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Filling in the Gaps in Civil Liability: The Development of Unjust Enrichment in Rhode Island

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Notes and Comments

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I. INTRODUCTION

An understanding of unjust enrichment is necessary for a complete and coherent accounting of civil liability in any jurisdiction. Unfortunately, the current formulation of unjust enrichment, as the basis of liability for and measurement of restitution, is largely misunderstood by courts, advocates and academics alike. Once part of law school curricula in institutions nationwide, resti-

tution has since disappeared and now receives but cursory treatment in general remedies courses.[1] As a result, most lawyers and courts are justifiably confused about its scope and application.[2]

This Comment adds to the body of legal literature clarifying the role and significance of unjust enrichment, an independent body of law, as liability for and measurement of restitution, with a focus on Rhode Island jurisprudence. Specifically, an independent law of unjust enrichment offers three substantial advantages to any system of civil liability. First, the law of unjust enrichment provides a cause of action where none may be had in contract or tort.[3] Second, a law of unjust enrichment allows for the recovery of defendant's gain in excess of plaintiff's loss in certain situations.[4] Finally, the law of unjust enrichment potentially allows a plaintiff to trace and recover property or proceeds via the proprietary remedy of constructive trust.[5]

To illustrate these advantages of unjust enrichment, this Comment analyzes the cause of action as currently treated by Rhode Island courts. Because misunderstanding of unjust enrichment is isolated to no particular jurisdiction, an analysis of Rhode Island jurisprudence lends significantly to a universal comprehension of the common pitfalls and advantages of this powerful cause of action.

As part of the effort to define the parameters of unjust enrichment and illustrate its significance as an independent body of law, this Comment argues that "quasi-contract," or "contract implied-in-law," should be stricken from the modern legal vocabu-

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1. *See* RESTATEMENT OF THE LAW THIRD: RESTATEMENT OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT xv-xvi (Discussion Draft 2000) [*hereinafter* THIRD RESTATEMENT]; *see also* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989) ("Few law schools teach a separate course in restitution, no restitution casebook is in print, and scholarship in the field is largely devoted to specific applications.").

2. *See* THIRD RESTATEMENT, *supra* note 1, at xv-xvi; Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1191 (1995) (commenting that most lawyers associate the term restitution with criminal law, not a distinct mode of civil liability based on unjust enrichment); Laycock, *supra* note 1, at 1277 ("In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground.").

3. *See infra* Part II.B.1.

4. *See infra* Part II.B.2.

5. *See infra* Part II.B.3. For a definition of constructive trust, see *infra* text accompanying note 39.

lary. Historically, the term quasi-contract was employed to catalogue various "common counts," causes of action available in the English law courts.[6] It must be stressed, however, that the actions comprising quasi-contract were based on unjust enrichment liability, *not* contractual theories.[7] Uncertainty as to the semantic distinctions between quasi-contract, contract implied-in-law and contract implied-in-fact, coupled with a common law that equates unjust enrichment with quasi-contract, invites arbitrary labeling of either cause of action. Moreover, a jurisdiction that views quasi-contract as legally tantamount to unjust enrichment inhibits the development of unjust enrichment as an independent body of law.

This Comment begins with a brief exposition of the law of unjust enrichment as proposed in the discussion draft of the Restatement (Third) of the Law of Restitution and Unjust Enrichment (Third Restatement). The next section discusses the law's scope, followed by a further explication of the advantages of unjust enrichment. Part III undertakes an analysis of unjust enrichment in Rhode Island. Part IV concludes that realization of a coherent, independent law of unjust enrichment requires elimination of quasi-contract from the legal vocabulary.

II. THE MODERN VIEW OF UNJUST ENRICHMENT

A. *Overview of an Independent Law of Unjust Enrichment*

The current legal environment entertains a variety of meanings and interpretations of the term "restitution." While restitution is often prescribed to mandate criminal reparations or remedy liability in contract or tort, neither application sufficiently conveys the substantive import of modern restitution.[8] Instead, "most of what is covered by the law of restitution might more helpfully be called the law of unjust or unjustified enrichment."[9]

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6. *See* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1600 (2002).

7. *See id.*

8. *See* THIRD RESTATEMENT, *supra* note 1, ch.1, § 1, at 12-13.

9. *Id.* at ch.1, § 1, 7. The Third Restatement points out that a distinction must be drawn between the terms "unjust enrichment" and "unjustified enrichment." The term "unjust enrichment" connotes notions of *a priori* morality borne from dictum found in *Moses v. Macferlan* that "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged

The American Law Institute, in an ongoing effort to produce a Third Restatement, has defined restitution primarily as liability for and measurement of unjust enrichment.[10] Unjust enrichment is "[t]he retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected."[11] Thus, this Comment focuses on unjust enrichment as the basis of liability in restitution – a body of law parallel to contract and tort – in accord with the Third Restatement.[12]

In addition to comprising the foundation for the Third Restatement, this formulation of restitution finds support in current legal academia.[13] Indeed the proposed title of the Third Restatement incorporates both restitution and unjust enrichment to un-

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by the ties of natural justice and equity to refund the money." 97 Eng. Rep. 676, 681 (1760); *see also* THIRD RESTATEMENT, *supra* note 1, ch.1, § 1, at 1-2. However attractive in principle, such a broad interpretation of unjust enrichment necessarily leads to the mistaken conclusion that restitution is available in *all* instances of unjust enrichment. This is not the case. Restitution is available only where there exists "unjustified enrichment" – "enrichment that lacks an adequate legal basis." *Id.* ch.1, § 1, at 3.

10. *See generally* THIRD RESTATEMENT, *supra* note 1, ch.1.

11. BLACK'S LAW DICTIONARY 1536 (7th ed. 1999).

12. *See* THIRD RESTATEMENT, *supra* note 1, ch.1, § 1, at 12-13 ("[R]estitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract."); *see also* Kull, *supra* note 2 at 1192-93; Murphy, *supra* note 6, at 1582.

13. *See* Kull, *supra* note 2, at 1193 ("The modern consensus puts unjust enrichment at the heart of liability in restitution . . . ."); *see generally* THIRD RESTATEMENT, *supra* note 1, ch.1, § 1. However, it is important to note that current academia promulgates at least two alternate formulations of restitution. At one end of the spectrum, Peter Birks has suggested that restitution is exclusively remedial in nature. Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1767 (2001) (aligning himself as a "multicausalist[], [one] who believes that restitution is the law's response to a number of different causative events"). A position falling between Birks's and the definition adhered to in this Comment is a theory advanced by Douglas Laycock, suggesting that restitution, in fact, is both a liability-based body of law and a remedial tool. Laycock, *supra* note 1, at 1279. Such lack of consensus surrounding the appropriate formulation of restitution has undoubtedly been a factor in the misguided application of unjust enrichment. *See* Kull, *supra* note 2, at 1194 ("Disagreement at this basic level about the content of the law of torts or the law of contracts would be unthinkable . . . because they have acquired stable conventional definitions (as restitution has yet to do).").

derline the interdependence inherent in the relationship of these terms.[14]

B. *The Advantages of Unjust Enrichment*

Understanding unjust enrichment has paramount significance for a complete accounting of civil liability in a given jurisdiction.[15] Recognition of unjust enrichment as a substantive body of law affords a party a cause of action where none may be had in contract or tort.[16] In addition, the remedy of restitution – measured by defendant's gain rather than plaintiff's loss – may be a more attractive remedy than damages in tort.[17] Finally, unjust enrichment allows a plaintiff to trace and recover property or proceeds that have either been transformed or lie with a third party.[18]

1. *When Unjust Enrichment is an Exclusive Means of Recovery*

Unjust enrichment is most easily comprehended when it is the only mode of recovery available to a plaintiff. According to the Third Restatement, the law of unjust enrichment comprises the sole basis for liability in "transfers subject to avoidance,"[19] such as the mistaken payment of money not due, mistaken improvements to property, a benefit conferred under fraud or duress, or a transfer under legal compulsion.[20] It is within this first category that

14. THIRD RESTATEMENT, *supra* note 1, ch.1, § 1, at 7. Please note that this Comment will refer to "restitution as liability for and measurement of unjust enrichment" simply as "unjust enrichment" to avoid any confusion between the terms stemming from their unique association with one another.

15. *See* Kull, *supra* note 2, at 1192.

16. *See id.* at 1192-93.

17. *See* THIRD RESTATEMENT, *supra* note 1, ch.1, § 1, at 8; Kull, *supra* note 2, at 1192-93.

18. *See* THIRD RESTATEMENT, *supra* note 1, ch.1, § 56.

19. This is the title given to the first substantive chapter of the Third Restatement. THIRD RESTATEMENT, *supra* note 1, ch.2 Table of Contents.

20. *See id.* Under the second chapter of the discussion draft entitled "Transfers Subject to Avoidance," the Third Restatement lists three subtopics comprising all instances where unjust enrichment may be the sole cause of action available to a plaintiff. *Id.* The first subtopic, "Transfers Induced by Mistake," includes "Invalidating Mistake," "Payment of Money Not Due," "Performance or Discharge of Another's Obligation," "Payment in Discharge of Lien," "Benefits Other Than Money," "Mistaken Improvements," "Mistake in Gifts Inter Vivos" and "Mistake in Impression." *Id.* The second subtopic, "Other Instances of Defective Consent," lists "Fraud and Misrepresentation: Rescission," "Duress," "Undue Influence" and "Incapacity of Transferor" as

unjust enrichment affords a plaintiff a cause of action where none may be had in either contract or tort.[21] Where a nonconsensual transfer is "void or voidable at the election of the transferor . . . because it has been induced by mistake, fraud, duress, or other invalidating cause," unjust enrichment will be the sole basis for recovery.[22]

Andrew Kull, the Reporter for the Third Restatement, has labeled the mistaken payment of money as the prima facie case of unjust enrichment.[23] The Third Restatement gives the following as an example of this situation:

> A owes B $100 on an account. By mistake, A pays B $200. There is no contract between A and B establishing a duty to refund a payment not due. B's obligation to refund the overpayment is a liability in restitution.[24]

As this example makes clear, A has no recourse in either contract or tort to recover the excess $100 paid to B. B's liability is defined and measured by the amount he was unjustly enriched at the expense of A; thus B is liable to A in restitution for $100.

2. *Availability of Defendant's Gain When it Exceeds Plaintiff's Loss*

The second significant advantage of unjust enrichment is the potential requirement that a defendant disgorge any gain that may exceed a plaintiff's loss. In other words, when a plaintiff may maintain concurrent actions in tort and unjust enrichment, recovery for unjust enrichment might exceed recovery in tort.[25]

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contents. *Id.* The final subtopic, "Transfers Under Legal Compulsion," includes "Judgment Subsequently Reversed or Avoided" and "Recovery of Tax Payments." *Id.*

21. *See* Kull, *supra* note 2, at 1192 ("[T]here are important instances of liability that contract and tort, conventionally defined, cannot adequately explain. In some cases, a theory of unjust enrichment provides the only available explanation of why the defendant is liable at all.").

