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Paying for What You Get—Restitution Recovery for Breach of Contract

By Jean Fleming Powers*

I. INTRODUCTION

Many contracts casebooks, in dealing with contract remedies, include the case *Sullivan v. O'Connor*,¹ a case dealing with an unsuccessful nose job.² While a case about the results of surgery at first blush seems more fitting for a torts book, *Sullivan*, like its iconic counterpart *Hawkins v. McGee*³ uses a vivid fact pattern in an atypical contracts case⁴ to illustrate important points about contract remedies.⁵ *Sullivan* has the added benefit of providing a launching point for a discussion of the three contracts measures of recovery: expectation, reliance, and restitution.⁶ If the approach of the Restatement (Third) of Restitution and Unjust Enrichment⁷ [hereinafter referred to as “the Restatement of Restitution,” or just “the Restatement”]

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1. 296 N.E.2d 183 (Mass. 1973).

2. *Id.* at 184.

3. 146 A. 641 (N.H. 1929). *Hawkins*, sometimes referred to as the “hairy hand” case, see, e.g., Daniel P. O’Gorman, *Expectation Damages, the Objective Theory of Contracts, and the “Hairy Hand” Case: A Proposed Modification to the Effect of Two Classical Contract Law Axioms in Cases Involving Contractual Misunderstandings*, 99 KY. L.J. 327, 327-28 (2011), deals with an unfortunate outcome from skin grafts. *Id.*

4. The plaintiff in *Sullivan* did, in fact, allege negligence, *Sullivan*, 296 N.E.2d at 184, but the jury found for the defendant on that count. *Id.*

5. *Id.* at 186-89.

6. See Eric G. Anderson, *The Restoration Interest and Damages for Breach of Contract*, 53 MD. L. REV. 1, 8 (1994) (“Conventional contract theory sets out three alternative remedial interests on which a court may base damages for breach: the expectation, reliance, and restitution interests.”) (footnote omitted).

7. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. LAW INST. 2011).

gains general acceptance, this could all be changing. The Restatement, could, if followed in contracts cases, rewrite contracts casebooks and change the approach to measuring contracts damages.

Published seventy-four years after the first Restatement of Restitution,⁸ the Third Restatement provides a welcomed updated treatment of this important area of law.⁹ The promise of the Restatement is to provide clarification, explanation, and indeed, respect, for the law of restitution and unjust enrichment.¹⁰ According to many commentators, it has achieved that goal.¹¹ Yet in dealing with restitution as a recovery for breach of contract, it falls short. Rather than creating a framework for analyzing the restitution recovery for a non-breaching contract party, it, at least for most situations, eliminates the recovery. It retains a recovery for restitution that accompanies rescission and adds a disgorgement of profits recovery for what it calls opportunistic breach. It otherwise prohibits a recovery for unjust enrichment, “replacing” the restitution recovery with a new *damage* recovery for breach of contract.

The approach creates at least three important problems. First, it needlessly, and sometimes harmfully, discards the possibility of a recovery in unjust enrichment for many non-breaching parties to a contract.¹² The Restatement unduly

8. RESTATEMENT (FIRST) OF RESTITUTION (AM. LAW INST. 1937). “A *Restatement (Second)* was started and abandoned in the 1980s.” DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES & MATERIALS 492 (concise ed. 4th ed. 2012).

9. See, e.g., Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 929 (2012) (“The *Restatement (Third) of Restitution and Unjust Enrichment* brings clarity and light to an area of law long shrouded in fogs that linger from an earlier era of the legal system. It makes an important body of law once again accessible to lawyers and judges. This new *Restatement* should be on every litigator’s bookshelf . . .”).

10. *Id.*; See also Lance Liebman, *Foreword to RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT*, 1 (AM. LAW INST. 2011) (“[T]his project [the Restatement] has been pursued according to the best ALI procedures and is now a finished work that is as high in quality and as valuable as the very best Restatements constructed in our 88 years.”).

11. Laycock, *supra* note 9.

12. The disapproval of unjust enrichment in this context is discussed generally in RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, introductory note 2 (AM. LAW INST. 2011). The note

focuses on ensuring that the non-breaching party suffers the consequences of an ill-fated bargain,¹³ and eschews a basic analysis of whether the breaching party has been unjustly enriched at the expense of the non-breaching party. Second, the new, but limited, recovery for opportunistic breach¹⁴ runs the risk of both over-compensation and under-compensation, either denying a deserved recovery for a plaintiff that does not meet the strict requirements for the exception, or requiring a breaching defendant to disgorge all profits even though the amount exceeds the plaintiff's loss. The punitive nature of the provision is inconsistent with contract theory generally, and comes dangerously close to rekindling the failed experiment with the tort of bad faith breach of contract.¹⁵ Third, the changes the Restatement makes are not only unnecessary, but can be detrimental. Established contract law and restitution law are adequate to address most of the concerns expressed, and provide sufficient flexibility to accommodate any needed adjustments. A better approach would be to explain how those principles apply in the context of remedies for breach of contract. The Restatement approach blurs, not brightens, the lines between damages and restitution.

This article begins with a brief discussion of restitution as a remedy for breach of contract under the Restatement (Second) of Contracts.¹⁶ It then discusses the changes the Restatement of Restitution adopts and the reasons for the changes. Next, it discusses why the changes have not only failed to achieve the goal of clarifying the “prevailing confusion” related to restitution

expresses the view that “performance of a valid and enforceable contract cannot result in the unjust enrichment of either party.” *Id.* (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2(2), §44, cmt. a (AM. LAW INST. 2011)). The contention that this approach is harmful is discussed throughout this article.

13. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. d (AM. LAW INST. 2011) (“[A]llowing damages measured by the value of performance unlimited by the contract price, permits the injured party to reallocate or revalue risks that it is the function of contract to price and to assign. Such an outcome is contrary to fundamental objectives of contract law and inconsistent with the other remedies for breach of contract . . .”).

14. *Id.* § 39.

15. *See infra* Part V.B.2.

16. *See generally* RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981).

and breach of contract,¹⁷ but have at times created more confusion. It then explains that contract and restitution principles are not only in tension relative to restitution for breach of contract, but in fact support such a recovery.

II. THE RESTATEMENT (SECOND) OF CONTRACTS APPROACH

The Restatement (Second) of Contracts posits that remedies for breach of contract

serve to protect one or more of the following interests of a promisee: . . . his “expectation interest,” which is his interest in having the benefit of his bargain . . . his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract . . . or . . . his “restitution interest,” which is his interest in having restored to him any benefit that he has conferred on the other party.¹⁸

The three interests in turn result in three different potential kinds of relief.¹⁹ Normally a court will enforce “the broken promise by protecting the expectation that the injured party had when he made the contract,” but it may “recognize a claim based on his reliance rather than on his expectation,” or, “in some situations . . . grant relief to prevent unjust enrichment.”²⁰ Thus, the Restatement (Second) of Contracts recognizes both three *kinds* of relief and three *purposes* of relief. The distinction is an important one. Maintaining appropriate focus on purpose aids in understanding the importance of retaining a restitution remedy for breach of contract.

In presenting the three interests, the Restatement (Second) of Contracts prominently cites Fuller and Perdue’s esteemed

17. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note 1.

18. RESTATEMENT (SECOND) OF CONTRACTS § 344(a)-(c) (AM. LAW INST. 1981).

19. *Id.* § 344 cmt. a.

20. *Id.*

article, *The Reliance Interest in Contract Damages*.²¹ In the article, the authors delineate the three purposes of contract damages: the protection of the restitution interest, the reliance interest, and the expectation interest.²² They assert that in justice, restitution “presents the strongest case for relief” among the three, noting that the support for restitution is especially strong where there is a two-unit disparity.²³ For example, if my bank mistakenly puts \$1000 in my account, I have a \$1000 undeserved gain and the bank has a corresponding \$1000 loss. The disparity between myself and the bank is \$2000. The two-unit disparity will often occur in a contract recovery situation.²⁴ For example, if the plaintiff is granted restitution for the value of the services performed for the defendant, the value that the defendant received is the same as the value the plaintiff gave.

Yet in spite of the strong policy reasons supporting restitution, expectation damages are generally the preferred measure.²⁵ In the Restatement (Second), the three interests are part of a hierarchy in which, for the usual case, each succeeding interest is smaller than, and likely included in,²⁶ the preceding one.²⁷ Because larger recoveries are preferred by plaintiffs,

21. *Id.* at reporter’s note (citing L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contracts Damages*, 46 YALE L.J. 52 (1936)).

22. Fuller & Perdue, *supra* note 21, at 53-54.

23. *Id.* at 56. (“The ‘restitution interest,’ involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief.”)

24. *See id.* at 54-55. *Cf id.* at 55 (“[F]or our purposes the most workable classification is one which presupposes in the restitution interest a correlation of promisor’s gain and promisee’s loss.”).

25. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contracts Damages*, 46 YALE L.J. 52, 57 (1936) (“[T]he normal rule of contract recovery [is] that which measures damages by the value of the promised performance.”).

26. *See* Aaron R. Petty, *The Reliance Interest in Restitution*, 32 S. ILL. U. L.J. 365, 374 (2008) (“Fuller & Perdue suggested that the restitution interest was merely a subset of the reliance interest, where, in addition to reliance by the promisee, there is also a resultant gain to the promisor.”).

27. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (AM. LAW INST. 1981).

[T]he court may recognize a claim based on his reliance rather than on his expectation Although [the reliance interest] may be equal to the expectation interest, it is ordinarily smaller because it does not include the injured party’s lost profit. In some situations a court will recognize

normally the restitution interest would come into play only when the agreement is not enforceable²⁸ or when “it will give a larger recovery than will enforcement based on either the expectation or reliance interest.”²⁹ The sequence would go something like this: The party who has a cause of action for breach of contract is normally entitled to the benefit of the bargain, provided by the expectation measure.³⁰ If, however, he for some reason cannot prove his lost expectation, or expectation is for some other reason inadequate, he should be entitled to recover his expenditures made in reliance on the contract.³¹ If he further is unable to recover some or all of those expenditures (for example, because he would have lost money on the contract), he should at least be able to recover any net benefit currently held by the breaching party at his expense.³² The last recovery described is of course restitution based on unjust enrichment. The comments make clear both that the restitution interest of a non-breaching party will apply only in those “rare instances” in which “it will give a larger recovery than will enforcement based on either the expectation or reliance interest”³³ and that the recovery in those instances is based on the unjust enrichment of the breaching party.³⁴ It is true that the cases in which there is a need for a restitution option in this contracts context may be few. But justice is not reserved for those whose situations are commonly

yet a third interest and grant relief to prevent unjust enrichment Although [the restitution interest] may be equal to the expectation or reliance interest, it is ordinarily smaller because it includes neither the injured party’s lost profit nor that part of his expenditures in reliance that resulted in no benefit to the other party.

Id.

28. *Id.* § 344 cmt. d.

29. *Id.*

30. *Id.* § 347, cmt. a. (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to give him the benefit of his bargain . . .”).

31. *Id.* § 344, cmts. a, c.

32. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 344 cmts. a, d (AM. LAW INST. 1981).

33. *Id.* § 344 cmt. d).

34. *Id.* (Restitution applies “in connection with contracts . . . when a party, instead of seeking to enforce an agreement, claims relief on the ground that the other party has been unjustly enriched as a result of some benefit conferred under the agreement.”).

replicated.³⁵ The preference for expectation damages should not obscure the strong policy reasons for granting a recovery in restitution in an appropriate case.

III. THE RESTATEMENT OF RESTITUTION RESPONSE

A. Restitution and Contract

In the chapter dealing with Restitution and Contract, the Restatement of Restitution first addresses “Restitution to a Performing Party with no Claim on the Contract.”³⁶ Because there is no contract claim in the situations covered—unenforceable or illegal contracts, cases of incapacity, mistake, or “supervening change of circumstances,” performance of a “disputed obligation,” or recovery by a breaching party³⁷—it recognizes a right to restitution for unjust enrichment. Under a separate topic it deals with “alternative remedies” for a non-breaching party, generally rejecting restitution based on unjust enrichment—the most universally accepted justification for restitution³⁸—for a non-breaching party.³⁹ It criticizes the Restatement (Second) of Contracts for “indicating that the purpose of rescission [restitution] for breach was to prevent unjust enrichment.”⁴⁰ It labels as “error” use of the “word

35. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a. (AM. LAW INST. 2011) (“The attempt to make the list comprehensive cannot make it exclusive: cases may arise that fall outside every pattern of unjust enrichment except the rule of the present section.”).

36. *Id.* pt. II, ch. 4, topic 1.

37. *Id.*

38. *Id.* § 1 cmt. a (“Liability in restitution derives from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant.”).

39. *See id.* at pt. II, ch. 4, topic 2, intro. note 1. (“The attempt to assimilate . . . traditional contract remedies to a liability based on unjust enrichment . . . is abandoned here.”). *See also id.* at pt. II, ch. 4, topic 2, introductory note 2 (“This restatement rejects the view that the principal forms of what is sometimes called ‘restitution for breach’ have any necessary relation to the unjust enrichment of the defendant.”).

40. *Id.* at pt. II, ch. 4, topic 2, intro. note, reporter’s note. The drafters criticize the Restatement of Contracts’ use of *restitution* to prevent unjust enrichment. The drafters use the word *rescission*, indicating that the Contracts Restatement uses “the word ‘restitution’ as its name for rescission.” *Id.* The section cited by the drafters uses the word *restitution*. RESTATEMENT

‘restitution’ to describe both (i) a rescission and (ii) an action for damages measured by the value of the plaintiff’s performance.”⁴¹ It characterizes the choice between expectation damages and restitution as an “imaginary election of remedies produced by the hypothesis that unjust enrichment had something to do with it.”⁴² This article suggests that the Restatement (Second) of Contracts got it right, and that unjust enrichment *does* have something to do with it.

A general description of the Restatement of Restitution approach is set out herein. However, as the focus of the article is on the denial of unjust enrichment to the non-breaching party, the discussion of sections 37 (Rescission for Material Breach) and 39 (Profit from Opportunistic Breach) will be limited to providing context for the unjust enrichment emphasis.

B. Rescission and Restitution

Section 37 relates to the limited situations where rescission for breach is appropriate.⁴³ The Restatement deals with rescission based on fraud, mistake, and other avoidance issues in another section unrelated to breach, preserving a restitution possibility in each of those situations.⁴⁴ However, it characterizes the “restitution” option when the contract is rescinded because of material breach⁴⁵ as a claim “independent of the defendant’s unjust enrichment,”⁴⁶ conceding that its rejection of unjust enrichment raises questions about whether either section 37 or section 38 “belong in the present Restatement at all.”⁴⁷ It nonetheless includes them for the “practical” reason that the “remedies are in urgent need of clarification, and that readers will look for these rules” in the

(SECOND) OF CONTRACTS § 345 (AM. LAW INST. 1981).

41. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note, reporter’s note (AM. LAW INST. 2011).

42. *Id.*

43. *Id.* § 37.

44. *Id.* at pt II, ch. 4, topic 1.

45. *Id.* § 37. The Restatement mischaracterizes the concept of material breach, as discussed later. *See infra* Part IV.D.1.

46. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note, reporter’s note (AM. LAW INST. 2011).

47. *Id.*

Restatement.⁴⁸ It indicates a preference for using the term rescission *instead of* restitution.⁴⁹ Nonetheless, it ultimately generally adopts “rescission and restitution,”⁵⁰ a term that appears, to this author, to be more apt.⁵¹

The section has two important limitations that underscore its rejection of unjust enrichment. First, the remedy “is not available against a defendant whose defaulted obligation is exclusively an obligation to pay money.”⁵² The limitation is justified partly by its simplicity,⁵³ and partly by a concern that “allowing the credit seller to seek rescission instead of enforcement of the debt would alter the terms of the underlying transaction in the plaintiff’s favor,”⁵⁴ which would be inconsistent with the Restatement’s insistence that the plaintiff must suffer the consequences of its bad bargain.⁵⁵ Second, the remedy is not available unless “the further requirements of section 54 can be met.”⁵⁶ Section 54 deals generally with the requirements for rescission and restitution in situations where the contract is avoided, but includes an “overlapping” reference to rescission for breach of contract.⁵⁷ The Restatement

48. *Id.*

49. *Id.* § 37, cmt. a (“This section describes an alternative remedy for breach of contract that is sometimes called ‘restitution’ but is more easily recognized under the name ‘rescission.’”).

