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Brief of Reporter and Advisers to Restatement (Third) Restitution and Unjust Enrichment, as Amici Curiae in Support of Respondent

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

Douglas Laycock
University of Virginia School of Law

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No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,
v.
DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF OF REPORTER AND ADVISERS TO RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Doug Rendleman
Washington & Lee
School of Law
1 Denny Circle
Lexington, VA 24450
540-458-8934
rendlemand@wlu.edu

Douglas Laycock
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903
434-243-8576
dlaycock@virginia.edu
Counsel of Record

Electronic copy available at: http://ssrn.com/abstract=1961261

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INTEREST OF AMICI

Amici are the Reporter for the *Restatement (Third) of Restitution and Unjust Enrichment*, law professors and practicing lawyers who served as Advisers or on the Members Consultative Group to that *Restatement*, and law professors who study and publish on the law of restitution. Individual amici are further identified in the Appendix.[1]

The law of restitution and unjust enrichment is central to this case. Petitioners' theory of standing proceeds in disregard of long established doctrines in the law of restitution and unjust enrichment. Respondent's brief, by contrast, is squarely based on the law of restitution and unjust enrichment, but respondent does not appear to be fully aware of how extensively she relies on that law. The risk is great that in deciding this case, the Court may inadvertently disrupt an important body of law that long predates the American founding and that serves essential functions, especially in private law but in parts of public law as well.

This brief explains the law of restitution and unjust enrichment and how the Court would disrupt that long established law if it were to adopt petitioners' reasoning. These amici take no position

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[1] This brief was prepared entirely by amici and their counsel. No person other than amici and their counsel made any financial contribution to the preparation or submission of this brief. The consents of the parties are on file with the Clerk.

The American Law Institute speaks only through its *Restatements*, *Principles of the Law*, and similar projects. Each such project is carefully reviewed and formally approved by both its governing Council and its membership. This brief is not a statement of the American Law Institute.

on the underlying statutory claim or on the meaning of the statute.

SUMMARY OF ARGUMENT

Petitioners' argument that there is no standing in this case would wreak havoc with the law of restitution and unjust enrichment, barring many long established causes of action from federal court.

The law of restitution and unjust enrichment is a longstanding part of Anglo-American law. It creates remedies and causes of action that are based on gain to defendant rather than loss to plaintiff. It follows that in appropriate cases, the law of restitution and unjust enrichment may impose liability for unjust enrichment even though plaintiff has no claim for compensatory damages, or no claim for compensatory damages that can be proved at reasonable expense. Such causes of action and remedies were part of English law before the American founding, and they have been part of American law ever since.

Standing necessarily depends on the type of relief sought. A plaintiff may have standing to sue for damages but not standing to sue for an injunction, or vice versa. And similarly, a plaintiff may have standing to sue for restitution of unjust enrichment without having standing to sue for damages or an injunction.

Standing in the law of restitution and unjust enrichment requires the restitution plaintiff to show that he is the source of defendant's enrichment, either in the sense that he suffered a loss that corresponds to defendant's gain, *or* in the sense that defendant's gain was acquired by violating plaintiff's rights.

These rules are deeply embedded in the substantive law of restitution, and only occasionally are they labeled as standing rules. But they serve the same function as standing rules: they confine the right to sue to identifiable individuals with a concrete stake in the litigation.

These standing rules may be reconciled with cases interpreting Article III in either of two ways, and the choice of explanation does not affect the result. First, the violation of plaintiff's rights that leads to defendant's unjust enrichment may be recognized as injury in fact. Alternatively, injury in fact may be dismissed as irrelevant, because the whole focus of the claim is on defendant's gain, not plaintiff's loss. Courts have relied on both explanations.

These amici take no position on any of the statutory issues presented by respondent's claim in this case. The limited grant of certiorari requires the assumption that the statute creates the cause of action recognized by the court of appeals. If this Court were to hold that Congress cannot constitutionally create such a cause of action, the apparent implication would be that no plaintiff has standing to assert any claim in restitution and unjust enrichment without first demonstrating that he could also have sued for compensatory damages. Such a holding would bar many longstanding state-law claims from the diversity jurisdiction and would hold unconstitutional many longstanding federal claims.

ARGUMENT

I. A Plaintiff With a Claim in Restitution and Unjust Enrichment Has Standing to Sue in Federal Court.

A. The Law of Restitution and Unjust Enrichment Is Based on Defendant's Gain, Not Plaintiff's Loss.

Compensatory damages, based on plaintiff"s loss, and restitution of unjust enrichment, based on defendant's gain, are fundamentally distinct. Each kind of claim ends in a monetary remedy, but both the remedies and the causes of action have different conceptual bases, different histories, and different measures of recovery.

These differences are long established and utterly uncontroversial. As summarized in the standard American treatises, "[R]estitution is measured by the defendant's gains, not by the plaintiff's losses." 1 Dan B. Dobbs, *Law of Remedies: Damages - Equity - Restitution* §1.1 at 5 (2d ed. 1993). "[I]n the damage action the plaintiff seeks to recover for the harm done to him, whereas in the restitution action he seeks to recover the gain acquired by the defendant through the wrongful act." 1 George E. Palmer, *The Law of Restitution* §2.1 at 51 (1978).[2]

Very often, an unjust gain to defendant will be matched by a corresponding loss to plaintiff. If $100 is misappropriated, or paid by mistake, defendant has gained $100 and plaintiff has lost $100. But

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[2] *See also, e.g.*, 1 Dobbs at 280, 552, 555; Douglas Laycock, *Modern American Remedies: Cases and Materials* 622-23, 651-52 (4th ed. 2010); Doug Rendleman & Caprice Roberts, *Remedies: Cases and Materials* 473 (8th ed. 2011).

sometimes, plaintiff's loss is smaller than defendant's gain. And sometimes, plaintiff has no loss measurable in dollars at all. But such a plaintiff may still have a claim in restitution and unjust enrichment, because the basis of the claim is defendant's gain, not plaintiff's loss.

