and added to Williston's earlier observations. 2 S. Williston, *A Treatise on the Law of Contracts* § 536 (rev. ed. Williston & Thompson 1936); 6 S. Williston, *A Treatise on the Law of Contracts* § 1977 (rev. ed. Williston & Thompson 1938). Dawson wrote in the same vein in 1959. Dawson, *Restitution or Damages?*, 20 Ohio St. L.J. 175, 191 (1959). This list is by no means exhaustive.

20. See, e.g., *Riley v. Capital Airlines, Inc.*, 185 F. Supp. 165 (S.D. Ala. 1960); *Albre Marble & Tile Co. v. John Bowen Co.*, 338 Mass. 394, 155 N.E. 2d 437 (1959), *aff'd on rehearing*, 343 Mass. 777, 179 N.E. 2d 321 (1962).

21. This espousal of the reliance interest is primarily manifested in the new *Restatement's* provisions with respect to promissory estoppel. See Restatement (Second) §§ 87(2), 88(c), 89(c), 90, 139, 150.

framed restitutionary provisions reminiscent of the first two decades of the twentieth century. Rebuffing the authorities that protect the reliance interest in actions for restitution, the drafters declared that the restitutionary measure of recovery "exclude[s] expenditures] to the extent that they conferred no benefit."²² Thus, the reliance interest is barely protected because only rarely is a benefit conferred by reliance rather than by performance.²³ Second, with a few quick strokes, the drafters edited earlier, tentatively adopted, provisions and apparently created a new cause of action. Neither an action for breach, the customary use of reliance, nor an action for restitution based upon a failed contract, this newborn writ is an action for reliance. Sections 158²⁴ and 272²⁵ of the *Restatement (Second)* were amended in 1979 to provide that where an obligation has been discharged or a contract avoided for impracticability, frustration, mistake, or the like, the court may grant, instead of or in addition to restitution, "relief on such terms as justice requires including protection of the parties' reliance interests."²⁶

Reliance has traditionally been linked to the doctrine of promissory estoppel, which renders binding a promise that induces foreseeable action or forbearance to the promisee's detriment, notwithstanding the absence of consideration or of other requirements for an enforceable promise.²⁷ In each of the instances in which the *Restatement (Second)* engages promissory estoppel,²⁸ the promisee's reliance interest is protected by enforcement of an otherwise defective contract against a party in breach. On the other hand, when a contract is discharged or avoided for impracticability, frustration, or mistake, there is no enforceable contract; no party is in breach. Heretofore, absent tortious conduct, the only common law action that was permitted in such circumstances was the quasi-contractual action of restitution—an action for reliance was unavailable. However, under the new formulation of sections 158 and 272, when a contract fails for impracticability, frustration, or mistake, an action for reliance is permitted. Although there is clearly some relationship between this action and the concept of promissory estoppel, the degree of kinship is unclear.²⁹ If a new kind of action based solely on reliance is to be created, it should be given an analytic and procedural framework.

22. Restatement (Second) § 371 comment b. Another comment explicitly treats the reliance interest, stating that "[a] party cannot, however, recover his reliance interest under the rule stated in this Section" Restatement (Second) § 377 comment b. See also *id.* § 373 illustration 11; § 375 comment b. But see § 376 illustration 4, where the reliance interest is protected apparently because it enriched the defendant's estate.

23. For an example of that rare situation, consider the Second Restatement's illustration involving a promise by a mortgagee not to foreclose for a year, even if the mortgagor makes no payments. In reliance thereon, the mortgagor makes valuable improvements. In breach of his promise, the mortgagee forecloses and buys the land at foreclosure sale. The mortgagor is permitted to recover the value of the improvements. Restatement (Second) § 373 illustration 4.

24. Restatement (Second) § 158.

25. *Id.* § 272 (mistake).

26. *Id.* §§ 158(2), 272(2).

27. On the tremendous increase in application of the doctrine in recent decades, see Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 *Yale L.J.* 343, 386 (1969).

