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What Happened to Unjust Enrichment in California - The Deterioration of Equity in the California Courts

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WHAT HAPPENED TO UNJUST ENRICHMENT IN CALIFORNIA? THE DETERIORATION OF EQUITY IN THE CALIFORNIA COURTS

*Douglas L. Johnson & Neville L. Johnson**

Under common law, the principles of equity have always demanded the recognition of the right of individuals to seek recovery under the theory of unjust enrichment. Recovery under this doctrine is so deeply embedded into Western Society that it continues to be a core element in legal education and is codified in the Restatement Third of Contracts. Despite this rich tradition, an alarming divergence in decisions among California courts is deteriorating unjust enrichment as an independent cause-of-action, leaving many Californians who have been taken advantage of, unprotected. This Article examines the historical underpinnings of unjust enrichment and the confusion among California courts surrounding the doctrine. To resolve this confusion and provide a fair sense of justice, the California Supreme Court must interject in the discussion to solidify unjust enrichment as a stand-alone cause-of-action.

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*“The forms of action we have buried . . .
still rule us from their graves.”¹*

I. INTRODUCTION

It is something hammered into the heads of first-year law students: a person cannot receive a windfall at the expense of another without seeing his day in court. The theory is dubbed “unjust enrichment.” But, while the theory is constantly at the top of law students’ minds, poised for repetition on an exam, it is all but lost in the California courts. The doctrine is sometimes no longer interpreted as a cause of action; rather, it has been rendered a light echo in remedial analysis. The result leaves many who have been taken advantage of disenfranchised, scrambling to find other, maybe non-existent causes of action to which they can tether their desire to be made right.

The unprecedented diminishment of unjust enrichment has reverberating effects that are evidenced in cases where plaintiffs have no other method of relief available to them. This Article will analyze the intellectual and societal underpinnings of the doctrine of unjust enrichment to prove its recognition as an independent cause of action and the necessity that it remains so, despite being convoluted by the California courts.

II. UNJUST ENRICHMENT HAS LONG BEEN EMBEDDED IN WESTERN SOCIETY

The concept of unjust enrichment is not a novel one; its origins can be traced back to Roman law.² The Roman jurist Pomponius wrote, “[T]his by nature is equitable, that no one be made richer through another’s loss.”³ Lord Mansfield’s opinion in *Moses v. Macferlan*⁴ marks the induction of the unjust-enrichment concept

1. FREDERIC WILLIAM MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 2 (A.H. Chaytor & W.J. Whittaker eds., 1936).

2. *See, e.g.*, JOHN P. DAWSON, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* 42–63 (1951).

3. *Id.* at 3.

4. (1760) 97 Eng. Rep. 676.

into English common law and subsequently, American common law.⁵

In *Moses*, the plaintiff endorsed four promissory notes to the defendant under an express agreement that Moses would neither be liable for paying the notes nor suffer in any way because of his endorsement.⁶ But Macferlan sued Moses, compelling him to pay the notes and breaching the agreement.⁷ Moses then sued Macferlan to recover the money that he paid to Macferlan.⁸ Mansfield decided that “the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”⁹ The decision is a generalized reference to the doctrine of unjust enrichment in that it insinuates that there is an intangible element of justice that exists beyond the realm of codified law. Mansfield articulated a sense of obligation by natural justice—to make those who have been unjustifiably harmed right.

Unjust enrichment was first expressed in the Restatement (First) of Restitution as the doctrine whereby “[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.”¹⁰ Restitution has since evolved into its own recognized body of law, with unjust enrichment as its guiding principle.

III. TRADITION GIVES WAY TO CONFUSION

The basic principle of unjust enrichment and its remedy counterpart, restitution, appears simple at first blush. Unjust enrichment and restitution are both derivative of an instinctual understanding of societal dealings: if one person receives more than he bargained for from a deal, at the expense of another, he should be held accountable for remedying the windfall.¹¹

5. *See id.*

6. *Id.*

7. *Id.* at 676–77.

8. *Id.*

9. *Id.* at 681.

10. RESTATEMENT OF RESTITUTION § 1 (1937).

11. James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 57 (2007) (“The central substantive notion is that one must not (unjustifiably) enrich oneself at the expense of another. The correlative remedial principle might be expressed as ‘a party who unjustifiably enriches

Despite their familiarity with the ethics behind the principle, scholars, judges, and lawyers remain uncertain about how to practically apply it.¹² Despite the long-standing tradition of providing some form of relief to those who have been harmed, courts have recently refused to recognize unjust enrichment as an independent cause of action. Rather, they view it as a remedy, incidental to another claim.¹³ As one scholar surmises: “To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is.”¹⁴ This uncertainty exists, all the while leaving many without any remedy.

