1. Overview of Restitution and Unjust Enrichment

   Summary
   Texas recognizes a general cause of action to prevent unjust enrichment. As noted below, that cause of action has been referred to, albeit indirectly, as one in unjust enrichment by the Texas Supreme Court. A majority of Texas courts of appeals have rejected the unjust-enrichment title, but they nevertheless accept the general cause as one supported by the doctrine of “quasi-contract.” A set of well recognized defenses add predictability to the cause of action and restrain what might appear to be an open-ended “equitable” right. Once satisfied, however, the cause of action supports the important remedies of restitution that range from monetary awards to the transfer of property.
Unjust Enrichment

Section 1 of the Restatement (Third) states that "[a] person who is unjustly enriched at the expense of another is subject to liability in restitution." Although the Restatement (Third) does not describe these specifics as elements of a cause of action, § 1 does describe the factual characteristics and legal conclusions that establish a prima facie claim for restitution. The defendant’s liability thus depends on having acquired a benefit at the plaintiff’s expense and, finally, on the court’s conclusion that retention of this benefit constitutes unjust enrichment.

These three elements describe the core requirements that any plaintiff must fulfill before the remedies of restitution become available. Some courts insist on referring to unjust enrichment as a mere theory justifying restitution, but calling the concept a theory obscures its practical importance. Proving the civil liability that authorizes a court to award restitution requires more than a moral or theoretical decision about whether some person deserves a particular enrichment. One proceeds as with any other legal conflict to determine unjust enrichment by considering facts and narrowing issues in light of rules and precedents. Unjust enrichment thereby stands not

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1 See id. at § 1.
2 The Supreme Court of Colorado in its decision in Lewis v. Lewis explained its unjust-enrichment claim in the following manner: “We have previously determined that a party claiming unjust enrichment must prove that (1) the defendant received a benefit (2) at the plaintiff’s expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation.” 189 P.3d 1134, 1141 (Colo. 2008). If one worries that this is a vague and open-ended claim, compare it with the universally accepted claim for negligence. Courts describe a negligence claim as one requiring a showing that (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, and (3) thereby proximately caused the plaintiff’s injuries. See O’CONNOR’S TEXAS CAUSES OF ACTION 2012 at 657. The words “duty,” “breach,” and “proximate cause” do not inherently refer to more manageable specifics than would “unjust enrichment.” However, courts have for many years applied their interpretive powers to limit the range of specifics to which tort concepts refer. That interpretive development will also give the concepts of restitution greater certainty.
3 The Restatement (Third) voices some hesitation about the use of checklists to determine liability for restitution. See RESTATEMENT (THIRD) of Restitution and Unjust Enrichment § 1, cmt. d (2011). The danger, however, arises from the inclusion of particularized factors such as one requiring the defendant to have “appreciated” the benefit received. See id. The elements listed by the Colorado Supreme Court in Lewis serve the important function of alerting litigants and lower courts to that which must be pleaded and proved. Furthermore, these elements are free of unnecessary and mischievous limiting factors and closely track what the Restatement (Third) posits as the fundamental principles of liability.
for an abstract theory but for a conclusion of liability reached after the application of legal rules.

In applying the first two elements of the unjust-enrichment cause of action, one investigates the relationship of the parties, and this effort may well end the claim. The plaintiff has standing to sue only to recover a benefit that the defendant gained at his expense and to which the plaintiff has a superior right.\(^4\) No disinterested person can therefore challenge the enrichment of someone else.

In *Walker v. Cotter Properties, Inc.*,\(^5\) the Dallas Court of Appeals made the following statement: “Unjust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay.”\(^6\) The court thus characterizes restitution as a remedy to prevent unjust enrichment and states that the remedy applies whether the defendant acted wrongfully or not. Because one who passively receives a benefit ordinarily does not thereby commit a tort, the Dallas Court of Appeals necessarily recognized that the liability it was discussing would not rest in tort. The reference to an “implied or quasi-contractual obligation to pay” effectively separates the obligation from one based on an agreement of the parties. Instead, such an obligation to pay necessarily arises as a matter of law to avoid what would otherwise be an unjust enrichment.\(^7\)

Numerous Texas courts have quoted this language from *Walker* in rejecting an independent claim for unjust enrichment.\(^8\) One argument for this conclusion would be that unjust enrichment claims are always dependent on other causes of action. This explanation fails for at least three reasons. First, since a valid contract preempts such claims, unjust enrichment could only be dependent on tort claims.\(^9\) If the contract is faulty, an unjust enrichment claim can apply, but its basis would be unjust enrichment and not contract law. Second, contending that unjust enrichment depends on the existence of

\(^4\) HECI Exploration Co. v. Neel, 982 S.W.2d 881, 891 (Tex. 1998).


\(^6\) Id. at 900.

\(^7\) See id.


a valid tort claim fails to account for the plaintiff’s historical right to “waive the tort” and assert unjust enrichment instead. Third, the view that restitution is merely an alternative remedy in tort or contract has been directly contradicted by Texas Supreme Court rulings justifying restitution when unjust enrichment was the result of the claimant’s mistake.

Restitution

In its broadest use, the law of restitution encompasses both a cause of action and a set of remedies. However, the definition of “restitution” fits more comfortably as a reference to a distinct set of court-made remedies. Restitution typically means restoration, as in restoring property to the plaintiff that was taken by the defendant. Although that may not catch every result, it does accurately describe the main focus of restitution. Restitution returns property obtained at the expense of the plaintiff when the defendant’s retention of that property would constitute unjust enrichment. The specific remedies used to accomplish this end do so, therefore, in order to prevent unjust enrichment. The remedies of restitution, in contrast to traditional tort and contract remedies, capture profits acquired through use of wrongfully taken funds, require a transfer of title, or secure a lien on property.