28. See Restatement (Second) §§ 86, 87, 88, 89, 90, 139.

29. I have previously noted the interconnection between restitution and estoppel. Perillo, *supra* note 7, at 1218.

The new *Restatement's* treatment of the reliance interest in restitution actions bears the earmarks of a last-minute compromise insufficiently deliberated, the implications of which are obscure. Because there is no clash of social values between protecting the reliance interest in an action for restitution and protecting it in a different kind of action, the drafters' choice can only be judged in terms of what Fuller and Perdue called the "superstructure of the law."³⁰ Does the architectural choice made by the *Restatement (Second)* aid in the intelligibility of the law? In a field already overloaded with confusing and overlapping terminology,³¹ the creation of a new kind of action may provide further confusion. Will the choice ease the administration of justice? It is doubtful that this question, which ought to be basic to the design of our legal superstructure, can be answered affirmatively. As the common law has developed, the parties' restitution and reliance interests were being protected in an action known, in recent decades, as restitution. No reason is apparent why this growth should be obstructed and redirected into a conceptually new category.

Although the new *Restatement* permits an action for reliance instead of, or in addition to, restitution in such contexts as mistake and impracticability, no parallel provision is supplied for the case of a breaching defendant. This is surprising, since this latter case contains the most compelling claim for the plaintiff. Nonetheless, the plaintiff can recover his expenses under the new *Restatement* in an action for damages rather than restitution. Section 349 permits any injured party to elect to recover reliance damages instead of expectancy damages.³² Insofar as reliance expenditures confer a benefit on the defendant, recovery of reliance damages will protect the restitution interest; therefore, the election permitted by section 349 significantly diminishes the need for section 373, which covers restitution for a breaching defendant.³³ Although the reliance interest will not be protected if the complainant labels his action restitutionary, the restitution interest can be promoted in an action for reliance damages. Consequently, the informed complainant will normally claim reliance damages.³⁴

30. Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 *Yale L.J.* 52, 54 (1936).

31. In the field of restitution there is a profusion of terms that are nearly, but not quite, synonymous. "Restitution" has become a term of art relatively recently, with the publication of the *Restatement of Restitution* in 1937. It encompasses rights at law known as quasi-contractual rights and certain equitable rights, particularly constructive trusts, that perform similar functions. "Unjust enrichment" is occasionally used, especially in England, as a synonym for restitution; one sometimes hears of the "law of unjust enrichment." Its primary use, however, is to describe an ultimate fact: "because X was unjustly enriched, he must make restitution." A "contract implied in law" is a fictitious contract. The fiction was created to fit certain actions into the writ of *assumpsit*. A contract implied in fact is a true contract that arises from the tacit agreement of the parties. Because students, practitioners, and even Blackstone were confused by the distinction between the two kinds of implied contracts, Keener and Woodward sought to extirpate the term "contract implied in law" from legal usage and to substitute for it the term "quasi-contract," which was borrowed from Roman law and only rarely used in the common law before 1893. Although the new term "quasi-contract" took hold, the old term successfully resisted extirpation to the further confusion of law students and lawyers.

32. *Restatement (Second)* § 349.

33. *Id.* § 373. The full range of the restitution interest is not, however, protected. Appreciation damages, such as are available under a constructive trust, see text accompanying notes 102-05 *infra*, are not available under § 349.

34. This is explicitly acknowledged in *Restatement (Second)* § 373 comment d.

Two other distinctions between the two actions are noteworthy. First, in an action for reliance damages on a losing contract, the injured party's recovery is diminished by his prospective contract losses.³⁵ No analogous reduction accompanies a restitution action.³⁶ Second, in an action for reliance damages on a losing contract, the contract price sets an upper limit on recovery,³⁷ while in a restitution action, the injured party's recovery may sometimes exceed that price.³⁸

If, as some have argued, a restitution action for breach of contract is contractual, rather than quasi-contractual,³⁹ it seems wrong-headed to permit the injured party to recover in restitution the same amount on a losing contract as on a profitable one. To permit the same recovery is to ignore the balance of risks negotiated by the parties and incorporated into the contract.⁴⁰ Nonetheless, a majority of cases supports the new *Restatement's* exclusion of the loss factor from the calculation of restitution damages in an action for breach.⁴¹ Although I quarrel with particular details of the new *Restatement's* treatment of the restitution and reliance interests where the defendant has breached, I believe that its provisions are generally pointed in the proper direction. The separate action of restitution for breach will eventually disappear as the restitution interest receives protection in actions for reliance damages. As Fuller and Perdue noted decades ago, the restitution interest is but a subspecies of the reliance interest,⁴² distinguished simply by receipt of the benefit of restitution interest expenditures by the party against whom restitution is sought. This melding of restitution with reliance in the context of default will free restitution for breach from domination by the concept of unjust enrichment, dominance developed in response to the felt needs of nonconsensual transactions.

