2003

Justice Scalia Reinvents Restitution

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JUSTICE SCALIA REINVENTS RESTITUTION

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Equitable restitution is unrecognizable in recent Supreme Court decisions. The Court, led by Justice Scalia, is reinventing equitable restitution in order to deny relief to claimants. Its most recent pronouncement came in *Great-West Life & Annuity Insurance Co. v. Knudson*,[1] where a divided Court in an opinion by Justice Scalia held that "equitable relief" authorized by the Employee Retirement Income Security Act of 1974 (ERISA) does not include claims for specific performance or restitution seeking money for breach of contract.[2] Instead, the Court held that with respect to restitution, the term "equitable relief" includes only those restitutionary remedies which were historically available in courts of equity.[3] Using this definition, Justice Scalia narrowly classified as equitable restitution only those claims for an accounting for profits, equitable lien, or constructive trust that seek the return of specific funds held by the defendant.[4] None of these types of remedies was expressly sought by Great-West.[5] Instead, the insurance company simply enforced the subrogation clause of its contract with Knudson, the insured, to

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1. 534 U.S. 204 (2002).

2. *See id.* at 209–12. A civil action under ERISA may be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to *obtain other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3) (2000) (emphasis added).

3. *See Great-West Life*, 534 U.S. at 209–10. *But see* WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY 1–2 (Erwin N. Griswold et al. eds., 2d ed. 1956) (stating that equity is commonly defined as the system of jurisprudence originally administered by the High Court of Chancery in England, but arguing that such a definition invites inquiry rather than answers); PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA, 7–21 (1990) (discussing the question of "What is Equity?").

4. *See Great-West Life*, 534 U.S. at 213.

5. *See id.* at 204.

recover for medical bills paid by the insurance company but subsequently recouped by Knudson from a third-party tortfeasor.[6]

This Article levels two criticisms at the Court's holding in *Great-West Life*. The primary critique is that the Supreme Court distorted history and equity to reach its result on restitution. Historically, equitable restitution was not restricted to three types of formalistic claims seeking only the return of plaintiff's specific funds. To the contrary, equity was a flexible legal alternative that issued a variety of monetary remedies in order to address the failure of the hyper-formalist common law courts to redress wrongs.[7] Moreover, despite Justice Scalia's claim that the Court can easily distinguish between law and equity,[8] it is not a simple task to discern historical rules of equity. For example, with respect to restitution, there is significant overlap between the rules of equitable and legal restitution due to the parallel development of restitution historically in both courts of common law and equity in order to fill the gaps created by other remedies.[9] Moreover, the historical distinctions between equity and law have long been forgotten as it has been commonly assumed that the merger of law and equity obviated the need to distinguish the ancient remedial forms.[10] However, Justice

6. *See id.* In *Great-West Life*, a medical insurance company brought an ERISA action seeking reimbursement of $411,157 in benefits paid to Janet Knudson from a $650,000 settlement she obtained from Hyundai as compensation for the injuries she incurred as a result of its defective product. *See id.* at 207–08. Great-West's plan expressly required the beneficiary to reimburse the company out of any settlement proceeds obtained from third parties for injuries covered by the plan. *See id.* at 207–09.

7. *See* DE FUNIAK, *supra* note 3, at 5, 8 (noting that a growing worship of formalism and technicality began to obsess the courts of law leading to the gradual diminishment of the relief awarded to only pecuniary compensation in the nature of damages); *see also* George Burton Adams, *The Origin of English Equity (1916)*, *in* SELECTED ESSAYS ON EQUITY 1, 10–11 (Edward D. Re ed., 1955) (discussing the need for equity because common law became an inflexible system).

8. *See Great-West Life*, 534 U.S. at 210–11.

9. *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 384–92 (2d ed. 1993); *see also* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 529 (2d ed. 1994) [hereinafter LAYCOCK, MODERN AMERICAN REMEDIES]; Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1278 (1989) [hereinafter Laycock, *The Scope and Significance of Restitution*].

10. *See* Miss. Mills v. Cohn, 150 U.S. 202, 204–05 (1893) ("Though by it all differences in forms of action be abolished; though all remedies be

Scalia's return to the past in defining equitable relief resurrects the outdated distinctions between law and equity and makes them even more significant today. This Article does not attempt the Herculean task of detailing the history of equitable restitution. Instead, it suggests that the dearth of scholarship on historical equity creates a dangerous opportunity for courts, like the Supreme Court in *Great-West Life*, to issue decisions unguided by accurate knowledge, yet insulated from knowing challenge.

Accordingly, this Article's second criticism of *Great-West Life* is that the Court improperly interpreted modern remedial statutory language by historical reference.[11] This Article suggests that statutory language distinguishing legal and equitable remedies should instead be interpreted by the purpose of the remedy sought. Remedies generally are classified according to their purpose to compensate, punish, disgorge an unjust benefit, or prevent future harm.[12] A purpose test rather than a historical inquiry for defining "equitable relief" more easily delineates the available remedies and avoids the overly formalistic approach taken thus far by the Supreme Court.

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administered in a single action at law; and, so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the Federal court, sitting as a court of equity, remains unchanged.").

11. The dissenting Justices agreed. *See Great-West Life*, 534 U.S. at 233 (Ginsburg, J., dissenting) ("This Court's equation of 'equity' with the rigid application of rules frozen in a bygone era, I maintain, is thus, 'unjustifiabl[e]' . . . ."); *id.* at 222 (Stevens, J., dissenting) ("This does not mean, however, that all inquiries . . . must involve historical analysis . . . ."). For another view arguing that the *Great-West Life* decision was incorrectly reasoned, see Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 S.M.U. L. Rev. 1577, 1616–22 (2002) (arguing the Court incorrectly classified the relief requested as restitution, misread historical practice, and suggested that a claim for specific money in defendant's possession was always equitable restitution.)

12. *See* DOBBS, *supra* note 9, at 3–7; LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 3–5.