22. THIRD RESTATEMENT, *supra* note 1, ch.1, § 1, at 8; *see also id.* ch.2.

23. Kull, *supra* note 2, at 1228.

24. THIRD RESTATEMENT, *supra* note 1, ch.1, § 1, at 9.

25. *See id.* ch.1, § 3, at 24 ("As a practical matter, therefore, the claim in restitution will have independent significance chiefly in those cases where the benefit to the defendant from defendant's wrongdoing exceeds the injury to the plaintiff . . . .").

Notably absent from this discussion is the analogous situation in contract law, when a plaintiff has concurrent claims in both contract and unjust enrichment. There is a simple reason for this omission. Voluntary transfers – those based on enforceable promises, either express or implied-in-fact – have, by definition, contemplated value. Therefore, even in the presence of conscious wrongdoing (i.e., efficient breach) the proper measure of recovery necessarily refers back to the initial agreement because a transactional value has previously been set.[26] Unjust enrichment as juxtaposed with tort, alternatively, appraises value "by external social standards, . . . framed with equal logic in terms either of defendant's gain (restitution) or plaintiff's loss (tort)."[27] For these reasons, when an express or implied-in-fact contract exists between two parties, contract law will take precedence in determining the outcome of the case.[28]

Because the amount of recovery in unjust enrichment is measured by defendant's gain as opposed to plaintiff's loss, generally when a defendant has consciously wronged a plaintiff, any amount in excess of the benefit taken at plaintiff's expense may be recovered. Defendant's gain, however, may potentially be less than, equal to or greater than plaintiff's loss.[29] For instance, consider a thief who steals $100.00 from an unsuspecting victim and stows the cash away. Recovery in tort is exactly that in unjust enrichment: namely $100.00. However, should the same thief invest the $100.00 and realize a profit from the investment, recovery in unjust enrichment would exceed recovery in tort.[30] When defen-

26. *See* Kull, *supra* note 2, at 1209 n.54 ("The attempt to identify unjust enrichment in a contractual context inevitably dissolves into contract interpretation . . . because we have no standard by which to measure either justice or injustice in a contractual exchange apart from the parties' agreement, actual or imputed.").

27. *Id.*

28. *Id.* at 1209; *accord* THIRD RESTATEMENT, *supra* note 1, ch.1, § 2, at 21 ("Contract is incomparably superior to restitution as a means of regulating most voluntary transfers because it eliminates, or minimizes, the fundamental difficulty of valuation. Considerations of justice as well as efficiency require, therefore, that voluntary transfers be made pursuant to contract whenever reasonably possible.").

29. *See* Murphy, *supra* note 6, at 1589 & n.66.

30. When a defendant has realized additional gains directly flowing from money or property taken from a plaintiff with knowledge of her wrongdoing, the plaintiff is often entitled to disgorgement of those additional gains.

dant's gain is less than or equal to plaintiff's loss, pursuing a cause of action in unjust enrichment will be undesirable since, generally speaking, plaintiff's loss can be recovered under traditional tort or contract law.[31]

When defendant's gain exceeds plaintiff's loss, a cause of action in unjust enrichment will be most attractive to a plaintiff. For example, a defendant may have used the initial benefit obtained at the plaintiff's expense to realize additional assets. This surplus is often referred to as profits, which a defendant is required to disgorge upon a showing of conscious wrongdoing.[32] It is only in unjust enrichment that a plaintiff may recover these defendant gains; a cause of action in tort is remedied exclusively by recovery of the plaintiff's loss.[33]

The rationale underlying a defendant's duty to disgorge all realized gain when he has acted as a conscious wrongdoer is twofold: deterrence and liability. The Third Restatement recognizes the potential for a defendant to discount unjust enrichment claims as mere costs of doing business if recovery in unjust enrichment were limited to plaintiff's loss.[34] To deter such behavior and to highlight the import of the underlying tort claim, a conscious wrongdoer must disgorge anything in excess of the initial benefit to exact a proportionate sanction. Because disgorgement is such a

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31. Obviously, this formulation of defendant's gain is redundant. *See* THIRD RESTATEMENT, *supra* note 1, ch.1, § 1, at 10. The Third Restatement explicitly recognizes that where defendant's gain equals plaintiff's loss and can be recovered under either unjust enrichment or tort or contract, the defendant has "duplicative liability." *Id.* As such, the Third Restatement omits any mention of such "duplicative liability" since its genesis has an alternate source outside of unjust enrichment. *Id.*

32. *Id.* ch.1, § 3, at 24; *see, e.g., id.* at 23-25 (referring to realized "profits" to describe defendant's gain in excess of the original benefit). While a defendant's excessive gain is commonly referred to as "profit," this Comment will instead exclusively refer to any surplus as "defendant's gain" to avoid any confusion with alternate definitions of the word "profit."

33. *See id.* It is essential to note that while defendant is simultaneously liable in tort and unjust enrichment, his gains in excess of the initial benefit are only recoverable in an action for unjust enrichment. *Id.* This distinction is the essence of this second advantage of unjust enrichment.

34. *See id.* Unjust enrichment "requires full disgorgement of profits by a conscious wrongdoer, because any lesser liability would provide an inadequate incentive to contract." *Id.* ch.1, § 3, at 25. In other words, if a defendant was only liable for plaintiff's loss in such situations, there would be no motivation for the defendant to enter a legally cognizable agreement for the same benefit with the plaintiff. *See id.*

drastic remedy, however, conscious wrongdoing is a prerequisite to recovery of defendant's gain in excess of plaintiff's loss.[35]

Disgorgement can also be explained in terms of liability; while tort law measures liability by the extent of nonconsensual harm inflicted upon a plaintiff, unjust enrichment measures liability by the extent of benefit conferred upon a defendant (defendant's gain) at a plaintiff's expense.[36] As Kull aptly notes, "Whenever the law gives a remedy measured by the defendant's gain rather than the plaintiff's loss, a duty to disgorge unjust enrichment will explain the defendant's liability more readily . . . than will a duty merely to refrain from injuring others."[37]

The availability of disgorgement of defendant's gain is important for two reasons. First, a jurisdiction that prefers tort to unjust enrichment due to unfamiliarity may be prone to summarily dismiss unjust enrichment claims where the evidence clearly demonstrates a tort has been committed. In such a case, if the defendant is a conscious wrongdoer, dismissal would potentially preclude a plaintiff's full recovery of the defendant's gain. Similarly, the advocate who does not fully comprehend the scope of recovery available in unjust enrichment may view the two causes of action as substantively identical, potentially denying her client a more attractive remedy. A simple hypothetical is illustrative. Suppose Adam has purchased a winning lottery ticket for $1. Eve, without Adam's consent and before the drawing, takes the ticket and, after the drawing, claims a $5,000 award. Adam suffers no physical harm from Eve's act. Eve is liable in tort to Adam for $1; however, Eve is simultaneously liable in unjust enrichment to Adam for $5,000. Since Eve's gain was the result of conscious wrongdoing – the nonconsensual transfer of Adam's lottery ticket – Eve must disgorge her winnings. Otherwise, Eve's retention of $4,999.00, after Adam's recovery in tort, would constitute unjust enrichment at Adam's expense.

3. *Tracing Property and Proceeds*

A third advantage of unjust enrichment allows a plaintiff to trace and recover her property or proceeds wrongfully obtained by

35. *See id.* ch.1, § 3, at 25.
36. *Id.* ch.1, § 2, at 15.
37. Kull, *supra* note 2, at 1193.

a defendant that have either changed form (e.g., embezzled monies used to purchase property) or lie with a third party (e.g., embezzler gives proceeds to another).[38] Constructive trust is "[a] trust imposed by a court on equitable grounds against one who has obtained property by wrongdoing, thereby preventing the wrongful holder from being unjustly enriched."[39] This proprietary remedy is generally invoked in these instances, offering a return of property or a refund of money rather than a damage award.[40]

The ability for a plaintiff to trace property or proceeds wrongfully obtained by a defendant is significant to a law of unjust enrichment in two situations. The first, referred to as a "simple two-party contest" by the Third Restatement, occurs when a "claimant has traced misappropriated property into its product, held by [a single] defendant, and the remedy is a declaration that the defendant holds the new property in constructive trust."[41] The established constructive trust allows the plaintiff to obtain the new property held by the defendant.[42] Consider the following example from the Third Restatement:

> B embezzles $50,000 from A and invests the money. A traces the stolen funds into shares now worth $200,000. In a two-party contest between A and B, A is entitled to a declaration that B holds the shares in constructive trust for A.[43]

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38. THIRD RESTATEMENT, *supra* note 1, ch.1, § 4, at 28-31.

39. BLACK'S LAW DICTIONARY 1515 (7th ed. 1999); *see also* THIRD RESTATEMENT, *supra* note 1, ch.1, § 4 at 28.

40. *See id.* ch.1, § 4, at 29 (explaining "why and when restitution allows a proprietary remedy as opposed to a simple money claim"). The Third Restatement suggests that the proprietary remedy of constructive trust affords more complete and efficient recovery because the court avoids the necessary task of valuation inherent in awarding a pecuniary equivalent. *Id.* This is not to say, however, that a court is without the power to issue a money judgment as an alternative. *See id.* ("The court could give a money judgment for the value of the new property . . . .").

41. *Id.*

42. *Id.* The property is labeled *new* because in many instances the property wrongfully taken from the plaintiff will not be in the identical form when the constructive trust is established as it was when it was obtained by the defendant.

43. *Id.* ch.1, § 4, at 30. Note here that disgorgement of the $150,000 realized from the investment is available to prevent the defendant's unjust enrichment at the plaintiff's expense. Compare this situation to that of the "multi-party contest" discussed below where disgorgement is unavailable

Thus, the court awards the plaintiff the shares.

A second situation where constructive trust significantly affects unjust enrichment is in a "multi-party contest" where the "claimant [is competing] with other creditors and potential creditors of the initial transferee."[44] In this situation, the primary goal of unjust enrichment is to create a preference for the plaintiff above the transferee's creditors when those creditors would be unjustly enriched by the retention of any property or proceeds wrongfully obtained from the plaintiff.[45] Consider the following example from the Third Restatement:

> A is induced by fraud to convey Blackacre to B. B declares bankruptcy, and B's bankruptcy trustee claims Blackacre as part of the bankruptcy estate. . . . [The] two-party contest has been supplanted by a new restitution contest, between A on the one hand and B's general creditors on the other. "Strong-arm clause" permitting, A recovers Blackacre by means of a declaration that B holds the property in constructive trust for A. The remedy is granted because the alternative would be a nonconsensual transfer from A to the general creditors, resulting in the unjust enrichment of the creditors at A's expense.[46]

As the above example illustrates, unjust enrichment provides a plaintiff with the means of reclaiming her property held by defendant.