The Restatement (Third) adopts the approach that unjust enrichment is to be viewed as an independent cause of action with restitution as a corresponding remedy:

A more important misconception is that restitution is essentially a remedy, available in certain circumstances to enforce obligations derived from torts, contacts, and other topics of substantive law. On the contrary, restitution . . . is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution’s own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies.¹⁵

According to the Restatement (Third), unjust enrichment, as part of the greater body of law of restitution, is thus a stand-alone doctrine, carrying with it the same force as any other body of contract or tort law with its own rights and remedies. The Restatement (Third) will, by nature, overlap with numerous doctrinal subjects, but it may also

himself at the expense of another owes a duty to pay a sum of money that will disgorge the enrichment.”).

12. DAWSON, *supra* note 2, at 8 (“The ideal of preventing enrichment through another’s loss has a strong appeal to the sense of equal justice but it also has the delusive appearance of mathematical simplicity.”).

13. George P. Roach, *How Restitution and Unjust Enrichment Can Improve Your Corporate Claim*, 26 REV. LITIG. 265, 266–68 (2007).

14. *Id.* at 266 (2007); see also Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1191 (1995) (“Significant uncertainty shrouds the modern law of restitution.”).

15. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. h (Discussion Draft 2000) (emphasis omitted).

hold itself as separate and distinct.¹⁶ Professor Kull, the principal drafter of the Restatement (Third), articulates three main components of restitution as a body of law: “(1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on defendant’s gain instead of plaintiff’s loss, or (3) the court restores to plaintiff, in kind, his lost property or its proceeds.”¹⁷

Kull directly reflected those three components in the Restatement (Third) draft. First, comment a to section 1 of the Restatement (Third) states, “The source of a liability in restitution is the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of the defendant at the expense of the plaintiff.”¹⁸ The second component is found in section 2, which states, “Liability in restitution is based on and measured by the receipt of a benefit”¹⁹ However, it is important to remember that the receipt of a benefit alone does not necessarily induce liability in restitution; the enrichment must be one the law treats as unjust.²⁰ Lastly, the third component is seen in section 4 of the Restatement (Third). Section 4 states that “[t]he function of remedies in restitution is to prevent or redress the unjust enrichment of one or more persons at the expense of the plaintiff.”²¹ This may be accomplished by: a “reformation of instruments”; a monetary judgment that eliminates any unjust enrichment; or a superior right, conferred on the plaintiff by the court, to a piece of property, fund, or other item in dispute.²²

Although the foregoing provisions are part of a discussion draft and are therefore subject to change, in the six tentative drafts published since the project began in 2000, the introductory sections (1–4) have yet to change.

16. See Kull, *supra* note 14, at 1198 (“Legal remedies having the effect of restoring and returning do not constitute, as does unjust enrichment, an independent basis of liability, and such remedies bear no essential or even useful relation to the avoidance of unjust enrichment.”).

17. *Id.* at 1224 (emphasis omitted) (footnote omitted).

18. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (Discussion Draft 2000).

19. *Id.* § 2(1).

20. *Id.* § 2 cmt. a.

21. *Id.* § 4(1).

22. *Id.* § 4(2).

IV. *WALKER V. USAA*: A CALIFORNIA FEDERAL DISTRICT COURT'S
DISMISSAL OF A CLAIM FOR UNJUST ENRICHMENT

*Walker v. USAA Casualty Insurance Co.*²³ presents a situation in which a federal district court applying California law has misunderstood the history and use of unjust enrichment as a cause of action.²⁴ The district court's opinion (affirmed by the Ninth Circuit²⁵) consequentially left the harmed plaintiff and corresponding class in *Walker* without any relief. *Walker* wrongly held that unjust enrichment was merely an effect and not an independent cause of action.²⁶

The factual background in *Walker* reveals a multi-faceted scheme carried out by insurance companies to indirectly steer auto-body-repair work away from independent California auto-body-repair shops, like the plaintiff, to direct-repair providers (DRPs).²⁷ The insurance companies had been admonished for direct steering in the past, and consequently, insureds have been given the right to go to auto-body-repair shops of their choice.²⁸ Undeterred, the insurance companies conceived of a way to end-run California's anti-steering laws and consumer protections in a manner that adversely affects the plaintiff and an entire class of independent, non-DRP auto-body-repair shops.

