

Title

The Restatement of Restitution [for Unjust Enrichment] (1936): An indispensable doctrinal and practical supplement to the Uniform Trust Code

Text

Lord Mansfield, via the 1750 English case of *Moses v. Macferlan*, had injected unjust enrichment doctrine into the English legal tradition. Long before 1937, which was when the U.S. Supreme Court expressly applied the doctrine in *Stone v. White*, the doctrine had become woven into the fabric of our legal tradition as well.

Whether at law or in equity, unjust enrichment is the principle on this side of the Atlantic that now underlies the substantive equitable remedy of restitution. Restitution as a remedy for a trustee's unauthorized self-dealing is covered in §7.2.3.3 of *Loring and Rounds: A Trustee's Handbook* (2024), which section is reproduced in the appendix below.

The quasi contract, a creature of the law, was all about unjust enrichment. On the equity side, the concept of unjust enrichment evolved as a corollary to both the fiduciary principle and constructive-trust jurisprudence. By the end of the nineteenth century, American legal scholars were busy developing a unified theory of unjust enrichment that would come to straddle and transcend the traditional law-equity divide. The Restatement of Restitution (1936) is the culmination of those efforts. Sad to say, on this side of the Atlantic there are now few lawyers left who are equipped, by formal legal training at least, to appreciate the boldness of the efforts of those realists to colonize the “vast *terra incognita* occupied by the set of legal actions grouped under the impenetrable name of ‘quasi-contract’ and a miscellaneous set of equitable remedies (principally constructive trust)...[M]any American lawyers would be hard pressed even to say what equity is (or was).” Andrew Kull, *Restitution and Reform*, 32 S. Ill. U. L.J. 83, 87 (2007). The Uniform Trust Code, just an aggregation of legislative tweaks to certain aspects of core trust principles, stays out of the Restatement’s bailiwick altogether. The Restitution’s authors are memorialized in the appendix below.

As to the intersection of agency fiduciary law (not trust fiduciary law) and unjust-enrichment jurisprudence, consider the litigation complaint in *X Corp [formerly Twitter] v. Wachtell, Lipton, Rosen & Katz*, Sup. Ct. State of Calif., CGC-23-60746, filed July 5, 2023. X Corp seeks restitution for the defendants’ alleged unjust enrichment. See generally Restatement of Restitution (1936), specifically Chapter 12 (Acquisition of Property by a Fiduciary).

Appendix

The American Law Institute's Committee on Restitution

July 1, 1933-May 8, 1936

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§7.2.3.3 Restitution and Specific Reparation/Restitution, a.k.a.

Restitution in Specie as Substantive Remedies [from *Loring and Rounds: A Trustee's Handbook* (2024)].

General restitution. Restitution is the primary remedy for the wrong of unjust enrichment.³⁸⁵ Unjust enrichment is covered in §8.15.78 of this handbook. “A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.”³⁸⁶ In §7.2.3.1 of this handbook, we cover the procedural mechanics for effecting a restitution for unjust enrichment in the context of a breach of trust, such as the imposition of a constructive trust. The topic of the constructive trust is generally covered in §3.3 of this handbook. “With few exceptions, a claimant entitled to a disgorgement remedy in restitution might instead recover compensation for the injury caused by the defendant’s tort or other breach of duty. Restitution becomes significant when it affords remedial or procedural advantages by comparison with an action for damages.”³⁸⁷ Damages as an equitable relief for breach of trust is covered in §7.2.3.2 of this handbook. Considered in §8.47 of this handbook is the tort of wrongful interference with inheritance or gift and whether equity rather than the law is generally better equipped to remedy the harm caused by such an interference.

The equitable remedy of restitution for unjustified enrichment is concerned with “the receipt of benefits that yield a measurable increase in the recipient’s wealth.”³⁸⁸ The wealth-shifting, however, is not of the

³⁸⁵Restatement of Restitution §1 (1936).

³⁸⁶Restatement of Restitution §1, cmt. a; *see also* Rest. (Third) of Restitution and Unjust Enrichment §1, cmt. a.

³⁸⁷Rest. (Third) of Restitution and Unjust Enrichment §3, cmt. b.

³⁸⁸Rest. (Third) of Restitution and Unjust Enrichment §1, cmt. d.

type that is incident to an enforceable contract.³⁸⁹

At one time restitution was limited to the return of a specific item of property.³⁹⁰ In other words, it was a synonym for specific reparation. “In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner and returning to the status quo, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another.”³⁹¹ Thus, under the right circumstances, restitution would be available to remediate an unauthorized distribution of fungible trust monies.³⁹²

The Restatement (Third) of Restitution and Unjust Enrichment provides that one who is unjustly enriched is “liable in restitution,” an unfortunate definitional innovation in that it implies that the one who is unjustifiably enriched must be at fault, which is not necessarily the case.³⁹³ “There are prominent instances of unjust enrichment in which a negligent claimant recovers from a blameless defendant.”³⁹⁴ The negligent misdelivery of trust property to an innocent non-BFP comes to mind. The topic of BFPs is taken up in §8.15.63 of this handbook.

