

UNJUST ENRICHMENT IN TEXAS: IS IT A FLOOR WAX OR A DESSERT TOPPING?¹

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I.	Introduction.....	154
II.	Why Is Unjust Enrichment Important to Texas?	157
	A. The Data Economy Needs Monetary Remedies in Equity	159
	B. Strategic and Tactical Advantages of Unjust Enrichment	162
	C. Federal and State Agency Litigation.....	166
III.	Traditional Law in Equity	168
	A. The Doctrine of Irreparable Injury	172
	B. Equity Jurisprudence After Merger.....	175
	C. Burdens of Proof and Counter-Restitution.....	178
	D. Unjust Enrichment at Law.....	184
	E. Equitable Semantics	186
IV.	Equity in Texas	188
	A. The Doctrine of Irreparable Injury	190
	B. Jurisdiction in Equity	194
	C. Burdens of Proof and Counter-Restitution.....	199
V.	Unjust Enrichment and Constructive Trusts	203
	A. Assumpsit Claims: Quantum Meruit and Money Had and Received	204

¹ *Saturday Night Live* (NBC television broadcast Jan. 10, 1976) (“New Shimmer is both a floor wax and a dessert topping!”).

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B.	Accounting in Equity	209
C.	Unjust Enrichment.....	210
D.	Unconscionability	226
E.	Constructive Trusts	229
VI.	Forfeiture: It Tastes Just Like Chicken.....	240
A.	Burrow v. Arce.....	241
B.	ERI Consulting Eng'rs, Inc. v. Swinnea	248
VII.	Conclusions.....	252

I. INTRODUCTION

As the state in which the lone-star maverick has been enshrined as a group role model, Texas could be expected to pursue an unusual approach to equitable remedies. Texans' penchant for legal innovation was spotted early by United State Supreme Court Chief Justice Roger Taney in his reversal of a district judge in Texas in 1851. Alarmed that the federal judge might have 'gone native,' Taney chastised him for applying Texas law:

Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States. And although the forms of proceedings and practice in the State courts have been adopted in the District Court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.²

Taney had good reason to fear that his district judge might stray from standard doctrine, as Texas introduced a number of significant and lasting innovations to American law.

Texas was the first jurisdiction to abolish forms pleading, one of the first to merge courts in equity with courts at law, and the first to require jury trials for claims in equity.³ Therefore, our law in equity started from a unique position and has continued to break its own trail ever since. Unfortunately, along that trail, unjust enrichment in equity got misplaced or

²Bennett v. Butterworth, 52 U.S. 669, 674, 676 (1851) (holding that the jury verdict was not at issue in the dispute).

³See *infra* notes 194 to 207.

a little lost, perhaps because Texas had almost no experience with a separate court in equity.

The law in equity was largely developed before the Texas Republic was founded. Empowered with *in personam* authority from the English sovereign, the Chancery Court conducted the law in equity to resolve civil complaints that were otherwise substantively or procedurally irreparable under the common law.⁴ It was not developed to repair the common law but only to provide a safety net for claims ignored or minimized by the common law.⁵ Traditionally, it did not provide trials by jury but it developed a legal process better suited for complicated and evidence-intensive litigation.⁶ When common law or statute failed to adequately address a business claim, the law in equity was frequently effective by combining injunctive relief and an accounting to resolve the dispute.⁷ In the

⁴ See *Kuechler v. Wright*, 40 Tex. 600, 681–82 (1874) (explaining that the English court of equity “filled up the vacuum wherever there was a deficiency in the execution of the laws . . .”); C.C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 116 (1887) (“[T]he object of equity, in assuming jurisdiction over legal rights, is to promote justice by supplying defects in the remedies which the courts of law afford.”).

⁵ 1 DAN B. DOBBS, *LAW OF REMEDIES*, § 2.2, at 72–73 (2d ed. 1993) (“No; the chancellors were keeping the law intact and making personal orders to the defendant.”); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 432 (2003) (“One virtue of an autonomous system of equity was its authority to act in opposition to the strict law when the unique circumstances of a particular case demanded intervention.”).

⁶ See Charles Donahue, Jr., *What Happened in the English Legal System in the Fourteenth Century and Why Would Anyone Want to Know?*, 63 SMU L. REV. 949, 964 (2010) (“In the second half of the fourteenth century, the king’s council received an increasing number of complaints from litigants that they could not obtain justice because their adversaries had bought or intimidated all the jurors in the county.”); see also 1 DOBBS, *supra* note 5, § 2.2, at 70 (“[P]etitioner’s chief complaint about the law courts was that the defendant was rich and would bribe the juries.”); *id.* (“Equity developed its own elaborate forms of pleading in due time, but in this simple essence at least, it introduced a strong emphasis on fact-gathering and fact-decision that permeated modern trials in both law and equity.”); 1 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA* § 1.32 (12th ed. 1877) (“[Courts of Equity are established] to detect latent frauds, and concealments, which the process of courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law.” (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* 92 (1765))).

⁷ For an account of some early business disputes that were resolved by this combination of remedies, see 1 STORY, *supra* note 6, § 3.68.

last two centuries, the combination of injunctive relief and claims for the defendant's profits has proven to be effective for many types of business claims but especially those related to wrongful use or misappropriation of intellectual property and intangible assets.⁸

This article will show that Texas courts are not comfortable with the law in equity and unjust enrichment. Texas courts resist unjust enrichment as a cause of action; claims for unjust enrichment in equity are rare; the courts' opinions on jurisdiction fail their glowing words for equity's safety net; and the remedy of forfeiture represents an unexplained departure from other remedies in equity in Texas. Section II discusses the importance of the law in equity to the current and future data economy. The rapid growth in the number of cases relating to unjust enrichment in both state and federal courts over the last twenty years confirms an increasing presence in litigation. Section III explains how the key traditions of the law in equity were developed and provides a baseline for the comparison of Texas law in Section IV. Texas actively applies the doctrine of irreparable injury despite offering jury trials and courts of general jurisdiction. At the same time, Texas constrains jurisdiction in equity and therefore limits the safety net compared to other jurisdictions.

Section V examines the dispute about whether unjust enrichment is a cause of action or just a remedy under Texas law. Not only are the appellate courts split on the issue, but many opinions seem to resist the Supreme Court's consistent endorsement of unjust enrichment in at least ten modern opinions. Resistance to the Supreme Court position, however futile, seems to be increasing.