50. *See id.* § 54; *See also id.* at pt. II, ch. 4, topic 2, intro. note 1.

51. The rescission and the restitution are distinct. Rescission is the “unmaking of a contract for a legally sufficient reason,” or an “agreement by contracting parties to discharge all remaining duties of performance and terminate the contract.” *Recission*, BLACK’S LAW DICTIONARY (9th ed. 2009). Regarding the “unmaking” of the contract, the definition continues: “Rescission is generally available as a remedy or defense for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions.” *Id.* (emphasis added). Thus, rescission is the undoing of the contract; restitution is the restoration of the benefits. If the contract is entirely executory, there can be a rescission without any restitution or restoration.

52. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37(2) (AM. LAW INST. 2011).

53. *Id.* § 37 cmt. a.

54. *Id.*

55. *See infra* Part V.B.1.

56. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37(1) (AM. LAW INST. 2011).

57. *Id.* § 54(4)(b) cmt. e (“The topic reappears at this point—despite the resulting overlap . . .”).

emphasizes the distinction between rescission accompanying fraud, for example, which involves unjust enrichment, and rescission for breach, which the Restatement contends does not.⁵⁸ The Restatement again cites a concern for “remedial economy,” along with a “concern with fairness to the injured party.”⁵⁹ Yet, as will be discussed more fully, the concern for ensuring that the plaintiff suffers from his bad bargain is not a feature of contract law, and denying a restitution recovery often does not produce fairness to the injured party.

C. The Damages Response

Surprisingly, the drafters of the Restatement of Restitution, in dealing with restitution in the contract context, undertook to change the Restatement (Second) of Contracts approach to recovery for breach.⁶⁰ More surprisingly, they chose to make changes related to damages,⁶¹ rather than just to restitution. The stated purpose of the changes is to “provide a simplified and rationalized explanation of some straightforward contract remedies that have become needlessly difficult to describe.”⁶² While it is true that the concept of restitution recovery for breach is not without problems,⁶³ such an undertaking would seem more appropriate in a Contracts Restatement. Further, the approach taken, while providing some helpful insights and suggestions regarding the measure of contract damages, falls short of its stated goal of providing a simpler and more rational explanation of contract remedies, and fails to address important

58. *Id.* § 54(4)(b) cmt. e.

59. *Id.*

60. *See id.* at pt. II, ch. 4, topic 2, intro. note 3 (“[T]his Restatement reverts to the doctrinal position of the *first* Restatement of Contracts.”) (emphasis added).

61. *See id.* at pt. II, ch. 4, topic 2, intro. note 1 (“The claims described in §§ 37-38 are alternative remedies for breach of contract, available to plaintiffs who find them more advantageous than expectation damages or specific performance. Neither depends on a showing of unjust enrichment.”).

62. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. a (AM. LAW INST. 2011).

63. *See generally id.* pt. II, ch. 4, topic 2, intro. note, reporter’s note (describing the historical development of a “restitution” remedy for breach of contract, and the concerns about whether a non-breaching party should be allowed a recovery “off the contract” at all).

considerations related to restitution in a contracts context.

The section generally rejects an unjust enrichment option for one whose contract was breached by the other party,⁶⁴ providing instead for performance-based damages, which, while preserving a focus on the value of the benefit conferred,⁶⁵ is not restitution at all. It changes the traditional contracts approach to recovery for breach (allowing recovery for expectation, reliance, or restitution) by setting out two damage alternatives: expectation and performance-based damages. The latter includes what is essentially the reliance measure, along with a new measure that is somewhat similar to restitution. The relevant section reads as follows:

- (1) As an alternative to damages based on the expectation interest (Restatement Second, Contracts § 347), a plaintiff who is entitled to a remedy for material breach or repudiation may recover damages measured by the cost or value of the plaintiff's performance.
- (2) Performance-based damages are measured by
 - (a) uncompensated expenditures made in reasonable reliance on the contract, including expenditures made in preparation for performance or in performance, less any loss the defendant can prove with reasonable certainty the plaintiff would have suffered had the contract been performed (Restatement Second, Contracts § 349); or
 - (b) the market value of the plaintiff's uncompensated contractual performance, not exceeding the price of such performance as determined by reference to the parties' agreement.
- (3) A plaintiff whose damages are measured by the rules of subsection (2) may also recover for any other loss, including incidental or consequential

64. *See id.* at pt. II, ch. 4, topic 2, intro. note 2 (“[E]nrichment derived from a valid consensual exchange is neither unjust nor unjustified.”).

65. *Id.* § 38(2)(b).

loss, caused by the breach.⁶⁶

Thus, the Restatement takes what was once considered restitution and recognizes it as an alternative damage measure.⁶⁷ In making the changes, it seeks to correct perceived shortcomings in the Restatement (Second) of Contracts approach.⁶⁸ It rejects a recovery for unjust enrichment that exceeds the contract price.⁶⁹ For a negative contract expectancy, it uses legal presumptions that provide a “partial recovery,” albeit not “a complete escape from an unfavorable bargain”⁷⁰ Thus the recovery option created under the Restatement can be a beneficial recovery option for some plaintiffs. Nonetheless, it is a damages option, not restitution.

An examination of the section, in the context of a couple of the illustrations, sheds light on what the section does and does not do. Illustration 9 to Section 38 compares recovery under the section to recovery under the expectation measure in a profitable contract.

A promises B to construct 5000 feet of gravel road at a price of \$12 per running foot, payable on completion. After 2000 feet of road has been built, A is wrongfully discharged without payment. A’s cost of performance is a uniform \$10 per foot, so his expectation damages would be \$30,000 (\$60,000 total price less \$30,000 saved cost to complete). A offers to prove that the value of the work done so far, measured on a quantum meruit

66. *Id.* § 38.

67. *Id.* § 38(2)(b).

68. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note 1 (“The most important purpose of this Restatement’s treatment of restitution and contract is to clear up the prevailing confusion.”).

69. *Id.* § 38(2)(b). As discussed later, the rejection of a recovery exceeding the contract price is consistent with a recovery for unjust enrichment. *See infra* Part IV.A.2.

70. *Id.* § 38 cmt. a (applying a rebuttable presumption that the “plaintiff’s earnings from performance would have been at least sufficient to defray the plaintiff’s reliance expenditures; alternatively, that the plaintiff’s unknown expectancy would have been at least equal to the market value of the plaintiff’s performance”).

basis, is \$16 per foot; A seeks damages in the amount of \$32,000. The rule of § 38(2)(b) allows A to recover damages measured by the value of his performance (alias quantum meruit), but it caps such recovery at the contract rate. Because A's performance-based damages cannot exceed the contract rate of \$24,000, A will elect to recover expectation damages of \$30,000.⁷¹

The calculations illustrate the limits on reliance-based damages, and the preference for expectation in a profitable contract.⁷² The reliance measure, which would not include the \$10,000 profit, yields damages of just \$20,000. While the hypothetical suggests a possible higher restitution recovery (the \$32,000 claimed in the illustration), a restitution claim under these facts is not supported by the Restatement (Second) of Contracts⁷³ or the common law of contract.⁷⁴ In fact, the illustration is included not to demonstrate a real-world scenario,⁷⁵ but to provide context for the illustration that

71. *Id.* § 38 cmt. b, illus. 9.

72. The Restatement (Second) of Contracts also recognizes the general superiority of the expectation measure. *See* RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. d (AM. LAW INST. 1981) (“An injured party who has performed in part will usually prefer to seek damages based on his expectation interest (§ 347) instead of a sum of money based on his restitution interest because such damages include his net profit and will give him a larger recovery.”).

73. The Restatement discusses restitution in the context of losing contracts, *id.*, and makes clear that the recovery is uncommon. *Id.* § 344 cmt. d (“These rare instances [of parties to a losing contract seeking restitution] are dealt with in § 373.”). Further, assuming the example is a divisible contract, the Restatement rejects a restitution recovery for divisible contracts. *Id.* § 373 cmt. c (“If one party has fully performed his side of [a divisible part of a contract] and all that remains on the other side is for the other party to pay a definite sum of money, recovery for the performance rendered is limited to that sum. Restitution is not available as an alternative . . .”).

74. *See* E. ALLAN FARNSWORTH, CONTRACTS § 12.20, at 823-27 (4th ed. 2004) (emphasizing that generally “damages should be based on the injured party’s lost expectation[.]” but explaining that in a losing contract restitution may be the appropriate remedy).

75. While most of the illustrations in the Restatements are based on cases, “Illustration 9 is strictly hypothetical, representing a claim that is seemingly never asserted.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38, reporter’s note c (AM. LAW INST. 2011).

follows.⁷⁶ The more enlightening illustration is Illustration 10.

Same facts as Illustration 9, except that B proves that A's cost of construction is \$14 per foot, with the result that A is performing at a loss. This fact does not bar recovery, but A's damages under § 38(2)(b) may not exceed the contract rate for the work performed. A recovers \$24,000, though on the facts supposed his contractual expectancy from full performance (or from any partial performance) is negative. In other words, damages measured by the value of A's unpaid partial performance are not reduced by the loss A would have incurred in completing performance.⁷⁷

Under these facts, the expectation measure of damages would be \$18,000 (\$60,000 contract price less \$42,000 costs saved). The reliance measure, preserved in the Restatement of Restitution as one of the options under performance-based damages, is the same. While \$28,000 was spent in reliance on the contract, reliance damages preserve the entire loss bargained for by the plaintiff.⁷⁸ Thus the \$10,000 loss (A would have spent \$70,000 to make \$60,000), which was not caused by reliance on the contract, but was bargained for in creating the contract in the first instance,⁷⁹ is subtracted.⁸⁰

Moving to the next potential recovery, the approaches of the Restatement (Second) of Contracts and the Restatement of Restitution diverge. The Restatement of Restitution, like the Restatement (Second) of Contracts, recognizes that, while the reliance measure is conceptually defensible, and sufficiently compensatory in some situations, it can at times fall short.⁸¹ It

76. *Id.* (According to the drafters, the significance of Illustration 9 “in the present context lies in its juxtaposition with Illustration 10,” which deals with a losing contract.)

77. *Id.* illus. 10.

78. RESTATEMENT (SECOND) OF CONTRACTS § 349 (AM. LAW INST. 1981).

79. *Cf. id.* § 349 cmt. a (explaining that “recovery for expenditures . . . may not exceed the full contract price”).

80. *Id.* § 349.

81. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. b (AM. LAW INST. 2011) (noting that a “recovery based on cost,” like

seeks to remedy this shortcoming, not by allowing a recovery in restitution as the Restatement (Second) of Contracts does,⁸² but by adding the new market value measure.⁸³ Under this measure, rather than saddling the non-breaching party with the entire bargained-for loss, it takes a proportional approach.⁸⁴ Granted, the proportional nature of the approach is not entirely clear from the text of the section: It describes the measure as “the market value of the plaintiff’s uncompensated contractual performance, not exceeding the price of such performance as determined by reference to the parties’ agreement.”⁸⁵ The comments shed light on the meaning, explaining that the “recovery based on value will be limited to the *contract rate* for the performance in question – when such a rate may be determined – even if this is insufficient to allow the plaintiff to recoup the cost of performance.”⁸⁶ The contract rate, when it can be calculated, would distribute the loss proportionally.

Thus, in a “losing” contract, the recovery of a party that would have been paid 75% of the value of full contract performance will be limited to 75% of the market value of the benefit conferred. In the illustration, for example, the contractor was to be paid at the rate of \$12 per foot for work worth \$16 per foot, or 75% of the market value.⁸⁷ The market value for the 2000 feet completed by the breaching party is the \$32,000 suggested in the previous illustration,⁸⁸ which is consistent with

reliance “will be reduced (or eliminated altogether) if the defendant can prove that the plaintiff would have suffered a loss had the contract been performed”); RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. d (AM. LAW INST. 1981) (“In the case of a contract on which he would have sustained a loss instead of having made a profit, however, his restitution interest may give him a larger recovery than damages on either [expectation or reliance].”).

82. See RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. d (AM. LAW INST. 1981) (“Occasionally a party chooses the restitution interest even though the contract is enforceable because it will give a larger recovery than will enforcement based on either the expectation or reliance interest.”).

83. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38(2)(b) (AM. LAW INST. 2011).

84. The new measure limits recovery to the “contract rate,” rather than subtracting the entire loss. See *id.* § 38 cmt b.

85. *Id.*

86. *Id.* § 38 cmt. b (emphasis added).

87. See *id.* § 38 cmt. c, illus. 11 (using a percentage calculation to calculate the recovery at the contract rate).

88. *Id.* § 38 cmt. c, illus. 9.

Restatement (Second) of Contracts approach.⁸⁹ Under the Restatement of Restitution, he would recover 75% of that amount, or \$24,000 (the same result reached by multiplying the contract rate of \$12 per foot by the 2000 feet completed). The importance of the potential difference depends on the size of the contract, and the extent of the miscalculation of the cost of performance. Yet the section does much more than distribute the loss proportionately. It unapologetically creates a damage measure rather than a restitution measure.⁹⁰

Yet, as long as this new damage measure, which deducts not the entire loss, but only the part attributable to the partial performance, creates an additional arrow in the quiver of a non-breaching plaintiff, it can be beneficial. The concern herein is not the inclusion of the section, but the removal of legitimate restitution claims. If all that the Restatement did was provide a third option for measuring *damages*—a third way to view and calculate the harm caused by the breach—the approach could be a useful alternative calculation, albeit an odd inclusion in a Restatement of Restitution. But it should not foreclose a recovery for unjust enrichment. Unfortunately, it does just that by intentionally⁹¹ omitting a recovery that may be needed to satisfy the *purpose* behind the recovery for unjust enrichment.

D. Restitution for Opportunistic Breach

At the other end of the spectrum, the Restatement includes a restitution option in section 39.⁹² The section deals with opportunistic breach of contract,⁹³ providing a kind of

89. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. d, illus. 10 (AM. LAW INST. 1981). *But see supra* note 72 (indicating that if the contract is found to be divisible, the recovery would not be in restitution but would be \$24,000 under divisibility).

90. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 (AM. LAW INST. 2011). The title of the section is “Performance-Based Damages.” The provision for recovery of consequential damages further underscores the damages classification. *Id.* § 38(3) (“A plaintiff whose damages are measured by the rules of subsection (2) may also recover for any other loss, including incidental or consequential loss, caused by the breach.”).

91. See *supra* note 39.

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

93. *Id.*

“restitution plus” designed to provide for disgorgement of profits in situations where deterrence is the goal.⁹⁴ The section provides for disgorgement of profits from a profitable breach under limited circumstances. Specifically,

- (1) If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee’s contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.
- (2) A case in which damages afford inadequate protection to the promisee’s contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.
- (3) Breach of contract is profitable when it results in gains to the defendant (net of potential liability in damages) greater than the defendant would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defendant would not have realized but for the breach, as measured by the rules that apply in other cases of disgorgement (§ 51(5)).⁹⁵

The comments emphasize that the section applies only in “exceptional cases”⁹⁶ dealing with “restitution for benefits wrongfully obtained.”⁹⁷ So limited, the approach has initial

94. *See id.* § 39 cmt. b (“Restitution (through the disgorgement remedy) seeks to . . . [reduce] the likelihood that the conscious disregard of another’s entitlement can be more advantageous than its negotiated acquisition.”).

95. *Id.* § 39.

96. *Id.* § 39 cmt. a.

97. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39

appeal and evokes established restitution principles.⁹⁸ However, in the contract context in which it appears, especially as coupled with a broad rejection of unjust enrichment for a non-breaching party, it becomes problematic.

E. The Justification for the Restatement Changes

The Restatement of Restitution states that the “most important purpose of this Restatement’s treatment of restitution and contract is to clear up the prevailing confusion.”⁹⁹ It “rejects the view that . . . ‘restitution for breach’ ha[s] any necessary relation to the unjust enrichment of the defendant.”¹⁰⁰ It expands on the latter point by stating that “performance of a valid and enforceable contract cannot result in the unjust enrichment of either party.”¹⁰¹ Thus the overarching goal of the changes seems to be two-fold: to clarify the law, and to reject, for most cases, the possibility of restitution for unjust enrichment for a non-breaching party. The latter goal seems to be based on the perceived incompatibility between contract law and restitution principles in relation to breach of contract remedies.¹⁰² In the next section I will examine the extent to which the Restatement has met the goal of clarifying the law and the extent to which it has not. In the following section, I will explain why restitution as a remedy for a non-breaching party is compatible with both restitution and contract principles, and why it can be the preferred remedy.

cmt. a (AM. LAW INST. 2011).