The insurance companies' scheme starts out by negotiating a lower-than-average hourly rate for labor charges with DRPs in exchange for the referral of a high volume of auto-body-repair work to the DRPs.²⁹ Once the insurance companies secure these negotiated deals with the DRPs, they use those lower-than-average rates in surveys they conduct, which are intended to determine the prevailing auto-body rate in a given geographic area.³⁰ However, when the DRPs' negotiated rates are used for the survey, the prevailing auto-

23. 474 F. Supp. 2d 1168 (E.D. Cal. 2007), *aff'd* by *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025 (9th Cir. 2009), *cert. denied* *Walker v. Geico Gen. Ins. Co.*, 130 S. Ct. 400 (2009).

24. *See id.* at 1174 (authors were counsel in *Walker*).

25. *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025 (9th Cir. 2009).

26. *Walker*, 474 F. Supp. 2d at 1174.

27. *Id.* at 1170–71.

28. *See* CAL. INS. CODE § 758.5 (West 2010); CAL. CODE REGS. tit. 10, § 2695.85 (2010).

29. *See Walker*, 474 F. Supp. 2d at 1174–75.

30. Tit. 10, § 2698.91.

body rate turns out to be artificially low.³¹ The insurance companies then utilize the artificially low prevailing auto-body rate to cap the amount they are required to pay to have their insureds' cars repaired at non-DRP auto-body-repair shops.³²

While California's Insurance Code³³ allows insurance companies to rely on their own surveys to settle claims with non-DRP shops, it does not specifically prohibit insurance companies from artificially drawing down the prevailing auto-body rate by including DRP-negotiated rates.³⁴ In fact, the plaintiff in *Walker* was not aware that the insurers were using negotiated rates for their surveys until he uncovered the scheme while investigating why the insurer's prevailing auto-body rate was so much lower than his posted hourly rate.³⁵ Insurers have long been successful in strong-arming plaintiffs and numerous other independent body-repair shops into unwittingly accepting below-market rates for repairs out of fear of losing the work to competing DRPs.³⁶ Not surprisingly, this scheme has caused plaintiffs and numerous other auto-body shops to suffer significant financial harm.³⁷

But what makes matters worse is that the insureds are also affected if a non-DRP shop refuses to do the work at the manufactured prevailing auto-body rate. In that instance, either the insureds are forced to pay the difference between the prevailing auto-body rate and the non-DRP shop's rate in order to receive quality work from shops that they know and trust, or, the insureds, who do not want to or cannot afford to pay the difference, are indirectly forced to take their cars to DRPs.³⁸ Under either scenario, the insurance companies get exactly what they want—lower rates for labor charges—even if that means sacrificing quality repair work or an insured's choice of body shop.

31. See, e.g., *Walker*, 474 F. Supp. 2d at 1170–71.

32. See, e.g., *id.*

33. INS. § 758.

34. See *id.*

35. *Walker*, 474 F. Supp. 2d at 1170–71, 1174–75.

36. See, e.g., *id.* at 1171, 1175.

37. *Id.*

38. E.g., *id.*

The *Walker* court evaluated three separate causes of action, only one of which relates to this Article: (1) whether the plaintiff had standing to bring a claim for restitution or injunctive relief under Section 17200 of the California Business and Professions Code; (2) whether California recognizes a cause of action styled as unjust enrichment that seeks restitution as its remedy; and (3) whether the complaint satisfied the pleading requirement for a Cartwright cause of action.³⁹

The *Walker* court dismissed all three causes of action, including the one for unjust enrichment, by citing *Melchior v. New Line Productions, Inc.*⁴⁰ as well as *McKell v. Washington Mutual Inc.*⁴¹: “There is *no cause of action* in California for unjust enrichment.”⁴² The *Walker* court went further to say that unjust enrichment is synonymous with the remedy of restitution, and thus there is no remedy for unjust enrichment without an alternative, underlying valid legal claim.⁴³ Unjust enrichment was viewed merely as a synonym for restitution and was therefore incapable of standing on its own.

*A. Prior to Walker, the California Supreme Court
Recognized a Cause of Action for Unjust Enrichment
Under the Restatement (Third)’s Principles*

The trial court in *Walker* erred in dismissing the unjust-enrichment claim and, in doing so, wrongfully disregarded important precedent recognizing unjust enrichment as a stand-alone claim. In particular, *Walker* directly contravenes the California Supreme Court’s decision in *Ghirardo v. Antonioli*.⁴⁴ In *Ghirardo*, the high court clearly stated that a plaintiff might be entitled to seek relief under traditional equitable principles of unjust enrichment.⁴⁵ In expounding on this, the *Ghirardo* court drew from the Restatement (First) of Restitution and stated that “[u]nder the law of restitution,

39. *Id.* at 1170.

