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I. Introduction

We are here today to celebrate, and criticize, the Restatement (Third) of Restitution & Unjust Enrichment (R3RUE), the product of more than ten years' work by its great reporter, Andrew Kull, assisted by a gilt-edged group of advisors and a serious and hard-working Members' Consultative Group. The product of this work is more than just a worthy successor to the 1937 Restatement of Restitution, which created and has shaped the subject for nearly seventy-five years. Besides Professor Kull's careful delineation of the specifics of modern restitution law, his drafts continue to give us an opportunity to consider the scope and rationale for restitution. We wish to

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examine restitution's scope, and after examining how it has already been used, to apply an aggressive use of it to the current mortgage crisis.

II. The Scope of Restitution

The scope of restitution has always been a topic of interest and controversy, and our friend, Professor Doug Rendleman, one of the most perceptive observers of remedies in general and restitution in particular, and the catalyst of this conference, has written at least three important articles touching on the question of scope: *When Is Enrichment Unjust? Restitution Visits an Onyx Bathroom*,[1] *Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock*,[2] and *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get In Their Eyes?*[3] We would like to use his thinking as a jumping off point, a metaphor that he will surely think apt in light of his reference to Dawson's Dock.

Professor Rendleman discusses "broad" and "narrow" restitution,[4] broad restitution being an unbounded system based on fairness, supported by Lord Mansfield[5] and modern giants such as George Palmer,[6] Goff and Jones,[7] and Dan Dobbs,[8] while narrow restitution requires in Doug's quotation from John P. Dawson, "'some specific ground' for restitution, like 'fraud, mistake, compulsion, undue influence, impossibility or frustration, sometimes substantial breach, and certain kinds of illegality.'"[9]

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1. Doug Rendleman, *When is Enrichment Unjust? Restitution Visits an Onyx Bathroom*, 36 LOY. L.A. L. REV. 991 (2002–2003) [hereinafter Rendleman, *Onyx Bathroom*].

2. Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock?*, 79 TEX. L. REV. 2055 (2001) [hereinafter Rendleman, *Dawson's Dock*].

3. Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847 (1999) [hereinafter Rendleman, *Smoke*].

4. Rendleman, *Onyx Bathroom*, *supra* note 1, at 994–1001. He also speaks of "freestanding restitution" and "restitution as an alternative remedy for a breach of contract or tort" in Rendleman, *Smoke*, *supra* note 3, at 886, following Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1276, 1277 (1999). Rendleman, *Dawson's Dock*, *supra* note 2, is equally concerned with scope, though it does not use shorthand terms.

5. *See infra* note 17 and accompanying text.

6. GEORGE E. PALMER, THE LAW OF RESTITUTION §§ 1.1, 1.7 (1978).

7. LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 12 (Gareth Jones ed., 5th ed. 1998).

8. DAN B. DOBBS, LAW OF REMEDIES (2d ed. 1993).

9. Rendleman, *Onyx Bathroom*, *supra* note 1, at 998 (quoting JOHN P. DAWSON,

Narrow restitution has many supporters,[10] including, especially in its first draft, the R3RUE itself.[11] The obvious problem with broad restitution is that it seems boundless, while narrow restitution seems to add little to the existing substantive law of contract, tort and property.

Professor Rendleman proposes a middle ground: "[A] judge or a jury ought to emphasize the question: Will granting the plaintiff restitution undermine a policy of property, contract, tort or substantive law?"[12] We do not think that this is an adequate test, and want to focus on a factor that is not rejected by the Restatement, but which is certainly minimized: The impoverishment of the plaintiff.

The addition of the words "unjust enrichment" to the title of the R3RUE emphasizes the centrality of enrichment, as does the text of Section 1: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." [13] A Comment continues, "[r]estitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth."[14] The R3RUE does not dismiss impoverishment,[15] but it minimizes its importance. We recognize that tort and breach of contract are common ways of dealing with loss, but we believe that a focus on unjust impoverishment can reveal fact situations that fall between the

UNJUST ENRICHMENT 117–18 (1951)).

10. *See, e.g.*, Peter Birks, *A Letter to America: The New Restatement of Restitution*, *in* 3 GLOBAL JURIST FRONTIERS (2003); Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2112 (2001).

11. *See* Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts,* 2001 WIS. L. REV. 695, 700–01 [hereinafter Linzer, *Rough Justice*] (describing the Discussion Draft of Mar. 31, 2000). The specific language criticized in that article remains in the Final Draft, but the overall attitude is considerably softened.

12. Rendleman, *Onyx Bathroom, supra* note 1, at 1002–03.

13. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (2011).

14. *Id.* § 1 cmt. d. Contrast the scope section of the abandoned RESTATEMENT (SECOND) OF RESTITUTION, drafted by William F. Young. "A person who receives benefit by reason of an infringement of another person's interest, *or of loss suffered by the other*, owes restitution to him in the manner and amount necessary to prevent unjust enrichment." RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tentative Draft No. 1, 1983) (emphasis added). *See* Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 493 n.20 (2007).

15. After quoting from *LaSalle Nat'l Bank v. Perelman*, 82 F. Supp. 2d 278, 294–95 (D. Del. 2000), which had written that "the elements of unjust enrichment are: 1) an enrichment, 2) an impoverishment, 3) a relation between the enrichment and the impoverishment, 4) the absence of justification and 5) the absence of a remedy provided by law," Comment d to Section 1 notes that "[t]he first four elements of this list might make a plausible definition, though the reference to 'impoverishment' is too narrow: there is often no 'impoverishment' other than a violation of the claimant's rights." This obviously does not deny that impoverishment may be a factor leading to liability in restitution.

cracks of other areas of law and deserve remediation, and that often may show what makes an enrichment unjust.

Whether courts actually use the term "restitution" or manipulate other concepts beyond their normal shapes,[16] we believe that they are really following Lord Mansfield in his formation of the North Star of restitution in *Moses v. Macferlan*[17]: "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."[18] These words, like other towering phrases, can be characterized as either vapid and platitudinous or profound and central—or both.[19] Because justice and fairness are so central to law, restitution should have a much broader sway than the wide, but bounded role given it by this Restatement, and should include loss to the claimant even without a discernable enrichment of the defendant.

