

Summer 6-1-2011

## Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment

Joseph M. C. Perillo

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Contracts Commons](#), and the [Legal Remedies Commons](#)

---

### Recommended Citation

Joseph M. C. Perillo, *Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 Wash. & Lee L. Rev. 1007 (2011), <https://scholarlycommons.law.wlu.edu/wlulr/vol68/iss3/9>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [lawref@wlu.edu](mailto:lawref@wlu.edu).

# Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment

Joseph M. Perillo\*

## *Table of Contents*

I. Introduction .....	1007
II. Performance Under an Indefinite Agreement or Under an Unenforceable Contract Within the Statute of Frauds .....	1009
III. Restitution for Diminished Capacity .....	1016
IV. Performance Under a Contract Avoided for Mistake or Discharged by Impracticability .....	1017
V. Restitution on Behalf of a Breaching Party .....	1019
VI. Performances Under Protest .....	1020
VII. Illegality .....	1020
VIII. Breach .....	1021
IX. Performance-Based Damages for Breach .....	1023
X. Profit from Opportunistic Breach .....	1024
XI. An Overview .....	1026

## *I. Introduction*

Restitution is frequently said to be a remedy designed to place a party "in as good a position as he would have been if no contract had been made and restore . . . to plaintiff the value of what he parted with."<sup>1</sup> If the goal of

---

\* Distinguished Professor Emeritus, Fordham University School of Law. I wish to express my thanks to Professor Helen Hadjiannakis Bender who reviewed the manuscript and made valuable suggestions.

1. CLN Prop., Inc. v. Republic Serv., Inc., 688 F. Supp. 2d 892, 901 (D. Ariz. 2010) (quoting Patel v. Pate, 128 S.W. 3d 873, 878 (Mo. Ct. App. 2004)).

restitution is really to restore the status quo ante,<sup>2</sup> it would lead to a definition of restitution in a contractual context somewhat similar to the following: "Restitution is a remedy for an unenforceable, void, or avoided contract that enables a party to recover costs incurred by performing or preparing to perform provided that the plaintiff did part of what was bargained for." This Restatement says: Not so! The performing party may only recover costs that have enriched the defendant. (An exception is made for restitution for breach of contract.)<sup>3</sup> It says this often and loudly and clearly. In many cases the unjust enrichment rationale works. If, by mistake, the defendant overbills the plaintiff who proceeds to overpay the defendant by \$1,000, the reliance interest of the plaintiff is exactly the same as the defendant's unjust enrichment.<sup>4</sup> The defendant is unjustly enriched by \$1,000 and the plaintiff's reliance interest is exactly \$1,000. Suppose, however, that the defendant requests that a check be dispatched by overnight mail. The plaintiff's reliance interest is now \$1,000 plus what was paid for the overnight dispatch of the check. In some cases the reliance interest is far greater than this simple hypothetical. The thrust of the first part of this Article is that plaintiff's reliance interest should trump the defendant's unjust enrichment.

---

2. Andrew Kull, the Reporter of the Restatement (Third) of Restitution & Unjust Enrichment, noted that restitution in the first Restatement of Contracts was based on a theory of restoration of the status quo ante and in the second Restatement shifted to a theory of unjust enrichment. He was kind enough to state in a footnote that this went unnoticed but "the single exception was an article by Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37 (1981)." Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2029 n.21 (2001).

For a fuller exposition of the concept that restitution in a contractual context means restoration of the status quo ante, see Joseph M. Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1222 (1973) ("[A]lthough courts have tended to give their obeisance to the unjust enrichment theory of restitution, the undercurrent of their decisions has flowed into broader channels: the restoration of the status quo ante.").

3. See *infra* notes 57–84 and accompanying text.

4. RESTATEMENT (FIRST) OF RESTITUTION § 1(d) (1937).

Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result of the remedies given under the rules stated in the Restatement of this Subject is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.

There is no RESTATEMENT (SECOND) OF RESTITUTION.

*II. Performance Under an Indefinite Agreement or Under an Unenforceable Contract Within the Statute of Frauds*

To prove its point, this Restatement adopts, in Section 31, the fiction that "recovery under this Section follows the familiar rule by which a *requested performance* is ordinarily deemed to yield a benefit to the defendant equivalent to its market value, without regard to the increase in defendant's assets attributable thereto."<sup>5</sup> The Restatement (Third) thus adopts the fiction that a requested performance automatically enriches the requesting party whose wealth may actually be diminished thereby. Let's not overlook the history of this formulation. In 1893, Professor William A. Keener built his system of quasi-contracts based primarily on the idea of unjust enrichment.<sup>6</sup> In his 1913 book, Professor Frederic Campbell Woodward criticized the notion that unjust enrichment explained restitution and pointed out that a requested benefit that is received under an unenforceable contract was frequently compensated even if the receiving party was not enriched by the performance.<sup>7</sup> He substituted the "receipt of benefit" notion for the idea of unjust enrichment.<sup>8</sup> Subsequent students of the law, confused by the already confusing proliferation of terminology that has afflicted this corner of the law, have equated the requested-receipt-of-benefit idea with the notion of unjust enrichment. Some noticed that the

---

5. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 (2011).

6. See WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 16 (New York, Baker, Voorhis & Co. 1893) (writing of the doctrine "that no one should be allowed to enrich himself unjustly at the expense of another"). He included in his catalog of quasi contracts certain actions provided by statutes and an action on a judgment. None of these two additional kinds of quasi-contractual actions seems to be treated in the Restatement (Third) of Restitution & Unjust Enrichment.

7. See FREDERIC CAMPBELL WOODWARD, THE LAW OF QUASI CONTRACTS 9 (1913) ("The word 'enrichment' . . . is unsatisfactory in that it connotes an actual increase of the defendant's estate. Such an increase of estate . . . must sometimes appear; but there are many cases . . . where it is sufficient to show that the defendant has received something desired by him.").

8. *Id.* He gave this example in Section 8: "For example, if *A* renders services and furnishes material in the erection of a building for *B* under a supposed contract calling for such services and material, which contract for some reason is invalid, *B* is under a quasi contractual obligation to pay *A* for the value of such services and material whether or not his property is enhanced in value," citing *Vickery v. Ritchie*, 88 N.E. 835, 835-36 (Mass. 1909) (involving an architect who scammed the parties by procuring their signatures to separate alleged contracts containing different prices).

