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Recognizing Restitutionary Causes of Action and Remedies Under Rhode Island Law

Colleen P. Murphy*

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INTRODUCTION

Restitution is an independent basis of civil liability, parallel to contract and tort. Despite its importance, however, the law of restitution may not be as familiar to lawyers as the law of contract or the law of tort.¹ The purpose of this article is to provide a brief primer on restitution, with respect to the substantive law of unjust enrichment, various restitutionary remedies, and possible defenses to a claim in restitution.

In presenting this overview, I draw from the essential resource on the subject—the Restatement (Third) of Restitution and Unjust Enrichment, published by the American Law Institute in 2011²—as well as pertinent Rhode Island cases. To facilitate reader understanding of the subject, the text of this article focuses on legal concepts rather than case descriptions. Supporting Rhode Island cases are cited extensively in the footnotes. Part I of the article discusses general principles pertaining to the law of restitution; Part II addresses liability in restitution (the cause of action in unjust enrichment); Part III describes restitutionary remedies; and Part IV discusses defenses that are unique to the cause of action in unjust enrichment.

I. GENERAL PRINCIPLES

To provide background for the ensuing discussion of restitutionary causes of action and remedies, this part of the article discusses general principles that pertain to the law of

1. Professor Andrew Kull, the Reporter of the *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (2011), in 2000 lamented that “a substantial portion of the American bench and bar today could not comfortably explain what the ‘law of restitution is’ or how it works.” *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* reporter’s intro. memo., at xvi (Discussion Draft 2000). He attributed the lack of familiarity about restitution in part to the disappearance of a course on restitution from the U.S. law school curriculum in the mid-1960s. *Id.*

2. The American Law Institute has explained the function of Restatements: “Restatements are addressed to courts and others applying existing law. Restatements aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court.” *AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK* 4 (2015), available at <http://www.ali.org/doc/StyleManual.pdf>.

restitution. Besides defining the concepts of “restitution” and “unjust enrichment,” this part also offers distinctive advantages of the unjust enrichment cause of action and of restitutionary remedies. Moreover, although restitution and unjust enrichment often are termed “equitable” in the loose sense of “fairness,” this part makes clear that some forms of restitution are technically “legal” while other forms are technically “equitable.” Finally, this part explains that the law of restitution is subordinate to the law of contract in two principal respects: 1) the terms of an enforceable contract normally displace a claim in unjust enrichment, and 2) non-gratuitous transfers of benefits are expected to be made pursuant to contract whenever reasonably possible.

A. *Restitution and Unjust Enrichment Defined*

The terms “restitution” and “unjust enrichment” are interchangeable to denote a basis of civil liability, distinct from contract or tort, that is premised on the basic principle that: “A person who is unjustly enriched at the expense of another is subject to liability in restitution.”³ To be “unjustly enriched” is to obtain an economic benefit (such as money, property, a service, a saved expenditure, or a discharged obligation) when that benefit was transferred without an adequate legal basis.⁴ The Rhode Island Supreme Court has recognized unjust enrichment as a

3. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1; *see also* *Zambarano v. Ret. Bd. of the Emps.’ Ret. Sys. of the State of R.I.*, 61 A.3d 432, 438 (R.I. 2013) (“Liability in restitution derives from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant.” (quoting RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a)).

4. *See, e.g.*, *APG, Inc. v. MCI Telecomms. Corp.*, 436 F.3d 294, 306 (1st Cir. 2006) (applying Rhode Island law to conclude that an unjust enrichment claim could be asserted by a subdistributor against a seller for time and effort expended by the subdistributor to sell products of the seller); *Metro. Life Ins. Co. v. Drainville*, CA 07-427 ML, 2009 WL 1209473, at *4 (D.R.I. May 4, 2009) (noting that “benefit” is construed broadly under the doctrine of unjust enrichment but expressing doubts that refraining from legal action constitutes a “benefit”); *Narragansett Elec. Co. v. Carbone*, 898 A.2d 87, 99 (R.I. 2006) (stating that materials, services, improvements to property, and stolen utilities are examples of benefits within the law of unjust enrichment); *Dellagrotta v. Dellagrotta*, 873 A.2d 101, 113–14 (R.I. 2005) (home improvements constituted a benefit under the law of unjust enrichment); *Landmark Med. Ctr. v. Gautier*, 635 A.2d 1145, 1148–49 (R.I. 1994) (medical services constituted a benefit under the law of unjust enrichment).

distinctive cause of action and stated its fundamental elements:

[U]njust enrichment . . . can stand alone as a cause of action in its own right. To recover for unjust enrichment, a claimant must prove: (1) that he or she conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances “that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof.”⁵

The cause of action in unjust enrichment historically has been recognized under different names such as “implied-in-law contract” and “quasi-contract.”⁶ (A claim for “quantum meruit” technically can be either a contract claim or an unjust enrichment claim, depending on the circumstances.)⁷ The nomenclature of

5. *Dellagrotta*, 873 A.2d at 113 (alteration in original) (citations omitted) (quoting *Bouchard v. Price*, 694 A.2d 670, 673 (R.I. 1997)). Regarding the second requirement for a cause of action in unjust enrichment, the Rhode Island Supreme Court has held that “a benefit is ‘appreciated’ when the defendant has used it in a way that has value to the defendant.” *R.I. State Pier Props., LLC v. Cargill, Inc.*, CA No. 12-198S, 2013 WL 5509200, at *8 (D.R.I. May 31, 2013) (report and recommendation) (citing *Carbone*, 898 A.2d at 99–100), *adopted in part and rejected in part by* R.I. State Pier Props., LLC v. Cargill, Inc., C.A. No. 12-198S, 2013 WL 5205800 (D.R.I. Sept. 13, 2013).

6. *See, e.g.*, *Multi-State Restoration, Inc. v. DWS Props., LLC*, 61 A.3d 414, 418 (R.I. 2013) (“This Court has held that actions brought upon theories of unjust enrichment and quasi contract are essentially the same.” (quoting *Laurence v. Sollitto*, 788 A.2d 455, 456 (R.I. 2002)) (internal quotation marks omitted)); *Hurdis Realty, Inc. v. N. Providence*, 397 A.2d 896, 897 (R.I. 1979) (equating “implied in law contract” with “quasi-contract”).

7. A recent decision of the Rhode Island Supreme Court, *Process Engineers & Constructors, Inc. v. DiGregorio, Inc.*, 93 A.3d 1047, 1052–53 (R.I. 2014) has some confusing language that attempts to distinguish between quantum meruit and unjust enrichment, citing a Connecticut appellate court case and *Black’s Law Dictionary*. The RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT more clearly explains the potential overlap between quantum meruit and the cause of action in unjust enrichment:

If it is appropriate to conclude that a promise to pay reasonable compensation (usually measured by market price) was part of the parties’ agreement—although nowhere expressed in so many words—a recovery called “quantum meruit” enforces an implied term of an actual contract. Such an obligation is part of contract law, not restitution [Q]uantum meruit . . . was equally available to recover the value of benefits conferred in cases where the defendant

“quasi contract” and “implied-in-law contract” is misleading, however. The cause of action in unjust enrichment does not require a contract; no prior consent between the parties, either express or implied, is necessary.⁸ Thus, it is better to use the terms “unjust enrichment” or “restitution,” making clear that this basis of civil liability is independent of contract law.

Very importantly, in contrast to contract or tort causes of action, the cause of action in unjust enrichment in many contexts does not require that the recipient of the benefit have been at fault. For example, a claimant who mistakenly conferred a benefit on a recipient may be entitled to restitution of the benefit itself or the value of the benefit.⁹ Even if the recipient was not at fault in receiving the benefit or even if the claimant was the one at fault in conferring the benefit, the claimant may recover in restitution if the recipient was unjustly enriched. Moreover, a cause of action in unjust enrichment may exist even if the claimant has not suffered an economic loss; the cause of action depends instead on whether the recipient has unjustly received an economic benefit from the claimant.¹⁰

B. *Distinctive Advantages of the Unjust Enrichment Cause of Action and of Restitutionary Remedies*

Restitution, in both its substantive and remedial aspects, has several distinctive advantages over other civil causes of action and

had made no promise, express or implied. A classic example is the action to recover the value of medical services to an unconscious patient. . . . No lawyer today would describe the patient’s obligation as contractual, but restitution in such cases—being pleaded in quantum meruit—was long said to be based on a “contract implied in law.”