Section VI develops further evidence of Texas courts' discomfort with remedies in equity. It explores why the Supreme Court endorsed the remedy of forfeiture for breach of fiduciary duty when the remedies of unjust

⁸1 DOBBS, *supra* note 5, § 4.1(2) ("Restitution as a means for recognizing rights in intangibles[.] . . . Restitution in fact seems to be the tool that allowed law to move from the old medieval world of property and things to the modern world of contracts and by intangibles. Most wealth today is represented by intangibles like money, stock, trade secrets, or business opportunities. Restitution and unjust enrichment are often the terms in which rights in intangibles are recognized or rejected."); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699 (1990) ("The explosive growth of substantive protection for intangible rights created more cases in which only specific relief would do."); Main, *supra* note 5, at 441 ("As England transitioned from an agricultural to a commercial nation, the more frequent became situations involving rights not previously contemplated and for which no writ and, thus, no remedy, was available." (quoting William Q. deFuniak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54, 56 (1948))).

enrichment or constructive trust are equally capable and offer a fuller, more defined body of precedents. The Court's opinions in *Burrow v. Arce*⁹ and *ERI Consulting Engineers, Inc. v. Swinnea*¹⁰ raise more questions than answers, highlighting the uncertainties and inconsistencies for forfeiture as a possible remedy in equity as well as for the unifying principles for Texas remedies in equity.

This article focuses on unjust enrichment in Texas principally for business litigation. Time, space, and editorial patience are limited, so the related topics of injunctive relief and accounting in equity are not fully addressed. The last section analyzes the Texas Supreme Court's two most recent opinions on forfeiture as they relate to monetary remedies in equity but the law underlying forfeiture cannot be fully addressed in the one section. As explained in Section III, this article will use the term 'unjust enrichment' to denote unjust enrichment in equity as a cause of action and 'disgorgement' as the remedy of unjust enrichment in equity.

II. WHY IS UNJUST ENRICHMENT IMPORTANT TO TEXAS?

Contrary to the perceptions of many lawyers and judges that unjust enrichment is as outdated as conversational Latin, unjust enrichment is growing more important in business litigation.¹¹ For perspective, a simple word search was conducted to count the number of opinions available on the LEXIS database that mention the term "unjust enrichment" or "disgorgement" in the text of the opinion. Despite the approximately 50% decline in Texas civil court trials over the last twenty years,¹² the annual number of opinions citing these terms from federal courts, all state courts, and Texas courts increased 700%, 264%, and 276%, respectively, from

⁹997 S.W.2d 229 (Tex. 1999).

¹⁰318 S.W.3d 867 (Tex. 2010).

¹¹Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1191 (1995) ("Few American lawyers, judges, or law professors are familiar with even the standard propositions of the doctrine, and the few who are continue to disagree about elementary issues of definition."); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989) ("Despite its importance, restitution is a relatively neglected and underdeveloped part of the law. In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground.").

¹²Carl Reynolds, *Texas Courts 2030—Strategic Trends & Responses*, 51 S. TEX. L. REV. 951, 975–78 (2010); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 166 (2005).

1992 through 2011.¹³ By comparison, a similar search was conducted for the term “lost profits” showed increases of 128%, 44%, and 100%, respectively. See Table A below:

Table A: Annual Case Opinions

Unjust Enrichment or Disgorgement

	Federal	All States	Texas
2011	4,214	1,888	79
2007 to 2011 avg.	3,364	1,697	78
2002 to 2006 avg.	1,459	1,131	58
1997 to 2001 avg.	807	722	38
1992 to 1996 avg.	591	523	19
1992	527	518	21

“Lost Profits”

	Federal	All States	Texas
2011	725	377	36
2007 to 2011 avg.	714	366	44
2002 to 2006 avg.	472	334	40
1997 to 2001 avg.	317	266	35
1992 to 1996 avg.	313	254	25
1992	318	261	18

No detailed breakdown of the sources of this growth has been conducted, but at least three drivers have been identified. First, remedies in equity have frequently proven more effective in resolving claims relating to intellectual property than many other forms of remedies.¹⁴ Second, unjust enrichment can present unique advantages in individual corporate claims.¹⁵

¹³This search merely estimates the growth in the use of “unjust enrichment” or “disgorgement.” For all of the potential errors and biases, it is reasonable to observe that there has been a substantial increase in the rate at which unjust enrichment is mentioned and that the number of federal opinions is growing significantly faster than state opinions.

¹⁴See *supra* note 8.

¹⁵See George P. Roach, *How Restitution and Unjust Enrichment Can Improve Your Corporate Claim*, 26 REV. LITIG. 265, 319 (2007) (“Combined with rescission and/or specific

Third, some federal agencies are shifting a substantial portion of their budgets from administrative regulation to litigation.¹⁶ The principal remedies claimed by the Securities and Exchange Commission (SEC), the Commodities Futures Trading Commission (CFTC), the Federal Trade Commission (FTC), and the Food and Drug Administration (FDA) are injunction and disgorgement of revenues or profits.¹⁷

A. *The Data Economy Needs Monetary Remedies in Equity*

Monetary remedies in equity came into greater use in business litigation with the appearance of intellectual property and intangible assets.¹⁸ In the absence of applicable statutes or common law causes of action, claims for the misappropriation of intellectual property had to rely on a combination of injunctive relief and disgorgement to secure the only remedy available.¹⁹ In the middle of the nineteenth century, federal statutes provided only for injunctive relief, but the U.S. Supreme Court held that monetary remedies in equity were also available even if such additional relief was not pled in

restitution, this perspective for the measure of the defendant's benefit can produce a unique award for the plaintiff, especially for a plaintiff with a claim that experienced significant delay after the date of the unjust act and/or a plaintiff in which the key asset values fluctuate greater than normal."').

¹⁶*Id.* at 267.

¹⁷*See id.* at 267 n.3.

¹⁸Laycock, *supra* note 8, at 713–14 ("Injunctions are a routine remedy for misappropriation of trade secrets; infringement of patents, copyrights, or trademarks; violations of antitrust laws or covenants not to compete; interference with contract; and other kinds of unfair competition. In all these cases, damages and restitution are the usual remedies only for past violations beyond the reach of injunctions." (footnotes omitted)).