Some cases seem to be in accord with Keener's analysis. See, e.g., *McDaniel v. Hutchinson*, 124 S.W. 384 (Ky. 1910), *overruled by Boone v. Coe*, 154 S.W. 900 (Ky. 1913) (adopting the requested-receipt-of-benefit test).

equation often was fictitious.<sup>9</sup> Others, being mathematically challenged, were blithely unaware of the fiction. Legal fictions do not belong in the twenty-first century, and should be banished from all restatements of the law.<sup>10</sup>

This Restatement is seemingly aware of the fiction, but is seemingly unaware that by employing the fiction it is masking reliance recovery.<sup>11</sup> An example of such recovery is the award of quantum meruit to an architect who has performed under an *indefinite* agreement but the owner has abandoned the project.<sup>12</sup> Only a fiction can describe a recovery as based on unjust enrichment; it is plainly a case of the plaintiff's impoverishment. The absurdity of the "unjust enrichment" rationale is shown by a case where

9. See John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 191–92 (1959) (noting the problems that have arisen from the differing interpretations of the "benefit" concept); Aaron C. Petty, *The Reliance Interest in Restitution*, 32 S. ILL. U. L.J. 365, 388 (2008) (discussing the "resort to legal fiction to accommodate the benefit requirement"); Recent Important Decisions, *Quasi Contracts—Recovery for Part Performance Not Benefiting Defendant*, 26 MICH. L. REV. 942, 943 (1928) (referring to the "aging theory of a fictional benefit"); cf. Jeffrey L. Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573, 575 (1983) (discussing a partnership analogy). See generally Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695 (2001). The case law granting recovery for reliance goes back for a considerable time. *E.g.*, *McCrowell v. Burson*, 79 Va. 290 (1884).

10. See generally LON L. FULLER, *LEGAL FICTIONS* (1967). For an update, see Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1 (2010).

11. *Coleman Eng'g Co., Inc. v. North Am. Aviation, Inc.*, 420 P.2d 713, 729 (Cal. 1966) (Traynor, C.J., dissenting). Chief Justice Traynor would have ruled that no contract existed and would have awarded restitution. *Id.* He said "[i]f in fact the performance of services has conferred no benefit on the person requesting them, it is pure fiction to base restitution on a benefit conferred." *Id.* He voted to remand the case for a determination of the amount of recovery in restitution based on the plaintiff's reliance costs. The majority held that a contract had been formed and breached. *Id.* at 722–23. The dissenting opinion was discussed and adopted by the full court in *Earhart v. William Low Co.*, 600 P.2d 1344, 1351–52 (Cal. 1979) ("The determination to protect 'justifiable reliance' forms not only the inspiration for Chief Justice Traynor's application of a quasi-contractual remedy in *Coleman*, but also provides the basis for several parallel contractual doctrines as well."). For a review of these reliance-based decisions, see *Tanaguchi-Ruth & Associates v. MDI Guam Corp.*, 2005 WL 735938 (Guam 2005).

12. See generally *Tanaguchi-Ruth & Assocs. v. MDI Guam Corp.*, 2005 WL 735938 (Guam 2005). Many other examples exist. See, e.g., *Heyl & Patterson Intern., Inc. v. F. D. Rich Hous. of Virgin Islands, Inc.*, 663 F.2d 419 (3d Cir. 1981) (involving defendant starting a project at urging of governor, new administration denied building permit; subcontractor recovered \$262,398.01, plus costs of \$2,668.25, and attorney's fees of \$21,000.00); *Earhart v. William Low Co.*, 600 P.2d 1344 (Cal. 1979) (involving a contractor at defendant's request improving non-party's land).

Analogous cases can be found in the Reporter's Notes to Section 34 dealing with change of circumstances. For example, the architect dies before completing the plans.

the jury determined that the plaintiff had been enriched by \$84 million. The court rebelled at this finding, saying in a heading, "*Quantum Meruit Allows Recovery for the Value of Beneficial Services, Not the Value by Which Someone Benefits from Those Services.*"<sup>13</sup> To base a key idea on a fiction in a restatement in the twenty-first century is to revert to a primitive notion that some had believed to be exorcised from the legal system.

Let's take a hypothetical oral building contract that by its terms will last fifteen months. The contractor fabricates a custom-made unit for the project for later installation. The owner reneges and pleads the Statute of Frauds and also shows that the agreement is too indefinite for enforcement. The unit has no market value other than for scrap. The construction of the unit involves a reliance cost that corroborates the existence of an agreement and that is a cost that should be borne by the owner. Even adopting Woodward's 1913 fiction, it is not a benefit to the owner. If this section is followed, injustice has been adjudged.<sup>14</sup>

Many successful restitution cases in a contractual context result in the plaintiff's quantum meruit recovery.<sup>15</sup> Quantum meruit is typically based on reasonable market value. The measurement of reasonable market value is usually based on reasonable cost plus a reasonable profit margin minus any offsets for defects.<sup>16</sup> This typically represents the plaintiff's reliance interest as well as the plaintiff's restitution interest. What if there is no benefit to the defendant? For example, in a number of cases a landlord has made idiosyncratic alterations at the defendant's request under agreements to lease that have been unenforceable under the Statute of Frauds. When

---

13. *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 104 (Cal. Ct. App. 1998).

14. Compare the Restatement's formulation with *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co.*, 341 S.W.3d 323 (Tex. 2011). Restitution was granted for fraud. The calculation included the loss of capital expended none of which inured to the defendant, the time and effort expended by the plaintiffs, and accounts payable plus interest. The court expressly stated, quoting an earlier case: "Rescission is an equitable remedy, and, as a general rule, the measure of damages is the return of the consideration paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract." *Id.* at 345.

15. Frequently, quantum meruit is granted for breach of contract. It is then a damages remedy rather than an award of restitution. See *infra* notes 67–74 and accompanying text.

