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Doug Rendleman
*Washington and Lee University School of Law*, rendlemand@wlu.edu

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# Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock?

Doug Rendleman*

After buying a "fixer-upper" home in Lexington, Virginia, Harriet Homeowner contracted with Prime Contractor to remodel the house. To prepare to replace Homeowner's steam and radiator furnace with a forced-air heating-cooling system, Prime subcontracted with AsbestOut to remove two hundred feet of asbestos-covered pipe from the basement. After AsbestOut completed its removal, Prime exited. AsbestOut sued Homeowner seeking a $4000 money judgment for quantum meruit restitution. Its so-far-uncompensated asbestos removal, AsbestOut insists, has unjustly enriched Homeowner.[1]

The question you are probably asking—"Has Homeowner already paid Prime?"—I will place to one side for now, but I will deal below with both "yes" and "no" answers.

*Introduction*: AsbestOut's uncomplicated $4000 lawsuit stands astride one of the fault lines in restitution. Why does it turn out to be what Professor Dan Friedmann calls a "rather intricate" subject?[2] On the one

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* Huntley Professor, Washington and Lee Law School. Many others have been involved in this Article. Professor Andrew Kull, Reporter for the *Restatement (Third) of Restitution and Unjust Enrichment* and the other Advisers have stimulated my thoughts about the larger issues in restitution, although nothing herein is ALI policy; my interest in the discrete subject was first piqued while researching my yearly supplement for the mechanic's lien chapter in DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENT AND LIENS IN VIRGINIA (2d ed. 1994), and Ms. Julie Hawkins was working with me on that supplement; Professor Mark Gergen, the faculty participants, and the law review staff at the *Texas Law Review* Symposium on Restitution in January of 2001 encouraged me to persevere; Professor David Carlson's careful readings and constructive comments at two stages strengthened my analysis; Dean David Partlett's and Professor Leo O'Brien's thoughtful comments on drafts were beneficial; and Mr. Joe Carpenter helped with footnotes. I thank them all. I thank as well the Frances Lewis Law Center for its financial support.

1. The hypothetical is based on *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.*, 910 P.2d 839 (Kan. 1996).

2. Daniel Friedmann, *Valid, Voidable, Qualified, and Non-existing Obligations: An Alternative Perspective on the Law of Restitution*, *in* ESSAYS ON THE LAW OF RESTITUTION 247, 273 (Andrew Burrows ed., 1991).

hand, lawyers, judges, and scholars perceive restitution's unjust enrichment core to be capable of suppressing injustice across large areas of private law. But, on the other, its bumptiousness has touched the positivist in many, leading them to search for principles of confinement. One of the major themes of this restitution symposium is the necessity of intermediate limiting principles between the spacious generalization "unjust enrichment" and the results in disparate disputes.

This Article's title was inspired by Professor John Dawson's pithy observation about restitution's benefits and risks:

> [A] general principle prohibiting enrichment through another's loss appears first as a convenient explanation of specific results; it is an instrument for quite practical and intelligible purposes. Yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock. . . . The ideal of preventing enrichment through another's loss has a strong appeal to the sense of equal justice . . . . It constantly tends to become a "rule," to dictate solutions, to impose itself on the mind.[3]

In this Article, I use AsbestOut's quantum meruit claim to examine the search for limiting principles. But first I will return to the image in Dawson's second sentence above—the heady brew of undiluted unjust enrichment is intoxicating enough to induce "sober citizens" (read "judges") "to jump right off the dock." "Analogies," S.F.C. Milsom observed, "always make one point at the expense of another."[4] The need to confine the "general principle" of unjust enrichment is the point Dawson emphasizes. In short, by positing an unfortunate dunking in store for the judge who relies on broad unjust enrichment principles, Dawson's analogy supports absolute rules, rules designed to keep the judge "on the dock." The aquatic pratfall that follows a decision based on general principles makes Dawson's point at the expense of another important point: the need for judicial flexibility and creativity.

Although I agree with Dawson's basic idea—the need for intermediate limitations on unjust enrichment—I am skeptical about the absolutism suggested by the view from Dawson's dock. An old saying expresses my view a little better: "Unjust enrichment is a hard dog to keep on the porch." But our dog does not live on the porch. The purpose of restitution sometimes requires it to go "off the porch," to lead the hunt for unjust enrichment. I will propose a frame of reference for restitution

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3. JOHN P. DAWSON, UNJUST ENRICHMENT 8 (1951). Professor Dannemann quotes the same passage from Dawson in his Article for this restitution symposium. *See* Gerhard Dannemann, *Unjust Enrichment by Transfer: Some Comparative Remarks*, 79 TEXAS L. REV. 1837, 1851-52 (2001).

4. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 100 (2d ed. 1981).

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disputes that will respect the integrity of limitations yet preserve a safety valve for creative and individual decision making, depending on the facts and context.

My own approach to restitution is a process-oriented one, influenced by Texas's own Leon Green.[5] Law created and administered through courts is a question-asking process. The overarching principles that shape the questions are moral, economic, and administrative. Rules, no matter how moral and efficient, must be capable of administration through the stages in the system of civil justice and workable with different people at different phases of the dispute process. Lawyers advise clients, evaluate disputes, and negotiate settlements. Lawyers miss many restitution issues when planning litigation.[6] As a result, they plead and argue restitution badly. Trial judges decide pretrial motions and, in the United States, approve jury instructions and instruct juries. Juries decide the factual issues in trials. Finally, appellate courts pass on appeals. Professors spend much of their time on the last stage of the process, telling appellate judges how to decide appeals and proportionally less of their time on the other, certainly more practical, and perhaps more important, stages of the process, like primary conduct, lawsuit planning, the settlement process, and trials in the first instance.

Stable and predictable rules coexist in tension with the courts' quest for justice, explicit in the policy against unjust enrichment. The common law is always incomplete, lying as it does in the path of changing times and the adversary system of legal argument. Judges cannot predict how future disputes will test prior rules. Accordingly, rules ought to be flexible and capable of growth. Common law is created by judges; judges adopt the common law to decide disputes. Imprecision lurks in common-law rules because courts mold the common law at the same time that they apply it to disputes. Reflective philosophers of law who believe in rules nevertheless allow courts to change the rules.[7] When common-law rules are not efficient, not fair, or not administrable, the court can adopt new ones.

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5. *See* LEON GREEN, THE LITIGATION PROCESS IN TORT LAW (1965). My views are explained in more detail in Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 855-64 (1999).

6. *See, e.g.*, Centex Corp. v. Dalton, 840 S.W.2d 952, 955 (Tex. 1992) (noting that although "it is possible a contract claim may be held invalid, it is somewhat standard practice for a party to plead an alternative quantum meruit claim. . . . [But] never at any point . . . did [the party] assert a quantum meruit claim"); Dobbins v. Redden, 785 S.W.2d 377, 378 (Tex. 1990) (noting that "[w]hile the theory of quantum meruit might have provided Redden with an alternate ground of recovery, . . . Redden did not plead this theory").

7. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 207-28 (1991) (suggesting that when the application of a rule becomes socially, politically, or morally unattractive, the judge is empowered to treat the rule as nonconclusive and thus subject to revision).

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I suggest a series of questions to focus judges' and jurors' critical judgment on the crucial restitution issues in AsbestOut v. Homeowner. Was Homeowner benefited or enriched? Was Homeowner's benefit, if any, at AsbestOut's expense? Was Homeowner's enrichment unjust? What factors call for restitution? Are there reasons to withhold restitution?[8] Will granting AsbestOut restitution interfere with a property, contract, tort, or other substantive policy?[9] If AsbestOut cannot recover under a contract principle, can the judge grant and measure restitution in ways that advance, or at least do not retard, the contract principle? In short, can the court grant and measure restitution yet avoid incongruence with the related substantive policy? While answering these questions will not steer everyone to the same solution, the various answers should focus everyone's judgment on the important issues and lead to a beneficial discussion, if not to universal approbation for a particular solution.

In this Article, I will examine the preceding series of restitution questions in tandem with the reasons many courts and commentators would give to refuse quantum meruit to AsbestOut. The answers, I will conclude, should not always keep unjust enrichment on the porch. This is a consequence of democratic government through courts. The common law is not merely technical and politically neutral; common-law rules are not forever found. Hard questions divide lawyers, classrooms, bar associations, collegial courts, faculties of law, and even restatement advisory committees. The generative process of shaping law inevitably leads different people to different results on difficult questions. The untidy uncertainty that follows is part of the process of formulating policy in a democracy.

*Related Doctrine*: The most important issues grow out of the relationship between restitution and related substantive doctrines. A researcher will quickly find how complex the substantive issues in AsbestOut's quantum meruit claim are. Restitution is only one of the three relevant legal subjects. Although Virginia lacks direct quantum meruit precedent, many other states have decisions on a subcontractor's quantum meruit claim.[10] Moreover, many leading restitution scholars,[11] as well

8. The reader will observe the influence of Peter Birks in formulating the foregoing questions. *See* Peter Birks, *At the Expense of the Claimant: Direct and Indirect Enrichment in English Law*, 2000 OXFORD U. COMP. L.F. 1, text accompanying note 11, *at* http://ouclf.iuscomp.org.

9. *See* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEXAS L. REV. 1277, 1285 (1989) (noting that "restitution should not undermine policies of tort or contract law that are served by denying recovery").