Lon Fuller famously wrote that the "restitution interest" in contract remedies, "involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief,"[20] while Grant Gilmore, referring to restitution and reliance in contract law, quipped that "[t]he two concepts were, indeed, twins. . . . Both situations could have been dealt with under either slogan but the legal mind has always preferred multiplication to

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16. *See* Linzer, *Rough Justice*, *supra* note 11, at 739 (citing *Hoffman v. Red Owl Stores*, 133 N.W.2d 267 (Wis. 1965) and *Pop's Cones, Inc. v. Resorts Int'l Hotels*, 704 A.2d 1321 (N.J. App. Div. 1998) as examples of where courts will find contract reliance where the existence of an actual promise is questionable, but a breach of informal trust in a developing business relationship was clear). Although both cases applied Section 90 of the RESTATEMENT OF CONTRACTS, it can be argued that the reliance was not on promises, but on the relationships themselves. The foundational writer on relational contract theory is Ian Macneil. *See generally* Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); William Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545. Among authorities speaking of reliance on relationships rather than promises, see Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992); Wallace K. Lightsey, *A Critique of the Promise Model of Contract*, 26 WM. & MARY L. REV. 45 (1984–1985); Peter Linzer, *Uncontracts: Context, Contort and the Relational Approach*, 1988 ANN. SURVEY OF AMER. L. 139, 155–66; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). On restitution and implied contract in nonmarital cohabitation, see RESTATEMENT (THIRD) RESTITUTION & UNJUST ENRICHMENT § 28 cmt. a (2011).

17. Moses v. Macferlan, (1760) 97 Eng. Rep. 676 (K.B.).

18. *Id.* at 681.

19. Compare for instance "the pursuit of happiness" in The Declaration of Independence.

20. Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages I*, 46 YALE L.J. 52, 56 (1936).

division."[21] In both Williston's defense of reliance in what became Section 90 of the Restatement of Contracts and in that Section's revision in the Restatement (Second),[22] the interplay with restitution is equally apparent.

Williston, in fact, went to considerable length to say that restitution, or as it was then called, quasi-contract, was heavily concerned with the injury to the plaintiff. During the famous "Johnny and the car" discussion in the American Law Institute's debate over Section 88 (later Section 90), Williston argued that as a matter of contract law, reliance on a promise required its full performance even if the promisee had only spent half as much as was promised.[23] He contrasted this position by saying that it would be possible to substitute for that section "a section in the restatement of quasi-contract that under these circumstances the promisee should be allowed to cover such a sum as would represent the injury he had suffered."[24] A moment later, he continued "[a]s I said to Mr. Coudert, I could leave this whole thing to the subject of quasi contracts so that the promisee under those circumstances, shall never recover on the promise but he shall recover such an amount as will fairly compensate him for any injury incurred."[25]

We will first look at traditional restitution, focusing on unpaid contractors and the public costs of legal private actions like selling cigarettes and lead paint. Then we will look at the current crisis in home ownership—mortgage foreclosures in which there are many questions about the actions of lenders and their successors in interest.[26] These actions often do benefit lenders, and almost always impoverish people who have invested their savings in their homes, the equity known to be the bedrock of most American wealth.[27]

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21. GRANT GILMORE, THE DEATH OF CONTRACT 97 (Ronald Collins ed., 1995).

22. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (1979) (noting that "[r]eliance is also a significant feature in numerous rules in the law of negligence, deceit and restitution," and that those rules overlap with Section 90 in some cases).

23. 4 A.L.I. Proc. app. 85, 98–99 (1926).

24. *Id.*

25. *Id.*

26. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 55 (Mass. 2011) (affirming the lower court's finding that plaintiff could not foreclose where it did not hold the underlying note).

27. Lenders and servicers should be distinguished. Servicers will dramatically increase profit through a fee schedule and retention of late charges where the lender has sold the mortgage-backed securities (MBS) to the investor and neither servicer or lender now have "skin in the game."

While cases have so far focused on saving the people's homes from foreclosure or undoing the foreclosure, in cases where the homeowners have been injured—through loss of their homes, loss of monies that they have properly paid, loss of credit, improper fees or costs of litigation, among others—they should be entitled to compensation. Sometimes tort will accomplish this, but business torts are not always clear and are often closer to contract and restitution than tort, which is so heavily based on personal injury. Flexible use of statutory and common law remedies and expansion of restitution are all appropriate ways to deal with this impoverishment of those spurred by the heavy selling and sloppy servicing of the American dream of home ownership.

The lender—the original party to the contract—is long gone; its expectancy was realized by the sale of the securitized loan leaving some successor or servicer to benefit from windfall fees and profits largely in excess of or established outside the original contract.

Part III looks to awards of restitution when defendants do not appear to have been enriched, at least not unjustly, but where the plaintiffs have suffered some loss. Part IV is a background and primer on mortgages. Part V focuses on the foreclosure crisis.

In his *Smoke* article, Professor Rendleman imagines a young writer proposing in 1994 a massive lawsuit by the states against the tobacco companies, and concludes that she would have been called "dreamy" and her article "deficient," and the writer would not have received tenure.[28] He spends the rest of the article trying to figure out why, given that starting point, the tobacco companies settled in 1998 by agreeing to pay at least $206 billion.[29] We believe that the tobacco companies made a smart choice in not going to trial, despite the enormous cost of the settlement, and we think that our Parts IV and V raise the same kinds of issues: The law may not yet guarantee the victims of mortgage foreclosure abuses recoveries that could total billions, but we believe that it will. Hundreds of thousands, if not millions of people who have lost their homes and credit or are left in a state of threatened homelessness when the mortgagees and their deputies were really at fault, are not in a dream, but a nightmare, and the ties of natural justice and equity call for a remedy.