16. See generally *Stock v. Hafif*, 2010 WL 1509774 (Cal. App. 2010); *Leighton v. Rossow*, 2010 WL 772341 (Minn. App. 2010); *Frick's Meat Prods., Inc. v. Coil Constr. of Sedalia Inc.*, 308 S.W.3d 732 (Mo. App. 2010); *Rocky Top Realty, Inc. v. Young*, 2010 WL 118777 (Tenn. Ct. App. 2010) ("[T]he Trial Court should have determined the value of Mullins' time and effort and expenses Mullins devoted to the task of bringing the buyer and seller together"); *Chambers v. Hunt Petroleum Corp.*, 320 S.W.3d 578 (Tex. App. 2010). *Contra Schwab Sales, Inc. v. Shea Hills Dev., Ltd.*, 2010 WL 2773379 (Ariz. App. 2010) (giving value to defendant).

the tenant repudiated, the landlord recovered in a restitution action for the alterations that in no way enriched, benefitted or were even received by the tenants.<sup>17</sup> Some of these cases were based on the fictitious benefit to the tenant, but other cases have avoided the fiction. In most of the cases, the landlord's unjust impoverishment was redressed.

In their seminal article, Fuller and Perdue, speaking of the reliance interest in restitution, wrote:

When the benefit received by the defendant has become as attenuated as it is in some of the cases cited, and when this benefit is "measured" by the plaintiff's detriment, can it be supposed that a desire to make the defendant disgorge is really a significant part of judicial motivation? When it becomes impossible to believe this, then the courts are actually protecting the reliance interest, in whatever form their intervention may be clothed.<sup>18</sup>

If the thrust of the caselaw has been to protect the reliance interest in restitution cases, why is this Restatement resistant to the law's thrust? One would expect that the boundaries of restitution would be enlarged to accommodate the just results that many courts had reached.<sup>19</sup> Instead the boundaries of restitution have been constricted from that of the first Restatement of Restitution.<sup>20</sup> This Restatement explains that, because the Restatement (Second) of Contracts has adopted promissory estoppel, the restitution cases that had protected the reliance interest of the claimant are "now obsolete."<sup>21</sup> This explanation is inadequate for a number of reasons.

17. *E.g.*, *Clement v. Rowe*, 146 N.W. 700 (S.D. 1914) (involving a benefit received by a corporation). *See generally* *Minsky's Follies of Fla., Inc. v. Sennes*, 206 F.2d 1, 4 (5th Cir. 1953) (applying Florida law); *Trollope v. Koerner*, 470 P.2d 91 (Ariz. 1970); *Kearns v. Andree*, 139 A. 695 (Conn. 1928); *Wyman v. Passmore*, 125 N.W. 213, 214 (Iowa 1910); *Huey v. Frank*, 182 Ill. App. 431 (Ill. App. Ct. 1913); *Randolph v. Castle*, 228 S.W. 418, 420 (Ky. Ct. App. 1921); *Farash v. Sykes Datatronics*, 452 N.E.2d 1245 (N.Y. 1983); *Abrams v. Fin. Serv. Co.*, 374 P.2d 309 (Utah 1962). Other provisions of the Statute of Frauds have similar holdings.

Both in 1920 and in 1924, Williston noted that the reliance interest frequently received covert protection in restitution cases. 1 S. WILLISTON, *THE LAW OF CONTRACTS* § 536 (1920); 3 S. WILLISTON, *THE LAW OF CONTRACTS* § 1977 (1924).

18. L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 2*, 46 *YALE L.J.* 373, 394 (1936).

19. The award of expenditures in reliance are as least as old as *McCrowell v. Burson*, 79 Va. 290 (1884).

20. Compare the allowance of the reliance interest in some contexts in Restatement (First) of Restitution § 1 cmt. e.

21. The quoted language appeared in a prior draft of Restatement (Third) of Restitution & Unjust Enrichment § 31 cmt. c. It does not appear in the materials e-mailed to me as the latest draft. Nonetheless, they are silently treated as obsolete. Illustration 1 states

Let me first note that the relief for promissory estoppel in indefiniteness cases is somewhat different from the promissory estoppel theory in Statute of Frauds cases.<sup>22</sup> The latter is largely dictated by evidentiary concerns and the former is largely concerned with matters of administrability.<sup>23</sup> Let us consider the Statute of Frauds. One limitation on the availability of promissory estoppel as a substitute for a writing is the availability and adequacy of the remedy of restitution.<sup>24</sup> Of course, whether restitution is an available remedy is a Catch-22 question under the shrunken idea of restitution in the Restatement (Third) of Restitution & Unjust Enrichment.

One inadequacy of this Restatement's provisions on the measure of recovery is that it is not dealing solely with the measure of recovery. The two restatements deal with two different kinds of primary rights. A comment to one of the Restatement (Second) of Contracts provisions on promissory estoppel states: "the requirement of consideration is more easily *displaced* than the requirement of a writing."<sup>25</sup> In contrast, a restitution action does not displace anything. Unlike promissory estoppel, it provides no remedy for breach. It merely restores the status quo ante (or if you believe this Restatement, it merely redresses unjust enrichment). According to the Restatement (Second) of Contracts: "A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate."<sup>26</sup> Restitution in a contractual context creates no contract.

---

the facts of *Boone v. Coe*, 154 S.W. 900 (Ky. Ct. App. 1913) and indicates that the plaintiffs might be successful on a promissory estoppel theory.

22. See David G. Epstein, Ryan D. Starbird & Joshua C. Vincent, *Reliance on Oral Promises: Statute of Frauds and "Promissory Estoppel,"* 42 TEX. TECH L. REV. 913, 935 (2010) (noting that different approaches to promissory estoppel are the result of different uses and misuses of the term). Of course, in addition to its evidentiary function, the Statute of Frauds serves many other functions. See generally Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39 (1974).

23. See Epstein et al., *supra* note 22, at 929 ("[T]he primary purpose of the Statute of Frauds is assumed to be evidentiary.").

24. See RESTATEMENT (SECOND) OF CONTRACTS § 139(2)(a) (1981) (noting that the availability and adequacy of a restitution remedy is a significant factor in determining whether injustice can be avoided only by enforcement of the promise).