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when the plaintiff attempts to recover from a defendant's creditors. *See infra* notes 44-46 and accompanying text.

44. *Id.* ch.1, § 4, at 29.

45. *Id.*

46. *Id.* ch.1, § 4, at 30. As this example illustrates, when a claim for unjust enrichment is made and the remedy is in constructive trust but involves the defendant's creditors, disgorgement is generally unavailable if the creditors are the rightful parties in interest to the defendant's debt. The Third Restatement explains that the purpose of constructive trust in this context becomes merely to avoid the unjust enrichment of the creditors at the plaintiff's expense. *Id.* at 31. When a claim for restitution involving a defendant's creditors becomes "attenuated and artificial," mere restoration (plus interest) of the initially misappropriated proceeds or property is the appropriate remedy. *Id.*

III. UNJUST ENRICHMENT IN RHODE ISLAND

This Comment will next apply the above principles and advantages of unjust enrichment to ascertain Rhode Island's treatment of the cause of action. A brief explication of the current parameters of Rhode Island's law of unjust enrichment is immediately followed by a discussion of the state's treatment of an unjust enrichment claim when no other cause of action is available (i.e., in contract or tort). This first section is followed by an analysis of the Rhode Island unjust enrichment claim when a plaintiff has concurrently viable actions in both tort and unjust enrichment. A third section examines the relationship between unjust enrichment and contract law in Rhode Island. This discussion analyzes unjust enrichment claims in the presence of legally valid, contemplated agreements. A fourth section summarizes the Rhode Island courts' implementation of the proprietary remedy of constructive trust.

A. *General Principles*

Rhode Island does recognize a cause of action for unjust enrichment[47] as an alternative pleading to contract[48] and tort claims.[49] A Rhode Island court may even occasionally invoke un-

47. *See* Metro Properties, Inc. v. Yatsko, 763 A.2d 617, 621 (R.I. 2000) (recognizing a claim for unjust enrichment but concluding that the cause of action cannot be used to circumvent a statutory requirement); Richmond Square Capital Corp. v. Ins. House, 744 A.2d 401, 402 (R.I. 1999) (holding that plaintiff's recovery of unearned insurance premiums was appropriate under a claim for unjust enrichment); Lehman v. Robitaille, 714 A.2d 605, 606-07 (R.I. 1998) (holding that a subcontractor could not recover from a homeowner under a claim for unjust enrichment for services rendered); Providence Steel & Iron Co., v. Flammand, 413 A.2d 487, 487-88 (R.I. 1980) (holding that a steel supplier could recover from a property owner the value of goods supplied under a claim for unjust enrichment when the general contractor had declared bankruptcy); Cardoso v. Mendes, 1998 WL 321439, *13-15 (R.I. Super. Ct. June 9, 1998) (invoking the doctrine of unjust enrichment to allow defendants to recover the value of a mortgage less principal payments already made by the plaintiffs).

48. *See, e.g.*, *Yatsko*, 763 A.2d at 619.

49. *See, e.g.*, *Richmond Square*, 744 A.2d at 401 (pleading in unjust enrichment and conversion); Toupin v. Laverdiere, 729 A.2d 1286, 1287 (R.I. 1999) (pleading "unjust enrichment, conversion, unilateral mistake, and wrongful payment"); Hauser v. Davis, 2000 WL 1910031, *1 (R.I. Super. Ct.

just enrichment to allow recovery in the absence of a formal pleading.[50] To prove a claim of unjust enrichment in Rhode Island,

> a plaintiff is required to prove three elements: (1) a benefit must be conferred upon the defendant by the plaintiff, (2) there must be an appreciation by the defendant of such benefit, and (3) there must be an acceptance of such benefit in such circumstances that it would be inequitable for a defendant to retain the benefit without paying the value thereof.[51]

Rhode Island recognizes this cause of action both when a plaintiff has a claim in tort[52] and when a plaintiff has no legally cognizable action in either contract or tort.[53]

Rhode Island defines "benefit" quite broadly, recognizing the traditional formulations of the term – such as services rendered, materials supplied, and money paid – in addition to entertaining more progressive interpretations. At least one court has recog-

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Dec. 21, 2000) (alleging claims of various property right infringements, trespass, tortious interference and unjust enrichment).

50. *See, e.g.*, *Cardoso*, 1998 WL 321439 at *13-15 (resolving a case under a claim of unjust enrichment although not pleaded as a counterclaim by defendants because relief was justified exclusively in unjust enrichment); *but see* Romano v. Retirement Bd. of the Employee's Retirement System of R.I., 767 A.2d 35, 44-46 (R.I. 2000) (holding that a sua sponte order of restitution by a trial judge was inappropriate when this relief was not prayed for by defendant).

51. *Id.* at 673 (quoting Anthony Corrado, Inc. v. Menard & Co. Building Contractors, 589 A.2d 1201, 1201-02 (R.I. 1991)).

52. *See, e.g.*, *Richmond Square*, 744 A.2d at 401-02 (affirming jury awards for both conversion and unjust enrichment). The holding of this case is examined in greater detail below. *See infra* Part III.C.

53. *See, e.g.*, *Toupin*, 729 A.2d at 1288-89 (allowing recovery for a mistaken payment). It is important to note that Rhode Island will not always allow recovery in unjust enrichment when a plaintiff has conferred money upon a defendant under a mistake of fact. If the defendant has changed her circumstances in such a way that restitution would be "unjust and inequitable the loss must be borne by the party making the mistake." *Romano*, 767 A.2d at 45 (quoting Jonklaas v. Silverman, 370 A.2d 1277, 1282 (R.I. 1977)). A change in circumstance precluding restitution may be an assumption of liabilities or obligations, or payment of the money to a third party creditor. *Id.* at 45 (quoting *Jonklaas*, 370 A.2d at 1282). An example of a changed circumstance that will not defeat a prayer for restitution is if the defendant has used the funds to "cover living expenses or to pay preexisting debts." *Id.* at 45 (quoting *Jonklaas*, 370 A.2d at 1282). Andrew Kull has recognized this affirmative defense to a claim of unjust enrichment as "uncontroversial." Kull, *supra* note 2, at 1232.

nized the possibility that avoided costs constitute a benefit sufficient for recovery in unjust enrichment.[54] Further, in accord with contemporary mores, a benefit in the form of domestic services may form a sufficient basis for recovery in unjust enrichment.[55] However, where speculative profits are claimed as the basis for unjust enrichment (i.e., a benefit defendant *may, at his option*, obtain in the future at plaintiff's expense), Rhode Island courts appear unwilling to grant relief.[56] In addition, when a plaintiff has knowledge of the inherent risk involved in a transaction (e.g., plaintiff improves her property pursuant to an agreement premised on the occurrence of a future condition), she will most likely be precluded from recovery in unjust enrichment;[57] thus, Rhode Island courts seem to appropriately disfavor affording relief to an officious intermeddler.[58]

The Rhode Island Supreme Court has designated the appropriate measure of relief for unjust enrichment when services are rendered or materials are provided as the fair and reasonable

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54. State v. Lead Industries Ass'n, 2001 WL 345830, *14-15 (R.I. Super. Ct. Apr. 2, 2001) (refusing to summarily dismiss a claim for unjust enrichment where the benefit conferred was allowing defendants to avoid the costs incident to their business by paying for cleanup and medical expenses related to lead contamination).

55. *See* Doe v. Burkland, 808 A.2d 1090, 1095 (R.I. 2002). Here, the Rhode Island Supreme Court reversed a lower court's grant of summary judgment on claims of breach of implied-in-fact contract and unjust enrichment. *Id.* The Court held that domestic services would suffice as consideration for an implied-in-fact contract, but if such a contract could not be factually implied, the plaintiff could potentially recover the reasonable value of those services in unjust enrichment. *Id.*

56. *See* Bouchard v. Price, 694 A.2d 670 (R.I. 1997). In this case, plaintiffs, survivors of the deceased, brought an action for unjust enrichment, among others, to recover any profits the defendant – convicted of murdering a woman and her two daughters – might realize by selling the rights to his story of the slayings. *Id.* The court held that the plaintiffs could not recover in unjust enrichment because these speculative profits (a) did not constitute a benefit under Rhode Island law, and (b) even conceding they were a legally cognizable benefit the plaintiffs had not conferred the benefit upon the defendant. *Id.* at 672-73.

57. *See* Eastern Motor Inns, Inc. v. Ricci, 565 A.2d 1265, 1272-73 (R.I. 1989) (holding that where plaintiff had made improvements to property with knowledge that its only legal claim to the land was under a purchase and sales agreement whose enforceability was conditioned upon a zoning variance, no recovery in unjust enrichment could be had).

58. This is consistent with the practice of denying relief to the officious intermeddler. *See* THIRD RESTATEMENT, *supra* note 1, ch.1, § 2, at 21-22.

value of the services or materials.[59] Similarly, a plaintiff who has made a payment under a mistake of fact may be able to recover the amount of the mistaken payment, provided the defendant has not sufficiently changed his circumstances by relying on the money.[60] At least one court, however, has exhibited reluctance to recognize the availability of defendant's gain when it exceeds plaintiff's loss, even when the defendant was a conscious wrongdoer.[61] Thus, a plaintiff in Rhode Island may be denied the right to disgorgement of profits in such cases where a defendant has engaged in conscious wrongdoing and realized a profit from this tortious conduct. The implications of this are discussed below.[62]

B. *Unjust Enrichment as a Sole Cause of Action in Rhode Island*

According to Andrew Kull, the prima facie case of unjust enrichment exists when a plaintiff makes a payment to a defendant under a mistake of fact.[63] In such a scenario, there has been no promise between the parties to warrant recovery under breach of contract, and there has been no tort committed, thereby precluding recovery under either mode of liability.[64] Thus, the plaintiff's only avenue of recovery is in unjust enrichment.[65] Of course, mistaken payment does not exhaust the list of circumstances in which a plaintiff may have no other means of recovery than in unjust enrichment; indeed a plaintiff may plead unjust enrichment alternatively to either contract or tort and have either of these latter claims summarily dismissed or barred by an applicable statute of limitations, leaving only the unjust enrichment claim as the sole viable cause of action and means of recovery. What follows is an exposition of Rhode Island jurisprudence where unjust enrichment is a plaintiff's only means of civil recourse.

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59. *See, e.g.*, ADP Marshall, Inc. v. Brown Univ., 784 A.2d 309, 312-13 (R.I. 2001).