40. 131 Cal. Rptr. 2d 347 (Ct. App. 2003).

41. 49 Cal. Rptr. 3d 227 (Ct. App. 2006).

42. *Walker*, 474 F. Supp. 2d at 1174–75 (emphasis added) (quoting *Melchior*, 131 Cal. Rptr. 2d at 357); see also *McKell*, 49 Cal. Rptr. 3d at 254.

43. *Walker*, 474 F. Supp. 2d at 1174.

44. 924 P.2d 996 (Cal. 1996).

45. *Id.* at 1002.

an individual may be required to make restitution if he is unjustly enriched at the expense of another.”⁴⁶ A person is enriched if he or she receives a benefit at another’s expense, and the term “benefit” has been construed to mean any form of advantage.⁴⁷ Thus, the *Ghirardo* court stated that a “benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss.”⁴⁸

That California recognizes this equitable doctrine is amplified by the fact that its reviewing courts have adopted certain portions of the Restatement (First) of Restitution, including its underlying principles.⁴⁹ Indeed, these courts have noted that when the facts of a given case do not fall within a certain Restatement (First) provision, its underlying principles may be invoked.⁵⁰

Furthermore, *Walker* runs afoul of numerous cases in which California appellate courts have recognized an independent cause of action for unjust enrichment.⁵¹ Likewise, *Ghirardo* and the Restatement (Third) have been recognized and utilized by numerous federal district and appellate courts, including all four federal districts in California.⁵²

46. *Id.* at 1003 (citing RESTATEMENT OF RESTITUTION § 1 (1937)).

47. *Id.*

48. *Id.*

49. *See, e.g.*, *First Nationwide Sav. v. Perry*, 15 Cal. Rptr. 2d 173, 177, 181 (Ct. App. 1992); *Kossian v. Am. Nat’l Ins. Co.*, 62 Cal. Rptr. 225, 227 (Ct. App. 1967).

50. *See* B.E. WITKIN, SUMMARY OF CALIFORNIA LAW 1105 (10th ed. 2005) (“The Restatement of this Subject deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss. . . . Where the facts do not come within a specific section, a court may base recovery on this underlying principal or even the opening sentence.” (citation omitted)); *see also Kossian*, 62 Cal. Rptr. at 227.

51. *See, e.g.*, *Hirsch v. Bank of Am.*, 132 Cal. Rptr. 2d 220, 229 (Ct. App. 2003) (reversing lower court’s dismissal of plaintiff’s unjust enrichment claim upon finding that appellants stated a valid cause of action for unjust enrichment; applying *Ghirardo* and the *Restatement of Restitution*); *Lectrodryer v. SeoulBank*, 91 Cal Rptr. 2d 881, 883 (Ct. App. 2000) (setting forth elements of a claim for unjust enrichment); *Cnty. of Solano v. Vallego Redevelopment Agency*, 90 Cal. Rptr. 2d 41 (Ct. App. 1999) (applying *Ghirardo* and *Restatement of Restitution*); *Birman v. Loeb*, 75 Cal. Rptr. 2d 294 (Ct. App. 1998) (recognizing but distinguishing *Ghirardo*); *Enter. Leasing Corp. v. Shugard Corp.*, 282 Cal. Rptr. 620, 626–27 (Ct. App. 1991) (recognizing claim); *Marina Tenants Ass’n v. Deauville Marina Dev. Co.*, 226 Cal. Rptr. 321 (Ct. App. 1986) (discussing *Restatement of Restitution*).

52. *See, e.g.*, *Shum v. Intel Corp.*, 499 F.3d 1272 (Fed. Cir. 2007); *In re Atkinson*, 14 F. App’x 960, 962 (9th Cir. 2001); *Gonzales Commc’ns, Inc. v. Titan Wireless, Inc.*, No. 04cv147 WQH (WMC), 2007 WL 1994057, at *2 (S.D. Cal. Apr. 18, 2007); *ViChip Corp. v. Lee*, 438 F. Supp. 2d 1087, 1097 (N.D. Cal. 2006); *Villager Franchise Sys. v. Dhami, Dhami & Virk*, No.