The new *Restatement* summarizes the basic principle as its predecessors summarized it: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." *Restatement (Third) of Restitution and Unjust Enrichment* §1 (2011) (hereinafter *Restatement (Third)*).[3] It further explains in the first paragraph of the first Comment:

> While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," *without the need to show that the claimant has suffered a loss*. See §3.

Restatement (Third) §1 cmt. *a* (emphasis added).

Section 3, also closely tracking its predecessors, says simply that "A person is not permitted to profit by his own wrong." The first Comment makes two important points about this principle. First:

> The present section marks one of the cornerstones of the law of restitution and unjust enrichment. The general principle it identifies is the one underlying the

[3] Accord, *Restatement (Second) of Restitution* §1 (Tentative Draft No. 1, 1983); *Restatement of Restitution* §1 (1937).

> "disgorgement" remedies in restitution, whereby a claimant potentially recovers more than a provable loss so that the defendant may be stripped of a wrongful gain.

Id. §3 cmt. *a*.

Second, the broad principle that no man may profit by his own wrong "identifies an outlook and an objective, not a cause of action." *Ibid.* "Working rules" that describe specific causes of action come in later sections, where liability for defendant's wrongful profits is generally confined to fiduciary and confidential relationships and to conscious wrongdoers. And some statutes, most notably the Copyright Act, impose liability for unjust enrichment without a showing that a violation was knowing or intentional.[4]

B. Many Familiar Causes of Action for Unjust Enrichment Do Not Require Proof of Compensable Injury to Plaintiff.

Petitioners do not appear to define the "injury" they would require to give a plaintiff standing. But petitioners' working definition appears to be that a plaintiff suing for a past wrong must be eligible to recover compensatory damages. This definition is implicit in petitioners' recurring statements equating injury with compensation in damages, often italicizing the word "compensation." Pet. Br. 17, 24, 35 n.17, 40, 46.

Petitioners' argument is oblivious to the law of restitution and unjust enrichment. Many familiar

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[4] *See, e.g.*, *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482-83 (9th Cir. 2000) (reviewing opinions on "subconscious" copying from Learned Hand forward).

causes of action can support a restitutionary remedy in which plaintiff recovers defendant's unjust enrichment, without proof of damages or of any compensable injury to plaintiff. Plaintiffs in these cases may have suffered no damages, or, what is the same thing for most practical purposes, may have suffered no damages that can be proved and quantified at reasonable expense. These causes of action and their remedies are available even if it is clear that plaintiff suffered no damages at all in any economic sense. In nearly all of these cases, the key to plaintiff's standing is that defendant enriched himself by violating plaintiff's legally protected rights.

1. Two General Points About the Examples That Follow.

This brief will offer many examples of long established causes of action without compensable injury. In considering these examples, it is important to keep in mind two more general points.

a. The relationship between injury in fact and compensable injury. In nearly all the examples that follow, there was a violation of a legally protected interest of the plaintiff. One way to explain these cases is to say that there was an injury in fact to this protected interest, even though there was no compensable injury. But if that explanation is accepted for all these long established claims in restitution and unjust enrichment, then it is equally available for respondent's claim here. That is, if petitioners explain all the law of restitution and unjust enrichment as involving an injury in fact, then respondent can explain her claim the same way.

The other way to explain these cases is to say,

more simply, that a cause of action in restitution and unjust enrichment is based on defendant's gain, and that injury to the plaintiff is simply irrelevant.

Courts have written these opinions both ways. Some opinions rather clearly say that plaintiff can recover defendant's unjust enrichment without proof of any injury to plaintiff. *See*, *e.g.*, *Jackson v. Smith*, 254 U.S. 586 (1921). Other opinions rather clearly say that defendant's violation of plaintiff's legal rights is an injury to plaintiff, even though measurable damages appear to be zero. *See, e.g.*, *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946). And of course, many opinions simply apply the law of restitution and do not attend to conceptual underpinnings. The result is the same under either explanation: plaintiff can sue for defendant's unjust enrichment without proof of compensable injury.

b. Fiduciary duty does not explain these cases. Petitioners would apparently confine these cases to fiduciaries. Pet. Br. 33. Respondent replies that Congress can impose some of the duties and liabilities of fiduciaries without imposing all the duties and liabilities of fiduciaries, Resp. Br. 31-32, and that is undoubtedly correct. But there is much more to be said.

First, the duty of loyalty, which originally arose in fiduciary relationships, now applies to other confidential relationships that courts are unwilling to characterize as fully fiduciary. *See Restatement (Third)* §43(a), (b). *See also* Comment *f* ("Confidential relation where defendant not a fiduciary") and reporter's note *f*. Both categories — fiduciary duties and confidential relationships — have expanded over time.

This liability extends also to the unjust enrichment of one who receives a benefit "in consequence of another's breach" of a fiduciary duty or confidential relationship. *Restatement (Third)* §43(c) and cmt. *g*. This brief takes no position on the meaning of the statute at issue in this case. But if that statute makes petitioners liable for gains derived from the misconduct of their affiliate, Tower City, that liability would be entirely parallel to the longstanding law on profits accruing to one person from another person's breach of a fiduciary or confidential relationship.

Second, liability for unjust enrichment without proof of compensable injury to plaintiff is not confined to fiduciary or confidential relationships. We offer examples below of liability for unjust enrichment, without proof of compensable injury, on the part of defendants without the slightest whiff of fiduciary duty or confidential relationship — cases of infringers, trespassers, converters, fraudsters, and contract breachers. The basic category here is fiduciaries *or* conscious wrongdoers. *Restatement (Third)* §51(4).