60. *See infra* notes 79-90 and accompanying text.

61. *See, e.g.*, Hauser v. Davis, 2000 WL 1910031, *4 (R.I. Super. Ct. Dec. 21, 2000) (holding that because defendant took benefit from plaintiff, it was not conferred upon him and thus recovery was in tort, which was barred by the statute of limitations, not unjust enrichment).

62. *See infra* Part III.B.

63. Kull, *supra* note 2, at 1228.

64. *Id.*

65. *Id.*

In 1999, the Rhode Island Supreme Court specifically dealt with an action for unjust enrichment involving a mistaken payment.[66] Mary and Robert had filed for divorce. A court order prevented the transfer of either parties' assets while the divorce was pending.[67] During this period, however, Robert sold his liquor business and acted as mortgagor for the third party buyer on a $41,000 mortgage.[68] Still during the divorce proceedings, the third party satisfied his debt by paying Robert the full value of the note with financing obtained through plaintiff Toupin, an agent of a major mortgage corporation.[69] The $41,000 was paid to Robert by Toupin, and Robert deposited the money into his checking account.[70] Upon learning of the transfer, Mary contacted Toupin to inquire about the payment made to Robert.[71] Toupin mistakenly responded that the $41,000 remained uncashed.[72] In the course of subsequent litigation to estop Robert from cashing the check, Mary's attorney filed an ex parte motion asking the court to prevent Robert from cashing the check.[73] The court granted the order, but Mary's attorney had added that Toupin was to cut a second check for $41,000 made payable to the Family Court until resolution of the divorce.[74] Upon finalizing the divorce, the Family Court awarded the liquor store proceeds to Mary, and, after she withdrew the sum, Toupin was surprised to discover that his escrow account was short $41,000.[75]

Toupin was faced with a situation where he had mistakenly conferred a benefit upon others in the absence of contractual privity or tortious harm at his own expense. There was no liability in contract law because Robert never made an express promise to pay back any mistakenly received funds, and the facts as given did not demonstrate that Robert acted in a manner implying an

66. Toupin v. Laverdiere, 729 A.2d 1286 (R.I. 1999).
67. *Id.* at 1286.
68. *Id.* at 1287.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

agreement to do so.[76] Likewise, tort law offered no basis for liability because Robert did not steal the funds, nor did he accept them with knowledge that he should not.[77] Thus, the only viable mode of recovery for Toupin was unjust enrichment. The Rhode Island Supreme Court, attributing fault for the mistaken payment to Mary, Mary's lawyer and Robert, affirmed the trial court's ruling that Mary and Robert were jointly and severally liable to Toupin for the mistaken payment.[78]

Perhaps the most salient feature of Rhode Island cases concerning mistaken payment is the stringent application of the "changed position" affirmative defense. As noted above, Rhode Island will allow recovery in unjust enrichment for a mistaken payment only if a defendant has not materially altered his position in reliance on the money paid.[79] The seminal case illustrating the operation of this affirmative defense is *Jonklaas v. Silverman*,[80] in which a stockbroker sued a client to recover mistakenly paid market earnings. The Rhode Island Supreme Court vacated a judgment for the plaintiff and remanded the case, finding that "the defendant was entitled to introduce evidence showing a change in circumstances as a result of the mistake" and concluding that "the action of the trial justice in excluding such evidence as irrelevant was a misconception of law and clearly error."[81]

Likewise, in *Romano v. Retirement Board of the Employee's Retirement System of Rhode Island*,[82] the court reversed a trial

76. This distinction between an express agreement and one implied from the facts of Robert and Toupin's relationship is simply to stress that in either case, Robert's liability would exclusively lie in contract.

77. The only conceivable action in tort here may be found in conversion. However, a successful conversion claim would require that Mary have knowledge that Robert cashed the first payment by Toupin, a fact that is immediately controverted by Toupin's representation that the check had not been cashed.

78. *Toupin*, 729 A.2d at 1289. It is worth noting that the court rejected defendants' argument that Toupin was barred from recovery because the mistaken payment was the result of his own lack of care: "This contention runs afoul of the prevailing view that '[a] person who has conferred a benefit upon another by mistake is not precluded from maintaining an action for restitution by the fact that the mistake was due to his own lack of care.'" *Id.* at 1288-89 (quoting RESTATEMENT OF THE LAW, RESTITUTION § 59 (1937)).

79. *See supra* note 53.

80. 370 A.2d 1277 (R.I. 1977).

81. *Id.* at 1282.

82. 767 A.2d 35 (R.I. 2001).

court's sua sponte order of restitution for unemployment benefits mistakenly paid to defendant Romano. Romano retired from the Rhode Island Department of Transportation (RIDOT) and subsequently accepted municipal employment from the town of Bristol.[83] A municipal director had misinformed Romano, leading him to believe that he could legally collect retirement benefits from RIDOT in addition to his municipal salary.[84] For nearly seven years, Rhode Island paid the defendant in this manner and Romano accepted such payment in violation of a Rhode Island statute; the State subsequently sought recovery of the mistaken payments in restitution.[85] The supreme court held that a factual inquiry into whether the defendant changed his circumstances as a result of the payments must precede any sua sponte order of restitution.[86]

Note that the mere presence of plaintiff negligence will not preclude that plaintiff's recovery in unjust enrichment.[87] For example, in *Jonklaas*, the plaintiff stock broker was permitted to recover in unjust enrichment despite arguable negligence in failing to update his database to reflect the defendant's transferred shares.[88] Similarly, the plaintiff retirement board in *Romano*, while perhaps negligent in its oversight of defendant's double-dipping, was allowed to argue its entitlement to reimbursement

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83. *Id.* at 36-37.

84. *Id.* at 36.

85. *Id.* at 37-38.

86. *Id.* at 44-46; *accord* R.I. Hosp. Trust Nat'l Bank v. Almonte, 1981 WL 386426, *1-2 (R.I. Super. Ct. June 4, 1981) (stating that mistaken payment may be recovered in unjust enrichment "provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund").

87. The court in *Jonklaas* explicitly noted, "The trial justice found that there was a mutual mistake of a material fact and that even though defendant had knowledge of the error he did nothing about it." Jonklass v. Silverman, 370 A.2d 1277, 1281 (R.I. 1977). Indeed, the Rhode Island Supreme Court has noted that "a party who has conferred a benefit upon another by mistake is not precluded from maintaining an action for restitution because the mistake was caused by that party's own lack of care." *Romano*, 767 A.2d at 44 (citing Toupin v. Laverdiere, 729 A.2d 1286, 1289 (R.I. 1999)); *see also Almonte*, 1981 WL 386426 at *1-2 (recognizing negligence by bank in failing to verify a check endorsement resulting in mistaken payment on the check, but concluding that the bank could still recover under unjust enrichment).

88. *See Jonklass*, 370 A.2d at 1281.

via unjust enrichment.[89] Because too often mistake will border on negligence – certainly at some point mistake must be precipitated by an oversight – a requirement that there be an absence of negligence by a plaintiff would preclude recovery in most cases, even those where retention of a benefit obtained at plaintiff's expense would be unjust.

Despite being the prima facie case for unjust enrichment, mistaken payment is not the only situation where the cause of action will be an exclusive remedy. Alternately, a plaintiff may sue for breach of an express or implied-in-fact contract and the court may dismiss the claim for lack of consideration. The Rhode Island Supreme Court entertained such a case in *Doe v. Burkland*.[90] Doe had resided with his partner for nine years, during which time he performed regular domestic services.[91] The two men separated under adverse circumstances and Doe sought injunctive relief to stop Burkland's threats and harassment.[92] Burkland counterclaimed for breach of an express or implied-in-fact contract and unjust enrichment, alleging that the two had an oral agreement to share all property individually acquired during their relationship.[93] The trial court ruled that any agreement between the two men was unenforceable because Rhode Island "does not recognize 'a marital dissolution between unmarried couples, homosexual or heterosexual.'"[94] The supreme court reversed the trial court's summary dismissal of Burkland's counterclaims, holding that his agreement to "'devote his skills, effort, labors and earnings' to assist plaintiff in his career, and that he provided homemaking services, business consulting, and counseling to plaintiff," was sufficient consideration to allow enforcement of either an express or implied-in-fact contract.[95] The court proceeded to indicate that even if the lower court were to find no enforceable contract, Burkland may still have a cause of action in unjust enrichment if "[Doe] acquired certain property with the help of the legitimate services

89. *See Romano*, 767 A.2d at 44.
90. 808 A.2d 1090 (R.I. 2002).
91. *Id.* at 1092.
92. *Id.*
93. *Id.* at 1092-93. The defendant also included claims for promissory estoppel, constructive trust and resulting trust. *Id.*
94. *Id.* at 1093.
95. *Id.* at 1094.

that [defendant] provided to him."[96] On remand, the trial court might not find an express or implied-in-fact contract ever existed between the two men, in which case Burkland's only recourse would be in unjust enrichment.

Unjust enrichment may also provide an exclusive remedy when a concurrent tort claim is barred by an applicable statute of limitations. In *Hauser v. Davis*,[97] the town of Warwick entered Hauser's land and rerouted a stream without permission.[98] The city failed to remedy the resulting swamp area, and Hauser sued the town for various property rights infractions,[99] tortious interference and unjust enrichment.[100] The relevant holding of the court was that the claim for tortious interference was barred by a statute of limitations.[101] The court held that the unjust enrichment claim did not survive summary judgment, concluding that "[the town's] conduct [was] plainly tortious not inequitable,"[102] because Hauser did not confer a benefit upon the town at his own expense, but rather the town *took* the benefit from plaintiff.

The holding is flawed in two respects.[103] First, it assumes that a claim for unjust enrichment cannot exist when a set of circumstances may also give rise to tort liability. This proposition clearly contradicts the Third Restatement which specifically provides that it is precisely in this situation of concurrent liability that unjust enrichment has "particular significance."[104]

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96. *Id.* at 1095.

97. 2000 WL 1910031 (R.I. Super. Ct. Dec. 21, 2000).

98. *Id.* at *1.

99. Namely, plaintiff sued the town for eminent domain, denial of procedural due process, denial of substantive due process and inverse condemnation. *Id.*

100. *Id.* Plaintiff also sought implied contractual indemnification. *Id.*

101. The only claim left intact after the court's statute of limitations analysis was the claim for eminent domain. *Id.* at *3.

102. *Id.*

103. The court's distinction between tortious conduct and a benefit here is questionable. Certainly a plaintiff may maintain a cause of action in unjust enrichment when a benefit has been taken from her as opposed to being conferred; the distinction is not legally cognizable. *See* THIRD RESTATEMENT, *supra* note 1, ch.1, § 3, at 25 (giving, as an example of an unjust enrichment fact pattern, an illustration where one may recover in unjust enrichment when a defendant steals a car and realizes a profit).