To prevent unjust enrichment, courts can award a monetary judgment equal to the defendant’s gain at the plaintiff’s expense. The law of tort or contract only measures monetary awards by reference to the plaintiff’s loss without regard to the defendant’s gain. Restitution is limited, however, to those cases in which the defendant has gained some measurable benefit. It does not, therefore, apply in cases in which the defendant gains nothing from a legal wrong.

When a defendant gains something at the expense of the plaintiff, her gain may not exceed the plaintiff’s loss. Where restitution is applicable, however, evidence of defendant’s gain may be easier to gather. Furthermore, a conscious wrongdoer who has enhanced the value of the property taken at the plaintiff’s expense or who has profited from its use must disgorge those profits to the plaintiff. If the plaintiff can trace the benefit taken to identifiable property held by the defendant, a court can

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11 See Myrad Props., Inc. v. LaSalle Bank Nat’l Ass’n, 300 S.W.3d 746, 753 (Tex. 2009); Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974). If the remedies of restitution depended on the commission of a tort, the impressing of a constructive trust in Castano v. Wells Fargo Bank would also have to be deemed erroneous. 82 S.W.3d 40 (Tex. App.—San Antonio 2002, no pet.)
12 See RESTATEMENT (THIRD), supra note 3, at § 49(1).
13 See id. at § 49(4).
impress a *constructive trust* or an equitable lien on that property. The court thus declares plaintiff’s superior title to that property and orders the transfer of title by the defendant to the plaintiff.14 Again, the plaintiff can recover any increase in the property's value when the defendant wrongfully acted to acquire that property.

2. Monetary Awards

*Overview*

The unjust enrichment cause of action was developed initially in the common law courts of England. Commentators and courts often refer to common law courts as the “law” courts, as opposed to the “equity” courts (with jurisdiction dependent on the absence of an adequate remedy at law). The primary remedy of the common law courts was the judgment for damages, measured by the plaintiff’s loss. When these courts accepted a right of action in “quasi-contract” for restitution by a defendant who had been unjustly enriched, they gave a monetary award to the plaintiff. As noted above, that monetary award equaled the benefit gained by the defendant. Under the common law, courts also entered monetary judgments under the common counts of quantum meruit and quantum valebat to restore a plaintiff who had provided the defendant with goods or services that could not be returned.

This restitution by the law courts, or “legal restitution,” must be distinguished from the remedies developed by the equity courts. For example, the equity courts expanded the constructive trust remedy, originally used to capture property held by misbehaving trustees, to order recovery of the plaintiff’s tangible property that would otherwise be unjustly retained by the defendant. Expansion of the remedy’s use left behind the requirement of an intentional trust agreement. This was “equitable restitution” in the sense that the equity courts developed such remedies to remedy unjust enrichment.

Some courts have referred to legal restitution as a “measure of damages.” This characterization is misleading initially because it equates restitution in money, measured by the defendant’s unjust gain, with the traditional form of damages, measured in different ways but always with reference to the plaintiff’s loss. Furthermore, even recognizing the different methods of calculating monetary awards, one should understand that the law of restitution also provides different forms of liability – liability that exists independent of tort or contract.

14 *See id.* at § 55 cmt. b.
A monetary award in restitution applies when the defendant has acquired a benefit at the plaintiff’s expense, whether by the plaintiff’s mistake or the defendant’s wrongful conduct. Mistaken improvers, for example, may enhance the value of others’ property by mistake and can assert a claim for restitution. In Texas, special causes of action have long existed to support restitution where the plaintiff has no right in tort or contract. A cause of action for money-had-and-received exists to obtain return of money paid, and one for quantum meruit yields payment typically measured by the value of goods or services received by the defendant.

The measuring tools for a monetary award in restitution have been outlined in the American Law Institute’s new Restatement (Third) of Restitution and Unjust Enrichment.

§ 49. Restitution In Money; Measures Of Enrichment

(1) A claimant entitled to restitution may obtain a judgment for money in the amount of the defendant's unjust enrichment.

(2) Enrichment from a money payment is measured by the amount of the payment or the resulting increase in the defendant's net assets, whichever is less.

Texas Supreme Court Cases

In Gavenda v. Strata Energy, Inc., the Texas Supreme Court found liability in a case in which the facts supported the three elements of a general unjust enrichment cause of action.\(^\text{15}\) In Gavenda, royalty owners sued the oil and gas lease operator for underpayment of royalties.\(^\text{16}\) The operator had prepared division orders that, in respect to the plaintiffs, erroneously reduced the percentage of their royalties.\(^\text{17}\) Division orders prescribe the procedure for distributing royalty proceeds and designate the recipients and the proportion they are due from the sale of oil and gas. The operator defended based on the Texas rule that division orders bind underpaid royalty owners until revoked.\(^\text{18}\) Prior to that revocation, the operator is immune to suit based on errors in the order. Both the trial court and the court of appeals held in favor of the operator on this ground.\(^\text{19}\)

The rule protecting unrevoked division orders is typically justified by the need to protect operators and purchasers and to enhance the stability of

\(^\text{16}\) Id. at 691.
\(^\text{17}\) Id.
\(^\text{18}\) Id.
\(^\text{19}\) Id. at 690.
the oil and gas industry. However, the Texas Supreme Court noted that the rule applied when an operator overpaid some royalty owners and underpaid others, but had itself retained none of the money it should have paid in royalties. Under these circumstances, recovery from the operator by the underpaid royalty owners would impose double liability—the operator would have to pay an additional amount that duplicated what it had already paid the overpaid royalty owners. In addition, an operator who erred in this fashion would not profit from the error and, therefore, could not have been enriched, much less unjustly so. Furthermore, enforcing the division order did not leave the underpaid royalty owners without a remedy because they could sue the overpaid royalty owners. The supreme court described its reasoning by noting that “[t]he basis for recovery is unjust enrichment; the overpaid royalty owner is not entitled to the royalties.”