B. *Faulty Analysis of Melchior v. New Line Productions, Inc. Led the Court Astray*

The divergence in understanding the principle of unjust enrichment as a cause of action sparked from a blatant misunderstanding of case law. Despite recognizing ample authority from California state and federal courts to the contrary, the trial court in *Walker* was led astray by a series of California appellate decisions that held there is no cause of action for unjust enrichment. The trial court expressed that it felt it had no choice but to follow the “binding authority” from two decisions out of Division One of the Second District of the California Court of Appeal: *Melchior v. New Line Productions, Inc.* and *McKell v. Washington Mutual, Inc.*

Regrettably, these cases have caused a great deal of confusion and an apparent conflict among California appellate courts, even leading the *Walker* court to issue an opinion that contradicts the decision of the California Supreme Court in *Ghirardo*. Specifically, the *Walker* court, primarily relying on *Melchior*, held that a cause of action for unjust enrichment does not exist.⁵³ The problem is that, rather than applying supreme court precedent from *Ghirardo*, the *Melchior* court relied on two decisions out of the First District of the California Court of Appeal, *Dinosaur Development, Inc. v. White*⁵⁴ and *Lauriedale Associates, Ltd. v. Wilson*,⁵⁵ both of which predated *Ghirardo*.⁵⁶

In *Dinosaur Development*, the First District of the California Court of Appeal did not emphatically hold that there is no cause of action for unjust enrichment, but instead concluded that “unjust enrichment . . . is synonymous with restitution.”⁵⁷ The *Dinosaur Development* court reached this result by deferring, not to principles of California law, but rather to the musings of a legal commentator who conflated a circumstance that gives rise to recovery with the

CVF046393RECSMS, 2006 WL 224425, at *7 (E.D. Cal. Jan. 26, 2006) (“California law recognizes a cause of action for unjust enrichment.”) (citing *Ghirardo v. Antonioli*, 924 P.2d 996 (Cal. 1996)); *MV Transp., Inc. v. Omne Staff Leasing, Inc.*, 378 F. Supp. 2d 1200, 1207 (E.D. Cal. 2005); *Westways World Travel v. AMR Corp.*, 182 F. Supp. 2d 952, 964 (C.D. Cal. 2001).

53. *Walker v. USAA Cas. Ins. Co.*, 474 F. Supp. 2d 1168, 1174 (E.D. Cal. 2007).

54. 265 Cal. Rptr. 525 (Ct. App. 1989).

55. 9 Cal. Rptr. 2d 774 (Ct. App. 1992).

56. See *Melchior v. New Line Prods., Inc.*, 131 Cal. Rptr. 2d 347, 357 (Ct. App. 2003).

57. *Dinosaur Dev.*, 265 Cal. Rptr. at 527.

recovery itself.⁵⁸ The two are not the same: unjust enrichment focuses on the individual who received a benefit, whereas restitution focuses on the provider of the benefit. Moreover, the commentator ignored the temporal aspect of these two terms. An individual cannot make restitution unless he or she has first been unjustly enriched. This principle does not work in reverse. To make matters worse, the *Lauriedale Associates* court also relied on the flawed analysis of *Dinosaur Development*, which is cited in *Walker*.⁵⁹ The *Lauriedale Associates* court, however, did recognize that the plaintiffs were essentially seeking restitution.⁶⁰

The bottom line is that the court in *Melchior* appears to have over-extrapolated from the holdings of *Dinosaur Development* and *Lauriedale Associates*, causing it to produce a holding that has no basis in California law. The fact that the *Melchior* court failed to discuss *Ghirardo* (and that other divisions in the Second District of the California Court of Appeal have reached contrary results)⁶¹ leads to only one conclusion: if *Melchior* foreclosed a cause of action for unjust enrichment that seeks restitution as its remedy, it was wrongly decided.

1. Opposition Claims That the Court Was Justified in Its Application

Opponents to this theory claim that it is justifiable to rely on the court's holdings in *Melchior* and *McKell* because of further citation to *Melchior* in *Jogani v. Superior Court*.⁶² In *Jogani*, the court once again stated that "unjust enrichment is not a cause of action," but it did so only by reiterating the plaintiff's concession without further analysis.⁶³

Courts that have addressed *Ghirardo* have attempted to skirt its holding by arguing that *Ghirardo* does not stand for the proposition

58. *Id.*

59. See *Lauriedale Assocs.*, 9 Cal. Rptr. 2d at 780.

60. *Id.*

61. See, e.g., *supra* notes 52–52 (listing examples of California federal district and state courts that have recognized that California has a claim for unjust enrichment).

62. 81 Cal. Rptr. 3d 503, 511 (Ct. App. 2008).

