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Kelsey A. Hayward

J.D. 2018, Roger Williams University School of Law

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Comments

Disgorgement of Defendant's Gains from "Opportunistic" Breach of Contract: Its Fit in Rhode Island

Kelsey A. Hayward*

For breach of contract, should the plaintiff/non-breaching party be able to get a remedy based on any profit the defendant made from the breach? Contract law generally answers "no": The norm is that the non-breaching party who seeks a monetary remedy is entitled to "compensation" for its losses resulting from the breach rather than "disgorgement" or "restitution" of the defendant's gains resulting from the breach.¹ But consider the following scenario from the *Restatement (Third) of Restitution and Unjust Enrichment* (2011):

Farmer sells Buyer his entire crop of carrots for the coming season at a price of \$500 per ton. It is in Buyer's interest to be the exclusive distributor of Farmer's carrots, and Farmer's obligation to tender his entire output is a material term of the parties' agreement. Bad weather results in a reduced harvest and higher prices. Farmer delivers 20 tons of carrots to Buyer, then sells a

* Candidate for Juris Doctor, Roger Williams University School of Law, 2018. Thank you to Professor Colleen Murphy, Clare Harmon, and Gregory Henninger for all of your guidance and support throughout the writing process.

1. Long v. Atlantic PBS, Inc., 681 A.2d 249, 253 (R.I. 1996).

further 10 tons to a competing buyer at \$800 per ton.²

The *Restatement (Third)* indicates that the Buyer need not be relegated to compensation based on its loss resulting from the breach.³ Instead, the Buyer may obtain disgorgement of Farmer's gain resulting from the breach—\$3000 (10 tons sold to a different purchaser for \$300 per ton more than the contract price between Farmer and Buyer).⁴ This disgorgement remedy is advantageous when defendant's gain is greater than plaintiff's loss, or when the plaintiff more easily can prove defendant's gain than the plaintiff's own loss. The disgorgement remedy on these facts is justified because the Farmer intentionally breached the contract and a compensatory remedy based on Buyer's loss resulting from the breach might insufficiently protect the very thing that Buyer bargained for in the contract—the right to be the exclusive distributor of Farmer's carrots.⁵

Beyond this illustration, *Restatement (Third)* Section 39 broadly recognizes a remedy for disgorgement of a defendant's gains in a limited category of breach of contract actions.⁶ Under *Restatement (Third)* Section 39, the disgorgement remedy is available when: (1) the breach is deliberate, (2) the breach is profitable, and (3) the claimant's contractual entitlement cannot adequately be protected by an award for compensatory damages.⁷ When these three conditions are met, the breach is "opportunistic" and can be remedied by restitution—disgorgement of the defendant's gains—rather than compensation.⁸ The critical policy argument supporting the disgorgement remedy for "opportunistic" breaches is that one who intentionally breaches a contract should not be allowed to keep its gains if a compensatory remedy would inadequately protect the plaintiff's bargained-for entitlement under the contract.⁹ The disgorgement remedy does not punish

2. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. h, illus. 14 (AM. LAW INST. 2011).

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.* § 39.

7. *Id.*

8. *See id.*

9. *See id.* § 39 cmt. b ("A promisor who was permitted to exploit the shortcomings of the promisee's damage remedy could accept the price of the promised performance, then deliver something less than what was promised.

the defendant, but instead, “merely deprives a defendant of a profit wrongfully made.”¹⁰

In this Comment, I argue that, based on the trend toward disgorgement in other jurisdictions, and Rhode Island’s past recognition of a remedy based on defendant’s gains in breach of contract for the sale of land and in contexts other than breach of contract, Rhode Island should recognize the disgorgement remedy as an alternative to compensatory damages in “opportunistic” breaches of contract. Part I of this Comment will address the state of the law in other jurisdictions, demonstrating that both before and after the adoption of *Restatement (Third)* Section 39, disgorgement has been a widely accepted alternative to a typical compensatory damages remedy. Part II shows that Rhode Island case law already recognizes a disgorgement remedy for a breach of contract for the sale of land and in the non-contractual settings of unfair competition and breach of fiduciary duty. Part III argues that based on the trend of other jurisdictions and the logical implications of the Rhode Island disgorgement cases, Rhode Island courts should allow a claimant to recover disgorgement of defendant’s gains in “opportunistic” breaches of contract—as described in *Restatement (Third)* Section 39—because a disgorgement remedy protects a plaintiff’s contractual entitlement and deprives an intentionally breaching party of wrongful gains.

I. MODERN TREND TOWARD DISGORGEMENT OF DEFENDANT’S GAINS IN CERTAIN TYPES OF BREACH OF CONTRACT CASES

Courts have increasingly allowed plaintiffs to recover defendant’s gains in a claim for restitution when there has been an “opportunistic” breach of contract.¹¹ Even before the inclusion of Section 39 in the *Restatement (Third)*, several jurisdictions awarded disgorgement of defendant’s gains in breach of contract actions for certain types of contracts, including contracts for the sale of land, contractual protection of confidential information,

Such an outcome results in unjust enrichment as between the parties.”).

10. *Laurin v. DeCarolis Const. Co.*, 363 N.E.2d 675, 679 (Mass. 1977); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. e (AM. LAW INST. 2011).

11. *See, e.g.,* *Snepp v. United States*, 444 U.S. 507, 514, 515–16 (1980); *Laurin*, 363 N.E.2d at 678–79; *Y.J.D. Rest. Supply Co. v. Dib*, 413 N.Y.S.2d 835, 836 (N.Y. Sup. Ct. 1979).

and non-compete agreements.¹² Several courts have since adopted the language of *Restatement (Third)* Section 39, allowing for disgorgement of a defendant's gain when there has been an "opportunistic" breach of contract.¹³ In fact, one jurisdiction even expanded the remedy allowed in the *Restatement (Third)*.¹⁴

A. *Pre-Restatement (Third) Section 39*

Restatement (Third) Section 39 draws from the common law in jurisdictions that have allowed for this remedy in several types of contract cases, most notably, contracts for the sale of land, confidentiality agreements, and non-compete agreements.¹⁵

1. *Contracts for the Sale of Land*

Before the existence of the *Restatement (Third)* Section 39, several jurisdictions permitted a plaintiff to recover defendant's gains greater than plaintiff's losses for deliberate breach of a contract for the sale of land.¹⁶ In general, courts tended to treat contracts for the sale of land differently because real property was considered to be unique.¹⁷ In a contract for the sale of land, a buyer bargains to receive the land in a certain condition. Should the defendant deliberately change the condition of that land, by, for example, extracting materials such as trees or fill from the land after execution of the contract, the buyer does not receive the land for which he or she bargained.¹⁸ In a straightforward breach of contract action, a compensatory damage remedy would afford the buyer the difference between the contract price and the fair market value of the land after the damage.¹⁹ However, this

12. See, e.g., *Snepp*, 444 U.S. at 514, 515–16; *Laurin*, 363 N.E.2d at 678–79; *Y.J.D. Rest. Supply Co.*, 413 N.Y.S.2d at 836.