I. CONCEPTIONS OF EQUITABLE RESTITUTION BEFORE *GREAT-WEST LIFE*

A. A Brief History of Restitution

Restitution is commonly understood as a remedy that requires the disgorgement or return of the defendant's unjust benefit.[13] At its simplest level, it is a remedy that focuses on the defendant's gain in contrast to most other remedies that focus on the plaintiff's loss.[14] Yet restitution is more complex because it is both a theory of liability based on the unjust enrichment of the defendant, and a remedy for other liability theories requiring the stripping of defendant's gain.[15] This dual meaning of "restitution" is simply a feature of its development under the common law writ system in which the claim or writ designated the specific remedy. For example, if there is no contract upon which to base a claim for compensatory damages, restitution might provide a viable alternative basis of unjust enrichment upon which to seek the return of the defendant's gain. However, a request for a restitution remedy might also be based on a proven breach of contract claim.[16] Thus, restitution as a remedy can be used with a restitution liability theory or with a regular type of contract, tort, or property claim.[17]

Courts of common law and chancery both developed restitution theories in order to authorize relief that they otherwise were jurisdictionally prohibited from imposing. For example, courts of law developed theories like replevin to allow them to order the return of specific property rather than being limited to awarding a money judgment for lost property, and quasi contract to award damages

13. *See* DOBBS, *supra* note 9, at 4–5, 365–68; LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 523–25. "Disgorge" means to surrender unwillingly. AMERICAN HERITAGE DICTIONARY 533 (4th ed. 2000).

14. *See* DOBBS, *supra* note 9, at 368; LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 524.

15. *See* DOBBS, *supra* note 9, at 366; LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 523–25.

16. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 523, 553–54; *see, e.g.*, Snepp v. United States, 440 U.S. 507 (1980) (awarding restitution in the amount of defendant's profit for employee's breach of employment agreement pledging not to divulge classified CIA information).

17. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 523; ELAINE W. SHOBEN & WILLIAM MURRAY TABB, REMEDIES 770–71 (2d ed. 1995).

even in the absence of a breach of contract causing a compensable loss.[18] Similarly, courts of equity developed claims for constructive trust and equitable lien to permit them to award money through these fictionalized paths to recovery.[19] Thus, equity courts historically did award money despite the apparent jurisdictional prohibition.

For the most part, few distinctions between the historic legal and equitable restitution remain. The first *Restatement of Restitution* recharacterized historical practice into two groups: legal restitution was classified in part I of the *Restatement* as "quasi contract"[20] and equitable restitution was classified in part II of the *Restatement* as "constructive trust."[21] But the drafters advocated a generalized approach to restitution, viewing it as a holistic remedy applicable to all cases and characterized by its disgorgement of the defendant's gain.[22] American law students are commonly instructed in the leading Remedies textbooks that the forms of restitution—constructive trust, equitable lien, and quasi contract—are legal fictions rather than real claims.[23] There is no real contract in quasi contract, no real trust in constructive trust, and no real lien in equitable lien.[24] Thus, students and lawyers are told that the restitution devices are not meaningful, but rather are mere frameworks for legal arguments that must be made as long as courts are wedded to these antiquated terms.[25] The only relevant practical distinction between legal and equitable restitution is whether a jury trial is available.[26] The common working assumption and practice among lawyers is simply that restitution is an alternative remedy to compensatory damages or injunctive relief available in any type of

18. *See* DOBBS, *supra* note 9, at 383–90.

19. *See id.* at 391–413.

20. *See* RESTATEMENT OF RESTITUTION: QUASI CONTRACT AND CONSTRUCTIVE TRUSTS pt. 1 (1937).

21. *See id.* pt. 2.

22. *See id.* at Introduction.

23. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 526; SHOBEN & TABB, *supra* note 17, at 770.

24. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 529, 548–49; RESTATEMENT OF RESTITUTION § 160 cmt. a (distinguishing between constructive trust and express trust).

25. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 526.

26. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Discussion Draft 2000). For cases addressing the Seventh Amendment right to a jury trial for restitutionary remedies, see *infra* cases cited in note 58.

case. This was apparently the assumption upon which Great-West proceeded in its case, seeking the alternative remedies of specific performance or reimbursement of the defendant's gain for breach of the insurance contract.[27]

B. Justice Scalia's Precedent on the Law/Equity Distinction

Confusion and debate over equitable restitution have been percolating through the Supreme Court for the past decade. Scalia's reinvention of equity in *Great-West Life* is not new; it had its genesis fourteen years ago in his dissent in *Bowen v. Massachusetts*.[28] Justice Scalia comes full circle in *Great-West Life* and resurrects his dissenting opinion in *Bowen* with respect to the law/equity distinction and transforms it, with the switch of Justice O'Connor, into a binding precedent that effectively restates the law of restitution.[29]

Dissenting in *Bowen*, Justice Scalia created a distinction between legal and equitable relief that would have denied the restitutionary relief sought by the State in the case seeking reimbursement of Medicaid funds wrongfully retained by the federal government.[30] The applicable statute at issue in *Bowen* authorized remedies "other than money damages."[31] To interpret this remedial phrase, Justice Scalia divided remedies into two categories: damages and specific relief.[32] He stated that the line between these two categories "must surely be drawn on the basis of the substance of the

27. Great-West did not identify the specific form of this restitutionary claim until its briefing before the U.S. Supreme Court when it argued that its reimbursement claim constituted one of a multitude of restitution claims including constructive trust, equitable lien, and subrogation. *See infra* text accompanying note 85.

28. 487 U.S. 879, 913–30 (1988) (Scalia, J., dissenting).

29. Indeed, much of Justice Scalia's language in the *Great-West Life* opinion is taken verbatim from his dissenting opinion in *Bowen*. *Compare* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210–15 (2002), *with Bowen*, 487 U.S. at 915–19 (Scalia, J., dissenting) (containing same phrases).

30. *See Bowen*, 487 U.S. at 914–15 (Scalia, J., dissenting).

31. *See* Administrative Procedure Act, 5 U.S.C. § 702 (authorizing "action in a court of the United States seeking relief other than money damages").

32. *See Bowen*, 487 U.S. at 913–14 (Scalia, J., dissenting). Scalia defines specific relief as that relief which undoes or prevents harm. *See id.* at 914 (Scalia, J. dissenting).

claim, and not its mere form."[33] Where the substance of the claim was seeking payment of a sum of money, as was the claim in *Bowen*, Justice Scalia found it to be a request for damages.[34] The majority of six justices, however, disagreed, holding that a claim seeking reimbursement of unjustly retained benefits was a restitutionary remedy not precluded by the statute.[35] In addition, Justice Scalia further opined that in his view, "'restitution' in the judicial context commonly consists of money damages."[36]

Yet in *Mertens v. Hewitt Associates*,[37] Justice Scalia reversed this position, holding that restitution is a type of remedy typically found in equity.[38] In *Mertens*, Scalia commanded a bare majority of the Court to hold that "equitable relief" authorized by ERISA means only "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[39] He elaborates upon restitution and states that disgorgement of ill-gotten gains is the type of remedy falling within statutory authorizations of equitable relief.[40] In addition, he expressly rejects a statutory definition that would look closely to the pre-merger practice of courts of equity, arguing that such a statutory meaning is unlikely as "memories of the divided bench, and

33. *Id.* at 915 (Scalia, J., dissenting). He went on to explain, "one of the few clearly established principles is that the substance of the pleadings must prevail over their form." *Id.* at 916 (Scalia, J., dissenting).