63. *Id.* at 511.

that unjust enrichment is a stand-alone claim.⁶⁴ As discussed in *Vincent Consolidated Commodities, Inc. v. American Trading & Transfer, LLC*,⁶⁵ the court in *Ghirardo* “merely mentioned ‘a cause of action for unjust enrichment’ in passing while discussing the remedy of restitution.”⁶⁶ The *Ghirardo* court’s mention of “traditional equitable principles of unjust enrichment” was in reference to the specific remedy of restitution for the unpaid portion of a note secured by a deed of trust when the creditor inadvertently understated the obligation in his payoff demand.⁶⁷ The conclusion drawn is that unjust enrichment was not a stand-alone cause of action and that *Ghirardo* addressed the concept only when discussing the remedy of restitution.

2. It Is Wrong to Ignore *Ghirardo v. Antonioli*

Those who attempt to narrowly construe *Ghirardo* have been unable or unwilling to delve into California’s adoption of the Restatement (Third), as discussed in *Ghirardo*. Instead, courts have too quickly relied on cases like *Melchior* and *McKell* to dismiss claims for unjust enrichment. In doing so, courts have done little to advance the analysis within the greater context of the history of unjust enrichment and of the equitable remedy of restitution. Courts have been too easily transfixed on the label of the claim rather than the gravamen of the claim.

In *Ghirardo*, the *only* viable claim was a claim for unjust enrichment. The high court upheld the appellate court’s determination that the plaintiff, Antonioli, could not obtain a deficiency judgment because he did not first proceed by judicial foreclosure, and that he could not obtain relief under Civil Code § 2943 because the statute was enacted only after the action was filed and did not apply to the underlying transactions.⁶⁸ Notwithstanding the plaintiff’s inability to obtain relief pursuant to either of these routes, the *Ghirardo* court determined that Antonioli could proceed

64. See, e.g., *Vincent Consol. Commodities, Inc. v. Am. Trading and Transfer, LLC*, No. 07-CV-20 W, 2007 U.S. Dist. LEXIS 53680, at *8 (S.D. Cal. July 24, 2007).

65. *Id.*

66. *Id.* at *8 (quoting *Ghirardo v. Antonioli*, 924 P.2d 996, 1002 (Cal. 1996)).

67. *Ghirardo*, 924 P.2d at 1002–03.

68. *Id.* at 1002.

on a theory of unjust enrichment.⁶⁹ The facts of *Ghirardo* confirm that unjust enrichment can proceed as a stand-alone claim.

As proof that the principles and holding in *Ghirardo* should be respected, the First District of the California Court of Appeal relied on *Ghirardo* in *Hirsch v. Bank of America*⁷⁰ in upholding a claim for unjust enrichment based on restitution principles.⁷¹ *Hirsch* specifically held that the unjust-enrichment claim survived demurrer *without* determining whether the practices complained of were illegal under federal law.⁷²

Interestingly, the court decided *Hirsch* a month *after* the Second District of the California Court of Appeal decided *Melchior*. Consequently, *Melchior* did not have the opportunity to discuss *Hirsch*, but more importantly, *Melchior* did not discuss the holding in *Ghirardo*.

Frankly, no court should rely on *Melchior* (or the cases that follow it) because *Melchior*'s discussion of the unjust-enrichment claim is dicta. The actual holding of *Melchior* was that the Copyright Act preempted the unjust-enrichment claim.⁷³ Unfortunately, the *Melchior* court decided to reiterate *the alternate holding* of the trial court, which mistakenly concluded that there was no cause of action for unjust enrichment.⁷⁴ In any event, the cases cited in *Melchior* do

69. *Id.*

70. 132 Cal. Rptr. 2d 220 (Ct. App. 2003).

71. *Id.* at 229–30.

72. *Hirsch* states:

We conclude that appellants' unjust enrichment cause with respect to the alleged overcharges survives demurrer without deciding whether the practices described in the SAC—namely, extension of benefits to title companies through earnings' credits and MRCF's—were illegal under federal law. This equitable claim of unjust enrichment applies regardless of the mechanisms employed by Banks to attract escrow accounts from title companies.

Id.

73. *Melchior v. New Line Prods., Inc.*, 131 Cal. Rptr. 2d 347, 356 (Ct. App. 2003).

74. *Melchior* states:

In addition, as the trial court observed, there is no cause of action in California for unjust enrichment. "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." Unjust enrichment is "'a general principle, underlying various legal doctrines and remedies,'" rather than a remedy itself. It is synonymous with restitution.