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28. *See* Rendleman, *Smoke*, *supra* note 3, at 847.

29. *Id.* at 848–933.

III. Traditional Restitution and Impoverishment

A. The Unpaid Contractor Cases

Let us begin with a line of cases that has caused great consternation in some restitution circles, the unpaid contractor.[30] Typically, a contractor is hired by a person who becomes judgment-proof and does not pay. The contractor sues another person, sometimes a stranger to the transaction, sometimes the intended recipient of a gift, claiming an unjust enrichment. One of the best-known is *Paschall's, Inc. v. Dozier*,[31] a Tennessee case from 1966, in which Mary Best and her son, Ronald, had hired the plaintiff, Paschall's, to build an addition to her parents' bathroom.[32] Mrs. Best went bankrupt without paying Paschall's and Paschall's sued the parents only, claiming a mechanic's lien and also seeking the value of the labor and materials furnished.[33] The trial court had dismissed both of Paschall's claims, and Paschall's, which had failed to comply with the procedures governing mechanics' liens, did not appeal from the dismissal of its claimed lien.[34] Mary and Ronald lived with her parents, but while they were clearly enriched by having the use of the improved bathroom, that was irrelevant to the suit against her parents. So here we have Paschall's, which had done the work but was unpaid, and Mrs. Best's parents, who for all we know didn't want the new bathroom, except as a gift, and at any rate didn't contract for it.

But the court reversed the judgment below and held that the parents were enriched by the new bathroom. It remanded the cause to determine "whether or not the defendant [the parents] has been so unjustly enriched at the detriment of the complainant [Paschall's] so as to require him [sic] to

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30. *See* Rendleman, *Onyx Bathroom, supra* note 1. The First Restatement denied all recovery in restitution to the contractor. *See* RESTATEMENT OF RESTITUTION § 110 (1937) ("A person who confers 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.").

31. *See* Paschall's, Inc. v. Dozier, 407 S.W.2d 150, 155–56 (Tenn. 1966) (holding "that where a materialman or subcontractor furnishes labor or materials which benefit the property of a person with whom there is no privity of contract, an action on quantum meruit may lie against the landowner to recover the reasonable value of said labor and materials so furnished"). *Paschall's* is the basis of Illustration 13 to Section 25.

32. *Id.*at 151.

33. *Id.* at 152.

34. *Id.* at 151–52. Paschall's claim was listed in Mary Best's bankruptcy petition but the court did not know if it had been discharged. *Id.* Why Paschall's did not sue Ronald, whose age we are not told, is not explained by the court.

make compensation therefor."[35] Apparently, it was prepared to find a sufficiently unjust enrichment if the parents had not paid Paschall's anything and Paschall's had exhausted its remedies against Mary and Ronald.[36] There is no suggestion that it expected the lower court to find the value to the parents, as opposed to the loss to Paschall's of its labor and materials.

Similarly, in a 1997 North Dakota case, Ruby Hoger's brother hired George Opp to drill a well on property owned by the brother, their mother and Ruby.[37] George Opp never got paid, and the brother and mother conveyed the property to Ruby and her husband, Daniel, who let them live on the property.[38] Though Daniel and Ruby did not live on the property and claimed that they didn't need or benefit from the well, the North Dakota Supreme Court held them both liable.[39] Ruby claimed that the well had little or no value on a rural piece of land, and that she got no benefit out of it since she didn't live on the land.[40] The court found that "a water well for domestic use in a rural part of this state will have some value. As the trial court noted, this value may be intrinsic, but value nonetheless."[41] It appears, however, to have affirmed an award to Opp of what he sued for, the cost of drilling the well—his loss, not Ruby and Daniel's gain.[42]

Computing the restitution damages based on the contractor's loss can cut both ways. In *Idaho Lumber Co. v. Buck*,[43] in which a contractor renovated a former funeral home into a space for "a first class restaurant" at a cost of $106,000, and was paid $66,000 by the now-insolvent developer, the court agreed that the owner of the property was liable in restitution for the increased value of the property,[44] but only to the limit of the contractor's loss—$40,000, though there was evidence that the increase in

35. *Id.* at 155–56.

36. *Id.* at 155.

37. Opp v. Matzke, 559 N.W.2d 837, 839 (N.D. 1997).

38. *Id.*

39. *Id.* at 841. The trial court had granted summary judgment against Ruby but not Daniel because of questions of service, but the Supreme Court found that he had appeared in the action. *Id.*

40. *Id.* at 840.

41. *Id.*

42. *Id.* at 838. The court is not totally clear on this point, but this seems correct.

43. *See* Idaho Lumber Co. v. Buck, 710 P.2d 647, 744 (Idaho Ct. App. 1985) (holding that "the district court did not err in denying a lien against Buck's interest in the property").

44. *See id.* at 655 (relying in part on *Paschall's*). *But see id.* at 661 (Barnett, J., dissenting) (arguing that *Paschall's* should be limited to transactions in which the defendant was a family member).

value was more than that.[45] A similar holding was made by the Seventh Circuit in *Midcoast Aviation, Inc. v. General Electric Credit Corp.*,[46] and both cases are cited for the proposition that "recovery under § 25 is invariably measured by the lower of the cost incurred and the value impaired."[47] That seems sensible, but not if the basis of liability is enrichment. Yes, it is plausible to say that the additional gain is not unjust, since the contractor would be fully paid, but that is another way of saying that the unjust portion of an enrichment is the unjust impoverishment.

Orleans Onyx, Inc. v. Buchanan,[48] is both interesting and troubling. There, one Buchanan had contracted to buy an antebellum house in Louisiana for $430,000 in 1980 dollars.[49] The seller, Edward G. Brennan, had allowed him to make alterations, and Buchanan contracted with Orleans Onyx to redo three bathrooms in cultured onyx, paying $9,900 in advance.[50] When the work was done, Orleans Onyx billed Buchanan for an additional $10,291.50, but his check for that amount bounced and he was later sent to prison on an unrelated fraud charge.[51] As a result, Mr. Brennan lost the sale of his house and had to reoccupy it, with three half-paid-for onyx bathrooms.[52] Orleans Onyx sued Brennan, both to enforce a materialman's lien and for unjust enrichment.[53] The trial court dismissed both claims, but in an earlier opinion, *Orleans Onyx I*,[54] the Louisiana Court of Appeals affirmed the dismissal of the lien, but held that Brennan was liable for unjust enrichment.[55] Referring to a previous decision, *Vandervoort v. Levy*,[56] the *Orleans Onyx I* court wrote:

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45. *Id.* at 659.