10. The decisions are collected in J.R. Kemper, Annotation, *Building and Construction Contracts: Right of Subcontractor Who Has Dealt Only with Primary Contractor to Recover Against Property Owner in Quasi Contract*, 62 A.L.R.3d 288 (1975) (1975 & Supp. 2000).

11. 1 DAN B. DOBBS, LAW OF REMEDIES § 4.9(4), at 697-99 (2d ed. 1993); 3 *id.* § 12.20(3), at 469-74; 2 GEORGE E. PALMER, THE LAW OF RESTITUTION § 10.7 (1978 & Supp. II 2000); John P.

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as prominent scholars in the worldwide community of restitution,[12] have commented on the general situation exemplified in AsbestOut's claim.

Following restitution, the second relevant legal subject is construction and contract law. Construction contracts are an intricate branch of contract law.[13] Mechanic's liens statutes are a complex construction law subspecialty based on discrete state statutes and existing in discrete legal cultures, which usually fly below the horizon of scholarly radar. The construction law and mechanic's lien features of AsbestOut's problem are stripped to the essentials, omitting possible nuances like lien waivers, performance bonds, and multiple corporations.

The third legal specialty is insolvency and bankruptcy, for although Prime merely "exited," if Prime files a bankruptcy petition, the dispute between Homeowner and AsbestOut takes on a new dimension that draws Prime's and both litigants' creditors into our consideration. A subcontractor's quantum meruit recovery may threaten the bankruptcy policy of distributing a debtor's assets equally among similarly situated creditors.

Finally, neither AsbestOut's defendant (Homeowner) nor AsbestOut's substantive theory (quantum meruit) are AsbestOut's first choices. AsbestOut's best defendant is Prime, and AsbestOut's best substantive theory is its contract with Prime. But Prime is out of the picture, remitting AsbestOut, the subcontractor, to second- or third-best solutions. Homeowner is AsbestOut's second-best defendant, after Prime. AsbestOut's second-best substantive theory is a mechanic's lien against Homeowner's house, which may let AsbestOut recover from Homeowner. However, a mechanic's lien may be unavailable. This possibility leaves AsbestOut pursuing its claim for quantum meruit, its third-best substantive theory, against Homeowner, its second-best defendant.

*Quantum Meruit and Contract*: May AsbestOut, the subcontractor, recover from Homeowner for quantum meruit, even though there is no contract between the two and a mechanic's lien may have been available to the subcontractor? Courts' "resistance to such claims," as Professor Dawson has noted, "is deep-seated."[14] This treatment will begin with

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Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1445-46 (1974); Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 88-89 (1985).

12. *See, e.g.*, LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 59 (Gareth Jones ed., 5th ed. 1998) (stating that the breach of an obligation to pay by a contractor does not necessarily entitle the subcontractor to sue a third party who benefited from his performance); *see also* Birks, *supra* note 8, at text accompanying note 11 (noting that "the ground for recovery of [unjust] enrichment is unlike any other . . . ."); Friedmann, *supra* note 2, at 274 (pointing out that "[u]nder English law the right to restitution (i.e. *quantum meruit*) for unrequested services is very limited").

13. *See generally* JUSTIN SWEET, SWEET ON CONSTRUCTION LAW (1997) (helpfully introducing the subject's complexity and diversity).

14. Dawson, *supra* note 11, at 1448.

restitution, move to contract, to limiting principles, and then to the mechanic's lien; it will discuss the concepts of unjustness and enrichment, the distribution of risk, the measurement of quantum meruit recovery, the effect of insolvency and bankruptcy, and ways to protect Homeowner from double payment.

A short discussion of the excessive and confusing restitution terminology will ameliorate some obfuscation. Restitution is divided into two branches. The first—which this Article does not discuss directly—is equitable restitution, comprised mainly of constructive trusts, resulting trusts, and equitable liens. The second, legal restitution—also referred to as both general assumpsit and quasi-contract—comprises the common counts, mainly money had and received, quantum valebant, and our subject, quantum meruit.

Quantum meruit—legal restitution to recover for the value of plaintiff's services—is the technical name of AsbestOut's claim against Homeowner. Courts sometimes exacerbate readers' confusion by referring to quantum meruit as "equitable."[15] This may be simply a mistake. Quantum meruit is legal restitution. "[I]t is clear that [a quantum meruit] action is at law and the relief given is a simple money judgment."[16] By "equitable" the

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15. *See, e.g.*, Great Plains Equip., Inc. v. Northwest Pipeline Corp., 979 P.2d 627, 632 (Idaho 1999); Southtown Plumbing, Inc. v. Har-Ned Lumber Co., 493 N.W.2d 137, 140 (Minn. Ct. App. 1992); Ontiveros Insulation Co. v. Sanchez, 3 P.3d 695, 699 (N.M. Ct. App. 2000); Columbia Wholesale Co. v. Scudder May N.V., 440 S.E.2d 129, 131 n.1 (S.C. 1994).

16. 1 PALMER, *supra* note 11, § 1.2, at 9; *see also* Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., 695 So. 2d 383, 390 (Fla. Dist. Ct. App. 1997) (noting that subcontractor restitution is an action at law); 1 DOBBS, *supra* note 11, § 4.2(3), at 583 (asserting that quantum meruit, one of the common counts, is legal restitution); 1 *id.* § 2.6(3), at 157 (asserting that restitution claims are at law because "they seek simply money relief" and because historically they have been brought in separate courts of law).

A court's incorrect classification of quantum meruit as "equitable" may lead the court to improperly refuse a jury trial. "Since plaintiff sought damages in *quantum meruit*, the claim was based in equity, and presented an issue for the court rather than a jury." L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 909 n.1 (E.D. Ky. 1993).

A Virginia mechanic's lien action is in chancery, and thus equitable, and there is no right to a jury trial. A subcontractor could sue the owner for quantum meruit in a separate action at law and seek a jury trial and a money judgment. What if, however, the subcontractor asserts its quantum meruit claim against the owner alternatively in its action on an alleged mechanic's lien? There are two possibilities. Either the judge would try the subcontractor's quantum meruit claim with the rest of the action under the doctrine of equitable cleanup, or the judge could transfer the subcontractor's quantum meruit claim to the law side for the jury trial. 1 DOBBS, *supra* note 11, § 2.6(4), at 169-70. If the subcontractor's mechanic's lien fails completely, for example because hazardous waste removal does not qualify for a mechanic's lien, then the option of transfer to the law side is more desirable. If, on the other hand, the subcontractor asserts another form of restitution, an equitable lien, in a mechanic's lien action, then this chancery remedy will raise no jury trial issue. Avoiding the confusion are states that have wisely followed the federal approach and merged law and equity as far as the constitutional jury right permits. *See* FED. R. CIV. P. 1 (asserting that the Rules apply regardless of whether the cases are considered legal or equitable), 2 (requiring a single form of action), 38 (preserving the right to trial by jury).

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courts may mean equitable in the nontechnical sense of "fairness, rectifying injustice," not in the technical sense of "equitable jurisdiction in the court of chancery."[17]

The next layer of linguistic disarray surfaces when a court or commentator says that quasi-contract, quantum meruit restitution, is based on a promise or contract implied in law. Such statements lead to confusion between contracts implied in law and contracts implied in fact. Quasi-contract, of the quantum meruit variety, began in medieval common law in the form of action named general assumpsit.[18] The early English judges invented the legal fiction that the law "implied" a contract where no actual contract existed.[19] Their goal was simple and laudable: to employ the assumpsit writ to prevent the defendant's unjust enrichment.[20] The court would "imply" that the defendant made a fictional promise to restore or give to the plaintiff an asset which, if retained by the defendant, would unjustly enrich the defendant.[21] Except for the legal fiction necessary to base legal restitution in assumpsit, neither an express contract nor a contract implied in fact is essential for quantum meruit.[22] Nevertheless, a claimant's recovery for services furnished to a defendant often grows out of a business and bargaining environment. Moreover, a well-advised plaintiff will often plead quantum meruit as a fallback to a preferred contract count. Understanding would be advanced and the fog of obfuscation would be dissipated somewhat if both "contract implied in law" and "quasi-contract" were eliminated from the legal vocabulary.[23]

*Limiting Principles*: The next part discusses restitution and several principles of confinement, each of which would, if applied, keep the judge "on the dock," restrict AsbestOut's recovery to its contract with Prime, and prevent AsbestOut from recovering quantum meruit from Homeowner.

A court may limit AsbestOut's potential recovery to its contract with Prime, expressing this conclusion by saying there was no "privity"—no

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17. *See* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEXAS L. REV. 2083, 2088-89 (2001) (discussing the different ways courts use the term "equity" in restitution cases and concluding that courts should not link "equity" to unjust enrichment in the sense of correcting particular injustices).

18. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 415 (3d ed. 1990).

19. *See id.*

20. *See id.* at 424-25.

21. *See id.*

22. *See id.* at 415. *See also* MILSOM, *supra* note 4, at 355 (noting that such legal fictions were a mechanism "by which *assumpsit* was able to reach beyond debt into the ambit of the old action of account, and to recover for the common law some of its lost conceptual potentialities in quasi-contract and restitution").

23. 1 PALMER, *supra* note 11, § 1.2, at 8 (suggesting this elimination upon surveying the history of quasi-contract and noting that courts are not "fully aware of the fundamental difference between a contract implied in fact and 'a contract implied in law'").