13. See *Kansas v. Nebraska*, 135 S. Ct. 1042, 1056–57 (2015); *Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 676–77 (E.D. Pa. 2015).

14. See *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1194–95, 1196 (Colo. App. 2011).

15. See, e.g., *Snepp*, 444 U.S. at 515–16; *Laurin*, 363 N.E.2d at 678–79; *Y.J.D. Rest. Supply Co.*, 413 N.Y.S.2d at 836.

16. See *Laurin*, 363 N.E.2d at 678; *May v. Muroff*, 483 So. 2d 772, 772 (Fla. Dist. Ct. App. 1986).

17. *Jolicoeur Furniture Co. v. Baldelli*, 653 A.2d 740, 749 (R.I. 1995).

18. See *Laurin*, 363 N.E.2d at 677; see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. d, illus. 1, 2 (AM. LAW INST. 2011).

19. See *Laurin*, 363 N.E.2d at 678.

compensatory damage remedy does not restore the land to the condition to which the buyer is entitled under the contract. Thus, because real property is unique, compensatory damages are often inadequate to compensate a buyer for damaged property.²⁰ Where the breach of contract for the sale of land is deliberate, courts have found that the buyer is entitled to the seller's gains as a result of the breach of the contract because compensatory damages are inadequate to protect the buyer's contractual entitlement to the land in its existing condition at the time of contract formation.²¹

To demonstrate this principle, the drafters of *Restatement (Third) Section 39* cited to *Laurin v. DeCarolus Construction Co.*²² In that Massachusetts case, the seller of a plot of land deliberately removed and sold gravel, trees, and shrubs after executing the contract with the buyer.²³ The court ordered the defendant to disgorge his gains—the \$6,480 value of the gravel—to the plaintiff because the breach was deliberate and willful, and the plaintiff was entitled to the land as it was contracted for, with the trees, shrubs, and gravel included.²⁴ The Massachusetts Supreme Judicial Court in *Laurin* reasoned that deliberate breaches similar to this likely will not result in a major diminution in fair market value of the land.²⁵ Therefore, disgorgement of profits is an effective remedy because it “deprives the defendant of a profit wrongfully made” so that the wrongful party cannot “shield” himself from increased liability by claiming that the value of the land after damage had only decreased marginally.²⁶ Other courts have reiterated this approach in similar situations in contracts for the sale of land where the breach is deliberate and defendant has profited as a result of the breach.²⁷

In *Laurin*, the Massachusetts Supreme Judicial Court

20. *Id.*

21. *Id.* at 678–79.

22. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 rep. note on cmt. d (AM. LAW INST. 2011); see *Laurin*, 363 N.E.2d at 679.

23. *Laurin*, 363 N.E.2d at 676.

24. *Id.* at 677, 678–79.

25. *Id.* at 678.

26. *Id.* at 678–79.

27. See *May v. Muroff*, 483 So. 2d 772, 772 (Fla. Dist. Ct. App. 1986) (finding that plaintiff is entitled to disgorgement of defendant's profit of \$240,000 from deliberately removing and selling fill from property rather than compensatory damages of \$122,067 after executing a contract for the sale of the land).

emphasized that a remedy of disgorgement of gains by the defendant is appropriate only in certain cases.²⁸ Specifically, the court focused on the fact that the breach of contract was willful and deliberate.²⁹ Second, the court recognized that “damages limited to the diminution in value of the premises,” the ordinary measure of compensatory damages for breach of contract, “may sometimes be seriously inadequate.”³⁰ Lastly, the court explicitly stated that a remedy ordering a defendant to disgorge gains in this situation is “not punitive” and, instead, affords the plaintiff the value or profit to which he or she was entitled under the contract.³¹

2. *Contractual Protection of Confidential Information*

Courts have also recognized a remedy for disgorgement of defendant’s gains from breach of contractual protection of confidential information.³² In the principle case demonstrating this proposition, *Snepp v. United States*, the United States Supreme Court allowed the CIA to recover Snepp’s profits from selling a book containing information about his time spent with the CIA in South Vietnam.³³ Snepp’s employment contract contained a provision requiring him to submit any material containing information about CIA activities for prepublication review by the CIA.³⁴ Snepp deliberately breached this provision of the employment contract by publishing his book without acquiring the required approval from the CIA, and profited through his sales of the books.³⁵ The Court allowed for the disgorgement of Snepp’s profits from the books to the CIA, because without this remedy, the Government would not be able to protect its contractual entitlement—the prepublication

28. *Laurin v. DeCarolis Const. Co.*, 363 N.E.2d 675, 678–79 (Mass. 1977).

29. *Id.* at 678.

30. *Id.*

31. *Id.* at 679.

32. *Snepp v. United States*, 444 U.S. 507, 515–16 (1980); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. d, illus. 4 (AM. LAW INST. 2011).

33. *Snepp*, 444 U.S. at 507, 515–16.

34. *Id.* at 507–08.

35. *Id.* at 508.

review.³⁶

Similar to the sale of land, courts consider the contractual entitlement to confidential information a right that cannot be adequately remedied through ordinary compensatory damages for a breach of contract action.³⁷ Indeed, in *Snepp*, the Court awarded the plaintiff disgorgement of defendant's profits even though the Government conceded that it did not actually sustain losses from Snepp's breach because the book did not reveal any classified information.³⁸ If a potential plaintiff in this situation could not recover the defendant's gains, the plaintiff would be much more vulnerable in protecting its contractual rights and position because the defendant could deliberately breach, knowing that the breach is likely to yield little or no provable loss to the plaintiff. Without the disgorgement remedy, the plaintiff cannot protect his or her contractual rights and the defendant can breach the contract with little repercussion. The defendant should not be unjustly enriched "at the expense of the plaintiff."³⁹

3. *Non-Compete Contracts*

Third, courts have recognized a remedy requiring disgorgement of defendant's gains in actions for deliberate breach of a non-compete contract.⁴⁰ In this situation, the plaintiff's contractual entitlement is to prevent its employees from working for competitors within a certain amount of time after they leave the company to prevent the opening of another business to compete with the plaintiff. A compensatory damage remedy is not adequate because it is unlikely or difficult to prove that a defendant's breach of a non-compete contract directly resulted in loss to the plaintiff. For example, in *Y.J.D. Restaurant Supply Co. v. Dib*, the defendant deliberately breached an agreement not to

36. *Id.* at 515–16.