As I have sought to demonstrate elsewhere,⁴³ there are several situations in which the law of restitution creates both the parties' primary rights and their secondary or remedial rights. For example, where one unofficially pays the funeral expenses of a deceased neighbor who was only seemingly destitute, unjust enrichment of the decedent's estate provides the sole rationale for the plaintiff's recovery. Such cases are relatively rare and fall outside the usual norms of commercial or interpersonal behavior; yet the concept and objectives of unjust enrichment, on which these uncommon cases are based, have been allowed to dominate the complex galaxy of restitution cases. Cases in which restitution is sought involve predominantly either tortious conduct or performance under a

35. Restatement (Second) § 349.

36. *Id.* § 373 comment d.

37. *Id.* § 349 comment a.

38. See text accompanying notes 71-82 *infra*.

39. 5 A. Corbin, *Contracts* § 1106 (1964); F. Woodward, *supra* note 10, § 260; Perillo, *supra* note 7, at 1212-19.

40. This argument is pursued at greater length below. See text accompanying notes 71-82 *infra*.

41. See, e.g., *United States v. Algernon Blair, Inc.*, 479 F. 2d 638 (4th Cir. 1973); *Connolly v. Sullivan*, 173 Mass. 1, 53 N.E. 143 (1899). See generally 1 G. Palmer, *The Law of Restitution* § 4.4 (1978).

42. Fuller & Perdue, *supra* note 30, at 53-55.

43. See generally Perillo, *supra* note 7.

failed agreement. In the latter instance, contractual policies should underlie the remedial rules readjusting the parties' economic relations. Among these policies are honoring the allocation of risks agreed to by the parties and recognizing customary understandings of suitable risk allocations, relative fault, and elementary fairness. Prevention of unjust enrichment is also a contractual policy, but it is not preeminent.

II. MEASURE OF RECOVERY

A. *Enrichment or Market Standard*

A comment to the *Restatement (Second)* defines the promisee's restitution interest as "his interest in having restored to him any benefit that he has conferred on the other party."⁴⁴ This prompts the question: how is that benefit to be measured? The first *Restatement* did not dwell on the measure of recovery, but its comments indicated that the market value of the performance would be appropriate where the performance rendered was part of the agreed exchange.⁴⁵ In other cases, the defendant would be liable only for the amount by which he is enriched.⁴⁶ Because these "other cases" are rare,⁴⁷ market value generally prevailed. The new *Restatement* treats the question more flexibly and in greater detail. It adds section 371, "Measure of Restitution Interest,"⁴⁸ which provides that "as justice requires" the measure of recovery is either the market value of the plaintiff's performance⁴⁹ or the "extent to which the other party's property has been increased in value or his other interests advanced."⁵⁰

Restitution in contract arises in a variety of situations, from the extreme of a defaulting defendant to that of a defaulting plaintiff, and justice does not require that the same measure of recovery always be used. The comments to section 371 appropriately urge flexibility in fitting the measure of recovery to the particular case, while comments to other sections attempt to guide a "just" fit. One suggests that doubts are to be resolved against a defaulting plaintiff.⁵¹ Another qualifies the general rule that where a contract is discharged for impracticability, the benefit is measured at market value;⁵² it provides that where the benefit is destroyed by the event creating the impracticability, the "recovery may be limited to the measure of increase in wealth prior to the

44. *Restatement (Second)* § 370 comment a.

45. *Restatement* § 347 comment c. See also *id.* § 348 comment a.

46. *Id.* § 347 comment c.

47. The first *Restatement*, like its successor, limited restitution to situations where the defendant has received a benefit. *Restatement* § 348. Normally, the benefit is part of what has been bargained for. For an exceptional case where an unbargained-for benefit is recoverable, see *Restatement* § 347 illustration 7, which was the model for *Restatement (Second)* § 373 illustration 4, discussed in note 23 *supra*.

48. *Restatement (Second)* § 371.

49. *Id.* § 371(a).

50. *Id.* § 371(b).

51. *Id.* § 374 comment b.

52. *Id.* § 377 comment b.