In the Gavenda case, the operator prepared erroneous division orders and retained money due the underpaid royalty owners. Under these circumstances, the Texas Supreme Court held that division orders were not binding, and the underpaid royalty owners could recover the money retained by the operator because to the extent it profited from its own error “[t]here was unjust enrichment.” As noted, the three elements for a general unjust enrichment cause of action consist of (1) the defendant having obtained a benefit (2) at the expense of the plaintiff, (3) and retention of that benefit would constitute unjust enrichment. Although the supreme court was not this explicit, satisfaction of these three elements explain how the royalty owners (the plaintiffs) proved that the operator retained their royalties, thereby gaining a benefit at their expense. The operator had no justification for retaining those benefits and was therefore unjustly enriched. When, instead, the operator erred in paying the proper amounts to various royalty owners but retained none of these royalties, it gained no benefit at the expense of the underpaid royalty owners and could not have been unjustly enriched.

The Texas Supreme Court also used language that directly supports the existence of a general unjust enrichment cause of action in HECI.

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20 See id. at 692.
21 See id.
22 Id.
23 See id.
24 Id.
25 Id.
26 See id. This reasoning by the supreme court applied the three elements of a general unjust enrichment cause of action.
Exploration Co. v. Neel. HECI was the lessee of a tract on which the Neels held oil and gas royalties. Prior to this litigation, HECI had sued AOP, the lessee of an adjoining tract, claiming that AOP was overproducing their common reservoir. HECI was the sole plaintiff and recovered a judgment against AOP, which HECI and AOP settled. Four years later, the Neels sued HECI to recover that portion of HECI’s judgment that they claimed represented damages to their royalty interests. The trial court entered summary judgment in favor of HECI, ruling against all of the Neels’ claims, including one for unjust enrichment.

The supreme court upheld the summary judgment in respect to the unjust enrichment cause by concluding that HECI had no legal right to recover from AOP for any of the interests held by the Neels. Therefore, no part of the settlement received by HECI from AOP could represent payment for the harm AOP’s actions caused the Neels’ interests. The Neels may well have had an unjust enrichment cause of action against AOP, but they failed to assert that claim within the limitations period.

In conclusion, the Texas Supreme Court held that the Neels could not sue HECI for unjust enrichment because HECI could not have been enriched at the Neels’ expense in the settlement with AOP. In this discussion, the supreme court made the following statement: “We have recognized that, in some circumstances, a royalty owner has a cause of action against its lessee based on unjust enrichment, but only when the lessee profited at the royalty owner’s expense.” On a related point, the supreme court in HECI cited its earlier decision in Gavenda v. Strata Energy, Inc. for the proposition that a lessee’s erroneous division order was not binding on a royalty owner when that order had caused the lessee to retain funds due that royalty owner. If, on the other hand, the lessee’s error merely overpays some and underpays other royalty owners, the underpaid royalty owners possess an unjust enrichment claim against the overpaid royalty owners but not against the lessee. Unlike the lessee in Gavenda, HECI had not retained or obtained any money that was legally due the Neels, and therefore, HECI could not

27 HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998).
28 Id. at 884.
29 Id.
30 Id. at 891–92.
31 See id.
32 Id. at 891.
34 HECI, 982 S.W.2d at 891 (citing Gavenda, 705 S.W.2d at 692–93).
35 See id.
have been unjustly enriched at the Neels’ expense. In *HECI*, as noted above, the Texas Supreme Court explicitly referred to an unjust enrichment “cause of action” rather than to an unjust enrichment theory.

In *Fortune Production Co. v. Conoco, Inc.*, the Texas Supreme Court upheld a judgment in favor of one of the plaintiffs (Cox) solely on the basis of an unjust enrichment cause of action. In distinguishing the rights of the other plaintiffs, the supreme court stated that “[a] cause of action for unjust enrichment is not available to recover payments in addition to the contract price the parties agreed upon.” However, the court upheld the judgment in favor of Cox based on an unjust enrichment cause of action in part because he was not a party to a contract during the relevant period.

In *Fortune*, four natural gas producers (Fortune, Tucker, Hankamer, and Cox) had written agreements to sell natural gas to Conoco’s predecessor in interest, Farmland. After purchasing the interests and receiving an assignment of these contracts, Conoco had terminated the existing contracts and entered new ones in 1990 with three of the four producers. Cox had refused to enter a contract, but continued selling natural gas to Conoco. In 1992, Hankamer refused to renew its contract but continued selling natural gas to Conoco as well. These four producers sued Conoco alleging fraud in the inducement to sign the contracts in 1990, contending Conoco misrepresented its ability to sell the gas according to a long-term contract, and claiming unjust enrichment because Conoco had been selling the field liquids (condensate) it collected by compressing the natural gas flow without sufficient payment to the producers.

To the extent the plaintiffs had valid contracts that dealt with the subject matter of this unjust enrichment claim, the contracts precluded their

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36 *Id.* ("The fact that HECI may have recovered more than it was entitled is a matter about which AOP could have complained in the suit against it, but that does not give rise to a cause of action for unjust enrichment in favor of the Neels." (emphasis added)).
37 *See id.* ("We have recognized that, in some circumstances, a royalty owner has a cause of action against its lessee based on unjust enrichment, but only when the lessee profited at the royalty owner’s expense." (first emphasis added)).
39 *Id.* at 685.
40 *Id.* As noted above, unjust enrichment cannot stand as a cause of action to alter valid and enforceable provisions of a contract.
41 *See id.*
42 *Id.* at 673–74.
43 *Id.* at 674–75.
44 *Id.* at 675.
right to recover based on unjust enrichment. However, Cox had refused to enter a contract with Conoco during the period in question, and the supreme court expressly upheld Cox’s unjust enrichment judgment. The unjust enrichment judgment awarded to Hankamer, who had stopped entering into contracts after Cox, was remanded because the jury had not distinguished between the time Hankamer was operating under an express contract and the period during which Hankamer was not. The supreme court also stated that the plaintiffs “elected to pursue a claim for unjust enrichment rather than breach of contract.”