Id. at 357 (citations omitted) (citing *Lauriedale Assocs. v. Wilson*, 9 Cal. Rptr. 2d 774 (Ct. App. 1992); *Dinosaur Dev., Inc. v. White*, 265 Cal. Rptr. 525 (Ct. App. 1989)).

not stand for the proposition that there is “no cause of action in California for unjust enrichment.”⁷⁵ Yet, ever since *Melchior* was decided, courts have relied on *Melchior* to come to the conclusion that no cause of action for unjust enrichment exists. The dicta in *Melchior* has single-handedly invalidated a cause of action that has existed for hundreds of years and has been recognized in every single state.

California needs to clarify and/or criticize *Melchior* so that other courts will stop relying on it for the wrong reason. Neither *Ghirardo* nor *Hirsch* required a separate, viable legal claim to serve as the basis for a claim styled as unjust enrichment. In fact, neither case stated any other legal basis for relief. If other decisions required some additional legal basis in order to state an unjust-enrichment claim, they were, unfortunately, wrongly decided.

V. CONTINUING CONFUSION IN CALIFORNIA

The court’s treatment of unjust enrichment in *Walker* is merely symptomatic of the continuing confusion surrounding the cause of action for unjust enrichment. New cases coming through the California courts show that the schizophrenic treatment of unjust enrichment has yet to be resolved. As one scholar notes, “The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it.”⁷⁶

In the recent unpublished decision *Webster v. Allstate Insurance Co.*,⁷⁷ the Second District of the California Court of Appeal once again followed the *Melchior* and *McKell* approach. The corner-cutting decision simply repeats the court’s faulty understanding of unjust enrichment in California from *Walker*, contradicting established precedent and the Restatement (Third), without furthering the analysis.⁷⁸

75. *Melchior*, 131 Cal. Rptr. 2d at 357; see also *McKell v. Wash. Mut., Inc.*, 49 Cal. Rptr. 3d 227, 254 (Ct. App. 2006).

76. Roach, *supra* note 13, at 266.

77. No. B211390, 2010 WL 60642 (Cal. Ct. App. Jan. 11, 2010).

78. *Id.* at *6–*7.

Just days before *Webster* was decided, the Fourth District of the California Court of Appeal, in *Hernandez v. Lopez*,⁷⁹ reaffirmed the belief that unjust enrichment is its own independent cause of action that seeks restitution as its remedy. The *Hernandez* court reversed the trial court's decision, which held that the plaintiff could not proceed under a theory of unjust enrichment where the plaintiff's cause of action was labeled as "breach of contract."⁸⁰ According to the modified opinion:

The trial court's holding provides a textbook example for application of the equitable doctrine of unjust enrichment. The doctrine applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value.⁸¹

Relying on *Dunkin v. Boskey*,⁸² the *Hernandez* court explained:

[T]he measure of damages . . . for unjust enrichment is synonymous with restitution. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to another. . . . The phrase "Unjust Enrichment" does not describe a theory of recovery, but an effect: the result of a failure to make *restitution* under circumstances where it is equitable to do so. In any event, . . . there is no particular form of pleading necessary to invoke the doctrine of restitution.⁸³

Surprisingly, *Webster* did not discuss *Hernandez* or *Dunkin*.

California courts have not been entirely consistent with the terminology, but it does not matter whether the claim is styled as

79. 103 Cal. Rptr. 3d 376 (Ct. App. 2009).

80. *Id.* at 381.

81. *Id.* at 380.

82. 98 Cal. Rptr. 2d 44 (Ct. App. 2000).

83. *Hernandez*, 103 Cal. Rptr. 3d at 380–81 (emphasis added) (citations omitted) (quoting *Dunkin*, 98 Cal. Rptr. 2d at 62–63) (internal quotation marks omitted).

unjust enrichment, restitution, quasi-contract, or quantum meruit; California law “respects form less than substance.”⁸⁴

VI. MISHANDLING OF UNJUST ENRICHMENT CLAIMS OUTSIDE OF CALIFORNIA

Courts have not handled restitution with a consistent hand.⁸⁵ In fact, one commentator complains that one court’s handling of restitution and unjust enrichment was “little short of gibberish.”⁸⁶

California is not the only state falling victim to confusion by disregarding the Restatement (Third)—a surprising number of courts handle claims for restitution incorrectly. For example, the Alaska Supreme Court wrote in *Reeves v. Alyeska Pipeline Service Co.*⁸⁷: “Unjust enrichment is not itself a theory of recovery. ‘Rather, it is a prerequisite for the enforcement of the doctrine of restitution; that is, if there is no unjust enrichment, there is no basis for restitution.’”⁸⁸ At first, the statement appears to fall in line with the Restatement (Third); however, the court goes on to say, “Restitution also is not a cause of action; it is a remedy for various causes of action.”⁸⁹ The misconception that restitution is merely a remedy is a common one that needs to be set straight.⁹⁰