37. *See id.* at 514, 516.

38. *Id.* at 510.

39. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. a (AM. LAW INST. 2011).

40. *See Y.J.D. Rest. Supply Co. v. Dib*, 413 N.Y.S.2d 835, 836 (N.Y. Sup. Ct. 1979) (requiring defendant to disgorge \$35,500 in net profits from the sale of a competing business, thereby deliberately breaching a non-compete contract, and where the plaintiff could not prove loss of profits); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. d, illus. 6 (AM. LAW INST. 2011).

compete with the plaintiff within a five-block radius for a period of three years.⁴¹ The defendant eventually sold his competing business, earning a \$35,500 profit.⁴² The plaintiff was unable to adequately prove his lost profits from the breach, because there were “too many competitive or economic factors involved . . . to prove any correct or fair amount of damages.”⁴³ The New York Supreme Court held that the plaintiff was entitled to the defendant’s full profit, \$35,500, because, “[e]quity will not aid in any scheme or project which might lead to undeserved profit.”⁴⁴

Often, a plaintiff may not be able to prove compensable damages for loss of profits directly resulting from defendant’s breach due to uncertainty of outside economic and competitive factors.⁴⁵ Therefore, a compensatory damage remedy is inadequate to protect the plaintiff’s entitlement to restrict a person from competing against his business. Courts have allowed for disgorgement in restitution to ensure that a defendant does not benefit unjustly from a breach of a non-compete contract that is deliberate and profitable.⁴⁶

*B. Restatement (Third) of Restitution and Unjust Enrichment
Section 39*

The *Restatement (Third)* Section 39 allows a plaintiff to recover a breaching party’s profits as a result of an “opportunistic” breach of contract, provided the breaching party’s profits exceeds the plaintiff’s provable loss or the plaintiff cannot prove loss.⁴⁷ There are three requirements for the availability of disgorgement of defendant gains based on “opportunistic” breach of contract: (1) a deliberate breach, (2) where the defendant profited as a result of that breach, and (3) the plaintiff’s contractual entitlement cannot be protected adequately by compensatory damages.⁴⁸ For typical

39. *Y.J.D. Rest. Supply Co.*, 413 N.Y.S.2d at 836.

40. *Id.*

41. *Id.*

42. *Id.*

43. *See id.*

44. *See id.*

45. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011).

46. *Id.* § 39(1) (“If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee’s contractual entitlement, the promisee has a claim

breach of contract actions, the measure of a monetary remedy is based on plaintiff's loss, not defendant's gain.⁴⁹ Section 39 carves out a claim in restitution for a certain type of breach of contract, which it calls "opportunistic."⁵⁰ A claim that meets all of the requirements of this Section is rare.⁵¹ Defendant's gains from the breach can be measured either by profits earned or the expenses saved as a result of the breach.⁵²

Contract law recognizes that in some cases, the typical remedy of compensatory damages is not sufficient to protect the rights for which the plaintiff bargained in the contract. Where compensatory damages are insufficient to compensate for that right, a court may award specific performance of a contract.⁵³ A disgorgement remedy for "opportunistic" contract provides the same protection for a non-breaching party that is provided by a remedy for specific performance, if the plaintiff had brought the claim earlier in time.⁵⁴ In granting specific performance, courts already have recognized that there are situations where contractual entitlements cannot be protected sufficiently by a compensatory remedy. A disgorgement remedy for "opportunistic" breach of contract suggests that courts recognize the same protection, only after the fact.⁵⁵

This disgorgement remedy for "opportunistic" breach of contract intends to protect a party that may be in a vulnerable position under the contract by deterring a potential breaching party with the threat that the wrongdoer might be required to disgorge his gains from the breach.⁵⁶ The contract rights that this

to restitution of the profit realized by the promisor as a result of the breach.").

49. *Long v. Atlantic PBS, Inc.*, 681 A.2d 249, 253 (R.I. 1996).

50. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011).

51. *Id.* § 39 cmt. a ("The restitution claim described in this section is infrequently available, because a breach of contract that satisfies the cumulative tests of § 39 is rare.").

52. *Id.* § 39 cmt. e.

53. *Id.* § 39 cmt. a ("Where a party's contractual entitlement would be inadequately protected by the legal remedy of damages for breach, a court will often reinforce the protection given to the claimant by an order of injunction or specific performance.").

54. *Id.* § 39 cmt. d.

55. *Id.*

56. *Id.* § 39 cmt. b ("Cases in which restitution reaches the profits from a breach of contract are those in which the promisee's contractual position is

Section seeks to protect “may resemble non-contractual entitlements that are routinely protected” such as misappropriation or fiduciary or confidential duty.⁵⁷ The plaintiff in an action for “opportunistic” breach of contract would face an inadequate compensatory damage remedy under the contract, or may not be able to prove compensable losses at all.⁵⁸ In a claim for restitution under *Restatement (Third)* Section 39, a plaintiff need not prove their own losses.⁵⁹ This provision aims to deter a potential breaching party from deliberately breaching a contract and taking advantage of decreased liability in the action because the plaintiff either cannot prove compensable losses or the compensatory damage remedy would not protect the plaintiff’s entitlement under the contract.⁶⁰ Thus, this provision discourages a party from deliberately breaching a contract because the party will be required to give its profit to the plaintiff, rather than receive a windfall from breach of contract after paying a compensatory damage remedy for the breach.⁶¹

1. Requirements

The first two requirements under *Restatement (Third)* Section 39 are straightforward: the breach must be deliberate and profitable.⁶² This remedy in restitution is only intended to apply to conscious wrongdoers who willfully breach a contract, not to unintentional breach of contract.⁶³ Further, this provision is also only intended to reach those who actually profit from the breach, where that profit exceeds the non-breaching party’s provable loss or where the non-breaching party cannot prove its loss.⁶⁴ While it may be common for a party to deliberately breach a contract, the defendant’s profit resulting from this breach does not often exceed

vulnerable to abuse. Vulnerability in this context stems from the difficulty that the promisee may face in recovering, as compensatory damages, a full equivalent of the performance for which the promisee has bargained.”).

57. *Id.* § 39 cmt. d.

58. *Id.* § 39 cmt. c.

59. *Id.* § 39 cmt. b.

60. *Id.*

61. *Id.*

62. *Id.* § 39(1).

63. *Id.* § 39 cmt. f.