Third, and more fundamental, petitioners' argument about fiduciary duty goes only to the merits. It does not go to the existence of a constitutional case or controversy. If a trust beneficiary has standing to recover his trustee's unjust enrichment, without evidence of compensable injury to the beneficiary, then there is no Article III barrier to the creation of analogous claims for other plaintiffs to recover unjust enrichment without proof of compensable injury.

Article III authorizes jurisdiction over various

categories of “Cases” and “Controversies.” It does *not* say “cases, controversies, and claims against fiduciaries.” Plaintiffs can sue fiduciaries in unjust enrichment without proof of compensable injury *because* such claims present a case or controversy — *not* because there is something constitutionally special about fiduciaries.

2. Familiar Claims in Restitution and Unjust Enrichment Without Compensable Injury to Plaintiff.

We turn now to illustrations of liability in unjust enrichment without compensable injury to plaintiff.

a. Commercial bribes and kickbacks. Prominent among these restitutionary claims to defendant’s profits are the cases on which Congress appears to have modeled the cause of action in this case — claims arising from commercial bribes and kickbacks. What respondent accurately describes as the “no-further-inquiry rule,” Resp. Br. 21-38, is enforced by causes of action that are more broadly classified as claims in restitution and unjust enrichment.

An employer can recover any bribe or kickback paid to his employee, without proof that the quality of the employee’s services or the terms of any transaction were actually affected by the bribe or kickback. The rule is the same for a client who is entitled to honest and loyal services from a professional or a service provider. If seller bribes a buyer’s agent to buy from seller, the agent’s employer can recover the amount of the bribe even if the sales were at the market price and there is no evidence of any injury to the buyer. *Restatement (Third)* §43 illus.

17-19 & reporter's note *d* (collecting cases); *id.* §44 illus. 9 & reporter's note *b*; *Restatement (Third) of Agency* §8.02 and cmt. *b* (2006) ("it is not necessary that the principal show that the agent's acquisition of a material benefit harmed the principal.")

As the Minnesota court explained:

> It matters not that the principal has suffered no damage or even that the transaction has been profitable to him. . . .
>
> "Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. . . . It is not material that no actual injury to the company (principal) resulted, or that the policy recommended may have been for its best interest."

Tarnowski v. Resop, 51 N.W.2d 801, 803 (Minn. 1952), quoting *Lum v. McEwen* (*Lum v. Clark*), 57 N.W. 662, 662-63 (Minn. 1894).

These causes of action are an important tool in the fight against government corruption, and governments, including the United States, are frequent plaintiffs in such cases. *See, e.g.*, *United States v. Carter*, 217 U.S. 286, 305-09 (1910) (quoted at Resp. Br. 26); *United States v. Podell*, 572 F.2d 31, 34-35 (2d Cir. 1978); *Continental Management, Inc. v. United States*, 527 F.2d 613, 615-17 (Ct. Cl. 1975) (holding that government can recover the bribe from the briber, instead of the bribee, and collecting cases).

b. Business opportunities. Another example, with ancient roots, is trustees or agents who take for themselves business opportunities that might have been of interest to their beneficiaries or principals.

This body of law begins at least as early as *Keech v. Sanford*, 25 Eng. Rep. 223 (Ch. 1726), briefly described at Resp. Br. 21. A landlord refused to renew a lease to a trust for a minor, and instead leased the property to the trustee individually. "[T]here was clear proof of the refusal to renew for the benefit of the infant," *id.* at 223, and the Lord Chancellor did not doubt the fact. So the beneficiary of the trust had not lost the lease due to any action by the trustee.

The beneficiary had suffered no injury in fact unless the impairment of the trustee's undivided loyalty and the risk that harm *might* have ensued counts as injury in fact. But the Lord Chancellor said that the absence of harm could not change the result: "it is very proper that rule should be strictly pursued, and not in the least relaxed." *Ibid.* Note too that the Chancellor treated this decision as an application of an already settled rule. For modern variations on *Keech v. Sanford*, see *Restatement (Third)* §43 illus. 1 and reporter's note *b*.

From these beginnings, there has grown the whole modern law of corporate opportunities. Partners, directors, officers, agents, and the like cannot take for themselves a business opportunity that might have been of interest to their principal. If they do so, they are liable to the principal for all their profits from the opportunity. The plaintiff need not show that it would have invested in the opportunity itself, and therefore, it need not show that it suffered any compensable injury. *Restatement (Third)* §43 illus. 14-15 and

reporter's note *d*; American Law Institute, *Principles of Corporate Governance* §§ 5.05, 5.12 (1992) and reporter's notes; *Restatement (Third) of Agency* §8.02 and cmt. *d*.

A famous illustration is Justice Cardozo's opinion in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928). The opportunity there was to take a lease on a much larger tract, for a much longer term, requiring much more capital, than the original lease in the joint venture between the parties. *Id.* at 545-46. But it was not for defendant to decide whether his joint adventurer would have been willing and able to participate. "No answer is it to say that the chance would have been of little value even if seasonably offered." *Id.* at 547. One who improperly takes a business opportunity for himself is liable for his profits, whether or not the victim suffered compensable injury.

c. Other conflicts of interest. The rule that applies to bribes and kickbacks and to corporate opportunities applies with equal rigor to other transactions conducted under the potential influence of a conflict of interest. The principal or beneficiary in such a case can sue to recover the unjust enrichment of his agent or trustee without proof of compensable injury. Or, he can sue to rescind or set aside the transaction without proof of either compensable injury to plaintiff or any gain to defendant. *Restatement (Third) of Agency* §8.01 cmt. *d*(1) and reporter's note *d*(1) (summarizing both remedies).

Thus, it is a settled rule, once again with ancient roots, that a receiver or trustee of the assets of an insolvent debtor cannot buy at his own sale, even if the sale is conducted at a public auction and the

trustee is the high bidder. Resp. Br. 21-25; *Restatement (Third)* §43 illus. 20 & reporter's note *d*.