[destruction].”⁵³ While resolving doubts against a defaulting plaintiff is sensible, this qualification on the market value measure arguably is not. Assume that A contracts to shingle the roof of B’s house for \$5,000. After A has rendered services valued in the market at \$2,000, increasing the building’s value by \$1,500, the house burns to the ground. According to the *Restatement (Second)*, A may recover \$1,500.⁵⁴ What is “just” in this case involving two innocent parties is not obvious, but the second *Restatement*’s determination is apparently contrary to every case on point. At a minimum, these would allow A to recover the market value of his performance;⁵⁵ some would even permit recovery for A’s materials lost at the job site and other reliance losses.⁵⁶ The comments do not attempt to explain why it is appropriate to limit A’s recovery to \$1,500. Although the new *Restatement*’s call for flexibility is commendable, perhaps a conceptual framework explicating when an enrichment value should prevail over a market value measure would enable us to understand this result. Absent such a framework, it is not clear why the roofer should bear the loss caused by the homeowner’s fire to the extent that the market value of his services exceeds the increase in the homeowner’s estate, and this illustration leads one again to suspect that here, as elsewhere, the drafters were unduly influenced by Keener’s unjust enrichment analysis.

B. *Contract Price as a Cap on the Measure of Recovery*

Debate in the restitution area has long smoldered over whether the contract price or rate sets an upper limit upon the measure of restitution. The case of *Boomer v. Muir*⁵⁷ presents the conflict. Plaintiff, a construction contractor, justifiably cancelled his contract because of defendant’s breach. Had he completed performance he would have been entitled to a final payment of \$20,000. Electing to sue for restitution, plaintiff received a judgment for over \$250,000, which was affirmed on appeal. *Boomer* accords with the “overwhelming weight of authority,” which permits restitutionary recovery to exceed the contract rate or price.⁵⁸ The 1979 tentative draft of the new *Restatement* audaciously but wisely followed the minority view, limiting restitution for part performance to the sum that would have been due had performance been completed.⁵⁹ Restitution for breach is a contractual remedy;⁶⁰ consequently, it seems inappropriate to ignore

53. *Id.*

54. *Id.* § 377 illustration 4.

55. According to Palmer, there “appears to be no case authority, nor should there be,” limiting recovery to the enhanced value of the structure. 2 G. Palmer, *supra* note 41, § 7.8, at 155 (emphasis in original). His footnote to this assertion specifically criticizes Restatement § 357 illustration 1, upon which Restatement (Second) § 377 illustration 4 is based. See reporter’s note, Restatement (Second) § 377 comment b.

56. See J. Calamari & J. Perillo, *The Law of Contracts* 484 n.40 (2d ed. 1977). For extended discussion, see 2 G. Palmer, *supra* note 41, § 7.8.

57. 24 P.2d 570 (Cal. Dist. Ct. App. 1933) (reversing an order granting a new trial).

58. 1 G. Palmer, *supra* note 41, at 389.

59. Restatement (Second) of Contracts § 387(2) (Tent. Draft No. 14, 1979).

60. See A. Corbin, *supra* note 39; 1 G. Palmer, *supra* note 41, at 366-67; F. Woodward, *supra* note 10, § 260; Perillo, *supra* note 7, at 1215-19.

the parties' allocation of the risks.⁶¹ Should a plaintiff who would have lost on the contract receive an amount that not only spares him from further loss but also compensates him as if he had made a profitable bargain? Perhaps, on the erroneous assumption that the restitutionary action is divorced from the contract upon which the performance was based,⁶² that a contractual breach necessarily involves fault,⁶³ or that the defendant is profiting from his own breach if he uses the contract to shield against greater liability.⁶⁴ This last thought ignores the fact that the defendant's profit, if any, stems from the parties' bargain and not from any subsequent wrongdoing.

The final draft of the new *Restatement* rejects the minority view,⁶⁵ substituting instead the conventional position, which ignores the contractual allocation of risks assumed by the parties and maintains that restitution for breach of contract is not a contractual action. This position seemingly conflicts with a premise of the new *Restatement's* rule on breaching plaintiffs. That rule provides that "in no case will the party in breach be allowed to recover more than a ratable portion of the total contract price."⁶⁶ While undoubtedly just and sound from the perspective of upholding the parties' allocation of the risks, this rule manifests recognition of the intimate connection between restitution and the contract upon which the restitutionary recovery is based.