Wrongful Conduct

A court that orders restitution from a defendant who received a benefit because of the plaintiff’s mistake or negligence seeks to restore the benefit that rightfully belongs to the plaintiff. Restitution thus restores what is the most just arrangement of property rights by returning the benefit to its rightful owner.

However, in some instances, two changes in these facts can alter the meaning of restitution. Those two changes are: (1) the defendant consciously engages in wrongdoing to appropriate the plaintiff’s property, and (2) that property gains value significantly from what appears to be the defendant’s efforts. When those two characteristics describe the case, the policies of restitution expand to encompass the additional policy of preventing a wrongdoer from profiting from his wrong.

As so expanded, restitution appears more like a remedy of disgorgement – requiring the defendant to disgorge both the benefit obtained from the plaintiff and its enhanced value. The plaintiff receives a windfall to the extent the enhanced value exceeds the benefit plus its use value, but this result seems more appropriate than allowing a wrongdoer to profit to any degree from the wrong.

In *Meadows v. Bierschwale*, the Texas Supreme Court held that a seller, who was fraudulently induced to sell his property, could recover from the original buyer any profits he obtained in the resale of that property. In reaching this conclusion, the court stated that the plaintiff was entitled to proceeds that “include any profit [the buyer] made on the sale to [a third party].” In support of its conclusion, the supreme court cited § 160 of the

45 Id. at 685.
46 Id.
47 Id.
48 Id. at 683.
49 516, S.W.2d 125 (Tex. 1974).
50 Id. at 129.
first Restatement of Restitution.\textsuperscript{51} More recently, the Texas Supreme Court has noted that “courts may fashion equitable remedies such as profit disgorgement and fee forfeiture to remedy a breach of fiduciary duty.”\textsuperscript{52}

The Restatement (Third), published in 2011, provides an explanation of what happens when the defendant engages in consciously wrongful conduct in obtaining the plaintiff’s property and thereafter adds to its value.

\textbf{§ 51. Enrichment Of Wrongdoers: Disgorgement; Accounting}

(3) Unless the rule of subsection (2) imposes a greater liability, the unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault, is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate any profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. Restitution remedies that pursue this object are often called “disgorgement” or “accounting.”

One must prove the conscious wrongdoer profited and to what extent from moneys belonging to the plaintiff. If discovery methods are ineffective in finding profits, the plaintiff can seek an equitable accounting.

3. Constructive Trust

\textit{Overview}

The major disadvantage of a monetary award in a judgment comes from its so-called \textit{in rem} nature – that is, judgments must be enforced, typically through law enforcement’s seizure of the judgment debtor’s assets. Judgment debtors may have no assets, may have exemptions under local law for the most valuable of those assets, or may have a wave of competing creditors for whatever assets are available. Even when successful the judgment creditor must exert energy and resources to turn the judgment into money. A constructive trust avoids all of these troubles and provides that immediate gratification most valued by modern litigants.

The Restatement (Third) of Restitution and Unjust Enrichment (2011) describes the constructive trust in the following manner.

\textbf{§ 55. Constructive Trust}

(1) If a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant

\textsuperscript{51} Id. at 129-30.

\textsuperscript{52} ERI Consulting Engineers, Inc. v. Swinnea, 318 S.W.3d 867, 873 (Tex. 2010).
or in violation of the claimant's rights, the defendant may be declared a constructive trustee, for the benefit of the claimant, of the property in question and its traceable product.

(2) The obligation of a constructive trustee is to surrender the constructive trust property to the claimant, on such conditions as the court may direct.

Comment b of § 55 explains the practical meaning of this arcane term by noting that, once we abandon the metaphoric allusion to trust law, [E]very judicial order recognizing that “B holds X in constructive trust for A” may be seen to comprise, in effect, two remedial components. The first of these is a declaration that B’s legal title to X is subject to A’s superior equitable claim. The second is a mandatory injunction directing B to surrender X to A or to take equivalent steps.

The courts of equity originally employed this injunctive remedy to return trust property as a cure for a trustee’s breach of fiduciary duty. The Texas Trust Act includes the constructive trust as a modern remedy for breaches of the trustee’s fiduciary duty. However, a constructive trust became a remedy for the prevention of unjust enrichment; in this role, it does not depend on the intent of the parties to enter a confidential or fiduciary relationship. The term “constructive” means “not-a-trust” in that, though no actual trust exists, the law imposes (constructs) a remedy that resembles those available for breaches of a real trust.

The key feature of a constructive trust, from the plaintiff’s point of view, comes from the recovery of specific property typically through the court’s issuance of a mandatory injunction ordering the defendant to sign documents effectuating that transfer. The plaintiff must trace the property taken by the defendant at his expense to identifiable property unjustly held by the defendant. In this manner, the right to restitution gives the plaintiff superior title to property even though it may not be in its original form.