Respondent cites many cases illustrating this rule, including several from this Court. Another revealing example in this Court is *Jackson v. Smith*, 254 U.S. 586 (1921). In *Jackson*, "it affirmatively appear[ed] that the sale was fairly conducted, that there was competitive bidding, and that the property was finally knocked down to the highest bidder." *Id.* at 587. But this high bidder was a group that included the trustee responsible for conducting the sale, and the group went on to make profits with the property it had purchased. The Court unanimously held that the trustee and his confederates were liable "for all the profits obtained by him and those who were associated with him in the matter, *although the estate may not have been injured thereby*." *Id.* at 589 (emphasis added).

Another striking example is *Mosser v. Darrow*, 341 U.S. 267 (1951). There, the *employees* of a reorganization trustee traded in the securities of the enterprise undergoing reorganization. The trustee who employed them and allowed them to trade was held personally liable for their profits, although he had not traded for his own account and had no improper profits of his own. The trustee argued that his employees had caused no loss, and even that their purchases of securities had supported the price and been beneficial to the reorganizing enterprise. *Id.* at 272. The Court was not so sure of that, but its fundamental holding was the now familiar point that it did not matter. *Id.* at 273. The plaintiff could recover the profits of a conflicted transaction, without regard to whether he had suffered any compensable

injury.

Another variation arises when an agent or trustee borrows, formally or informally, assets of the principal or of the trust, and uses those assets to profit personally. The borrower is liable for his personal profits no matter how clear it may be that no harm was done. A clear example is *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). The trustees borrowed money from the trust to invest personally in a speculative venture. They gave an interest-bearing note secured by deeds of trust on real property and oil and gas interests, *id.* at 385, and they had repaid most of the loan by the time of trial, *id.* at 387. Almost certainly the speculative investment would have been inappropriate for the trust. But the trustees were liable to the trust for the profits on the speculative investment, because they had improperly used trust assets to make the profit. *Id.* at 387-89.

Similarly if a corporate officer uses any of the corporation's property for his own benefit, he is liable to the corporation for any resulting profit or benefit. American Law Institute, *Principles of Corporate Governance* §5.04(a), (c) (1992).

d. Disgorgement of fees. An agent, attorney, or other fiduciary who breaches a duty of loyalty may forfeit fees to which he would otherwise be entitled. *Restatement (Third) of Agency* §8.01 cmt. *d*(2) (2006); *Restatement (Third) of the Law Governing Lawyers* §37 (2000). If he has already collected those fees, the client may sue to recover them. *Id.* cmt. *a*. The fiduciary would be unjustly enriched if he retained fees that he had forfeited by his disloyalty.

When the client sues to recover all or an allocable

portion of the fees, he need not show that the disloyal act caused compensable injury. *See, e.g.*, *Burrow v. Arce*, 997 S.W.3d 229, 237-40 (Tex. 1999); *see id.* at 239 nn.36-37 (collecting authorities).

This rule too appears to have been part of the model for the statutory cause of action in this case. Liability is triggered by a bribe or kickback, but the measure of recovery is based on the fees paid, perhaps because that amount is fully known to customers and therefore easier to prove.

e. Infringement of intellectual property. Examples far removed from fiduciary duty arise in the law of intellectual property. One who infringes the intellectual property of another is generally liable for either his own profits or the victim's losses. 17 U.S.C. §504(b) (copyright); 15 U.S.C. §1117(a) (2006) (trademark); Uniform Trade Secrets Act §3(a), 14 Unif. Laws Ann. 633 (2005) (trade secret). Liability for profits has been repealed in patent infringement, except for design patents, 35 U.S.C. §§ 284, 289 (2006), for policy reasons having nothing whatever to do with standing or the existence of cases and controversies.

If the infringer takes sales away from the victim of infringement, plaintiff will have losses and defendant will have gains that may be either more or less than plaintiff's damages. Plaintiff can generally sue for whichever is larger.

It not infrequently happens that the infringer expands the market, or creates a derivative work that is infringing but not duplicative, so that the infringer has substantial profits from infringing sales, but the plaintiff has no lost sales and no damages. In such a

case, plaintiff can recover defendant's profits without proof of any compensable injury. *Restatement (Third)* §42 illus. 7-9 and reporter's note *g*.

A copyright example is *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000), where defendant produced a hit song in 1991 that infringed another hit from 1964. The infringer was liable for the portion of his profits attributable to the infringement, estimated by the jury at 18%.[5] But it is hard to imagine that the plaintiff lost any sales of his 1964 song in 1991.

A leading trademark example is *Maier Brewing Co. v. Fleischmann Distilling Corp*., 390 F.2d 117 (9th Cir. 1968), where the maker of an inexpensive beer copied the trademark of a well known scotch whisky. The infringer profited from his deliberate infringement, but plaintiff did not claim that it had lost any sales of whisky. Defendants plausibly argued that plaintiffs had shown "no injury to themselves, no diversion of sales from them to the appellants, no direct competition from which injury may be inferable." *Id.* at 120.

The leading case in this Court is *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), where MGM plagiarized the script of a play and made a major movie. Damages to the copyright holder might have been zero, and were at most quite modest

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[5] The infringing song was sold on an album. The jury attributed 28% of the profits of the album to the infringing song, and 66% of the profits of that song to the infringement. 212 F.3d at 487. The net result was that 28% of 66%, or 18.48% of the profits of the album, were attributable to the infringement. Such estimates are unavoidable in copyright litigation, and were approved by this Court in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).

compared to the profits from the movie. The Court affirmed a judgment for 20% of the profits from the movie, based on the lower court's estimate of the highest proportion of the profits that might possibly have been attributable to the plagiarized script. *Id.* at 408-09.