104. *Id.* ch.1, § 3, at 24. The Third Restatement notes that it is when a defendant may be liable in both tort and unjust enrichment that the benefits of unjust enrichment become obvious. *See id.* Given this circumstance, recovery in unjust enrichment may exceed recovery in tort due to the availability of

Second, this holding would seem to preclude recovery of defendant's gain in excess of plaintiff's loss in instances of conscious wrongdoing.[105] Since, in effect, the court is denying Hauser recovery in unjust enrichment simply because the town could have been liable in tort had the case been timely commenced, Hauser is denied recovery of defendant's gain. In addition, this holding undermines both the deterrence and liability rationales underlying the availability of disgorgement of defendant's gain when the defendant is a conscious wrongdoer.[106] Concededly, if the town was not a conscious wrongdoer, the distinction is purely semantic since Hauser's recovery would be identical in tort as in unjust enrichment. The distinction becomes critical, however, if Hauser can show scienter by the town, thereby securing his ability to recover any gain the town may have realized in excess of his loss.[107]

This case suggests there may be tension between the law of torts and unjust enrichment in Rhode Island. When a plaintiff has concurrently viable claims in both tort and unjust enrichment, at least the *Hauser* court seems to be unclear as to the scope and potency, and perhaps even the relevance, of unjust enrichment as a substantive cause of action. This, in turn, has the effect of foreclosing a plaintiff's opportunity to recover defendant's gain. The following section explores this dilemma in greater detail.

C. *Tort and Unjust Enrichment in Rhode Island*

Where liability in tort and unjust enrichment overlap, two principles warrant annunciation. First, that any one set of circumstances may give rise to liability in both tort and unjust enrichment, allowing a plaintiff to plead and pursue both causes of action throughout litigation, but ultimately requiring a plaintiff to choose recovery in *either* tort *or* unjust enrichment. Second, in the case of conscious wrongdoing, recovery in unjust enrichment may prove more attractive than tort since the award is quantified by defendant's gain rather than plaintiff's loss.[108] Rhode Island's implementation of these principles is evaluated below.

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defendant's gain, thus making unjust enrichment the more attractive remedy. *See id.*

105. *See supra* Part II.B.2.

106. *See supra* notes 36-37 and accompanying text.

107. *See supra* Part II.B.2.

108. *See* THIRD RESTATEMENT, *supra* note 1, ch.1, § 3, at 24.

Rhode Island courts recognize that claims for unjust enrichment and tort may be plead together, but the jurisprudence fails to indicate whether a plaintiff must choose a theory of liability pre-verdict or a mode of recovery post-verdict. In the landmark case *State v. Lead Industries Ass'n*,[109] the State sued the defendants ("Lead Industries") alleging multiple causes of action including tort and unjust enrichment.[110] The State alleged that it had incurred substantial costs making renovations, sanitizing various public and private facilities, and especially paying for its children's medical care stemming from Lead Industries' ongoing production of lead paint.[111] On Lead Industries' motion to dismiss, the court held that the claim for unjust enrichment, and several others, survived summary dismissal.[112] The court concluded that "[i]t [was] impossible for [it] to determine at [that] stage that the State's lead-related expenditures [had] not added to the defendants', including the LIA's, advantage or saved them from loss;" thus the court was unable to determine, as a matter of law, that the State had not plead a sufficient claim for unjust enrichment.[113]

Although the court allowed claims for tort and unjust enrichment to survive summary judgment and be pursued together in the same action – thereby at least entertaining the potential for concurrent liability – note that ultimately, given the same set of facts, the State can recover under only *one* theory of liability. Upon retrial, the State's potential recovery for unjust enrichment may be more attractive than in tort, and it is precisely at this intersection of civil liability that unjust enrichment becomes salient in a coherent and complete system of non-criminal

109. 2001 WL 345830 (R.I. Super. Ct. Apr. 2, 2001). Labeling this litigation *landmark* may, in fact, be an understatement. When then Attorney General Sheldon Whitehouse initiated this lawsuit in 1999, "[Rhode Island] [was] the first [state] in the country to sue the companies for creating a public nuisance by making and marketing lead-based paints that continue to poison children." Peter B. Lord, *Judge Postpones Lead-Paint Retrial Until April 2005*, Mar. 4, 2004, A1, *available at* 2004 WL 59116324. Indeed there are countless articles concerning the litigation since its inception in 1999 on the *Providence Journal* website. *See generally* http://www.projo.com.

110. *Lead Industries*, 2001 WL 345830 at *1.

111. *Id.* at *1-2.

112. *Id.* at *6-16.

113. *Id.* at *15. This case ultimately ended in a mistrial in 2002. *See* Lord, *supra* note 109. The State has subsequently won the right to relitigate, and Rhode Island Superior Court Judge Michael A. Silverstein has recently postponed this second trial until April 2005. *Id.*

in a coherent and complete system of non-criminal accountability.[114] If Lead Industries is found to have engaged in conscious wrongdoing,[115] Rhode Island may be presented with a situation where recovery in tort, measured by the actual costs incurred by the State to remedy lead-related contamination, is *less* than the State's potential recovery in unjust enrichment, measured by Lead Industries' gain – or the benefit realized as a direct result of being able to avoid paying for what Rhode Island was forced to incur.[116] This amount may be significantly greater than Rhode Island's loss.

Another Rhode Island decision illustrating concurrent tort and unjust enrichment liability is *Richmond Square Capital Corp. v. Insurance House*.[117] Here, Richmond contracted with a demolition company to prepare for the possible destruction of certain property.[118] The demolition company obtained a payment and performance insurance bond from Insurance House, on which Richmond paid the premiums because the demolition company could not afford to do so.[119] When Richmond ultimately decided not to have the property destroyed, they attempted to collect the unearned premiums from the performance bond, and Insurance House refused to pay without permission from the demolition company.[120] Insurance House eventually paid the premiums directly to the demolition company,[121] and Richmond brought suit to recover these funds from the demolition company alleging conver-

114. *See supra* Part II.B.2.

115. It appears that there is evidence available to support a finding of conscious wrongdoing by defendants assuming the second trial reaches the liability phase. Two historians have published a book which suggests defendants were aware of the health risks lead-based paint posed to society, yet continued its production and distribution. *See* Peter B. Lord, *Historians Say Paint Makers Knew About Poisonings*, Oct. 31, 2002, B1, *available at* 2002 WI 22527678. The historians' findings were "based on internal company memos, meeting minutes and reports subpoenaed" for use in another lawsuit. *Id.* at ¶ 5.

116. *See supra* Part II.B.2.

117. 744 A.2d 401 (R.I. 1999).

118. *Id.* at 401. Plaintiff's predecessor, Westminster, actually initiated this action. *Id.* Richmond Square was substituted as Westminster's successor corporation before trial commenced. *Id.* These facts, however, are irrelevant to the analysis for the purposes of this Comment.

119. *Id.*

120. *Id.*

121. *Id.*

sion and unjust enrichment.[122] The jury found for Richmond on both claims, and awarded $22,919.00 in restitution, the amount of the unearned premiums, and an additional $6,000.00 for conversion.[123] The Rhode Island Supreme Court affirmed this award on defendant's subsequent appeal.[124]

While pursuing concurrent actions in tort and unjust enrichment pose no particular problem, concurrent *recovery* – itemizing an award in terms of both tort and unjust enrichment – blurs the boundaries of civil liability. It is unclear from the court's opinion whether these awards arose from the same conduct of the defendant – in which case the court would have impermissibly allowed recovery both in tort and unjust enrichment – or whether the award for the conversion claim was attributable to different circumstances than the award for unjust enrichment. It would be helpful for the court to have delineated clearly the factual circumstances supporting the unjust enrichment award and the different set of facts underlying the conversion claim. What is absolutely crucial is that a plaintiff not recover in both unjust enrichment and tort for the same conduct.

D. *Contract and Unjust Enrichment in Rhode Island*

Where liability in contract and unjust enrichment intersect, two issues merit consideration. Recall that when a single set of circumstances may give rise to liability in both contract and unjust enrichment, contract law is better equipped to offer an appropriate remedy.[125] However, exceptions to this general premise exist. First, when a benefit is conferred that is beyond the scope of a valid agreement, a plaintiff may recover this value in unjust enrichment. Second, if an otherwise valid contract is void or voidable (e.g., an agreement induced by fraud or misrepresentation) then a plaintiff's sole mode of recovery may be in unjust enrichment. The workings of these doctrines in Rhode Island are examined below.

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122. *Id.* Plaintiffs initially sought to recover the unearned premiums only from Insurance House under breach of contract or conversion, but then amended their complaint to include the suit against Ocean State, the demolition company, to recover the premiums under conversion and unjust enrichment. *Id.* The claims against Insurance House are irrelevant for the purposes of this discussion.

123. *Id.* at 401-02.

124. *Id.* at 402.

125. *See supra* notes 26-28 and accompanying text.

In accord with the Third Restatement,[126] Rhode Island does not recognize a claim for unjust enrichment when an enforceable express or implied-in-fact contract exists between two parties.[127] In fact, the supreme court has noted that "[i]t is well settled that where there is an express contract between the parties referring to a subject matter, there can be no implied contract arising by implication of law governing the same subject matter."[128] The reason for such a limitation, as mentioned above, is the problem of valuation. When a valid contract is operative, the measure of unjust enrichment must necessarily refer to the contemplated bargain for value, creating an unnecessary redundancy. [129] Because contract law is far better equipped to deal with contractual disputes, liability in a case where claims for breach and unjust enrichment could be concurrent should be assigned to contract law.[130]

In Rhode Island a party may, in certain circumstances, recover in unjust enrichment for any amount paid or service performed beyond a contemplated bargain, so long as the additional benefit is not so far beyond the scope of the initial agreement.[131]

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126. *See supra* note 28.

127. *See* Fondedile, S.A. v. C.E. Maguire, Inc., 610 A.2d 87, 97-98 (R.I. 1992); Mehan v. Gershkoff, 230 A.2d 867, 869-70 (R.I. 1967); Cazabat v. Metropolitan Property & Casualty Ins. Co., 2000 WL 1910089, *7 (R.I. Super. Ct. Apr. 24, 2000).

128. *Mehan*, 230 A.2d at 870; *Cazabat*, 2000 WL 1910089 at *7. A contract implied-by-law is synonymous with quasi-contract. As is discussed below, Rhode Island equates unjust enrichment with quasi-contract, so the court here is actually saying that an action in unjust enrichment cannot coexist with a valid express agreement. *See infra* Part IV. The Court in *Fondedile, S.A. v. C.E. Maguire, Inc.* gave the following justification for limiting unjust enrichment when an agreement is operative: "It would be unjust after execution of the contract and completion of the work to deprive the [defendant] of the benefit for which it bargained. If the [defendant] was enriched because it made a good deal for itself, the enrichment is not unjust." *Fondedile, S.A.*, 610 A.2d at 98.