III. THE CONSTRUCTIVE TRUST: SOURCE OF BENEFIT AND APPRECIATED VALUE

The constructive trust is an astonishingly powerful and flexible restitutionary remedy. An aggrieved party can use it to obtain two important advantages: he can reach benefits acquired by the defendant from third persons, and he can procure any appreciation in value that benefits obtained by the defendant may have undergone. However, the *Restatement (Second)* not only fails to treat the constructive trust, but also advances provisions that are inconsistent, at least in part, with such uses.

The *Restatement (Second)* states that restitution is available only if the benefit is conferred by the plaintiff. "It is not enough that it was simply derived from the breach."⁶⁷ The comments offer the illustration of an employee, A,

61. See Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 Nw. U.L. Rev. 433 (1969).

62. See Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 Ohio St. L.J. 264, 269-73 (1959).

63. *Id.* at 278-79. According to Prof. Palmer, frequently no moral condemnation can properly be attached to a finding that a defendant has breached. 1 G. Palmer, *supra* note 41, at 395. This point is strongly emphasized by Childres & Garamella, *supra* note 61.

64. J. Murray, *Contracts* 480 (2d rev. ed. 1974).

65. *Restatement (Second)* § 373(2); see *id.* comment d. For a transcript of the floor debate culminating in the change, see generally 56 ALI Proceedings 405-13 (1979).

66. *Restatement (Second)* § 374 comment b.

67. *Id.* § 370 comment a. The use of the word "breach" in the comment is inappropriate inasmuch as § 370 ("Requirement That Benefit Be Conferred") purports to apply to restitution on all grounds, including misrepresentation, governed by the *Restatement (Second)*.

who in violation of his obligation to his employer, *B*, not to work for anyone else, takes a part-time job with *C*. *B* cannot recover from *A* the salary paid by *C*, "because it [is] not a benefit conferred by *B*."⁶⁸ The *Restatement (Second) of Agency*, the source of this illustration, agrees with the result,⁶⁹ but not with the rationale. Indeed, three of its sections are devoted to situations in which an employee is liable to his employer for benefits conferred by third persons.⁷⁰ One of the most elementary of these situations involves a bribe paid to the employee. Without question, the employer can recover the value of the bribe in a quasi-contractual action at law,⁷¹ and may, as an alternative, have available the equitable, restitutionary constructive trust.⁷² Consider also the fate of Frank Snapp, a former CIA agent, who had contracted with that agency not to reveal any intelligence or information about the CIA without its prior consent. In violation of this agreement, he wrote and had published a book detailing some of the actions of the CIA. A constructive trust was imposed upon the royalties he earned from the publication.⁷³ Snapp's case is distinguishable from the *Restatement (Second)* illustration only on the ground that Snapp's relationship of trust and confidence with the CIA, which supplied a foundation for an equitable remedy, is absent from the *Restatement (Second)* example. These cases can be reconciled with the view of the *Restatement (Second)* that benefits received from third persons are not recoverable in a restitution action. This bar on recovery is expressed in a comment to a section, the black-letter text of which commences: "A party is entitled to restitution *under the rules stated in this Restatement*."⁷⁴ Consequently, the new *Restatement* does not foreclose recovery under the provision of the *Restatement (Second) of Agency* or the *Restatement of Restitution*, which treats the constructive trust in detail.⁷⁵ Nonetheless, the Introductory Note to the Restitution Topic of the new *Restatement* appears to promise more: "This Topic treats restitution in five situations that are closely related to contracts. The first is that in which the other party is in breach and the party seeking restitution has chosen it as an alternative to the enforcement of the contract between them."⁷⁶ Since the constructive trust is available for some contractual breaches and is

68. *Restatement (Second)* § 370 illustration 4.

69. *Restatement (Second) of Agency* §§ 400 comment c, 404 illustration 2 (1958).

70. *Id.* §§ 403, 404, 404A. See also *Restatement of Restitution* §§ 200, 199 comment b (1937). For a case where a fraud-feasor was made to disgorge a benefit that was not conferred by the plaintiff, see *Harper v. Adamez*, 142 Conn. 218, 113 A.2d 136, 55 A.L.R.2d 334 (1955).

71. See *Reading v. Attorney General*, [1951] A.C. 507, discussed in Perillo, *supra* note 7, at 1211-12. See also *Sears, Roebuck & Co. v. Kelly*, 1 Misc. 2d 624, 149 N.Y.S.2d 133 (Sup. Ct. 1956); *Restatement (Second) of Agency* § 403 (1958).