The rule allowing recovery of the infringer's profits is sufficiently settled that although this Court decides many intellectual property cases, it has not returned in recent years to issues of how to measure the infringer's profits. Numerous earlier cases are cited in *Sheldon*. *See also Mishawaka Rubber & Woolen Manufacturing Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942), awarding a trademark infringer's profits.

f. Harmless but profitable trespasses. A trespasser is liable for compensatory damages, for nominal damages in the absence of any actual damage,[6] or for the profits of the trespass, *Restatement (Third)* §40.

There are well known examples in which the trespass was harmless, because plaintiff was not using his land or was not even capable of using his land. But he could still sue for the profits of a substantial commercial trespass. In *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946), defendant had an easement to build a railroad across plaintiff's land and to transport on that railroad coal mined from specified tracts of land. Without authorization, defendant also transported coal mined from additional tracts. Defendant argued that the only remedy should be nominal damages for the tort. The

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[6] Dan B. Dobbs, *The Law of Torts* § 50 at 97 (2000).

Virginia court disagreed, awarding instead the value of the benefit wrongfully acquired:

> The illegal transportation of the coal in question across plaintiff's land was intentional, deliberate and repeated from time to time for a period of years. . . . To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received. Defendant's estate has been enhanced by just this much.

Id. at 238; *Restatement (Third)* §40 illus. 2.

Another well known example is *Edwards v. Lee's Administrator*, 96 S.W.2d 1028 (Ky. 1936); *Restatement (Third)* §40 illus. 4, §51 illus. 13. Edwards, who owned the mouth of the Great Onyx Cave, developed and exploited the entire cave as a tourist attraction. About one-third of the cave was Lee's property — 360 feet below the surface and inaccessible to Lee. 96 S.W.2d at 1030. The court did not find any compensatory damages; instead, it awarded one-third of the profits from the cave to Lee. "[W]e are led inevitably to the conclusion that the measure of recovery in this case must be the benefits, or net profits, received by appellants from the use of the property of the appellees." 96 S.W.2d at 1032. Reviewing similar rules in a range of factual contexts, the court said that "The philosophy of all these decisions is that a wrongdoer shall not be permitted to make a profit from his own wrong." *Ibid.*

g. Harmless but profitable conversions. Similar facts can arise in conversion. A well known example is *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946). Defendant "borrowed" the plaintiff's egg-washing machine, without authorization, and used it in his business for more than three years until discovered. Plaintiff had stored the machine in a space adjacent to defendant's business site, had no current use for it, and did not know that defendant was using it. Defendant plausibly argued that plaintiff had suffered no loss.

The court said that plaintiff had suffered a loss, at least in the abstract, but the remedy it affirmed was a judgment for defendant's profits from using the machine. "To hold otherwise would be subversive of all property rights since his use was admittedly wrongful and without claim of right. The theory of unjust enrichment is applicable in such a case." *Id.* at 654; *Restatement (Third)* §40 illus. 17.

h. Rescission. Rescission of transactions is another familiar restitutionary remedy that need not be accompanied by compensable injury. If one party to a contract commits a material breach, by repudiation or substantial failure to perform, the other party is entitled to get his money back, even if performance would have been worthless and contract damages would have been zero. *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000); *Restatement (Third)* §37 illus. 1. After reviewing the underlying principles, *id.* at 607-08, and resolving various preliminary issues, the Court turned to the facts. The government convincingly argued that Mobil had suffered no damages, but the Court said that did not matter.

> This argument, however, misses the basic legal point. The oil companies do not seek damages for breach of contract. They seek restitution of their initial payments. Because the Government repudiated the lease contracts, the law entitles the companies to that restitution whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore. If a lottery operator fails to deliver a purchased ticket, the purchaser can get his money back — whether or not he eventually would have won the lottery.

Id. at 623-24.

The rule is the same when a transaction is rescinded for fraud. "Rescission of a transfer induced by fraud or material misrepresentation requires no showing either that the transferor has suffered economic injury (the requirement in tort) or that the transferee has realized a benefit at the transferor's expense (the standard condition of unjust enrichment)." *Restatement (Third)* §13 cmt. *e*; *see* illus. 7-9 and reporter's note *e*. If plaintiff has been deceived on a point that matters to him, he can undo the transaction, whether or not the point of the deception has a value measurable in dollars.

i. Misuse of confidential information. A person who misuses confidential information is liable for any profits he makes as a result — whether or not the person entitled to control the information suffers a compensable injury. An example in this Court is *Snepp v. United States*, 444 U.S. 507 (1980), where a CIA agent published a book about his work without submitting the manuscript for review by the agency.

The government made no effort to prove damages. The Court believed the government had been harmed but that any damages were "unquantifiable." *Id.* at 514. The Court granted a constructive trust over all proceeds of the book.

The rule is the same in more prosaic contexts such as trade secrets. One who misappropriates a trade secret is liable for his profits, whether or not plaintiff proves any damages. Uniform Trade Secrets Act §3(a), 14 Unif. Laws Ann. 633 (2005).

The whole civil law of insider trading depends on this rule. When the insider uses corporate information to profit by trading in the corporation's securities, the corporation can recover those profits without pleading or proving any compensable injury to the corporation. *Restatement (Third)* §43 illus. 9 and reporter's note *c*; American Law Institute, *Principles of Corporate Governance* §5.04(a), (c) (1992); *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969). The cause of action is to recover defendant's profits, *see, e.g.*, *SEC v. Warde*, 151 F.3d 42, 49-50 (2d Cir. 1998), and it is probably rare in such cases for the corporation to have any compensable injury.

j. The slayer rule. If a person in position to inherit property on the death of another feloniously kills that other person, the slayer does not get to keep the property he inherits. *Restatement (Third)* §45. The rule is the same if the slayer would acquire the property through life insurance, joint tenancy with right of survivorship, or any other means by which property passes at death. *Ibid.*

The property passes instead to the person next in

line, usually the person who would have inherited the property if the slayer had predeceased the victim. §45(3). Very often, that person has no compensable injury, and no legally protected interest, under the wrongful death act. The person who inherits in lieu of the slayer may be an adult child of the victim, a sibling, a nephew, or a first cousin once removed. If that person was not financially dependent on the victim, and not on the short list of other potential plaintiffs listed in the wrongful death acts of some states, he cannot sue for wrongful death.