34. *See id.* at 918 (Scalia, J., dissenting).

35. *See id.* at 893–94. Justice Scalia lamely attempts to distinguish the holding of *Bowen* in *Great-West Life* by characterizing it primarily as a request for injunctive relief to prevent withholding of benefits accompanied by a request for the return of specific monies. *See Great-West Life*, 534 U.S. at 212. *Bowen*, however, involved a similar type of reimbursement to that sought in *Great-West Life*, although the basis of the reimbursement was statutory rather than contractual. *See Bowen*, 487 U.S. at 893–94.

36. *Bowen*, 487 U.S. at 917 n.2.

37. 508 U.S. 248 (1993).

38. *See id.* at 256.

39. *Id.* Professor Laycock pointed out that this statement was inaccurate since mandamus was exclusively legal and restitution was available in both law and equity. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 7–8.

40. *See Mertens*, 508 U.S. at 260 ("even in its more limited sense, the 'equitable relief' awardable under [ERISA] includes restitution of ill-gotten plan assets or profits.").

familiarity with its technical refinements, recede further into the past."[41]

However, in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*,[42] Justice Scalia applied the test he had previously rejected in *Mertens*.[43] He looked to historical equity practice in order to deny the requested preliminary injunction freezing assets in a case seeking compensatory damages.[44] He reasoned that the form of requested relief—a preliminary injunction in a case of legal damages—was "unknown to traditional equity practice" in the English Courts of Chancery and thus was unavailable in federal court.[45] The federal courts, Scalia held, have authority to award only those judicial remedies devised and administered by the English chancery courts as of the time of the adoption of the U.S. Constitution.[46] He justified his modern reliance upon pre-merger practice by stating that "the merger [of law and equity] did not alter substantive rights."[47] Justice Scalia concluded that since the preliminary injunctive remedy is part of the substantive property right rather than a mere question of procedure, its historic form and usage must be preserved.[48]

The three contradictory strains of reasoning on the law/equity distinction developed in Justice Scalia's prior cases converge in his decision in *Great-West Life*, once again for the purpose of denying the requested relief.

41. *Id.* at 256.

42. 527 U.S. 308 (1999).

43. *See id.* at 333.

44. *See id.* (holding that "[b]ecause such a remedy was historically unavailable from a court of equity," the district court had no authority to issue the preliminary injunction); *see also* Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250, 252 (2000) (relying upon the common law of trusts and common-law remedial principles to hold that restitution claim under ERISA was equitable relief); Tull v. United States, 481 U.S. 412, 427–28 (1987) (Scalia, J., concurring and dissenting in part) (agreeing with majority that determining the legal or equitable nature of a claim should be based upon historical practice).

45. *See Grupo Mexicano*, 527 U.S. at 328–33.

46. *See id.* at 318–24.

47. *Id.* at 322.

48. *See id.* at 322–23; *see also id.* at 318 n.3 (declining to consider for the first time on appeal the claim that the availability of the injunction should be determined as a substantive rule under state and not federal law).

II. JUSTICE SCALIA'S REINVENTION OF RESTITUTION

A. The Great-West Life *Definition of Equitable Relief*

Justice Scalia begins his reinvention of restitution in *Great-West Life* with his signature statutory interpretation tenets,[49] holding at the outset that the statutory term "equitable relief" indicates Congress's intent to limit the availability of remedies under the statute since it provided only for equitable rather than all relief.[50] Using his remedial dichotomy from *Bowen* of categorizing all remedies as either damages or specific relief, Scalia quickly equates equitable with specific relief and then concludes that the restitutionary monetary relief sought by Great-West constitutes damages.[51] However, Scalia does not end his analysis there, perhaps recognizing as he did in *Bowen* that it can be argued that restitution constitutes a request for the return of specific funds.[52]

Justice Scalia then adds an additional layer of analysis by resorting to the *Mertens* standard of defining equitable relief as that which is "typically available" in equity. Scalia argues that a *Bowen*-type substance test standing alone without reference to the conditions that equity typically attached to the provision of remedies, logically

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49. *See* 534 U.S. 204, 209, 212–13 (2002); *see, e.g.*, Justice Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581 (1990) (discussing his "intense dislike" for the "oft-repeated statement[]" that "remedial statutes are to be liberally construed"); Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing general rule of law versus personal discretion to do justice); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (describing Justice Scalia's statutory interpretation as new, despite the Justice's claim to be returning to a traditional, nineteenth century approach to interpretation, because his theory incorporates the intellectual inspirations of public choice theory, strict separation of powers, and ideological conservatism).

50. *Cf.* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 696 (2001) ("[W]here Congress has created the statutory right it may also create the statutory remedy.").

51. *See Great-West Life*, 534 U.S. at 210, 216.

52. *See id.* at 216. He acknowledged in *Bowen* that a claim for restitution could precisely fit a description of a suit for money damages, because it seeks money, but could also fit a general description of a suit for specific relief "since the award of money undoes a loss by giving respondent the very thing (money) to which he was legally entitled." Bowen v. Massachusetts, 487 U.S. 879, 918 (1988) (Scalia, J., dissenting).

leads to the untenable conclusion of authorizing equitable relief that was never permitted at common law, thereby rendering the statutory limitation of relief meaningless.[53] Accordingly, Scalia in *Great-West Life* amends his *Mertens* standard to determine the typical availability of remedies not by general category, but rather by formal, claim-specific qualifications that he alleges existed in pre-merger days.[54]

This reliance upon ancient equitable devices and historical practice integrates Scalia's reasoning from *Grupo Mexicano* and similarly portrays the fictional remedial devices as substantive rights. Just as in *Grupo Mexicano*, Justice Scalia looks to historical practice of England in the eighteenth century to determine the nature and requirements of modern equitable relief.[55] By using the cases of *Bowen*, *Mertens*, and *Grupo Mexicano* in combination, Justice Scalia is able to accomplish a 180-degree shift in the Court's jurisprudence by converting his lone dissent in *Bowen* into a binding decision.