¹⁹*Root v. Ry. Co.*, 105 U.S. 189, 214 (1882) ("It is true that it is declared in those cases that, in suits in equity for relief against infringements of patents, the patentee, succeeding in establishing his right, is entitled to an account of the profits realized by the infringer, and that the rule for ascertaining the amount of such profits is that of treating the infringer as though he were a trustee for the patentee, in respect to profits."); *HM A-G v. Blake*, [2000] 1 A.C. 268, 279–80 (H.L.) (appeal taken from Eng.) (U.K.) *available at* <http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000727/blake-1.htm> ("Thus, in 1803 Lord Eldon L.C. stated, in *Hogg v. Kirby*, a passing off case: 'what is the consequence in Law and in Equity? . . . [A] Court of Equity in these cases is not content with an action for damages; for it is nearly impossible to know the extent of the damage; and therefore the remedy here, though not compensating the pecuniary damage except by an account of profits, is the best: the remedy by an injunction and account.'" (citations omitted)).

the complaint for an injunction.²⁰ Similarly in the middle of the twentieth century, Congress passed enabling legislation that provided jurisdiction for federal regulatory agencies to secure injunctive relief which was sufficient to imply jurisdiction for monetary remedies in equity.²¹

Recently, disgorgement has been applied to state claims on patents,²² claims for gross negligence against corporate officers,²³ claims for the misappropriation of a website²⁴ or confidential information,²⁵ and can now extend such relief for the unauthorized viewing of data files whether on the internet or stored on a private computer or network.²⁶ It is the only remedy that can be pled in cases relating to the misappropriation of 'negative information' (or information on unsuccessful or failed experiments).²⁷ New

²⁰ See *Stevens v. Gladding*, 58 U.S. 447, 455 (1855) (applying the doctrine of complete relief, another name for the clean-up doctrine); see also 1 GEORGE E. PALMER, LAW OF RESTITUTION § 2.7 (Supp. 2007) ("Decisions of the United States Supreme Court in the nineteenth century established that in a suit in equity for infringement of patent or copyright, the patent or copyright holder was entitled to recover the profits made through the infringement. Although the Court sometimes explained this as a method for measuring the plaintiff's damages, it was clear that the relief was based on unjust enrichment, as the Court later recognized. In the cases during this earlier period, recovery of profits could be obtained only in equity, where there was an independent basis for an injunction." (footnotes omitted)).

²¹ *Porter v. Warner Holding Co.*, 328 U.S. 395, 397–98 (1946).

²² *Univ. of Colo. Found., Inc. v. Am. Cyanamid Co.*, 342 F.3d 1298, 1311 (Fed. Cir. 2003); see also *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1359–60 (Fed. Cir. 2001) (affirming jury verdict for fraud, misappropriation of trade secrets and patent infringement that awards rescission, monetary remedy and punitive damages).

²³ See generally John Kairis, *Disgorgement of Compensation Paid to Directors During the Time They Were Grossly Negligent: An Available But Seldom Used Remedy*, 13 DEL. L. REV. 1 (2011).

²⁴ *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003). For further background, see *Kremen v. Cohen*, 325 F.3d 1035, 1037–39 (9th Cir. 2003) (certifying a question to the California Supreme Court regarding whether an Internet domain name is property that can be converted under California tort law).

²⁵ *Snepp v. United States*, 444 U.S. 507, 515, n.11 (1980) (per curiam), ("[E]ven in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment.").

²⁶ COMPUTER FRAUD & ABUSE ACT, 18 U.S.C.A. § 1030(g) (West Supp. 2012) ("Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief.").

²⁷ See *Bourns, Inc. v. Raychem Corp.*, 331 F.3d 704, 709–10 (9th Cir. 2003) ("Bourns denies that Raychem proved that it suffered \$9 million in damages. Raychem replies by pointing to Bourns' enrichment by its torts. According to Hogge, 'the burn rate,' or development cost, on

claims relating to new forms of property such as virtual property²⁸ and genetic codes or patterns²⁹ seem likely to appear and challenge traditional principles of property law.

For centuries the flexibility of the law in equity has been the key trait that resolved existing issues and newly emerging problems.³⁰ Some observers may underestimate the importance of unjust enrichment for the future by failing to recognize the breadth of substantive law that is served by the basic accounting in equity principles. A remedy's underlying origin in equity is revealed by the presence of an unusual rule for measuring the defendant's benefit, much like genetic relations, can be established with DNA. For more than 150 years, remedies based on accounting in equity have permitted the plaintiff to measure the defendant's benefit by excluding the defendant's losses from her profits if those results can be adequately distinguished as separate transactions. The doctrine has been applied to segregate the defendant's losses as distinguished by year,³¹ individual retail outlet,³² and separate or experimental product lines.³³

PPTCs was \$3 million per year. According to credible evidence from the industry, Bourns saved at least three years of development by its torts. As the district court found, this unjust enrichment is fairly recoverable by Raychem.”).

²⁸See generally Jordan L. Ludwig, *Protections For Virtual Property: A Modern Restitutionary Approach*, 32 LOY. L.A. ENT. L. REV. 1 (2011).

²⁹See generally Delso Alford, *HeLa Cells and Unjust Enrichment in the Human Body*, 21 ANN. HEALTH L. 223 (2012).

³⁰See 1 DOBBS, *supra* note 5, § 4.1(2) (“Unjust enrichment cannot be precisely defined, and that very reason has potential for resolving new problems in striking ways.”); see also Main, *supra* note 5, at 505 (“The ability of equity to correct problems stemming from application of strict law modernizes and reforms the legal doctrine while also boosting its societal legitimacy. Equity is a fundamental method by which the law has sought to meet changing conditions. . . . Equity thus plays an important role in the growth of the law, and without that engine, our law will be moribund, or worse.” (footnotes and quotations omitted)); 1 STORY, *supra* note 6, § 28, at 20 (“So that one of the most striking and distinctive features of courts of equity is, that they can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas courts of common law . . . are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or the defendant.” (footnote omitted)).

³¹See *Black & Decker (U.S.), Inc. v. Pro-Tech Power, Inc.*, 26 F. Supp. 2d 834, 856 (E.D. Va. 1998) (“Given that the calculations of damages rests on equitable considerations, the Court will not allow Pro-Tech to offset the profits it made in 1995, 1995 [sic], 1997, and 1998 by its losses in 1993 and 1996.”).

³²*Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 54–55 (2d Cir. 1939), *aff’d*, 309 U.S. 390 (1940); *Burger King Corp. v. Mason*, 855 F.2d 779, 781–82 (11th Cir. 1988).

³³*Jones Apparel Grp., Inc. v. Steinman*, 466 F. Supp. 560, 563 (E.D. Pa. 1979).