*Texas Supreme Court Cases*

53 See TEX. PROP. CODE ANN. § 114.008(a)(9) (West 2007) (stating that as one remedy for a breach of trust, a court can “impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property”).
In its 1948 decision in Pope v. Garrett, the Texas Supreme Court upheld a judgment awarding a constructive trust against all of the heirs of an intestate and covering all of the assets of her estate.54 These heirs had received property through the descent and distribution statute from the estate of Ms. Carrie Simons. Although Ms. Simons died without leaving a will, she had clearly intended to execute a will giving all of her estate to the plaintiff, Ms. Garrett. When she sought to sign her will, two of her heirs caused such a disturbance that she was prevented from executing the will. She fell seriously ill shortly thereafter and died. Some of the defendants who as heirs took property from Ms. Simons’ estate had not participated in this disturbance and were innocent of any wrongdoing.55 Nevertheless, all of the heirs had received property from the estate as a result of the wrongful action of the two heirs. The heirs were all enriched at Ms. Garrett’s expense because Ms. Simons had intended to transfer all of her estate to her.56 The trial court impressed a constructive trust on all of the assets of the estate, including those assets held by the heirs innocent of any wrongdoing, but the court of appeals reversed insofar as the constructive trust affected the property in the hands of the innocent heirs.57

However, all of the defendants had benefited at the expense of Ms. Garrett, and the Texas Supreme Court held that retention of this benefit, even by the innocent heirs, would amount to unjust enrichment.58 Restitution through the constructive trust effectively transferred the estate’s assets to the plaintiff because “[t]he policy against unjust enrichment argues in favor of the judgment rendered herein.”59 The trial court impressed the constructive trust because “[b]ut for the wrongful acts [of two of the defendants] the innocent defendants would not have inherited interests in the property.”60

The Texas Supreme Court recognized that some courts denied such a plaintiff any relief in tort against the innocent heirs because the plaintiff had no existing right to the property but merely an expectancy interest.61 Without deciding the existence of this tort cause of action in Texas, the supreme court approved the trial court’s power as a court of equity to compel the

54 Pope v. Garrett, 211 S.W.2d 559, 562 (Tex. 1948).
55 Id. at 559–60.
56 See id.
57 Id. at 559.
58 Id. at 562.
59 Id.
60 See id.
61 Id. at 561.
transfer of the estate to the intended legatee. The supreme court concluded that, though not guilty of tortious wrongdoing, the innocent defendants had obtained a benefit at the expense of the plaintiff and that the “policy against unjust enrichment” required the return of that benefit to the plaintiff.

More recently, the Texas Supreme Court stated in Meadows v. Bierschwale that violation of a fiduciary relationship is not necessary to support imposition of a constructive trust. In Meadows, Oakes used fraud to induce Bierschwale to convey an apartment complex in exchange for a series of notes that turned out to be worthless. Before Bierschwale sued him, Oakes sold the property at a profit to a second buyer in exchange for promissory notes that were not worthless. Bierschwale recovered a judgment against Oakes and obtained a constructive trust on the promissory notes that Oakes received from the second buyer.

In the case before the Texas Supreme Court, Bierschwale’s real estate agent, Meadows, sought a constructive trust for his brokerage fee on the valuable promissory notes. Bierschwale wanted sole possession of the proceeds from those notes, and had not committed any wrong against Meadows. Unjust enrichment, rather than fraud or other wrongdoing, supported the supreme court’s decision to give Meadows a share of the constructive trust. The court made this clear in stating “[c]onstructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment.” The court went further to say that “there is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted.”

_Curse of the Errant Conjunction_

A number of Texas courts of appeals have stated that a constructive trust always requires proof of either a fiduciary relationship or of actual fraud. “To obtain a constructive trust, the proponent must prove: (1) breach of a special trust, fiduciary relationship, or actual fraud; (2) unjust

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62 See id.
63 Id. at 562.
64 Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974).
65 Id. at 127–28.
66 Id. at 131.
67 See id. at 131
68 Id. (emphasis added).
69 Id.
enrichment of the wrongdoer; and (3) tracing to an identifiable res.” This statement imposes three prerequisites to the remedy: proof of a breach of a fiduciary relationship or of fraud; a showing of unjust enrichment; and tracing to the property at issue. The Restatement (Third), as noted above, makes clear that unjust enrichment and tracing suffice, without the need to prove wrongdoing.

The Texas Supreme Court has required breach of a fiduciary duty when the beneficiary seeks to use a constructive trust to enforce an oral agreement to convey land, which would circumvent the Statute of Frauds. These cases do not purport to impose this requirement, or an alternative requirement of fraud, to limit the use of a constructive trust in situations in which the Statute of Frauds does not apply.

In *Pope*, the supreme court approved the use of a constructive trust to return property to the plaintiff from innocent heirs who had received the property because of the wrongdoing of others. Retention of the property by these innocent heirs unjustly enriched them because the plaintiff had a superior right to the property, but they were no responsible for any wrongful conduct. More recently, the Texas Supreme Court quoted from *Meadows* in stating that “[c]onstructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice.”

In *Holmes v. Kent*, a deceased teacher had failed to comply with statutory requirements in removing her ex-husband as the beneficiary of her retirement benefits, and the court refused her estate’s request for a constructive trust on the benefits received. It rejecting a constructive trust, the court stated that it did not “think a designated beneficiary wrong or unjustly enriched to receive what the retiree gave him and never took back.” In other words, the supreme court believed either wrongful conduct or unjust enrichment would satisfy the substantive requirement for a

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71 See Naftalis v. Rankin, 542 S.W.2d 893, 897 (Tex. 1976); Tyra v. Woodson, 495 S.W.2d 211, 213 (Tex. 1973); Consolidated Gas & Equipment Co. v. Thompson, 405 S.W.2d 333, 336-37 (Tex. 1966).
72 Holmes v. Kent, 221 S.W.3d 622, 628 (Tex. 2007) (quoting Meadows v. Bierschwale, 516 S.W.2d 125, 131 (Tex. 1974)).
73 Id. at 623-24.
74 Id. at 629.
constructive trust. This conflicts with the repeated statement by the cited lower courts that a constructive trust could not be impressed unless the plaintiff proved both wrongful conduct and unjust enrichment.