64. *Id.* § 39(3).

the plaintiff's provable losses.⁶⁵

In order for a plaintiff to recover disgorgement of defendant's gain for "opportunistic" breach of contract, the "available damage remedy" must "afford[] inadequate protection to the promisee's contractual entitlement."⁶⁶ Essentially, if the traditional contract remedy of compensatory damages will not protect the right bargained for under the contract, disgorgement of profits may be available, provided the first two conditions are met.⁶⁷ An example of this occurs in contracts for the sale of land.⁶⁸ There is no adequate measure of compensation based on plaintiff's loss that could protect the plaintiff's contractual right to the land in the condition at the time of the contract or as provided for in the contract.⁶⁹

Often, however, a contractual entitlement can be adequately protected by an award of compensatory damages. For example, the non-breaching party of a contract for the sale of goods may recover replacement cost to procure the same goods from another vendor. In that case, the replacement cost is an adequate measure of compensatory damages to protect the non-breaching party's right under the contract, which is to obtain the goods or the reasonable value of what it would cost to obtain the goods from another seller.

Cases lacking an adequate compensatory damage remedy to protect a party's contractual entitlement are often those where an injunction or specific performance would have been appropriate had the plaintiff brought an action prior to the breach.⁷⁰ Comment c of *Restatement (Third) Section 39* suggests that one possible test to determine if the contractual entitlement cannot be adequately protected by a compensatory damage award is to conduct a hypothetical test for the availability of either an injunction or specific performance.⁷¹ For example, in *Snepp*, if the Government was aware that Snepp intended to release his book

65. *Id.* § 39cmt. f.

66. *Id.* § 39(1).

67. *See id.*

68. *See Laurin v. DeCarolus Const. Co.*, 363 N.E.2d 675, 678 (Mass. 1977).

69. *See id.*

70. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. c (AM. LAW INST. 2011).

71. *Id.*

without obtaining pre-publication review, a court likely would have issued an injunction preventing Snepp from releasing the book until he submitted the information for pre-publication review.⁷² Instead, the non-breaching party sued after the performance or non-performance had stopped, thus requiring a backward-looking remedy instead of the forward-looking remedies of specific performance or injunction. Specific performance or injunctive relief would have protected the Government's contractual entitlement to pre-publication review when it could not adequately be compensated by a compensatory damage award. In the same light, a disgorgement remedy addresses situations where the plaintiff's contractual entitlement cannot be protected through a compensatory damage award, but after specific performance and injunctive relief are no longer an option.⁷³

2. Illustrations

Because the requirements for this remedy under *Restatement (Third)* Section 39 make an "opportunistic" breach of contract unique, the drafters included several illustrations of applicable situations in the law. Many of the illustrations are based on the cases referenced in other sections of this Comment. This section outlines some of the other applicable cases for disgorgement of defendant's gain that are included in illustrations within *Restatement (Third)* Section 39.

In certain circumstances, damages may be compensable, but still inadequate to protect the plaintiff's entitlement under the contract. Illustration 10 demonstrates an example of when the plaintiff is able to demonstrate compensable loss, but his compensatory damage award would not protect the rights for which he bargained in the contract.⁷⁴ In this illustration, a car dealer and buyer execute a contract for the sale of a used car for \$5,000, with the stipulation that if the buyer wishes to sell the car within two years of the purchase, he would sell the car back to the dealer for \$4,000, who could then sell it for that price, plus ten

72. See *Snepp v. United States*, 444 U.S. 507, 509 (1980).

73. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. d (AM. LAW INST. 2011).

74. *Id.* § 39 cmt. d., illus. 10.

percent commission.⁷⁵ The buyer deliberately breaches the contract, and sells the car one month later to a third party for \$10,000.⁷⁶ The dealer's losses equal \$400, the ten percent commission he would have earned from selling the car after purchasing it back from the buyer.⁷⁷ Instead of recovering compensatory damages based on his losses, the dealer could bring an action seeking restitution for breach of contract, and, under Section 39, the dealer would be entitled to recover \$6,000, the profits wrongfully gained by the buyer through breaching the contract by selling the car to a party other than the dealer.⁷⁸ The dealer bargained for the right to buy and resell the car if the buyer decided to get rid of it within the first two years of purchase.⁷⁹ This right cannot be adequately compensated by the measure of the plaintiff's losses, a \$400 commission.

Other illustrations in the *Restatement (Third)* address situations in which the plaintiff elected to pay in advance for a certain performance, and defendant breached by failing to perform.⁸⁰ For example, Illustration 7 outlines a contract that the plaintiff City executed with the defendant Fire Department for fire protection, specifying that a certain number of firefighters, horses, and wagons were to be available for fire protection at all times, if needed.⁸¹ After the contract expired, the City learned that the Fire Department deliberately breached the contract by devoting fewer firefighters, wagons, and horses to this protection.⁸² Though the City did not sustain any actual losses from the breach, it is entitled to the \$100,000 saved by the Fire Department as a result of the breach because the City bargained for a specific number of resources under the contract, and the Fire Department profited by limiting those resources.⁸³

Finally, another set of illustrations in *Restatement (Third)* Section 39 highlight situations where disgorgement of profit is needed to adequately protect a plaintiff's ability to enforce

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* § 39 cmt. d.

81. *Id.* § 39 cmt. d., illus. 7.

82. *Id.*

83. *Id.*

negative covenants.⁸⁴ For example, in Illustration 8, a plaintiff landlord contracted to lease property to defendant lessee for one year at a cost of \$100,000, specifying in the contract that the lessee is not allowed to sublet the property.⁸⁵ Defendant deliberately breached the contract, subletting the property to a third party for \$110,000.⁸⁶ The landlord is likely not able to prove any actual loss as a result of this breach, and his ability to enforce a negative covenant in the contract is not protected by compensatory damages.⁸⁷ Therefore, in this situation, the landlord is entitled to the defendant's \$10,000 profit under *Restatement (Third) Section 39*.⁸⁸

C. *Courts Embracing Restatement (Third) Section 39 or Expanding Disgorgement Theory*

In the few years after adopting *Restatement (Third) Section 39*, a few courts have spoken about it directly and its applicability in various jurisdictions. Specifically, the United States Supreme Court addressed the disgorgement remedy and *Restatement (Third) Section 39* with regard to water rights among states.⁸⁹ Several other courts have embraced *Restatement (Third) Section 39* and its requirements for the disgorgement of defendant's gains for "opportunistic" breach of contract.⁹⁰ However, a few jurisdictions reject *Restatement (Third) Section 39* and the availability of disgorgement of defendant gains for certain types of breach of contract actions.⁹¹

84. *Id.* § 39 cmt. d., illus. 8.

85. *Id.*

86. *Id.*

87. *See id.*

88. *Id.*

89. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1056 (2015).