72. *Fuchs v. Bidwill*, 31 Ill. App. 3d 567, 334 N.E.2d 117 (1975), *rev'd* on other grounds, 65 Ill. 2d 503, 359 N.E.2d 158 (1976); *Restatement of Restitution* § 197 (1937).

For a number of other cases, not imposing constructive trusts and not involving employment relationships, where a contracting party has been permitted recovery of the profit made by the defendant as a result of his breach, see 1 G. Palmer, *supra* note 41, § 4.9.

73. *Snapp v. United States*, 444 U.S. 507 (1980).

74. *Restatement (Second)* § 370 (emphasis added).

75. *Restatement of Restitution* §§ 160-215 (1937) cover "Constructive Trusts and Analogous Equitable Remedies."

76. *Restatement (Second)*, ch. 16, topic 4, introductory note.

concededly restitutionary,⁷⁷ some discussion of it belongs in the *Restatement (Second)*.

As indicated above, one of the advantages of the constructive trust is that a deserving party may use it to obtain the appreciated value of a benefit conferred on the other party. The *Restatement (Second)* discusses two situations in which the enrichment of the defendant's estate may exceed the market value of the benefit, suggesting for both that the plaintiff be restricted to the smaller recovery.⁷⁸ Yet it fails to consider other fact patterns that would have implicated the constructive trust. For instance, in cases of restitution for misrepresentation, a topic covered by the *Restatement (Second)*,⁷⁹ where any increase in the value of fraudulently obtained property should clearly flow to the defrauded party, courts can use this remedy to award the plaintiff recovery in kind or the increased value of property no longer recoverable in kind.⁸⁰ This measure of recovery is indissolubly linked to the defendant's unjust enrichment, and leads to a larger recovery than either the status quo ante rationale or the receipt of benefit rationale measured at market value. Interestingly, there appears to be an increasing adoption of this measure of recovery in actions at law in which no constructive trust is imposed.⁸¹ Since the *Restatement (Second)* so enthusiastically embraces the unjust enrichment rationale, its failure to notice this use of the constructive trust as well as this development at law is surprising.

IV. SPECIFIC RESTITUTION

The right to specific restitution—the restoration of a specific thing to the party seeking the remedy—is enlarged dramatically by the *Restatement (Second)*. The first *Restatement* made the availability of the remedy turn on the familiar twins: the uniqueness of the thing transferred and the inadequacy of the legal remedy.⁸² Instead, under the new *Restatement*, a party who otherwise qualifies for restitutionary relief is entitled to specific restitution⁸³ unless he is in default.⁸⁴ The court in its discretion may withhold the remedy if granting it would “unduly interfere with the certainty of title to land or otherwise cause injustice.”⁸⁵ Specific restitution based on a defendant's breach is also subject to the rule that restitution is unavailable for breach when the breaching party owes no duty other than to pay a definite sum of money.⁸⁶

77. It is one of the two principal topics of the *Restatement of Restitution* (1937).

78. *Restatement (Second)* § 371 comment b.

79. *Id.* § 376.

80. See, e.g., *Sher v. Sandler*, 325 Mass. 348, 90 N.E.2d 536 (1950), noted in 63 *Harv. L. Rev.* 1463 (1950) & 45 *Ill. L. Rev.* 510 (1950).

81. See, e.g., *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965).

82. *Restatement* § 354.

83. *Restatement (Second)* § 372.

84. *Id.* § 372(1)(b). On the restitutionary rights of a defaulting party, see text accompanying notes 93-104 *infra*.

85. *Restatement (Second)* § 372(1)(a).

86. *Id.* § 373(2).