New York blurred the lines between unjust enrichment as an independent cause of action and contract law in its decision in *Allstate Insurance Co. v. Administratia Asigurarilor De Stat.*⁹¹ “[U]njust enrichment and quantum meruit . . . ‘are related theories that are best addressed as a whole[,] since the latter is merely the means by which the former is remedied.’”⁹²

84. CAL. CIV. CODE § 3528 (Deering 2009).

85. See Kull, *supra* note 14, at 1222–26.

86. Rogers, *supra* note 11, at 56.

87. 926 P.2d 1130 (Alaska 1996).

88. *Id.* at 1143 n.17 (citing *Alaska Sales & Serv., Inc. v. Millet*, 735 P.2d 743, 746 (Alaska 1987)).

89. *Id.* (citing *Alaska Sales & Serv., Inc.*, 735 P.2d at 746).

90. See Kull, *supra* note 14, at 1196 (noting that if restitution continues to be negated, unjust enrichment will return to its pre-Restatement status when it was only a remedy).

91. 948 F. Supp. 285 (S.D.N.Y. 1996).

92. *Id.* at 312; see also *Artie’s Autobody, Inc. v. Hartford Fire Ins. Co.*, No. X08CV030196141S, 2006 WL 2730143 (Conn. Super. Ct. Aug. 30, 2006) (acknowledging Connecticut’s recognition of unjust enrichment claims when the complained-of conduct is similar to that in *Walker v. Geico* and *Webster v. Allstate*).

This inconsistent application of unjust enrichment and restitution throughout the states gives reason to heed Professor Kull's warning:

Unless the means are found to revive it, restitution in this country may effectively revert to its pre-Restatement status, in which problems of unjust enrichment were treated in isolation, classified only by transactional or remedial setting: Mistake, Indemnity, Trustees, Subrogation. The loss to American law, measured in terms of its ability to yield coherent and reasoned adjudication, has already been very great, and the outlook is not encouraging.⁹³

VII. CALIFORNIA'S OBLIGATION TO EQUITY SHOULD TRUMP LABEL NITPICKING

Regardless of how a court phrases the cause of action, California has an obligation to protect those who come before its courts from harm under principles of equity. Virtually all courts recognize a traditional equitable theory under which an aggrieved party may recover the value of a benefit that has been conferred on another in a manner that stings the conscience. California is no exception. In *Cassinovs v. Union Oil Co.*,⁹⁴ the court stated:

California recognizes that: "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention." In the same spirit it is said . . . "Living as we do in a world of change, equitable remedies have necessarily and steadily been expanded to meet increasing complexities of such changing times, and no inflexible rule has been permitted to circumscribe the power of equity to do justice. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be

93. See Kull, *supra* note 14, at 1196.

94. 18 Cal. Rptr. 2d 574 (Ct. App. 1993).

invented, or old ones modified, in order to meet the requirement of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrong are constantly committed.”⁹⁵

These principles were recently affirmed in *Nordberg v. Trilegiant Corp.*⁹⁶ After discussing the muddy waters surrounding unjust-enrichment claims, the court rejected trifling semantic distinctions and held that the plaintiffs could properly “assert a claim for restitution based on a theory of unjust enrichment.”⁹⁷ Regardless of how a claimant labels a cause of action, the trial court has a duty to examine the factual allegations of the complaint “to determine whether they state a cause of action on any available legal theory.”⁹⁸

VIII. CONCLUSION

Is the common law dead? Unjust enrichment is the weapon of courts to protect the people. The human mind can be ingeniously dishonest; that is why the common law, and unjust enrichment in particular, exist—to identify, catch, and mete out fair justice when this occurs. Statutory law is often impotent. Forty-nine other states and half the courts in California do recognize and give effect to unjust enrichment. The California Supreme Court needs to set the record straight and return unjust enrichment to the place it belongs in the pantheon of the common law.

95. *Id.* at 583 (citations omitted).

96. 445 F. Supp. 2d 1082 (N.D. Cal. 2006).

97. *Id.* at 1100–01.

98. *Adelman v. Associated Int’l Ins. Co.*, 108 Cal. Rptr. 2d 788, 792 (Ct. App. 2001) (emphasis omitted) (quoting *Ellenberger v. Espinosa*, 36 Cal. Rptr. 2d 360 (Ct. App. 1994)).