90. *See Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 676 (E.D. Pa. 2015) (recognizing that while opportunities for a remedy for disgorgement of profits in "opportunistic" breaches of contract are narrow, there are certain circumstances where a plaintiff may qualify for this relief); *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1194–95 (Colo. App. 2011).

91. *See SAS Institute, Inc. v. World Programming Ltd.*, No. 5:10–CV–25–FL, 2015 WL 5227801 at *2 (E.D.N.C. Sept. 18, 2015) (rejecting a request for disgorgement of profits for a breach of licensing contract because the plaintiff could not produce North Carolina case law that supported this remedy); *Henry v. Masson*, 333 S.W.3d 825, 849 (Tex. App. 2010) ("Disgorgement of profits is not a measure of damages available in breach of

In *Kansas v. Nebraska*, the Supreme Court, by a six to three decision, allowed Kansas to recover \$1.8 million of Nebraska's profit from breach of the Republican River Compact of 1943 and a 2002 settlement agreement set up to effectuate the Compact.⁹² A Special Master found that Nebraska "knowingly failed to comply" with the Republican River Compact by consuming more water than the state was allotted, and because the value of water in Nebraska exceeded that in Kansas, Nebraska's gain from the breach exceeded Kansas' loss.⁹³ The Court supported the Special Master's findings and adopted his recommendation of a disgorgement remedy because Nebraska profited directly from its deliberate breach by consuming 70,869 extra acre-feet of water.⁹⁴ Additionally, the Court concluded that awarding compensatory damages would be inadequate because, "that remedy alone 'would permit [an upstream State] to ignore its obligation to deliver water so long as it is willing' to pay that amount."⁹⁵ Ultimately, the United States Supreme Court cited *Restatement (Third)* Section 39 as a basis for Kansas's entitlement to a disgorgement remedy, embracing the availability of this remedy in certain types of breach of contract claims.⁹⁶

Justice Thomas's dissent, however, was more skeptical of the disgorgement remedy and the influence of *Restatement (Third)* Section 39.⁹⁷ First, he disagreed with the use of disgorgement in this particular case because the disgorgement remedy was meant for deliberate and intentional breaches, and disagreed with the majority's position that Nebraska "knowingly" breaching the contract equated to intentionally breaching the contract.⁹⁸ He also observed that the Supreme Court had never used the disgorgement remedy before, and that, "[t]he sheer novelty of this proposed remedy counsels against applying it [in the case]."⁹⁹

Since 2011, a few other courts have expressly adopted Section 39 as a basis for a disgorgement remedy in breach of contract

contract action.").

92. *Kansas*, 135 S. Ct. at 1049, 1050, 1051.

93. *Id.* at 1051, 1053–54.

94. *Id.* at 1057.

95. *Id.* (quoting *Texas v. New Mexico*, 482 U.S. 124, 132 (1987)).

96. *See id.* at 1057.

97. *Id.* at 1068 (Thomas, J., dissenting).

98. *Id.*

99. *Id.* at 1069.

actions. Specifically, the District Court for the Eastern District of Pennsylvania and the Bankruptcy Court for the Eastern District of Pennsylvania have concluded that Pennsylvania state law supported disgorgement of defendant's gain as an appropriate remedy for "opportunistic" breaches of contract.¹⁰⁰

Furthermore, one jurisdiction even expanded the scope of *Restatement (Third)* Section 39 requirements.¹⁰¹ In *Watson v. Cal-Three, L.L.C.*, the Colorado Appellate Court concluded that a defendant was allowed to recover plaintiff's profits on a counterclaim for breach of contract in a loan transaction for real estate.¹⁰² The court stated that, "[i]f the breaching party's wrongdoing is intentional or substantial, or there are no other means of measuring the wrongdoer's enrichment, recovery of the breaching party's profits may be granted."¹⁰³ This court's standard for awarding disgorgement of profits for "opportunistic" breach of contract is even lower than the *Restatement (Third)* provision because it allows for recovery of this remedy when the breach is *substantial* but unintentional.¹⁰⁴

Both prior and subsequent to the *Restatement (Third)* Section 39, several states and the United States Supreme Court have recognized a plaintiff's entitlement to a disgorgement remedy for a deliberate breach of contracts such as those for the sale of land, contractual protection of confidential information, non-compete agreements, and breach of water compacts.¹⁰⁵ These courts have recognized that in certain contractual relationships, a non-

100. See *Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 678 (E.D. Pa. 2015); *In re 400 Walnut Associates, L.P.*, 506 B.R. 645, 668 (Bankr. E.D. Pa. 2014) ("Pennsylvania law supports an award for restitution as to contract as well as tort.").

101. See *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1190 (Colo. App. 2011).

102. 254 P.3d at 1194–95.

103. *Id.* at 1195 (citing *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113, 119 (Colo. 1995)) (emphasis added).

104. See *id.* An example of a substantial breach can be found in *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, where the Colorado Supreme Court determined that the defendant "substantially" breached the contract when it unilaterally decided to stop royalty payments to the plaintiff pending clarification of obligations under the contract. 900 P.2d at 116, 119.

105. See *Kansas v. Nebraska*, 135 S. Ct. 1042, 1056 (2015); *Snepp v. U.S.*, 444 U.S. 507, 515 (1980); *Y.J.D. Restaurant Supply Co. v. Dib*, 413 N.Y.S.2d 835, 835–36 (N.Y. Sup. Ct. 1979); *Laurin v. DeCarolis Const. Co.*, 363 N.E. 2d 675, 679 (Mass. 2015).

breaching party is vulnerable and is not able to protect its bargained for entitlement under the contract because damages from a breach would likely result in little or no provable compensatory damages. Therefore, the disgorgement remedy serves as an effective alternative for a plaintiff, because, as the United States Supreme Court noted in *Snepp*, without the disgorgement remedy, the non-breaching party is deprived of means to protect the very thing it sought to protect under the contract.¹⁰⁶

II. DISGORGEMENT OF DEFENDANT'S GAIN IN RHODE ISLAND LAW

Rhode Island has little case law discussing disgorgement of defendant's gains as a potential remedy both in contract and other contexts. When Rhode Island has allowed a plaintiff to recover a defendant's gains, courts have structured it as the remedy of an "accounting for profits," rather than "disgorgement of profit or gain."¹⁰⁷ An accounting for profits is a remedy that "compel[s] a defendant to account for and pay over money owed to the plaintiff but held by the defendant."¹⁰⁸ Therefore, though the method includes one extra step, taking an account of the profits, the end result is essentially the same, because the defendant must turn its profits over to the plaintiff.