46. *See* Midcoast Aviation, Inc., v. General Electric Credit Corp., 907 F.2d 732 (7th Cir. 1990) (holding that the lower court incorrectly instructed the jury on the measure for *quantum meruit* recovery).

47. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 25 cmt. d (2011).

48. *Orleans Onyx, Inc. v. Buchanan*, 472 So. 2d 598, 601 (La. Ct. App. 1985) [hereinafter *Orleans Onyx II*] (affirming the trial court).

49. *Id.* at 598.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* Orleans Onyx, Inc., v. Buchanan, 428 So. 2d 841, 846 (La. Ct. App. 1983) [hereinafter *Orleans Onyx I*] (holding a lien unenforceable).

55. *Id.*

56. *See* Vandervoort v. Levy, 396 So. 2d 480, 486 (La. Ct. App. 1981) (affirming the trial court's award for work done).

> In *Vandervoort*, the homeowner benefitted from extra work done by the architect without their approval. A similar situation exists in this case. Buchanan [sic] benefits from the installation of the more luxurious bathrooms than he intended to place in the home. Appellant performed labor and furnished materials for which he received no compensation. A connection between the enrichment and the impoverishment was the failure of the owner to take steps to prevent the harm which he could have or should have foreseen.[57]

The court of appeals remanded the case for an assessment of damages, and on remand the trial court awarded Orleans Onyx only $5,000, about half what Buchanan owed it.[58] On the second appeal, Brennan argued that he and his wife did not like the bathrooms, finding them "flashy and gaudy," and Buchanan's own interior designer said that the fixtures were incompatible with the style of the house.[59] Brennan also had counterclaimed for $2,250 for his expenses in preparing the bathrooms for the new fixtures.[60] The trial court had not explained how it reached the $5,000 figure, saying only that unjust enrichment was an equitable remedy. The court of appeals affirmed, saying little more: "Although we cannot determine exactly how the court arrived at the figure of $5,000.00, it seems to be an equitable and realistic award and we so affirm the judgment."[61] It seems clear that the trial court had cut the baby in half, and that this must have seemed fair to the court of appeals in light of the fact that the Brennans were benefitted by getting the use of three new bathrooms, but were burdened by being stuck with vulgar improvements that didn't go with the rest of the house and could only be removed at great cost. Since they had to bear this mixed blessing, the contractor having to bear a quarter of his total loss does not seem unjust.

Professor Rendleman built his *Onyx Bathroom* article on *Orleans Onyx II* with some modifications,[62] and used the case for an illustration

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57. *Orleans Onyx I*, 428 So. 2d at 845. It is hard to see what the owner did wrong. The true connection between the enrichment and the impoverishment is simply that Orleans Onyx had done the work for Brennan's buyer and when the buyer defaulted, Brennan received the "benefit" of the onyx bathrooms.

58. *Orleans Onyx II*, 472 So. 2d at 600–01.

59. *Id.*

60. *Id.*

61. *Id.* at 600. We, of course, know that the question whether unjust enrichment is an equitable remedy is considerably subtler than the Louisiana courts thought. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 (2011) (discussing the complex origin of restitutionary remedies).

62. Rendleman, *Onyx Bathroom*, *supra* note 1, at 1013 (increasing the dollar amounts into twenty-first century numbers, and adding a fact that the existing bathrooms were in need

why the result probably should have gone the other way.[63] He was somewhat ambivalent. Applying his test, he asked whether a grant of restitution would undermine the doctrines of other areas of law, here, contract and perhaps bankruptcy, arguing that the contractor had assumed the risk of Buchanan's inability to pay.[64] He noted that if the court had given the contractor his expenses but not his profit, the loss would be somewhat shared, while giving it all of the owner's increased market value, a greater amount, would equal the owner's "benefit," despite his possible dislike for the new bathrooms.[65] He suggested that the higher amount was the "right" answer "under precedent,"[66] but that the considerations against restitution persuaded him more than those for it.[67] The considerations against restitution appear to be both the undermining of contract doctrine by shifting the risk of loss from Orleans Onyx to a noncontracting party, Brennan, and imposing a result on Brennan that interferes with his autonomy.[68]

This does not get us very far. Professor Rendleman makes clear that the First Restatement's absolute ban on contractors recovering from third parties cannot be defended.[69] In fact, he offers his proposal "[i]nstead of the [First] Restatement of Restitution section 110's obstruction."[70] But since the contractor will always have a contract with the absent party who should have paid, the assumption of risk and invasion of autonomy arguments will always be present, producing as great an obstruction as the First Restatement's.

R3RUE Section 25 puts emphasis on the avoidance of a forced exchange, and in its Illustration 12, based on *Paschall's, Inc. v. Dozier*, it

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of refurbishing).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1015. To be sure, Professor Rendleman was basing his conclusion on his restating of the facts of *Orleans Onyx* in an extensive illustration that appears *id.* at 1011.

68. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2(4) (2011) ("Liability in restitution may not subject an innocent recipient to a forced exchange: [I]n other words, an obligation to pay for a benefit that the recipient should have been free to refuse."). The Comment and Reporter's Note to this subsection, however, discuss only volunteers, and Orleans Onyx was neither a volunteer nor an intermeddler, given its contract with Buchanan. *Id.* cmts. a–e.

69. *See* Rendleman, *Onyx Bathroom*, *supra* note 1, at 1013 ("The [First] Restatement commentary does not supply intelligible reasons for this flat rule.").