129. *See supra* notes 26, 28.

130. *See* Kull, *supra* note 2, at 1209.

131. *See* Keystone Elevator Co., Inc. v. Johnson & Wales Univ., 2002 WL 169195, *9-10 (R.I. Super. Ct. Jan. 17, 2002). For example, liability in unjust enrichment probably would not attach if a defendant, under a valid and enforceable services contract to repair a plaintiff's roof, paves the plaintiff's driveway to facilitate access to the roofing job. The paving was not expressly contemplated within the initial roofing contract, and the conduct is so far beyond the scope of a simple roofing job that defendant will most likely be denied recovery in unjust enrichment.

This rule is in accord with the Third Restatement, which acknowledges that

> [i]mportant instances of restitutionary liability do occur in a contractual context .... These are transactions in which the defendant's liability to pay for a performance actually received has not been specified by a contract that is both valid and enforceable.[132]

The point is illustrated in *Keystone Elevator Co. v. Johnson & Wales University*,[133] where Johnson & Wales hired a general contractor, defendant Agostini Construction Company (ACC), to construct a residence hall, and ACC subsequently employed Keystone to install two elevators.[134] During the construction, ACC was forced to pay one of Keystone's parts vendors for a replacement part because Keystone, alleging dissatisfaction with the vendors' product and performance, had refused to reimburse the vendor.[135] Eventually, Keystone brought suit against ACC to recover unpaid overtime hours, and ACC counterclaimed for the payment to Keystone's vendor.[136] It was uncontroverted that the subcontract assigned all liability for payments to Keystone's vendors to Keystone.[137] The court held Keystone liable to ACC for the vendor payment, noting that the payment was owed to ACC under an unjust enrichment theory, even though the subcontract contemplated that Keystone, rather than ACC, would pay its vendors.[138] In other words, ACC was not an officious intermeddler when it conferred the "benefit" on Keystone (i.e., the payment to the vendor for a necessary part). Keystone had failed to meet its contractual obligation to provide a working elevator in a timely manner. Thus, via unjust enrichment, ACC was entitled to obtain the replacement part directly from the vendor and seek reimbursement from Keystone for the "benefit" of ACC's payment to the vendor.

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132. THIRD RESTATEMENT, *supra* note 1, ch.1, § 2, at 16.
133. 2002 WL 169195 (R.I. Super. Ct. Jan. 17, 2002).
134. *Id.* at *1-2.
135. *Id.* at *2-3.
136. *Id.* at *3.
137. *Id.* at *9.
138. *Id.* at *10. Indeed the subcontract itself was far from silent as to who was to incur the costs of third party suppliers; this burden was affirmatively placed on the plaintiff. *Id.*

Rhode Island courts correctly recognize a claim for unjust enrichment when a contract is void or voidable due to fraud or misrepresentation.[139] The usual remedy in such a case is rescission of the contract, which retains an element of unjust enrichment. *Kalina v. Clarry*[140] is illustrative here. Clarry advertised lakefront property and the Kalinas responded.[141] Clarry sent the Kalinas an offer to sell along with photographs of the lake and cottage.[142] The Kalinas responded with an offer to purchase and enclosed a $1,000.00 deposit to hold the property.[143] Clarry then informed the Kalinas that the photographs she had sent were not actually of her cottage, and the Kalinas wrote to Clarry telling her to hold the transaction pending an on-site inspection of the property.[144] The Kalinas subsequently revoked their offer and asked that their deposit be returned, which Clarry failed to do,[145] and the Kalinas brought an action for restitution in the amount of the deposit. The trial court awarded the Kalinas the amount of the deposit along with a punitive award of $350.00. The supreme court upheld the judgment for restitution, but reversed the punitive award.[146] Li-

139. When an agreement is void or voidable because assent was obtained by fraud or misrepresentation, the induced party may avoid the contract typically through rescission. *See* E. ALLEN FARNSWORTH, CONTRACTS § 4.15, at 260-61 (3d ed. 1999). To rescind a contract in an action at law, most jurisdictions require that the rescinding party first tender her consideration for the agreement before she is entitled to restitution. *See id.* at 263. Rhode Island, as well, recognizes tender as a prerequisite to obtaining restitution under rescission. *See* Cruickshank v. Griswold, 104 A.2d 551, 553 (R.I. 1954) ("[I]n actions at law based upon the rescission of contracts, the general rule is that such rescission must be complete, and the adverse party, whether plaintiff or defendant, placed in status quo, before the bringing of the action or assertion of the defense.").

140. 276 A.2d 280 (R.I. 1971).

141. *Id.* at 282.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 281, 282-83. Obviously the availability of punitive damages in tort actions – usually limited to when a tortfeasor acts maliciously, willfully or wantonly – adds yet another dimension to the unjust enrichment calculus. For instance, it is conceivable that although an action in unjust enrichment may yield more than a tort claim (in the presence of conscious wrongdoing), the behavior of the tortfeasor may be such that the availability of punitive damages on top of the tort award may still exceed recovery for defendant's gain in unjust enrichment. The relationship between punitive awards and unjust enrichment, however, is beyond the scope of this article.

ability in unjust enrichment is appropriate here as ancillary to the action for rescission because once the Kalinas revoked their offer to purchase, Clarry retained the deposit amount while the Kalinas held nothing in consideration.[147]

Rhode Island's jurisprudence tracks the Third Restatement with fair accuracy at the intersection of unjust enrichment and contract liability. Rhode Island courts explicitly defer to contract law to determine liability in the presence of an express or implied-in-fact contract. Further, Rhode Island courts appropriately use unjust enrichment to allow a plaintiff to recover benefits exceeding the scope of a valid contract, assuming the added benefits are reasonably within the scope of the initial agreement. Finally, Rhode Island properly uses unjust enrichment to afford plaintiffs a remedy if a contract to which they are a party is void or voidable.

E. *Tracing Property and Proceeds in Rhode Island*

Recall that unjust enrichment allows recovery of defendant's gain in excess of plaintiff's loss;[148] constructive trust is the tool used to obtain any amount exceeding the initial benefit. The typical unjust enrichment claim often involves an easily ascertainable damage amount, and thus a specific pecuniary award is an appropriate remedy. This mode of recovery, however, can be frustrated in some situations. Money damages may be inappropriate when the amount in question is not readily determinable, or is entirely unascertainable. Furthermore, a plaintiff may prefer to acquire an interest in the property that is the basis for a claim in unjust enrichment rather than its monetary equivalent. Such scenarios would require the imposition of a constructive trust; an equitable rather than legal remedy. The Third Restatement categorizes constructive trust as a proprietary remedy, aptly illustrating its purpose: to trace whatever comprised the basis of the unjust enrichment claim and afford a plaintiff a proprietary right in its present manifestation.[149]

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147. It is evident from this situation, however, that if the defendant had realized a profit from the deposit, rescission alone may not have allowed the plaintiffs to recover defendant's gain. For this reason, an action in unjust enrichment may be the preferred means of recovery here.

148. *See supra* Part II.B.2.

149. THIRD RESTATEMENT, *supra* note 1, ch.1, § 4, at 28-31.

In Rhode Island, "a constructive trust is a relationship imposed by operation of law as a remedy to redress a wrong or prevent an unjust enrichment."[150] As such, a constructive trust may be imposed regardless of the intent of the parties.[151] Because constructive trust is a remedy, a prerequisite to its imposition is proof of unjust enrichment.[152] To successfully establish a constructive trust, a plaintiff must prove either fraud or breach of a fiduciary duty or confidential relationship,[153] and each must be proved by

150. Simpson v. Dailey, 496 A.2d 126, 128 (R.I. 1985) ("The underlying principle of a constructive trust is the equitable prevention of unjust enrichment of one party at the expense of another . . . ."); *see also* Renaud v. Ewart, 712 A.2d 884, 885 (R.I. 1998) (same); Clark v. Bowler, 623 A.2d 27, 30 (R.I. 1993) ("[A] constructive trust arises when a person who holds title to property is subject to an equitable duty to convey it to another if the holder of that property would be unjustly enriched if he or she were permitted to retain it.") (citing Desnoyers v. Metropolitan Life Ins. Co., 272 A.2d 683 (1971)); Bourque v. Goodwin, 1999 WL 813655, *3 (R.I. Super. Ct. Nov. 6, 1999) ("A constructive trust is imposed by operation of law as a remedy to redress a wrong or prevent an unjust enrichment.") (citing Curato v. Brain, 715 A.2d 631, 634 (R.I. 1998)).

151. *See Simpson*, 496 A.2d at 128 ("The device of a constructive trust can be employed independently of the intent of the parties."). Because actual intent is not an issue in determining whether constructive trust is appropriate, evidence proving its necessary elements is adduced by considering the totality of the circumstances surrounding an agreement. Thus, "parol evidence of the agreement is admissible to prove unjust enrichment," and any proof of a contract is incidental. Therefore, "where the plaintiff is not attempting to establish, challenge, or modify the terms of the contract, neither the parol-evidence rule nor the best-evidence rule is applicable." *Id.*; *see also In re* Estate of Hart, 1993 WL 853837, *3-4 (R.I. Super. Ct. July 12, 1993) (holding that a constructive trust in real property is not within the statute of frauds).

152. *See* Grotta v. Grotta, 2002 WL 31324109, *1 (R.I. Super. Ct. Sept. 20, 2002) (noting that in a prior bench decision the plaintiff was denied imposition of a constructive trust, but was awarded $61,865.00 on an unjust enrichment claim); Sullivan v. Connor, 2001 WL 1685594, *2 (R.I. Super. Ct. Dec. 18, 2001) (stating, after denying plaintiff's plea for imposition of a constructive trust, that "[t]his decision is not dispositive of claims, if any, the plaintiff has for unjust enrichment . . . .").