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contract between AsbestOut and Homeowner.[24] This assertion begs the question. Quantum meruit is a freestanding theory of recovery, separate from property, contract, and tort. Confusing "implied contract" terminology may have led these courts to overlook "contract implied in law" as a branch of restitution rather than a branch of express contract.[25] Denying the existence of restitution-quantum meruit as a body of principle separate from contract prevents courts from reversing unjust enrichment. Thus the court would err if it held, as some courts have held, that in the absence of a contract between Homeowner and AsbestOut, AsbestOut cannot recover from Homeowner for quantum meruit.[26]

The 1937 *Restatement of Restitution*'s section 110 is a more elaborate limiting principle. Section 110 assumes, as a restatement of restitution must, the existence of restitution; but it maintains that "[a] person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person."[27] In other words, if AsbestOut benefits Homeowner while performing its contract with Prime, AsbestOut cannot recover restitution from Homeowner.

Professor Dannemann's analysis of German restitution doctrine's treatment of claims like AsbestOut's resembles that of *Restatement* section 110, but it is based on more sophisticated reasoning. The general German rule prompts restitution when the defendant's gain is at the expense of the plaintiff and unsupported by a legal ground.[28] While a necessary prerequisite for restitution, the plaintiff's satisfaction of the general rule is not sufficient.[29] In addition, the restitution defendant must have received the benefit as a result of performance by the restitution plaintiff.[30]

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24. *See, e.g.*, Graystone Materials Inc. v. Pyramid Champlain Co., 604 N.Y.S.2d 295 (App. Div. 1993); Metro. Elec. Mfg. Co. v. Herbert Constr. Co., 583 N.Y.S.2d 497 (App. Div. 1992); Sybelle Carpet & Linoleum of Southampton, Inc. v. East End Collaborative, Inc., 562 N.Y.S.2d 205 (App. Div. 1990).

25. *See* GOFF & JONES, *supra* note 12, at 58 ("At first it was said that the [subcontractor's] claim must fail because there was no privity between the parties; but that requirement, which is a relic of the heresy of implied contract, has been justly condemned as 'unintelligible.'"); *see also* Paschall's, Inc. v. Dozier, 407 S.W.2d 150, 154 (Tenn. 1966) (stating that lack of privity does not bar quantum meruit).

26. Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 910 P.2d 839, 847 (Kan. 1996).

27. RESTATEMENT OF RESTITUTION § 110 (1937); *see also* Advance Leasing & Crane Co. v. Del E. Webb Corp., 573 P.2d 525, 526 (Ariz. Ct. App. 1977) (citing § 110 approvingly in its finding that a subcontractor could not recover from a general contractor on the theory of quantum meruit); Henning v. Sec. Bank, 564 N.W.2d 398, 403-04 (Iowa 1997) (citing § 110 as a basis for finding that subcontractors do not have a common-law right of action on a theory of unjust enrichment or implied contract).

28. *See* Dannemann, *supra* note 3, at 1839-40.

29. *See id.* at 1845-46.

30. *See id.*

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This limiting principle, Dannemann observes, prevents the general rule "from catching more than was bargained for."[31] The plaintiff must have consciously shifted an asset to the defendant "with a particular obligation in mind."[32] This limitation confines restitution claims to the legal relationships they arise from and prevents plaintiffs from using restitution to leapfrog the "true" defendant to find a solvent defendant. If applicable, this doctrine would bar AsbestOut's quantum meruit claim against Homeowner,[33] for AsbestOut did not "shift an asset" to Homeowner with an AsbestOut-Homeowner obligation in mind.[34]

Professor Peter Birks would also erect a fence around AsbestOut's contract with Prime and emphasize AsbestOut's "proper defendant," Prime; while admitting exceptions, Birks's analysis forbids AsbestOut from "leapfrog[ging]" Prime to recover restitution from Homeowner.[35] English restitution, Birks assumes, is expanding beyond a prerequisite of direct enrichment, which would require the defendant's "plus," or enrichment, to match the plaintiff's "minus," or loss.[36] Indeed, English restitution is moving in the direction of accepting the defendant's "interceptive subtraction" in the absence of the plaintiff's loss.[37] Seeking to confine this "leapfrogging" claim, Birks comes to rest on a principle similar to *Restatement* section 110: a court, following his reasoning, will forbid AsbestOut from jumping over Prime, a party to its valid contract, to recover restitution from Homeowner "who received a benefit from [AsbestOut's] performance of that contract."[38]

Applying Birks's analysis leads to the following description: AsbestOut performed its contract with Prime; Prime is "the immediate recipient;" Homeowner has been "directly, or immediately enriched" at Prime's expense; Homeowner is "only a remote recipient" of AsbestOut's performance; AsbestOut cannot "leapfrog" over Prime to recover from Homeowner.[39] Birks indicates two policy reasons for such a prohibition: (1) AsbestOut, who dealt with Prime, must take the risk of Prime's "bad behavior or insolvency"; (2) allowing AsbestOut to leapfrog Prime and recover restitution from Homeowner would also subvert the "insolvency regime."[40]

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31. *Id.* at 1846.
32. *Id.*
33. *See id.*
34. *See id.*
35. Birks, *supra* note 8, at text preceding note 65.
36. *Id.* at II(1), ¶ 1.
37. *Id.* at II(3).
38. *Id.* at IV, ¶ 3.
39. *Id.* at II(2), ¶ 1.
40. *See id.* at III(3)(d); *see also* Pendleton v. Sard, 297 A.2d 889, 895 (Me. 1972) (finding no contract implied by law between a property owner and a subcontractor and that there are many other

Professor Levmore's article takes a position similar to Birks's, albeit one more influenced by market economic theory. Denying a subcontractor quantum meruit from an owner, he maintains, encourages subcontractors (1) to check the credit of contractors and (2) to charge a risk premium.[41] Moreover, a subcontractor's knowledge that a court will not order an owner to pay restitution sets the boundary on the subcontractor's search for viable defendants and reduces its transaction costs.[42]

Each of the limiting principles summarized above will bar AsbestOut from recovering restitution; however, none responds satisfactorily to AsbestOut's claim to recover for a benefit it conferred on Homeowner. A plaintiff's contract with another may sometimes be a reason for a court to deny it recovery of restitution from a defendant, but the limiting principles overstate the plaintiff's contract with another as a reason for a court always to deny restitution. Such broad limiting principles constrain the lower court's ability to make mistakes, to "jump right off the dock." However, they also prevent the court from reversing unanticipated specific instances of unjust enrichment and from developing the common law to respond to changing conditions and perceptions of injustice.

Both Dannemann and Birks use a "leapfrogging" metaphor to posit a "true" contract defendant athwart the plaintiff's path to restitution; that metaphor shows their subordination of restitution to contract. Birks describes the relationships in terms of directness and indirectness; this further emphasizes the primacy of contract over restitution. It downgrades restitution as a freestanding legal doctrine, and it elevates contract unnecessarily. The question neither Dannemann, Birks, nor Levmore asks is whether the court ought to countenance the spectacle of Homeowner retaining the benefit of AsbestOut's services without paying anyone.

The better inquiry poses questions about restitution and contract principles. Why can't AsbestOut recover in contract? Prime is absent. AsbestOut lacks a defendant, or lacks a solvent defendant. Can the court grant AsbestOut restitution from Homeowner and measure its recovery in a way that will reverse Homeowner's unjust enrichment without improperly undermining related contract principles? I will return below to Birks's and Levmore's justification, that AsbestOut assumed the credit risk of Prime. Ultimately, though, I argue that a court that pursues the inquiry in this paragraph will advance both the goal of reversing unjust enrichment and the concerns which led to the absolute bars on recovery.

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considerations, including the subcontractor's extension of credit to the prime contractor, that will "tend to prevent any 'enrichment' from being 'unjust'").

41. Levmore, *supra* note 11, at 88.

42. *Id.* at 88-89.

*Quantum Meruit Confined*: Professor Friedmann, who sympathizes with the general idea of confinement is, however, not convinced by those who, without more explanation, erect a legal barrier to restrict AsbestOut to recovery from its contract partner, Prime. He finds a more precise limitation: quantum meruit restricts a plaintiff's recovery when the recipient of a service, Homeowner, has not requested the service from the provider, AsbestOut.[43]

This position leads me to discuss whether and how quantum meruit differs from other forms of restitution. The Kansas court stated quantum meruit's three "elements":

> (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.[44]

The Kansas court's inquiry asks whether the owner accepted the subcontractor's work under circumstances which notified it that the subcontractor expected to be paid *by the owner*.[45] The court's analysis is, up to this point, broader than Professor Friedmann's, for the court stops short of requiring a request by the recipient-owner to the provider-subcontractor.

The Kansas court further limited the subcontractor's opportunity to maintain quantum meruit by adding that the court can grant the subcontractor restitution only under one of three circumstances: (1) "[T]he owner misled the subcontractor to his or her detriment." (2) "[T]he owner in some way induced a change of position in the subcontractor to his or her detriment." (3) There is "some evidence of fraud by the owner against the subcontractor."[46]

The Kansas court's statement seems to me too cramped and narrow. The court appears to be saying that a subcontractor may succeed against the owner in quantum meruit only if it could, in addition, prevail under estoppel—promissory estoppel or fraud. A subcontractor who could re-

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43. *See* Friedmann, *supra* note 2, at 274.

44. Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 910 P.2d 839, 847 (Kan. 1996) (quoting J.W. Thompson Co. v. Welles Prods. Corp., 758 P.2d 738, 745 (1988)); *see also* Green Quarries, Inc. v. Raasch, 676 S.W.2d 261, 264 (Mo. Ct. App. 1984) (adopting a similar formulation).

45. *See Haz-Mat Response*, 910 P.2d at 847 (concluding that "an essential prerequisite to such liability is the acceptance by the owner (the one sought to be charged) of benefits rendered under such circumstances as reasonably notify the owner that the one performing such services expected to be compensated . . . by the owner").

46. *Id.* at 847. *Costanzo v. Stewart*, in which the court granted quantum meruit restitution to a subcontractor, has features of a contract implied in fact or an estoppel, for the homeowner "knew" the subcontractor "was concerned about his payment and he assured him escrow arrangements had been made." Costanzo v. Stewart, 453 P.2d 526, 528-29 (Ariz. Ct. App. 1969). The Missouri court noted this feature of *Costanzo* in *Raasch*, 676 S.W.2d at 266.

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cover under another theory would normally decline to rely on quantum meruit. Moreover, requiring the subcontractor to fit itself into another substantive theory before it can succeed in quantum meruit annuls quantum meruit as a freestanding restitution theory based on the defendant's unjust enrichment.

The Texas courts agree with another version of quantum meruit that looks at the plaintiff's rather than the defendant's expectation. A subcontractor cannot recover quantum meruit from an owner unless the subcontractor expected to be paid by the owner.[47]

To me all of the versions of quantum meruit summarized above are too narrow. AsbestOut expected to be paid by someone, Prime; Homeowner expected to pay someone, Prime. Restitution principles ought to be capacious enough to eliminate the intermediate step and to encompass AsbestOut's "indirect" benefit to Homeowner. Should Homeowner's "acceptance" of the benefit be a prerequisite to AsbestOut's quantum meruit claim?[48] "Acceptance," Professor Palmer maintained, is often a bogus issue, "a meaningless requirement, since it presupposes [the owner had] a feasible alternative."[49] To begin with, Homeowner contracted with Prime for a project that included the asbestos removal. It might be feasible to remove a structure but to return hazardous waste is ludicrous and probably illegal. A preferable way to analyze the quantum meruit issue between Homeowner and AsbestOut is to follow the lead suggested by Professor Kovacic and several courts and to ask more generally whether Homeowner received and retained a benefit from AsbestOut's work and next to inquire whether it is unjust and unfair for Homeowner to keep the benefit without paying AsbestOut for it.[50]

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47. *See* Berger Eng'g Co. v. Village Casuals, Inc., 576 S.W.2d 649, 652 (Tex. Civ. App. 1978); Crockett v. Brady, 455 S.W.2d 807, 808-09 (Tex. Civ. App. 1970); Crockett v. Sampson, 439 S.W.2d 355, 358 (Tex. Civ. App. 1969) (all holding that the party performing services must have an expectation of payment from the party it sues to recover in quantum meruit).

Other courts agree that a subcontractor cannot recover quantum meruit from the owner unless the subcontractor expected to be paid by the owner. *See, e.g.*, McCorry v. G. Cowser Constr., Inc. 636 N.E.2d 1273, 1277 (Ind. Ct. App. 1994) (granting quantum meruit); Sybelle Carpet & Linoleum of Southampton, Inc. v. East End Collaborative, Inc., 562 N.Y.S.2d 205, 206 (App. Div. 1990) (holding that a subcontractor had no claim against a homeowner absent evidence that the homeowner had assumed an obligation of payment to the subcontractor); Custer Builders, Inc. v. Quaker Heritage, Inc., 344 N.Y.S.2d 606 (App. Div. 1973) (holding a general contractor liable to a subcontractor for payment because the general contractor had made such an agreement).

48. *See Haz-Mat Response*, 910 P.2d at 847.

49. 1 PALMER, *supra* note 11, § 5.14, at 679; *see also* Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. U. L. REV. 547, 638-39 (1986) (criticizing "acceptance" when the defendant cannot return or stop the benefit).

50. *See* Flooring Sys., Inc. v. Radisson Group, Inc., 772 P.2d 578, 580-81 (Ariz. 1989) (rejecting Restatement § 110 and narrowing principles, and finding that the property owner was not entitled as a matter of law to prevail on the subcontractor's unjust enrichment claim because it was evident from the subcontractor's contract with the prime contractor that the subcontractor intended to be paid for its

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But even under the more general approach to quantum meruit in the preceding paragraph, difficult questions of judgment and analysis remain.

*Quantum Meruit as an Involuntary Contract?* AsbestOut's argument for quantum meruit must overcome Homeowner's response that the court should not allow the subcontractor to foist a benefit onto an owner and, without a contract, force it to pay. Courts hesitate to interfere with a person's choice of how to spend her money. Preserving Homeowner's free choice and autonomy to make unconstrained individual decisions militates against a court-ordered transfer through quantum meruit. Assuming that freely bargained consensual transactions allocate resources more efficiently than courts' decisions, judges are reluctant to obligate a defendant to pay a claimant for unrequested services.[51] Quantum meruit restitution for AsbestOut will, it may be argued, interfere with Homeowner's ability to form contracts. Does the need to prevent Homeowner's unjust enrichment overcome the court's reluctance to interfere with Homeowner's free choice and autonomy?[52]

Consider the AsbestOut-Homeowner dispute in contrast to Painter who drives down the street, spots Owner's house in need of painting, slaps a coat of paint on it, and sues Owner for the value of his services. Painter's quantum meruit claim would, if successful, force Owner to pay someone she did not deal with, for a service she did not want, in a color she did not pick. The coat of paint is a benefit she did not desire, did not contract for, cannot easily remove, and may be unable to afford.

The AsbestOut-Homeowner dispute differs in several major ways. Homeowner desired the remodeling; she bargained with Prime for improvements; and her basic contract with Prime encompassed asbestos removal. Homeowner expected to pay someone, and her contract set the amount she was willing to spend. The Homeowner-Prime contract may contemplate—or perhaps it even permits or expects—Prime to farm out

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services); Ayotte Bros. Constr. Co. v. Finney, 680 A.2d 330, 332 (Conn. App. Ct. 1996) (finding that the defendant was liable to the subcontractor on the theory that "[r]ecovery for unjust enrichment is appropriate when a defendant retains a benefit that has come to him at the expense of another"); Ontiveros Insulation Co. v. Sanchez, 3 P.3d 695, 701 (N.M. Ct. App. 2000); Paschall's, Inc. v. Dozier, 407 S.W.2d 150, 155 (Tenn. 1966) (both stating that recovery in quasi-contract requires, most significantly, that the defendant's enrichment be unjust); Kovacic, *supra* note 49, at 638.

51. Andrew Kull, *Restitution and the Noncontractual Transfer*, 11 J. CONT. L. 93, 93-97 (1997) (stating that because contract is superior to restitution as a means of regulating a given transaction, a claim in restitution, except as against a wrongdoer, is inevitably a disfavored recourse); Levmore, *supra* note 11, at 79-82 (explaining that denying restitution encourages a well-developed or "thick" market of many active buyers and sellers).

52. 1 DOBBS, *supra* note 11, § 4.9(1), at 681 (stating that many unsolicited benefits cases make sense if understood as judicial efforts to respect the defendant's autonomy while also minimizing his unjust enrichment); *id.* § 4.9(2), at 683 (explaining that the right of self-determination through personal choices is central to the concept of a free society).

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parts of the remodeling project to others. While we cannot say that Prime was Homeowner's agent with authority to pick subagents like AsbestOut, the analogy to agency is evocative. Prime selected AsbestOut to remove the asbestos. AsbestOut's asbestos removal under the Prime-AsbestOut agreement conforms to both contracts' specifications. AsbestOut seeks to recover from Homeowner for performance under a valid contract but one with someone else. The Prime-AsbestOut contract negates any notion that AsbestOut was gratuitously conferring a gift on Homeowner.[53] Finally, as will be discussed below, if Homeowner has not paid Prime, AsbestOut's recovery of quantum meruit will prevent Homeowner's unjust enrichment.[54]

Two leading restitution scholars favored restitution. Professor Palmer's position was that "in circumstances in which it is apparent that the owner's obligation to the general contractor will not be enforced, restitution in favor of the [unpaid] subcontractor should be granted."[55] Professor Dawson's conclusion was similar.[56]

The argument for arbitrary barriers to bar AsbestOut's quantum meruit claim against Homeowner has yielded to a more open-textured analysis focusing on benefit, unfairness, and related substantive policy. But why should the court grant restitution to AsbestOut, who might have prevented this whole mess by filing a mechanic's lien?

*Quantum Meruit and the Mechanic's Lien*: Should the court preclude AsbestOut's quantum meruit recovery from the owner because of a mechanic's lien statute? Mechanic's liens protect persons whose labor and materials add value to a property owner's land.[57] The goal of the statutes is to provide a way for those who improve real property to be paid or

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53. *See Flooring Systems*, 772 P.2d at 581 (finding that the contract between Flooring and Five Star, a third party, indicated Flooring's intent to be paid).

54. *See* Costanzo v. Stewart, 453 P.2d 526, 528-29 (Ariz. Ct. App. 1969) (finding that the theory of unjust enrichment did allow a subcontractor to recover restitution against the property owner).