98. *Cf. id.* § 54.

99. *Id.* pt. II, ch. 4, topic 2, intro. note 1.

100. *Id.*

101. *Id.* at note 2.

102. *Id.*

IV. CLARIFYING, OR CREATING MORE CONFUSION?

A. Clarifying the Remedy

1. Rescission and Restitution

By treating separately restitution that accompanies rescission, and by emphasizing the distinction between it and unjust enrichment, the Restatement provides some promised clarity.¹⁰³ There is good reason to retain restitution in connection with rescission in response to breach of contract. Restitution can provide the plaintiff with a simpler and more favorable recovery.¹⁰⁴ It is also useful to draw a distinction between restitution accompanying rescission and that based on unjust enrichment. Confusion between the two terms can result in parties improperly designating their claims¹⁰⁵ and in courts applying flawed analyses.¹⁰⁶ Distinguishing the concepts more accurately describes the remedies sought and granted.

Rescission is an *unwinding* of a transaction, *not an enforcement* of the transaction. Undoing the transaction necessarily requires restoring the parties to their pre-contract position.¹⁰⁷ Unjust enrichment can be a useful analysis for

103. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 (AM. LAW INST. 2011).

104. *Id.* § 37 cmt. a (“The plaintiff entitled to a remedy for material breach or repudiation potentially chooses between damages, specific performance, and rescission, electing the remedy that promises the most favorable recovery at the lowest cost.”).

105. *Cf. Worcester Heritage Soc’y v. Trussell*, 577 N.E.2d 1009, 1010 (Mass. App. Ct. 1991) (“There is ample authority for refusing rescission where there has been only a breach of contract rather than an utter failure of consideration or a repudiation by the party in breach.”).

106. *See Anderson, supra* note 6, at 20 (Courts may “treat[] rescission and restitution as a linked pair, suggesting that the invocation of the latter as a measure of damages necessarily brings the former into play. It is widely recognized, however, that in the context of remedies for breach of contract, references to ‘rescission’ are unnecessary and confusing . . . [W]hen one party seeks relief on account of the other’s breach, the word ‘rescission’ is misleading.”).

107. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. a (AM. LAW INST. 2011) (“Rescission under § 37 looks backward as well, offering to restore the parties to the status quo ante by unwinding the contractual exchange instead of pressing it forward.”).

accomplishing that restoration.¹⁰⁸ But the focus is properly more on restoration than on preventing unjust enrichment.¹⁰⁹ Restitution accompanying rescission is not so much an independent recovery as a concomitant to rescission. While ideally, once the transaction has been unwound, neither party will be unjustly enriched, that is because such a result would indicate an ineffective unwinding of the transaction. The focus is not so much on the injustice of the retention of the benefit as it is on the logical steps necessary to restore the prior position and the context in which the rescission occurred.¹¹⁰

The previously discussed case of *Sullivan v. O'Connor*¹¹¹ illustrates the difference between the two analyses. Although the court disapproved the restitution measure in *Sullivan*,¹¹² it recognized it as one of the options available to a plaintiff¹¹³—an option based in unjust enrichment,¹¹⁴ not on a return to the status quo ante. The court stated that the restitution measure would be “restoration of the benefit conferred on the defendant (the fee paid).”¹¹⁵ Such restoration would prevent unjust enrichment of the doctor by preventing him from retaining a payment for a service inadequately performed, which would be unjust for him to retain at the plaintiff’s expense. The recovery

108. DAN B. DOBBS, 1 DOBBS LAW OF REMEDIES § 4.3(6), at 617 (Practitioner Treatise Series, 2d ed. 1993). (“[O]nce rescission is granted it is easy to see why restitution must follow. If the defendant has received performance under a contract that is to be undone by rescission, he is unjustly enriched unless he is made to restore that performance or its value.”).

109. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. a (AM. LAW INST. 2011) (“Rescission ostensibly requires each party to return to the other whatever has been received by way of performance . . .”).

110. *Compare id.* § 54(4)(a) (“If the claimant seeks to reverse a transfer induced by fraud or other conscious wrongdoing, the limitation . . . is liberally construed in favor of the claimant.”) *with id.* § 54(4)(b) (“If the claimant seeks rescission instead of damages as a remedy for material breach of contract (§ 37), the limitation . . . is employed to prevent injustice to the defendant from the reversal of a valid and enforceable exchange.”).

111. 296 N.E.2d 183 (Mass. 1973).

112. *Id.* at 187 (“For breach of the patient-physician agreements under consideration, a recovery limited to restitution seems plainly too meager . . .”).

113. *Id.* at 186 (Plaintiff may recover, “presumably, at the plaintiff’s election, ‘restitution’ damages, an amount corresponding to any benefit conferred by the plaintiff upon the defendant in the performance of the contract disrupted by the defendant’s breach.”).

114. *See id.*

115. *Id.*

in no way returns the plaintiff to her pre-contract position.¹¹⁶ In other words, the restitution recovery is firmly grounded in unjust enrichment, which is conceptually distinct from restitution accompanying rescission. Yet the need to clarify the remedies does not justify discarding restitution for unjust enrichment as a remedy in other scenarios. The two are not mutually exclusive. Where a “rescission and restitution” remedy is not appropriate, all of the remedies for breach, including restitution for unjust enrichment, should be available.

2. Recovery in Excess of the Contract Price

The Restatement of Restitution also clarifies the recovery where the value of the benefit conferred exceeds the contract price, rejecting a recovery in excess of the bargained price. The provision is well-founded. Under restitution principles, the proposition that one who receives a benefit and pays the agreed amount is not unjustly enriched seems unassailable.¹¹⁷ The Restatements of both Contracts and of Restitution unquestionably agree by adopting a rule denying restitution to a party who has fully performed his obligations under the contract.¹¹⁸ In such situations, the performing party is entitled

116. Sadly, plaintiff’s nose, which the doctor was to improve, after the surgery “had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint was [sic] flattened and broadened, and the two sides of the tip had lost symmetry. This configuration evidently could not be improved by further surgery.” *Sullivan v. O’Connor*, 296 N.E.2d 183, 185 (Mass. 1973).

117. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. c (AM. LAW INST. 2011) (“Considerations of both justice and efficiency require that private transfers be made pursuant to contract whenever reasonably possible, and that the parties’ own definition of their respective obligations – assuming the validity of their agreement by all pertinent tests – take precedence over the obligations that the law would impose in the absence of agreement.”).

118. RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (AM. LAW INST. 1981) (“The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38(2)(b) (AM. LAW INST. 2011) (limiting “performance-based damages” to the “price of such performance as determined by reference to the parties’ agreement”).

to the contract return.¹¹⁹ Yet there is authority for the proposition that a party who has not fully performed, but who has conferred a benefit greater than the contract price, will recover the greater amount.¹²⁰ The result seems incongruous to some, including the drafters of the Restatement of Restitution.¹²¹ It makes no sense, so the argument goes, to allow a party who has fallen short of full performance to recover *more* than the contract price for his incomplete performance. The concern seems to go to the heart of the Restatement changes,¹²² but it is not without a solution consistent with both restitution and contract theory. The simple solution is to adopt a rule that a non-breaching party cannot recover, in restitution, an amount exceeding the agreed contract price, which is precisely what the Restatement has done.¹²³

The question then is whether this simple solution is the right one. It is certainly not without controversy, and not universally accepted by courts and commentators.¹²⁴ Yet, after careful consideration of the various arguments, this author is persuaded by the limitation in the context of an agreed contract

119. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38(2)(b); (AM. LAW INST. 2011) RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (AM. LAW INST. 1981).

120. *Boomer v. Muir*, 24 P.2d 570, 577 (Cal. Ct. App. 1933) (“To hold that payments under the contract may limit recovery where the contract is afterwards rescinded through the defendant’s fault seems to us to involve a confusion of thought.”). *Cf.*, *United States v. Algernon Blair, Inc.*, 479 F.2d 638, 641 (4th Cir. 1973) (“The measure of recovery for quantum meruit is the reasonable value of the performance [R]ecover is undiminished by any loss which would have been incurred by complete performance.”). While the court in *Algernon Blair* focused on not reducing the recovery by the losses, *id.*, logically the undiminished recovery might exceed the contract price.

121. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note 2 (AM. LAW INST. 2011).

122. *See id.* § 38, cmt. d (“[A]llowing damages measured by the value of performance unlimited by the contract price, permits the injured party to reallocate or revalue risks that it is the function of contract to price and to assign. Such an outcome is contrary to fundamental objectives of contract law and inconsistent with the other remedies for breach of contract [P]erformance of a valid and enforceable contract does not result in the unjust enrichment of the recipient.”).

123. *Id.* (“[S]ome authorities allow a recovery ‘off the contract,’ unlimited by the contract price; but this Restatement rejects that outcome.”).

124. *See* FARNSWORTH, *supra* note 74, § 12.20, at 828-29 (“Although authority can be found that the contract price is an upper limit on recovery in such a case, there is also support for the contrary view.”) (footnotes omitted).

price.¹²⁵ The rule can be explained in much the same way that the well-accepted rule disallowing restitution to the party who has fully performed is explained: Having committed to perform for an agreed price, it is not unjust to receive the agreed price for the agreed performance.¹²⁶ That being the case, it cannot possibly be unjust to receive the agreed price for *less than* the agreed performance.¹²⁷ It would be a windfall to the non-breaching party to receive more than the contract price, thus the enrichment is not unjust. The famous, and often criticized,¹²⁸ case of *Boomer v. Muir*¹²⁹ that condoned a recovery exceeding the price¹³⁰ misses the mark in its reasoning in this regard. The court reasoned that the contract, which was rightfully “rescinded through the defendant’s fault[,] . . . ceases to exist for all purposes.”¹³¹ Yet the support for limiting restitution to the full contract price does not spring from a commitment to enforcing the contract. The limitation simply considers the context in which the performance was rendered¹³² in determining the extent to which the benefit conferred constitutes unjust enrichment.

In addition to the logical inconsistency of a rule allowing a party who has partially performed to receive more than he would have had he fully performed, such a rule could also negatively

125. See *infra* text accompanying notes 237-38 regarding the reasons the limitation does not work when the limitation relates to “value” rather than price.

126. RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. b (AM. LAW INST. 1981) (“Since [the party who has fully performed] is entitled to recover the price in full together with interest, he has a remedy that protects his expectation interest by giving him the very thing that he was promised. Even if he asserts that the benefit he conferred on the other party exceeds the price fixed by the contract, justice does not require that he have the right to recover this larger sum in restitution.”).

127. See, e.g., *Johnson v. Bovee*, 574 P.2d 513, 514 (Colo. App. 1978) (“Had Johnson fully performed, his recovery would be limited to the contract price It is illogical to allow him to recover the full cost of his services when, if he completed the house, he would be limited to the contract price plus the agreed upon extras.”).

128. Mark P. Gergen, *Restitution as a Bridge over Troubled Contractual Waters*, 71 *FORDHAM L. REV.* 709, 711 (2002) (“Boomer has attracted a fair amount of attention from scholars, much of it critical of the decision.”).

129. 24 P.2d 570 (Cal. Ct. App. 1933).

130. *Id.* at 577.

131. *Id.*

132. See *generally infra* text accompanying notes 345-58.

impact the performance of the contract. It could open the door to manipulation as full performance looms, potentially tempting the party who would benefit from removing the recovery “ceiling” to precipitate a breach by the other party or otherwise try to end the contract short of substantial performance.¹³³ Rules of contract enforcement should not be crafted in a way that undermines the stability of contracts. Finally, the parties have already provided us with a valuation of the upper limit of compensation, and therefore the court should not substitute its valuation for that of the parties.

Besides making it clear that a claimant may not recover more than the agreed contract price as compensation for a partial performance of the contract, the Restatement further explains why, in some situations, the *total recovery* may in fact exceed the contract price. A contractor may be due more money than the contract price, for example, because he did extra work at the request of the other party. In that case, extra money may be due based on additional agreements made, or on a restitution claim outside the confines of the original contract.¹³⁴ These recoveries are consistent with, and anticipated by, the Restatement approach.¹³⁵ Further, it is axiomatic that a legitimate *damage* recovery can exceed the contract price.¹³⁶

133. The Contracts Restatement recognizes such a possibility, pointing out that “[s]ince a contract that is a losing one for the injured party is often an advantageous one for the party in breach, the possibility should not be overlooked that the breach was provoked by the injured party in order to avoid having to perform.” RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. d (AM. LAW INST. 1981). Similarly, if the party has some legitimate insecurity regarding return performance, he might make a demand for assurances, hoping to be in a position legitimately to cancel the contract, again receiving a much better recovery. *See id.* § 251. While this latter possibility does not have the same “bad faith” overtones as the former, it nonetheless appears to be a manipulation that is at best an unintended consequence of the relevant law.

134. The reasoning would not be that the contract performance was worth more than the agreed amount, but that the party provided services not contemplated by the contract, for which he should be compensated in restitution.

135. Regarding the recovery of damages, *see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38, cmt. e (AM. LAW INST. 2011) (While § 38 “prohibits a recovery in excess of the contract price for the work done, . . . plaintiffs may obtain the same compensation if they can prove the necessary elements of special damages.”).

136. *Sullivan v. O’Connor*, referenced at the beginning of this article, would be a case in point. The plaintiff paid \$622.65 for the doctor’s fee and

Damages may exceed the contract price, for example, because the breaching party has caused compensable consequential damages.¹³⁷ In any given case, one of the above suggested reasons for the award may provide a more appropriate and coherent justification than does restitution. The Restatement of Restitution appropriately points out the flawed analyses and suggests better approaches. Yet any misunderstanding and misapplication of a legitimate remedy, such as restitution, should not foreclose legitimate applications of the remedy.

B. Redundant Recovery

1. Performance-Based Damages

The performance-based damage calculation will often mirror the damage calculation under existing contract and restitution principles. An example of a contract damage principle that reaches the same result as the Restatement of Restitution is seen in Illustration 9 to section 38, previously discussed.¹³⁸ In the illustration, A had agreed to construct a gravel road for an agreed price of \$12 per foot.¹³⁹ For a breach after A completes 2000 feet, performance-based damages under the Restatement would be \$24,000.¹⁴⁰ However, the same result could be reached using the well-established contract doctrine of divisibility.¹⁴¹ No new damage measure is necessary to reach the

hospital expenses. *Sullivan v. O'Connor*, 296 N.E.2d 183, 185 (Mass. 1973). The court, however, upheld a damage award of \$13,500 representing the harm to the plaintiff due to the worsened condition of her nose and the various costs, including pain and suffering for her third operation. *Id.* at 184, 189.

137. *Cf.*, Gergen, *supra* note 128, at 712 (“In a fair number of cases in which a plaintiff elects restitution on breach to recover costs in excess of the contract price, the cost overruns are attributable to the defendant’s breach of contract.”).

138. *Supra* notes 71-76 and accompanying text.

139. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38, cmt. c, illus. 9 (AM. LAW INST. 2011).

140. *Id.*

141. *See* RESTATEMENT (SECOND) OF CONTRACTS § 240 (AM. LAW INST. 1981) (“If the performances to be exchanged . . . can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party’s performance of his part . . . has the same effect . . . as it would have if only that pair of performances had been promised.”). Here, two thousand feet at \$12 per foot would come out to

result.¹⁴²

Illustration 6 to section 38 likewise describes a situation where a contract restitution recovery and the Restatement of Restitution approach produce the same result. The illustration provides:

Driller undertakes to drill a well at a given spot on Farmer's land at a price of \$5 per foot, payable on completion, with no charge if water is not found. The prevailing price of well-drilling without such a guarantee is \$3 per foot. The cost of drilling a well varies between 50 cents and \$10 per foot, depending on the conditions encountered. After Driller reaches 500 feet without finding water, Farmer wrongfully repudiates the contract and orders Driller off the job. Driller's contractual expectancy is unknowable: the court cannot determine whether water would eventually have been found at all, nor at what depth, nor at what cost. Driller has a claim against Farmer for damages of \$1500 by the rule of § 38(2)(b).¹⁴³

The suggested recovery is of course reached by multiplying the market value for the work done (\$3 per foot) by the 500 feet drilled by Driller at the behest of Farmer.¹⁴⁴ This is also precisely how the restitution recovery would be calculated under contract law.¹⁴⁵

\$24,000. If the contract is found to be divisible, restitution would not be available. *See supra* note 72.