It is unimaginable that this body of law would be held unconstitutional and stricken from the books. Yet the cause of action is vested in a person — the substitute heir or beneficiary — who may have no compensable injury and no legally protected interest. The cause of action is vested in the most appropriate plaintiff, and that plaintiff has a clear personal stake in the litigation.

* * * * *

The point of all these examples is that plaintiffs who suffered no compensable injury can often sue to recover or prevent a defendant's unjust enrichment. Large, diverse, and important areas of law would be thrown into confusion by an opinion suggesting that an unjust enrichment plaintiff must show injury in fact and that injury in fact may be equated with compensable injury or economic loss.

C. These Causes of Action for Plaintiffs Who Suffered No Compensable Injury Long Predate the American Founding.

The law of restitution and unjust enrichment has ancient roots. It developed independently in the

courts of equity and in the courts of common law before the American founding. These cases were part of "the traditional concern of the courts at Westminster." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)). The history is briefly reviewed in the comments and reporter's notes to *Restatement (Third)* §4.

Respondent offers an accurate account of some of the pre-founding and founding-era cases. Resp. Br. 21-23. These are cases in which the Chancellor granted an accounting of profits — an order that defendant account for any profits wrongfully earned and pay those profits over to the plaintiff — even though plaintiff proved no damages and appears to have suffered no compensable injury. In addition, conflicted transactions were set aside, whether or not plaintiff had any damages or defendant had any profits. We have already described *Keech v. Sanford*, *supra* at 12, in which the Lord Chancellor awarded an accounting of a trustee's profits from a lease even though the landlord had expressly refused to renew the lease with the trust as a tenant. That was in 1726, and the core of the rule appears to have already been settled.

The other early cases cited by respondent are equally clear. The trustee in *Whelpdale v. Cookson*, 27 Eng. Rep. 856 (Ch. 1747), cited at Resp. Br. 21, was the highest bidder at a public sale, but suit lay to set aside the sale on the ground that the trustee had acted both as buyer and seller. The facts are more fully stated in *Whelpdale v. Cookson,* 28 Eng. Rep. 440 (Ch. 1747), where the reporter of decisions says

that "The doctrine is not confined to Trustees, but extends to Assignees under Commissions of Bankrupt, Solicitors, Agents, and in short all persons having a confidential character," citing numerous cases. *Id.* at 441.

The reporter there also notes that the authority of *Whelpdale* had "been doubted" by Lord Eldon in *Ex parte Lacey*, 31 Eng. Rep. 1228, 1229, 6 Vesey Jr. 626, 628 (Ch. 1802). Lord Eldon's "doubt" was that *Whelpdale* had not gone far enough. The Lord Chancellor in *Whelpdale* had said that a majority of the creditors could ratify a sale to a bankruptcy trustee who bought at his own sale. But Lord Eldon insisted in *Lacey* that the majority could not waive the rights of the minority, and that only unanimous consent by all the creditors could ratify such a sale.

There were many of these cases in early modern England, as indicated in Resp. Br. 21-23 & n.4, and in the discussion and citations in the opinions. The Chancellors discuss these cases as a recurring problem. They insist that neither harm to plaintiff nor gain to defendant need be proved; there is a cause of action to set aside the sales because the temptation to abuse is ever present, and whether there is actual injury or gain is too difficult to determine. As Lord Eldon explained:

> [The rule] is founded upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not.

Ex parte Lacey, 31 Eng. Rep. at 1229.

So the courts dispensed with proof of loss to plaintiff; they dispensed even with proof of gain to defendant. It was enough to support a cause of action that there was a duty of loyalty and a temptation to profit at the plaintiff's expense.

D. The Requirements of Standing Necessarily Depend on the Relief Plaintiff Seeks.

1. Standing in Suits for Damages and Injunctions.

A plaintiff must show "that he has standing for each type of relief sought." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009), citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). The reason plaintiff must separately show standing for each type of relief sought is that the precise requirements for standing necessarily vary with the type of relief sought. There is no uniform rule of standing that applies without change to every type of relief.

In *Lyons*, this Court acknowledged that plaintiff had standing to sue for compensatory damages but held that he lacked standing to sue for an injunction. Plaintiff had suffered the damages, so he had standing to sue for those, but he was not sufficiently threatened with a repetition to have standing to sue for an injunction.

Many other cases are the reverse. A plaintiff who is threatened with unlawful conduct has standing to sue for an injunction, but he has no standing to sue for damages, because he has not yet suffered any damages. A plaintiff who faces threatened harm has

not suffered injury in fact, but he has standing to sue for an injunction or declaratory judgment because he is threatened with injury in fact that the judgment can prevent. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

In claims for compensatory damages, injury in fact is obvious. The emphasis on injury in fact for standing developed in public-law suits for injunctions or declaratory judgments, where it is necessary to separate those who can appropriately sue to challenge government policies from those who cannot. This purpose is clearly stated in the cases that petitioners rely on most heavily.

In *Summers*, the most recent of these cases, the context was a suit to enjoin implementation of certain rules of the Forest Service. The Court emphasized that standing rules are "founded in concern about the proper — and properly limited — role of the courts in a democratic society." 129 S. Ct. at 1148 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Except where necessary to redress actual or threatened injury, "courts have no charter to review and revise legislative and executive action." 129 S. Ct. at 1148.

It was in this context that the Court said that "injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id.* at 1151. This "hard floor" statement was immediately followed by a statement again focusing attention on the context: "[I]t would exceed [Article III's] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's *nonconcrete interest in the proper administration of the laws*." *Ibid.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81

(1992) (Kennedy, J., concurring)) (emphasis added).