70. *Id.* at 1014.

justifies the court's result by changing the facts to add that the daughter had no regular income, that the owner and his wife were present at all times, and that the improvement increased the appraised value of the house by $15,000. These facts might be viewed as factors against finding a forced exchange, but they aren't in the *Paschall's* case itself, and the court imposed liability on the parents without these artificial assists away from the forced exchange.[71] In *Orleans Onyx* there is a very strong argument about a forced exchange, an argument that seems more persuasive than the assumption of risk by Orleans Onyx on which Professor Rendleman relies. Admittedly, Brennan assumed the risk that his buyer would not be able to complete the purchase of the house. He could easily have required Buchanan to wait until he took title to commence his improvements. Maybe this could count against the notion of a forced exchange, but just as in *Paschall's* and the North Dakota case involving the well,[72] Brennan ended up with an improvement that he didn't want and wouldn't have agreed to, especially if he had to pay for it. Nonetheless, in both cases the court found an unjust enrichment.

We believe that the most feasible way of dealing with this difficult problem is to weigh the impact upon the contractor against both the benefit to and the forced exchange imposed upon the ultimate user. Thus, unjust impoverishment becomes part of the unjustness of the enrichment. In *Orleans Onyx II*, Brennan is getting three new, if vulgar, bathrooms for $5,000, while Orleans Onyx is being paid about three-fourths of its contract price with Buchanan. If Buchanan had not made the first payment, that fact might have justified a higher award against Brennan, since it would have increased Orleans Onyx's impoverishment, which wouldn't have increased Brennan's enrichment, but it would have made it more unjust. On the other hand, in that situation we could also ask why Orleans Onyx had taken so big a risk with Buchanan, which would really be asking whether its impoverishment was really that unjust, just as we ask why Brennan allowed Buchanan to make the improvements before paying for the house. The balance of both Orleans Onyx's and Brennan's risk-taking affects the question of Brennan's enrichment, not by increasing it, but by making it more unjust. This comparison between benefit and impoverishment is not

71. The only relevant allegation is that "[s]aid materials and services were furnished and performed in the construction of the addition heretofore mentioned with the Full knowledge and consent of Defendants," and had enhanced the value of the property. *Paschall's*, 407 S.W.2d at 152.

72. *See supra* notes 30–42 and accompanying text (discussing *Paschall's* and the North Dakota case involving the well).

completely different from the approaches of Professor Rendleman and the R3RUE, but it focuses on relative fairness, and not on an abstract discussion of the undermining of contract, forced exchange, and free will jurisprudence.

B. The Public Costs of Legal Private Business: Of Cigarettes and Lead

Professor Rendleman also wrote about the more than $206 billion settlement between various cigarette companies and almost all the states, with his opinion made clear from the article's subtitle: "Did the Smoke Get in Their Eyes?"[73] Rendleman focused on the original suit, brought by Mississippi, but noted that almost all the states followed. A Minnesota judge explained:

> Six months after the Minnesota settlement agreement, 46 states and 6 U.S. territories also settled their lawsuits against the major tobacco manufacturers by entering into the "Master Settlement Agreement." Like the Minnesota settlement, the Master Settlement Agreement requires the major tobacco manufacturers to make large settlement payments over time, to make additional annual payments in perpetuity, and to agree to certain restrictions on lobbying and advertising activities. In exchange, each participating state agreed to release the participating tobacco manufacturers from present and future claims.[74]

Rendleman pointed out that the cigarette litigation had been mischaracterized as a tort action, and analyzed it exhaustively, but with considerable skepticism:

> The law of restitution, as it has been developed and presently stands, must be stretched and expanded before it will encompass the State's unjust enrichment-restitution argument. Settlement may have made perfect political or business sense to the tobacco companies. But, in light of the law on the tobacco companies' side, settlement did not make a lot of legal sense. They, however, may not have caught on. Understanding neither the courthouse culture nor the substantive law, the tobacco companies may have been "flummoxed" and "bamboozled" on both levels.

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73. Rendleman, *Smoke*, *supra* note 3, at 847.

74. Council of Indep. Tobacco Mfrs. v. State, 713 N.W.2d 300, 315 (Minn. 2006) (Meyer, J., dissenting). The Master Settlement Agreement is 124 pages long. Collins v. Chandler, 2002-CA-001985-MR WL 22149515, at *1 (Ky. Ct. App. Sept. 19, 2003).

> Rendleman's rule: Don't decide that because Southerners talk slower than you do, they think slower too. That's a big mistake.[75]

To be sure, the effect of years of pending litigation on stock prices may have affected the companies' decisions to settle, but we are very doubtful that a phalanx of high-priced lawyers, working for the most amoral of tobacco executives, gave away more than two hundred billion dollars because they were fooled by Forest Gump. While individual smokers had universally been defeated by juries' common sense feeling that they had assumed the risk, those same jurors, or judges sitting without juries,[76] would have focused on the impoverishment of their states' treasuries, while the tobacco companies made billions. There was no contract being breached, no property right being trespassed upon, and no tort duty not to sell a legal product widely known to be dangerous to health. But there was a massive impoverishment, and as between the states and the companies "the ties of natural justice and equity" argued for the cost to be met by those who had benefitted. As the Rhode Island Superior Court said in a similar suit, involving the lead industry:

> Here, the Attorney General alleges that the State's payment of Lead-related costs has allowed and continues to allow the defendants to derive economic gain from their promotion and sale of lead while, at the State's expense, avoiding responsibility for the damages it has caused. Further, the State alleges that the defendants have appreciated the benefit and that retention of the benefit is inequitable. In order for the defendants to succeed on their motion to dismiss, they are required to show that the State would not be entitled to relief under any of its alleged facts. It is impossible for the Court to determine at this stage that the State's lead-related expenditures have not added to the defendants', including the LIA's [Lead Industry Association's], advantage or saved them from loss. Accordingly, the States' pleading is sufficient with respect to its claim for unjust enrichment.[77]

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75. Rendleman, *Smoke*, *supra* note 3, at 930.