Supporting case law for the anti-netting rule in the U.S. dates back to no later than 1869 and is recognized as a key principle in measuring unjust enrichment in the recently completed Restatement (Third) of the Law of Restitution and Unjust Enrichment.³⁴ This obscure doctrine has been applied in opinions relating to fiduciary claims,³⁵ patents,³⁶ copyrights,³⁷ trademarks,³⁸ trade secrets,³⁹ and federal agency claims.⁴⁰ In a case relating to the taxation of domestic oil production in the 1970s and 1980s, the controversy over this doctrine related to a difference of more than \$500 million of damages.⁴¹ Remarkably, only one of the cases cited acknowledged the source of the rule as lying in trust law.⁴² According to the Restatement (Third) of the Law of Trusts, the anti-netting rule holds a trustee who is in breach accountable for all profits and liable for all losses to remove the temptation for a trustee to gamble further with trust assets and to gain profits that would otherwise offset or even hide prior losses.⁴³

B. Strategic and Tactical Advantages of Unjust Enrichment

The strategic advantages of unjust enrichment as a cause of action and the tactical advantages of disgorgement as a remedy have been analyzed in detail in previous articles.⁴⁴ Texas courts regularly grant jurisdiction in

³⁴ King v. Talbot, 40 N.Y. 76, 90–91 (1869) (“The rule is perfectly well settled, that a *cestui que trust* is at liberty to elect to approve an unauthorized investment, and enjoy its profits, or to reject it at his option”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(5)(b) (2011) (“A conscious wrongdoer or a defaulting fiduciary who makes unauthorized investments of the claimant’s assets is accountable for profits and liable for losses.”).

³⁵ See Slay v. Burnett Trust, 187 S.W.2d 377, 387–88 (Tex. 1945); King, 40 N.Y. at 91.

³⁶ See Crosby Steam Gage & Valve Co. v. Consol. Safety Valve Co., 141 U.S. 441, 457 (1891).

³⁷ See Sheldon, 106 F.2d at 54–55.

³⁸ See Black & Decker (U.S.) Inc. v. Pro-Tech Power Inc., 26 F. Supp. 2d 834, 856 (E.D. Va. 1998).

³⁹ See Adolph Gottscho, Inc. v. Am. Mktg. Corp., 139 A.2d 281, 286 (N.J. 1958).

⁴⁰ See SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978).

⁴¹ United States v. Sutton, 795 F.2d 1040, 1062–63 (Temp. Emer. Ct. App. 1986).

⁴² Commonwealth Chem. Sec., 574 F.2d at 102.

⁴³ 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, 350 (2010) (explaining that the anti-netting doctrine is based on the Restatement (Third) of Trusts § 213 (1990)).

⁴⁴ Laycock, *supra* note 11, at 1277; see generally Douglas L. Johnson & Neville L. Johnson, *What Happened to Unjust Enrichment in California? The Deterioration of Equity in the*

equity for claims based on fraud, breach of fiduciary duty, mistake, accident, and conversion.⁴⁵

Unjust enrichment is sometimes the best alternative as it provides a favorable outcome and at other times because it is the only alternative.⁴⁶ Equity provides the only cause of action when it includes eclectic claims like mutual mistake or because of safety net claims.⁴⁷ Unjust enrichment also offers some tactical advantages that sometimes can be critical in allowing a claim to survive constraints that would otherwise apply in relation to comparative advantages in the statute of limitations, contributory liability, and damages in fact.⁴⁸

As a remedy, disgorgement can be pled for a variety of causes of action. Compared to remedies at law for the same facts, disgorgement may be greater in amount, easier to prove, cheaper to prove and enjoy various procedural advantages.⁴⁹ Furthermore, disgorgement may be the only remedy that can be proven either because actual damages are too speculative⁵⁰ or because the plaintiff has no actual damages.⁵¹

California Courts, 44 LOY. L.A. L. REV. 277 (2010); Doug Rendleman, *When Is Enrichment Unjust? Restitution Visits an Onyx Bathroom*, 36 LOY. L.A. L. REV. 991 (2003); Paul T. Wangerin, *The Strategic Value of Restitutionary Remedies*, 75 NEB. L. REV. 255 (1996).

⁴⁵ See *infra* section IV.B.

⁴⁶ Laycock, *supra* note 11, at 1284 (“The restitutionary claim matters in three sets of cases: (1) when unjust enrichment is the only source of liability; (2) when plaintiff prefers to measure recovery by defendant’s gain, either because it exceeds plaintiff’s loss or because it is easier to measure; and (3) when plaintiff prefers specific restitution, either because defendant is insolvent, because the thing plaintiff lost has changed in value, or because plaintiff values the thing he lost for nonmarket reasons.”).

⁴⁷ *Id.*

⁴⁸ *Weiss v. Lehman*, 759 F. Supp. 1, 2 (D.D.C. 1989) (denying the plaintiffs’ claims at law due to the plaintiffs’ own “imprudence and greed,” but granting the claim for unjust enrichment in equity); see also *Bank of Saipan v. CNG Fin. Corp.*, 380 F.3d 836, 841 (5th Cir. 2004) (holding that negligence is not the same as the unclean hands doctrine); *Romano v. Ret. Bd. of the Emps. Ret. Sys.*, 767 A.2d 35, 44 (R.I. 2001) (“[A] party who has conferred a benefit upon another by mistake is not precluded from maintaining an action for restitution because the mistake was caused by that party’s own lack of care.” (citing *Toupin v. Laverdiere*, 729 A.2d 1286, 1289 (R.I. 1999))). While there have not been many cases yet on point, it appears that in Texas claims in equity may not be subject to adjustment for the claimant’s contributory negligence. See *Holt v. Robertson*, No. 07-06-0220-CV, 2008 Tex. App. LEXIS 3735, at *4 (Tex. App.—Amarillo May 21, 2008, pet. denied) (mem. op., not designated for publication) (adjusting special damages but not award of rescission for contributory liability).

⁴⁹ See generally Roach, *supra* note 15.

⁵⁰ *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 410 (Tex. App.—Houston [1st Dist.] 2012, pet. filed) (“Finally, we note that the damages that Chief challenges as too speculative

Much of the advantage of unjust enrichment is due to the fact that unjust enrichment is a measure of what the defendant has actually gained by the time of trial.⁵² Unjust enrichment is based on *ex post* data, which can be greater than *ex ante* damages under favorable circumstances.⁵³ Based on actual results by the time of trial, damages based on *ex post* evidence are easier to understand, require less expert testimony, and are sometimes viewed as more credible to juries.⁵⁴ Claims for future unjust enrichment have been rare because injunctive relief is granted to preclude further gains for the defendant. However, in the absence of injunctive relief, future unjust enrichment is awarded.⁵⁵

to be recovered as actual damages may be available in disgorgement, an equitable remedy it has not contested.”).