55. 2 PALMER, *supra* note 11, § 10.7, at 424-25; *see also* Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 910 P.2d 839, 847 (Kan. 1996) (concluding that "an essential prerequisite to such liability is the acceptance by the owner (the one sought to be charged) of benefits rendered under such circumstances as reasonably notify the owner that the one performing such services expected to be compensated . . . by the owner"); Robert Dugan, *Mechanic's Liens for Improvements on Real Property*, 25 S.D. L. REV. 238, 265 (1980) (stating that "where the owner is shielded, by the lack of privity or by the insolvency of an intermediary party, from paying for an improvement made at another's behest, the courts in a number of . . . jurisdictions have imposed liability upon the owner under restitutionary theory . . . ").

56. Dawson, *supra* note 11, at 1457-58 (asserting that the most "plausible" solution would be to allow restitution to be "held in reserve to insure . . . against deficits in the return promised" when a benefit is conferred upon a stranger).

57. *See* DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA § 6.1, at 278 (2d ed. 1994); SWEET, *supra* note 13, § 5.10, at 171.

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repaid out of that property.[58] To this end, the statutes create a lien in favor of someone who improves another's land under contract and provide for perfection through filing and satisfaction of technical prerequisites.[59] In some states, mechanic's liens are standard features in construction sites; in others a mechanic's lien is rare, foreshadowing trouble.[60]

The mechanic's lien statutes are built on two overarching pillars: to assure payment for those who improve property; and to prevent an owner's unjust enrichment.[61] A landowner who knowingly accepts the benefit of another's labor or supplies should pay for the improvement. Because of mechanic's lien statutes, "one sector of our economy—the construction industry and its work force and suppliers—[receives] firmer assurance of its promised rewards than is given by the standard machinery of contract enforcement."[62] In aid of these policies, a subcontractor who lacks a contract with the tract owner may perfect a mechanic's lien on the owner's property for the value of the improvements it added. "[T]he owner's consent to the prime contract subjects his land to the costs of the entire enterprise."[63] In many states, a subcontractor's mechanic's lien does not depend on the state of the accounts between the owner and the prime contractor.[64] In these states, an unpaid subcontractor may file for a mechanic's lien against the land and indirectly against the landowner even though the landowner has paid the prime contractor.[65] Under Virginia mechanic's lien law, moreover, a subcontractor, lacking a contract with the owner, may perfect a mechanic's lien on the land and even obtain the owner's personal liability under some circumstances, but the subcontractor must give the owner notice of the mechanic's lien to ensure that the owner does not pay the prime contractor.[66]

There are two kinds of legal reasons a subcontractor may lack a mechanic's lien. First, the subcontractor may be disqualified for a mechanic's lien because it did not file in time, did not satisfy a statutory technicality, or, in Virginia, did not notify the owner before filing. Second, a mechanic's lien may not be available to the subcontractor; for example, in the decision that the AsbestOut dispute was based on, the Kansas court held that the subcontractor's removal of hazardous waste was

58. *See* RENDLEMAN, *supra* note 57, § 6.1, at 278; SWEET, *supra* note 13, § 10.18, at 383.

59. *See* RENDLEMAN, *supra* note 57, § 6.1, at 278-79.

60. *Id.* at 278 n.2 (listing sources surveying various states' mechanic's lien statutes); *but see* SWEET, *supra* note 13, § 5.10, at 171-72 (listing some approaches adopted by states and advocating the abolition of mechanic's liens).

61. Dawson, *supra* note 11, at 1452-53.

62. *Id.* at 1451.

63. *Id.*

64. *Id.* at 1447-53.

65. *Id.* at 1446-47, 1452 n.128.

66. *See* RENDLEMAN, *supra* note 57, § 6.6(B)(3)(a)-(b), at 315-17.

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not an "improvement" that qualified for a mechanic's lien under the Kansas statute.[67] Finally, even if a subcontractor and the project "qualify," a particular contract may be too small to justify, as a practical matter, the subcontractor's expense of filing and perfecting a mechanic's lien.

Still, should a court grant restitution to a subcontractor who, although eligible for a mechanic's lien, has passed up the opportunity to file and perfect one? A strong argument exists for barring this subcontractor from recovering quantum meruit from the owner. A mechanic's lien is exceptional protection for the construction industry, but to qualify, the claimant must satisfy technical prerequisites, including filing a public notice to alert the owner and others. Some courts decline quantum meruit restitution when the subcontractor has a statutory remedy—a mechanic's lien against the owner—but has not completed the prerequisites for one within the allotted time.[68] The mechanic's lien statute, courts say, is the exclusive way for a subcontractor to recover from an owner.[69] This reason to decline restitution sounds like waiver: if a mechanic's lien is available, the subcontractor can only blame itself for delaying or omitting formalities to perfect the instrument.

However, Professor Dawson called this "waiver" theory a "makeweight" argument.[70] If a subcontractor's work qualified for a mechanic's lien, but the subcontractor did not file in time or filed in a defective way, the subcontractor may, following Professor Dawson, nevertheless be eligible for quantum meruit. Other courts reject the line of decisions cited in the preceding paragraph and hold that the mechanic's lien statutes are not the subcontractor's exclusive method of reaching and recovering from the owner.[71] Focusing more on the goal of preventing

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67. Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 910 P.2d 839, 842-46 (Kan. 1996).

68. *See, e.g.*, Green Quarries, Inc. v. Raasch, 676 S.W.2d 261, 267 (Mo. Ct. App. 1984) (holding that quasi-contractual recovery is not available when the subcontractor has "cut himself off from . . . [the statutory] remedy due to his own delay or omission").

69. *See, e.g.*, Great Plains Equip., Inc. v. Northwest Pipeline Corp., 979 P.2d 627, 640-41 (Idaho 1999); Henning v. Sec. Bank, 564 N.W.2d 398, 402 (Iowa 1997); Brick Constr. Corp. v. CEI Dev. Corp., 710 N.E.2d 1006, 1008 (Mass. App. Ct. 1999).

70. Dawson, *supra* note 11, at 1445-46.

71. *See, e.g.*, Guarantee Elec. Co. v. Big Rivers Elec. Corp., 669 F. Supp. 1371, 1378-80 (W.D. Ky. 1987); Ayotte Bros. Constr. Co. v. Finney, 680 A.2d 330, 333 (Conn. App. Ct. 1996); Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., 695 So.2d 383, 388-90 (Fla. Dist. Ct. App. 1997); G & G Langenbrunner, Inc. v. Davis Constr. Co., 488 N.E.2d 506, 508 (Ohio Mun. Ct. 1984); Columbia Wholesale Co. v. Scudder May N.V., 440 S.E.2d 129, 131 (S.C. 1994); *see also* United States *ex rel.* Sunworks Div. of Sun Collector Corp. v. Ins. Co. of N. Am., 695 F.2d 455, 458 (10th Cir. 1982) (holding that recovery under the Miller Act is not an exclusive remedy against a general contractor).

Professor Carlson made the following point to the author after reading a draft of this Article: The mechanic's lien is a property theory that makes the subcontractor an owner, roughly speaking, of the house itself. Quantum meruit is an in personam theory. Given that in rem differs radically from in personam theory, the notion that a mechanic's lien statute preempts

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unjust enrichment, these courts allow the subcontractor to maintain quantum meruit successfully.

The Arizona court in *Costanzo* furnished a more elaborate justification for allowing a subcontractor to recover quantum meruit despite having failed to perfect a mechanic's lien.[72] A mechanic's lien, the court reasoned, is not the subcontractor's sole remedy against the owner; the subcontractor may recover a personal judgment against someone who is personally liable, here the owner who was personally liable for quantum meruit.[73] The subcontractor's right to a personal judgment against the landowner, it can be deduced, depends on a contractual relationship, which can be a quasi-contractual one.

The *Costanzo* court's reasoning implements the policy of preventing the owner's unjust enrichment. It erodes the policy of encouraging an eligible subcontractor to file a mechanic's lien to provide notice to the owner and to later firms and people who deal with the owner, the prime contractor, and other subcontractors.

The Virginia Supreme Court has interpreted the Virginia mechanic's lien statute, which states that "no [mechanic's] lien shall attach . . . unless such repairs or improvements were ordered or authorized by the owner . . . ."[74] The court said that the quoted language means that a mechanic's lien "must have its foundation in a contract."[75] Virginia's statutory mechanic's lien may not be exclusive because a subcontractor may secure the owner's personal liability.[76] The possibility of Homeowner's personal liability may be the technical or statutory route to AsbestOut's quantum meruit; the justification would be that quantum meruit will prevent Homeowner's unjust enrichment in the absence of a contract or a mechanic's lien.

Quantum meruit will mean that AsbestOut recovers a personal money judgment against Homeowner, while in most states a mechanic's lien is on the land. AsbestOut may thus have access to more assets than Homeowner's other creditors. In Virginia, however, this risk is reduced because the subcontractor may serve notice on the owner and obtain

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quantum meruit is especially unpersuasive. Concerns about notice and timing requirements in the mechanic's lien statute tend to go to the state of title in Homeowner and have no "preemptive" quality with respect to the fundamental issue of Homeowner's unjust enrichment.

E-mail from David G. Carlson, Professor of Law, Cardozo School of Law, Yeshiva University, to Doug Rendleman.

72. Costanzo v. Stewart, 453 P.2d 526 (Ariz. Ct. App. 1969).

73. *Id.* at 528.