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. e.

8. See, e.g., *Hurdis Realty*, 397 A.2d at 897 (equating “implied in law contract” with “quasi-contract” and stating that liability under either label “is implied by the law and arises from the facts and circumstances irrespective of any agreement or presumed intention”).

9. See *infra* Part II.A.1.

10. An example is a fiduciary that uses the beneficiary’s money for the fiduciary’s own purposes, makes a profit with that money, and restores the beneficiary’s money in full before the legal violation is discovered. Even though the beneficiary did not sustain an economic loss, the fiduciary was unjustly enriched by wrongfully taking the money from the beneficiary, and the fiduciary will be required to disgorge to the beneficiary the profit gained. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. b.

remedies. The law of restitution is advantageous in the following circumstances:

- Claimant's only cause of action is unjust enrichment (i.e., the circumstances do not present a tort, contract, or statutory cause of action)
- Recipient's gain from receiving a benefit at Claimant's expense exceeds Claimant's loss
- Recipient's gain is easier to prove than Claimant's loss
- Claimant wants to rescind a transaction (such as a contract) and obtain restitution of any benefit that Claimant conferred pursuant to the transaction
- Recipient is insolvent and Claimant is able to identify and obtain a specific asset held by Recipient in which Claimant is deemed to have an equitable interest
- Claimant seeks to obtain its asset or the traceable product of its asset in the possession of a third person

Part II, discussing the cause of action in unjust enrichment, and Part III, discussing restitutionary remedies, will delve into the required elements for any of the foregoing advantages to be realized.

C. *Restitution May be "Legal" or "Equitable"*

The cause of action in unjust enrichment has been loosely termed "equitable" in the general sense of achieving fairness.¹¹

11. In apparently the first case to articulate the general principle of unjust enrichment in English law, *Moses v. MacFerlan*, Lord Mansfield stated—in a common law court (not an equity court)—that:

If the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case . . . In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

(1760) 97 Eng. Rep. 676 (K.B.) 678, 681. Although Lord Mansfield employed the term "equity" and "equitable" throughout his opinion, he used those terms in a nontechnical way to connote fairness. One of the leading American restitution scholars in the early to mid-twentieth century stated: "Restitution is the equitable principle by which one who has been enriched at the expense of another, whether by mistake, or otherwise, is under a duty to return what he has received or its value to the other. Perhaps unjust enrichment would be a better term." Warren A. Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257, 257 (1954). Here again, the term "equitable" is used in the

However, as a technical and historical matter, some strands of restitution are “legal,” while others are “equitable.”¹² Some Rhode Island decisions (as well as numerous decisions in other courts) have erroneously asserted that unjust enrichment or restitution is exclusively “equitable” in the technical sense.¹³ Concrete consequences, including whether a right to jury trial exists, whether an action is authorized by statute, and whether certain types of defenses are available, depend on a proper understanding of which restitutionary causes of action and remedies are technically “legal” and which are technically “equitable.” Typically, a simple money judgment for the value of a benefit obtained by the defendant is a “legal” remedy, as is monetary restitution of a defendant’s unjust gain of money.¹⁴ By contrast, the asset-based remedies of constructive trust and equitable lien are technically “equitable” remedies.¹⁵

D. *The Primacy of Contract Law*

If the parties have a valid contract between them, any rights

nontechnical meaning of fairness.

12. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 4.

13. See Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1607–34 (2002) (discussing how federal courts, including the Supreme Court of the United States, have confused nontechnical with technical uses of the term “equitable” in classifying monetary restitution). For examples of Rhode Island opinions that failed to recognize that many actions for unjust enrichment are technically and historically “legal” rather than “equitable,” see *United Lending Corp. v. Providence*, 827 A.2d 626, 632 (R.I. 2003) (“It is true that claims for unjust enrichment sound in equity and that in general, equitable actions do not fall within the purview of [R.I.G.L.] 45-15-5.” (citations omitted)); *Rosetta v. Moretti*, No. 98-89, 2005 WL 1109638, at *6 (R.I. Super. Ct. May 4, 2005) (“Unjust enrichment sounds in equity and as such, it is a matter to be decided ultimately by the Court. It is a matter for the Court, not the jury, to decide.”).

14. See Murphy, *supra* note 13, at 1598–1607 (discussing legal and equitable roots of restitution and documenting that monetary recovery of defendant’s gain of money generally is a remedy at law with some important exceptions—recovery of money is a remedy in equity when the money was obtained by abuse of a fiduciary or confidential relationship, when the defendant is insolvent and the plaintiff thus needs a constructive trust or equitable lien, or when the plaintiff seeks to trace its property through subsequent changes in form or into the hands of a third person).

15. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. d (stating that “the hallmark of equitable remedies in restitution cases is that they give relief to the claimant via rights in identifiable assets” and citing the constructive trust and equitable lien as examples).

and remedies are governed by the law of contract, not the law of unjust enrichment.¹⁶ A cause of action in unjust enrichment may not displace rights and obligations specified by a valid contract.¹⁷ Moreover, the law of unjust enrichment should not undermine legal incentives to enter contracts. Thus, it is often said that one who voluntarily conferred a benefit has no cause of action in unjust enrichment. This general proposition is subject to some exceptions, such as when the benefit was conferred in an emergency situation.¹⁸ As the Restatement (Third) of Restitution and Unjust Enrichment explains, “[t]here is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant’s intervention in the absence of contract.”¹⁹

II. LIABILITY IN RESTITUTION: THE CAUSE OF ACTION IN UNJUST ENRICHMENT

As the law governing liability for the transfer of a benefit without an adequate legal basis, the law of unjust enrichment applies in many different contexts. The general categories of liability in unjust enrichment are: when a benefit was acquired by a transfer subject to avoidance (such as benefit transferred by mistake or by defective consent); when the recipient of the benefit did not request the benefit but it would be unjust for the recipient to retain the benefit without paying for it (such as when the

16. See, e.g., *Doe v. Burkland*, 808 A.2d 1090, 1095 (R.I. 2002).

17. See, e.g., *Café La France, Inc. v. Schneider Sec., Inc.*, 281 F. Supp. 2d 361, 375 (D.R.I. 2003) (stating that under Rhode Island law, “[u]njust enrichment is an equitable doctrine that, in the absence of an enforceable contract, allows a plaintiff to recover a benefit transferred to a defendant if that defendant’s ongoing possession would be inequitable” but concluding that an enforceable contract existed between the parties, thus precluding the plaintiff’s unjust enrichment claim (citing *Doe*, 808 A.2d at 1095)); see also RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 2(2) (“A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.”).

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

19. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 2(3); see also *E. Motor Inns, Inc. v. Ricci*, 565 A.2d 1265, 1272–73 (R.I. 1989) (“When a party makes improvements or confers a benefit upon the land of another with full knowledge that title is vested in another, or subject to dispute, the improver will not be entitled to restitution under the . . . doctrine of unjust enrichment.”).

restitution claimant conferred the benefit in an emergency); when the recipient requested the benefit but the restitution claimant does not have a valid contract claim against the recipient; and when the benefit was wrongfully acquired (such as by tort or breach of a fiduciary or confidential duty). In the next few sections, I will discuss these categories in turn.

A. *Benefit Was Acquired Through a Transfer Subject to Avoidance*

Liability in restitution may exist when the restitution claimant has transferred a benefit to the recipient, but the transfer was, in the words of the Restatement (Third), “imperfectly voluntary” and thus subject to rescission or avoidance.²⁰ Common contexts in which the transfer of a benefit is subject to avoidance are when the restitution claimant transferred a benefit by mistake or when the transfer of a benefit was the product of defective consent or authority.²¹

1. *Mistake*

One who receives a benefit by mistake may be liable in restitution, notwithstanding that the recipient may have been innocent in receiving the benefit.²² Courts applying Rhode Island law have recognized a cause of action in unjust enrichment for mistaken payment of money,²³ mistaken good faith improvement of another’s property,²⁴ and mistaken performance of another’s

20. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT ch. 2, intro. note.