⁵¹Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942) (“It is beside the point for either Turner or Corbett to say that Kinzbach suffered no damages because it received full value for what it has paid and agreed to pay.”); Slay v. Burnett Trust, 187 S.W.2d 377, 389 (Tex. 1945) (“Self-dealing transactions may be attacked by the beneficiary even though he has suffered no damages and even though the trustee has acted in good faith.”).

⁵²Providence Rubber Co. v. Goodyear, 76 U.S. 788, 804 (1869) (“The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty and invite to aggression.”); see also *Allen*, 367 S.W.3d at 410.

⁵³When market values or operating performance improves in the interim between the date of the tort or breach and the trial, *ex post* data will favor the plaintiff who sold the business or who seeks damages measured by the performance of the business. Similarly, when market values or operating performance declines, *ex post* data will generally favor the plaintiff who bought the business. See *supra* note 391.

⁵⁴George P. Roach, *Correcting Uncertain Prophecies: An Analysis of Business Consequential Damages*, 22 REV. LITIG. 1, 64–67 (2003).

⁵⁵*Am. Speedy Printing Ctrs., Inc. v. AM Mktg., Inc.*, 69 F. App’x 692, 699 (6th Cir. 2003) (awarding franchisor “lost future profits”); *Next Level Commc’ns v. DSC Commc’ns Corp.*, 179 F.3d 244, 250 (5th Cir. 1999) (ruling that jury’s verdict including future damages was sufficient compensation to preclude enjoining against future transfer or disclosure of trade secrets); *JTH Tax, Inc. v. H & R Block E. Tax Servs.*, 245 F. Supp. 2d 749, 751 (E.D. Va. 2002) (calculating net present value of six years’ worth of future earnings); *Fin. Programs, Inc. v. Falcon Fin. Servs., Inc.*, 371 F. Supp. 770, 776 (D. Or. 1974) (applying Oregon law); *LJ Charter, L.L.C. v. Air Am. Jet Charter, Inc.*, No. 14-08-00534-CV, 2009 Tex. App. LEXIS 9469, at *12 (Tex. App.—Houston [14th Dist.] Dec. 15, 2009, pet. denied) (mem. op., not designated for publication) (“As part of both causes of action, Air America alleged: ‘this fraudulent conduct has resulted in a benefit to Defendant Starflite in increased recapture of fuel costs it has experienced and will experience while in the Hangar (\$ 1,381,341), or in the alternative, the amount of profits it has made and will make while in the Hangar (\$ 819,229.17).’”).

For example, the principal attraction of fee forfeiture as a remedy in breach of fiduciary duty claims in Texas is that proving causation and damages is simpler and easier for fee forfeiture than proving actual damages. There are a number of Texas appellate opinions that have concluded that, unless the plaintiff can secure the remedy of fee forfeiture, she has not introduced sufficient evidence to otherwise establish causation and damages in fact.⁵⁶ No single measure or approach is always best, but claims or remedies in equity can also be pled in the alternative or in case *ex post* evidence changes favorably before trial.⁵⁷

In some cases, however, pleading for unjust enrichment would be a disadvantage for plaintiffs in Texas who require the four-year limitation period for breach of fiduciary duty rather than the two-year period for unjust enrichment.⁵⁸ It may be either a disadvantage or advantage for the trial judge or opposing counsel to misunderstand unjust enrichment.⁵⁹ For example, if your judge only thinks of quantum meruit whenever you say ‘unjust enrichment,’ you may want to reconsider unjust enrichment or at least plead for disgorgement instead.

One of the more unusual distinctions regarding unjust enrichment as a remedy is that occasionally its primary advantage is that “unjust

⁵⁶Finger v. Ray, 326 S.W.3d 285, 287 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (“We hold that the causal connection between the conduct alleged and any injury is not within a jury’s common understanding, and thus the trial court properly ruled that expert testimony was necessary to show that the lawyer’s acts caused the client actual damages. We affirm the judgment of the trial court.”); Home Loan Corp. v. Tex. Am. Title Co., 191 S.W.3d 728, 735 n.22 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (noting that because plaintiff’s claim for breach of fiduciary duty sought only actual and punitive damages, and not fee forfeiture, the lack of causation in the case was dispositive).

⁵⁷Recently there was an interesting case in which the plaintiff pled money damages and rescission in the alternative on a property-by-property basis. The plaintiff was awarded a judgment of money damages on two properties and rescission on two others. See *Houston v. Ludwick*, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at *2–3 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op., not designated for publication).

⁵⁸See *infra* notes 300 to 304 and accompanying text.

⁵⁹Merely as an example of how unjust enrichment claims can be sometimes be ignored or overlooked, see *Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied) (“The trial court specifically found appellant was unjustly enriched in an amount of at least \$ 479,348.33. Appellee contends the judgment for actual damages arising from unjust enrichment must be affirmed because appellant has presented no point of error challenging the trial court’s judgment awarding and the underlying findings of fact and conclusions of law. We agree.”).

enrichment” or “disgorgement” is not considered the same as “damages.”⁶⁰ This innocuous distinction can sometimes make a major difference when critical statutes or prior documentation are narrowly drawn.⁶¹ The Fifth Circuit applied this notion to support collection efforts for disgorgement orders, holding that imprisonment for failure to disgorge unjust enrichment is permissible because disgorgement “is not a remedy at law; rather disgorgement is equitable in nature, constituting an injunction in the public interest.”⁶² However, this distinction can also cut in the other direction. It was recently held that insurance policies that require the insurer to defend lawsuits for damages do not necessarily cover lawsuits for equitable relief.⁶³

C. Federal and State Agency Litigation

The possibility that a business may be sued by a regulatory agency is readily acknowledged for some agencies but may be overlooked for other agencies.⁶⁴ Publicly held companies, stock brokerages, and commodity traders operate under the possibility that they might be sued by the SEC or CFTC.⁶⁵ Aware of such a possibility, the companies work with experienced law firms that are prepared to defend against such claims.⁶⁶ For other companies, the possibility that they might be sued by agencies like the FTC

⁶⁰Thomas v. State, 226 S.W.3d 697, 710–11 (Tex. App.—Corpus Christi 2007, pet. dism’d) (holding that the remedies of restitution or rescission are available in addition to injunction in a class and are treated differently from the suit for monetary damages).