25. *Id.* cmt. b (emphasis added).

26. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981); see also *id.* § 17 (2) ("Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94."). The promissory estoppel provision with respect to the Statute of Frauds states that if the criteria of the Restatement section are met the "promise . . . is enforceable." *Id.* § 139(1).



If one adopts the reasoning of the restatements that promissory estoppel creates a contract and that the reliance interest is not protected in restitution, the doctrine of election of remedies deals a fatal blow to any possibility of restitution coexisting with promissory estoppel in indefiniteness and Statute of Frauds cases. In most jurisdictions, one must opt for damages or opt for restitution.<sup>27</sup> Because under the Restatement (Second) of Contracts, as under the Restatement (First) of Contracts, promissory estoppel creates a full contract with all the attributes of a contract,<sup>28</sup> the doctrine of election of remedies is triggered. The Uniform Commercial Code has abolished the doctrine in sale-of-goods cases;<sup>29</sup> the new restitution restatement, unlike others,<sup>30</sup> has not followed its lead.

Let us put aside the doctrine of election of remedies for the moment. After all, a court can always create an exception to the doctrine, or deem the estoppel rationale to create a tort, or a sui generis cause of action. There are several other reasons why the explanation is inadequate. One problem with substituting promissory estoppel for reliance recovery in a restitution action is that many jurisdictions are averse or, at least, reluctant to adopt promissory estoppel. It is still the new kid on the block. The New York Court of Appeals, for example, has never adopted the doctrine; Maine has specifically rejected it.<sup>31</sup> There is even greater reluctance to embrace

---

27. See JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 15.7 (6th ed. 2009) [hereinafter PERILLO, CONTRACTS] ("As a general rule, a plaintiff may not recover both restitution and damages for breach of contract. At some stage the plaintiff must elect remedies . . .").

28. See *supra* note 24 and accompanying text.

29. See Uniform Commercial Code § 2-711(1) ("A breach of contract by the seller includes the seller's wrongful failure to deliver or to perform a contractual obligation, making of a nonconforming tender of delivery or performance, and repudiation."); *Grandi v. LeSage*, 399 P.2d 285, 290 (N.M. 1965) (noting that the Uniform Commercial Code gives "a buyer, who rightfully rejects or justifiably revokes acceptance of the goods, the right not only to rescind and recover back the purchase price paid, but, in addition, the right to recover incidental damages resulting from the seller's breach . . ."); *Budd v. Quinlan*, 860 N.Y.S.2d 802, 802 (N.Y. App. Term 2008) ("While . . . the right to recover veterinary expenses is limited to the price the purchaser paid for the dog or cat . . . the remedy provided . . . is not exclusive . . .").

30. See E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) Contracts*, 81 COLUM. L. REV. 1, 10–12 (1981) (comparing the content of the Restatement (Second) of Contracts with the provisions of the Uniform Commercial Code).

31. See *Stearns v. Emery-Waterhouse Co.*, 596 A.2d 72, 74 (Me. 1991) (declining to "accept promissory estoppel as permitting avoidance of the statute [of frauds] in employment contracts that require longer than one year to perform."). For other jurisdictions, see ERIC MILLS HOLMES, 3 CORBIN ON CONTRACTS § 8.12 (1996) (providing a comprehensive jurisdiction-by-jurisdiction analysis of promissory estoppel); *Comment Note—Promissory Estoppel as Basis for Avoidance of Statute of Frauds*, 56 A.L.R. 3d 1037 (examining state

promissory estoppel to circumvent the Statute of Frauds. Many jurisdictions apply a test of unconscionability before relief will be given. According to a dissent in a 2009 case, twenty-four jurisdictions have accepted "in certain circumstances" promissory estoppel against a plea of the Statute of Frauds, and eight have rejected it.<sup>32</sup> The rest, apparently, had not passed on the question.

A criticism of the approach of this Restatement, is that both substantively and procedurally it leads to the proverbial Serbonian Bog of quicksand where whole armies have been swallowed up.<sup>33</sup> Consider this hypothetical. Peter was a developer who had many handshake deals with David, a wealthy but nearly illiterate landowner who was suspicious of all written contracts. This time David agreed to sell Peter 500 acres for \$900,000. Peter paid \$90,000 as a down payment. Peter also paid \$15,000 for an option to buy (in a signed writing) an additional adjoining 150 acres from Terry which Peter hoped to develop as additional parking for the mall he planned to build on the land he was acquiring from David who not only knew of his deal with Terry but helped Peter to arrange for the option by introducing him to Terry. Before the deal with David resulted in a conveyance, David died and his heirs did not want to go through with the sale and on various grounds refused to return Peter's down payment. If Peter sues David's estate for restitution, assuming the heirs' defenses are unsound, he may recover \$90,000 but not the option costs which he would not have expended but for the unenforceable contract with David. Will promissory estoppel be invoked? Is the action in reliance substantial enough to meet the criterion of the Restatement (Second) of Contracts or

---

courts' treatments of promissory estoppel as a basis for avoiding the statute of frauds). A West Publishing Company Key Number starts as follows: "Promissory estoppel is not a favorite of the law. . . ." Key Number 13 in West's publication of *Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380 (Mo. App. 2010).

32. See *Olympic Holding Co. v. Ace Ltd.*, 909 N.E.2d 93, 101-05 (Ohio 2009) ("Although the analyses differ in some respects, an overwhelming majority of jurisdictions recognize that promissory estoppel may bar a party from asserting a defense under the statute of frauds in certain circumstances.") The circumstances vary greatly, leading one article to speak of "many different approaches." Epstein et al., *supra* note 22, at 941.

33. For those who may be unfamiliar with this metaphor, I reproduce this from the Serbonian Bog entry in Wikipedia: "Because sand blew onto it, the Serbonian Bog had a deceptive appearance of being solid land, but was a bog. The term is metaphorically applied to any situation in which one is entangled from which extrication is difficult." *Serbonian Bog*, WIKIPEDIA (Mar. 8, 2011), [http://en.wikipedia.org/wiki/Serbonian\\_Bog](http://en.wikipedia.org/wiki/Serbonian_Bog) (last visited Oct. 12, 2011) (on file with the Washington and Lee Law Review). It is "one of the string of 'Bitter Lakes' to the east of the Nile's right branch. It was described in ancient times as a quagmire in which armies were fabled to be swallowed up and lost." *Id.*

the very tough criteria of most states? Will justice be done? I don't think so. The law has a gap and that gap should be filled with a more robust notion of restitution.