This emphasis on concrete injury in fact makes sense in its original context. But plainly, the Court was not thinking about restitution of unjust enrichment in any of these opinions. Restitution of unjust enrichment is a different "type of relief," with different requirements for standing.

2. Standing in Suits for Restitution and Unjust Enrichment.

Just as standing to sue for damages is different from standing to sue for an injunction, so standing to sue for restitution of unjust enrichment is different from either. Because claims for unjust enrichment are based on defendant's gains rather than plaintiff's losses, a focus on compensable injury or economic loss asks the wrong question. Either any requirement of injury must be abandoned in unjust enrichment cases, or else it must be clarified to fit the law of restitution and unjust enrichment.

The basis for standing in claims for restitution of unjust enrichment is that defendant made his profits "at the expense of" plaintiff, *supra* at 5, either in the sense of a corresponding loss to plaintiff and gain to defendant, or in the sense that defendant's profits are derived from a violation of plaintiff's legally protected rights. It matters little whether the Court describes this requirement as a special category of injury in fact or as a distinct requirement that suffices in claims for restitution of unjust enrichment. What is critical is that the Court recognize that claims to restitution of unjust enrichment are different from claims for compensatory damages and different from claims for injunctions, and that standing must be determined in

light of the nature of the claim.

This Court considered the standing question in *Gollust v. Mendell*, 501 U.S. 115 (1991), a decision that petitioners badly misinterpret. Pet. Br. 33. *Gollust* was a suit to recover a corporate insider's short-term trading profits under §16(b) of the Securities and Exchange Act, 15 U.S.C. §78p(b) (2006). The statute authorizes the issuer whose securities are illegally traded to recover these profits, and it authorizes other holders of that issuer's securities to recover the profits on behalf of the issuer if the issuer fails to act. It is unlikely that the issuer suffers any compensable injury when one of its officers or major shareholders buys and sells in a six-month period, and almost unimaginable that an individual holder of its securities suffers compensable injury. But the issuer has standing to sue because its confidential information was misused to produce the trading profits. Its securities holders have standing to sue on the general principles of derivative suits.

Gollust held that a derivative plaintiff in a §16(b) suit must continue to hold his securities in the issuer throughout the litigation. Otherwise, he would not have the necessary "personal stake" in the lawsuit that is essential to Article III standing. 501 U.S. at 125-26.

But the "personal stake" at issue in *Gollust* was *not* a compensable injury or an economic loss. The Court quoted the requirement of "injury" to the plaintiff, *id.* at 126, but there is not the slightest hint in the opinion that any injury to plaintiff was compensable, or that it was anything more than an intentional violation of his legal rights that had been profitable to the violator. Plaintiff's "personal stake"

was that "respondent still stands to profit, albeit indirectly, if this action is successful." *Id.* at 128. "[H]e retains a continuing financial interest in the outcome of the litigation derived from his stock in International's sole stockholder, Viacom, whose only asset is International." *Id.* at 127-28. The decision was unanimous.

To have standing to sue on a restitutionary claim for defendant's wrongful profits, plaintiff had to have a personal stake in *defendant's profits* — not a personal stake in his own non-existent losses. Claims in restitution and unjust enrichment are based on defendant's gains, and standing depends on plaintiff's stake in those gains.

It does not follow that just anybody can create a personal stake by suing to recover a stranger's unjust enrichment. The requirement that defendant's gains be at plaintiff's expense is deeply embedded in the law of restitution. It appears in the black letter of §1 of the *Restatement (Third)*, and in the formulation of nearly every substantive rule of restitution and unjust enrichment. Even in the exceptional case of the slayer rule, careful attention is paid to identifying the appropriate plaintiff entitled to inherit in lieu of the slayer — a choice that is easy in most cases but difficult in a few. *Restatement (Third)* §45(3) & cmt. *d*. Only that plaintiff can sue. Self-appointed plaintiffs without a personal stake cannot sue.

These rules requiring identification of the source of defendant's enrichment, or the appropriate heir in the case of the slayer rule, control who can be a plaintiff. Usually lawyers and judges think of these rules as simply part of the substantive rules of restitution and unjust enrichment — just as in

compensatory damages cases, they are more likely to think of the requirement that plaintiff prove damages as part of his substantive claim than as a standing rule.

But when the wrong plaintiff tries to sue, or when an unusual plaintiff asserts that special circumstances give him the right to sue, then the court may talk about the identity of the restitution plaintiff in terms of standing. An example is *Fuchs v. Bidwill*, 359 N.E.2d 158 (Ill. 1976), where the court held that citizens and taxpayers lacked standing to sue on behalf of the state for restitution of corrupt profits allegedly earned by state legislators. *Id.* at 508-10. The state could have sued, but individual citizens and taxpayers could not.

Standing to sue depends on the "type of relief" sought. The proper rule of standing in claims for restitution of unjust enrichment is that plaintiff have a personal stake in the recovery, and in all but exceptional cases, such as the slayer rule, that defendant's gains were acquired by a violation of plaintiff's legal rights.

II. Petitioners' Argument Would Disrupt or Overturn Large Bodies of Long Established Law with Respect to Unjust Enrichment.

The statutory claim in this case appears to be modeled on common law and equitable claims in restitution and unjust enrichment. Respondent alleges that petitioners paid a bribe to get a flow of business that included her, and that consequently she is entitled to restitution of the fees she paid for their services. A holding that there is no standing here would appear to mean that there is no standing in

many long established causes of action. Certainly petitioners offer no plausible explanation of how their position is consistent with the law of restitution and unjust enrichment.