76. Professor Rendleman notes that the state had gone to great lengths to avoid a jury, given the tobacco companies' track record, Rendleman, *Smoke*, *supra* note 3, at 893–98, but we wonder if juries would not have acted quite differently when it was their tax money that the state had been forced to spend to care for those made ill by tobacco.

77. State v. Lead Indust. Ass'n, No. 99-5226, 2001 WL 345830, at *15 (R.I. Super. Ct. Apr. 2, 2001). In 2008 the Rhode Island Supreme Court reversed findings that lead paint was a public nuisance. *See* State v. Lead Indust. Ass'n, 951 A.2d 428, 435 (R.I. 2008). The status of nationwide lead paint litigation is difficult to assess, since the various blogs generally are tilted for or against the lead paint industry. It appears, however, that the industry has done rather well. While the level of lead in children's blood has declined nationally, it is clear that lead paint remains a problem, particularly in poor neighborhoods.

IV. Unjust Impoverishment Through Wrongful Foreclosure

We are all aware of the mortgage boom, the subprime mortgage collapse and the foreclosure pandemic. In 2010, as the recession appeared to be waning, it became widely known that lenders had ignored foreclosure procedures and filed thousands of defective petitions. Among the abuses disclosed were:

- The bringing of actions as parties without establishing or having standing. Proceedings commenced by servicers who did not own the loan and frequently did not disclose the party in interest or ever produce the Note.
- The signing of hundreds of affidavits per day by "robo-signers" who falsely swore that they had personal knowledge of the accuracy of the information relied upon for foreclosure.
- Homeowners being falsely assured that no foreclosure or sale would take place and that a modification was in process by the alleged lender. Then the homes were regularly sold by auction to the same servicer making the empty promises during this extended period that regularly extended multiple months if not a year. Servicers would then increase profits by charging late fees and other unearned junk fees for themselves or for unnecessary services provided by subsidiaries making foreclosure an avenue of fee revenue and a profit center for servicers.
- Holding a formerly delinquent borrower in default after she brought the account current.
- Failing to modify when the borrower was able to make payments sufficient to avoid foreclosure.[78] In light of a bargain

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78. An opportunity to cure is an important part of modern contract remedies jurisprudence, and failure to cure, *if the opportunity is made available*, is an essential component of the materiality of a breach. *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 237, 241; UCC 2-508, cmts. 2–4; E. ALLAN FARNSWORTH, CONTRACTS § 8.17 (4th ed. 2004); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS §§ 11.18, 11.20 (4th ed. 2003). Sixty years ago, Corbin wrote:

> Care must, of course, be taken not to bring suit prematurely. If a minor breach has occurred, but there is sufficient assurance that defects will be cured and losses compensated, the bringing of suit at once may be properly regarded as vexatious and an unreasonable enhancement of damages. Furthermore, if the breach is minor it does not justify the injured party in refusing further performance of his own and suing for damages as for a total breach. Such action by him constitutes a total breach on his own part and puts him in the position of a defendant rather than a plaintiff.

4 CORBIN, CONTRACTS § 948 (1951). In addition, state and federal statutes give homeowners

for 360 payments, extending the term by two or so months hardly puts the lender in a compromised position. Many of these foreclosures are created by the servicers refusing payments after the initial two or three months of hardship. Where the borrower could resume the payments, they are often refused or retained for fees in the foreclosure by re-characterizing the remittance as unapplied funds. Essentially, the servicer, assumedly working in the best interest of the investor, is forcing foreclosure by practices resulting in self-dealing profits at the expense of the investors.

- The lenders who might take payments while looking into modification or while a borrower is in bankruptcy failing to "reset" the payment as current and then continuing to assess fees which then accrue to the point it creates a deficiency that the homeowner is unaware of or unable to catch up on. These acts permit an improper foreclosure even when payments are being remitted as agreed.
- Promising to cancel a sale and other similar assurances that borrowers relied upon in not seeking counsel, permitting the financial institution to avoid the barrier of borrower representation during the foreclosure process. The homes were bid upon for the amount of the debt, not the appraised value, so the servicer then retains the difference in equity without returning overage proceeds to the homeowner.[79]

For years the restitution concept focused on what one party gained. Generally this was a consistent way to address the concept and differences in results were negligible when looking from the other perspective. This was a balanced equation, generally what one was enriched by, the other was deprived of. The formula created an avenue for balance and equity that is absent when reviewing the foreclosures.

It is absent due to the subject matter in perspective to the bargaining power and relationship of the parties, now combined with the societal aspects from taxpayer bailouts, to depletion of market value through abandoned unsold properties and neighborhoods going to waste.

If these actions are found out early enough, the foreclosure can be avoided, but often they go undiscovered or are not realized until after a foreclosure and sale. Even if the homeowner has equity in the house, the

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opportunities to cure and in some circumstances require modification.

79. Remember, although many properties are upside down in equity, others have increased in value. Homeowners paid for a number of years, or put significant funds down which are swallowed by the retained fees and sale windfall making foreclosure windfalls far above the bargain and unjust enrichment.

supposed mortgage holder typically bids only the outstanding balance on the note. While the homeowners can theoretically take part in the auction, in practice they rarely do, and few can raise the money. If they could, they would redeem and begin repayment of the note.

Let us assume a house appraised at $150,000, with $100,000 remaining unpaid on the loan, and the homeowner is unable to make his mortgage payments for a short period due to some unforeseen event. The foreclosure takes place, the alleged mortgagee bids $100,000 and later resells the house at a discount for $130,000. Assuming 10%[80] for costs and realtor fees, the lender receives a windfall of $17,000 while the homeowner loses $50,000 in equity.