While an occasional case may justify a choice between promissory estoppel and a more robust idea of restitution, the law accommodates choices. The very notion of Election of Remedies that occupies chapters of law books is based on the idea that causes of action can coexist in the same legal system. Fraud, for example, justifies avoidance or a tort action. The plaintiff must, however, choose. Certain kinds of wrongs justify an action in tort, contract, or restitution, but not all three. Similarly, restitution can coexist with promissory estoppel in those jurisdictions that choose not to follow the anti-reliance thrust of this Restatement. In those jurisdictions, a court could allow Peter to recover the option price in a restitution action while deciding that the reliance was insufficient to trigger promissory estoppel.

### *III. Restitution for Diminished Capacity*

While I have strongly criticized this Restatement's treatment of restitution in cases involving the Statute of Frauds and indefiniteness, I do not criticize its treatment of the measure of recovery in cases involving diminished capacity to contract. Protection of the reliance interest in these cases would be inappropriate. The law provides that agreements made by minors, certain medically incapacitated persons, and municipalities may be void or voidable.<sup>34</sup> The law of restitution has intruded on this protection and states that to the extent the person with diminished capacity has benefitted, the person *may* be compelled to make restitution. There is no basis for raising an estoppel against such a protected person and there is no basis for giving the other party more than the protected party has received. Indeed, in some instances restitution will only be adjudged for what the protected party still has.<sup>35</sup>

This Restatement expands significantly the grounds for restitution for a minor. It states that an infant is liable in restitution for benefits received

---

34. This Restatement assumes that the contract may be disaffirmed under the rules of the Restatement (Second) of Contracts or other rule of law. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 16 cmt. a (2011) ("When a transfer occurs as part of an exchange transaction, the rules of this section overlap substantially with the corresponding rules of contract law. See Restatement Second, Contracts §§ 12–16.").

35. This paragraph suffers from some overgeneralizations. A more exact analysis appears in PERILLO, CONTRACTS, *supra* note 27, at ch. 8.

whether or not the benefit constitutes a necessary.<sup>36</sup> There is very little authority outside of New Hampshire for this view of the law. However, in the modern world where minors purchase goods freely, they should be held to their bargains, other than their entry into credit transactions.<sup>37</sup>

*IV. Performance Under a Contract Avoided for Mistake or Discharged by Impracticability*

Section 34 deals with the related areas of mistake and impracticability. The Reporter's Notes to § 34 start with scolding the authors of "all the standard works on contract."<sup>38</sup> They are said to be guilty of "conflat[ing] the two causes of action, subsuming—as part of contract law—restitution claims asserted in a contractual context."<sup>39</sup> The Reporter's Notes then refer to Illustrations 1 and 2, both based on the famous case of *Sherwood v. Walker*.<sup>40</sup> Illustration 1 is a brief description of the actual facts and the holding is that the executory contract is avoided for mistake. Illustration 2 changes one fact: Rose the 2d of Aberlone is delivered by Walker to Sherwood. Restitution is denied. As the author of a contracts hornbook, I do not agree with the charge that my fellow writers on contract law and I are conflating contract law with the law of restitution. I would suggest, instead, that mistake is a part of contract law and that the different results in the illustrations are the result of the truism that possession is nine points of the law. This truism is shared by contract law and the law of restitution. Before there can be a claim for Rose's specific restitution or a money judgment for her value, contract law dictates whether the sale can be avoided.<sup>41</sup> As this Restatement's comment correctly states: "Barriers to

---

36. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 33 cmt. c (2011) (discussing the essential premises of incapacity and unjust enrichment).

37. For the present state of the law, see PERILLO, CONTRACTS, *supra* note 27, §§ 8.5, 8.7, 8.8.

38. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 34, reporter's note a (2011).

39. *Id.*

40. *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887).

41. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 34 cmt. a (2011) ("If the obligation has been partially or wholly performed, the same challenge to the transaction presents what is simultaneously a question of contract and a question of restitution.").

relief become nearly insuperable once the exchange has been fully performed."<sup>42</sup>

My plea of "not guilty" to the conflation charge may be suspect because it is self-serving. Conflation of contract and restitution may be inevitable. Both are products of the writ of *assumpsit*. Suppose I build a fence and the owner of the adjoining property is well aware that I expect her to foot half the costs and she is able to disabuse me of her willingness to share the costs but fails to do so and remains silent. She will be made to pay her share. Sometimes the result is based on a true contract implied-in-fact<sup>43</sup> and sometimes the result is explained as based on quasi-contract<sup>44</sup>—one of the predecessors of what is today known as restitution. This reflects the confusion engendered by the common origin of these related doctrines.

According to Section 34, Comment a: "[T]he restitution claim described by this section is the same as that referred to in Restatement Second, Contracts §§ 158, 272, 376, and 377. This Restatement presents a substantially different organization of this common material, *without altering specific outcomes*."<sup>45</sup> This claim is puzzling. According to the Restatement (Second) of Contracts Sections 158(2) and 272(2) which deal respectively with mistake and impracticability:

In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.<sup>46</sup>

42. *Id.* § 34 cmt. e.

43. *See Day v. Caton*, 119 Mass. 513, 513–14 (1876) ("[T]he jury may . . . infer [a] promise to [pay] if the plaintiff undertook and completed the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting . . ."). *See also* its progeny which includes Restatement (Second) of Contracts § 69(1)(a). RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(a) (1981) ("(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only: (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.").

44. *See Neal v. Eastern Controls, Inc.*, 2008 WL 706853 at \*9 (N.J. Super. Ct. App. Div. 2008) (holding that because an express contract governed plaintiff's claim for commission payments, plaintiff's implied contract claims based on theories of quasi-contract were properly dismissed); *Soldiers', Sailors', Marines' & Airmen's Club, Inc., v. Carlton Regency Corp.*, 911 N.Y.S.2d 774, 783 (N.Y. Sup. Ct. 2010) (discussing the criteria for recovery under a theory of unjust enrichment).

45. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 34 cmt. a (2011) (emphasis added).

46. RESTATEMENT (SECOND) OF CONTRACTS §§ 158(2), 272(2) (1981).

Contrast the black letter language of the Restatement (Third) of Restitution & Unjust Enrichment, which echoes Professor Keener's language of the late nineteenth century: "[T]o recover the performance or its value, as necessary to prevent unjust enrichment."<sup>47</sup> Contrast further the language of the comments: The recovery is "measured by the defendant's net enrichment."<sup>48</sup> The Restatement (Second) of Contracts instead provides for greater flexibility, including the protection of the reliance interest in restitution cases.

#### *V. Restitution on Behalf of a Breaching Party*

Section 36 of this Restatement occupies the same terrain as Restatement (Second) of Contracts Section 374, which is titled, "Restitution in Favor of a Party in Breach."<sup>49</sup> The Restatement (Third) of Restitution & Unjust Enrichment has the more accurate title: "Restitution to a Party in Default." The latter title is more accurate because both sections address restitution to a party after a contract has been discharged for total breach, which "default" connotes.

Some points of difference exist. The Contracts Restatement refers to "restitution for any benefit that [the plaintiff] has conferred by way of part performance or reliance . . ."<sup>50</sup> The ALI's restitution document instead provides for "restitution against the recipient as necessary to prevent unjust enrichment . . ."<sup>51</sup> This Restatement's refusal to embrace the reliance interest in this context is understandable. After all, the plaintiff is in default and the only mercy that should be shown the plaintiff is restitution of the benefit he has conferred minus any damages suffered by the defendant.

Other than its abolition of reliance recovery, the two sections appear in general accord. The Restitution Restatement contains more discussion and more illustrations. It is possible that there are some differences that I have missed. Both documents attempt to assure that only a genuine increase in the wealth of defendant is a predicate for restitution. Thus, the reference to "reliance" in Section 374 of the Restatement (Second) of Contracts is somewhat enigmatic. No illustrations support the idea and I have come up empty of thinking of a suitable hypothetical.

---

47. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 34(1) (2011).

48. *Id.* cmt. a.

49. *Id.* § 36.

50. RESTATEMENT (SECOND) OF CONTRACTS § 374(1) (1981).

51. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 33(1) (2011).

### VI. Performances Under Protest

Lest this review of the provisions of the Restatement (Third) of Restitution & Unjust Enrichment be regarded as unduly negative, let me applaud Section 35. It provides that if a performance is under protest the party who has protested may have restitution for any excess performance that has been rendered after the protest.<sup>52</sup> This echoes commercial good sense and the Uniform Commercial Code.<sup>53</sup> A prior generalization had been that, outside of the UCC, a protest was only some evidence of duress.<sup>54</sup>

Decisions to that effect were bereft of common sense and encouraged contractual breaches of greater magnitude than would litigation about performances under protest. For example, a construction contractor undertakes a multi-million dollar project. In the course of construction the owner asks him to perform a task that he deems to be outside the scope of the contract. Performance of the task will cost \$10,000. Under the view that protest is only evidence of duress, the contractor has a difficult choice. The contractor may refuse to perform what it deems additional work which opens up the possibility of being ordered off the job, with heavy damages being assessed against whichever party is found to be incorrect. Or the contractor may perform the task, possibly performing extra work without compensation if a court later concludes that the task was within the scope of the work.

### VII. Illegality

Again, I sound a positive note on this Restatement's treatment of illegal bargains. The text is free of the fussy doctrines such as *in pari delicto* and *locus poenitentiae*. Williston's adoptive grandparents were, quite literally, Puritans.<sup>55</sup> Although he managed to free himself of the

---

52. *Id.* § 35.

53. See Uniform Commercial Code § 1-308 ("A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved."). Section 1-207 of the original version, still in effect in a few jurisdictions.

54. See 2 GEORGE E. PALMER, THE LAW OF RESTITUTION § 9.17 (1978) ("[P]rotest is not decisive, either as a prerequisite to restitution or as a sufficient reason for restitution. This does not mean that protest is irrelevant . . ."); 28 WILLISTON ON CONTRACTS § 71:18 (4th ed., Richard A. Lord 2003) (noting that "protest is valuable as evidence in a doubtful case" and "may establish the coercive character of a payment").

55. See SAMUEL WILLISTON, LIFE AND LAW 5 (1941) ("His manner, however, was

excesses of that sect, a certain puritanical streak is discernable in his treatise. His imprint on the topic of illegality is noticeable in most academic discussions of the topic. This Restatement seeks to simplify the law. Although Williston discussed primarily executory contracts,<sup>56</sup> his influence is discernable in restitution cases. I believe, however, that Williston's approach has been evaded by many modern decisions and that this Restatement is right.

### *VIII. Breach*

Restitution against a breaching party broke away from the notion of unjust enrichment early in the nineteenth century.<sup>57</sup> This Restatement accepts this separation and states that "restitution" for breach has nothing to do with true restitution which is reserved for cases of unjust enrichment. My quarrel with this Restatement is that in other contexts restitution was separate from the rationale of unjust enrichment, but this separation has been stifled by this Restatement's reiteration of nineteenth century dogma. This Restatement insists that the only correct use of the word "restitution" is where the defendant has been unjustly enriched. This is, to my way of thinking, a reactionary idea that mars what in most other respects is an innovative document.

I accept its treatment of restitution against a breaching party. However, I find its vocabulary strange and archaic. What previous documents sponsored by the ALI have called "rescission and restitution" are here labeled as "rescission." One introductory note refers to "the remedy that lawyers had always called 'rescission.'"<sup>58</sup> Rip Van Winkle, after his deep sleep, soon learned that language changes. Today, most lawyers know that "rescission" means putting the obligations of a contract to an end.<sup>59</sup> With some frequency we find phrases in modern case law such

---

uniformly serious if not solemn, suited to his faith as a strict Calvinist.") Williston states that his grandfather was a "Calvinist." I interpret his description of his grandfather's beliefs as those of the Puritans.