21. *See id.* The Restatement also discusses “payment of a judgment subsequently reversed or avoided, or payment of a tax not legally due” as transfers subject to avoidance, giving rise to potential unjust enrichment. *Id.*; *see also id.* at §§ 18–19.

22. *See generally* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 5–12.

23. *See, e.g.*, *RBS Citizens v. Avaya, Inc.*, CA No. 14-cv-02-M, 2013 WL 2158933, at *12 (D.R.I. May 23, 2014) (describing allegations of overpayment as pleading a plausible unjust enrichment claim); *Toupin v. Laverdiere*, 729 A.2d 1286, 1288–89 (R.I. 1999) (allowing recovery of mistaken overpayment).

24. *See, e.g.*, *Dellagrotta v. Dellagrotta*, 873 A.2d 101, 114 (R.I. 2005) (finding former daughter-in-law entitled to restitution of the appreciated value attributable to improvements she made to a house owned by her in-laws when she reasonably believed her in-laws intended the house to be a wedding gift to her and her husband.). A property owner that improves its

obligation.²⁵ One who mistakenly conferred a benefit on another has a claim in unjust enrichment against the recipient of the benefit, subject to the recipient's possible defense that it innocently and justifiably relied to its detriment on the mistake.²⁶

2. *Defective Consent or Authority*²⁷

Examples of a benefit conferred by defective consent or authority include a benefit obtained by fraud or material misrepresentation,²⁸ duress,²⁹ or undue influence.³⁰ Yet another

property, with the incidental effect that a neighbor's property increases in value, does not have a cause of action in unjust enrichment against the neighbor. *See, e.g.*, R.I. State Pier Props., LLC v. Cargill, Inc., C.A. No. 12-198S, 2013 WL 5205800, at *2 (D.R.I. Sept. 13, 2013) (stating that, although RISPP's work on its own property increased the value of Cargill's property, RISPP's unjust enrichment claim against Cargill failed); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. b, illus. 2 ("Improvements to A's property increase the market value of B's adjoining land. B sells and realizes substantial additional proceeds as the result of A's expenditure. B is not liable to A in restitution.").

25. *See, e.g.*, Alessi v. Bowen Court Condo., No. 03-0235, 2010 WL 897246 (R.I. Super. Ct. Mar. 10, 2010) (finding that plaintiff, who paid property taxes on the mistaken belief that he owned the property, was entitled to restitution from defendant who actually owned the property.).

26. *See infra* Part IV.

27. *See generally* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 13–19.

28. *See, e.g.*, J. K. Social Club v. J. K. Realty Corp., 448 A.2d 130, 134 (R.I. 1982) (acknowledging that fraud can lead to the creation of a constructive trust); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 13 (discussing liability in restitution when the transfer of a benefit was induced by fraud or material misrepresentation).

29. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 14 (discussing liability in restitution when the transfer of a benefit was induced by duress and defining duress as "coercion that is wrongful as a matter of law").

30. *See, e.g.*, Umsted v. Umsted, No. CA 03-219-S, 2004 WL 5308782, at *9 (D.R.I. Nov. 30, 2004) (report and recommendation) (concluding that Rhode Island law allows an action for undue influence and stating "that undue influence is not a tort, but rather a set of circumstances which gives rise to an equitable remedy, such as rescission, restitution, or, . . . imposition of a constructive trust" (citations omitted)), *report and recommendation adopted by* Umsted v. Umsted, No. 03-CV-219-S, 2005 WL 5438379 (D.R.I. Feb. 18, 2005); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 15 (discussing liability in restitution for a transfer of a benefit that was induced by undue influence and defining undue influence as "excessive and unfair persuasion, sufficient to overcome the free will of the transferor, between parties who occupy either a confidential relation or a

example is a benefit obtained from someone who lacked the legal capacity to transfer the benefit.³¹ When the claimant's consent to the transfer of the benefit was impaired for one of these reasons, the claimant has a claim in unjust enrichment against the recipient of the benefit.

B. Benefit Was Not Requested, but Recipient Would be Unjustly Enriched If Recipient Did Not Pay for the Benefit

In some circumstances, the recipient of the benefit did not request the benefit but it would nonetheless be unjust for the recipient to retain the benefit. The Restatement (Third) addresses three broad contexts in which a claimant could be considered to have justifiably conferred an unrequested benefit on the recipient, with the claimant possibly entitled restitution: "emergency intervention,"³² "performance rendered to a third person,"³³ and "self-interested intervention."³⁴

1. Emergency Intervention

A person who confers a benefit in an emergency to protect another's life or health,³⁵ or to protect another's property,³⁶ or to

relation of dominance on one side and subservience on the other").

31. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 16, 33 (discussing liability in restitution when the benefit at issue was transferred from "a person lacking requisite legal capacity" to make the transfer; examples include minors, those who have a mental incapacity, and certain legal entities that acted outside the scope of their statutory authority).

32. *Id.* §§ 20–22.

33. *Id.* §§ 23–25.

34. *Id.* §§ 26–30.

35. See *id.* § 20 ("(1) A person who performs, supplies, or obtains professional services required for the protection of another's life or health is entitled to restitution from the other as necessary to prevent unjust enrichment, if the circumstances justify the decision to intervene without request. (2) Unjust enrichment under this section is measured by a reasonable charge for the services in question.").

36. See *id.* § 21 ("(1) A person who takes effective action to protect another's property from threatened harm is entitled to restitution from the other as necessary to prevent unjust enrichment, if the circumstances justify the decision to intervene without request. Unrequested intervention is justified only when it is reasonable to assume the owner would wish the action performed. (2) Unjust enrichment under this section is measured by the loss avoided or by a reasonable charge for the services provided, whichever is less."). In *Bailey v. West*, 249 A.2d 414, 417–18 (R.I. 1969), the

perform another's duty³⁷ has a cause of action in unjust enrichment against the recipient of the benefit.

2. *Performance Rendered to a Third Person*

If a claimant performed an obligation of its own, and that performance also had the effect of discharging an obligation of another person, the claimant is entitled to restitution from the other person as necessary to prevent unjust enrichment.³⁸ Rights to indemnification, contribution, and equitable subrogation fall in this category.³⁹

3. *Self-interested Intervention*

A claim in unjust enrichment may be available to one who has made self-interested expenditures to protect, maintain, improve, or add value to an asset in which another person also has an interest. For example, if the claimant makes necessary expenditures to protect an interest in its property and thus confers an economic benefit on another person in consequence of the other's interest in the same property, the claimant has a cause of action in unjust enrichment.⁴⁰ Another example is that of a

Rhode Island Supreme Court found that a plaintiff who accepted a racehorse for boarding at his farm, when both the buyer and seller of the horse disclaimed ownership of the horse, was a mere "volunteer" and thus did not have a right to restitution from the defendant buyer. This result is inconsistent with the majority view expressed in the Restatement (Third) Restitution and Unjust Enrichment. Section 21 of the Restatement bases Illustration 11 on this case and asserts that a plaintiff in such a circumstance would indeed be "entitled to an equitable lien on the horse, securing to that extent a claim in restitution for the value of its services in preserving the property; but [plaintiff] has no claim under this section against either [b]uyer or [s]eller apart from its rights as lienor." RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 21 cmt. d, illus. 11.

37. See, e.g., *Hurdis Realty, Inc. v. N. Providence*, 397 A.2d 896, 897 (R.I. 1979) (finding that municipality was liable for unjust enrichment for cost of repairs that property owner expended to repair town sewer line when municipality had the duty to maintain the sewer system, the problem required "immediate attention," and the property owner had unsuccessfully attempted to get the municipality to repair the sewer line); see also RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 22.

38. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 23–25.

39. See *id.*

40. See, e.g., *Chambers v. Chambers*, 39 A. 243, 243 (R.I. 1898) (finding that life tenant, having paid city's assessments for installing curb and sewer

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claimant who makes expenditures to an asset that the claimant reasonably expects to acquire or retain, the claimant's expectation is frustrated, and another person becomes the unintended beneficiary of the expenditures.⁴¹ Yet another example, recognized in a decision of the Rhode Island Supreme Court, is that of a person who confers an economic benefit on his intimate cohabitant and the benefit in turn makes it possible for the intimate cohabitant to acquire property.⁴²

C. Benefit Was Requested by Recipient but Claimant Does Not Have a Valid Contract Claim

An unjust enrichment claim is available to a claimant who transferred a benefit pursuant to a contract, but, for one of several possible reasons, the claimant has no valid claim on the contract.⁴³ The claimant would lack a viable contract claim if: (1) the contract, when made, was unenforceable⁴⁴ (e.g., the contract

in order to prevent the sale of the property by the city treasurer, was entitled to restitution from the defendant who would obtain the property upon the death of the life tenant); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 26.

41. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 27.

42. *See, e.g., Doe v. Burkland*, 808 A.2d 1090, 1095 (R.I. 2002) (recognizing a potential cause of action in unjust enrichment between two men who cohabited in an intimate relationship when services rendered by one of the men might have aided in the acquisition of property by the other man; court did not require proof of a confidential or fiduciary relationship or a breach of that relationship); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 28(1) (stating that, unless contrary to state law, “[i]f two persons have formerly lived together in a relationship resembling marriage, and if one of them owns a specific asset to which the other has made substantial, uncompensated contributions [either] in the form of property or services, the person making such contributions has a claim in restitution . . . to prevent unjust enrichment”).

43. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 31–36. As courts applying Rhode Island law have summarized, a party to a contract may recover for unjust enrichment if the contract was “breached, rescinded, or otherwise made invalid, or [if] the benefit received was outside the scope of the contract.” *High Rock Westminster St. LLC v. Bank of America*, C.A. No. 13-500, 2014 WL 3867699, at *2 (D.R.I. Aug. 6, 2014) (quoting *Tantara Corp. v. Bay St. Neighborhood Ass’n, LLC*, C.A. No. NC-11-55, 2012 WL 4848704, at *16 (R.I. Super. Ct. Oct. 4, 2012)).

44. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 31.

was not in writing as required by statute⁴⁵ or the contract terms are indefinite⁴⁶); (2) the contract is illegal or otherwise unenforceable as a matter of public policy;⁴⁷ (3) the recipient of the performance lacked the capacity to contract;⁴⁸ (4) an initially valid contract is avoided subsequent to the claimant's performance because of mistake or supervening change of circumstances;⁴⁹ (5) the recipient demanded, and the claimant supplied, a performance that was not due under the contract;⁵⁰ or (6) the claimant who conferred a benefit under the contract also materially breached the contract.⁵¹ In the foregoing circumstances, the claimant generally would be entitled to return of the benefit conferred or the value of the benefit. Moreover, an unjust enrichment claim is available to one who erroneously believed that a contract had been

45. *See, e.g.*, *Brochu v. Santis*, 939 A.2d 449, 452–53 (R.I. 2008) (holding broker did not have a cause of action in unjust enrichment for real estate brokerage commission when agreement between parties was not in writing as required by Rhode Island General Laws section 9-1-4(6)). Depending on court interpretation of statutes that require a writing and of public policy, performance rendered under an oral agreement may or may not trigger a right to restitution. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 31, cmts. b, f.

46. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 31 cmts. b, d.

47. *See id.* § 32. The Restatement states that the distinction between “unenforceable” and “illegal” agreements “may usually be drawn by inquiring whether the contract at issue is one for which the law merely establishes special evidentiary requirements, or whether the underlying transaction is one that the law actually condemns.” *Id.* at § 31 cmt. b.

48. *See, e.g.*, *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1148–49 (R.I. 1994) (explaining that, even if the individual did not have capacity to contract, the individual would still be liable under the law of unjust enrichment for reasonable charges for medical services rendered); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 33.

49. *See, e.g.*, *Parker v. Macomber*, 24 A. 464, 465 (R.I. 1892) (holding that plaintiff who rendered homecare services with his wife to defendant pursuant to contract was entitled to restitution for the value of the services rendered even though full performance of contract had become impossible when his wife died); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 34.

50. *See, e.g.*, *High Rock Westminster St. LLC v. Bank of America, C.A.* No. 13-500, 2014 WL 3867699, at *2 (D.R.I. Aug. 6, 2014) (noting that a cause of action in unjust enrichment may be appropriate when the benefit received was outside the scope of the contract); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 35.

51. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 36.

formed and, because of that erroneous belief, conferred a benefit on the recipient.⁵²

A claimant may assert both a claim for breach of an enforceable contract and a claim in unjust enrichment, but those claims must be pleaded in the alternative.⁵³ To recover in unjust enrichment for a benefit conferred under a contract, the claimant must allege that the contract was void, invalid, or otherwise flawed.⁵⁴ If the court finds that the claimant does not have a valid contract claim, the claimant may continue with its unjust enrichment claim. If, however, a valid contract claim exists, the appropriate cause of action is breach of contract, not unjust enrichment.⁵⁵

52. See, e.g., *Branch v. Cardillo*, C.A. No. PC-07-620, 2011 WL 757389, at *6–*7 (R.I. Super. Ct. Feb. 24, 2011) (finding parties did not reach meeting of the minds to form a contract, nor was there promissory estoppel, but defendant's sisters mistakenly believed that an agreement with the defendant existed; court therefore concluded that defendant had been unjustly enriched by sisters' payments of expenses associated with defendant's property). In *Branch*, it is noteworthy that the plaintiffs did not plead unjust enrichment; the court on its own recognized this basis of liability. *Id.* at *8 n.5.

53. See, e.g., *RBS Citizens, N.A. v. Avaya, Inc.*, C.A. No. 14-cv-02-M, 2014 WL 2158933, at *4 (D.R.I. May 23, 2014) (noting that the plaintiff was allowed to assert both a breach of contract claim and an unjust enrichment claim in the alternative); *Hasbro, Inc. v. Mikohn Gaming Corp.*, No. Civ.A. 05-106-S, 2006 WL 2035501, at *8–9 (D.R.I. July 18, 2006) (stating that Rhode Island law allows a party to plead alternative claims for breach of contract and unjust enrichment (citing *Richmond Square Capital Corp. v. Ins. House*, 744 A.2d 401, 402 (R.I. 1999))).

54. See, e.g., *High Rock*, 2014 WL 3867699, at *2, *3 n.4.

55. See, e.g., *id.* at *2 (“[W]hen the benefit received was conferred under the terms of a contract and there is no allegation that the contract was invalid, voidable, unclear, or otherwise flawed, a court may properly dismiss the unjust enrichment claim.”); see also *Café La France, Inc. v. Schneider Sec., Inc.*, 281 F. Supp. 2d 361, 375 (D.R.I. 2003) (stating that under Rhode Island law, “[u]njust enrichment is an equitable doctrine that, in the absence of an enforceable contract, allows a plaintiff to recover a benefit transferred to a defendant if that defendant’s ongoing possession would be inequitable” but concluding that an enforceable contract existed between the parties, thus obviating the plaintiff’s unjust enrichment claim (citing *Doe v. Burkland*, 808 A.2d 1090, 1095 (R.I. 2002))); RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 2(2) (“A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.”).

D. Benefit Was Wrongfully Acquired

If a legal wrong to the claimant resulted in an economic benefit to the recipient, the claimant is entitled to restitution of the gain.⁵⁶ One type of legal wrong that may give rise to a claim in unjust enrichment is the intentional and wrongful interference with an intended donative transfer of a benefit.⁵⁷ The intended donee of the benefit has an unjust enrichment claim against the recipient of the benefit, whether the misconduct was the act of the recipient or of a third person.⁵⁸ Other legal wrongs that may result in an economic gain to the recipient are torts and violations of a fiduciary or confidential relation; I will elaborate on these bases for an unjust enrichment claim below.