⁶¹*Id.*

⁶²SEC v. AMX, Int’l, Inc. 7 F.3d 71, 74 n.6 (5th Cir. 1993) (“*Pierce* involved the issue of whether a contempt sanction enforcing disgorgement of unlawful gains under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701–1720, violated federal and state prohibitions on imprisonment for debt. This Circuit concluded that disgorgement was not a ‘debt’ because it is not a remedy at law; rather disgorgement is equitable in nature, constituting ‘an injunction in the public interest.’ Thus, enforcement of the disgorgement order through contempt sanctions was permissible.” (citations omitted) (quoting *Pierce v. Vision Invs., Inc.*, 779 F.2d 302, 307 (5th Cir. 1986))).

⁶³Maryland Cas. Co. v. Armco, Inc., 822 F.2d 1348, 1351 (4th Cir. 1987); *In re Estate of Corriea*, 719 A.2d 1234, 1239–40 (D.C. 1998); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 214 (Minn. 1984). *But see* *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1033 (Md. 1993).

⁶⁴George P. Roach, *Counter-Restitution for Monetary Remedies in Equity*, 68 WASH. & LEE L. REV. 1271, 1314–15 (2011).

⁶⁵*Id.*

⁶⁶*Id.*

may seem remote.⁶⁷ A previous compilation of case statistics indicates that the FTC files 80 to 90 suits a year, principally in the Ninth and Eleventh Circuits, and annually wins judgments of as much as \$900 million.⁶⁸ Most agency attorneys in charge of the case have previously handled five to ten cases.⁶⁹ On the other hand most lawyers for the defendant in an FTC case have worked on an average of only one other prior case.⁷⁰

The success of the principal federal agencies has attracted substantial attention from less prominent agencies. If the SEC,⁷¹ CFTC, and the Department of Energy⁷² were in the first generation of successful litigating regulators, the FTC is a prominent member of the second generation. Now the FDA has adopted a policy of suing pharmaceutical companies for unjust enrichment for violations of FDA manufacturing standards.⁷³

Texas businesses are not immune to such actions from state agencies. In 2007, the Texas Attorney General won a similar “de facto class action” for consumer fraud under the Texas Deceptive Trade Practices Act for injunctive relief and restitution without having to specify the names of all consumers harmed.⁷⁴

⁶⁷ *Id.*

⁶⁸ *Id.* at 1314–15 (“The FTC has filed an average of eighty to ninety cases per year for the last ten years or more. The range of annual total awards of unjust enrichment has ranged from \$300 million to \$900 million per year. On the basis of a survey of cases from January 2007 to October 1, 2010, it was determined that more than ten FTC lawyers had filed more than ten cases during that period, and that more than twenty had worked on more than five. Over that same time period, the average defense counsel has worked on less than two cases.” (footnotes omitted)).

⁶⁹ *Id.* at 1315.

⁷⁰ *Id.*

⁷¹ See *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971) (stating that the SEC can seek remedial relief other than an injunction so long as it is not a penalty assessment).

⁷² *E.g.*, *Hous. Oil & Ref., Inc. v. FERC*, 95 F.3d 1126, 1136 (Fed. Cir. 1996).

⁷³ Eric M. Blumberg, *Universal Management, Abbott, Wyeth, Schering-Plough, and . . . : Restitution and Disgorgement Find Another Home at the Food and Drug Administration*, 58 *FOOD & DRUG L.J.* 169, 170 (2003).

⁷⁴ See *Thomas v. State*, 226 S.W.3d 697, 710–11 (Tex. App.—Corpus Christi 2007, pet. dismiss’d) (There the State of Texas, acting through the Consumer Protection Division of the Attorney General’s Office, sued the defendants under the Texas Deceptive Trade Practices Act (DTPA). *Id.* Section 17.47(d) of the act authorizes suits that seek to enjoin violations of the DTPA. TEX. BUS. & COM. CODE ANN. § 17.47(d) (West 2011). The Court held that the remedies of restitution or rescission are available in addition to injunction in a class and are treated differently from the suit for monetary damages. *Thomas*, 226 S.W.3d at 710–11. See also *Molano v. State*, No. 13-10-00477-CV, 2011 Tex. App. LEXIS 6612 (Tex. App.—Corpus Christi Aug. 18, 2011, pet. den’d); *Avila v. State*, 252 S.W.3d 632, 646 (Tex. App.—Tyler 2008, no pet.).

III. TRADITIONAL LAW IN EQUITY

Historically, the Chancery Court evolved out of the early practice of the English King to hear petitions that sought his sovereign intercession. The King originally appointed the Chancellor just to administer the petitions for the King's judgment but the Chancellor's role grew into the Chancery Court as the King delegated more authority.⁷⁵ English citizens petitioned the King for special assistance for problems in which the common law courts could not help, problems in which the courts were the source of the trouble, or matters that sought the aid of the King's conscience.⁷⁶

U.S. Supreme Court Justice Joseph Story's narrative on the Chancery Court establishes that prior to the seventeenth century, the jurisdiction of the court was determined by supplementing the common law, not competing with it.⁷⁷ The maxim that "no right shall be left without a remedy"⁷⁸ represented the positive or expansive side of what would later become known as the Doctrine of Irreparable Injury, i.e., that the Chancery Court had jurisdiction over claims that the common law could not

⁷⁵ 1 STORY, *supra* note 6, § 44.

⁷⁶ Earl of Oxford's Case, (1615) 21 Eng. Rep. 485, 486; 1 Chan. Rep. 1, 6 ("The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, [t]hat it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances. The Office of the Chancellor is . . . to soften and mollify the Extremity of the Law."); 1 STORY, *supra* note 6, § 44; MAIN, *supra* note 5, at 441 ("Appeals to the king, instead of to his courts, became numerous, and about the time of Edward I, it became usual to refer such petitions for consideration and disposition to the Lord Chancellor. As 'the keeper of the king's conscience,' the Lord Chancellor was a churchman who was familiar with both the ecclesiastical and the civil or Roman law." (footnotes omitted)).

⁷⁷ 1 STORY, *supra* note 6, §§ 49, 64 ("If this be a true account of the earliest known exercises of equitable jurisdiction, it establishes the point that it was principally applied to remedy defects in the common-law proceedings; and, therefore, that equity jurisdiction was entertained upon the same ground which now constitutes the principal reason of its interference, namely, that a wrong is done, for which there is no plain, adequate, and complete remedy in the courts of common law." (footnote omitted)).

⁷⁸ See *Cigna Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011) ("Indeed, a maxim of equity states that '[e]quity suffers not a right to be without a remedy.'" (quoting R. FRANCIS, MAXIMS OF EQUITY 29 (1st Am. ed. 1823)); *Miers v. Brouse*, 271 S.W.2d 419, 421 (1954) ("The first maxim of equity is that it will not suffer a right to be without a remedy."). The Latin legal maxim is *ubi jus, ibi remedium* ("Where there is a right, there is a remedy."). BLACK'S LAW DICTIONARY 1520 (6th ed. 1990).

adequately remedy.⁷⁹ The mandate for a court in equity to provide a safety net for neglected or ignored claims has, therefore, been the key purpose for the court in equity for centuries.