Consider too the actual impoverishment of the foreclosed homeowner. Although impoverishment doesn't need to be dramatic to apply, let's look at the tumbling effect. They lose their shelter, their emotional attachment to their home, their initial investment in down payment, their equity, their wealth-building vehicle, and become renters with the challenge of finding housing since they have lost their credit rating. They increase expenses relating to insurance and interest, they can be faced with deficiency judgments, they can be strapped with mortgage insurers forcing repayment agreements many times drafted to indicate they are nondischargeable and spread over a decade. Now many of these borrowers are forced into bankruptcy where the loss is shifted in part to other creditors. With these effects of foreclosure, it will take years, if it can ever be accomplished, to get back into a home as all these must be overcome in addition to saving again and finding a creditor to take the risk after a foreclosure. Future risk is present. The real holder of the note may also demand payment since many of these notes were sold multiple times and the original was never produced in the foreclosure process. Even if it has not yet appeared, since the note is still in the market, there is a risk it will reappear at a later date. The courts generally, without a demand for strict proof, sign off on foreclosure by accepting production of a copy and the representation in the pleading without question.

Society struggles with the concept because it is hard to believe or see at first glance that the bank is enriched. However, it is easy to see how a homeowner is impoverished. If the process was deficient or tainted, and in

80. Understanding these costs vary from state to state, a general figure was picked which would include a real estate fee, upkeep costs, title and other closing costs. The reader should remember that most REO (real estate owned departments) use a limited number of realtors and a controlled list of service providers requiring that they provide services at reduced costs and commissions.

some cases, if it could have been avoided by a slight change in term such as moving a few payments to the end and allowing the lender to continue to amortize interest after a period of illness or layoff, then certainly the failure to modify and the consequence of forfeiture is unjust. Equity abhors forfeiture.

We looked at *Onyx Bathroom* where the contractor and homeowner shared the assumption that the buyer would pay. In that case they both shared in the loss under an assumption of the risk. When put on a balance, is it justice and equity to allow the lender to retain these enrichments or cause these impoverishments over a fraction of the costs? Perception in foreclosure seems to be different: The lender's risk assumption is forgotten by people believing that those in foreclosure defaulted and that the lender is the victim. However, this should be looked at as an equitable bargain and exchange. Even if we are unwilling to consider a mortgage contract in less than the strict reading of every word, when the foreclosure was tainted, there is a strong argument for restitution, especially if combined with the theories of tort, contract, and statutory consumer law.

There are many cases holding that compliance with HUD regulations is a condition precedent to foreclosure despite the mortgagor's failure to be current on its payments.[81] In addition, the Kansas Court of Appeals recently held that a mortgagee's failure to comply with contract terms not only precluded its enforcement of the contract but could be a breach of the duty of good faith and a breach of the mortgagee's fiduciary duties entitling the mortgagor to compensatory and punitive damages, affirming an award of $1,593,997 in a commercial construction mortgage case.[82] The Kansas case could be a precedent for recovery of damages as well as an affirmative defense when federal regulations are not followed before an attempted foreclosure.

The foreclosure crisis may be moving towards results we saw in the tobacco litigation, where society was paying the price and was ultimately entitled to recovery. Under these theories the attorneys general have begun settling with mortgage companies in large settlements regarding specific

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81. *See, e.g.*, Lacy-McKinney v. Taylor, Bean & Whitaker Mortg. Corp., 937 N.E.2d 853, 863 (Ind. Ct. App. 2010); Wells Fargo Home Mortg., Inc. v. Neal, 922 A.2d 538, 541 (Md. 2007); Cross v. Fed. Nat'l Mortg. Ass'n, 359 So. 2d 464, 464 (Fla. Dist. Ct. App. 1978).

82. Bank of America, N.A. v. Narula, No. 102,853, 2011 WL 3209849 at *2 (Kan. Ct. App., July 29, 2011).

loan types. In October of 2010, the fifty attorneys general entered a joint investigation into home foreclosures,[83] popularly called "fraudclosures."

We suspect that there will be increased litigation by shareholders, and investors seeking to recover these losses by repurchase and in breach of duties as servicers. With respect to homeowners, we include in an appendix a redacted demand letter raising many theories of damage recovery.[84]

V. In Conclusion

In our minds, the critical thing about restitution is the unjustness rather than the enrichment. Whether an enrichment is unjust often depends on its impact on the other party, that is, the extent to which the impoverishment outweighs the enrichment. They are two sides to the same coin. We have shown how mortgagees or their servicers have frequently violated procedures and failed to comply with the laws regulating mortgages and mortgage foreclosures. Homeowners impoverished by the wrongful or disproportionate acts of lenders and their successors in interest should be able to recover—in restitution and on related theories—for their impoverishment.

83. Margaret Cronin Fisk, *Attorneys General in 50 States Open Foreclosure Probe,* BLOOMBERG BUS. WK. (OCT. 13, 2010, 4:16 PM), http://www.businessweek.com/news/2010-10-13/attorneys-general-in-50-states-open-foreclosure-probe.html (last visited Oct. 12, 2011) (on file with the Washington and Lee Law Review).

84. *See* Appendix.

Appendix A [to Linzer and Huffman, Unjust Impoverishment*]*

The following is a redacted and mildly altered version of a demand letter sent by Ms. Huffman to the attorney for a mortgagee/servicer in a pending foreclosure case. (Apparently, the underlying mortgage had been sold to an "investor." The demand letter illustrates some of the possible ways to get affirmative damages for homeowner-mortgagors, based on the improper conduct of the foreclosing mortgage-holder or servicer.

Some background on the particular case: after initial problems with the attorneys representing the mortgagee, the homeowners' attorney had contacted the office of the company's president, and his office agreed that payments would be accepted and the mortgage terms modified. However, the functionaries at the mortgage company insisted that the homeowners pay with money orders or cashier's checks, even though that was not required by the underlying agreement. Because the amount of the payment was more than their bank's limit on money orders, the homeowners sent two money orders, totaling the amount of the payment, but their tender was refused.