In *Great-West Life*, Justice Scalia then translates these general principles of jurisprudence into a more precise standard for discerning the historical parameters of equitable restitution.[56] He defines equitable restitution by 1) the request for specific relief rather than money,[57] 2) the historical nature of the attendant cause of action as equitable,[58] and 3) the formalistic conditions restricting the award

53. *See Great-West Life*, 534 U.S. at 216.

54. *See id.* at 216–17. This elaboration of the word "typical" seems to conflate the questions of remedy characterization and qualification, even though the statute expressly provides separate words for each concept—i.e., whether other "equitable" relief is "appropriate." *See* 29 U.S.C. § 1132(a)(3)(B) (2000).

55. *See Great-West Life*, 534 U.S. at 212–14.

56. *See id.* at 210–20. The Court uses the same three factors to reject Great-West's alternate claim for equitable relief seeking specific performance of the reimbursement clause. Justice Scalia finds first that the substance of the request is simply money and thus constitutes damages. Second, that the irreparable injury standard disqualified such requests for performance of a contract when legal damages were adequate. And third, that this form of specific performance was not available in pre-merger courts of equity. *See id.*

57. *See id*. at 214 ("[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.").

58. *See id*. at 216. The Court has used the historical nature of the claim to guide it in its determination of whether a case is one at common law which requires a jury trial under the Seventh Amendment. In these Seventh Amendment cases, the Court examines both the nature of the action and the

of such relief.[59] Justice Scalia readily admits that Supreme Court cases "have not previously drawn this fine distinction between restitution at law and restitution in equity."[60] However, he uses these distinguishing factors to conclude that equitable restitution only includes claims for constructive trust, equitable lien, or accounting for profits, which expressly seek the return of specific funds or property belonging to the plaintiff now in the defendant's possession.[61] Thus, a five-justice majority of the Court concludes that Great-West's request for the imposition of personal liability upon Knudson for a contractual obligation to pay money is legal relief precluded by the federal statute.[62]

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remedy sought. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998); Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990) (stating the second inquiry regarding the nature of the remedy is more important in the analysis); Tull v. United States, 481 U.S. 412, 417–18 (1987). Interestingly, the Court seemed to say in the case of *Dairy Queen v. Wood*, 369 U.S. 469 (1962), that the Constitution required federal courts to grant a jury trial whenever the claim was one for money even though the claim was for accounting for profits. *See* DOBBS, *supra* note 9, at 413. For an in depth discussion of these and other related cases, see Murphy, *supra* note 11, at 1623–28.

59. *See Great-West Life*, 534 U.S. at 214, 216. Similarly, the Court in its opinion in *Great-West Life*, addressing the plaintiff's claim for specific performance, denies such relief holding that the condition of the irreparable injury rule at common law precluded such equitable relief where legal relief was adequate. *See id.* at 212–13. However, commentators have explained that this irreparable injury rule is in fact dead in our modern times, posing no impediment to the award of equitable relief. *See* LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 356–59; Laycock, *The Scope and Significance of Restitution*, *supra* note 9, at 1278.

60. *Great-West Life*, 534 U.S. at 214–15.

61. "[F]or restitution to lie in equity, the action generally must seek . . . to restore to the plaintiff particular funds or property in the defendant's possession." *Id*. at 214. In *Bowen*, Scalia defined specific relief as that which "prevents or undoes the loss." *Bowen*, 487 U.S. at 914 (Scalia, J., dissenting). His definition in *Great-West Life* of specific relief, perhaps intentionally, omits this broader concept of undoing the harm or restoration of the status quo ante, which arguably is what Great-West sought. *See Great-West Life*, 534 U.S. at 214.

62. *See Great-West Life*, 534 U.S. at 220–21. "A claim for money due and owing under a contract is 'quintessentially an action at law.'" *Id.* at 210 (quoting Wal-Mart Stores, Inc. v. Wells, 213 F.3d 398, 401 (7th Cir. 2000)). "Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied)." *Id.* at 213.

B. Justice Scalia's Misguided Approach to Equitable Relief

Justice Scalia's opinion, allegedly based upon historical practice, is mistaken in several respects, casting doubt upon the validity of the Court's holding. The majority opinion in *Great-West Life* alters the historical record of equitable restitution in several respects and blatantly contradicts controlling Supreme Court precedent in its rush to narrow the availability of equitable relief in federal court.

First, Justice Scalia has improperly categorized the historical forms of equitable restitution. He includes accounting for profits, which is seemingly disqualified under the *Great-West Life* tripartite test due to its legal nature and monetary form.[63] Indeed, Scalia acknowledges in *Great-West Life* that the accounting for profits device fails to satisfy his rule mandating specific relief, but he nevertheless includes it as a "limited exception."[64] The retention of the accounting for profits remedy within Justice Scalia's definition is significant, as it has been recently argued that the accounting remedy is an easy way to obtain monetary relief for breach of contract measured by the defendant's gain.[65]

Second, Justice Scalia's inclusion of the equitable lien contradicts the Court's unanimous decision just three years before in the little-noticed case of *Department of the Army v. Blue Fox, Inc*.[66] In *Blue Fox*, the Court held that a claim for an equitable lien to obtain monies owed to a government subcontractor was simply one for legal damages not authorized by the federal statute.[67] In this respect, *Blue Fox* is consistent with Scalia's first factor of discerning equitable relief that hones in on the monetary form of the remedy sought. However, the *Blue Fox* Court refused to place any

63. *See* 3 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 1420 (1881) (noting that the action of accounting was "one of the most ancient actions known to the common law," but that limited suits for an accounting were available in equity when the legal remedy was inadequate).

64. *Great-West Life*, 534 U.S. at 214 n.2; *cf.* Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940) (awarding a remedy of accounting for profits without constructive trust).

65. *See* Sam Doyle & David Wright, *Restitutionary Damages—The Unnecessary Remedy?*, 25 MELB. U. L. REV. 1, 9 (2001).

66. 525 U.S. 255 (1999).