Restitution in specie or in kind (specific reparation/specific/asset-based restitution). When a trustee wrongfully acquires from the trust estate by sale or otherwise an item of tangible personal property, a parcel of real estate, or a nonfungible item of intangible personal property, the beneficiaries may compel the trustee to put the specific property, or its in-kind equivalent, back in the trust.³⁹⁵ The same applies when a trustee in violation of his duty to the beneficiary transfers specific property or causes property to be transferred to a third person.³⁹⁶ The third person holds the property *in specie* upon a constructive trust for the beneficiaries.³⁹⁷ This type of equitable relief is known as specific reparation, or restitution *in specie* or in kind.³⁹⁸ The Restatement (Third) of Restitution and Unjust Enrichment refers to such remedies as “asset-based” or “property-based.” Specific reparation is not necessarily an exclusive remedy.³⁹⁹ It may be an ingredient in a cocktail of equitable remedies that the court in a given situation mixes in order to make the beneficiaries whole.⁴⁰⁰ This in-kind relief is expansive enough to capture like properties: “If the trustee owns similar property of his or her own, the court may compel the trustee to hold the trustee’s own property subject to the trust. Or the court may compel the trustee to procure similar property for the trust if it is readily available in the market.”⁴⁰¹

³⁸⁹“There are remedies for breach of contract that have frequently been called ‘restitution’ and have sometimes been explained in terms of unjust enrichment ...[The Restatement (Third) of Restitution and Unjust Enrichment, however]... describes them as a part of contract law, not restitution, and it rejects the supposed connection with principle of unjust enrichment.” Rest. (Third) of Restitution and Unjust Enrichment §1, cmt. e.

³⁹⁰Anne M. Payne and Monique Leahy, Restitution and Implied Contracts, 66 Am. Jur. 2d Restitution and Implied Contracts §1; *see also* Rest. (Third) of Restitution and Unjust Enrichment §1, cmt. c (restitution and restoration).

³⁹¹Anne M. Payne and Monique Leahy, Restitution and Implied Contracts, 66 Am. Jur. 2d Restitution and Implied Contracts §1.

³⁹²*See* Rest. (Third) of Restitution and Unjust Enrichment §17, illus. 18.

³⁹³Rest. (Third) of Restitution and Unjust Enrichment §1 (“A person who is unjustly enriched at the expense of another is subject to liability in restitution.”).

³⁹⁴Rest. (Third) of Restitution and Unjust Enrichment §1, cmt. f.

³⁹⁵4 Scott & Ascher §24.11.3 (Specific Reparation); Rest. of Restitution §190 (1936).

³⁹⁶Restatement of Restitution §201(1) (1936).

³⁹⁷Restatement of Restitution §201(1) (1936).

³⁹⁸Restatement of Restitution §4, cmt. d (1936).

³⁹⁹Restatement of Restitution §4(1936) (Remedies).

⁴⁰⁰Rest. of Restitution §4 (Remedies); Rest. of Restitution 640 (1936).

⁴⁰¹4 Scott & Ascher §24.11.3 (Specific Reparation).

Not only the trustee's improper acquisition of trust property can warrant a decree for specific reparation, but also the trustee's improper failure to purchase specific property for the trust. "... [I]f the trustee has improperly failed to purchase specific property, the court may order specific reparation, and compel the trustee to purchase the property, if it is reasonable to do so, to pay out of the trust fund only so much as the property would have cost at the time the trustee should have purchased it, and to pay any deficit out of the trustee's own pocket."⁴⁰² The term "specific restitution" as employed in the Restatement (Third) of Restitution and Unjust Enrichment is only a partial synonym for the term specific reparation: "References to 'specific restitution' are themselves ambiguous. Sometimes the expression is used to describe a remedy that restores the identical asset that the claimant has lost, while at other times it describes a remedy that gives substitute rights in specific property as opposed to money judgment. This Restatement attempts to minimize confusion on this score by avoiding the term 'specific restitution,' except when the claimant recovers the very thing that was lost."⁴⁰³

The potential advantages of seeking an asset-based remedy. Under certain circumstances, a trust beneficiary may be better off seeking an asset-based equitable remedy for a breach of trust than seeking an assessment against the trustee personally for equitable damages. Again, it all depends on the particular set of facts and circumstances. Here are some *possible* advantages in opting for an asset-based equitable remedy:

- Avoidance of valuation litigation
- Capture of postbreach appreciation
- Preference over trustee's creditors
- Accommodation of emotional attachment to a specific asset
- End-running the Uniform Trust Code's statute of ultimate repose (§1005(c)).⁴⁰⁴

Of course, an asset-based remedy for unjust enrichment would not be available if the particular asset in question is no longer identifiable. The process of identifying the particular asset is called "following," a topic we take up in §7.2.3.1.2 of this handbook. The Restatement (Third) of Restitution and Unjust Enrichment describes the process as tracing,⁴⁰⁵ which conflicts with the nomenclature of this handbook. *Tracing*, as the term is employed in this handbook, is the process of tracking property into its product, a topic we take up in §7.2.3.1.3 of this handbook.

⁴⁰²4 Scott & Ascher §24.14 (Liability for Breach of Trust by Failing to Purchase Specific Property). *See generally* §7.2.3.2 of this handbook (assessing damages for a breach of trust).

⁴⁰³Rest. (Third) of Restitution and Unjust Enrichment §1, cmt. e. "The broader set of remedies that is sometimes and more loosely called 'specific restitution' (or what English writers call 'proprietary restitution') appears in this Restatement under the heading 'Restitution Via Rights in Identifiable Property.'" Rest. (Third) of Restitution and Unjust Enrichment §1, cmt. e.

⁴⁰⁴*See generally* §7.1.3 of this handbook (the UTC's five-year statute of ultimate repose forecloses breach-of-trust actions, not necessarily actions for restitution to remedy unjust enrichment).

⁴⁰⁵*See* Rest. (Third) of Restitution and Unjust Enrichment, Chap. 7, Topic 2, Introductory Note.