The significance of this point can be seen in cases in which the plaintiff mistakenly confers a benefit on the defendant and can trace that benefit to identifiable property. In October 2000, Isabel Gonzales had her secretary wire $152,604 from her bank in Mexico to her account in the Wells Fargo Bank in San Antonio.\(^{75}\) In making this automated computer transaction, only Gonzales' account number and not her name was used. Unfortunately for Ms. Gonzales, her secretary accidentally transposed two numbers in the Wells Fargo account, thereby inadvertently crediting this amount to the Wells Fargo account of John Castano. Shortly thereafter, a second transfer amounting to $50,585.89 was made from Gonzales' account in Mexico and erroneously credited to Castano's account.

Castano notified officials of Wells Fargo that he was receiving large amounts of money. He converted all of the money in his account into cashier's checks and deposited these in a safety deposit box. After Gonzales discovered her mistake and notified Wells Fargo, the bank asked Castano to return the money he had received through the erroneous transfers. He refused, and Gonzales subsequently sued the bank, which then impleaded Castano. The trial court ordered Castano to surrender the two cashier's checks that represented Gonzales' erroneous transfers of $152,604 and of $50,585.89.

The San Antonio Court of Appeals upheld the trial court, recognizing that the trial court had imposed a constructive trust on the cashier's checks. It concluded that a constructive trust had the "broad function of redressing wrong or unjust enrichment."\(^{76}\) The court sought to bolster its conclusion by noting that Castano had agreed with bank officials to hold the funds in trust while they sought to determine who owned the funds. Although this conclusion did not describe Castano's attitude when the bank requested the return of that money, the court noted that the pleadings and evidence justified an "implied finding" that he agreed to hold the money in trust.\(^{77}\) It would seem that Castano did not intentionally enter a trust agreement or consent to return the money. However, without regard to his intent, the trial

\(^{75}\) These facts are taken from Castano v. Wells Fargo Bank, 82 S.W.3d 40 (Tex.App. - San Antonio 2002, no writ).

\(^{76}\) \textit{Id.} at 43.

\(^{77}\) \textit{Id.}
court imposed, and the court of appeals affirmed, the constructive trust as a matter of law.

It is important to note that Castano did not commit a wrongful act. The money appeared in his account, and he notified bank officials of the deposits. Perhaps after thinking about what a large sum of money could do for his personal finances, he balked at returning the windfall. Nevertheless, neither Gonzales nor Wells Fargo could have successfully sued him for breach of contract or for a tort. However, if he had been allowed to retain $203,189.89 of Gonzales' money under these circumstances, he would have been unjustly enriched. The court was certainly correct in upholding the constructive trust as a tool to prevent this unjust enrichment, even though the only fault in the case was that of either Gonzales (or her secretary) or the bank.

In this case, the San Antonio court of appeals ruled in accordance with the Restatement (Third) and, it would seem, in line with the Texas Supreme Court’s recognition of the flexibility of the constructive trust as a remedy. Nevertheless, one may encounter problems in those courts that insist on satisfaction of the three requirements in every case. In those courts, unjust enrichment may not be sufficient alone, and the plaintiff may be required to prove wrongdoing by the defendant in addition to unjust enrichment and tracing. That result is frustrating because the constructive trust is an equitable remedy that should be used when it will provide effective and deserved redress to the plaintiff.

Tracing

The Restatement (Third) of Restitution and Unjust Enrichment speaks of the more fundamental requirements of tracing in § 58 and of the rules for tracing into and out of a commingled fund in § 59. Section 58 reads, as follows:

1. A claimant entitled to restitution from property may obtain restitution from any traceable product of that property, without regard to subsequent changes of form.
2. A claimant entitled to restitution from property or its traceable product may assert the same rights against any subsequent transferee who is not a bona fide purchaser or a bona fide payee.
3. When property from which a claimant is entitled to restitution is exchanged for a more valuable product, the claimant's rights may be limited
4. To protect innocent recipients against liability for consequential gains;
(b) to protect the interests of the recipient's creditors and dependents; or
(c) to prevent a recovery that is grossly disproportionate to any loss on which the claimant's right to restitution is based.

The significance of tracing includes the ability to obtain the property’s transfer to the plaintiff through a constructive trust, and proof of plaintiff’s right to the property gives him priority over other creditors. It therefore acts as an adjunct to the equitable remedies of constructive trust, equitable lien, and equitable subrogation.

In *Wilz v. Flournoy*, the Texas Supreme Court upheld a constructive trust on the defendants’ farm even though the plaintiff did not prove that the purchase price was wholly paid with funds taken from an express trust. The supreme court held that once the plaintiff traced some of the trust funds to the purchase of the farm the burden shifted to the defendants. They failed to carry that burden and, therefore, the lower court was justified in impressing a constructive trust on the equity interest of the defendants’ in the farm. In this regard, the supreme court stated that:

>a party seeking to impose a constructive trust has the initial burden of tracing funds to the specific property sought to be recovered. … Once that burden is met, “the entire … property will be treated as subject to the trust, except in so far as the trustee may be able to distinguish and separate that which is his own.”