74. VA. CODE ANN. § 43-3 (Michie 1999).

75. Rosser v. Cole, 379 S.E.2d 323, 325 (Va. 1989).

76. VA. CODE ANN. § 43-11 (Michie 1999).

personal liability.[77] The courts have not adduced the money judgment/mechanic's lien distinction as a reason to decline quantum meruit restitution.[78]

Is there is a contractual base for AsbestOut's quantum meruit recovery from Homeowner? Three possible interpretations may be put forward. First, the Homeowner-Prime contract "ordered or authorized" the work AsbestOut did and that contract is sufficient. Second, the Prime-AsbestOut contract "ordered or authorized" the work. Third, the quasi-contract for quantum meruit is a "foundation in a contract," as the *Costanzo* court hints; this third way encounters the telling point, made above, that "quasi-contract" is a name for legal restitution that need not concern an express contract or contract implied in fact at all.[79]

Granting quantum meruit to a subcontractor who, although eligible for a mechanic's lien, did not perfect one, raises difficult issues of context and judgment. A subcontractor, otherwise eligible for a mechanic's lien, who does not file for one in time, does not file at all, or files defectively and then seeks quantum meruit against the owner, has passed up an opportunity to secure payment. It has invited the court to examine its reasons and the context. Such a subcontractor should not, however, be automatically disqualified from recovering for quantum meruit. For example, AsbestOut's $4000 job may not justify the expense of filing for a lien, especially if the state's legal culture does not favor routine filing for a mechanic's lien.

Suppose, as with the removal of hazardous waste in Kansas discussed above, a subcontractor's project is ineligible for the mechanic's lien that will secure its payment from the benefited property.[80] May a

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77. *Id.*

78. *See* Dawson, *supra* note 11, at 1445-47 (noting that courts generally do not refer to distinctions between money judgments and mechanic's liens in their decisions, but instead rely solely on theories of unjust enrichment to deny restitution). An exception is *Pendleton v. Sard*, 297 A.2d 889, 895 (Me. 1972). The personal money judgment argument is not effective against a subcontractor's request for an equitable lien, another form of restitution.

79. A federal court decision under the forfeiture statutes makes a related point. The players were a buyer, a criminal seller, and the government seeking to forfeit the seller's land for criminal activity. While the buyers' contract of sale was executory, they improved the seller's property to qualify for financing. Then, as the seller's interest was being forfeited to the government, the buyers filed a mechanic's lien. The court struck down the buyers' attempt to perfect a mechanic's lien on the ground that a mechanic's lien must be based on a contract, oral or written. The binder contract, the court said, did not qualify. United States v. 5.382 Acres in Franklin County, Virginia, 871 F. Supp. 880, 884-85 (W.D. Va. 1994), *aff'd sub nom.* United States v. Fisher, 61 F.3d 901 (4th Cir. 1995). The court also, in dicta, found no equitable lien. *Id.* at 885 n.4. But the court founded its dicta on a view of equitable liens as growing out of an express contract, not as an equitable restitution device to prevent unjust enrichment. *Id.*; *see also* 1 PALMER, *supra* note 11, § 1.5(a), at 20-21 (discussing equitable liens).

80. *See* Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 910 P.2d 839 (Kan. 1996) (holding that a subcontractor whose work does not qualify for a mechanic's lien can bring a claim on the basis of unjust enrichment, although the circumstances under which such a claim may be brought are limited).

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subcontractor whose efforts do not qualify for a mechanic's lien maintain quantum meruit? The disqualified subcontractor is free from the argument that it could have filed a mechanic's lien but did not. Granting quantum meruit to a plaintiff who is disqualified for a mechanic's lien will not erode the mechanic's lien statutory policy of encouraging eligible mechanics to file. The court should let this subcontractor recover under the usual elements of quantum meruit.

If AsbestOut is disqualified for a mechanic's lien, because, for example, it did not "improve" Homeowner's property, then the court should let it proceed to the following analysis of unjust enrichment.

*Unjust Enrichment*: A defendant's unjust enrichment is the major prerequisite for a plaintiff's quantum meruit. If Homeowner's house has a higher market value without the asbestos, the barrier to AsbestOut's recovery is not whether its removal work benefited Homeowner. The crucial inquiry is whether Homeowner's enrichment was unjust. The impediments are the Homeowner-Prime and Prime-AsbestOut contracts, which in essence called for Homeowner to pay Prime and then for Prime to pay AsbestOut. I return, as promised, to the issue of whether Homeowner has paid Prime. If, pursuant to Homeowner's principal contract with Prime, Homeowner has already paid Prime, the court ought to consider Homeowner not enriched or, if enriched, not unjustly enriched. The court should not require Homeowner to pay a second time.[81] This result requires the subcontractor to look to its contract to protect itself, and it aligns restitution with private ordering.

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81. *See, e.g.*, Advance Leasing & Crane Co. v. Del E. Webb Corp., 573 P.2d 525, 527 (Ariz. Ct. App. 1977) (finding no unjust enrichment where a party to a lease with a contractor defaulted in its contract with a third party; in the suit against contractor, the original lease payment constituted adequate consideration and the plaintiff could not recover for the difference in lease prices); Breckenridge Material Co. v. Allied Home Corp., 950 S.W.2d 340, 342 (Mo. Ct. App. 1997) (holding that unjust enrichment cannot exist when an owner would have to pay twice despite the subcontractor not having collected its fee); Hydro Conduit Corp. v. Kemble, 793 P.2d 855, 858 (N.M. 1990) (finding that unjust enrichment will not lie against a property owner who has already paid for the benefit supplied by the subcontractor); Columbia Wholesale Co. v. Scudder May N.V., 440 S.E.2d 129, 131 (S.C. 1994) (denying recovery on a claim of unjust enrichment by a subcontractor against an owner where the owner paid on its contract with the general contractor); *see also* 2 PALMER, *supra* note 11, § 10.7(b), at 424 n.25 (noting that restitution to the subcontractor should be denied in cases in which the landowner has paid the general contractor for the work performed since the landowner has not been enriched); Dawson, *supra* note 11, at 1446-47 (noting that courts generally find that an owner's payment in full to the general contractor operates as a complete defense against unjust enrichment claims). The owner's nonpayment of the prime contractor may even be an essential element of the subcontractor's quantum meruit claim against the owner: one court dismissed a subcontractor's complaint that failed to allege the owner had not paid the prime contractor. Green Quarries, Inc. v. Raasch, 676 S.W.2d 261, 265 (Mo. Ct. App. 1984) (finding that "[n]on-payment by the owner to the general contractor must be pleaded by the subcontractor in order to state a claim based on unjust enrichment," and denying recovery in the absence of such allegation by the subcontractor).

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After Homeowner has paid Prime, AsbestOut should look for recovery either to its contract with Prime or to a mechanic's lien. If Prime, after having been paid by Homeowner, has filed for bankruptcy and if it is too late for AsbestOut to perfect a mechanic's lien, then AsbestOut suffers nonpayment, the typical fate of a general creditor who has extended credit to a future bankrupt and neglected to perfect a security interest.

AsbestOut's claim for quantum meruit has the best chance of succeeding when Homeowner has not paid Prime. In that event, absent restitution, Homeowner may take the free ride on AsbestOut's effort, which will qualify as unjust enrichment. In *Costanzo*, for example, the homeowner had paid the contractor with a check that was not honored. The individual contractor had left the state and the corporation was bankrupt. The subcontractor, apparently relying for payment on an escrow, had not perfected a mechanic's lien.[82]

Perhaps Prime has breached its contract with Homeowner and Prime's sole proprietor has left the state. Another possibility is that Prime was Prime, Inc., incorporated for one project and one project alone, and after Prime, Inc. became insolvent, its sole stockholder disappeared. Or maybe, although Prime, having done next to nothing before completion time, is in material breach, AsbestOut has completed its removal satisfactorily. The court might follow reported decisions and require restitution.[83]

But does recovering restitution from Homeowner unwisely allow AsbestOut to escape from the credit risk it assumed when it contracted with Prime?

*Risk*: I return, as promised, to a formidable justification to refuse restitution to the subcontractor. AsbestOut contracted with Prime, not Homeowner. AsbestOut extended credit to Prime, not to Homeowner;

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82. Costanzo v. Stewart, 453 P.2d 526, 526 (Ariz. Ct. App. 1969).

83. Fed. Land Bank of New Orleans v. Jones, 456 So. 2d 1, 10-13 (Ala. 1984) (granting quantum meruit); Flooring Sys., Inc. v. Radisson Group, Inc., 772 P.2d 578 (Ariz. 1989) (approving quantum meruit); *Costanzo*, 453 P.2d at 526 (granting quantum meruit); Ayotte Bros. Constr. Co. v. Finney, 680 A.2d 330 (Conn. App. Ct. 1996) (granting quantum meruit); Zalay v. Ace Cabinets of Clearwater, Inc., 700 So. 2d 15, 18 (Fla. Dist. Ct. App. 1997) (granting quantum meruit); Rite-Way Painting & Plastering, Inc. v. Tetor, 582 So. 2d 15, 17-18 (Fla. Dist. Ct. App. 1991) (finding no cause of action in quantum meruit but allowing remand on a claim of unjust enrichment); Zaleznik v. Gulf Coast Roofing Co., 576 So. 2d 776, 778-79 (Fla. Dist. Ct. App. 1991) (approving restitution for unjust enrichment); Idaho Lumber, Inc. v. Buck, 710 P.2d 647, 654-59 (Idaho Ct. App. 1985) (granting quantum meruit); McCorry v. G. Cowser Constr., Inc., 636 N.E.2d 1273, 1277 (Ind. Ct. App. 1994) (granting quantum meruit because the subcontractor expected payment from the owner); Ontiveros Insulation Co. v. Sanchez, 3 P.3d 695 (N.M. Ct. App. 2000) (granting quantum meruit); G & G Langenbrunner, Inc. v. Davis Constr. Co., 488 N.E.2d 506 (Ohio Mun. Ct. 1984) (granting quantum meruit); Paschall's, Inc. v. Dozier, 407 S.W.2d 150 (Tenn. 1966) (granting the contractor quantum meruit from the homeowner when the owner's daughter made a contract); *see also* United States *ex rel.* Sunworks Div. of Sun Collector Corp. v. Ins. Co. of N. Am., 695 F.2d 455 (10th Cir. 1982) (recognizing quantum meruit under the Miller Act).