153. *See, e.g.*, Curato v. Brain, 715 A.2d 631, 634 (R.I. 1998) (holding that imposition of a constructive trust requires proof of fraud or breach of a fiduciary duty); Clark v. Bowler, 623 A.2d 27, 29 (R.I. 1993) (holding that to impose a constructive trust the plaintiff has the burden of proving breach of a fiduciary relationship or fraud); J. K. Social Club v. J. K. Realty Corp., 448 A.2d 130, 134 (R.I. 1982) (holding that a constructive trust may be imposed by either proof of fraud or breach of a fiduciary duty); Coastal Finance Corp. v. Coastal Finance Corp. of N. Providence, 387 A.2d 1373, 1378 (R.I. 1978) ("In order for a constructive trust to arise, actual or constructive fraud must be established . . . ."); Sullivan v. Connor, 2001 WL 1685594, *1 (R.I. Super. Ct.

clear and convincing evidence.[154] Where real property is the subject of an unjust enrichment claim, Rhode Island courts have additionally recognized the establishment of constructive trust where "legal title to property was obtained . . . by testamentary devise or intestate succession in exchange for a promise to hold trust."[155]

When a plaintiff seeks imposition of a constructive trust stemming from a breach of fiduciary duty or violation of a confidential relationship, the obvious threshold issue is whether such a duty or relationship ever arose between the parties.[156] In contests involving individuals rather than corporate entities, a familial relationship, while not dispositive of a fiduciary duty, may be probative of its existence.[157] Additional factors bearing on the development of a fiduciary duty may be the extent of one party's reliance on the other, whether promises had been made between the parties, and whether an agency relationship may have developed between the contestants.[158] In the corporate arena, similar factors influence whether a fiduciary relationship exists; most significantly, however, is that Rhode Island does not consider articles

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Dec. 18, 2001) (holding that a plaintiff must prove fraud and/or breach of a fiduciary duty as a prerequisite to imposition of a constructive trust); Lorene v. Burdick, 1994 WL 930968, *3 (R.I. Super. Ct. Aug. 2, 1994) (holding that imposition of a constructive trust is available only upon proof of fraud or "in violation of fiduciary or confidential relationship[s] . . . .").

154. *See Curato*, 715 A.2d at 634 ("The party or parties requesting the imposition of a constructive trust must establish by clear and convincing evidence the existence of fraud or breach of a fiduciary duty."); *Clark*, 623 A.2d at 29 (holding that the burden of proof for fraud or breach of fiduciary duty for the imposition of constructive trust is by clear and convincing evidence); *J.K. Social Club*, 448 A.2d at 134 (same); *Coastal Finance Corp.*, 387 A.2d at 1378 (same).

155. *Simpson*, 496 A.2d at 128; Lorene v. Burdick, 1994 WL 930968, *3 (R.I. Super. Ct. Aug. 2, 1994) (quoting *Simpson*, 496 A.2d at 128).

156. *See, e.g.*, Bourque v. Goodwin, 771 A.2d 900, 901 (R.I. 2001) ("[A] plaintiff must prove the existence of a fiduciary relationship.").

157. *See Simpson*, 496 A.2d at 128; *see also Curato*, 715 A.2d at 634 (holding that no fiduciary relationship had arisen between a woman and her stepdaughters).

158. *Simpson*, 496 A.2d at 129 (noting that in *Cahill v. Antionelli*, 390 A.2d 936 (R.I. 1936), the court found a fiduciary relationship between a brother and sister because she "had always looked to her brother for advice, that the brother had promised but failed to reconvey the property, and that an agency relationship was created when the sister agreed to let the brother act on her behalf to clear up certain liens").

of association determinative of such a duty due to their lack of legal enforceability.[159]

Constructive trust may also be available upon proof of a confidential relationship.[160] While Rhode Island has refused to adopt any bright line requirement for proof of such a relationship,[161] factors such as "the reliance of one party upon the other, the relationship of the parties prior to the incidents complained of, the relative business capacities or lack thereof between the parties, and the readiness of one party to follow the other's guidance in complicated transactions" all bear on the issue.[162] Furthermore, violation of a confidential relationship does not require that a defendant "occupy a position of dominance over a plaintiff."[163]

The elements required to prove fraud for the imposition of a constructive trust on an individual are indistinguishable from those components necessary to erect the same for a corporate entity. Claims for proprietary interests in real property, usually arising from contested intestate orders or conditional conveyances, require "some element of fraudulent conduct by the person in possession of the property in procuring the conveyance in order for a constructive trust to arise."[164] Similarly, the law requires both individuals and corporations to prove actual or constructive fraud in securing legal title.[165]

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159. *J.K. Social Club*, 448 A.2d at 134 (holding that a fiduciary relationship had not arisen between a club and an association it formed to purchase real property because "articles of association do not compose a legally enforceable contract," and no additional evidence bearing on such a relationship was adduced).

160. *See Simpson*, 496 A.2d at 129.

161. *Id.* ("There are no hard and fast rules about when a confidential relationship will be found.").

162. *Id.*

163. *Id.*

164. Curato v. Brain, 715 A.2d 631, 634 (R.I. 1998).

165. Desnoyers v. Metropolitan Life Ins. Co., 272 A.2d 683, 690 (R.I. 1971); *see also* Coastal Finance Corp. v. Coastal Finance Corp. of N. Providence, 387 A.2d 1373, 1378 (R.I. 1978). The court in *Desnoyers* proceeded to qualify this rule:

> If it can be shown that the transferee procured the conveyance by a consciously false representation of fact, a constructive trust will be raised in favor of the transferor. Thus if it is proved that when the transferee promised to reconvey the property he did not intend to fulfill his promise, there is more than a mere promise subsequently broken, there is actual misrepresentation as to the fact of his present

An important case illustrating these principles of constructive trust in Rhode Island is *Simpson v. Dailey*.[166] Defendant Kathleen and her sister-in-law, plaintiff Elizabeth, had purchased matching annuity contracts with Terrence, Elizabeth's deceased husband, using gift money from Kathleen and Terrence's dying mother.[167] Kathleen named Terrence primary beneficiary of her contract, and, as a reciprocal gesture, Terrence named Kathleen the same, but added Elizabeth as a contingent beneficiary.[168] While Kathleen maintained that upon Terrence's death she was to retain the proceeds from the annuity as consideration for taking care of their ailing mother, Elizabeth alleged that Terrence had represented that if he predeceased Kathleen, the monies were to go to Elizabeth and the children.[169] Kathleen retained the proceeds from Terrence's annuity, and Elizabeth brought suit seeking to impose a constructive trust upon those proceeds.[170] The trial court found in favor of Elizabeth, establishing a constructive trust on the proceeds of the disputed contract.[171]

The Rhode Island Supreme Court upheld the trial court's ruling, relying primarily on the existence of a fiduciary relationship between Kathleen and Terrence.[172] Because Terrence had "complete trust and confidence" in his sister, that trust was borne of

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intention. If this is proved, a constructive trust will be raised in favor of the transferor.

Desnoyers, 272 A.2d at 690 (citing 1 SCOTT ON TRUSTS, § 44.1, at 251). Constructive fraud is defined as an "[u]nintentional deception or misrepresentation that causes injury to another." BLACK'S LAW DICTIONARY 671 (7th ed. 1999). *But see* J.K. Social Club v. J.K. Realty Corp., 448 A.2d 130, 134 (R.I. 1982) ("There must be an actual misrepresentation of present intent."). The court in *J.K. Social Club* limited constructive trust by proof of fraud to only proof of *actual* fraud. *Id.* However, the court finds its support for this proposition from the same case which the *Desnoyers* court held that proof of constructive fraud would suffice for the imposition of a constructive trust. *See id.* (citing *Lawrence v. Andrews*, 122 A.2d 132, 135-36 (R.I. 1956), to support its conclusion that only proof of actual fraud will impose a constructive trust); *Desnoyers*, 272 A.2d at 690 (citing *Lawrence* for the proposition that constructive fraud may suffice for constructive trust).

166. 496 A.2d 126 (R.I. 1985).

167. *Id.* at 127. Terrence and Elizabeth's four children were also named plaintiffs in this suit. *Id.*

168. *Id.*

169. *Id.* at 127-28.

170. *Id.*

171. *Id.* at 128.

172. *Id.* at 129.

their relationship to one another, and their familial "relation was a moving cause in influencing [Terrence] to name his sister as a primary beneficiary to ensure the future well-being of his family," the court concluded that Kathleen owed Terrence a fiduciary duty.[173] Her failure to honor Terrence's wishes constituted a breach of that relationship, and her retention of the proceeds stemming from that breach was unjust enrichment.[174] Thus, the appropriate remedy was the imposition of a constructive trust in favor of Elizabeth and her children, allowing them to trace the proceeds of Terrence's annuity to whatever form they ultimately took, or whatever party eventually controlled them – namely Kathleen.

The value of constructive trust is evident in *Guiliano v. Cozzolino*.[175] Guiliano and defendant Cozzolino "orally agreed to associate themselves as partners for the purpose of purchasing real estate, agreeing to share in the payment of taxes thereon and in the proceeds from the sale thereof."[176] Thereafter, the parties split the cost of four parcels of real estate and recorded title in the name of Cozzolino.[177] Cozzolino then proceeded to transfer the four lots to defendants Montellas for $10,000.00 without the consent of the Guilianos, allegedly "to avoid the continual, harassing phone calls [defendant] Cozzolino was receiving" from the Montellas' financier.[178] The Guilianos brought suit against the Cozzolinos and Montellas praying the court order title be transferred back to the partnership;[179] however, it is a claim for unjust enrichment against the Montellas that is relevant for the purposes of this Comment.[180]

After recognizing the enforceability of the oral partnership agreement, the court then addressed the Guilianos' claim for un-

173. *Id.*
174. *Id.*
175. 1992 WL 813595 (R.I. Super. Ct. Aug. 7, 1992).
176. *Id.*
177. *Id.*
178. *Id.* at *2.
179. *Id.*
180. *See id.* at *9 ("[T]he defendants Montella argue that they have not been unjustly enriched by [defendant] Cozzolino's conveyance of land to them for the sum of ten thousand (10,000) dollars.").

just enrichment.[181] In light of an appraisal of the undeveloped property and two offers to purchase the parcel – all significantly exceeding the $10,000 purchase price – the court concluded that the Montellas were unjustly enriched by the conveyance.[182] As such, the court ordered title transferred back to the Cozzolinos "for the benefit of the partnership."[183]

Here the Guilianos were able to trace their property into the hands of the Montellas via unjust enrichment. The court found that Cozzolino did not have the authority to transfer the property under the partnership agreement.[184] Moreover, the court held that the Montellas were not bona fide purchasers for value because the amount they actually paid for the property was so disproportionate to its actual value.[185] Thus, the Montellas held the property in constructive trust for the partnership. Had the Montellas been deemed bona fide purchasers, they would not have been required to transfer the property back to Cozzolino, and the Guiliano's remedy would have been damages against Cozzolino. Unjust enrichment, manifested in constructive trust, allowed the Guilianos to trace the property into the hands of the Montellas. It is imperative to recognize that recovery of the property in this case is likely preferred since damages would probably be measured by the property's fair market value on the date of the conveyance. Since the appraisals and offers to purchase admitted into evidence indicate an increasing property value, reacquisition of the property itself is more attractive.