Exercising authority delegated by the Crown, the Chancery Court acted against the parties' person rather than their property, and it operated under the mandate to emphasize justice and moral conscience in its orders or decrees.⁸⁰ A court in equity is traditionally known as a "court of conscience," and this article will show that many modern opinions in equity assess the conscionability of the defendant's actions as part of the judgment. However, Justice Story's account of the history of equity makes it clear that after the early days of the court, the primary criterion for jurisdiction was whether a claimant's legitimate claim would otherwise be adequately considered on a substantive or procedural basis in courts at law.⁸¹

Dan Dobbs' treatise adds an additional perspective by explaining that the Chancellor's authority was not solely based on appealing to the parties' conscience but on the power to hold the defendant in contempt.⁸² He explains that the Chancery did not make or change the law, they issued in personam orders about how to resolve the dispute.⁸³ The order was based on what the judge determined was in keeping with good conscience or perhaps

⁷⁹ 1 DOBBS, *supra* note 5, § 4.3(1) ("Equity's moral interest in conscience was coupled with an enormous power the law courts did not have, to act against the person rather than against the property."); 1 STORY, *supra* note 6, § 21.

⁸⁰ 1 DOBBS, *supra* note 5, § 4.3(1).

⁸¹ Compare Story's description of the Chancery Court in its early days in *infra* note 122 with the description of the Court in a later period in *infra* note 103.

⁸² See 1 DOBBS, *supra* note 5, § 2.2.

⁸³ See *id.* ("The idea was that equity's pronouncements in an individual case did not make law; hence, the common law rule retained its generality and authority as 'law.' Equity's decree simply commanded an individual to act in some certain way. When he acted in that way, of course, he might have changed his legal status or his legal rights, but that would be by operation of 'law.' Equity did not, therefore, change the law, it changed the acts of persons."); 1 STORY, *supra* note 6, § 22 ("The decrees of the court of equity were then rather in the nature of awards, formed on the sudden, *pro re natâ*, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used, as precedents." (footnote omitted)); Main, *supra* note 5, at 503 ("But equity does not require judicial amendment; indeed equity does not accommodate it. The purpose of equity 'was to provide a tribunal where the hardship of particular cases might be relieved; the purpose was not to provide general rules of law.'" (quoting Colin P. Campbell, *The Court of Equity—A Theory of its Jurisdiction*, 15 GREEN BAG 108, 111 (1903))).

the King's conscience.⁸⁴ The parties were thus told what was or what should be in their consciences.⁸⁵ Should the defendant find that his conscience could not agree with the judge's order and refuse to comply, the judge would enforce his order with a contempt sanction, which was a form of sovereign authority delegated to incarcerate offenders.⁸⁶ The contempt sanction continues to be exercised in the United States and Texas today, albeit with greater restraint than in England in the Middle Ages.⁸⁷

The British legal system evolved dynamically from the competition between courts at law and courts in equity.⁸⁸ Until the middle of the nineteenth century, the majority of an English trial judge's compensation was derived from court fees and the judgments of most English jurists at the time were not subject to effective appellate procedures.⁸⁹ As a result, the causes of action and remedies permitted by the two court systems expanded in response to innovations in the other court.⁹⁰ For example, when claims at common law were pled for either debt or trespass, the claim for fraud was recognized only by courts in equity and was only gradually accepted thereafter by courts at law.⁹¹ According to Dominic O'Sullivan, English common law courts did not recognize a cause of action for rescission until the beginning of the nineteenth century, when the remedy at law evolved

⁸⁴ 1 STORY, *supra* note 6, § 42.

⁸⁵ *See id.*

⁸⁶ *See* 1 DOBBS, *supra* note 5, § 2.2. ("The command was personal and there were echoes in it of the king's political power of an earlier era. When he disobeyed, there was something like lese majesty, and he was clamped in irons as punishment for his disobedience."); *see also* Langdell, *supra* note 4, at 117.

⁸⁷ *Compare Ex Parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976), with 1 DOBBS, *supra* note 5, § 2.1(1).

⁸⁸ *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 254–55 (1979).

⁸⁹ Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1180 (2007) ("The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavored to draw to itself as much business as it could." (quoting 2 ADAM SMITH, *THE WEALTH OF NATIONS* 241–42 (Edwin Cannan ed., Univ. of Chicago Press 1976))).

⁹⁰ *See* Klerman, *supra* note 89, at 1179.

⁹¹ 1 PALMER, *supra* note 20, § 3.13; *cf.* *Williams v. Khalaf*, 802 S.W.2d 651, 654–56 (Tex. 1990) (supporting its conclusion regarding the applicable fraud statute of limitations by pointing to the cause of action's equitable origins as a form of quasi-contractual "debt").

until the advent of the “judicature reforms” in the middle of the century when courts in equity and courts at law were fused.⁹²

The competition between the two court systems in England occasionally flared into dysfunctional jurisprudence, especially when courts in equity issued injunctions against common law courts that were hearing the same case.⁹³ The conflict came to a head in 1616 when King James I intervened to establish a formal boundary between each court’s jurisdiction.⁹⁴ He dictated to the judiciary that common law courts would enjoy presumptive jurisdiction and that courts in equity would supplement the common law courts when the latter could not adequately remedy the dispute.⁹⁵ Belying the primacy of common law courts was the caveat that the adequacy of common law remedies was to be determined by courts in equity.⁹⁶

This formalization of the existing practice did not alter the positive or expansive principle of adequate remedy; it only formalized the boundary with the common law.⁹⁷ The doctrine of irreparable injury (the Doctrine), or the requirement that the claimant in equity to prove the want of an adequate remedy at law, was thus implemented to avoid the judiciary’s internal struggle for control of jurisdiction; but, the mandate for the courts in equity to provide a safety net for orphan claims did not diminish.⁹⁸

After another 250 years, some jurisdictions began to blend, merge, or fuse their common law courts with courts in equity. The merger wave started individually with Texas in 1845, New York in 1848, and was completed in England by 1875.⁹⁹ After New York adopted the Field Code in 1848, there was a rush among many other states to follow.¹⁰⁰ By 1873, the majority of American states had adopted a version of the Field Code, which merged the two courts and terminated or modified forms pleading.¹⁰¹

⁹² DOMINIC O’SULLIVAN ET AL., *THE LAW OF RESCISSION* §§ 10.20, 10.21 (2008); *see also* *infra* note 99–101 and accompanying text (on the judicature acts and the fusion of the legal and equitable courts).