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AsbestOut accepted the hazard that Prime might not pay. If AsbestOut's quantum meruit from Homeowner succeeds, AsbestOut will be liberated from the danger of not recovering from Prime, its contract partner. If AsbestOut recovers restitution from Homeowner, that, Professor Birks argued, will neutralize the credit risk that AsbestOut took in its contract with Prime.[84] In short, Birks remonstrated against letting a subcontractor "leapfrog" its contract partner, a prime contractor, to recover restitution from the owner of the improved tract because that would free the subcontractor from the credit risk it assumed in its contract with the prime contractor.[85]

Professor Levmore's reasoning is similar to Birks's. Homeowner has employed Prime for her remodeling. Homeowner's contract with Prime set the price of her benefit. Prime picked AsbestOut for the asbestos removal subcontract. Homeowner has revealed her preferences and the value of them. "[N]either market encouragement nor wealth dependency explains" why the court would deny quantum meruit to AsbestOut.[86] Nevertheless, citing the policy of visiting the hazard of Prime's default on AsbestOut, Levmore favored refusing AsbestOut quantum meruit even when Homeowner has "accepted" the improvement and has not paid Prime.[87] The policy of allocating to AsbestOut the burdens and strictures of its contract with Prime is a strong one.

But as an absolute bar to AsbestOut's quantum meruit, credit risk is not persuasive. Professor Birks's and Professor Levmore's goal is a worthy one in an economy devoted to private, negotiated exchange. To describe the result by saying that AsbestOut assumed the risk of Prime's default is to posit more of a legal conclusion than a legal argument. A person assumes a risk if positive law says that he assumes it because the court will assess his assumption of the risk in light of the preexisting legal rule.

The question that both the professors have neglected is whether a court should condone with equanimity the spectacle of Homeowner retaining the benefit of AsbestOut's services without paying anyone. It is harsh to give assumption of Prime's credit risk as a reason to deny recovery to AsbestOut when Homeowner has the improvement but has not paid Prime; moreover, it is unfair to leave Homeowner with a benefit for which she agreed to pay Prime but now may receive free.

In light of the windfall to Homeowner that outright denial of quantum meruit creates, may a court find a way to reverse Homeowner's improper

84. *See* Birks, *supra* note 8, at text accompanying notes 90-93.
85. *Id.*; *see also* GOFF & JONES, *supra* note 12.
86. Levmore, *supra* note 11, at 88.
87. *Id.*

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benefit and still visit on AsbestOut the credit-risk consequences of contracting with Prime? The court, I submit, can serve both policies by asking whether it can both grant restitution and measure it in a way that does not erode the related contract principle of preventing AsbestOut from avoiding the danger it undertook of Prime's breach or bankruptcy.

First, as discussed above, the court should refuse to allow AsbestOut to recover quantum meruit from Homeowner if Homeowner has paid Prime.[88] The underlying AsbestOut-Prime contract's risk allocation is vindicated, in part, by forbidding AsbestOut from recovering restitution from Homeowner if Homeowner has already paid Prime. Second, as follows, the court should measure AsbestOut's restitution to avoid hampering the contract policy of allocating Prime's credit risk to AsbestOut.

*Measurement of Quantum Meruit*: Granting AsbestOut quantum meruit prevents Homeowner from retaining the benefit of AsbestOut's services without paying anyone for them. Since AsbestOut's benefit to Homeowner cannot be returned, AsbestOut will recover a money judgment. How much money? The court vindicates the contractual allocation of risk by measuring AsbestOut's restitution at a lower-than-contract rate to let AsbestOut suffer the consequences of the credit that it extended to Prime.

I will develop this subject by examining the court's measurement options in light of the relevant restitution and contract policies. I will continue to respond to the argument that a subcontractor who accepted the danger of a prime contractor's default risk should not receive restitution from the property owner because that would subvert the contract's allocation of risk.

The court has four ways to measure AsbestOut's quantum meruit recovery: (1) the Homeowner-Prime contract, (2) the Prime-AsbestOut contract, (3) the reasonable value of AsbestOut's effort—AsbestOut's cost measured objectively, and (4) the work's value to Homeowner—the tract's value after AsbestOut's work less its value before the work.

AsbestOut removed the asbestos, so it might aspire to recover as much as the full contract price of its role in the project. Which contract?

If (1) the Homeowner-Prime contract and (2) the Prime-AsbestOut contract call for the same rate, the contract rate is set. But if the rates differ, which contract governs?

What if the rate in the Homeowner-Prime contract exceeds that in the Prime-AsbestOut contract? Homeowner agreed to pay the amount specified in its contract with Prime; the amount in the Homeowner-Prime contract is the payment or performance that Homeowner bargained for. Letting Homeowner off the hook for anything less than her contract with Prime

88. *See* cases cited *supra* note 81.

will, AsbestOut may assert, leave her unjustly enriched. At the same time, however, Homeowner will argue that the Homeowner-Prime contract ought to set a ceiling on the amount she pays.

The rate in the Prime-AsbestOut contract is the amount or performance that AsbestOut bargained for. Should AsbestOut recover more from Homeowner for quantum meruit than it would have received under its contract with Prime? It should not, I submit. AsbestOut's quantum meruit should not equal or exceed the rate in its contract with Prime, for that much recovery, which probably includes AsbestOut's calculation of profit above its expenses, would obviate the credit risk it undertook in that contract. The court can usually prevent Homeowner's unjust enrichment without awarding AsbestOut any "profit."

Perhaps the amount in the Prime-AsbestOut contract exceeds the one in the Homeowner-Prime contract. AsbestOut may argue for measurement of quantum meruit recovery from Homeowner by the Prime-AsbestOut contract rate. If so, AsbestOut's restitution from Homeowner might exceed even the amount of the Homeowner-Prime contract.[89] This will almost always be an excessive measure, I submit, because Homeowner should not pay more for restitution than her contract with Prime required. Nor should AsbestOut recover an amount that includes any "profit."

The contract rate or rates can be compared to measurement by (3) reasonable value and (4) addition to the owner's wealth.

AsbestOut will seek to measure quantum meruit by reasonable value when it made a bad contract with Prime and the reasonable value of its removal exceeds the contract rate. Where the plaintiff and the defendant were parties to a contract that the defendant breached, courts hold that the plaintiff may recover for its part performance as measured by its reasonable value, even though that exceeds the contract rate.[90] If Homeowner was acting in bad faith leading up to the rift, AsbestOut may analogize to these decisions to seek the reasonable value of its part performance.

The value of Homeowner's home after AsbestOut's work less the home's value before the work equals the addition of AsbestOut's work to Homeowner's economic wealth. If the court's sole goal is to prevent Homeowner's unjust enrichment, then measuring AsbestOut's quantum meruit recovery by Homeowner's economic augmentation supports that goal. If that amount is below the rate in either contract, the measurement will not allow AsbestOut to obviate Prime's credit hazard.

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89. *See* Dawson, *supra* note 11, at 1452 (noting that in "three-fifths of our states the aggregate collectible through mechanic's liens may exceed the price in the prime contract").

90. *See, e.g.*, United States v. Algernon Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973) (stating that "[t]he measure of recovery for quantum meruit is the reasonable value of the performance"); *see also* 1 PALMER, *supra* note 11, § 4.4, at 389 (noting that restitution is granted based on the reasonable market value of the performance and is not limited by the contract price or rate).

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Some conclusions about measurement follow. I prefer that the court respect the allocation of credit risk in AsbestOut's contract with Prime by measuring the subcontractor's quantum meruit using either reasonable value or addition to defendant's wealth (not to exceed the amount in the lower of the two contracts).[91] In short, AsbestOut should recover for Homeowner's benefit, not for the breached contract with Prime. The possibilities leave options open to the parties to select and prove favored measures, and flexibility to the judge to tailor the measure to prevent Homeowner's unjust enrichment and to allocate all or part of Prime's credit risk to AsbestOut, without upsetting related contractual interests.

In *Raasch*, the prime contractor was bankrupt.[92] What if Prime has filed for bankruptcy?