A different problem arises when a wrongdoer deposits the plaintiff’s money in a bank account that contains money belonging to the wrongdoer. The first question becomes whether the plaintiff can obtain a constructive trust on the whole of the commingled fund or on some lesser portion. If that account has been seriously diminished, the plaintiff can seek to trace funds from the account to property purchased by the wrongdoer. The Restatement (Third) of Restitution and Unjust Enrichment (2011) responds to these problems in the following fashion:

§ 59. Tracing Into Or Through A Commingled Fund
(1) If property of the claimant is deposited in a common account or otherwise commingled with other property so

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78 228 S.W.3d 674 (Tex.2007) (per curiam).
79 *Id.* at 676, quoting Eaton v. Husted, 172 S.W.2d 493, 498-99 (Tex. 1943) (emphasis in original).
that it is no longer separately identifiable, the traceable product of the claimant's property may be identified in
(a) the balance of the commingled fund or a portion thereof, or
(b) property acquired with withdrawals from the commingled fund, or a portion thereof, or
(c) a combination of the foregoing, in accordance with the further rules stated in this section.
(2) If property of the claimant has been commingled by a recipient who is a conscious wrongdoer or a defaulting fiduciary or equally at fault in dealing with the claimant's property:
(a) Withdrawals that yield a traceable product and withdrawals that are dissipated are marshaled so far as possible in favor of the claimant.
(b) Subsequent contributions by the recipient do not restore property previously misappropriated from the claimant, unless the recipient affirmatively intends such application.
(c) After one or more withdrawals from a commingled fund, the portion of the remainder that may be identified as the traceable product of the claimant's property may not exceed the fund's lowest intermediate balance.
(3) If property of the claimant has been commingled by an innocent recipient, the claimant's property may be traced into the remaining balance of the commingled fund and any product thereof, but restitution from property so identified may not exceed the amount for which the recipient is liable by the rules of §§ 50 and 53.

In *Paschal v. Great Western Drilling, Ltd.* 80, an employee embezzled funds from his employer, commingled those funds in a family checking account, and used funds from the account to buy life insurance policies. The court of appeals upheld the trial court’s constructive trust on all insurance proceeds remaining in the beneficiary’s possession. The court quoted an earlier court of appeals opinion for the following proposition:

A plaintiff seeking to recover embezzled funds has the initial burden to trace the embezzled funds into specific property. Once the plaintiff traces the embezzled funds into specific

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property, that property becomes the subject of a constructive trust. If property is purchased with funds from an account containing both embezzled funds and funds belonging to the wrongdoer, that property is the subject of the trust, unless the wrongdoer can prove that the subject property was purchased with the wrongdoer's own funds, and not embezzled funds.\textsuperscript{81}

The plaintiff must bear the initial burden of tracing funds or property, but once satisfied the burden shifts to the defendant to prove what portion of his own funds reside in a commingled account or were used to purchase property with money from the account. The plaintiff can satisfy the burden of tracing from a commingled account by using the “family expense method.”\textsuperscript{82} This method is based on a presumption that the wrongdoer’s money was drawn from the account first in order to pay the family’s living expenses. If the family’s living expenses exceed the wrongdoer’s income that has been deposited in the account, the money paid for unusual expenses, such as insurance proceeds, must come from embezzled funds.\textsuperscript{83} The court in \textit{Paschal} refused to use principles of tracing that are used in the marital-property context because the motives of an embezzler should not be presumed to be the same as a spouse.\textsuperscript{84}

4. Equitable Subrogation

\textit{Overview}

Subrogation refers to the law’s permission for a plaintiff to assert the rights originally belonging to a third party. Parties can agree to subrogation in contracts, typically those involving insurance companies, and contract law controls the application of this “conventional” subrogation. Equitable subrogation prevents unjust enrichment when no contractual provision covers the question.

Equitable subrogation can have two effects: it can substitute the plaintiff for one who originally held the right to establish the defendant’s liability, or it can create in the plaintiff a security interest against specific

\textsuperscript{81} \textit{Id.} at 444 (quoting Marineau v. General American Life Ins., 898 S.W.2d 397, 400 (Tex.App.-Fort Worth 1995, writ denied)).
\textsuperscript{82} \textit{Id.} at 448.
\textsuperscript{83} \textit{Id.} at 447.
\textsuperscript{84} \textit{Id.}
property of the defendant.\textsuperscript{85} The Restatement (Third) characterizes these two effects of equitable subrogation as substantive and remedial.\textsuperscript{86}

The remedial effect of subrogation typically appears in cases in which the defendant obtains money that rightfully belongs to the plaintiff, but uses that money to pay off a secured debt on specific property. For example, assume the defendant embezzled the plaintiff’s money and used that money to pay off the mortgage lien on her home and to obtain a release. If tracing evidence supports this description of the facts, a judicial order can reinstate the lien to cover the amount paid with the plaintiff’s money and name the plaintiff as the lienholder. This remedial form of equitable subrogation provides the plaintiff restitution only after he satisfies the requirements of liability—by proving unjust enrichment—and traces the benefit taken by the defendant to the release of the lien.

If the plaintiff could only prove a claim for unjust enrichment but could not trace his money to the removal of the lien, he could nevertheless obtain restitution in the form of a monetary judgment. A monetary judgment gives him no priority over other creditors who may be competing for the assets of the defendant. If the plaintiff can prove the unjust enrichment claim and satisfy the requirement for tracing, equitable subrogation allows him to enjoy the priority of a lien for the same amount of money and thus gives him priority over unsecured creditors.\textsuperscript{87}

\textit{Texas Supreme Court Cases}

Equitable subrogation’s substantive effect gives the plaintiff standing to assert a right of action the law originally lodged with a third party. This effect resembles a contractual assignment of a right of action, but allows substitution in the absence of a contract. The law creates this extra-contractual substitution of the plaintiff for the third party in order to prevent the defendant’s unjust enrichment.