In its catalog of "Judicial Remedies Available,"⁸⁷ the new *Restatement* describes specific restitution as "requiring restoration of a specific thing to prevent unjust enrichment."⁸⁸ The link between this remedy—or group of remedies⁸⁹—and prevention of unjust enrichment is tenuous; specific restitution serves objectives other than the redress of unjust enrichment. Both restatements use a familiar illustration in which specific restitution is available. A transfers a tract of land to B in exchange for B's promise to support A for life. B materially breaches the contract and A sues for specific restitution of the land. Specific restitution will be decreed.⁹⁰ The *Restatement (Second)* justifies this result by pointing to the difficulty of proving damages with sufficient certainty. Though it is doubtless true that expectancy damages are difficult to prove in this case, the alternative legal remedy of monetary restitution would not appear unduly difficult to establish and would prevent unjust enrichment. Nonetheless, for several reasons, specific restitution is the most appropriate remedy, especially in the usual case where the parties contemplated that the grantor would continue to live on the premises. First, the facts present two traditional touchstones of equity jurisdiction: the uniqueness of real property⁹¹ and a relationship of trust and confidence. Second, because of the intangible values that often accompany ownership of nonfungibles such as land, a money judgment will be inadequate compensation for the transferor's losses. Such a judgment is incapable of quantifying the value of these intangibles to the transferor; and if it could quantify them, it might not, to the extent that they do not enrich the transferee. Last, and usually decisive, a monetary award would violate the transferor's contractual intent. A did not offer the land for sale on the open market; limiting his recovery to monetary restitution would in effect force a bargain upon him that he never made.

Recognizing that specific restitution functions to compensate for losses and to protect contractual intent helps justify subjecting the remedy to the general rule that restitution is unavailable where the claimant has fully performed and the party in breach owes no duty other than to pay a definite sum of money.⁹² Assume that an owner of two patents sells one to corporation A for a sum certain to be paid in the future and assigns the other to corporation B in return for a promise of royalties and best efforts to promote the invention.⁹³ If both A and B

87. *Id.* § 345.

88. *Id.* § 345(c).

89. "Specific restitution" is actually a substantive result that may be obtained by using any number of procedural devices, such as an equitable decree cancelling a deed, a decree ordering the defendant to return a thing to the plaintiff, or a judgment at law authorizing a sheriff to replevy the object.

90. *Restatement* § 355 illustration 1; *Restatement (Second)* § 372 illustration 3.

91. For purposes of specific restitution, in contrast to specific performance, real property is not automatically treated as unique. Because the grantor was willing to part with the property, normally he cannot claim it has unique value to him. See J. Calamari & J. Perillo, *supra* note 56, at 575.

92. *Restatement (Second)* § 373(2).

93. *Alder v. Drudis*, 30 Cal. 2d 372, 182 P.2d 195 (1947); *Restatement* § 354 illustration 7. See also *Maytag Co. v. Alward*, 253 Iowa 455, 112 N.W.2d 654, 96 A.L.R.2d 162 (1962) (restitution of securities issued under a stock option plan).

breach, the seller is entitled to specific restitution from *B*, but not from *A*. By selling the first patent for a fixed price, the seller has quantified the value of the patent to him. Thus, his losses are certain; a judgment for the contract price will fully cover his losses and fulfill contractual intent. On the other hand, a court cannot as readily value the damage to the seller from *B*'s breach. Although the restitutionary interest—the market value of the patent—could probably be ascertained with the aid of expert witnesses, the expectancy interest—royalties—is likely to be highly uncertain. It is this latter interest that the court will protect,⁹⁴ because the seller evinced no intent to sell at market value. Instead, he manifested his intent to participate in the earnings of the patent; it would be unfair to thrust a market-value bargain upon him. Thus, unjust enrichment plays no part in the determination that the seller may elect specific restitution. Rather, the determinant is that this remedy, and none other, will cancel an unjust loss suffered by the plaintiff and prevent distortion of his manifested intent.

V. RESTITUTIONARY RIGHTS OF A DEFAULTING PARTY

In 1937, a commentator described the status of a defaulting party who seeks restitution:

For more than a century the plight of the defaulting plaintiff has been a prolific source of controversy among courts and legal scholars. Until 1834 the unpaid wilful defaulter was generally not entitled to judicial relief. This was the "common-law" rule. But in that year the Supreme Court of New Hampshire fired the first shot in a hundred year's legal war. Disregarding the hallowed precedents of the "common-law rule" that court, in the case of *Britton v. Turner*, created the "modern rule," by granting succor (to the extent of \$95) to a defaulting laborer. The reverberations of that shot threw the legal world into two camps, which have since then filled reams and reams of paper with attacks upon and defenses of the simple decision.⁹⁵

The debate still rages. In the absence of a statute on the subject, some jurisdictions grant the defaulting party no recovery,⁹⁶ while others permit recovery on some contracts but not others. Professor Palmer's recent treatise states that no

94. A thorough analysis of cases such as this may demonstrate that Fuller and Perdue's division of contract remedial choices into three interests cannot explain the full range of contract remedies. For example, although it is easy to state that specific restitution satisfies the restitution interest, it is quite clear that in our hypothetical, monetary restitution and specific restitution produce significantly different economic results and serve different goals. Similarly, it is possible to state that specific restitution protects the expectancy interest, but it does so in a considerably different way from that in which an award of expectancy damages protects it. In the case of the patent, it may be that the interest served is the inventor's autonomy and that this interest is protected separately from other interests.