1. Tort

When the recipient has acquired a benefit because of a tort committed against the claimant (such as fraud, misappropriation of funds, or conversion of property), the claimant may pursue either a tort claim or an unjust enrichment claim against the person who committed the tort.⁵⁹ Significantly, an unjust

56. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 3 (“A person is not permitted to profit by his own wrong.”).

57. The Restatement (Third) states that

[i]f assets that would otherwise have passed by donative transfer to the claimant are diverted to another recipient by fraud, duress, undue influence, or other intentional misconduct, the recipient is liable to the claimant for unjust enrichment. The misconduct that invalidates the transfer to the recipient may be the act of the recipient or of a third person.

Id. § 46(1) (“Wrongful Interference with Donative Transfer”). See also *id.* at § 45 (“Homicide: the Slayer Rule”).

58. See *id.* at § 46(1).

59. See, e.g., *Commercial Assocs. v. Tilcon Gammino, Inc.*, 998 F.2d 1092, 1100 (1st Cir. 1993) (noting that under Rhode Island law, “the existence of fraud or other wrongdoing is a factor in determining whether the retention of a benefit would be inequitable”). See generally RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 40–42. But see *Hauser v. Davis*, No. C.A. KC 93-0295, 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). *Hauser* is inconsistent with the weight of authority in other jurisdictions and the Restatement, which indicate that a cause of action in unjust enrichment may encompass benefits tortiously obtained. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST

enrichment claim can be successful against a person who did not commit the tort or even know of the tort, provided the person was unjustly enriched by a benefit that resulted from the tort.⁶⁰

The cause of action in unjust enrichment may provide a more favorable remedy than the cause of action in tort. Specifically, if the defendant's gain from the benefit exceeded the claimant's loss and the defendant was a conscious tortfeasor, the claimant may seek disgorgement of the defendant's gain in unjust enrichment rather than compensatory damages for the claimant's loss in tort.⁶¹ A classic and widely cited case in another jurisdiction is *Ollwell v. Nye & Nissen Co.*, in which the plaintiff was able to obtain, on a unjust enrichment cause of action, the disgorgement of the defendant's profits (the defendant's savings of labor costs) from the defendant's use of the plaintiff's abandoned egg-washing machine.⁶² If the plaintiff had instead pursued a tort claim, the measure of recovery would have been the plaintiff's loss—rental value of the machine—the amount of which was substantially less than the defendant's labor savings.⁶³

2. *Breach of a Fiduciary Duty or Breach of an Equivalent Duty Imposed by a Relation of Trust or Confidence*

One who violated a fiduciary or confidential duty to the claimant is liable for the claimant's losses or, under an alternative claim for unjust enrichment, for any net profit that the recipient gained from violating the duty.⁶⁴ To determine whether a

ENRICHMENT § 40.

60. See, e.g., *Narragansett Elec. Co. v. Carbone*, 898 A.2d 87, 93, 99–100 (R.I. 2006) (finding that the wife of a tortfeasor, who illegally diverted electricity to their home, was jointly and severally liable for unjust enrichment even though she did not know of the electricity bypass).

61. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT ch. 5, topic 1, intro. note.

62. 173 P.2d 652, 653, 655 (Wash. 1947).

63. *Id.* at 654.

64. See, e.g., *Lawton v. Nyman*, 327 F.3d 30, 42–50 (1st Cir. 2003) (predicting, in a case for breach of fiduciary duty by majority shareholders of closely held corporation, that Rhode Island law would allow plaintiffs either to obtain a remedy measured by the plaintiffs' loss—the difference in price between what they received for their stock and its fair value at the time of sale—or a remedy based on the defendants' wrongful profits in order to avoid unjust enrichment); see also RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 43.

fiduciary or confidential relationship exists between parties, the Rhode Island Supreme Court has stated:

The court may consider a variety of factors, including 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. There is no requirement in this jurisdiction that a defendant must occupy a position of dominance over a plaintiff.⁶⁵

The Rhode Island Supreme Court has at times found a fiduciary or confidential relationship to have existed between family members,⁶⁶ although it has also stated that “[c]onfidential or fiduciary relationships do not inherently exist between family members.”⁶⁷ Courts applying Rhode Island law to unjust enrichment claims have also found fiduciary or confidential relationships to have existed between a company and a director and officer of the company,⁶⁸ between minority shareholders of a closely held family corporation and directors and officers of the corporation,⁶⁹ and between persons in intimate, but unmarried,

65. *Simpson v. Dailey*, 496 A.2d 126, 129 (R.I. 1985) (citation omitted).

66. *See, e.g., id.* (finding a confidential relationship between a brother and sister when siblings had complete trust and confidence in one another and their relationship was a motivating factor in influencing the brother to name his sister as primary beneficiary); *Cahill v. Antonelli*, 390 A.2d 936, 939 (R.I. 1978) (finding a fiduciary relationship between a brother and sister because the brother had acted as an agent of his sister); *Del Greco v. Del Greco*, 142 A.2d 714, 717 (R.I. 1958) (finding a fiduciary relationship between a mother and son because the mother had trusted her son to care for her during the remainder of her life).

67. *Dellagrotta v. Dellagrotta*, 873 A.2d 101, 111–12 (R.I. 2005) (finding former daughter-in-law not entitled to a constructive trust over a house owned by her in-laws and in which she resided because facts did not establish a fiduciary or confidential relationship between the plaintiff and her former in-laws).

68. *See, e.g., Sladen v. Rowse*, 347 A.2d 409, 412–13 (R.I. 1975) (imposing constructive trust on stock in favor of company because defendant, who was a director and officer of the company, breached his fiduciary obligations by diverting the opportunity to buy the stock at a low price to himself).

69. *See, e.g., Lawton v. Nyman*, 357 F. Supp. 2d 428, 431 (D.R.I. 2004) (finding that defendants had breached their fiduciary duty to the minority shareholders by failing to disclose that the corporation soon might be sold).

relationships.⁷⁰

III. RESTITUTIONARY REMEDIES

A number of remedies are restitutionary. Examples include a money judgment based on the defendant's gain rather than the claimant's loss, the return of benefits that were transferred before a contract was rescinded, the constructive trust, and the equitable lien. The simplest remedy for a court to impose is the return to the plaintiff of the exact benefit that the defendant received, whether the benefit was money or a different type of asset. Many restitutionary remedies are not so simple, however. A benefit may be nonreturnable, such as when the benefit was in the form of services. A restitution claimant may be entitled to more than the exact benefit that the recipient obtained. An asset transferred from the claimant to the recipient may have changed into a different form or been transferred into the hands of a third person. In the following sections, I will discuss these complexities, focusing on restitution through a money judgment and restitution through the asset-based remedies of constructive trust and equitable lien.

A. *Restitution Through a Money Judgment*⁷¹

If a defendant has been unjustly enriched by money obtained from the claimant, the measure of monetary restitution is generally the amount that was transferred from the claimant to the defendant.⁷² An important exception to this rule is posed by the defaulting fiduciary or the "conscious wrongdoer" who acted with knowledge of the underlying wrong to the claimant or despite

70. See, e.g., *Randau v. Laplante*, C.A. No. WC-2011-0116, 2013 WL 5502262, at *14–16, *19 (R.I. Super. Ct. Sept. 23, 2013) (finding a fiduciary relationship existed between an unmarried couple, but concluding that there had not been a breach of a promise or an act involving fraud, and thus, a constructive trust could not be imposed); *Nani v. Vanasse*, No. C.A. PC/05-955, 2003 WL 24274579, at *7–10, *12 (R.I. Super. Ct. Feb. 23, 2003) (finding confidential relationship existed between an unmarried couple, determining the defendant breached the relationship, and imposing a constructive trust in favor of the plaintiff on a house that was jointly purchased but on which the defendant alone had legal title).

71. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 49–53 (2011).