142. The shortcomings of the approach when the contract is not divisible are discussed *infra* text accompanying notes 223-30.

143. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. b, illus. 6 (AM. LAW INST. 2011).

144. Because Farmer cannot prove that the contract would be a losing contract, no proportionate deduction is required.

145. RESTATEMENT (SECOND) OF CONTRACTS § 371 cmt. b (AM. LAW INST. 1981) ("The reasonable value to the party from whom restitution is sought . . . is . . . usually greater than the addition to his wealth If this is so, a party seeking restitution for part performance is commonly allowed the more generous measure of reasonable value"). The measure to which the comment refers is "the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the

Further, restitution analysis works even for a court that prefers a proportional approach to recovery in a losing contract situation. If the court were to consider the overall price for which the plaintiff agreed to perform in measuring the extent to which the benefit conferred is unjust, it may well reach a result similar to the one suggested by the Restatement. Restitution would thus work for such cases. However, maintaining a focus on unjust enrichment would increase the likelihood that a court will provide greater compensation when the circumstances indicate it would be unjust for the defendant to retain the benefit without paying for it.¹⁴⁶ Restitution provides the flexibility to consider not only the valuations in the contract but also such factors as the extent the breaching party has “taken advantage of the injured party’s part performance” and “the observance by the parties of standards of good faith and fair dealing during any negotiations leading up to the rupture of contractual relations.”¹⁴⁷ This flexibility makes restitution the superior analytical framework.

2. Opportunistic Breach

Section 39, dealing with opportunistic breach, also often reaches a result that could easily be reached under existing contract and restitution principles. Illustration 5 provides an example of the adequacy of contract damage principles.¹⁴⁸ The illustration involves a strip-mining contract between a landowner and mining company, under which the company is to pay royalties to the landowner and to restore the land once the mining is completed.¹⁴⁹ The illustration “combines the facts of

claimant’s position” *Id.* §371(a).

146. *See infra* Part IV.C.4.

147. *Id.* § 373 cmt. d.

148. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. d, illus. 5 (AM. LAW INST. 2011).

149. The entire illustration is as follows:

Landowner and Mining Company enter a contract for strip-mining. The agreement authorizes Mining Company to remove coal from Blackacre in exchange for payment of a specific royalty per ton. A further provision of the agreement, included at Landowner’s insistence, obliges Mining Company

Peevyhouse v. Garland Coal & Mining Co. . . . with the results¹⁵⁰ in two other well-known cases dealing with the same issue.¹⁵¹ The issue in the three cases is whether to award damages for failure to restore property by using the diminution in value measure or the cost to complete. The court in *Peevyhouse* chose diminution in value,¹⁵² while the courts in the other two cases chose cost to complete.¹⁵³ The concern in these cases, and others like it, is whether the cost to complete measure will involve economic waste or a windfall to the plaintiff, or, conversely, whether diminution in value will result in under-compensation.¹⁵⁴ Thus, in *Groves v. John Wunder Co.*,¹⁵⁵ one of the cases reaching the Restatement result, the court found the appropriate measure to be the cost to complete the performance.¹⁵⁶ It is worth noting that, along with concerns

to restore the surface of Blackacre to its preexisting contours on the completion of mining operations. Mining Company removes the coal from Blackacre, pays the stipulated royalty, and repudiates its obligation to restore the land. In Landowner's action against Mining Company it is established that the cost of restoration would be \$25,000, and that the diminution in the value of Blackacre is the restoration is not performed would be negligible. The contract is not affected by mistake or impracticability. The cost of restoration is in line with what Mining Company presumably anticipated, and the available comparisons suggest that Mining Company took this cost into account in calculating the contractual royalty. Landowner is entitled to recover \$25,000 from Mining Company by the rule of this section. It is not a condition to Landowner's recovery in restitution that the money be used to restore Blackacre.

Id.

150. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39, reporter's note d (Am. Law Inst. 2011) (referencing *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962).

151. The two other cases are *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939) and *Am. Standard, Inc. v. Schectman*, 439 N.Y.S.2d 529 (N.Y. App. Div. 1981).

152. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962).

153. *Groves*, 286 N.W. at 238; *Am. Standard, Inc.*, 439 N.Y.S.2d at 531.

154. See, e.g., FARNSWORTH, *supra* note 74, § 12.13.

155. *Groves*, 286 N.W. 235 at 238-39.

156. *Id.* at 238 (“[D]efendants here are liable to plaintiff for the reasonable cost of doing what defendants promised to do and have wilfully declined to do.”). Cost to complete was also awarded in the other case providing the result in the illustration, making the result apparently consistent with the

already mentioned, courts also often consider the willfulness of the breach in choosing the appropriate measure.¹⁵⁷ Thus, the concern for “opportunism” in section 39 is already addressed in the damage analysis. Further, the “disgorgement” of profits under section 39 is unnecessary in this context. The “profit” retained by the breaching party, in a case of refusing to complete the work contracted for, is in the nature of a saved expense.¹⁵⁸ Yet logically, the amount saved by not completing the work is the same as the cost to complete the work. There is no additional profit to disgorge.

Further, while it may be true that section 39 would change the result under the *Peevyhouse* facts, the section is not needed to change the result. Garland Coal’s breach may have been opportunistic, but the same result can be reached under damage principles. There is significant disapproval of the result in *Peevyhouse*.¹⁵⁹ As the illustration suggests, the cost to complete was \$25,000, while the diminution in value was negligible (\$300).¹⁶⁰ The court chose diminution in value, partly based on

illustration and with *Groves. Am. Standard Inc.*, 439 N.Y.S.2d at 534.

157. *H.P. Droher & Sons v. Toushin*, 85 N.W.2d 273, 280 (Minn. 1957).

It would seem that the better rule and the one followed by a majority of the courts is that, where there is a substantial good-faith effort to perform the contract, but there are defects of such a nature that the contract has not been performed according to its terms, which defects can be remedied without the destruction of a substantial part of the building, the owner is entitled to recover the cost of making the work conform to the contract but, where it appears that the cost of remedying the defects is grossly disproportionate to the benefits to be derived therefrom, the owner is entitled to recover the difference between the value of the property as it would have been if the contract had been performed according to its terms and the value in its condition as constructed.

Id.

158. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(3) (AM. LAW INST. 2011) (“Profits from breach include saved expenditure . . .”).

159. See, e.g., Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73.1 ALB. L. REV. 1, 36 (2009) (“*Peevyhouse* has become one of a handful of contracts cases that ignites readers’ sense of injustice.”).

160. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. d, illus. 5 (AM. LAW INST. 2011). In *Peevyhouse*, diminution in value was

a finding that reclamation of the land was “incidental” to the contract.¹⁶¹ Yet the facts clearly indicate that the provision was important and was specifically bargained for by the landowners.¹⁶² Thus the problem in *Peevyhouse* was likely created by a misapplication of contract principles,¹⁶³ and could be corrected by proper application of those principles. A new rule of law is not needed.

The redundancy with restitution principles is more complex and requires greater analysis. Of course, to the extent that the section is difficult to apply, it fails to clarify the law. At this point, the focus will be on the extent to which the section is redundant. In that regard, the congruence with restitution principles appears deliberate. The Restatement itself concedes that, at its core, the claim in this section is “an instance of restitution for benefits wrongfully obtained[,] . . . identical in principle to the claims described in Chapter 5 . . . (authorizing a disgorgement remedy in cases of profitable torts and equitable wrongs), and it is properly understood and delimited by analogy to those claims.”¹⁶⁴ It further indicates that the section logically could have been included in Chapter five,¹⁶⁵ but is in Chapter four “in order to group together, for clarity of exposition, the divergent themes of restitution in a contractual context.”¹⁶⁶ In other words, restitution principles provide, at the core, the basis for the results. An example illustrates the adequacy of restitution principles. Illustration 8 provides:

Landlord leases Blackacre to Tenant at an annual rent of \$100,000. The lease provides that Tenant shall not sublet the property without Landlord’s

§300. *Peevyhouse*, 382 P.2d at 114.

161. *Peevyhouse*, 382 P.2d. at 114.

162. *Id.* at 115 (Irwin, J., dissenting) (“Defendant admitted in the trial of the action, that plaintiffs insisted that the above provisions be included in the contract and that they would not agree to the coal mining lease unless the above provisions were included.”).

163. See generally Caplan, *supra* note 159, at 36-39 (discussing several legal and tactical mistakes that may have led to the unfortunate result).

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

165. *Id.*

166. *Id.*

prior consent. Tenant sublets Blackacre for one year at an annual rent of \$110,000. Landlord learns of this transaction after the sublease has expired and commences an action in restitution. Landlord is entitled to recover \$10,000 from Tenant by the rule of this section. It is not a condition of recovery that Landlord prove damages as a result of Tenant's breach.¹⁶⁷

The restitution recovery fits. The property belongs to Landlord. Tenant has no authority or permission to lease it to another person. Tenant has wrongfully taken from Landlord the right to either withhold consent, to condition consent on receiving any excess rent, or to negotiate for an early termination of Tenant's lease so that he can contract directly with any prospective tenant at a potentially higher rate. The proper focus is more on the wrongful appropriation of Landlord's property right than the breach of contract. Any gains from that wrongful use rightfully belong to Landlord. No finding of opportunism is required. Maintaining a focus on restitution is more instructive in reaching the right result. Introducing a redundant contract "rule" detracts from, rather than adds to, the analysis.

C. Clarification that Misses the Mark

1. The Nature of the Remedy

There is no doubt that the restitution measure of recovery for breach of contract is the subject of considerable confusion.¹⁶⁸ Conceptually, the idea of "restitution damages" seems a bit curious. Restitution and damages are different things, and serve different functions. The focus of restitution is on unjust enrichment; the focus of damages is on failed expectation and harm. The Restatement "clarifies" this confusion by rejecting a

167. *Id.* § 39 cmt. d, illus. 8.

168. Andrew Kull, *Rescission and Restitution*, 61 *BUS. LAW.* 569, 569 (2006) ("The relation between restitution and contract is notoriously confused.").

restitution option and embracing a damage remedy.¹⁶⁹ The problem, however, is more in the confusion about the two concepts than in any mutual exclusivity of the two as potential remedies. For example, if I enter into a contract to buy goods, and the seller fails to deliver the goods, I am entitled to the return of any down payment I may have made.¹⁷⁰ The return of the down payment prevents both economic harm and unjust enrichment.¹⁷¹ If all I really want is the return of my down payment, it makes little difference whether I am seeking damages or restitution.

On the other hand, if the amount of damages and of restitution diverge, it makes a difference. If I prefer restitution, am I seeking restitution as an alternative *measure of damages*, or as an alternative *method of recovery*? The tendency to treat the recovery as the former is likely the source of much of the confusion. This is not surprising. The Restatement (Second) of Contracts lists restitution with expectation and reliance damages as one of the three choices available to the non-breaching party.¹⁷² This placement can create an impression that restitution is a damage measure rather than a remedy to prevent unjust enrichment. Further, courts sometimes refer to the restitution measure as restitution damages.¹⁷³ The limitations placed on the measure under contract law further seem to support a damage measure categorization. For example, once a party has substantially performed, the contract price controls the recovery.¹⁷⁴ One might conclude that if restitution were truly based in unjust enrichment, rather than damage theory, the contract would not be relevant.¹⁷⁵ These factors unfortunately can create an impression that the goal is to measure harm rather than to measure unjust enrichment.

169. See generally RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note 2 (AM. LAW INST. 2011).

170. U.C.C. § 2-711 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

171. The loss of the down payment constitutes harm, and the seller is unjustly enriched at the expense of the buyer.

172. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST. 1981).

173. See, e.g., LaSalle Talman Bank, F.S.B. v. United States, 317 F.3d 1363, 1376 (Fed. Cir. 2003).

174. RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1981).

175. One would be wrong in such a conclusion, despite its initial appeal. *Supra* Part IV.A.2.

However, none of these observations necessarily leads to a conclusion that the recovery is not based in unjust enrichment. A closer look suggests just the opposite.

It is important to note, for example, that while restitution is one of the “purposes of remedies”¹⁷⁶ listed in the Restatement (Second) of Contracts, the recovery itself does not appear under Topic two (“Enforcement by Award of Damages”).¹⁷⁷ It rather appears under Topic four (“Restitution”),¹⁷⁸ along with other restitution recoveries for unjust enrichment,¹⁷⁹ clearly indicating the different basis for the recoveries. The Restatement (Second) of Contracts recognizes restitution not as a way “to enforce an agreement, [but to] claim[] relief on the ground that the other party has been unjustly enriched as a result of some benefit conferred under the agreement.”¹⁸⁰ Thus, terms like “restitution damages” reflect more a confusion by the user of the term than an inconsistency in the underlying theory. Confusion among lawyers and judges about a concept may be a good reason to explain the concept in a better way, but it is not a reason to abandon a legitimate recovery. Further, considering the impact of the contract is in keeping with the general approach to unjust enrichment of considering the context in which the benefit was conferred.¹⁸¹

2. The *Winstar* distraction

The Restatement of Restitution faults the two Restatements of Contracts for much of the “confusion surrounding the term ‘restitution’ in a contractual context”¹⁸² In support of its

176. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST.1981) (The section refers to “remedies,” not damages.).

177. *Id.* at ch. 16, topic 2.

178. *Id.* at ch. 16, topic 4.

179. *Id.* Including restitution for the breaching party, restitution when the contract is within the statute of frauds, and restitution when the duty does arise or is discharged. *Id.* §§ 374, 375, 377.

180. *Id.* § 344 cmt. d. *See also* Anderson, *supra* note 6, at 15 (explaining that “courts sometimes speak of a restitutionary recovery as ‘off the contract,’ as opposed to expectation damages ‘on the contract’ . . .”).

181. *See infra* Part V.C.

182. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note, reporter’s note (AM. LAW INST. 2011).

position, it cites an article,¹⁸³ *Rescission and Restitution*,¹⁸⁴ that suggests that “the treatment of ‘restitution and contract’ in the existing *Restatements* has been a failure.”¹⁸⁵ Several cases cited in support of the premise—the “Winstar-related cases”¹⁸⁶ —arose out of events with “origins in the savings-and-loan crisis of the 1980s.”¹⁸⁷ Federal regulators faced with the potential for “massive insolvencies” entered into agreements with “relatively healthy institutions” to acquire at-risk institutions in exchange for “favorable accounting and tax treatment” for a period of twenty-five or thirty years.¹⁸⁸ The subsequent adoption of the Federal Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) made these favorable agreements illegal.¹⁸⁹ The United States Supreme Court in *United States v. Winstar Corp.*¹⁹⁰ held that the United States, in refusing to honor the now-illegal agreements, was liable for a breach of contract, and remanded for a determination of “the appropriate measure or amount of damages”¹⁹¹ The article, which influenced the Restatement approach,¹⁹² takes exception to the treatment of restitution and contract in the cases dealing with the remedy.¹⁹³ There have been many *Winstar* cases,¹⁹⁴ and a thorough analysis of them could be the subject of an entire article. Yet because of the importance of the cases in the conception of the Restatement, a couple of observations are enlightening.

183. *Id.*

184. Kull, *supra* note 168.

185. *Id.* at 573.

186. *Id.* at 571.

187. *Id.* at 570.

188. *Id.*

189. *Id.* at 570-71 (citing Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989)).

190. *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

191. *Id.* at 910.

192. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38, reporter’s note a (AM. LAW INST. 2011) (“For the second thoughts that prompted the revision [of § 38], see Kull, *Rescission and Restitution*, 61 Bus. Law. 569 (2006), especially at 580-581 n.56 and 586 n.78.”).

193. Kull, *supra* note 168, at 573.

194. *Id.* at 571 (“[S]cores of ‘*Winstar*-related cases’ made their way through the Court of Federal Claims, with periodic appeals to the Federal Circuit.”).