[Law Office Letterhead]

Re: C. and D. E., Mortgagors
Mr. A.B.,
Attorney for X Trust Co.
Dear Mr. B.:

As we previously discussed, I believe it is in our clients' and the investor's mutual interest to settle this case. It would seem that based on the bill submitted, both sides will increase the costs of litigation by multiples but the Es have an opportunity to recoup theirs. As you are aware, these types of cases are very discovery intensive. Although you and I do not have discovery out together, I do have a Brown County case first request at your office that you might review to get a feel of the initial document request I will propound. You will see that it is considerable. I feel strongly about this case and have assured my clients, the Es, that should they be unable to continue to meet the litigation costs, I will engage in alternative arrangements such as seeking some cost sharing or shifting on expenses and/or a contingent fee agreement on damages; therefore, they are assured that the financial burdens of litigation will not deprive them due process. The future counterclaim defenses will not be chargeable to the Es, since your client, X Trust, would be defendant and have a different duty that was breached since it is a servicer rather than the owner of the mortgage note. Therefore, X Trust will not be able to recover those future costs, which substantially reduces the downside for the Es. I think both sides should go in understanding the risks and with our eyes open.

I refer you to the previously filed affidavits relating to the payment and servicing of the loan. After X Trust and Mr. and Mrs. E agreed that the Es would bring the account current, Mr. and Mrs. E remitted funds by money orders. Because their bank limited the size of any given money order, Mr. and Mrs. E sent two money orders totaling the amount of the payment, together with a payment coupon showing the total amount. Your client refused this payment, later explaining this action by saying, rather unconvincingly, that it didn't know how to apply the payments. The Es thought they were current, because suspense money was to be applied to their balance. Your client, however, applied the suspense money to other advances. This explains the discrepancy in the records between the parties.

I have reviewed the Note and the Mortgage, as well as the payment history you provided, and find no provision allowing X Trust to demand money orders or cashier's checks, no contractual obligation on the Es to do so, and no problems with non-sufficient funds. X Trust's unilateral change in the terms of tender of payment contributed to the crossing of funds and X Trust's ultimate refusal to accept payments. In addition, it seems that X Trust did not apply the funds in accordance with the agreement between the parties when it utilized the suspense account that is in question here.

Your client faces counterclaims relating to its failure properly to service the loan and its negligence in processing the modification. The accounting shows deficiencies in the suspense account that support an additional tort claim for conversion. In addition, your client deceptively charged the Es for preparing and recording assignments of the Mortgage to third parties as "statutory expenses" and "attorney's fees." These appear to be violations of the Truth In Lending Act (TILA) and the state Consumer Protection Act. In addition, comparing the bills you have provided with the statement given to the Es shows claims for "miscellaneous" expenses and "statutory" expenses of $10.00, $125.00, $150.00 and a second $125.00, when only one $125.00 fee appears on the provided bills. Each of the unsupported claims constitutes a statutory false claim.

Your client deceptively represented to the Es that their home would not be sold during the modification process but did not disclose the presence of an investor whom you later claimed insisted on the sale to avoid delays. (The delays the investor allegedly wanted to avoid were a foreseeable consequence of X Trust's negligence in losing documents, failing to communicate and failing to adequately perform its duties.)

Basic to the case is the representation of the Office of the President of X Trust that the payments would be accepted and the loan modified. My clients followed the instructions of your servicer, who repeatedly and negligently lost documents and failed to make the promised modifications in a proper and timely manner. This resulted in repeated and lengthy delays that required my clients to keep creating and making monthly and quarterly profit and loss statements, and later, at the insistence of X Trust, to have them prepared by an accountant. Your client is certainly in a position to know of these internal processing issues, as it has been subject to several suits and claims and substantial judgments against it on these grounds, as well as a recent consent order that covers the period of time in question and outlines similar findings on the issues we will present.

This claim of breach of contract would lead to a suspension of the duty to remit payments after your client refused them. Recent case law indicates that if this claim is successful, my clients will not be liable for late charges or interest during the period in question, an amount that you have calculated at more than $20,000. But for X Trust's failures and delays in accepting and applying the Es' payments and its subsequent refusals to modify the loan after your President's Office had agreed to do so, Mr. and Mrs. E would not have incurred substantial attorney's fees. These acts are violations of the state Consumer Protection Act and under that Act, the Es are entitled to recover their attorney's fees. For each of the acts that we prove, there is a statutory penalty of $10,000 under the applicable regulatory law.

X Trust also led the Es to believe that X Trust was their lender when it now claims that these actions were based on an "investor's" decision. X Trust failed to establish its standing at an earlier hearing and, while ordered to produce the pooling and servicing agreement with the investor/owner, has yet to do so.

[Ms. Huffman then went through a detailed examination of the attorney's fees claimed, stating that they were excessive when compared with court records, finding charges for a case that X Trust had filed and dismissed within three weeks, charges for several attorneys attending a routine hearing, charges for a hearing that did not take place in the case at hand, excessive time for preparation of standing arguments that appeared routine given leading cases on the topic, charges for attorneys' time in improperly contacting the Es directly when they were represented by counsel, and attorneys' time in ending this practice.]

In an effort to resolve all issues, the Es will settle all their claims for the terms of the modification previously presented as 5% fixed, and allowing for capitalization, reduced as detailed below.

In addition to the modification, X Trust must:

Remove the added $356.00 in unbilled foreclosure fees that were not provided in the invoices.

Pay its own attorney's fees and costs.

Contribute $5,000 towards the Es' attorney's fees and costs. (This is only half of one state Consumer Protection Act claim; all of the attorney's fees will be recoverable if the Es prevail on any one of their TILA and state Consumer Protection Act claims.)

Correct the Es' credit report to reflect a dispute from April 2009 forward, so that the credit bureau will not report on the matter until the modification takes place, showing the account as "current" by virtue of the new agreement.

Make the modification "permanent" rather than "trial," to avoid future disputes engendering further attorney's fees.

There is no doubt that continued litigation will be costly and time-consuming. With your client's potential exposure, I feel that this is a very good solution for everyone involved.

Sincerely yours,

* * *

[As of the time of publication, X Trust had not accepted the offer. Future litigation will apparently be necessary and will show whether lenders, including X Trust, should give this type of demand letter credence.]