For example, in \textit{Frymire Engineering Co. v. Jomar International, Ltd.}, the Texas Supreme Court used equitable subrogation to establish the plaintiff’s standing to assert the rights of the entity whose property was

\textsuperscript{85} \textit{See RESTATEMENT (THIRD) OF RESTITUTION AND UNJust ENRICHMENT § 57 cmt. a (2011) (“The word ‘subrogation’—an antique synonym for ‘substitution’—is commonly used to describe both a liability and a remedy in restitution.”).}

\textsuperscript{86} \textit{See id.}

\textsuperscript{87} \textit{See id. This remedial form of equitable subrogation is “closely analogous to the operation of constructive trust (§ 55) or equitable lien (§ 56), but . . . instead of an acquisition of property . . . at the claimant’s expense, . . . the claimant’s assets have been used to satisfy an obligation of the defendant.” Id.}
damaged. In *Frymire*, the Renaissance Hotel in Dallas had employed a general contractor to remodel one of its meeting rooms. Frymire contracted with the general contractor to do part of that work. In its contract with the general contractor, Frymire agreed to pay for any damages that its work caused the hotel or the general contractor and to cover this obligation with liability insurance. In completing its work on the hotel’s air conditioning system, Frymire installed a valve manufactured by Jomar. A leak in the air conditioning water line at the location of the valve caused extensive damage to the hotel. Upon demand by the hotel, Frymire’s insurer, Liberty Mutual, paid the hotel $458,496 on Frymire’s behalf. In exchange for this payment, the hotel released Frymire and Liberty Mutual from all claims arising from this damage.

Frymire and Liberty Mutual then sued Jomar alleging its valve was defective. However, the trial court granted summary judgment in favor of Jomar, and the court of appeals affirmed this judgment based on its conclusion that the plaintiffs lacked standing to assert what the court deemed were rights belonging to the hotel. The court of appeals held that Frymire failed to satisfy the requirements of equitable subrogation and thus could not obtain standing by substituting for the hotel.

The Texas Supreme Court reversed the court of appeals, holding that equitable subrogation applied to give Frymire standing to assert the hotel’s claims against Jomar. In reaching this conclusion, the supreme court stated that Frymire should have a trial because the evidence supported its “contentions that it (1) paid a debt primarily owed by Jomar, (2) did so involuntarily, and (3) seeks subrogation in a situation where Jomar would be unjustly enriched if Frymire were precluded from pursuing its claims.”

Here, the immediate remedy sought was equitable subrogation, and the supreme court granted that remedy to prevent the unjust enrichment of Jomar at the expense of Frymire. The Texas Supreme Court gave Frymire standing because it paid off a claim that was primarily the obligation of Jomar. If Jomar had been allowed to avoid Frymire’s claim for money paid to the hotel (allegedly to cover damages caused by Jomar’s defective

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89 *Id.* at 142.
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.* at 147.
94 *Id.*
95 *Id.*
product), Jomar would have been unjustly enriched. These characteristics track the three elements of a general unjust enrichment claim with the addition of a requirement that Frymire must not have voluntarily made the payment.

The Texas Supreme Court stated in its earlier decision in *Smart v. Tower Land & Investment Co.*, that:

> [e]quitable subrogation may be invoked . . . when one person confers upon another a benefit that is not required by legal duty or contract [such as when one person pays the debt of another]. . . . Subrogation . . . is available, however, only when the debtor was enriched unjustly; thus, the payor who confers a benefit as a “mere volunteer” is not entitled to this remedy.  

In general, restitution will not lie “for an unrequested benefit voluntarily conferred.”  

The subrogation requirement that the plaintiff acted involuntarily merely expresses a fundamental limiting principle on unjust enrichment claims.  

Frymire’s contract with the general contractor obligated it to pay any damages its work caused the hotel, and though entry into this contract may have been voluntary, Frymire’s “duty to honor that contract was not.” Furthermore, given “the evidentiary presumption that Jomar’s faulty product primarily caused the water damage, [the court had] no trouble concluding that Jomar would be unjustly enriched were Frymire not permitted to pursue its claims.”

**Conclusion**

This field of law consists of much arcane terminology, and these labels tend to obscure the nature both of the unjust-enrichment cause of action and of the nature of the remedies of restitution. These remedies enhance recovery when the defendant is a conscious wrongdoer, who has profited from the unjust enrichment. In all other cases, restitution first requires proof of the amount of the benefit taken at the expense of the

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97 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2(3) (2011); see also id. § 2 cmt. d (“Instead of proposing a bargain, the restitution claimant first confers a benefit, then seeks payment for its value.”).  
98 See id. § 2(3) (“There is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant’s intervention in the absence of contract.”).  
99 Frymire, 259 S.W.3d at 146.  
100 Id.
plaintiff. Second, tracing may show this benefit has been used to acquire identifiable property now held by the defendant. If that is the case, the plaintiff will seek restitution through a constructive trust or either an equitable lien or equitable subrogation. The first remedy gives plaintiff title to the property free of other creditors, and the other two provide a money judgment secured by a lien on specific property. If you can choose, you will seek equitable restitution, rather than the money judgment of legal restitution, because the former secures your rights against the defendant and gives you priority over her creditors.

Some courts may still talk about a claim in “quasi-contract” seeking a “constructive trust.” However, the simplified claim to prevent unjust enrichment supplies the elements of any general claim. In addition, the remedies known as a constructive trust, equitable lien, and equitable subrogation (in its remedial form) are injunctions. The names may carry the musty smell of the ancient common law and chancery courts, but they operate through what modern lawyers recognize as injunctive orders that carry the sanction of contempt. They therefore offer powerful and effective remedies where traditional tort or contract remedies would either fail or provide a, perhaps unenforceable, damages judgment. And remember, when a conscious wrongdoer has profited from the benefit she gained, the plaintiff can force her to turn over that benefit and her profits. You can’t do that with tort or contract.