It is true that respondent's statutory claim goes beyond the traditional boundaries of restitution in some ways. The statute imposes joint and several liability, instead of several liability for the portion of plaintiff's fees retained by each defendant. The law of restitution and unjust enrichment generally imposes only individual liability for each defendant's enrichment, but that is not a universal rule. This Court imposed joint and several liability for the profits of a group in *Jackson v. Smith*, 254 U.S. 586, 589 (1921), citing similar earlier cases. And *Mosser v. Darrow*, 341 U.S. 267 (1951), described *supra* at 14, imposed vicarious liability in unjust enrichment on a defendant who had no personal profits at all — a result that goes well beyond joint and several liability. Whether petitioners' liability is joint and several or only several has nothing to do with respondent's personal stake in the litigation, and nothing to do with whether petitioners' enrichment was at respondent's expense — in short, nothing to do with standing.

The statutory claim also goes beyond a restitution claim by adding a punitive element; petitioners will be liable, if at all, for three times the fees received. But there is nothing unusual about this. It is settled that in appropriate cases, a claim for restitution of unjust enrichment can be combined with a claim for punitive damages, and that plaintiff can recover both. *Restatement (Third)* §51 cmt. *k* and reporter's note *k*; *see, e.g.*, *Ward v. Taggart*, 336 P.2d 534, 538-39 (Cal.

1959) (Traynor, J.). And here too, Congress's decision to combine restitutionary and punitive elements in a single claim has nothing whatever to do with respondent's standing.

The Court must decide this case with careful attention to the vast body of law on restitution and unjust enrichment. Respondent appears to have a personal stake in recovery of fees paid to a service provider that, respondent alleges, collected those fees in a transaction that violated statutory rules designed to protect customers like her. Either the Court must uphold standing to assert that claim, or it must carefully and convincingly distinguish that claim from the many long established claims in unjust enrichment on behalf of plaintiffs who suffered no compensable injury.

An opinion requiring injury in fact, and suggesting that injury in fact requires a compensable injury or an economic loss, would overturn centuries of Anglo-American law. All the cases discussed above (in part I.B.2) would appear to be barred from federal court if this Court were to adopt petitioners' argument. Where a restitution plaintiff can prove compensable injury, the claim could proceed — but requiring such proof in a claim for restitution of unjust enrichment would fundamentally change the lawsuit, adding a previously irrelevant issue to every plaintiff's burden of proof.

Many federal claims would be barred or fundamentally changed — claims to recover bribes paid to federal employees, claims for infringement of copyright, trademark, and design patents, claims to recover the profits of trading on inside information, claims to recover short-term trading profits by

insiders, and more. Many state-law claims would be appear to be barred from the diversity jurisdiction.

Many states have similar standing rules for litigation in state court, often following or visibly influenced by this Court's decisions.[7] Future defendants would argue the persuasive value of this Court's decision in state court; every state would have to decide whether to preserve the traditional rules of restitution and unjust enrichment or to follow this Court's lead and bar many such claims. Of course this Court is not responsible for state law. But the Court should think carefully before it bars many state-law claims from federal court and throws large swathes of state law into potential chaos.

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[7] *See, e.g. Grayson v. AT&T Corp.*, 15 A.3d 219, 233-35 (D.C. 2011); *Corboy v. Louie*, 2011 WL 1687364, *12-16 (Haw. 2011); *Ciszek v. Kootenai County Board of Commissioners*, 254 P.3d 24, 29-30 (Idaho 2011); *Patuxent Riverkeeper v. Maryland Department of Environment*, 2011 WL 4502141, *1-8 (Md. 2011); *In re Custody of D.T.R.*, 796 N.W.2d 509, 512-13 (Minn. 2011); *Heffernan v. Missoula City Council*, 255 P.3d 80, 91-92 (Mont. 2011); *Frenchman-Cambridge Irrigation District v. Department of Natural Resources*, 801 N.W.2d 253, 258-60 (Neb. 2011); *San Juan Agricultural Water Users Ass'n v. KNME-TV*, 257 P.3d 884, 893-94 (N.M. 2011).

CONCLUSION

The judgment below should be affirmed. And the Court's opinion should take care to preserve the long established law of restitution and unjust enrichment.

Doug Rendleman
Washington & Lee
School of Law
1 Denny Circle
Lexington, VA 24450
540-458-8934
rendlemand@wlu.edu

Douglas Laycock
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903
434-243-8576
dlaycock@virginia.edu
Counsel of Record

October 18, 2011

APPENDIX

The following individuals have joined as amici in this brief:

Mark P. Gergen is Professor of Law at the University of California-Berkeley, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and the American Editor of the *Restitution Law Review*.

Andrew Kull is the Austin B. Fletcher Professor of Law at Boston University and the Reporter for the *Restatement (Third) of Restitution and Unjust Enrichment*.

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia, Alice McKean Young Regents Chair in Law Emeritus at the University of Texas, Second Vice President of the American Law Institute, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and editor of *Modern American Remedies* (4th ed. 2010).

Colleen P. Murphy is Professor of Law at Roger Williams University and part of the Members Consultative Group to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Phil C. Neal is former Dean of the University of Chicago Law School, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and a partner in Neal, Gerber, & Eisenberg, LLP.

Doug Rendleman is the Huntley Professor of Law at Washington & Lee University, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and editor of Doug Rendleman &

Caprice Roberts, *Remedies* (8th ed. 2011).

Caprice Roberts is Professor of Law at West Virginia University, part of the Members Consultative Group to the *Restatement (Third) of Restitution and Unjust Enrichment*, and editor of Doug Rendleman & Caprice Roberts, *Remedies* (8th ed. 2011).

Chaim Saiman is Associate Professor of Law at Villanova University and has published scholarly articles on restitution and unjust enrichment.

Emily L. Sherwin is Professor of Law at Cornell University and an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Michael Traynor is President Emeritus and Chair of the Council Emeritus of the American Law Institute, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and Senior Counsel at Cobalt LLP.