While it is true that some of the cases contain statements that seem inconsistent and confusing,¹⁹⁵ the confusion can be dispelled without denying recovery in unjust enrichment. Further, other cases illustrate the continued viability of the Restatement (Second) of Contracts approach. One prominent case, *Glendale Federal Bank v. United States*,¹⁹⁶ does both.

Glendale arises from facts that follow the pattern just described.¹⁹⁷ After finding for Glendale on the liability question,¹⁹⁸ the trial court then awarded \$909 million to the plaintiffs.¹⁹⁹ The Government appealed and the Federal Circuit vacated the judgment.²⁰⁰ Both the trial court and the Federal Circuit disapproved the expectancy measure as being too speculative.²⁰¹ The trial court then chose a restitution remedy, which the Federal Circuit found to be “basically flawed.”²⁰² The problem with the restitution remedy, as explained by the Federal Circuit in its earlier holding on damages,²⁰³ is that it too was fatally uncertain.²⁰⁴ The District Court had determined the amount by which the Government benefitted by calculating the obligations and risks Glendale accepted when acquiring the failing bank. However, as the court points out, this amount is not necessarily the benefit to the Government. It is not clear that the Government would have, even without the acquisition by Glendale, been liable for the full amount. For instance, the Government might have found another bank to acquire the failing institution, or it might have prevented some of the losses by instituting better management. Conversely, it might have incurred more liability after the merger if one or both banks ultimately failed.²⁰⁵ In other words, the case “presents an

195. *See id.* at 571-72.

196. 378 F.3d 1308 (Fed. Cir. 2004).

197. *See id.* at 1309.

198. *Id.*

199. *Id.* at 1310.

200. *Id.*

201. *Id.* (“[T]he problems of proof suggested that any award premised on expectancy damages would be too speculative to uphold.”).

202. *Glendale Fed. Bank, FSB, v. United States*, 378 F.3d at 1308, 1310 (Fed. Cir. 2004).

203. *Glendale Federal Bank, FSB v. United States*, 239 F.3d 1374 (Fed. Cir. 2001).

204. *Id.* at 1382.

205. *Id.*

illustration of the problem in granting restitution based on an assumption that the non-breaching party is entitled to the supposed gains received by the breaching party, when those gains are both speculative and indeterminate.”²⁰⁶ The court then decides that the reliance measure is the appropriate measure under the facts.²⁰⁷ The case ultimately is a good illustration of why the Restatement (Second) of Contracts approach works.

Perhaps the District Court would not have erred had it followed a better contracts analysis. Under the Restatement (Second) of Contracts, expectation is the preferred measure of damages. However, where expectation is not appropriate, the plaintiff may recover in reliance. Surprisingly, in *Glendale*, the District Court, having rejected expectation, determined that restitution would be appropriate. It was not until it had chosen a restitution measure that it then “recognized [a] third category of damages, known as reliance damages, and added specified reliance damages to the total award it granted plaintiff.”²⁰⁸ If it had not been distracted by restitution, but had considered reliance as the most likely alternative to expectation, as the Restatement (Second) of Contracts would suggest,²⁰⁹ it would have at that point calculated damages appropriately. While all of this confirms the unsuitability of an unjust enrichment recovery on the facts of the case, and similar cases,²¹⁰ it is in no way an indictment of unjust enrichment in contract generally. The next section provides another example of a *Winstar* case that creates confusion that is easily clarified without banning a restitution recovery.

206. *Id.*

207. *Id.*

208. *Id.*

209. RESTATEMENT (SECOND) OF CONTRACTS § 349 (AM. LAW INST. 1981) (“As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest . . .”).

210. The U.S. Court of Appeals for the Federal Circuit followed the *Glendale* reasoning in *LaSalle Talman Bank, F.S.B. Glendale Federal Bank, FSB v. United States*, 239 F.3d 1374, 1367-77 (Fed. Cir. 2001).

3. A Common Misconception

One unfortunate reading of the Restatement (Second) of Contracts is that the cost of the performance is an alternative way to measure restitution, sometimes resulting in courts confusing reliance and restitution.²¹¹ To the extent that the Restatement of Restitution debunks that notion, this author heartily concurs. However, the concept, which has admittedly gained a foothold, may be attributable to a misreading of the Restatement (Second) of Contracts. The Contracts Restatement provides that a non-breaching party may recover in restitution “for any benefit that he has conferred on the other party by way of part performance or reliance.”²¹² Unpacking the sentence, it unquestionably refers to either *a benefit* conferred by way of part performance *or a benefit* conferred by way of reliance. There can be no doubt, based on both the syntax and the justification for the recovery,²¹³ that reliance is not compensable under this section without a conferred benefit.²¹⁴ However, some courts have cited this provision when asserting that relief in restitution for the non-breaching party includes an alternative measure based on “the cost of the plaintiff’s performance, which includes both the value of the benefits provided to the defendant and the plaintiff’s other costs incurred as a result of its performance under the contract.”²¹⁵ The quote is from a Federal Circuit case, *Landmark Land Co. v. Federal Deposit Insurance Corp.*,²¹⁶ one of the *Winstar* cases. It is not entirely clear whether the court misread the restatement provision or *Acme Process Equipment*

211. *See, e.g., id.* at 1376 (“When restitution damages are based on recovery of the expenditures of the non-breaching party in performance of the contract, the award can be viewed as a form of reliance damages, wherein the non-breaching party is restored to its pre-contract position by returning as damages the costs incurred in reliance on the contract.”).

212. RESTATEMENT (SECOND) OF CONTRACTS § 373(1) (AM. LAW INST. 1981).

213. *See id.* cmt. a (“An injured party . . . may, as an alternative, seek, through protection of his restitution interest, to prevent the unjust enrichment of the other party.”).

214. *Id.* § 370 cmt. a (“Restitution is . . . available to a party only to the extent that he has conferred a benefit on the other party.”).

215. *Landmark Land Co. v. Fed. Deposit Ins. Corp.*, 256 F.3d 1365, 1372 (Fed. Cir. 2001).

216. *Id.*

*Co. v. United States*²¹⁷ (a case it cited in support of the statement²¹⁸), or both. The *Landmark* court quotes *Acme Process*: “As the best means of restoring the status quo ante, cost of performance is often used.”²¹⁹ But *Acme Process* itself makes clear that if cost of performance is used, it is used as a surrogate for the *value of the benefit* of the performance,²²⁰ not as a recovery based on out-of-pocket costs.²²¹ Thus, while a clarification of the Restatement provision is in order, an *actual* clarification, not a substantive change, is more appropriate. The clarification can occur without denying a potentially valuable remedy.

4. The Proportional Limitation

As indicated, limiting recovery for complete performance to the contract price is appropriate under both contract and restitution principles. The parties have agreed on the value of the performance. Yet in the case of a partial performance, unless the contract is divisible, we have no such evidence of the parties’ intent regarding valuation. Even as an alternate damage recovery, the Restatement approach leaves many unanswered questions. Questions about proportions and values still must be addressed. Whether the plaintiff recovers for unjust enrichment or performance-based damages, courts must grapple with measuring the value of the performance. To suggest that the parties would have agreed to a proportional allocation of amounts assumes too much. For example, a contractor who agrees to install 1000 linear feet of fencing at \$X per foot would not necessarily be willing to install ten linear feet at the same

217. *Acme Process Equip. Co. v. United States*, 347 F.2d 509 (Ct. Cl. 1965), *rev’d on other grounds*, *United States v. Acme Process Equip. Co.*, 385 U.S. 138 (1966).

218. *Landmark Land Co.*, 256 F.3d at 1372.

219. *Id.* (citing *Acme Process Equip. Co.*, 347 F.2d at 530).

220. *Cf. Acme Process Equip. Co.*, 347 F.2d at 530-31.

221. *See id.* The Court states that “cost of performance is often used as the basis for determining the amount of quantum meruit recovery, in the absence of ‘any challenging evidence.’ . . . But if the defendant is able to show that the costs incurred by the contractor were excessive (as a result, for example, of inefficiency or extravagance), the amount of recovery is commensurately reduced.” *Id.* (citations omitted).

price per foot. Thus, to impose such a valuation on the parties is to impose an obligation to which they have not agreed. The doctrine of divisibility anticipates such an inappropriate result and is formulated to avoid imposing such requirements on non-consenting parties.²²² The effort to protect contractual expectations under that doctrine will be of no avail if the same result can now be reached through performance-based damage theory.

The concept of a contract rate may involve someone other than the parties determining said rate.²²³ The potential problem is addressed under the divisibility doctrine by eschewing divisibility where the rate cannot be determined either by the terms of the contract,²²⁴ or by “considerations of fairness”²²⁵ considering the value to “the injured party in terms of his expectation with respect to the total agreed exchange.”²²⁶ The Restatement of Restitution itself recognizes the possibility that corresponding pairs of performances may not be agreed equivalents, and seeks to put it to rest by pointing out that initial impressions are not always correct. Illustration 12 makes the point:

A is employed by B for one year at an annual salary of \$30,000, payable monthly. After six months on the job, A is wrongfully discharged. As both parties are aware, these first six months constitute the “hard season” in A’s line of work: the reasonable value of A’s services during this period is \$3500 a month. Under such circumstances, the contract between A and B does not establish a price for the six months of A’s

222. RESTATEMENT (SECOND) OF CONTRACTS § 240 cmt. e (AM. LAW INST. 1981) (“[F]airness requires that a party, having received only a fraction of the performance that he expected under a contract, not be asked to pay an identical fraction of the price that he originally promised on the expectation of full performance, unless it appears that the performance that he actually received is worth to him roughly that same fraction of what full performance would have been worth to him.”).

223. *Cf. id.*

224. *Id.* § 240 cmt. d.

225. *Id.* § 240 cmt. e.

226. *Id.*

interrupted performance. A is entitled to performance-based damages of \$6000, over and above the \$15,000 in salary that B has already paid.²²⁷

The illustration makes the point that \$30,000 annually is not necessarily the same as \$2,500 per month. Had the contract specified a value of \$2500 per month, or \$3500 per month for six months, and then \$1500 per month for the remaining six months, recovery might have been available under the doctrine of divisibility at the contract rate.²²⁸ But if the Restatement approach is synonymous with divisibility, then it does not add anything to the analysis. If it goes beyond divisibility (which it clearly does),²²⁹ it risks imposing a limitation on recovery for the non-breaching party that is more severe than the parties would have bargained for.

Further, given that the contract did not give us the \$3500 per month, where did we get it? According to the Restatement, it is based on the value of the work done for B,²³⁰ which is precisely the amount to which A would have been entitled under an unjust enrichment claim. Yet if that is the measure, how have we simplified anything? We still must measure the value of that benefit. Further, the *reason* for a recovery based on the benefit conferred on the breaching party seems grounded in unjust enrichment, not damages to A.

227. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. b, illus. 12 (AM. LAW INST. 2011).

228. The illustration is slightly confusing, given that the contract seems to actually contemplate payments of \$2500 per month. Presumably the reason this does not fit a divisibility analysis is that the “corresponding pairs of part performances” are not “agreed equivalents.” RESTATEMENT (SECOND) OF CONTRACTS § 240 (AM. LAW INST. 1981).

229. For example, illustration 11 to section 38 involves a contract to build a barn, and applies a “ratable portion” analysis. Under a divisibility analysis, a contract to build a barn would not be divisible due to the intent of the parties and the lack of contract terms dividing performances and payments as “agreed equivalents.” See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. c, illus. 12 (AM. LAW INST. 2011).

230. The illustration bases damages on the difference between the amount A has been paid for the first 6 months (\$15,000) and the “reasonable value of A’s services during this period [of] \$3500 a month” (a total of \$21,000 for the six months) to arrive at the damage award of \$6,000. *Id.*

Considering the example in relation to A's damages, the example illustrates a solution in search of a problem. A has not necessarily been *harmed* vis-à-vis the six months worked. He has apparently been paid exactly what he was supposed to be paid under the contract. In fact, an employment contract, providing for regular payments, would likely be seen as a divisible contract.²³¹ Under these facts, however, divisibility is really beside the point. A has been harmed by the fact that he has been deprived of payment for the *remaining* six months of his contract. Given that the contract is a contract for a definite term, he should, at least at first blush, be entitled to the entire remainder of his unpaid salary.²³² The breaching party would then be entitled to prove what A could have reasonably made in similar employment and subtract it from the damage amount by way of mitigation.²³³ Even assuming the defendant could meet his burden of proof,²³⁴ however, since the remaining contract work was worth just \$1500 per month, mitigation principles would unlikely require him to work harder to limit damages.²³⁵ Thus, the plaintiff would have been entitled to a minimum of \$6000 in damages (the loss of \$1000 per month, after subtracting \$1500 per month he might have earned in mitigation), and probably more.²³⁶ The Restatement solution is at best redundant.

231. JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 651 (5th ed. 2011) (“[M]onthly employment contracts are said to ‘fit neatly into the usual definition of a divisible contract.’”).

232. “A wrongfully discharged employee is entitled to the salary that would have been payable during the remainder of the term” JOSEPH M. PERILLO, *CONTRACTS* § 14.18 (7th ed. 2014) (footnote omitted).

233. The payable salary is “reduced by the income which the employee has earned, will earn, or could with reasonable diligence earn in similar employment during the unexpired term.” *Id.*

234. MURRAY, *supra* note 231, § 123[D], at 781 (“The burden of proof is on the employer to prove both the employee’s opportunity to secure comparable employment and the employee’s failure to mitigate damages.”).

235. RESTATEMENT (SECOND) OF CONTRACTS §350(1) (AM. LAW INST. 1981) (denying recovery only for losses that could have been “avoided without undue risk, burden or humiliation.”). Of course, if he could easily earn \$2500 per month without working harder, there is no reason not to limit damages on this basis.

236. This best-case-scenario mitigation for the defendant assumes he can prove the plaintiff would have not only found “replacement” employment but would have been able to start his new job the day after being fired, a likely insurmountable burden.

Lastly, to say that the recovery should be limited to a proportional amount of the valuation the parties agreed on requires that we know what the parties considered the agreed contract return. While a contract that specifies a payment amount for an agreed performance sets the contract price for that performance, when the return involves something other than money the court has no valuation *by the parties* on which it can rely. Where the contract does not provide the valuation, the court must supply it, whether awarding restitution or performance-based damages. The Restatement chooses the latter²³⁷ without providing any greater certainty to the calculation.²³⁸

D. Creating More Confusion

1. The Confusion Surrounding Material and Total Breach

The Restatement of Restitution disapproves of the term “total breach,” a term used in the Restatement (Second) of Contracts, finding it to be “easily misconstrued.”²³⁹ It chooses to substitute the term “material breach”²⁴⁰ to avoid confusion. The attempt, however, adds to the confusion, potentially defeating much of a carefully constructed system of terms and analysis and creating unnecessary inconsistencies between the two Restatements. A material breach of contract does not, as the

237. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38(2)(b) (AM. LAW INST. 2011).

238. Performance-based damages under this section are measured by “the market value of the plaintiff’s uncompensated contractual performance” *Id.* The same measure might be used in restitution. RESTATEMENT (SECOND) OF CONTRACTS § 371 cmt. b (AM. LAW INST. 1981).

239. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 37 cmt. c (AM. LAW INST. 2011) (“[T]he expression ‘total breach’ is easily misconstrued.”). *See also id.* § 38 cmt. a (“[T]he expression ‘total breach’ is frequently misunderstood . . .”).

240. *Id.* § 37 cmt. c (“The present Restatement employs the term ‘material breach’ to designate what both Restatements of Contracts call ‘total breach,’ only because its meaning is more easily understood.”). *See also id.* § 38 cmt. a (“[T]his Restatement refers instead to ‘damages for material breach or repudiation.’”).

Restatement of Restitution would suggest,²⁴¹ necessarily result in a right to cancel the contract and sue for damages. True, a material breach may be required for cancellation, but it is not enough in and of itself. The party who would cancel must show more. The Contracts Restatement sets up a three-part analysis. Section 241 delineates significant circumstances in determining whether the breach (or “failure to render or to offer performance”²⁴²) is material.²⁴³ Section 242 indicates significant circumstances in determining whether the “remaining duties are discharged.”²⁴⁴ Section 243 states that “a breach by non-performance gives rise to a claim for damages for total breach only if it discharges the injured party’s remaining duties to render such performance”²⁴⁵ Significantly, the section 241 factors for material breach are also included as factors under section 242, along with other factors related to substitute arrangements and to the importance of timeliness.²⁴⁶ The comment further elaborates that a material breach may, depending on the circumstances,²⁴⁷ be cured.²⁴⁸ It is not until the requirements of section 242 are met that the contract may be cancelled. That point, as indicated in section 243, is when there is a *total* breach. The Restatement (Second) of Contracts uses the two terms consistently in other provisions, each time conveying the intended meaning.²⁴⁹ If there is some antipathy

241. *Cf. id.*

242. RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. LAW INST. 1981).

243. *Id.*

244. *Id.* § 242.

