Title

Nowadays a Practicing Lawyer's First Serious Exposure to Critical Unjust Enrichment Doctrine is Likely to be After Law School, Too Bad.

Synopsis

This modified excerpt from *Loring and Rounds: A Trustee's Handbook* (2013) is a primer on the wrong of Unjust Enrichment and its principal remedy, Restitution. Unjust enrichment doctrine is very much alive and well in the real world of the law practitioner. This is not the case, however, in the fantasy world of the contemporary law academic. Charles E. Rounds, Jr. explains how this came to be.

Text

§ 8.15.78 *Unjust Enrichment*

[Excerpted from *Loring and Rounds: A Trustee's Handbook* (2013), with modifications].

> *In 1997, Gummow, J, a justice of the High Court of Australia,…signaled in Hill v. Van Erp…his unhappiness with the exorbitant claims of those who sought to pack down the whole of restitution into a tight unjust enrichment box*.[1152]

Unjust enrichment can be either an equitable or a legal wrong.[1153] Whether in equity or at law, unjust enrichment is the basic principle, on this side of the Atlantic at least, that underlies the substantive equitable remedy of restitution.[1154] Restitution as a remedy for a trustee's unauthorized self-dealing is covered in Section 7.2.3.3 of this handbook. One who is unjustly enriched is unjustifiably enriched, that is to say there is no legal or equitable basis for the enrichment, such as what might be supplied by the law of gifts or the law of contracts.[1155] "Restitution is accordingly subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach."[1] Likewise, absent special facts, gift doctrine trumps considerations of unjust enrichment. Thus the term "unjustified enrichment" better captures the essence of traditional unjust enrichment doctrine in the Anglo-American legal tradition. It also better approximates the gist of comparable doctrine in the civil law tradition. "One reason is that

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[1152] Justice Keith Mason, Chancery Bar Assoc., Inner Temple, *What Has Equity to Do with Restitution? Does It Matter?* (Nov. 27, 2006).

[1153] Andrew Kull, James Barr Ames and the *Early Modern History of Unjust Enrichment*, 25 Oxford J. Legal Stud. 297 (2005).

[1154] Edwin W. Patterson, Book Review, 47 Yale L.J. 1420, 1421 (1938) (reviewing Restatement of Restitution (1937)).

[1155] Restatement (Third) of Restitution and Unjust Enrichment § 2, cmts. b (gift) & c (contract)..

[1] Restatement (Third) of Restitution and Unjust Enrichment § 2, cmt. c.

'unjustified enrichment' makes an approximate translation of both the German *ungerechtfertige Bereicherung* (BGB § 812) and the French *enrichissement sans cause*."[2]

At law, the concept of unjust enrichment incubated in the corner of the common law we now refer to as quasi contracts or "contracts implied in law."[1156] "That heading includes a wide variety of situations…, as where a person by mistake pays a debt a second time, or is coerced into conferring a benefit upon another, or renders aid to another in an emergency or is wrongfully deprived of his chattels by another who has used them for his own benefit."[1157] The legal remedy is generally limited to the payment of money.[1158] In equity, the concept of unjust enrichment evolved as a corollary to both the fiduciary principle and constructive trust jurisprudence.[1159] The constructive trust is covered in Section 3.3 of this handbook and in Section 7.2.3.1 of this handbook. By the end of the 19th century American legal scholars were busy developing a unified theory of unjust enrichment that straddled and transcended the traditional law/equity divide of the Anglo-American legal tradition.[3] The Restatement of Restitution (1937) is the culmination of those efforts. It purported to sever the concept of restitution for unjust enrichment from its various cultural roots and placed it in its own vase on the shelf of the constructs of the common law as it has been enhanced by Equity: "The task of 'restatement," in this instance, took the form of a radical reconception of an important area of the law that antiquated formal categories had previously obscured, following exactly in this regard the prescriptions of some noted realists."[1160] One such realist was Harvard's Prof. James Barr Ames.[4]And yet it is also said that the concept of unjustified enrichment is actually of exceedingly ancient origin. In the writings of Sextus Pomponius, a Roman jurist of the mid-second century A.D., appears this maxim: *Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiorerm* ("It is a principle of natural justice and equity, that no one should be enriched through loss or injury to another").[5]

The English and the Australians, however, have yet to fully buy into the American idea of a freestanding law of restitution for unjust enrichment.[1161] In any case, on this side of the Atlantic there are now few left who are equipped, by formal legal training at least, to appreciate the boldness of the efforts of the realists, via the Restatement of Restitution (1937), to colonize the

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[2] Restatement (Third) of Restitution and Unjust Enrichment § 1, Reporter's Note. "In the statute law of Louisiana, the source of what is here called a liability in restitution is described as an 'enrichment without cause.' La. Civ. Code art. 2298. As expressed in Canadian law, a claim in restitution requires that the plaintiff establish an enrichment , a corresponding deprivation, and 'the absence of any juristic reason…for the enrichment.' Rathwell v. Rathwell, [1978] 2 S.C.R. 436, 455."Id.

[1156]Restatement of Restitution, Part I, Introductory Note (1937).

[1157]Restatement of Restitution 1 (General Scope Note) (1937).

[1158]Restatement of Restitution 1 (General Scope Note) (1937).

[1159]Harold Greville Hanbury & Ronald Harling Maudsley, Modern Equity, Chap. 14 (10th ed. 1976).

[3] Restatement (Third) of Restitution and Unjust Enrichment § 4, cmt. b.

[1160]Andrew Kull, Restitution and Reform, 32 S. Ill. U. L.J. 83, 86 (2007).

[4] *See generally* Restatement (Third) of Restitution and Unjust Enrichment § 4, Reporter's Note.

[5] Restatement (Third) of Restitution and Unjust Enrichment § 4, cmt. b. & Reporter's Note.

[1161]*See* Charles E. Rounds, Jr., *Relief for IP Rights Infringement Is Primarily Equitable: How American Legal Education Is Short-Changing the 21st Century Corporate Litigator*, 26 Santa Clara Computer & High Tech. L.J. 313, 333–335 (2010).

"vast *terra incognita* occupied by the set of legal actions grouped under the impenetrable name of 'quasi-contract' and a miscellaneous set of equitable remedies (principally constructive trust)" in that "many American lawyers would be hard pressed even to say what equity is (or was)."[1162] For more on the marginalization of Equity in the curriculum of the American law school, the reader is referred to Section 8.25 of this handbook.

As to unjust enrichment as a principle of substantive liability, all that critical doctrine fell through the cracks years ago with the introduction of the traditional Remedies course into the American law school curriculum.[6] The course was a pedagogical contraption of selected elements of the traditional Damages, Equity, and Restitution required courses.[7] Now even Remedies is elective, or no longer offered at all. It is no wonder that unjust enrichment doctrine is generally a mystery to contemporary American lawyers, and to contemporary law professors even more so.[8] "Much of the substantive law of equity—in particular, the law describing equitable interests in property held by another—suffered the same fate."[9]

[1162] Andrew Kull, *Restitution and Reform*, 32 S. Ill. U. L.J. 83, 87 (2007).

[6] Restatement (Third) of Restitution and Unjust Enrichment § 1, Reporter's Note.

[7] Restatement (Third) of Restitution and Unjust Enrichment § 1, Reporter's Note.

[8] Restatement (Third) of Restitution and Unjust Enrichment § 1, Reporter's Note.

[9] Restatement (Third) of Restitution and Unjust Enrichment § 1, Reporter's Note.