*Insolvency*: Professor Birks interposed another reason to refuse restitution to the unpaid subcontractor—the disruptive effect that restitution would have on the insolvency system.[93] Restitution may treat AsbestOut, one of Prime's general creditors, better than its other general creditors. If Prime files for bankruptcy, Homeowner's debt to Prime under their contract may be available to Prime's general creditors, including all subcontractors. If Prime has performed completely but Homeowner has not paid Prime when Prime files for bankruptcy, then Prime's bankruptcy estate would be entitled to collect Homeowner's debt to Prime to divide among all of Prime's general creditors, including AsbestOut.[94] Letting AsbestOut recover quantum meruit from Homeowner and reducing Homeowner's debt to Prime would treat AsbestOut better than Prime's other creditors because AsbestOut would recover in full while Prime's other creditors would receive a percentage—indeed a smaller percentage if AsbestOut has recovered in full. In a typical bankruptcy, Prime's general creditors will not collect their full debts, and perhaps they might collect nothing at all; if AsbestOut receives quantum meruit from Homeowner, it may collect its whole claim.

The argument that a subcontractor's recovery of quantum meruit will create creditor inequality may persuade a court to deny the subcontractor's restitution claim. The *Raasch* court accepted Professor Dawson's point that allowing a subcontractor to recover quantum meruit restitution from the owner treats one of an insolvent prime contractor's general creditors better than others.[95]

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91. One exception may be to let AsbestOut recover the reasonable value of its work if Homeowner's fault led to the lawsuit.

92. Green Quarries, Inc. v. Raasch, 676 S.W.2d 261, 263 (Mo. Ct. App. 1984).

93. *See* Birks, *supra* note 8, at paragraph preceding note 91.

94. *See* 11 U.S.C. § 704 (1994) (outlining the duties of trustees in bankruptcies).

95. *Raasch*, 676 S.W.2d at 267. The court addressed the following possibility: the subcontractor recovers in full from the owner who has not paid the prime contractor; the owner's payment to the

That restitution sometimes treats a debtor's general creditors differently is not a reason to deny restitution all the time. Courts should reject the possibility that inequality may occur as a blanket reason to deny quantum meruit to all subcontractors. The Primes of this world do not all file for bankruptcy, and those Primes who do file for bankruptcy do not always file before Homeowner pays them. My reading of the decided appeals often left me unable to tell whether the prime contractor had filed for bankruptcy; even when bankruptcy had occurred, the status of the various debts was often murky. The effect of actual or potential bankruptcy distribution on a subcontractor's quantum meruit ought to be a matter for factual inquiry and contextual analysis, not an absolute barrier to the subcontractor's quantum meruit claim.

If the court avoids prejudice to Prime's general creditors, can it do as much for Homeowner?

*Protecting Homeowner*: Homeowner may be obligated by contract to pay Prime, but Homeowner should not pay twice. Courts have dealt with this problem by saying that, as a prerequisite for recovering quantum meruit from an owner, the subcontractor must "exhaust" its remedies against the prime contractor.[96]

Can the court ensure that quantum meruit between Homeowner and AsbestOut resolves the whole dispute? If AsbestOut recovers from Homeowner in two-party litigation, neither nondefendant Prime nor Prime's bankruptcy trustee would ordinarily be precluded.[97] Both Professor Palmer and Professor Dawson maintained that the court could protect an owner against double payment by crediting or offsetting the owner's payment of quantum meruit to a subcontractor against the owner's

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subcontractor will be offset from the owner's debt to the prime contractor so it will no longer be a debt that the owner owes to the prime contractor's bankruptcy estate; and there will be less money for the prime contractor's other general creditors. More precisely, the Missouri court and Professor Dawson said that a subcontractor's recovery of quantum meruit from the homeowner creates a "preference" for the subcontractor over the prime contractor and other creditors. *Id.* (citing Dawson, *supra* note 11, at 1447). Although not always technically a bankruptcy "preference," granting restitution may treat one creditor better than others—the hazard to which they refer and to which I respond.

The subject of setoff and indirect preferences in bankruptcy raises nettlesome issues discussed with wit, skill, and erudition in David Gray Carlson, *Tripartite Voidable Preferences*, 11 BANKR. DEV. J. 219, 273-82 (1995). In addition, see *Admiral Drywall, Inc. v. Cullen*, 56 F.3d 4 (1st Cir. 1995), in which unpaid subcontractors claimed an equitable lien in undisbursed contract funds that they argued outranked the contractor's bankruptcy trustee's claims to those funds. They were unsuccessful. "Individual subcontractors," the court observed, "can seek mechanics liens." *Id.* at 5.

96. *See, e.g.*, Maloney v. Therm Alum Indus., Corp., 636 So. 2d 767, 769-70 (Fla. Dist. Ct. App. 1994); L.S. Henriksen Constr., Inc. v. Shea, 961 P.2d 295 (Or. Ct. App. 1998); Tum-A-Lum Lumber v. Patrick, 770 P.2d 964 (Or. Ct. App. 1989).

97. *See* FLEMING JAMES, JR. ET AL, CIVIL PROCEDURE § 11.23 (4th ed. 1992) (noting that "[a]s a general rule, a person's legal rights may not be concluded without an opportunity to litigate them).

debt to the prime contractor.[98] So Homeowner's payment to AsbestOut releases Homeowner's debt to Prime because Homeowner's single liability on the segment of the Homeowner-Prime contract allocated to asbestos removal is a liability that runs ultimately from Homeowner to Prime to AsbestOut and which is discharged when Homeowner pays the one ultimately entitled to it.[99] In other words, if Homeowner pays restitution to AsbestOut, the court should release Homeowner from paying a second time to Prime.

Two other solutions to obviate the risk of Homeowner's double payment involve multiparty litigation and departures from strict quantum meruit.[100] First, Homeowner may interplead the money due under the Homeowner-Prime contract, asserting that AsbestOut may be entitled to quantum meruit; Prime and AsbestOut can resolve their dispute in the interpleader.[101] Second, AsbestOut may sue both Homeowner and Prime; if Prime is a codefendant with Homeowner, the court may subrogate AsbestOut to Prime for recovery on the asbestos-removal part of the Homeowner-Prime contract. In other words, AsbestOut is substituted for Prime to recover the appropriate part of Homeowner's debt on the Homeowner-Prime contract.[102]

The court should not refuse AsbestOut quantum meruit because of a theoretical possibility that Homeowner may have to pay twice. Instead, factual and contextual analysis plus the two possibilities mentioned in the preceding paragraph may lead the court to grant AsbestOut quantum meruit if appropriate to reverse Homeowner's unjust enrichment.

*Conclusion*: Suppose the court resolves the issue of defendant-Homeowner's benefit and that benefit's unjustness protects Homeowner from paying twice and prevents an unequal distribution of Prime's limited assets. Then the wiser solution is for the court to reject blanket reasons to

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98. 2 PALMER, *supra* note 11, § 10.7, at 425 (noting that payment of the judgment by the landowner to the subcontractor operates as a discharge of the landowner's obligation to the general contractor, thus protecting the landowner from double recovery); Dawson, *supra* note 11, at 1447 (arguing that where the owner still owes an unpaid balance on the contract price, the owner "could be protected against double liability . . . by crediting any enforced payment to the sub on the owner's debt to the general"). Professor Carlson's article discusses the preference issue in bankruptcy. Carlson, *supra* note 95, at 273-82.

99. 2 PALMER, *supra* note 11, § 10.7, at 425 (noting that payment of a judgment to a subcontractor operates as a discharge of the obligation to the general contractor).

100. 3 DOBBS, *supra* note 11, § 12.20(3), at 470-71.

101. Fed. Land Bank of New Orleans v. Jones, 456 So. 2d 1, 2 (Ala. 1984) (interpleader action); Flooring Sys., Inc. v. Radisson Group, Inc., 772 P.2d 578, 582 (Ariz. 1989) (recommending interpleader); *see also* 3 DOBBS, *supra* note 11, § 12.20(3), at 471.

102. 3 DOBBS, *supra* note 11, § 12.20(3), at 470; 1 *id.* § 4.3(4), at 607 (referring to the textual example as a "kind of equitable garnishment that resembles subrogation").

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say "No" and, instead, to grant AsbestOut quantum meruit, measured below either contract rate. Many courts, however, have bungled quantum meruit appeals with muddled analysis, suborned by inappropriate and misleading terminology. Conflicting authority exists at almost every decision point between AsbestOut's filing and final judgment. The law of restitution palpably needs theory and clarification from scholars and law schools, as well as a modern and accessible restatement from the American Law Institute.

But let us sit for a second on the edge of Professor Dawson's dock. This Article's principal goal has been to use AsbestOut's difficult quantum meruit claim to respond to suggested limitations—such as section 110 in the first *Restatement*—that would always bar it. Many of these limiting principles cut off restitution even when the common law should expand to prevent unjust enrichment. The original *Restatement* and some scholars propose limitations intended to refuse restitution to AsbestOut and to leave Homeowner potentially paying no one for a benefit she agreed to pay for in her contract with Prime.

Absolute rules that always bar restitution frustrate a court's pursuit of unjust enrichment. A better analysis would refuse to grant a subcontractor restitution only some of the time. The analysis that I have suggested rephrases the valid policies underlying the limitations as questions about restitution's effect on related substantive policies. These inquiries will structure a frame of reference for a court to evaluate the facts in light of genuinely related policies and to exercise contextual judgments about whether to grant or deny a plaintiff's claim for restitution and, if the court approves restitution, how to measure it. A court, following orderly "off-the-porch" analysis, can grant quantum meruit to AsbestOut without jumping off Professor Dawson's dock. Then restitution will fulfill its promise—its potential to thwart unjust enrichment—and the common law will retain its generative quality.

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