67. *See id.* at 264–65.

significance on the formal device pled, emphasizing that what is important is the "*real* remedy, the final object of the proceeding, the pecuniary recovery"[68] rather than the form of the remedy, which is "merely a means to the end of satisfying a claim for the recovery of money."[69] The *Blue Fox* Court concluded that the equitable lien was not specific relief: "equitable liens by their nature constitute substitute or compensatory relief rather than specific relief" because they do not give the plaintiff the very thing to which he is entitled, but merely grant a security interest in the property to satisfy a money claim.[70]

In contrast, Justice Scalia in *Great-West Life* relies heavily upon the particular claim pled to define equity. Thus Scalia concludes, contrary to *Blue Fox*, that an equitable lien is an equitable remedy. Scalia may have the better argument, as an equitable lien is a classic equitable restitution remedy exclusively available in courts of equity.[71] A decree establishing and enforcing an equitable lien upon property is a purely equitable remedy that results in personal liability against the defendant to pay a monetary sum.[72] However, the *Great-West Life* opinion makes no attempt to distinguish *Blue Fox* or explain if its three-part analysis of equitable relief trumps the pecuniary object test of *Blue Fox*.

Moreover, Justice Scalia is wrong that monetary awards are never equitable. Justice Scalia adamantly reiterates several times throughout his opinion that a suit for money simply is not an action for equitable relief.[73] His assumption that courts of equity could not

68. *Id.* at 263 (quoting 1 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 112 (5th ed. 1941)).

69. *Id.* at 262.

70. *Id*. Here the Court quotes Professor Laycock's characterization of the equitable lien as "a hybrid, granting a money judgment and securing its collection with a lien on the specific thing." *Id.* at 263 (quoting Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1290 (1989)).

71. *See* DOBBS, *supra* note 9, at 391 (listing the classic equitable restitution remedies developed by the courts of equity as the constructive trust, the equitable lien, subrogation, and accounting for profits); *see also* 3 POMEROY, *supra* note 63, §§ 1296, 1413.

72. RESTATEMENT OF RESTITUTION, pt. II, Introductory Note & § 161 cmt. a, b; 3 POMEROY, *supra* note 63, § 1413.

73. "'Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied."

award pecuniary remedies imposing personal liability upon defendants does not comport with historical accounts of equitable practice. Pomeroy provides one of the best explanations of the remedies available in courts of equity:

> § 1296. Effects of Contracts in General. . . . Where a contract stipulates merely for personal acts to be done or omitted, the equitable and the legal notions as to its effects are the same; the resulting rights are strictly personal in equity as well as at law. Where an executory contract deals with or relates to property, real or personal, as its subject matter, its operation in equity may be the same as at law; under proper circumstances courts of equity may treat the resulting rights and obligations as purely personal. [N1]
>
> N1. That is, an executory contract relating to money or to other property, may, in equity, as at law, be treated as imposing only the personal obligation of ordinary indebtedness, as creating only the personal right to a pecuniary payment, and as enforced only by the recovery of a general pecuniary judgment. This purely legal aspect of contracts is, however, very uncommon. In almost all cases where there is a personal indebtedness, and a pecuniary recovery, as in suits for an accounting, and the like, the ultimate remedy is made more efficient by the notion of some equitable interest, lien, or charge, or some trust, attaching to specific funds of money, or of securities, by which the actual relief consists in reaching and appropriating such specific fund or other form of property.[74]

Great-West Life, 534 U.S. at 210 (quoting Bowen v. Massachusetts, 487 U.S. 879, 918–19 (1988) (Scalia, J., dissenting)). Equitable restitution does not include actions that seek to impose "'personal liability upon the defendant to pay a sum of money'." *Id.* at 213 (quoting RESTATEMENT OF RESTITUTION § 160 cmt. a). "Because petitioners are seeking legal relief—the imposition of personal liability on respondents for a contractual obligation to pay money—§ 502(a)(3) does not authorize this action." *Id.* at 221.

74. 3 POMEROY, *supra* note 63, § 1296.

Courts of equity possessed both concurrent and exclusive jurisdiction.[75] Concurrent jurisdiction included those remedies available in both courts of equity and courts of common law. Equity courts had the ability to award remedies for pecuniary recovery for violations of rights recognized in courts of common law.[76] As Pomeroy explained:

> The remedies composing this group belong to the concurrent jurisdiction of equity; since the final reliefs are the same in form and substance, as that granted, under like circumstances, by a judgment at law—a general pecuniary recovery; and since the primary rights and interests of the parties are generally recognized and protected by the law.[77]

Examples of remedies available under equity's concurrent jurisdiction include accounting for profits, subrogation, and contribution. Exclusive jurisdiction encompassed those remedies that were available only in courts of equity: "They are all purely equitable, and therefore belong to the exclusive jurisdiction; because although the *final* relief is pecuniary, and so resembles the ordinary relief at law, it is obtained through preliminary proceedings, forming a part of the judgment, which belong solely to the procedure and jurisdiction of equity."[78]

The key distinction and advantage of equitable monetary remedies was that equity converted an otherwise general pecuniary judgment into a personal command to the defendant to pay.[79] This personal command was backed by the court's contempt power and

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75. *See* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 61–62 (1936). Courts of equity also possessed auxiliary jurisdiction allowing them to issue remedies in aid of their jurisdiction, such as discovery requests and depositions.

76. As McClintock described in his treatise on equity, concurrent jurisdiction includes all cases where the court of equity grants relief for the protection of common law rights because the common law remedies for the protection of those rights are not adequate. The primary or original substantive right of the plaintiff is a legal right, but the secondary or remedial right given by the court of common law does not afford adequate remedy. *See id.* at 61.

77. 3 POMEROY, *supra* note 63, § 1416.

78. *Id.* § 1413.

79. *See* DE FUNIAK, *supra* note 3, at 12; DOBBS, *supra* note 9, at 54; Leonard J. Emmerglick, *A Century of the New Equity (1945)*, *in* SELECTED ESSAYS ON EQUITY 53, 55 (Edward D. Re ed., 1955) (stating that a judgment of a common-law court creates rights in the plaintiff whereas a decree in equity operating in personam imposes duties upon the defendant).

thus made enforcement of the remedy more effective and efficient.[80] The Supreme Court in *Great-West Life* has redefined the legal meaning of "equitable relief" more narrowly than the actual remedial practice of the equity courts. The Supreme Court has now limited authorizations of equitable relief to only those remedies exclusively available in courts of equity to remedy equitable rather than legal wrongs.[81]

Justice Scalia then holds that Great-West failed to satisfy the formal requirements of a claim for equitable restitution.[82] Great-West initially pled its case as one for injunctive and declaratory relief.[83] Indeed, it was not until briefing to the Supreme Court, triggered by a reference in the Ninth Circuit's opinion denying it relief,[84] that Great-West (and the Solicitor General's office) argued that the claim for reimbursement under the contract constituted one of several restitution devices including constructive trust or equitable lien.[85] Rather than adopting the modern view of a constructive trust

80. The ancient maxim was the "equity acts in personam." DE FUNIAK, *supra* note 3, at 11–12.

81. *But see* MCCLINTOCK, *supra* note 75, at 61 (describing equity's distinguishing characteristics of the kinds of relief given and the methods by which such relief is administered that can be exercised in almost any of the various fields of law).