A. *Contract Context*

Rhode Island case law varies in its recognition of a disgorgement remedy for certain types of breach of contract claims.¹⁰⁹ In cases where the contract at issue is a contract for the sale of land, the Rhode Island Supreme Court has recognized the possibility of disgorgement of defendant's gains from a deliberate breach of contract.¹¹⁰ Additionally, Rhode Island has allowed a plaintiff to recover disgorgement of profits earned during delay in actions for specific performance of a contract for the sale of land where the defendant has breached the contract by

106. See 444 U.S. at 514–16.

107. See, e.g., *George v. George F. Berkander, Inc.*, 169 A.2d 370, 371 (R.I. 1961).

108. 1A C.J.S. *Accounting* § 6 (2016).

109. See *George*, 169 A.2d at 371; *Sweeney v. Brow*, 86 A. 115, 118–19 (R.I. 1913); *Bright v. James*, 87 A. 316, 317 (R.I. 1913).

110. See *Bright*, 87 A. at 317.

delaying conveyance.¹¹¹ In another case dealing with a non-competent contract, the Rhode Island Supreme Court denied the plaintiff's request for disgorgement of gains for breach of the contract.¹¹² However, the Rhode Island Supreme Court has recognized that there are situations where compensatory damages are inadequate to remedy the plaintiff, and instead issued injunctive relief or specific performance of the contract.¹¹³

Although there is little Rhode Island case law regarding disgorgement of defendant's gains in a breach of contract action, the Rhode Island Supreme Court has at least discussed the possibility of the disgorgement remedy in the context of contracts for the sale of land.¹¹⁴ In *Bright v. James*, Bright brought an action for specific performance of the contract for the sale of land, and additionally, an accounting of the defendant's profits from selling timber that had been cut from the land after the execution of the contract.¹¹⁵ The trial court awarded Bright an accounting for those profits.¹¹⁶ On appeal, the Rhode Island Supreme Court reversed the award; instead, awarding the fair market value of the timber, rather than the specific profits of the defendant. Because it concluded that the defendant believed the contract was abandoned, the fair market value for the sale of the timber would be a fair measure of damages, similar to a situation where the plaintiff had brought an action in conversion.¹¹⁷ By requiring the defendant to pay the value of the timber for sale, the court still required the defendant to give up his gains from the breach of

111. *Sweeny*, 86 A. at 119 (awarding a non-breaching party an accounting for profit of the rents collected between execution of the contract and resolution of the case as a result of the deliberate breach of the defendant seller).

112. *George*, 169 A.2d at 373.

113. *Griffin v. Zapata*, 570 A.2d 659, 661–62 (R.I. 1990) (granting specific performance in an action for breach of contract for the sale of property because, “[t]he granting of specific performance is appropriate when adequate compensation cannot be achieved through money damages as where the item is unique and distinctive, such as land”).

114. *Bright*, 87 A. at 316–17.

115. *Bright v. James*, 85 A. 545, 545, 546 (R.I. 1913).

116. *Bright*, 87 A. at 317.

117. *Id.* This case is analogous to *Laurin v. DeCarolus Const. Co.*, *infra* Part I.A.1, in which the Massachusetts Supreme Judicial Court awarded the plaintiff the value of timber defendant sold in breach of a contract for the sale of land. 363 N.E.2d 675, 678 (Mass. 1977). The drafters of *Restatement (Third)* § 39 cite to *Laurin* as authority for the *Restatement (Third)* provision.

contract, though it may not have been the exact dollar amount of his profit, and did not require any proof of losses from the plaintiff.¹¹⁸ Additionally, it seems that the court would have allowed the plaintiff to recover the full value of the defendant's profit had it not found that the defendant thought the contract had lapsed.¹¹⁹

Similarly, in *Sweeny v. Brow*, the plaintiffs sued the defendant seller for breach of a contract for the sale of land, and asked for the remedy of an accounting of the defendant's profits from cutting growing crops on the land after the execution of the contract.¹²⁰ The court found that the contract for the sale of land was valid, and, therefore, that the plaintiff was entitled to an accounting of the crops cut and removed from the land from the date of execution of the contract.¹²¹

The only other Rhode Island case law that discusses a disgorgement remedy is *George v. George F. Berkander, Inc.*, a 1961 Rhode Island Supreme Court case.¹²² In *George*, the plaintiff and defendant entered into a contract in which the plaintiff authorized the defendant to use its process for encasing small objects in plastic-like material, called Lucite, and to sell those objects in states other than Rhode Island.¹²³ The defendant deliberately breached the contract by selling the items in Rhode Island, and the plaintiff brought an action for breach of contract,¹²⁴ seeking an injunction barring the defendant from selling in Rhode Island, and further, an accounting of the defendant's gains as a result of selling the items in the state.¹²⁵ The Rhode Island Supreme Court held that the plaintiff would be entitled to a remedy for breach of contract to the extent that it

118. *See generally Bright*, 87 A. at 317.

119. *See id.*

120. 86 A. 115, 115–16 (R.I. 1913).

121. *Id.* at 118–19.

122. 169 A.2d 370, 370 (R.I. 1961).

123. *Id.* at 370–71.

124. The plaintiffs brought an action for breach of contract, seeking a restitutionary remedy for disgorgement of defendant's profits, but, based on the argument for disgorgement, the court assumed that the plaintiff wanted the court to analyze the case as both a breach of contract action and a claim for unfair competition. *George*, 169 A.2d at 370–71. The court found that the plaintiff did not meet the elements of a claim for unfair competition. *Id.* at 371.

125. *Id.*

could prove its losses, but that it was not entitled to disgorgement of the defendant's profits from the breach.¹²⁶ The court reasoned that, "[t]here was nothing in the record here that would warrant the establishment of a more extensive measure of damages."¹²⁷ Ultimately, the court concluded that the plaintiff could not prove loss of profits and thus was not entitled to a monetary remedy for the defendant's sale of goods in Rhode Island in breach of the contract.¹²⁸

On its face, the Rhode Island Supreme Court's ruling in *George* may appear to pose a problem to plaintiffs seeking disgorgement of defendant's gains in a breach of a non-compete contract in particular.¹²⁹ However, the court's reasoning can be distinguished from the principles espoused in *Restatement (Third)* Section 39. Implicit in the Rhode Island Supreme Court's opinion in *George* is its conclusion that a remedy based on defendant's profits would be *punitive*.¹³⁰ Because the court characterized the disgorgement award as a punitive damage award, it is understandable why the court dismissed the award's applicability to a breach of contract case because normally, punitive damages are not permitted in breach of contract actions.¹³¹ However, *Restatement (Third)* Section 39 does not propose a punitive remedy for breach of contract. Rather, it proposes restitution as an *alternative* to a compensatory damage remedy in "opportunistic" breach of contract actions.¹³² In fact, the theory behind the disgorgement award is to provide the plaintiff with

126. *Id.* at 373.