56. For a rare mention of a case of restitution in the context of illegality, see 3 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 1745 (1924) (discussing restitution in the context of cohabitation).

57. *Planché v. Colburn*, (1831) 8 Bing. 14.

58. *RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT* pt. II ch. 4, topic 2, intro. note (2011).

59. In fact, Article 2 of the UCC legislatively enacts "rescission" as a term of art to refer to a mutual agreement to discharge duties. UCC § 2-209 cmt. 3. "Termination" refers



as "[i]n addition to *rescission and damages*, Plaintiffs seek punitive damages . . ."<sup>60</sup> If we can accept the terminology of the UCC and the Restatement (Second) of Contracts we should be talking about "cancellation and restitution."

As to the substance of Section 37, I am in general accord. Happily, the Section continues to accept that the reliance interest is protected in what it calls an action for "rescission." Restoration of the status quo ante is the goal it announces.<sup>61</sup> It is in general accord with the Restatement (Second) of Contracts. But unlike that document, it does not tie restitution for breach to the concept of unjust enrichment. In so doing, it rejects the "hypothesis that unjust enrichment had something to do with" the remedy.<sup>62</sup> This last quotation summarizes my previously voiced criticism of this Restatement's treatment of restitution for performances under indefinite agreements and the like. As to them, the rules of this Restatement unlike its rules governing restitution for breach, are archaic.

A second point of disagreement with the Contracts document is the treatment of losing contracts. In most cases it bars any recovery in excess of a plaintiff's expectations.<sup>63</sup> This bar is based on the realistic notion that restitution for breach, as I will continue to call it, is not divorced from the contract. The fiction that there is no contract and that only the fictitious contract imposed by law is being enforced is totally surreal. Long ago I

---

to the discharge of duties by the exercise of a power granted by the agreement. UCC § 2-106(3). "Cancellation" refers to the putting an end to the contract by reason of a breach by the other party. UCC § 2-106(4). Unfortunately, it takes time for the legal profession to fully adopt such exacting terminology. The ALI should be held to a higher standard. Elsewhere I have written: "The Code primarily addresses itself to a number of unsound decisions that have held that, when a contract is canceled for breach, it is logically impossible to permit an action on the contract since the contract is nonexistent; therefore, only quasi-contractual relief is available." PERILLO, *CONTRACTS*, *supra* note 27, § 21.2 (citations omitted).

60. *MBIA Ins. Corp. v. Royal Bank of Canada*, 2010 WL 3294302 (N.Y. Sup. 2010) (emphasis added). In the hornbook, I say, "[s]ee, e.g., 1 ALR2d 1084 (1948), where the annotator brings together cases involving significantly different issues merely because the court utilized the term 'rescission.'" PERILLO, *CONTRACTS*, *supra* note 27, § 21.2 n.13. By "significantly different issues," I mean, "rescission" is used in contexts where the UCC would differentiate termination, cancellation, and a mutual agreement of rescission.

61. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 37 cmt. a.

62. *Id.* pt. II ch. 4, topic 2, intro. note.

63. It is contrary to casebook favorites such as *Boomer v. Muir*, 24 P.2d 579 (Cal. App. 1933), and most case law. An exceptional case is where the plaintiff has prepaid for a performance. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 37 illus. 1 & 2 (2001). This rule protects the plaintiff from being "put to the burden of proving damages from defendant's breach." *Id.* cmt. b.

wrote of the intimate connection between the real contract and the remedy of restitution.<sup>64</sup> This Section recognizes that connection. A third point of disagreement with the Restatement (Second) of Contracts is in its provision for disgorgement of profits from breach. This point is discussed below.<sup>65</sup> There is one additional disagreement on terminology. The Restatement (Second) of Contracts speaks in terms of a total breach, which refers to an uncured material breach.<sup>66</sup> This Restatement requires only a "material" breach. The difference in terminology is believed to be solely a misunderstanding of the terminology of the Restatement (Second) of Contracts. It is likely that both Restatements are concerned with total breaches.

### *IX. Performance-Based Damages for Breach*

Section 38 of this Restatement covers the same ground as does the Restatement (Second) of Contracts. Why the duplication? While with one exception it provides the same outcome it makes good its claim to offer a better explanation for the outcomes.<sup>67</sup> Section 38 covers what writers on contract law generally call "reliance damages." This Restatement continues that terminology.<sup>68</sup> Beyond the use of similar terminology to describe "reliance damages," the two Restatements differ in the use of other terminology. What the Restatement (Second) of Contracts calls "restitution,"<sup>69</sup> this Restatement, in the context of contract enforcement, treats as an alternative damages remedy.<sup>70</sup> Doctrinal purity of its vision is the goal. Because there is a breach of an enforceable contract, unjust enrichment is irrelevant. How does it differ from "rescission" discussed immediately above? It seems that Section 37, dealing with "rescission" is designed to restore the status quo ante. Contrariwise, Section 38 deals with alternative modes of calculating damages. To the extent that it deals with what the Restatement (Second) of Contracts calls restitution, it calculates

---

64. See Joseph M. Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1212 (1973) (discussing the "intimate connection between true contract and the quasi-contractual rules which function as rules for 'unwinding contracts'").

65. See *infra* notes 74–79 and accompanying text.

66. See generally PERILLO, CONTRACTS, *supra* note 27, § 11.18(a).

67. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 38 cmt. a (2011).

68. *Id.* § 38 cmt. b.

69. RESTATEMENT (SECOND) OF CONTRACTS § 373(1) (1979).

70. Section 38 is captioned as "Performance-Based Damages."

the value of a performance and labels recovery as "damages." In this, it seems correct.

This Restatement speaks of recovery of "the cost or value of the plaintiff's performance." The illustrations, based on actual cases, demonstrate that frequently the value of the plaintiff's performance is a more rational basis for recovery than its cost. For example, a woman works at the minimum wage, but her expectation of hefty commissions is destroyed by the employer's breach. She is entitled to claim the market value of her services. Her recovery could be labeled as quantum meruit, but is it a contractual or restitutionary recovery? Under this Restatement it is a contractual recovery.