82. *See Great-West Life*, 534 U.S. at 214.

83. *See id.* at 208–09; Brief for the United States as Amicus Curiae Supporting Petitioners, *Great-West Life* (No. 99-1786), *available at* 2001 WL 506039, at *11 (July 29, 2001) [hereinafter Brief for Solicitor General].

84. The Ninth Circuit conclusively held that Great-West's claim for reimbursement payments made pursuant to an insurance plan was not equitable relief based upon its prior decision in *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1262 (9th Cir. 1997). *See* Great-West Life & Annuity Ins. Co. v. Knudson, 208 F.3d 221 (9th Cir. 2000). In *Owens*, the Ninth Circuit held that relief is not equitable when the substance of the claim is money. *See* 122 F.3d at 1261. It further held that reimbursement for insurance payments from settlement proceeds received from a third-party tortfeasor could not be justified as either subrogation, general restitution, or constructive trust. *See id.* at 1259–61. The Ninth Circuit's decision in *Great-West Life* was defended neither by the victorious plaintiff in the case nor the Solicitor General, but rather by an attorney appointed specially by the Supreme Court whose brief influenced much of Justice Scalia's opinion. *See generally* Brief of Amicus Curiae in Support of the Judgment Below By Invitation of the Court, *Great-West Life* (No. 99-1786), *available at* 2001 WL 740878 (briefing by attorney Richard Taranto).

85. *See* Brief for Petitioners, *Great-West Life* (No. 99-1786), *available at* 2001 WL 506021, at *33, *41, *44 (noting that other federal courts of appeal

as an implied fiction imposed to facilitate recovery of money,[86] Justice Scalia views the constructive trust as a substantive claim which must fit the real facts.[87] Thus, the Court insists upon rigid conformance to the requisite elements required for a claim of constructive trust. Justice Scalia then easily concludes that Great-West cannot make out a claim for constructive trust. He finds that Great-West is not making a claim for the return of particular funds it previously owned, nor seeking the return of its funds from the defendant, since the settlement monies were distributed to a special needs trust, the attorney, and Medi-Cal.[88]

Yet the Supreme Court recently held in *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*,[89] that a constructive trust remedy is appropriate equitable relief where funds are in the possession of a third party.[90] Indeed, Judge Posner, whom Justice

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have appropriately characterized the plan reimbursement provision as one for restitution, constructive trust, and equitable lien); Brief for Solicitor General, *supra* note 83, at *17–19 (Great-West's reimbursement claim may be properly characterized as one for restitution, constructive trust, or equitable lien and perhaps subrogation).

86. *See* RESTATEMENT OF RESTITUTION § 160 (describing constructive trust as a remedy to prevent unjust enrichment and cautioning against conceptualizing it as a real trust involving fiduciary duties and holding of title); LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 526.

87. *Cf.* Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 322 (1999) (holding that courts must look to availability of equitable remedies in pre-merger times because merger did not change substantive rights); Thomas, *supra* note 50, at 687–95 (arguing that remedies are substantive rather than procedural rights because they give life to otherwise inert guarantees).

88. *See Great-West Life*, 534 U.S. at 212–15. However, Justice Ginsburg in dissent easily found that Great-West established a cause of action for specific relief:

> That Great-West requests restitution is beyond dispute. The relief would operate to transfer from the Knudsons funds over which Great-West claims to be the rightful owner . . . Great-West alleges that the Knudsons would be unjustly enriched if permitted to retain the funds . . . And Great-West sued to recover an amount representing the Knudsons' unjust gain, rather than Great-West's loss.

Id. at 229 (Ginsburg, J., dissenting).

89. 530 U.S. 238 (2000).

90. *See id.* at 250 (using constructive trust theory, a plaintiff may "maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom"); *id.* at 251 (court of equity has jurisdiction in a constructive trust action to "reach the property either in the

Scalia quotes at length in his opinion as supporting his reinvention theories, reached the opposite conclusion in *Wal-Mart Stores, Inc. Associates Health & Welfare Plan v. Wells*,[91] and held that a constructive trust was an appropriate remedy when imposed to reimburse funds to an insurance company from a settlement that were in the possession of a third party, the defendant's attorney, as they were in *Great-West Life*.[92] These interpretative differences seem to demonstrate Justice Ginsburg's point in her dissent in *Great-West Life* that the qualification rules for these antiquated restitution devices, such as the constructive trust, are in conflict, thus contributing to the unworkability of Justice Scalia's test.[93]

One missing link in the *Great-West Life* decision is a discussion of subrogation. Most business and legal practitioners would classify this case as one for subrogation.[94] Under subrogation, an innocent third party, here the insurance company, steps into the shoes of the plaintiff, Knudson, for purposes of recovering monies paid to the plaintiff by a third-party wrongdoer, Hyundai.[95] There is some disagreement as to whether the reimbursement type of subrogation, in which the insurer sues the insured, is the same as traditional subrogation under which the insurer sues the third party.[96] And

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hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust.") (quoting 2 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 1053 (1886)).

91. 213 F.3d 398 (7th Cir. 2000).

92. *See id.* at 401; *see also* Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999) (insurance company seeking reimbursement from settlement proceeds is not seeking "damages, or indeed any form of payment," but rather is seeking the imposition of a constructive trust on the plan beneficiary's claim to the money).

93. *See Great-West Life*, 534 U.S. at 231–32 (Ginsberg, J., dissenting).

94. *See Supreme Court Decision Highlights Third-Party Dangers for Health Plans*, BEST'S INS. NEWS, Mar. 8, 2002, *available at* 2002 WL 4524508 (quoting Bryan Davenport's statement that "[a]lthough the court did not mention subrogation in its decision, this case has everything to do with subrogation . . . .").

95. *See* DE FUNIAK, *supra* note 3, at 239; DOBBS, *supra* note 9, at 404.