245. *Id.* § 243.

246. *Id.* § 242.

247. RESTATEMENT (SECOND) OF CONTRACTS § 242 cmt. b (AM. LAW INST. 1981) (“This Section states circumstances which are to be considered in determining whether there is still time to cure a particular failure, or whether the period of time for discharge has expired.”).

248. *Id.* § 242 cmt. a (“Ordinarily there is some period of time between suspension and discharge, and during this period a party may cure his failure.”).

249. Section 237 provides that, with an exception for divisible contracts, “it is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured *material* failure by the other party to render any such performance due at an earlier time.” *Id.* § 237 (emphasis added). Section 236 provides that a “claim for damages for *total* breach is one for damages based on all of the injured party’s remaining rights to performance.” *Id.* § 236(1) (emphasis added). In other

toward the term “total breach” it seems that the better solution would be to come up with another term that might meet with the approval of the drafters rather than collapsing the two terms into one, thereby losing the carefully reasoned distinction.

2. Consequential Damages

Even with the performance-based damage measure, concerns about inadequate compensation persist. The drafters implicitly recognize the potential shortcomings and seek to correct them by making concessions that lack clarity. The Restatement of Restitution suggests that in granting performance-based damages, courts should not be stingy with their awards.²⁵⁰ But what would that mean exactly in a contract context? Does it mean, for example, that the requirements of avoidability, foreseeability, and certainty²⁵¹ are to be relaxed? If so, are we relaxing these limitations because they are not legitimate contract damages limitations? If the concepts need reevaluation, this is surely a rethinking of contract theory that requires serious evaluation of many factors related to contract law. If, on the other hand, the relaxation is to be limited to the traditional “restitution” context because it appears that contract damages are insufficient, it makes more sense to acknowledge that and allow a recovery in restitution. The Restatement almost concedes as much. In explaining the “relaxed” approach to damages in this context it acknowledges the possible injustice of denying restitution,²⁵² and seeks to solve it through this relaxed damage measure, suggesting that “plaintiffs may obtain the same compensation if they can prove the necessary elements

words, a material breach suspends duties and a total breach ends the contract. The two concepts are legally distinct.

250. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. e (AM. LAW INST. 2011) (“A jurisdiction that adopts the position of this Restatement should ensure that evidentiary requirements for proof of special damages caused by the defendant’s breach are not unduly restrictive.”).

251. See RESTATEMENT (SECOND) OF CONTRACTS §§ 350-52 (AM. LAW INST. 1981).

252. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. e (“[T]he plaintiff may face formidable difficulties in establishing the fact and amount of the resulting loss, if proof of damages must be made with rigorous specificity.”).

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of special damages,” using the suggested relaxed approach.²⁵³ One justification given is that the defendant may have “obtained a performance that was unexpectedly costly to the plaintiff”²⁵⁴ In other words, the defendant may have been unjustly enriched at the plaintiff’s expense. An award based on unjust enrichment addresses the same concerns in a more straightforward way.

V. COMPATIBILITY OF CONTRACTS PRINCIPLES AND RESTITUTION PRINCIPLES

A. The Oil and Water Concern

The Restatement justifies singling out non-breaching parties as undeserving of restitution²⁵⁵ by citing what it calls the “fundamental primacy of contract over restitution, and the effect of valid contractual dispositions in displacing any claim that a consensual transaction might be productive of unjust enrichment”²⁵⁶ Under this approach, a party to a contract who strives to perform it can never get restitution, while a party who totally breaches a contract may be entitled to restitution.²⁵⁷ The drafters effectively treat restitution and contract in this context like oil and water – incapable of combining effectively. Yet the two are not necessarily inconsistent at all. In fact, restitution and contract can coexist quite nicely.

Contract damages and restitution serve different purposes and thus can exist as alternate choices. Neither eclipses the other. Consider again, for example, the case of *Sullivan v. O’Connor*. The plaintiff was unhappy because she was supposed to recover from surgery with a beautifully improved nose, and instead found herself with a nose that was much less attractive. The plaintiff did not get what she paid for. Contract damages are designed to address that concern. Restitution, however, is not designed to enforce the bargain of the parties. It is designed

253. *Id.*

254. *Id.*

255. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch.4, topic 2, intro. note 1 (AM. LAW INST. 2011).

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

257. *Id.* § 36.

to provide a recovery for a benefit conferred on another person under circumstances in which it would be unjust to retain the benefit without paying for it. In other words, the concern with restitution is with an unjustly enriched party paying for what he gets.

A claim for restitution, as opposed to restitution as a remedy for another cause of action,²⁵⁸ is not dependent on a tort, a breach of contract, or any other separate basis for a claim.²⁵⁹ It is a cause of action under an independent body of law.²⁶⁰ That is not to say that other law does not impact the potential for recovery. If A today has \$50 that belonged to B yesterday, he is not unjustly enriched if B voluntarily gave him the money²⁶¹ or if B gave him the money in consideration of his mowing B's lawn.²⁶² If, however, B gave the money to A by mistake, A is unjustly enriched at B's expense. Likewise, if A took the money from B without B's consent, A is unjustly enriched because he got the money based on his own crime or tort.²⁶³ In other words, property law, contract law, tort law, criminal law, or some other law can inform the analysis about whether the enrichment is unjust. That does not change the fact that a claim for restitution exists, and exists *as* a restitution claim.

Like many other legal concepts, restitution law recognizes common patterns for which it will apply, and others where it will not. The last two examples cited ordinarily would support a restitution claim. But because a restitution claim is an independent cause of action, and may exist without a breach of

258. See DOBBS, *supra* note 108, § 4.1(1), at 552 (“Unjust enrichment has both a substantive and a remedial aspect. The substantive question is whether the plaintiff has a right at all . . .”).

259. *Id.* (noting that the defendant may gain “advantages without tort or breach of contract”).

260. *Id.*

261. See *id.* § 11.10, at 780 (“[O]ne who renders services without expecting payment for them is not entitled to restitution of that value, since he intended to, and did make a ‘gift’ of the services.”).

262. *Id.* § 4.9(2) at 684 (“[R]espect for the contract means that the plaintiff cannot recover restitution of benefits to which the defendant was entitled under the contract.”).

263. DAN B. DOBBS, 1 DOBBS LAW OF REMEDIES § 4.1(1), at 552 (Practitioner Treatise Series, 2d ed. 1993). (“Sometimes unjust enrichment is . . . obvious . . . : if the defendant steals the plaintiff's watch, he must restore it.”).

duty under some other law, the law must be very chary about imposing on the recipient an obligation to pay for the benefit. Thus, the law also recognizes some fairly categorical reasons to deny restitution. For example, it is universally accepted that one who makes a gift cannot claim restitution because the gratuitous intent is inconsistent with a finding that the enrichment is unjust.²⁶⁴ Likewise, the officious intermeddler hardly has justice on his side in claiming that the person on whom he has forced an unwanted benefit should pay for it.²⁶⁵ The prohibition on restitution in these situations is well-founded²⁶⁶ and the need to establish guidelines well-considered. But benefits conferred under a valid contract are neither gratuitous nor officious. The question then becomes whether there is some similar reason categorically to deny restitution to a breach of contract claimant. As explained below, I submit that there is not.

Yet, aside from the limited exceptions of sections 37 and 39, the Restatement prohibition on restitution seems to be categorical, but without any convincing justification. As previously noted, the categorical rule does not necessarily add predictability in contract cases.²⁶⁷ Further, allowing an unjust enrichment claim introduces no insoluble chaos to the analysis. If restitution is available, restitution principles would then inform that analysis for the contract context, just as they would in other restitution contexts, and would allow for more just results. The overarching justification, therefore, seems to be the perceived incompatibility between contract and restitution. The Restatement adopts, admittedly with some limiting explanation,²⁶⁸ the general rule that “enrichment derived from a valid consensual exchange is neither unjust nor unjustified.”²⁶⁹

264. *Id.* § 4.9(1) at 680 (“If there is a black-letter rule for unsolicited benefits it is that ‘volunteers’ and ‘officious intermeddlers’ cannot recover restitution.”) (footnotes omitted).

265. *See id.*

266. *But see generally id.* § 4.9(1) (discussing the overstatement of the “black-letter” rule, along with the important principles underlying the rule and the more nuanced approach taken by courts in its application).

267. *See supra* Part IV.C.4.

268. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, introductory note 2 (AM. LAW INST. 2011).

269. *Id.*

However, the rule focuses too heavily on the broad statement and too little on the admitted overstatement.

The broad statement works for many situations. It is undoubtedly true that contract terms may negate any unjust enrichment claim. For example, a party who failed to meet contractual requirements for a bonus payment would not be entitled to restitution for benefits conferred in the unsuccessful attempt.²⁷⁰ The same could be said for many failed conditions in contracts.²⁷¹ The most basic example would be any situation where a performing party, realizing he made a bad bargain, seeks to simply ignore the contract, and seek recovery by way of restitution because his performance is worth more than the earned contract amount.²⁷² It is such cases that give us the admittedly misleading statement that “there can be no unjust enrichment in contract cases.”²⁷³

The idea that restitution is inconsistent with contract is firmly planted in the General Principles set out at the beginning of the Restatement. The basis for restitution described in section 1 (“A person who is unjustly enriched at the expense of another is subject to liability in restitution. . . .”)²⁷⁴ is immediately followed by the Limiting Principles in section 2.²⁷⁵ The second limiting principle is that a “valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.”²⁷⁶ Likewise, in the chapter dealing with Restitution and Contract, the Restatement expresses a broad principle that the “fundamental primacy of contract over restitution” is “accurately expressed in more concrete terms by familiar judicial statements to the effect that

270. *Dove v. Rose Acre Farms*, 434 N.E.2d 931, 936 (Ind. Ct. App. 1982) (holding that an employee, having “failed to perform all of the conditions of the contract . . . is not entitled to recover any portion of the bonus.”).

271. RESTATEMENT (SECOND) OF CONTRACTS § 224 (AM. LAW INST. 1981) (indicating that non-occurrence of a condition excuses return performance).

272. Illus. 9 to RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 is such an example. *See supra* text accompanying notes 71-76.

273. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. c (AM. LAW INST. 2011).

274. *Id.* § 1 (referencing *Fenerjian v. Nogshim Co.*, 72 F.Supp.3d 1058, 1085 (N.D. Cal. 2014)).

275. *Id.* § 2.

276. *Id.* § 2(2).

‘where there is contract, there can be no unjust enrichment.’²⁷⁷ Yet it follows that statement with a note of caution, suggesting that these and “similar shorthand expressions . . . must be weighed with care, because their implications cannot always be taken at face value.”²⁷⁸ It further recognizes that “statements to the effect that ‘there can be no unjust enrichment in contract cases’ can be misleading if taken casually.”²⁷⁹ The gist of the non-restitution argument seems to be that the non-breaching party, having committed to perform for an agreed return, cannot later argue the injustice of holding him to the consequences of that bargain. However, the drafters fail to keep their own counsel in appropriately recognizing the limits of the general statement. Justice, being a relative concept, may be better served by preventing unjust enrichment of the breaching party at the expense of the non-breaching party.

What, then, is the correct analysis? The Limiting Principles are a good starting point, as long as the limitations on the limitation are respected. The point of the limitation is that a party who has contracted to perform for an agreed price cannot simply ignore the contract and demand a greater payment.²⁸⁰ However, the statement that a “valid contract defines the obligations of the parties” is limited by the language “as to matters *within its scope*, displacing *to that extent* any inquiry into unjust enrichment.”²⁸¹ The limitation is an important one. The comments to the general unjust enrichment rule provide insight into the import of the limiting words. Comment b states that “[u]njustified enrichment is enrichment that . . . results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights. Broadly speaking, an ineffective transaction for these purposes is one that is *nonconsensual*.”²⁸² The acceptance of restitution in the context of failed bargains (excluded from this rule by the requirement of

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

278. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note 2 (AM. LAW INST. 2011).

279. *Id.* § 2 cmt. c.

280. *Id.* (“[T]he parties’ own definition of their respective [valid] obligations . . . take[s] precedence over the obligations that the law would impose in the absence of agreement.”).

281. *Id.* § 2(2) (emphasis added).

282. *Id.* § 1 cmt. b.

a “valid contract”) is consistent with this view. However, restitution for the non-breaching party is also consistent. The consent to a contract is to the performance by both sides of the entire agreement. The non-breaching party has never consented to a different contract, under terms that are now being imposed by the actions of the breaching party and the court.²⁸³

The facts of illustration 4 to section 2 are helpful in understanding the limitation.

A prepares preliminary designs and cost estimates for the construction of a bridge contemplated by City. The parties agree that A will be compensated for its services only if City decides to construct the bridge and to award the contract to A. The project is abandoned. Five years later City revives the project, using A’s earlier studies for planning purposes but awarding the contract to B. A sues City for breach of contract and unjust enrichment, pointing out (correctly) that City has enjoyed the benefit of work for which A was never paid. Yet City’s use of A’s plans without compensation is in accordance with the terms of the parties’ valid agreement. That being so, there is no unjust enrichment of City and no liability in restitution.²⁸⁴

The illustration is based on a 1943 Washington case, *Chandler v. Washington Toll Bridge Authority*.²⁸⁵ The result in the case appears to be correct, and consistent with the rule described. Yet that consistency depends on a very specific understanding of the agreement. In the case itself, the builder “agreed, by an independent covenant, that if work on the bridge was not commenced within the period specified in the contract, the public should be entitled to the benefit of any of the work which he should have performed by way of preparation of plans,

283. Again, the comparison with divisible contracts is instructive.

284. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. c, illus. 4 (AM. LAW INST. 2011).

285. 137 P.2d 97 (Wash. 1943).

specifications, or similar data.”²⁸⁶

Thus, the case is an apt illustration of the contract limitation. However, the crucial information is the agreement that the City is entitled to use the work without compensation, which is not made clear by the more general language in the illustration.²⁸⁷ Without this explicit agreement, the illustration could just as easily exemplify an argument *for* restitution. If the parties had not addressed, either explicitly or implicitly, the ownership of any plans or other data prepared by the builder, it seems unlikely the court would, as a matter of law, supply such a term.²⁸⁸ If the contract does not address any use of the work, it is not “within its scope.”²⁸⁹ Therefore there is no reason to deny recovery for unjust enrichment.²⁹⁰ Without a categorical reason to deny, the argument for restitution is compelling. The benefit to the city and the corresponding detriment to the builder (assuming no evidence of gratuitous intent) support a restitution recovery. The omission of the crucial fact in the illustration underscores the categorical nature of the restriction in the Restatement, as opposed to a more case-specific analysis of the

286. *Id.* at 99.

287. To say that A is to “be compensated for its services only if City decides to construct the bridge and to award the contract to A[.]” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. c illus. 4 (AM. LAW INST. 2011), is not the same as saying that the City is entitled to use A’s work.

288. *See Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 889 (1921) (“Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication.”). In the case, it seems more reasonable and probable that a builder would not lightly agree to do significant work for another without any compensation. *Cf. Incomm, Inc. v. Thermo-Spa, Inc.*, 595 A.2d 954 (Conn. Super. Ct. 1991), in which the court refused to imply a condition of subjective satisfaction to the production of an advertising brochure. The court stated that such a condition “would subject an artist’s right to compensation for what might well be hundreds of hours of labor, not to mention whatever talent and training he happens to possess, to the purchaser’s whim.” *Id.* at 958. The court went on to explain that “if the parties wish to write such a condition into their contract, there is nothing to stop them. But in the absence of such an express condition . . . a condition of personal satisfaction will not be implied by the courts.” *Id.*

289. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2(2) (AM. LAW INST. 2011).