95. Mulder, *The Defaulting Plaintiff in North Carolina*, 15 N.C.L. Rev. 255, 255 (1937).

96. New York falls in this category. See *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103, 106, 107 (2d Cir. 1953), prophesying a change in New York law. The prophecy has not been fulfilled. See *Lawrence v. Miller*, 86 N.Y. 131 (1881), reaff'd in *32 Beechwood Corp. v. Fisher*, 19 N.Y.2d 1008, 228 N.E.2d 823, 281 N.Y.S.2d 843 (1967).

generalizations can safely be made.⁹⁷ Proponents of recovery seek to protect a defaulting party's restitution interest and to prevent the other party from gaining a windfall. Britton, the laborer, after all, had worked for over nine months of a twelve-month term without compensation.⁹⁸ His cause must have some appeal to everyone but an unreconstructed Ebenezer Scrooge. On the other hand, opponents argue that recovery invites contract-breaking and rewards morally unworthy conduct.

The first *Restatement* compromised, generally permitting a defaulting party to recover in restitution where his breach was not "wilful or deliberate,"⁹⁹ terms that are difficult to apply to many contractual breaches.¹⁰⁰ The *Restatement (Second)* extends the *Britton v. Turner* doctrine to its logical conclusion: the party in breach is entitled to restitution of "any benefit he has conferred . . . in excess of the loss that he has caused by his own breach"¹⁰¹ whether or not his breach was wilful. Rules of contract law are not rules of punishment; the contract breacher is not an outlaw. His restitution interest deserves protection to the extent that it does not subvert the legitimate interests of the party aggrieved by the breach. The countervailing interests of the injured party are protected in four ways. First, the defaulting party's right to recovery is subject to the aggrieved party's right to offset his damages.¹⁰² Second, the measure of benefit is limited to the actual enrichment and cannot exceed a ratable portion of the contract price.¹⁰³ Third, restitution is denied to the extent that the criteria for a valid liquidated damages clause are present.¹⁰⁴ Fourth, restitution is denied if the aggrieved party seeks and is entitled to specific performance.¹⁰⁵

These choices appear sound. How does one restate the chaos of the case law? The answer can only be to choose the just path. What appears to be just to one generation may be viewed differently by another. Keener and Woodward thought it unsound to award relief to a defaulting party. "Considerations both of justice and of policy forbid its approval," wrote Woodward.¹⁰⁶ My own random poll reveals nearly unanimous disagreement with Woodward's idea of justice in this case. In contract law, unless there is a countervailing public interest, justice means protecting the reasonable expectations of contracting parties. If my poll is accurate, such parties today expect to be paid for their performance even if they breach, and they expect to pay fair value for the performance of others who breach against them. The drafters' choice wisely reflects these expectations.

97. See 1 G. Palmer, *supra* note 41, at 568.

98. *Britton v. Turner*, 6 N.H. 481, 487 (1834).

99. *Restatement* § 357(1)(a).

100. See A. Corbin, *supra* note 39, § 1123.

101. *Restatement (Second)* § 374(1).

102. *Id.* § 374; *id.* comment a.

103. *Id.* § 374 comment b.

104. *Id.* § 374(2).

105. *Id.* § 374 comment a. Two additional rules can perhaps be added to this list. First, specific restitution is unavailable to the breaching party. See note 82 *supra*. Second, any doubts about the measurement of recovery should be resolved against him. See note 50 *supra*.

106. F. Woodward, *supra* note 10, at 274. See also W. Keener, *supra* note 8, at 222.

CONCLUSION

The discussion of restitution for parties in default is an apt place to conclude, because it sounds a note of approval. While I have questioned some of the Second *Restatement's* provisions, I have no doubt that if its rules on restitution are followed, justice will generally result. The main difficulty that I perceive in the new rules on restitution is their treatment of the reliance interest, which the drafters have ejected from the restitutionary path and placed on an uncharted course.