96. *See, e.g.*, FMC Corp. v. Holliday, 498 U.S. 52 (1990) (treating insurance company's suit for reimbursement of medical expenses from third-party tortfeasor suit as subrogation); Lisa N. Bleed, Comment, *Enforcing Subrogation Provisions As "Appropriate Equitable Relief" Under ERISA Section 502(a)(3)*, 35 U.S.F. L. REV. 727, 731–32 (2001) (distinguishing "traditional" subrogation from "reimbursement-type" subrogation). *But see*

perhaps this explains the Court's inclination that the suit here was merely one for breach of contract rather than subrogation as against a third party.[97] But the more problematic aspect of viewing this case as one for subrogation is that historically, subrogation was available in both law and equity.[98] So although the Supreme Court has recognized subrogation as an equitable remedy,[99] perhaps its dual availability in courts of law and equity exclude it from Justice Scalia's redefinition of restitution.[100] The ultimate effect of Justice Scalia's decision in *Great-West Life* is to limit modern courts to awarding only those remedies that were exclusively awarded by courts of chancery. In so doing, he has converted a unique enforcement mechanism available in equity into a required element of recovery.

The combined rule of *Great-West Life* and *Blue Fox* is that the Supreme Court now distinguishes legal from equitable remedies based on the monetary nature of such relief rather than the working categorization of legal and equitable relief. In the Court's view as seen in *Blue Fox* and *Great-West Life*, money constitutes a legal remedy substituting for the actual loss regardless of whether the claim for money is framed as one for equitable lien, specific

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Brief for Solicitor General, *supra* note 83, at *19 (arguing that subrogation and reimbursement differ only procedurally in that for subrogation the insurer proceeds against the third-party tortfeasor whereas under reimbursement it proceeds against the insured, but both have similar justifications to prevent unjust enrichment and both have similar substantive effects of preventing double recovery).

97. *But see Great-West Life*, 534 U.S. at 220 (suggesting without opinion that there may have been other means for Great-West to obtain the equitable relief they sought by suing the attorney and Special Needs Trust which held the settlement funds won by Knudson).

98. *See, e.g.*, American Nat'l Bank & Trust Co. v. Weyerhaeuser Co., 692 F.2d 455, 460 n.12 (7th Cir. 1982) (describing legal subrogation as grounded in equity and conventional subrogation as grounded in contract); DE FUNIAK, *supra* note 3, at 239 (distinguishing contractual subrogation based on an agreement from subrogation arising from equitable origin).

99. *See* United States v. California, 507 U.S. 746, 757–58 (1993) (holding that subrogation is equitable action); *see also* DOBBS, *supra* note 9, at 391 (identifying subrogation as one of the four classic equitable restitution remedies).

100. *See* Hotel & Rest. & Bar Employees v. Truong, 27 Empl. Ben. Cas. 1657, 2002 WL 171725 (D. Minn. 2002) (deciding after *Great-West Life* that medical insurer's subrogation claim seeking reimbursement from insured was merely monetary relief that was not "equitable relief" authorized by ERISA).

performance, or restitution. The practical effect of Justice Scalia's equity jurisprudence culminating in *Great-West Life* is that statutory authorizations of equitable relief or relief "other than money damages" become restrictions rather than authorizations of broad remedies or "catchall remedial provisions" as described by the Supreme Court in *Varity Corp. v. Howe*.[101] Historically, "equitable" was not a significant obstacle to relief in the courts. But Justice Scalia has reversed that pattern to convert the flexible remedy of equity into a narrow, rarely-occurring award.[102] That is a pattern seen in Justice Scalia's other opinions on equity and which casts some jurisprudential light upon his possible motivations in reinventing restitution: for all seek to restrict the availability of equitable relief in federal court.[103]

III. REMEDIAL PURPOSE AS THE INTERPRETIVE KEY

The downfall of Justice Scalia's approach in *Great-West Life* was his reliance upon inaccessible historical practice to interpret modern statutory language. As Justices Stevens and Ginsburg argued in dissent, "it is fanciful to assume that in 1974 Congress intended to revive the obsolete distinctions between law and equity as a basis for defining the remedies available in federal court."[104] Indeed Justice Scalia himself in *Mertens* rejected such reliance upon historical practice to define "equitable relief" finding that such a legislative definition was unlikely "[a]s memories of the divided bench, and familiarity with its technical refinements, recede further into the past."[105]

101. 516 U.S. 489, 510–11 (1996).

102. *See* Kishter v. Principal Life Ins. Co., 186 F. Supp. 2d 438, 443–46 (S.D.N.Y. 2002).

103. *See* discussion *supra* at Part I.B (discussing Justice Scalia's other decisions on equity); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of* Bush v. Gore, 11 WM. & MARY BILL RTS. J. (forthcoming Fall 2002) (manuscript at 62–63, on file with author) (discussing Justice Scalia's opinions criticizing structural and prophylactic injunctive relief).

104. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 221–22 (2002) (Stevens, J., dissenting).

105. Mertens v. Hewitt Assoc., 508 U.S. 248, 256 (1993).

It seems that a better approach would be to distinguish equitable remedies from those at law based upon their intended purpose.[106] If a remedy seeks to obtain money for plaintiff's loss, it is damages. If a remedy seeks to obtain money for a defendant's benefit, it is restitution. If a remedy seeks to obtain money by performance of the contract, it is an injunction. Not all money constitutes damages.[107] Money can be used to satisfy a variety of purposes: compensate for loss (compensatory damages), punish reprehensible behavior (punitive damages), coerce specific acts (civil contempt), or disgorge unjust benefit (restitution). Focusing on the purpose or goal of the remedy rather than on the superficial form of the relief would better preserve remedial rights of plaintiffs and keep the power of courts intact to remedy wrongs.[108]

Glimmers of a purpose-determinative test appear in the Court's prior cases. While the Court's reasoning in *Blue Fox* focuses on the specific device and the monetary nature of the relief, its conclusion refers to the ultimate purpose of the remedy sought.[109] It concludes that the subcontractor's request for money constituted damages because the remedy's *goal* was compensation for the plaintiff's loss under the contract.[110] Thus, it was the compensatory purpose, not the monetary form that was determinative of the nature of the remedy.

Furthermore, the purpose-determinative test serves the gate-keeping function of blocking inappropriate claims that is seemingly

106. *See* Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 571 n.8 (1990) (the analysis of the nature of a remedy should not replicate the "abstruse historical inquiry" into a comparison of remedies in the courts of England prior to the merger of the courts of law and equity, but rather "requires consideration of the general types of relief provided by courts of law and equity.").

107. Justice Scalia states in *Bowen v. Massachusetts* that "'money damages' is something of a redundancy." 487 U.S. 879, 914 (1988). That is true with respect to damages, for all damages are money, but not with respect to money for not all money is damages, as the *Bowen* majority held. *See id.* at 893 ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"); *see also Chauffeurs*, 494 U.S. at 570 ("This Court has not, however, held that any award of monetary relief must *necessarily* be 'legal' relief.").