127. *Id.*

128. *Id.* The superior court separately found that the defendants failed to pay royalty payments for one item under the contract, and held that the plaintiffs were entitled to a monetary award for the total of the royalty payments, \$158.91. *Id.* at 371.

129. *See id.* at 371–72.

130. *Id.* at 371 (emphasis added). The Rhode Island Supreme Court suggested that a remedy based upon defendant's profits rather than plaintiff's losses in an unfair competition claim may be awarded, but refers to this remedy as "punitive." Specifically, the court stated, "[a plaintiff may] in appropriate circumstances, be awarded punitive damages by requiring respondent to account . . . for such profits as arose out of the deception." *Id.*

131. *O'Coin v. Woonsocket Inst. Trust Co.*, 535 A.2d 1263, 1266 (R.I. 1988).

132. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011).

value to which it was entitled under the contract by denying the defendant the ability to keep its wrongful gains.¹³³

Also, *George* did not entirely close the door on the possibility of a remedy outside of that which is typical for contract actions. The court contended that there may be “special circumstance[s]” that “warrant the establishment of a more extensive measure of damages.”¹³⁴ By saying this, the court implicitly suggested that the normal compensatory damage remedy may not be adequate in all breach of contract actions. Through this suggestion, the court is preparing to recognize a remedy in the future such as is described here.

In sum, Rhode Island case law does not have a clear direction for recognition of a plaintiff’s right to recover defendant’s gains for breach of contract claims. The Rhode Island Supreme Court’s ruling on the disgorgement remedy in *George* does not represent the consensus for Rhode Island law on the disgorgement of defendant’s gains in *all* breach of contract actions. In *Bright v. James* and *Sweeny v. Brow*, the Rhode Island Supreme Court explicitly allowed for the possibility of disgorgement of defendant’s gains from cutting timber or crops in breach of contracts for the sale of land.¹³⁵ Rhode Island’s recognition of a disgorgement remedy in contracts for the sale of land and contexts outside of breach of contract lend the conclusion that it would not be far reaching for courts to allow a disgorgement remedy in “opportunistic” breaches of contract. Rhode Island has already acknowledged the availability of disgorgement in several contexts, and therefore, should extend this allowance to include all “opportunistic” breaches of contract.

B. Other Contexts

Rhode Island case law recognizes a disgorgement remedy for plaintiffs in actions other than those involving contracts. In addition, Rhode Island specifically allows the plaintiff to recover defendant’s gains in claims for unfair competition and breach of fiduciary duty.¹³⁶

133. *Laurin v. DeCarolus Const. Co.*, 363 N.E.2d 675, 679 (Mass. 2015).

134. *George*, 169 A.2d at 372–73.

135. *Bright v. James*, 85 A. 545, 546 (R.I. 1913); *Sweeny v. Brow*, 86 A. 115, 119 (R.I. 1913).

136. *See Bostitch v. King Fastener Co.*, 140 A.2d 274, 283 (R.I. 1958).

1. *Unfair Competition*

The Rhode Island Supreme Court has expressly allowed a plaintiff to recover defendant's gains in cases of unfair competition where the plaintiff can prove fraud.¹³⁷ The leading case is *Bostitch, Inc. v. King Fastener Co.*, where the court found the defendant was liable in a claim for unfair competition when it purposely copied the plaintiff's packaging for staples.¹³⁸ The plaintiff, a leading manufacturer of staplers and other associated products, used a well-known green and yellow packaging design for its boxes of staples.¹³⁹ The defendant sold its staples in a box almost identical to the plaintiff's, particularly with the green and yellow color scheme.¹⁴⁰ Approximately twenty percent of the defendant's profits were earned through selling staples to fit plaintiff's staplers in those yellow and green boxes.¹⁴¹ The superior court required the defendant to disgorge its profits from staple sales to the plaintiffs.¹⁴² The Rhode Island Supreme Court ultimately reversed the superior court because in this case, the plaintiff could not prove fraud, but the court expressly stated that a plaintiff could recover defendant's ill-gotten gains from unfair competition.¹⁴³ In this case, it would have been difficult for the plaintiff to prove its losses as a result of the defendant's wrongdoing.¹⁴⁴ Had the court found fraud and allowed the disgorgement remedy, it would have been the only method to deprive the defendant of its wrongfully acquired gains.¹⁴⁵

2. *Breach of Fiduciary Duty*

Rhode Island has also recognized a disgorgement remedy for claims of breach of fiduciary duty.¹⁴⁶ In fact, in *Grant v. Nyman*,

137. *Id.* at 284.

138. 140 A.2d 274, 278 (R.I. 1958).

139. *Id.* at 277.

140. *Id.*

141. *Id.*

142. *Id.* at 279.

143. *Id.* at 283–84 (“It is well established in cases involving unfair competition that remedies available to an injured party include . . . the ordering of an accounting to the injured party by the offending party for all profits arising out of the imitation . . .”).

144. *See id.* at 278.

145. *Id.* at 284.

146. *See* *Lawton v. Nyman*, 357 F. Supp. 2d 428 (D.R.I. 2005).

the plaintiff requested disgorgement of the defendant's gains from a breach of fiduciary duty.¹⁴⁷ The Rhode Island Supreme Court stated in response that the "traditional equity remedy for breach of fiduciary duty is the monetary remedy of an 'accounting.'"¹⁴⁸

A specific example of this is found in *Lawton v. Nyman*.¹⁴⁹ In that case, the United States District Court for the District of Rhode Island, interpreting a state law claim, discussed the availability of the disgorgement remedy under Rhode Island law for breach of fiduciary duty.¹⁵⁰ The court ultimately awarded compensatory damages because the damage award equaled the amount of the defendant's profit as a result of the breach of fiduciary duty.¹⁵¹ However, the court expressly stated that a remedy requiring the defendant to disgorge his gains for breach of fiduciary duty would also be appropriate in this case.¹⁵² In response to the defendant's argument that the plaintiff did not produce evidence to establish a constructive trust—a different equitable remedy—the court held that as an alternative to a constructive trust, "disgorgement or a money judgment may be appropriate remedies for unjust enrichment, especially when the plaintiff is not seeking to recover particular property or a specific fund of money."¹⁵³

III. RHODE ISLAND SHOULD ALLOW FOR DISGORGEMENT OF DEFENDANT GAINS IN "OPPORTUNISTIC" BREACH OF CONTRACT CASES

Case law demonstrates that many courts allow for plaintiffs to recover the defendant's gains from breach of "opportunistic" contract in several situations, including: contracts for the sale of land; contractual entitlements to protection of confidential information; and breach of non-compete contracts.¹⁵⁴ In Rhode Island, the Rhode Island Supreme Court has recognized the

147. No. PC03-2893, 2004 WL 1769150, at *1 (R.I. Super. Ct. July 9, 2004).

148. *Id.* at *2 (quoting *In re Evangelista*, 760 F.2d 27, 29 (1st Cir. 1985)).