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181. *Id.* at *7. By finding the oral partnership agreement enforceable, the subsequent transfer to the Montellas was rendered invalid, requiring the property be conveyed back to the Guilianos per statute. *Id.*

182. *Id.* at *9. It is essential to note that the Montellas insisted the purchase for $10,000 was simply to shield Ralph Montella's sister, Cozzolino, "from 'harrassment.'" If the court were to accept this argument, it may have found the express agreement between Cozzolino and the Montellas a product of duress, causing the unjust enrichment claim to trump any cause of action in contract. However, the court specifically noted despite Montella's contention, that it "[found] that this sale between siblings involving 'undeveloped' partnership property would have unjustly enriched Mr. Montella." *Id.*

183. *Id.*

184. *Id.* at *7.

185. *See id.* at *9.

IV. CONFUSION ABOUT TERMINOLOGY

Rhode Island courts have consistently held that "'actions brought upon theories of unjust enrichment and quasi-contract are essentially the same.'"[186] The courts will often invoke a quasi-contractual analysis when a plaintiff brings a claim solely for unjust enrichment.[187] Indeed, the elements required to prove an action in quasi-contract and a claim for unjust enrichment are identical under Rhode Island law.[188] Collectively, this overlap indicates that Rhode Island jurisprudence may not recognize a legal distinction between quasi-contract and unjust enrichment.

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186. Bouchard v. Price, 694 A.2d 670, 673 (R.I. 1997) (quoting R & B Electric Co., Inc. v. AMCO Construction Co., 471 A.2d 1351, 1355 (R.I. 1984)); State v. Lead Industries Ass'n, 2001 WL 345830, *14-15 (R.I. Super. Ct. Apr. 2, 2001) (same); *see also* Anthony Corrado, Inc. v. Menard & Co. Building Contractors, 589 A.2d 1201, 1201 (R.I. 1991); Hauser v. Davis, 2000 WL 1910031, *4 (R.I. Super. Ct. Dec. 21, 2000) ("Unjust enrichment claims usually arise out of implied contracts.").

187. *See, e.g.*, *Bouchard*, 694 A.2d at 672-73 ("The plaintiffs next contend that the trial justice erred by dismissing their claim for unjust enrichment. This Court has held that actions brought upon theories of unjust enrichment and quasi-contract are essentially the same."); *Lead Industries*, 2001 WL 345830 at *14-15 (recognizing a claim only for unjust enrichment, yet noting that "actions brought upon theories of unjust enrichment and quasi-contract are essentially the same"); *Hauser*, 2000 WL 1910031 at *4 ("Count VII purports to allege a claim of unjust enrichment. Unjust enrichment claims usually arise out of implied contracts.").

188. In *Harritos v. Cambio*, the court noted the following:

> To prevail on a claim for unjust enrichment, a plaintiff must show (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the benefit; and (3) acceptance of such benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without paying for it.

1996 WL 936906, *5 (R.I. Super. Ct. Mar. 13, 1996) (citing Landmark Medical Center v. Gauthier, 635 A.2d 1145, 1148-49 (R.I. 1994)). However, the case which the *Harritos* court cites for this proposition, *Landmark Medical Center*, articulated the following as its rule:

> In order to prove a *quasi-contract* it must be shown that: (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant appreciated the benefit, and (3) under the circumstances it would be inequitable for the defendant to retain such benefit without payment of the value thereof.

635 A.2d at 1148-49 (emphasis added). Therefore, at least the *Harritos* court does not recognize any substantive distinction between an action in quasi-contract and a claim for unjust enrichment.

The term quasi-contract was introduced to alleviate confusion pervading the distinction between contract implied-in-law and contract implied-in-fact. [189] Apparently, courts had difficulty identifying the factual circumstances calling for application of either type of non-express agreement.[190] Quasi-contract was meant to displace contract implied-in-law, but courts have been unwilling to let contract implied-in-law fade away, thereby leaving all three terms simultaneously operative.[191] Just as confusion continues between contract implied-in-law and contract implied-in-fact, it is now common between quasi-contract and contract implied-in-fact.[192]

To illustrate this point, consider *K & K Construction, Inc. v. City of Warwick*.[193] The City of Warwick had implemented a municipal program to assist homeowners in updating their septic sys-

189. *See* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.20, at 64 (revised ed. 1993); *see also* WILLIAM A. KEENER, TREATISE ON THE LAW OF QUASI-CONTRACTS, 7 (1893). The evolution of the term quasi-contract is complex. It has its origins in Roman Law, but our modern formulation of a claim for quasi-contract was first recognized in the law courts of England in the seventeenth century. *See* E. ALLEN FARNSWORTH, CONTRACTS § 2.20 (3d ed. 1999). Lord Mansfield subsequently annunciated the legal basis for the modern action for quasi-contract as unjust enrichment: "that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the [benefit]." Moses v. MacFerlan, 97 Eng. Rep. 676, 681 (1760). Indeed, the notion of unjust enrichment as liability for restitution being its own substantive body of law did not officially appear until publication of the First Restatement of restitution. *See generally* RESTATEMENT OF THE LAW OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (1936). Thus, quasi-contract was the only available means for resolving disputes where parties otherwise lacked civil recourse.

The difference between a legally implied contract and one implied from the facts of the case is actually quite stark. *See* FARNSWORTH, *supra* § 3.10, at 132-33 ("[A] contract that results from words is described as 'express,' while one that results from conduct is described as 'implied in fact,' but the distinction as such has no legal consequences."). Because there is no legal distinction between an express contract and a contract implied-in-fact, a contract implied-in-fact necessarily requires assent to be valid. *See id.* However, quasi-contractual obligations usually arise "without any expression of assent and sometimes even against a clear expression of dissent." CORBIN, *supra* §1.20, at 64.

190. *See* KEENER, *supra* note 189, 8-10.

191. *See, e.g.*, K & K Construction, Inc. v. City of Warwick, 693 A.2d 1038, 1039 (R.I. 1997).

192. *See, e.g., id.*

193. 693 A.2d 1038 (R.I. 1997).

tems.[194] The program would loan a prospective patron sixty percent of the purchase price for a new system and pay the patron the additional forty percent as a grant to the eventual contractor.[195] The city accepted an application from the O'Briens', and K&K was the low bidder for the septic job.[196] The O'Briens were dissatisfied with the condition in which K&K left their yard upon installation, so they repaid the City the sixty percent loan amount, and withheld the forty percent grant meant for K&K.[197] K&K sued the City and the O'Briens for breach of contract.[198] The trial justice instructed the jury on the elements of breach of contract, and also on an alternative theory of quasi-contract or unjust enrichment.[199] The jury found in favor of K&K for the full cost of the job.[200] In upholding the trial court's refusal to grant a new trial to the O'Briens, the Rhode Island Supreme Court held the following:

> [W]e believe that the jury could reasonably infer that an implied contract or a quasi-contract had been formed between the O'Briens and K & K and that the value of that contract was $5,000 or alternatively that K & K should recover this amount under an unjust enrichment theory.[201]

The problem here does not lie with the trial justice's jury charge. In fact, the trial justice accurately conveyed the law by recognizing that quasi-contract and unjust enrichment were together alternative claims to breach of contract. The supreme court's characterization of the claims, however, is misleading. It equated implied contract with quasi-contract,[202] and then stated that the *alternative* claim in unjust enrichment was viable. Even assuming the supreme court's reference to implied contract meant contract implied-in-law, the court's own jurisprudence seems to re-

194. *Id.* at 1038.
195. *Id.* at 1038-39.
196. *Id.* at 1039.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. This claim is not entirely incorrect. While the term "implied contract" commonly refers to a contract implied-in-fact, Black's Law Dictionary defines "implied contract" as "1. An implied-in-law contract," or "2. An implied-in-fact contract." BLACK'S LAW DICTIONARY 322 (7th ed. 1999).

fute the assertion that quasi-contract and unjust enrichment are alternative causes of action.[203] Certainly the fact that unjust enrichment is the basis for a claim in quasi-contract forecloses such a position. It is precisely these subtleties between terms that tend to lead courts astray.

Supplanting quasi-contract with the language of unjust enrichment would cure this linguistic confusion. The modern formulation of unjust enrichment has effectively swallowed quasi-contract. Unjust enrichment is broader than quasi-contract, extending to actions beyond the reach of contract implied-in-law.[204] Since unjust enrichment can accommodate all claims in quasi-contract and has applications exceeding the scope of quasi-contract, quasi-contract adds nothing to the law that unjust enrichment cannot provide; its existence is superfluous.

More importantly, however, quasi-contract's mere existence inhibits the development of unjust enrichment as an independent, substantive body of law. In a jurisdiction such as Rhode Island, where the law does not discern any substantive distinction between the two, the designation of either term to resolve a dispute premised on unjust enrichment liability becomes arbitrary. The reasonable inference to be drawn from such a capricious assignment of liability is that unjust enrichment cannot provide anything more than quasi-contract. As illustrated previously, this conclusion clearly is erroneous.

V. CONCLUSION

Unjust enrichment is the basis of liability for and the measurement of recovery in restitution. The law of unjust enrichment is a substantive body of law independent from, and parallel to, contract and tort. It offers several advantages, such as a mode of recourse when recovery in contract or tort are lacking, the availability of disgorgement of profits, and the ability to trace and recover property or proceeds that have either changed form or have been subsequently transferred to a third party. As such, the law of

203. *See supra* note 128 and accompanying text.

204. Recall that since quasi-contract was historically comprised of causes of action founded upon unjust enrichment liability, quasi-contract cannot constitute more than a subset of the law of unjust enrichment or restitution. *See supra* notes 6-7 and accompanying text. Consequently, the modern formulation of unjust enrichment necessarily supplants quasi-contract.

unjust enrichment is a necessary element for a complete system of civil liability in any jurisdiction.

To ensure the development and success of unjust enrichment the term quasi-contract should be stricken from the modern legal vocabulary. Only upon the elimination of quasi-contract can unjust enrichment achieve its rightful status as an independent, substantive body of law, capable of affording all litigants in a given jurisdiction the full panoply of its advantages. The elimination of quasi-contract will not deprive the law of a necessary tool to resolve certain disputes. In fact, as illustrated above, quasi-contract is a superfluous legal fiction premised upon unjust enrichment liability from its inception, and now completely swallowed by the law of unjust enrichment.

The elimination of quasi-contract from the legal vocabulary will put courts and advocates alike on notice that any claim based on liability for unjust enrichment should be pleaded as a claim for unjust enrichment. This will effectively eliminate any confusion in pleading, and draw a definitive line of demarcation between contract law, tort law, and the law of unjust enrichment. Finally, using the language of unjust enrichment rather than quasi-contract will make plain that a plaintiff is entitled to disgorgement of the defendant's profits under a claim for unjust enrichment in the presence of conscious wrongdoing.

Todd Barton[205]

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