The only difference in outcomes is in the case of a losing contract.<sup>71</sup> This Restatement recognizes the primacy of the bargained-for exchange for the measurement of damages. "A recovery based on value will be limited to the contract rate. . . ."<sup>72</sup> Section 373 of the Restatement (Second) of Contracts has no such limitation on what it calls restitution but has such a limitation in Section 349 on what it considers to be reliance damages. This Restatement is correct when it points out that Restitution for breach has long been divorced from the idea that the remedy is based on unjust enrichment. I also agree that the actual contract should be treated with primacy.

A peculiar distinction is made between recovery of expenditures and recovery of the value of a performance. In a losing contract, expenditures are reduced by the entire loss that the plaintiff would have incurred.<sup>73</sup> This is in accord with Restatement (Second) of Contracts Section 349. On the other hand, if the plaintiff seeks the value of its performance, the loss will be prorated at the contract rate of loss.<sup>74</sup> This seems to be an innovation.

### *X. Profit from Opportunistic Breach*

Section 39 is captioned as "Profit from Opportunistic Breach." This Section is both innovative and sound. Although Judge Posner is quoted on

---

71. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 38 cmt. d (2011) (discussing the results in the situation of a losing contract).

72. *Id.* cmt. b.

73. *See id.* (discussing coverage of damages measured by expenditure).

74. *See id.* ("A recovery based on cost will be reduced . . . if the defendant can prove that the plaintiff would have suffered a loss had the contract been performed.").

opportunistic breach,<sup>75</sup> his definition that is found elsewhere in his writings<sup>76</sup> is not followed. Any "deliberate" breach qualifies as opportunistic. The only other requisites are that the remedy of damages be inadequate and the defendant has profited from the breach. The inadequacy of the damages remedy is of course a stated prerequisite for specific performance. It is precisely in that kind of case that the remedy of disgorgement of profits is most apt to be appropriate. The litigation delays that may attach to an action for specific performance, for example, may induce the plaintiff to forgo that remedy and seek disgorgement instead. Specific performance may instead be impossible.<sup>77</sup> Unbeknownst to the purchaser, vendor may have severed minerals and timber from the property after contracting.<sup>78</sup> The defendant may have garnered profits from the violation of a confidentiality agreement.<sup>79</sup>

But Section 39 authorizes disgorgement in cases in which equitable relief, such as specific performance, is not available, even if it had been possible and even if the plaintiff knew of the breach in timely fashion. Illustration 5<sup>80</sup> posits a case much like the infamous *Peevyhouse* case,<sup>81</sup> appropriately reaching the opposite result. Illustration 7<sup>82</sup> involves a case where the breaching party promised to have a certain number of personnel on hand but deliberately didn't. Disgorgement is appropriate despite the plaintiff's inability to show that she had been damaged. In this case, the remedy of damages is inadequate to accomplish the plaintiff's goals or to provide the monetary equivalent.

Similarly, in Illustration 11,<sup>83</sup> the plaintiff sold a parcel of land, validly contracting that only 100 houses could be built on the parcel. The purchaser builds 120 houses. The profits from twenty houses belong to the vendor. The purchaser should, instead, have negotiated a release of the 100-house

---

75. See *id.* § 39 reporter's note b (quoting Judge Posner's opinion in *Patton v. Mid-Continental Systems, Inc.*).

76. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 93 *et seq.*, 118–19 (7th ed. 2007).

77. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 illus. 1 (2011) (illustrating a sale to a bona fide purchaser for value).

78. *Id.* illus. 2.

79. *Id.* illus. 3–4.

80. *Id.* illus. 5.

81. See *Peevyhouse v. Garland Coal & Mining*, 382 P.2d 109 (Okla. 1962) (involving strip miner breaching promise to restore premises; damages restricted to difference in value, allowing miner to pocket most of the cost of restoration).

82. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 illus. 7 (2011).

83. *Id.* illus. 11.

restriction. Section 39 only applies where the plaintiff is unable to cover or otherwise use the market to achieve the goals it bargained for, in which case the damages remedy is inadequate.

Comment e points out that even in the case of an unintentional breach, savings made by the party in breach may result in profits that the plaintiff may claim. Take Illustration 7, discussed above. Suppose the shortfall in staffing had been inadvertent as a result of miscalculation. The result should be the same. Many cases of disgorgement are cases where the result is characterized as damages rather than restitution.<sup>84</sup>

### *XI. An Overview*

What is the goal of a restatement? Should a restatement state the majority view or put a spin on the law? While I have faulted this Restatement for not following the minority view that the reliance interest needs to be recognized in an action for restitution based on certain kinds of agreements, I have applauded its approach to minor's agreements where it has taken the minority view. I have welcomed its approach to performances under protest. I am pleased by this Restatement's treatment of illegal agreements; it defies most academic treatments of the subject. Lawyering is argumentative. The academic life promotes arguments. My answer to the basic question of the purpose of a restatement is that the better argument that has significant precedential authority should prevail whether it reflects the majority or one of several minority views. This Restatement has chosen minority approaches towards these topics but has chosen the retrograde approach with respect to vindication of the reliance interest in other cases.

The most appealing ground for restitution is where the defendant has breached a contract. Predictably, it was the first kind of case to recognize the reliance interest. Slowly but perceptibly courts in other contexts have begun to vindicate the reliance interest. Performances despite the Statute of Frauds and rules of indefiniteness were next. Regrettably, I predict that this Restatement's views will stifle the development of restitution in indefiniteness cases and Statute of Frauds cases for at least five decades.

---

84. *See* *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939) (involving performance of promise to grade gravel and sand pit would cost \$80,000; land as restored would be worth \$12,000); *Emery v. Caledonia Sand & Gravel*, 374 A.2d 929 (N.H. 1977); *American Standard v. Schectman*, 439 N.Y.S.2d 529 (App. Div. 1981) (involving a contract to demolish and remove foundations to depth of one foot; land leveled but no foundation removed; court awards \$90,000 cost of completion rather than \$3,000 diminution in value).