149. 357 F.Supp.2d 428, 430–31 (D.R.I. 2005).

150. *Id.* at 434.

151. *Id.* at 440.

152. *Id.* at 434.

153. *Id.*

154. *Snapp v. U.S.*, 444 U.S. 507, 516 (1980); *Y.J.D. Restaurant Supply Co. v. Dib*, 413 N.Y.S.2d 835, 836 (N.Y. 1979); *Laurin v. DeCarolis Const. Co.*, 363 N.E.2d 675, 679 (Mass. 2015).

possibility of a remedy based on defendant's gains in contracts for the sale of land, along with contexts outside of contract claims, including unfair competition and breach of fiduciary duty.¹⁵⁵ Based on the logic of these cases, Rhode Island should extend recognition of a disgorgement remedy for all "opportunistic" contract claims.

Ultimately, a remedy in restitution for disgorgement of defendant's gains makes sense when the defendant commits an "opportunistic" breach of contract. When entering into a contract, parties bargain for certain rights that they expect will be fulfilled by performance of the contract. Typically, a party then has the choice to perform the contract or to breach and then pay compensation for plaintiff's losses resulting from the breach.¹⁵⁶ However, in cases where there has been an "opportunistic" breach, payment of compensatory damages is insufficient to protect the rights that the non-breaching party bargained for under the contract, and the disgorgement remedy is needed.¹⁵⁷

A disgorgement remedy for an "opportunistic" breach of contract encourages voluntary transactions and reinforces the stability of contracts because it protects the parties' contractual positions.¹⁵⁸ The disgorgement remedy also reinforces a recurring theme in the law of unjust enrichment that a conscious wrongdoer should not be able to keep its gains.¹⁵⁹ If the defendant's "liability is limited to provable damages[,] then the "defendant's election to disregard the plaintiff's entitlement is inadequately deterred."¹⁶⁰ Further, the disgorgement remedy in the *Restatement (Third)* Section 39 protects the "integrity of the parties' bargain and of the bargaining process by which contracts are made," because it encourages both parties to respect the entitlements under the contract.¹⁶¹ Those situations that meet the requirements under

155. *George v. George F. Berkander, Inc.*, 169 A.2d 370, 371 (R.I. 1961); *Sweeney v. Brow*, 86 A. 115, 118–19 (R.I. 1913); *Bright v. James*, 87 A. 316, 317 (R.I. 1913).

156. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. a (AM. LAW INST. 2011).

157. *Id.*

158. *Id.* § 39 cmt. b.

159. *Id.* § 39 cmt. a.

160. Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2045 (2001).

161. *Id.*

the *Restatement (Third)* Section 39 include contractual entitlements that cannot be easily valued monetarily.¹⁶² Instead of allowing the defendant to take advantage of a vulnerable party by deliberately breaching a contract and profiting from that breach, a disgorgement remedy encourages adherence to the contract.¹⁶³ For example, an employee that has signed a non-compete agreement will be deterred from breaching that agreement if the employee knows that the employee will have to disgorge all of his or her gains from the breach. The availability of the disgorgement remedy encourages both parties to perform under the contract, particularly where one party's entitlements under the contract are vulnerable.

Also, a disgorgement remedy for "opportunistic" breach of contract does not undermine the norm of compensatory damages in breach of contract claims because the disgorgement remedy is narrowly tailored to specific circumstances that likely will be infrequent.¹⁶⁴ More often than not, a non-breaching party will be adequately protected by a compensatory damage remedy from provable damages.¹⁶⁵

The disgorgement remedy for "opportunistic" breach of contract is rooted in two major policy considerations. First, a disgorgement remedy for breach of contract protects those rights bargained for under a contract that cannot be adequately protected by an award of compensatory damages.¹⁶⁶ Second, disgorgement reiterates the theory in restitution that a conscious wrongdoer should not be allowed to keep its ill-gotten gains.¹⁶⁷ Because Rhode Island courts have granted specific performance or injunctive relief in breach of contract actions,¹⁶⁸ thereby recognizing that some contractual rights cannot be adequately protected through compensatory damages, and because Rhode Island courts have already granted the disgorgement remedy in some cases, courts in Rhode Island should follow other jurisdiction in allowing the disgorgement remedy for "opportunistic" breaches

162. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. b (AM. LAW INST. 2011).

163. *Id.* § 39 cmt. a.

164. *Id.* § 39 cmt. c.

165. *See id.* § 39 cmt. a.

166. *See id.* § 39 cmt. a.

167. *See id.* § 39 cmt. b.

168. *Griffin v. Zapata*, 570 A.2d 659, 661–62 (R.I. 1990).

of contract.

IV. CONCLUSION

The law encourages and supports voluntary transactions through the formation of contracts. Sometimes, parties bargain for rights under a contract that cannot be adequately protected with an award of compensatory damages. In the rare situation where the defendant has deliberately breached the contract, profited from the breach, and a compensatory damage remedy would be inadequate to protect the right that was bargained for under the contract, the *Restatement (Third)* Section 39 provides an alternative remedy in a claim for restitution of disgorgement of defendant's gains for the non-breaching party.¹⁶⁹

The trend of case law has demonstrated a tendency to recognize the availability of disgorgement of a defendant's profits that have exceeded the plaintiff's provable losses or where the plaintiff cannot prove losses at all. Several jurisdictions have either expressly allowed for this type of remedy in breach of contract actions, like Massachusetts in *Laurin*, or have adopted *Restatement (Third)* Section 39 word for word, like the United States Supreme Court in *Kansas*. While Rhode Island law varies with respect to its stance on a disgorgement remedy in breach of contract actions, in the past, it has awarded plaintiffs disgorgement of defendant's gains based on contracts for the sale of land as well as other contexts.¹⁷⁰ Therefore, Rhode Island should recognize a plaintiff's right to a remedy of disgorgement of defendant's gains in "opportunistic" breach of contract actions.

169. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011).

170. See *George v. George F. Berkender*, 169 A.2d 370, 371 (R.I. 1961); *Bright v. James*, 87 A. 316, 317 (R.I. 1913).