72. See *id.* § 49(2).

a known risk that the conduct would violate the rights of the claimant; in such a situation, the defendant is liable for the amount transferred from the claimant to the defendant and for any net profit attributable to the underlying wrong.⁷³ (For example, the defendant who misappropriates claimant's money and successfully invests it for a net profit must disgorge the gain to the claimant.)⁷⁴ Rhode Island law has long recognized the rule that a conscious wrongdoer or defaulting fiduciary must disgorge the net gain from money wrongfully obtained from the claimant.⁷⁵

If a defendant has been unjustly enriched by a nonreturnable benefit, the measure of a money judgment in restitution generally will vary according to the blameworthiness of the defendant in obtaining the benefit; extensive rules are set forth in the Restatement (Third) of Restitution and Unjust Enrichment.⁷⁶ If the defendant was an innocent recipient of the benefit (e.g., the claimant mistakenly conferred a benefit on the defendant), the defendant generally must give back only the monetary value of the benefit, conservatively measured.⁷⁷ If the defendant was responsible for its own enrichment but not a "conscious wrongdoer" (e.g., the defendant was negligent or unreasonably failed, despite notice and opportunity, to avoid or rectify the unjust enrichment), the defendant may be subject to greater

73. *See id.* § 51(4). The Restatement elaborates how to determine "net profit." *Id.* § 51(5) & cmts. e–j.

74. *See id.* §§ 49(4), 51 & illus. 10, 12.

75. *See, e.g.,* *Greene v. Haskell*, 5 R.I. 447, 456–57 (R.I. 1858). In *Greene*, the Rhode Island Supreme Court found that the defendant had wrongfully taken the plaintiffs' money to pay partially for African ivory. *Id.* at 454. The ivory was to be sold. *Id.* The court stated that the plaintiffs were entitled to either their proportion of the proceeds of the sale of the ivory or the return of their money that was used to purchase the ivory. *Id.* at 456–57. This case illustrates the rule that a conscious wrongdoer should disgorge any gain resulting from the wrongful retention of a benefit at the plaintiff's expense. However, the court required that the plaintiffs make this election before the sale. *Id.* The Restatement criticizes the court's decision to make the plaintiffs choose their remedy prior to the sale as "inconsistent with the principle that the conscious wrongdoer be denied *any chance of profit* from the use of another's property." RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 56, reporter's note h (emphasis added).

76. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 49(3), 50–52.

77. *See id.* § 50 (stating rules for measuring the value of nonreturnable benefits acquired by an innocent recipient, varying on whether the benefit was requested or not requested by the innocent recipient of the benefit).

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liability in restitution than an innocent recipient of the same benefit; the measure of the defendant's enrichment may be chosen so as to avoid or mitigate loss to the claimant.⁷⁸ With respect to a "conscious wrongdoer" or a defaulting fiduciary, the remedial rule is the same for nonreturnable benefits as it is for a monetary transfer from the claimant to the defendant—the defendant must disgorge net gains to the claimant.⁷⁹

Beyond the remedial rules that a "conscious wrongdoer" or defaulting fiduciary must disgorge to the claimant any net gain the defendant made, the Restatement (Third) of Restitution and Unjust Enrichment also recognizes that for certain breaches of contract (which it labels "opportunistic" breaches), the breaching party may be liable to disgorge its net gain from the breach.⁸⁰ Relying on abundant case law in several jurisdictions, the Restatement (Third) states that a claimant should be able to recover the defendant's net profits resulting from the defendant's breach if the breach was deliberate and contract damages for the claimant's loss would afford "inadequate protection to the promisee's contractual entitlement."⁸¹ The latter condition is satisfied if a court with the benefit of hindsight would have granted an injunction or specific performance because contract damages would not have been adequate to protect the claimant's rights under the contract.⁸²

An example of disgorgement of profits for "opportunistic" breach of contract in the Restatement (Third) involves a contract for the sale of real estate providing that existing timber and gravel are to be conveyed with the property.⁸³ The seller of the real estate breaches the contract by removing the timber and gravel, which the seller sells at a profit of \$10,000. The purchaser later

78. *See id.* § 52.

79. *See, e.g.,* *Lawton v. Nyman*, 327 F.3d 30, 46 (1st Cir. 2003) (assuming that Rhode Island would adopt a disgorgement-of-profits rule to "avoid[] unjust enrichment for redemption of minority shareholders' stock involving a breach of fiduciary duty by corporate officers who are majority shareholders in close corporations"); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 51.

80. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 39.

81. *Id.*

82. *Id.* at § 39 cmt. c.

83. *See id.* § 39 cmt. d, illus. 2.

takes title to the real estate. The removal of timber and gravel does not diminish the market value of the real estate; contract damages for the purchaser's loss accordingly would be minimal. A contract damages remedy for such a breach would afford "inadequate protection to the promisee's contractual entitlement" to obtain the real estate with the timber and gravel still attached. Thus, the purchaser is entitled to recover seller's \$10,000 profit.⁸⁴

The foregoing illustration in the Restatement (Third) is based on a Massachusetts case.⁸⁵ I have not found a reported Rhode Island case that directly addresses whether disgorgement of defendant's profits is an appropriate remedy for breach of contract. However, on the strength of the Restatement (Third) and case law in other jurisdictions, one could argue that Rhode Island law should recognize the availability of disgorgement of profits when the defendant's breach of contract is both profitable to the defendant and contract damages would afford inadequate protection to the claimant's contractual rights.

B. *Restitution Through an Asset-Based Remedy*

The law of restitution affords very powerful asset-based remedies. These remedies are advantageous when the claimant wants its particular asset back, when claimant's asset (or its traceable product) has increased in value, or when the defendant is insolvent. Asset-based restitutionary remedies at law include replevin, which is the return of personal property to which the claimant retains legal title (such as when the property has been stolen). Asset-based restitutionary remedies in equity include the constructive trust and equitable lien, which grant the claimant a property interest in a specific asset to which the defendant has obtained legal title but in which the claimant has an "equitable" interest. For example, a claimant would have an equitable interest in an asset that the defendant obtained because of the claimant's mistake or the defendant's breach of fiduciary duty. Moreover, restitution through an asset-based remedy allows the

84. *See id.*

85. *Laurin v. DeCarolis Constr. Co.*, 363 N.E.2d 675, 678–79 (Mass. 1977) (noting that defendant's breach was "deliberate and willful" and a disgorgement remedy on the facts was not punitive—disgorgement "merely deprives the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make").

claimant to trace its property or funds through subsequent transfers or changes in form.

1. *Constructive Trust and Equitable Lien Defined*

The constructive trust is a remedy that requires the defendant to convey specific property or funds to the claimant.⁸⁶ It is based on the fiction that the defendant is holding the property or funds as “trustee” for the claimant, with the claimant being the “equitable” owner of the property or funds.⁸⁷ The equitable lien is a remedy that secures a money judgment against the defendant with a specific asset in which the claimant is deemed the “equitable” lienholder.⁸⁸ The Restatement (Third) of Restitution and Unjust Enrichment states that a claimant need not demonstrate the inadequacy of legal remedies in order to obtain a constructive trust or equitable lien; I found no Rhode Island case law to the contrary.⁸⁹

Generally, a claimant should prefer a constructive trust if the claimant’s asset or its traceable product has increased value. A claimant should prefer an equitable lien if the value of the

86. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 55.

87. See *id.* A constructive trust should not be confused with a resulting trust. The U.S. Court of Appeals for the First Circuit has explained the distinction:

Unlike resulting trusts, which are used primarily to enforce the parties’ unstated plan at the time of the transfer [of an asset], constructive trusts are used as remedial devices regardless of the parties’ original intent “whenever title to property is found in one who in fairness ought not to be allowed to retain it.”

In re Valente, 360 F.3d 256, 262–63 n.4 (1st Cir. 2004) (quoting GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 262 (1973)).

88. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 56.

89. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 4(2). To determine whether Rhode Island law requires that a claimant seeking a constructive trust or equitable lien must establish the inadequacy of legal remedies, I conducted research on February 3, 2015 in the LexisNexis online database, “RI Federal and State Cases, Combined.” For the first search, I used the terms “constructive pre/1 trust” w/50 “inadeq! w/8 remed!”; for the second search, I used the terms “equitable pre/1lien” w/50 “inadeq! w/8 remed!” Neither search revealed Rhode Island case law requiring a claimant to demonstrate the inadequacy of legal remedies in order to obtain a constructive trust or equitable lien.

identifiable property is less than the amount of the defendant's liability because the claimant will be entitled to a money judgment for the full liability amount. That judgment amount is secured by an equitable lien on the property, and the deficiency can be pursued by other collection means.⁹⁰

2. *Requirements for Imposition of the Constructive Trust or Equitable Lien*

Under Rhode Island law, the person seeking imposition of a constructive trust or equitable lien must prove by clear and convincing evidence that the remedy is warranted.⁹¹

To obtain a constructive trust or equitable lien, the restitution claimant must show that the “defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant's rights.”⁹² In other words, the claimant must both establish a claim under the substantive law of unjust enrichment and identify specific property in which the claimant has an “equitable” interest. In terms of substantive law, Rhode Island courts thus far have recognized the possibility of a constructive trust or equitable lien when an asset has been acquired through violation of a fiduciary or confidential relationship,⁹³ undue influence,⁹⁴ fraud,⁹⁵

90. See, e.g., *Darr v. Muratore*, 143 B.R. 973, 976 (D.R.I. 1992) (“Where a defendant has used the funds of a plaintiff to purchase new property, the plaintiff may have the option of enforcing either a constructive trust *of the property* or an equitable lien *against the property*.”).

91. See, e.g., *Manchester v. Pereira*, 926 A.2d 1005, 1013 (R.I. 2007).

92. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 55(1).

93. See, e.g., *Dellagrotta v. Dellagrotta*, 873 A.2d 101, 111–12 (R.I. 2005) (stating that imposition of a constructive trust requires existence of a fiduciary or confidential relationship between the parties and either a breach of a fiduciary duty or fraud resulting from the parties' association; former daughter-in-law not entitled to constructive trust over house owned by in-laws and in which she resided because facts did not establish a fiduciary or confidential relationship); *Sladen v. Rowse*, 347 A.2d 409, 412–13 (R.I. 1975) (imposing a constructive trust on stock in favor of claimant company because defendant, who was a director and officer of the company, breached his fiduciary obligations by diverting the opportunity to buy the stock at a low price to himself); *Nani v. Vanasse*, C.A. No. PC/05-995, 2003 WL 24274579, at *7–11 (R.I. Super. Ct. Feb. 23, 2006) (finding a confidential relationship existed between an unmarried couple, defendant breached the relationship, and imposing a constructive trust in favor of the plaintiff on a house that was jointly purchased but to which the defendant alone had legal title). Under

misappropriation,⁹⁶ or testamentary devise or intestate succession in exchange for a promise to hold in trust.⁹⁷ The Restatement (Third) also recognizes mistaken transfer of an asset as supporting the imposition of a constructive trust or equitable lien.⁹⁸

Once a claim under the substantive law of unjust enrichment is established, the claimant also must show that it has an equitable interest *in a specific asset* to which the initial recipient or a third person has legal title.⁹⁹ This showing can be made directly—when the very asset obtained from the claimant is held by the initial recipient or a third person—or by tracing the claimant’s asset through subsequent changes in form.¹⁰⁰

3. *Advantages of an Asset-Based Equitable Remedy Compared to a Simple Money Judgment*

An asset-based equitable remedy may be more advantageous to the claimant than a simple money judgment in a variety of circumstances, which are listed and exemplified below.

Rhode Island law, if a fiduciary or confidential relationship is proven, the plaintiff must also prove “either a breach of a promise or an act involving fraud occurred as a result of the relationship.” *Manchester*, 926 A.2d at 1013.

94. *See, e.g.*, *Umsted v. Umsted*, No. 03–CV–219–S, 2005 WL 5438379, at *1 (D.R.I. Feb. 18, 2005) (stating that undue influence is a “set of circumstances which gives rise to an equitable remedy, such as . . . imposition of a constructive trust”).

95. *See, e.g.*, *J.K. Social Club v. J.K. Realty Corp.*, 448 A.2d 130, 134 (R. I. 1982) (“For fraud to lead to the creation of a constructive trust, the evidence must show that the holder of legal title procured title through fraud. There must be an actual misrepresentation of present intent.”).

96. *See, e.g.*, *Slater v. Oriental Mills*, 27 A. 443, 443–44 (R.I. 1893) (authorizing a constructive trust in situation of misappropriation).

97. *See, e.g.*, *Simpson v. Dailey*, 496 A.2d 126, 128 (R.I. 1985).

98. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. f (2011) (“The underlying transaction is ordinarily one that is subject to avoidance for fraud, mistake, or comparable grounds of invalidity, or one in which the defendant has acquired property by wrongful interference with the claimant’s legally protected interests.”).

99. *See id.* §§ 55, 56.

100. *See, e.g.*, *Slater*, 27 A. at 443 (“The rule is clear that one has an equitable right to follow and reclaim his property, which has been wrongfully appropriated by another, so long as he can find the property, or its substantial equivalent if its form has been changed, upon the ground that such property, in whatever form, is impressed with a trust in favor of the owner.”); *see also* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 58.

- a. *The constructive trust is advantageous when the asset in which the claimant has an equitable interest has increased in value.*¹⁰¹

Example: Through undue influence, Defendant obtained stock worth \$1,000 from Claimant. The stock is now worth \$2,000. Claimant should seek a constructive trust over the stock rather than a money judgment for \$1,000 (the value of the stock when initially obtained from Claimant).

- b. *The constructive trust or equitable lien enables a claimant to trace its asset through subsequent changes in form.*¹⁰²

Example: Through fraud, Defendant obtained stock from Claimant worth \$1,000. Defendant sold the stock and reinvested the full \$1,000 to purchase a work of art for \$1,000. The art is now worth \$2,000. Claimant may obtain the work of art via a constructive trust.

101. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT ch. 7, topic 2, intro. note (“Where assets have increased in value, restitution from property may give the claimant the benefit of the appreciation without the need to prove the amount of the defendant’s enrichment.”); *id.* at §55 cmt. i.

102. See, e.g., *Slater*, 27 A. at 443 (“The rule is clear that one has an equitable right to follow and reclaim his property, which has been wrongfully appropriated by another, so long as he can find the property, or its substantial equivalent if its form has been changed, upon the ground that such property, in whatever form, is impressed with a trust in favor of the owner.”); see also RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 58.

- c. *If the claimant's asset has been commingled with the defendant's asset in a common account, the claimant may, by tracing rules, identify its asset in the account and, in some circumstances, take advantage of any withdrawals that are invested profitably.*¹⁰³

Example: Acting without authorization, Recipient deposits \$1,000 of Claimant's funds in a bank account that already contains \$1,000 of Recipient's funds. Recipient makes a \$1,500 withdrawal, using \$1,000 for current expenditures and \$500 to purchase shares of XYZ Corp. The traceable product of Claimant's original \$1,000 may now be identified in the \$500 balance in the bank account plus the XYZ shares. Recipient holds the \$500 in constructive trust for Claimant. Restitution from the XYZ shares will be effected by a constructive trust or equitable lien, at Claimant's election, depending on whether the shares have appreciated or declined in value. If the XYZ shares are now worth \$600, Claimant is entitled to the gain by a constructive trust over the shares. If the XYZ shares are now worth \$400, Claimant is entitled to a judgment of \$500, secured by an equitable lien on the shares. Claimant is entitled to the shares worth \$400 and retains an unsecured claim for \$100.¹⁰⁴

103. See, e.g., *Hungerford v. Curtis*, 110 A. 650, 652 (R.I. 1920) ("The fact that complainant's money was intermingled with [defendant's] did not destroy complainant's equitable title and his right to follow and reclaim it."); see also RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 58–59 (discussing tracing of property into its product and into or through a commingled fund).

104. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 59 cmt. d, illus. 5.

- d. *The constructive trust or equitable lien enables the claimant to trace its asset into the hands of a third person who is not a bona fide purchaser or a bona fide payee and to obtain that asset from the third person.*¹⁰⁵

Example: Through duress, Defendant obtains \$1,000 from Claimant, buys a used car with the \$1,000, and transfers title of the car to a third person. Claimant is entitled to a constructive trust over the car held by the third person even if the third person committed no wrong. However, the third person may have a defense against the restitution claim if she was a bona fide purchaser of the car.¹⁰⁶

- e. *The constructive trust or equitable lien is advantageous to the claimant if the recipient is insolvent, because the claimant's property interest in the asset is not considered part of the recipient's bankruptcy estate.*¹⁰⁷

Example: If Claimant can trace its asset into the bank account of an insolvent debtor, the funds are imposed with a constructive trust for the benefit of Claimant. Other creditors have no claim to those funds.

Limitation: If the insolvent debtor in the above example has unpaid creditors or innocent dependents, Claimant can only recover its actual losses. That is, Claimant is not entitled to recover any gains that the insolvent debtor may have

105. *See id.* § 58(2) (“A claimant entitled to restitution from property or its traceable product may assert the same rights against any subsequent transferee who is not a bona fide purchaser . . . or a bona fide payee.”). For discussion of the bona fide purchaser or payee defense, see below Part IV.

106. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 58 (2).

107. *See, e.g.,* Conn. Gen. Life Ins. Co., v. Universal Ins. Co., 838 F.2d 612, 618 (1st Cir. 1988) (“When a debtor is in possession of property impressed by a trust—express or constructive—the bankrupt estate holds the property subject to the outstanding interest of the beneficiaries. . . . [T]he claimant must identify the trust fund or property and, where the trust fund has been commingled with general property of the bankrupt, sufficiently trace the property or funds—the res.”).

obtained from Claimant's asset.¹⁰⁸

C. Implications for Discovery

Because of the distinctive advantages of restitutionary remedies, it may be prudent during discovery to seek information about potential gains the defendant made as a result of its dealings with the plaintiff, and, if the defendant obtained an asset from the plaintiff, any actions the defendant took with respect to the asset. For example, did the defendant transfer the claimant's money or property to someone else? Did the defendant purchase a different asset with the plaintiff's money or property? Did the defendant put the claimant's money in a banking or investment account or otherwise invest the money?

There are three independent reasons for seeking to trace the claimant's asset. First, if the defendant was a "conscious" wrongdoer or one who violated a fiduciary or confidential duty, any gain that the defendant made with the asset can be recovered by the claimant via restitution, even if that gain is greater than the claimant's loss.¹⁰⁹ (Of course, if the defendant's gain is less than the claimant's loss, then the claimant will instead pursue compensatory damages for the loss resulting from the wrong.) Second, the claimant may be entitled to a constructive trust or equitable lien on the traceable product of its asset.¹¹⁰ Third, if the defendant becomes insolvent, a restitution claimant's success in tracing its money or property into an asset held by the defendant will give the claimant a property interest in the asset, and the asset will not be considered part of any eventual bankruptcy estate.¹¹¹

In a breach of contract case, the plaintiff may want to inquire during discovery whether the breaching party made a profit from the breach. If the breaching party did profit from the breach, the claimant may be entitled to the breaching party's profits, providing the breach meets the elements of an "opportunistic" breach discussed earlier.¹¹²

108. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 61.

109. See *supra* Part II.D & Part III.A.

110. See *supra* Part III.B.

111. See *supra* Part III.B.3.

112. See *supra* Part III.A.

IV. DEFENSES TO THE UNJUST ENRICHMENT CAUSE OF ACTION

In addition to defenses that apply generally in civil litigation,¹¹³ a defendant to an unjust enrichment claim may be able to invoke defenses that are unique to the law of restitution.¹¹⁴ One example is detrimental change of position—an innocent recipient of a benefit (usually in the circumstance of a mistaken payment) has a defense to the restitution claim if the recipient justifiably relied to its detriment on the mistaken benefit.¹¹⁵ The defendant may not escape making restitution to the claimant, however, if the defendant's only reliance was paying living expenses or preexisting debts.¹¹⁶ Another example is the bona fide purchaser defense—a claimant may not obtain restitution of property from a third person if the third person was a bona fide purchaser for value of the property.¹¹⁷ Parallel to the

113. In the absence of a specific statutory limitations period applicable to a particular claim, it appears that unjust enrichment claims fall within the general limitations period of ten years under Rhode Island General Laws section 9-1-13. *See, e.g., Jonklaas v. Silverman*, 370 A.2d 1277, 1280 (R.I. 1977) (applying Rhode Island General Laws section 9-1-13 to a claim of mistaken payment of money).

114. *See generally* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 62–70 (2011).

115. *See id.* § 65. A claim to restitution based on mistake may be defeated if the defendant justifiably relied to its detriment on the mistaken benefit. *See, e.g., Romano v. Ret. Bd. of the Emps.' Ret. Sys. of R.I.*, 767 A.2d 35, 45 (R.I. 2001) (recognizing change of position as a defense to claim of restitution to recover money paid by mistake; burden is on recipient of mistaken payment to prove change of position (citing *Jonklaas*, 370 A.2d at 1281–82)).

116. *See, e.g., Romano*, 767 A.2d at 45 (quoting *Jonklaas*, 370 A.2d at 1282); *see also Goodbody & Co., Inc., v. Parente*, 358 A.2d 32, 34–35 (R.I. 1976) (holding that where claimant had mistakenly transferred shares and dividends to recipient, recipient's bad-faith delay in making restitution precluded any defense based on change of position).

117. *See generally* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 66, 68, 69 (discussing, respectively, the bona fide purchaser defense, the concept of “for value,” and the requirement that the recipient of the benefit must have acted “without notice” of the facts giving rise to the restitution claim). An example of the bona fide purchaser defense applied in Rhode Island is *Fleckhamer v. Fleckhamer*, 147 A. 886, 887–88 (R.I. 1929), in which a son wrongfully took money from a bank account held jointly by him and his mother, purchased two parcels of real estate with the money, and named his wife as joint tenant. *Id.* at 887. Upon the son's death, the wife conveyed both parcels to Landin, the person with whom she was living. *Id.* Landin sold one parcel to Doyle and granted a mortgage in the other parcel to Doyle as security for Doyle's loan to Landin. *Id.* The Rhode Island Supreme

bona fide purchaser defense is the bona fide payee defense. This defense may arise when a recipient obtains money that is not its own, whether by mistake or misappropriation, and uses that money to pay its creditor. The creditor, if it did not have notice of the mistake or misappropriation, is considered a bona fide payee with a defense to any restitution claim.¹¹⁸ This is true even if the money is still identifiable as the asset of the restitution claimant and even if the bona fide payee had not detrimentally relied on the payment.¹¹⁹

CONCLUSION

This overview of restitutionary causes of action and remedies has been intended to serve as a starting point for recognizing when a cause of action in unjust enrichment may exist and when restitutionary remedies may be of particular benefit to a claimant. Practitioners with potential unjust enrichment claims are encouraged to consult not only the Rhode Island cases referenced in the footnotes, but also the Restatement (Third) of Restitution and Unjust Enrichment for a deep and comprehensive treatment of the substantive and remedial law and for very helpful illustrations and case citations.

Court determined that the mother was entitled to restitution from the wife and Landin because they were not bona fide purchasers for value. *Id.* at 888. The court also ruled that the mother was *not* entitled to restitution from Doyle because his rights in the real estate were acquired by bona fide purchases for value, without notice of the facts giving rise to the restitution claim. *Id.* at 888.

118. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT §§ 67, 68, 69 (discussing, respectively, the bona fide payee defense, the concept of “for value,” and the requirement that the recipient of the benefit must have acted “without notice” of the facts giving rise to the restitution claim).

119. See *id.*