290. The absence of a provision for compensation under the contract is not the same as a prohibition against compensation under unjust enrichment, nor is it a statement about the right to use the plans.

presence (or absence) of unjust enrichment.²⁹¹

B. The Underlying Contract Considerations

1. The Unwarranted Concern for Preserving Bargained-for Losses

The Restatement of Restitution is overly aggressive in ensuring the plaintiff is not relieved of the consequences of its bad bargain, while at times being overly solicitous in protecting breaching defendants.²⁹² The concern for preserving the plaintiff's losses seems unjustified for several reasons. First, the Restatement approves restitution that accompanies rescission of the contract,²⁹³ which can also relieve the plaintiff of bargained-for losses.²⁹⁴ That rule is justified partly by the simplicity of the remedy.²⁹⁵ Yet even where rescission is not feasible, restitution may be a fairly easy remedy to apply. Where it is not, the Restatement approach does not necessarily simplify the

291. After citing the *Chandler* case, the drafters include a discussion of an English case, *Cutter v. Powell* (1795) 101 Eng. Rep. 573; 6 Term Rep. 320, for the proposition that the denial of a recovery based on “the value of his services, measured not by the conditional contract but by the prevailing wage” to the estate of a seaman who died before fulfilling the condition of completing voyage is not consistent with modern law. The drafters stated that a finding that “the parties intended to contract for a forfeiture in the event of Seaman’s death during the voyage . . . seems so unlikely, a modern court would presumably allow restitution of the value of Seaman’s services by the rule of § 34.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2, reporter’s note c (AM. LAW INST. 2011). The case, of course, was in the context of impracticability, as it was impossible for the seaman, having died, to complete the contract. Yet the reasoning is entirely consistent with allowing restitution in the situation of a breach of contract, as was actually the situation in *Chandler*.

292. See *id.* § 38 cmt. d. “By capping the damage calculation at the contract rate . . . , § 38(2)(b) prevents these plaintiffs as well from electing performance-based damages as a means of escape from an unfavorable bargain.” *Id.*

293. *Id.* § 37.

294. *Id.* § 37 cmt. b (“In theory, and sometimes in practice, rescission pursuant to § 37 permits a plaintiff who has paid in advance for a defaulted performance to recover an amount exceeding compensatory damages.”).

295. *Id.* § 37 cmt. a (“So long as it is possible as a practical matter to order that the plaintiff’s performance be restored *in specie*, it will usually be easier to do so than to calculate damages for breach or to compel [performance].”).

calculation.²⁹⁶ And there is no principled reason to allow or disallow the non-breaching party to escape the consequences of a bad bargain solely due to the timing of the defendant's breach.

Second, contract law does not normally concern itself with preventing parties from escaping bad bargains. "Rather, it focuses on overcoming the loss to the aggrieved promisee."²⁹⁷ If there is no loss, there is no reason to examine the bargain further. If A agrees to sell his boat to B at a price that is ridiculously below market value, and B repudiates the contract, A can now happily sell his boat to another at the market rate. He can pocket the benefit he got from the breach without so much as a "thank you" to B.²⁹⁸ The goal of contract damages is to compensate, not to make sure the consequences of bad bargains fall entirely on non-breaching parties.²⁹⁹

Third, there is no justification for treating non-breaching parties who admittedly made bad bargains worse than other contracting parties. Yet the Restatement of Restitution, in the contract context, singles out non-breaching parties for its refusal to allow a restitution recovery. Parties who made *defective* bargains are entitled to restitution.³⁰⁰ Parties to contracts that become impracticable are entitled to restitution.³⁰¹ *Breaching parties* are entitled to restitution for benefits conferred on non-breaching parties.³⁰² Restitution should likewise be available to

296. See *supra* Part IV.C.4.

297. MURRAY, *supra* note 231, § 118[B], at 752.

298. Under the UCC, an aggrieved seller, after a breach by a buyer, may choose to resell the goods and receive as damages "the difference between the resale price and the contract price . . ." U.C.C. § 2-706(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977). Logically, this "difference" represents a harm to the seller only when the seller must sell for less than the contract price – in other words, when the seller had a favorable contract. If the seller is able to sell for more, he is not harmed, and is in fact released from a bad bargain. But the Uniform Commercial Code (UCC) is quite clear that this seller, even having made a bad bargain, can keep his resulting gains. *Id.* § 2-706(6) ("The seller is not accountable to the buyer for any profit made on any resale.").

299. See RESTATEMENT (SECOND) OF CONTRACTS ch. 16, introductory note, reporter's note (AM. LAW INST. 1981) ("[T]he principal purpose of the [contract law] rules relating to breach is to place the injured party in as good a position as he would have been in had the contract been performed.").

300. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 31-34 (AM. LAW INST. 2011).

301. *Id.* § 34.

302. *Id.* § 36; RESTATEMENT (SECOND) OF CONTRACTS § 374 (AM. LAW INST.

non-breaching parties.

Fourth, the Restatement allows the defendant to avoid paying for net benefits received from the other party by hiding behind the contract it has disavowed or dishonored. It thus, for this purpose, gives the defendant—the breaching party—the benefit of the bargain. Yet the benefit of the bargain is a concept that normally applies to the wronged party, not the breaching party. If the plaintiff has in fact suffered a loss, and the only reason he is not entitled to damages (or is entitled only to inadequate damages) is that he made a bad bargain, why should he absorb a potentially large part of the loss and leave the breaching party with an unearned benefit? In other words, why is it not *unjust* to allow the defendant to keep benefits he got, at the plaintiff's expense, under a contract he will not honor?

2. The Normative Pitfall

The opportunistic breach provision places an inordinate focus on the injustice of retention of benefits by the breaching party, bordering on, or in fact becoming, punitive. The Restatement refers to the breaching party as a “wrongdoer” who “takes without asking.”³⁰³ Yet even with this emphasis, it seeks to limit the scope of the provision,³⁰⁴ recognizing that breach of contract “is not usually treated in law as a wrong to the injured party of a sort comparable to a tort or breach of equitable duty.”³⁰⁵ The approach stakes out two extreme positions, each of which is inconsistent with contract law. On the one hand, it protects the breaching party at the expense of the non-breaching party, allowing the former to keep gains without payment in order to ensure that the latter does not escape his bad bargain.³⁰⁶ On the other hand it is overly punitive toward one who breaches

1981).

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

304. *Id.* § 39 cmt. a. “The restitution claim described in this section is infrequently available . . .” *Id.*

305. *Id.*

306. *Id.* pt. II, ch. 4, topic 2, intro. note 3(b) (noting that the “practical result” of the Restatement approach “is to foreclose ‘restitution’ as a means by which a party bound to perform at a loss can escape the consequences of a disadvantageous bargain.”).

out of self-interest.

Fundamentally, contract law is not normative law.³⁰⁷ It is not concerned with punishing people who breach contracts,³⁰⁸ but maintains a focus on compensation.³⁰⁹ In fact, under “efficient breach” theory, the law recognizes potential benefits of a breach of contract.³¹⁰ While the theory has its detractors,³¹¹ it remains an important part of contract law.³¹² A rule that allows disgorgement of profits following a breach of contract is inconsistent with this focus. The inconsistency is embraced by the Restatement of Restitution itself, which acknowledges that the “rationale of the disgorgement liability in restitution, in a

307. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (AM. LAW INST. 1981) (“The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach.”).

308. *Id.* (“‘Willful’ breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party.”).

309. For example, the UCC provides that the “remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in *as good a position* as if the other party had fully performed . . .” U.C.C. § 1-305(a) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (emphasis added). The minimal standard is underscored by the further provision that “neither consequential or special damages nor penal damages may be had except as specifically provided in [the Uniform Commercial Code] or by other rule of law.” *Id.*

310. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (AM. LAW INST. 1981) (“[A] party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss.”); *see generally id.*, intro. note, reporter’s note.

311. *See, e.g.,* PERILLO, *supra* note 232, § 14.36.

312. *See, e.g.,* Patton v. Mid-Continent Sys., 841 F.2d 742, 750 (7th Cir. 1988) (“[If the promisor has] discovered that his performance is worth more to someone else . . . efficiency is promoted by allowing him to break his promise, provided he makes good the promisee’s actual losses.”); Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985) (“A third explanation [for the rule generally denying punitive damages for breach of contract], offered by economists, is the notion that breaches of contract that are in fact efficient and wealth-enhancing should be encouraged, and that such ‘efficient breaches’ occur when the breaching party will still profit after compensating the other party for its ‘expectation interest.’”); Allapattah Servs. Inc. v. Exxon Corp., 61 F. Supp. 2d 1326, 1329 (S.D. Fla. 1999) (citing L.L. Cole & Son, Inc. v. Hickman 665 S.W.2d 278, 280 (Ark. 1984) (“Not only are intentional breaches exempt from punitive claims, they are sometimes encouraged. ‘The law has long recognized the view that a contracting party has the option to breach a contract and pay damages if it is more efficient to do so.’”)).

contractual context or any other, is inherently at odds with the idea of efficient breach in its usual connotation.”³¹³ It is true that the Restatement takes pains to limit application of the section to “exceptional cases.”³¹⁴ Yet the text seems amenable to expansion. As pointed out by one author, the “provocative nature of the term [opportunistic], coupled with the power and bounty of disgorgement, may provide significant temptation to overutilize section 39.”³¹⁵

Any such expansion would be reminiscent of the unfortunate foray into creating a tort of “bad faith’ denial of the existence of a contract.”³¹⁶ The tort had been “recognized” in a California case, *Seaman’s Direct Buying Services v. Standard Oil Company of California*.³¹⁷ Even though the court in that case ultimately reversed the holding on this ground due to “the trial court’s failure to instruct as to the bad faith requirement[,]”³¹⁸ the recognition of the cause of action, which included a potential punitive damage recovery, was roundly criticized.³¹⁹ The case was eventually overruled by the California Supreme Court,³²⁰ putting an end to the failed experiment.³²¹

Professor Nicholas Johnson discusses the problems associated with the debunked theory, noting the inability to contain it within any predictable boundaries.³²² He further

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

314. *Id.* § 39 cmt. a. Caprice L. Roberts, Symposium: *Restitutory Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131, 144 (2008) (“In the careful drafting of section 39, the Restatement attempts to ensure narrow application of this restitutory disgorgement remedy.”).

315. Roberts, *supra* note 314, at 145.

316. Nicholas J. Johnson, *The Boundaries of Extracompensatory Relief for Abusive Breach of Contract*, 33 CONN. L. REV. 181, 181 (2000).

317. *Seaman’s Direct Buying Serv., Inc. v. Standard Oil Co. of Cal.*, 686 P.2d 1158, 1167 (Cal. 1984) (“[A] party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists.”).

318. *Id.* at 1170.

319. Johnson, *supra* note 316, at 181.

320. *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 680 (Cal. 1995).

321. Johnson, *supra* note 316, at 181-82.

322. *Id.*

notes that, while there may indeed be reasons to provide “extracompensatory damages” for some breaches of contract,³²³ such efforts tend to be unworkable unless confined to “subcategories that are conceptually and practically severable from the general pool of transactions,”³²⁴ such as abusive breach in insurance contracts.³²⁵ The Restatement provision on opportunistic breach has no such limitation. Yet as Professor Johnson points out, “a general standard of abusive breach,”³²⁶ creates the same parameters problems seen in *Seaman’s*.³²⁷ More to the point here, he notes the impact such a general rule would have on all contracts, by raising the risk of liability for contracting parties generally. As he points out, “saying that we will award punitive damages [–which the disgorgement principle effectively does –] for willful, opportunistic or bad faith breach . . . elevates risk in all transactions.”³²⁸ Yet this is precisely the kind of standard suggested in the Restatement of Restitution. Having realized the folly of such an approach in the past, courts should not be eager to create the same problems under a new name. While there may be situations where “disgorgement” is appropriate, the justification for such disgorgement should be grounded in restitution principles³²⁹ not in a misguided desire to punish breaching parties.³³⁰

323. *See id.* at 183.

324. *Id.*

325. *Id.*

326. Nicholas J. Johnson, *The Boundaries of Extracompensatory Relief for Abusive Breach of Contract*, 33 CONN. L. REV. 181, 181-82 (2000).

327. *Id.* at 183.

328. *Id.*

329. If an unjust enrichment option is preserved, there is no need to create a new and separate claim. At that point, the question becomes simply one of measurement of the unjust enrichment.

330. It is important to note the distinction between bad faith breach of contract, as just described, and the breach of the duty of good faith. The latter remains a viable theory of liability under contract law and provides protection from bad faith actions without the need to change existing law. *See* U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM’N 1977) (“Every contract . . . imposes an obligation of good faith in its performance and enforcement.”); RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

3. Obscuring other Considerations

The bright line rules in the opportunistic breach section tend to obscure not only restitution principles, but also relevant contract concerns. Consider, for example, illustration 7 to section 39. In the illustration, City enters into a contract for fire protection services that “specifies the number of men, horses, and wagons to be kept in readiness at specified times and places, and the contract price is negotiated as a function thereof.”³³¹ The illustration “adopts the facts and reverses the result in *City of New Orleans v. Firemen’s Charitable Ass’n . . .*.”³³² The changed Restatement result provides for disgorgement of the money saved by the Association when it failed to supply the specified numbers.³³³

The result in the case itself was based in part on important contract considerations not carried into the illustration. For example, the court considered whether the contract was for a performance, or for a method, finding, contrary to the illustration’s description, that it was for the former.³³⁴ Because the performance was the basis of the contract,³³⁵ and there was no fault with the performance, there was no claim.³³⁶ The fact that it was performed in a way that saved money for the defendant was not the issue. Absent mistake or a deficiency in performance, no recovery was available.³³⁷ Another nuance in

331. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. d, illus. 7 (AM. LAW INST. 2011).

332. *Id.* § 39 reporter’s note d (citing *City of New Orleans v. Fireman’s Charitable Ass’n*, 9 So. 486 (La. 1891)).

333. *Id.* § 39 cmt. d, illus. 7.

334. *Fireman’s Charitable Ass’n*, 9 So. at 488 (“The Ordinance required the contractor to keep up its equipments to a certain standard so as to insure a faithful performance of the contract The complaint is to the deficiencies in the minor parts of the contract, relating to the employment of a certain number of men and the use of equipments.” (emphasis added)).

335. Granted, the illustration’s description seems to emphasize the importance of the method, but as presented does not give enough consideration to the distinction. The approach thus seems more categorical than is warranted.

336. *Fireman’s Charitable Ass’n*, 9 So. at 488 (“[W]e are of the opinion that the main purpose of the contract was faithfully executed.”).

337. *City of New Orleans v. Fireman’s Charitable Ass’n*, 9 So. 486, 488 (La. 1891) (“There is no averment that the money was paid through error in law or fact, or that it was delivered on a condition which has not been

the case that is omitted in the more categorical illustration is a possible waiver issue. As the court stated, “[d]uring the execution of the contract the city accepted the fire department tendered by the association with the alleged deficiencies. The city, therefore, has no just cause of complaint unless it can show some damage from the failure of the association to carry out its contract by reason of the alleged deficiencies.”³³⁸ This again is an important consideration that may get lost in a reflexive application of the Restatement rule.

Further, if the contract had been for a specific number of men, as the illustration seems to suggest, we would not need section 39 to award compensation. Contract principles would provide the appropriate remedy. Another example shows why this would be so. If I hire a security guard to provide security for a party that I host, paying him in advance, and he does not show up, I am entitled to get my money back because of his breach of contract. I did not get what I bargained for—a security guard for my event. The guard cannot defend by saying that nothing bad happened anyway. I did not get what I paid for, and I have a claim for breach of contract. In *City of New Orleans*, the court found that the City *did* get what it paid for, even though the method was not the one contemplated. If on the other hand, the court had found that the City had contracted for a specific number of men, and did not get what it paid for, it would be (absent waiver) entitled to damages to the extent the performance fell short.³³⁹

This last statement highlights another concern with the Restatement of Restitution approach. The appropriate recovery for the City if the contract were breached would be damages, not disgorgement of the money the defendant saved. While it may be true that the amount the Association saved was the same as the value the City lost, if there were any differences, contract damage principles would support compensation based on the City’s damages rather than the Association’s gain.³⁴⁰ As long as

performed.”).

338. *Id.*

339. *Cf. id.* (“The city, therefore, has no just cause of complaint, unless it can show some damage from the failure of the association to carry out its contract by reason of the alleged deficiencies.”).