108. *Cf.* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477–78 (stating that the constitutional right to jury trial in suits at common law "cannot be made to depend upon the choice of words used in the pleadings.").

109. *See* Dept. of Army v. Blue Fox, Inc., 525 U.S. 255, 263 (1999).

110. *See id.*

important to the Court. For example, the AARP in its amicus brief in *Great-West Life* argued that "[q]uite simply, make-whole relief should be the meaning of 'appropriate equitable relief.'"[111] But a remedy that makes the *plaintiff* whole is focused on the goal of compensating for the plaintiff's loss, not ensuring that the defendant's gain is disgorged or that the defendant is returned to his rightful position.[112] The purpose-determinative test would prevent the restitution remedy from expanding to include every remedial purpose.

As applied in *Great-West Life*, the purpose-determinative test would ask what goal Great-West is seeking to further by its request for $411,000. A restitution purpose would require Great-West to seek to disgorge the unjust benefit obtained by Knudson. Arguably, as Justice Ginsburg stated in dissent, the unjust benefit was Knudson's retention of double payments for her medical injuries from both the insurance company and the settlement, resulting in a windfall to her that goes beyond compensation for her loss.[113] Justice Scalia himself, when sitting as a judge on the D.C. Circuit, found that such retention of double payments from an insurer and settlement constitutes the kind of unjust enrichment that restitution is designed to prevent.[114] The problem for Great-West was that it was not in fact seeking disgorgement of the double payments. Knudson's settlement funds were primarily for future medical expenses that had not yet been paid and for attorney fees necessary to litigate the difficult case. The only double recovery, as the state court found, was the $13,828 of the settlement allocated to past medical bills.

Instead, the $411,000 sought was the amount of loss that Great-West arguably suffered under the contract breached by Knudson.[115]

111. Brief of AARP in Support of Neither Party, *Great-West Life* (No. 99-1786), *available at* 2001 WL 476084, at *2; *see also* Petitioners' Reply Brief, *Mertens* (No. 91-1671), *available at* 1993 WL 289713, at *6–7 (arguing that equitable relief includes "make-whole" relief to compensate for losses).

112. *See, e.g.*, Mertens v. Hewitt Assoc., 948 F.2d 607, 612 (9th Cir. 1991) (finding no claim for restitution under ERISA where defendant had no benefit or gain and where plaintiffs sought money for their own losses).

113. *See Great-West Life*, 534 U.S. at 229 (Ginsberg, J., dissenting).

114. *See* Carter v. Dir., Office of Workers' Comp. Programs, 751 F.2d 1398 (D.C. Cir. 1985) (discussing the double recovery problem and equitable principles of subrogation to avoid such double recovery).

115. Alternatively, Great-West could have argued that the $411,000 was a restitution measure of rescission in which it sought to undo the contract

Justice Scalia seems to intimate this in several places throughout the opinion by referring to the fact that Great-West is only suing for breach of contract and that it seeks merely payment for monies due under that contract.[116] However, it is not the monetary form of the relief that renders it damages, but rather its compensatory purpose. Money cannot be a proxy for compensation.

One court following the *Great-West Life* decision appeared to make this type of purpose inquiry. In *Kishter v. Principal Life Insurance*,[117] an executor of an estate sought payment of $270,000 due under a life insurance policy that was not paid allegedly because of fraud in failing to tell the worker that she was no longer covered by the policy.[118] After going through the precise analysis the *Great-West Life* decision mandates, the court focused on the ultimate purpose of the request.[119] All the plaintiff sought, said the court, was money for the damage and loss he had suffered from the legal wrong.[120] Thus it was the compensatory purpose of the relief, not its monetary form that determined the legal nature of the claim.

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The *Great-West Life* decision, read in context of some of the Supreme Court's recent precedents and Justice Scalia's equity decisions, signals a shift toward a narrowing of available equitable relief. The practical result of Justice Scalia's reinvention of restitution is that it severely curtails the available remedies under ERISA and seventy-seven other federal statutes that similarly authorize equitable relief.[121] The irony of Justice Scalia's definition,

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because of Knudson's substantial breach, and be returned to its status quo ante with the return of all benefits conferred upon Knudson. *See, e.g.*, Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) (ordering rescission of contracts for oil drilling due to government's failure to grant exploration permission and restitution of all contract payments).

116. *See Great-West Life*, 534 U.S. at 210–12.

117. 186 F. Supp. 2d 438 (S.D.N.Y. 2002).

118. *See id.* at 439.

119. *See id.* at 444–46.

120. *See id.* at 446.

121. *See Great-West Life*, 534 U.S. at 217 n.3 (noting that the term "equitable relief" appears in seventy-seven provisions in the United States Code). However, Great-West's counsel in the case disagrees that the case had a narrowing effect. He stated that Great-West is happy with the logic the Court used to reach its decision: "It's a narrow opinion that leaves most of the remedies still available to the plan." Allison Bell, *High Court: ERISA Limits*

however, is that restitution was invented historically to allow courts of equity to award money—a remedy that they otherwise were prohibited from awarding because of the jurisdictional turf battle with the courts of common law.[122] Thus, the classic equitable restitutionary forms, while framed in terms of qualifying rules that sound like specific relief, are nothing more than a guise in which to award money. As the Court in *Blue Fox* noted, the restitution form is merely a means to the end of awarding money.[123] Thus, Justice Scalia's insistence upon prohibiting monetary awards of restitution, unless qualifying under the guise of a constructive trust, will do nothing more than foster the kind of "lawyerly inventiveness" Justice Scalia condemns in order to obtain relief under many federal statutes.[124]

Suits by Plans, NAT'L UNDERWRITER LIFE & HEALTH-FIN. SERVICES EDITION, Jan. 28, 2002, *available at* 2002 WL 9934900; *see, e.g.*, Great-West Life v. Brown, 192 F. Supp. 2d 1376 (M.D. Ga. 2002) (granting "restitution in equity" in ERISA action where insurer sought to recover for medical benefits from funds received by plan beneficiary from recovery in third-party tort suit where settlement funds were placed in escrow pending litigation).

122. *See* DOBBS, *supra* note 9, at 48–49, 54; LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 9, at 548–49.

123. *See* 525 U.S. 255, 262 (1999).

124. *See Great-West Life*, 534 U.S. at 211 n.1.