340. *Freund v. Washington Square Press, Inc.*, 314 N.E.2d 419, 422 (N.Y.

the City is made whole,³⁴¹ any disgorgement beyond compensation seems punitive. Any urge to punish the Firemen's Charitable Association, even for a clear-eyed choice to reduce costs, seems inconsistent with both contract³⁴² and equitable principles.

C. The All-or-Nothing Approach

The choice to deny virtually all unjust enrichment for the non-breaching party³⁴³ results in an all-or-nothing approach to restitution. Thus, most non-breaching parties would get no recovery in restitution at all. However, recognizing that there may be injustice in allowing breaching parties to keep the benefits conferred by the other party, and being unwilling to let some enrichments go uncompensated, the drafters chose to give super-restitution to a limited group of disappointed contracting parties.³⁴⁴ The result of the approach is that some deserving claimants get no restitution at all, others get more than they should, and many important restitution concerns are not addressed.

Deciding whether an enrichment is unjust, and the extent to which it is unjust, is at the heart of any restitution analysis.³⁴⁵ Context is key. General restitution principles recognize that wrongfulness of the gain can impact the recovery.³⁴⁶ However,

1974) ("Damages are not measured, however, by what the defaulting party saved by the breach, but by the natural and probable consequences of the breach to the plaintiff.").

341. The other possibility of course is that City's damages exceed the savings by the Association. In such case, providing full compensation to the City would not likely generate any pushback.

342. See RESTATEMENT (SECOND) OF CONTRACTS § 355 cmt. a ("[C]ourts in contract cases do not award damages to punish the party in breach . . ."). See also Roberts, *supra* note 314, at 148-49. ("Unlike tort law, contract law does not also service the desire to punish – at least not officially.").

343. See generally RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note (AM. LAW INST. 2011).

344. *Id.* § 39.

345. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. LAW INST. 2011) ("The substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as 'unjust' for purposes of imposing liability.").

346. *Id.* § 3 cmt. a. ("Liability to disgorge profits is ordinarily limited to cases of . . . 'conscious wrongdoing,' because the disincentives that are the

restitution, although sometimes *affected by* wrongdoing, is not *dependent on* wrongdoing. So, for example, the recipient who receives money based on a mistaken payment may be required give it back to the rightful owner to prevent unjust enrichment even though no wrongdoing is involved. On the other hand, if he had stolen the money, he may have to not only return the money, but also disgorge any gains he received because of his wrongdoing.³⁴⁷ The victim is no longer constrained by considering the value of what was taken, or by a two-unit disparity analysis.³⁴⁸ And rightly so. Certainly, as between the thief and the victim, it is more unjust for the thief to keep any gains resulting from the victim's property than it is for the victim to get a recovery that exceeds the technical value of his loss. The choice of measure "is dictated by general principles of unjust enrichment, turning chiefly on the innocence or blameworthiness of the defendant."³⁴⁹ The *amount* of restitution required thus depends on the degree of wrongdoing and other factors, but the *right* to restitution requires only unjust enrichment. The Restatement of Restitution recognizes this nuanced approach in the context of failed contracts.³⁵⁰ For example, a court may, in allowing restitution following a failed contract, focus on restoring the prior position of one party more than the other.³⁵¹ Where one party is more at fault, the focus will be on insuring that the more "innocent" party is effectively returned to the status quo, even at the expense of the one more

object of a disgorgement remedy are not required in dealing either with innocent recipients or with inadvertent tortfeasors . . .").

347. "When the plaintiff is entitled to 'waive the tort' and sue for restitution in a case of converted chattels, the normal measure of recovery is the benefit received by the defendant, not the loss to the plaintiff." DOBBS, *supra* note 108, § 5.18(2), at 928.

348. Compare RESTATEMENT (SECOND) OF CONTRACTS §344 cmt. d (AM. LAW INST. 1981) with RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011).

349. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 49 cmt. a (AM. LAW INST. 2011).

350. *Id.* § 31 cmt. a ("The restitution claims asserted by performing parties in such cases are classified by this Restatement according to the nature of the transactional defect.").

351. See, e.g., DOBBS, *supra* note 108, § 11.5 at 737 (discussing various approaches, varying with the context, for measuring restitution in mistake cases).

at fault.³⁵² In other words, fault may be an important factor in measuring the recovery,³⁵³ but it is not required for granting a recovery in the first instance.

In denying any restitution to the non-breaching party, the Restatement of Restitution essentially skips a step, providing no restitution to most plaintiffs who enrich the breaching party, effectively penalizing them for innocently making bad bargains. On the other hand, it may provide super-restitution to some plaintiffs, effectively penalizing the breaching party. The resulting penalty is not necessarily because of wrongdoing. Potentially it could result from reasonable business decisions. The section requires that the breach be “deliberate,” that it result in “profit to the defaulting promisor,” and that “the available damage remedy afford[] inadequate protection to the promisee’s contractual entitlement,”³⁵⁴ none of which necessarily involve wrongdoing. And there is no middle ground for recognizing that restitution decisions are often nuanced and case specific.

If the focus remains on restitution, the results are more coherent. Restitution based on unjust enrichment will be granted or denied based on applying unjust enrichment principles in context. The risks accepted in the contract will be considered, and may weigh against restitution.³⁵⁵ However, because the non-breaching party did not agree to, in the event of a breach, enrich the breaching party at his own expense, he

352. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54(3)(b) (AM. LAW INST. 2011) (“Rescission is limited to cases in which counter-restitution by the claimant will restore the defendant to the status quo ante, unless . . . (b) the fault of the defendant or the assignment of risks in the underlying transaction makes it equitable that the defendant bear any uncompensated loss.”). See also, *id.* § 54 cmt. i (this concern for the more innocent party may in fact result in the recovery of “what are commonly called ‘incidental damages’ . . . in connection with rescission, consistent with the remedial objective of restoring the claimant to the precontractual position”).

353. *Id.* pt. III, ch. 7, topic 1, introductory note (“Unlike the assessment of compensatory damages – to which the defendant’s relative culpability is usually irrelevant – it will be seen that the measurement of unjust enrichment frequently turns on a judgment about the defendant’s degree of fault.”).

354. *Id.* § 39(1).

355. See DOBBS, *supra* note 108, § 4.5(1), at 629 (measurement should “reflect the substantive law purpose that calls for restitution in the first place”) (citing *Murdock-Bryant Const., Inc. v. Pearson*, 703 P.2d 1197, 1204 (Ariz. 1985)).

should not be precluded from receiving restitution just because he does not meet the high standards for opportunistic breach. The Restatement itself acknowledges that the “tradition from which we receive the modern law of restitution authorizes a court to remedy unjust enrichment where it finds it”³⁵⁶

When disgorgement is sought, granting the remedy must require more than a profitable breach of contract. The stated reason for disgorgement in the case of opportunistic breach is deterrence,³⁵⁷ which is inconsistent with contract law. Thus, if disgorgement is to be the measure, it must be justified under restitution principles, not granted as a penalty for a profitable breach. Such an approach avoids the very difficult problem of defining and cabining opportunistic breach³⁵⁸ by focusing on restitution principles to support any potential disgorgement.

An example illustrates the potential problem with the all-or-nothing approach. Assume Contractor (C) is hired by a homeowner (O) to demolish his old house and build a new one on the same lot. There is one price for the job (the contract is entire).³⁵⁹ After the contract is entered, the cost of lumber rises sharply. Of course, contract law says too bad for C. He accepted the risk. At this point he has no good options. He can perform as agreed, losing money, or breach the contract, also losing money. If he breaches, O’s damages will, of course, be based on the market value of the unfulfilled performance, which at this point is high in relation to the bargained compensation. Either way, his unfortunate bargain will cost him. Let us assume that he decides to proceed, hoping he can find ways to limit costs as much as possible to avoid paying damages based on the much higher prices a new contractor will likely charge. The first order of business is the demolition. He tears down the house, clears

356. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011). The quote goes on to state that not every injustice qualifies as unjust enrichment. However, that statement does not diminish the force of the premise as to those enrichments that *are* unjust and deserving of compensation.

357. *See id.* § 39 cmt. b (“Restitution (through the disgorgement remedy) seeks to . . . reduc[e] the likelihood that the conscious disregard of another’s entitlement can be more advantageous than its negotiated acquisition.”).

358. *See supra* notes 314-15 and accompanying text.

359. A contract for the construction of a single structure is generally considered entire, not divisible. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 240 cmt. e, illus. 7 (AM. LAW INST. 1981).

the land and prepares to build the house. O then gets a very attractive offer from a developer to buy the property. O determines that it makes more economic sense to sell and to buy another, more desirable, property with his unexpected profit. He fires C and sells the land. C sues for breach of contract. He will not seek expectation damages because his contract was a losing contract. He could sue for reliance damages, but if his projected losses exceed the amount of money spent on the demolition, he will recover nothing.

The question at this point is whether we are to consider the breach “opportunistic.” If we do not, then under the Restatement he is not entitled to restitution.³⁶⁰ Under section 38, he can sue for the market value of the demolition, but it, of course, will be diminished by the proportionate loss on the contract.³⁶¹ Yet in the example, O, the breaching party, gets a windfall. He gets, and will use, *all* of the benefit of the work done, paying a fraction of its worth, and at the expense of the non-breaching party. In fact, the ability to breach the contract without paying full value for the work done may well have encouraged him to breach. In this case, the limitation on his recovery is unwarranted.

On the other hand, maybe we could call O opportunistic, and make him disgorge his profits to C. But now we have created the opposite effect. C gets a windfall,³⁶² and O loses all the benefit of dealing with his own property. Why not just make him pay C for the value of the work done? Is O really a bad actor? Does contract law not allow him to breach and move on? Should it not? If he knew he would have to pay C in restitution, he would make his calculation accordingly: If the new deal is still beneficial while paying restitution to C, he will likely take it. If not, he will not. If he is going to give up all his profits, he will likely forego the new opportunity. Thus, C will have to continue to perform at a loss, O will lose the opportunity to make more

360. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note 2 (AM. LAW INST. 2011). See also *id.* § 2(2), § 44 cmt. a.

361. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38(2)(b) (AM. LAW INST. 2011).

362. The windfall to C is inconsistent with the Restatement’s generally unforbearing attitude toward to parties who make unprofitable agreements.

money and buy a property that pleases him more, and the developer will lose an opportunity that was apparently going to be beneficial to him.³⁶³ Granted, this result will not occur if we do not consider the breach opportunistic, but that just leads us back to the original unsatisfactory result in which the contractor is not adequately compensated for a breach that the new Restatement rule may have encouraged.

Application of restitution principles produces more satisfactory results. C is paid for his work by O, who received the benefit. If it is determined that O is actually a “bad actor,” perhaps restitution principles will require a disgorgement of profits.³⁶⁴ But a “deliberate breach of contract result[ing] in profit”³⁶⁵ would not in itself label him a bad actor. The disgorgement of profits would enhance a claim only where disgorgement is justified under restitution principles. Such principles would not provide disgorgement simply because the breaching party benefits from the breach. No new free-standing claim in contract should risk the same result.

D. A Final Example

A final example from the Restatement illustrates how the new approach can deprive the plaintiff of a legitimate claim, and how retaining a restitution option serves contracts principles, restitution principles, and justice. The example can be found in illustration 15 to section 38:

A works for five years as manager of B’s business, in exchange for a nominal salary and an option to purchase the business at the end of the period on stated terms. When the time comes, A tenders the option price but B repudiates the agreement and sells the business to a third party. A can prove that the market value of his services during the

363. This characterization of course sounds like classic efficient breach theory, which, while criticized, remains an important underpinning in contract law. *See supra* notes 310-12 and accompanying text.

364. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (AM. LAW INST. 2011) (“A person is not permitted to profit by his own wrong.”).

365. *Id.* § 39.

five-year period exceeded his aggregate salary by \$500,000. On the other hand, B can prove that the value of A's option (the value of the business less the option price) was \$300,000 at most. A is entitled to damages by the rule of §38(2)(b), but A's recovery is limited to \$300,000. (On these facts, A's expectation and performance-based damages are identical).³⁶⁶

The parenthetical at the end of the illustration is most telling. It emphasizes that the Restatement approach is a damage measure and leaves the plaintiff without a restitution option. With the facts given, the illustration appears to be a losing contract. A may have made a bad bargain. Under the expectation measure, he will live with that bad bargain.³⁶⁷ He will likewise live with it under the reliance measure, because he would have to subtract the losses, putting him in the same position.³⁶⁸ However, if we were to protect his *restitution interest*, he should be in a better position.

Restitution is designed to prevent unjust enrichment. Thus, we must examine the facts to find both the enrichment, and the injustice of allowing B to retain it without compensating A. The enrichment is easy. B has received a \$500,000 benefit from A.³⁶⁹ But for the contract with A, he would have had to pay someone the going rate to manage his business—in other words, another \$500,000. The question then is whether it is unjust for B to retain this benefit without compensating A. I submit that it is, and that A should recover the \$500,000 in restitution.

Importantly, the illustration does not involve a plaintiff trying to sue for more than the total amount of the contract. If A had agreed to work for five years for \$500,000 total, and B

366. *Id.* § 38 cmt. c, illus. 15.

367. The expectation interest is “intended to give [the plaintiff] the benefit of his bargain by . . . put[ting] him in *as good a position* as he would have been in had the contract been performed.” RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (AM. LAW INST.1981) (emphasis added).

368. *Id.* § 349.

369. This benefit is of course in the form of a “saved expenditure,” but as the Restatement acknowledges, a “saved expenditure . . . is no less beneficial to the recipient than a direct transfer.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. LAW INST. 2011).

fired him without justification some time before the five-year period, it makes sense that A's claim for any unpaid work cannot be for more than \$500,000 no matter how much the work he has done is actually "worth." That is the contract price limitation with which I agree. In the variation, we know what value the parties placed on the work based on their contract. But in the original illustration, we do not have that information. We know the value *the market*, and thus *the court*, placed on the performance, but that is not the same as saying we know what the value was to the parties. And not knowing that value, arguments about windfalls, exceeding the contract value, or relying on the valuation made by the parties, falter.

From a restitution perspective, it appears A has a good argument for the entire \$500,000. Having established B's enrichment, let us consider A's position. Why would A enter into such a contract? It appears that A wants to own his own business—to be his own boss. Presumably he could have simply started a business from nothing. Had he done so, it is highly likely that he would have worked for an effectively low rate in the early stages while the business is being established. He would realize this, but would be willing to do so to reach his goal of owning his own business—something he may value very highly. The benefits of the type of arrangement he had with B (avoiding large start-up costs, less risk) are clear, but the goal, and the need to sacrifice to reach that goal, is much the same.

So what is A's situation now? He has spent five years working at a below-market rate to reach his goal of owning his own business. Yet he does not own his own business. I suppose he could buy another business now at the market rate, but that business would not be the one he has had several years to learn and to shape. Or he could find someone else to make a similar deal with him, and invest another five years of his life, hoping this new party does not breach the new contract. But under either of those options, it would have been much better for him to have earned the going rate for his services for the previous five years and now have \$500,000 instead of \$300,000 to use to embark on his new endeavor. Yet that opportunity has been lost to him because of B's conduct. And it *has* in fact been much better for B, who received the benefit of A's work without paying the going rate. In other words, B has been enriched at A's

expense, creating a two-unit disparity. A rule that prevents A from suing for the benefit conferred on B seems unjustified.

VI. CONCLUSION

The Restatement of Restitution, in the three sections dealing with “Alternative Remedies for Breach of an Enforceable Contract,” for the most part disallows restitution based in unjust enrichment for a non-breaching party to a contract.³⁷⁰ The determination to eliminate the unjust enrichment option, treating breach of contract claimants as uniquely undeserving of restitution, seems to drive much of the structure of the section. Yet the Restatement creates a potentially punitive recovery for some claimants, which is inconsistent with contract theory. The approach also creates more confusion than clarification. Further, its rejection of a restitution recovery for breach of contract is not justified under either contract or restitution principles. Importantly, the approach denies a recovery that may be the best compensation for a deserving claimant. One who has performed work under a valid contract that is ended due to a total breach by the other party should not categorically be denied the chance to receive compensation for the benefit conferred on the breaching party. And the breaching party should not, just because the benefit was conferred in a contract context, be excused from paying for what he got.

370. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, topic 2, intro. note 2 (AM. LAW INST. 2011). See also *id.* § 2(2), § 44 cmt. a.