⁹³ 1 STORY, *supra* note 6, § 51.

⁹⁴ 1 OTTO J. SCOTT, *JAMES I: THE FOOL AS KING* 351–52 (1976).

⁹⁵ *Id.*; 1 STORY, *supra* note 6, § 51.

⁹⁶ *See* Laycock, *supra* note 8, at 699–700.

⁹⁷ *See Id.*

⁹⁸ *See Id.*

⁹⁹ *See* Main *supra* note 5, at 431 (“The Judicature Acts of 1873 and 1875 accomplished much the same for law and equity courts in England.”); *id.* at 464–65 n.213.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

In today's terms, merger was an administrative consolidation in which two courts, each with a separate judge, were consolidated into one court with one judge who presided over the common law and the law in equity: one judge with two hats.¹⁰² However, it is widely acknowledged that no state or country has made much progress in blending, merging, or fusing the two bodies of law into one.¹⁰³

A. *The Doctrine of Irreparable Injury*

After most of the states had merged their court systems, another 100 years passed before legal scholars publicly wondered if any purpose remained for the Doctrine.¹⁰⁴ In 1990, a professor teaching law in Texas, Douglas Laycock, published a landmark study on the modern role of the irreparable injury rule in American courts. He concluded that "[t]he[] real reasons for denying equitable remedies are not derived from the adequacy of the legal remedy or from any general preference for damages. . . . Sometimes there are good reasons to deny legal relief and grant equitable relief instead. But there is no general presumption against equitable remedies."¹⁰⁵

Laycock found that the issue of jurisdiction in equity is frequently determined by criteria that are left unmentioned and unrelated to the Doctrine.¹⁰⁶ He concluded that these covert rules of decision may not be wrong, but they are unreliable because they are not contested openly in the litigation process.¹⁰⁷

¹⁰² See *id.* at 431.

¹⁰³ *Rogers v. Daniel Oil & Royalty Co.*, 110 S.W.2d 891, 894 (Tex. 1937) ("In spite of this blended system of law and equity the distinction between them is as absolute as ever, and to entitle the plaintiff to equitable relief he must show a proper case for a court of equity to exercise its equitable jurisdiction."); see also *Ochoa v. Am. Oil Co.*, 338 F. Supp. 914, 920 (S.D. Tex. 1972) ("Although the equity side and the law side of the federal trial courts were thus fused, we are still far from the time . . . when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law." (internal quotation omitted)); Main, *supra* note 5, at 476 ("As with the Field Code and the Federal Rules of Civil Procedure, the Judicature Acts of 1873 and 1875, fused only the procedure of law and equity, leaving the substance of equity both intact and predominant . . ."); O'SULLIVAN, *supra* note 92, § 10.04 (stating that British fusion did not substantially combine the substance of either body of law).

¹⁰⁴ See, e.g., Laycock, *supra* note 8, at 692–93.

¹⁰⁵ *Id.* at 692.

¹⁰⁶ *Id.* at 726–27.

¹⁰⁷ *Id.* at 770.

As of January 9th, 2013, Laycock's study has been cited by at least 115 subsequent articles¹⁰⁸ and was instrumental in the rejection of the Doctrine by the recently completed Restatement Third.¹⁰⁹ Aside from the judiciary, most authorities now reject the Doctrine or minimize its relevance.¹¹⁰ However, Laycock's study remains largely ignored in the opinions of most courts, including courts in Texas.¹¹¹ After twenty years in circulation, the article has been cited in only six state court cases and sixteen federal cases.¹¹² This slight reaction in case opinions suggests that the judiciary want to maintain their discretion and opaque rationale.

Both Dobbs¹¹³ and George Palmer¹¹⁴ list acknowledged exceptions to the Doctrine. They explain, for example, that a plaintiff with a claim for unjust enrichment against an insolvent defendant does not have an adequate remedy at law because restitution at law cannot offer the seniority protections against an insolvent defendant that would be provided by a

¹⁰⁸ See LEXISNEXIS *Shepard's* Results for Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 699 (1990) (search last performed Jan. 9, 2013) (on file with Baylor Law Review) (results included 115 article results, 16 federal case results, and 6 state case results).

¹⁰⁹ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. e (Supp. 2012) (citing Professor Laycock's article).

¹¹⁰ See, e.g., 1 DOBBS, *supra* note 5, § 2.5(1) ("With the merger of law and equity courts into a unitary system of justice, this history offers no basis for continued use of the rule, and it remains today primarily as a convenient (but perhaps misleading and overstated) expression for entirely different policies." (footnotes omitted)); 1 PALMER, *supra* note 20, § 1.6 ("In general there has been a gradual erosion of the [adequacy] doctrine which suggests that in time it will be discarded, and this on the whole would be a good thing."); OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 38–40 (1978). But see *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (holding that the decision to grant injunctive relief for patent claims must include consideration of four factors including irreparable damage and adequate remedy.).

¹¹¹ *Supra* note 108 and accompanying text. But see *Patrick v. Thomas*, No. 2-07-339-CV, 2008 Tex. App. LEXIS 3219, at *5 (Tex. App.—Fort Worth May 1, 2008, no pet.) (mem. op., not designated for publication) (citing Laycock's article as support for an exception to the adequacy doctrine).

¹¹² See *supra* note 108.

¹¹³ 1 DOBBS, *supra* note 5, § 5.18(3), at 936 ("The legal remedy is clearly not adequate compared to the equitable remedy whenever the trust or lien would give the plaintiff a priority, or when the trust would give the plaintiff a return of specific unique property not reachable at law, but in such cases there is a question whether the more effective equitable remedy appropriately protects the interests of third-party creditors.").

¹¹⁴ See 1 PALMER, *supra* note 20, § 1.6, at 35–37.

constructive trust.¹¹⁵ If a remedy at law cannot be measured, it is also generally found to be inadequate.¹¹⁶

Another exception to the Doctrine is for claims against trustees or fiduciaries, which is widely recognized by treatises,¹¹⁷ restatements¹¹⁸ and case opinions¹¹⁹ to be entitled to presumptive jurisdiction in equity. For example, claims for money are generally restricted to jurisdiction at law unless the claim is made against a fiduciary.¹²⁰ Alternatively, section 197 of

¹¹⁵ *See id.*

¹¹⁶ *Id.* § 1.6.

¹¹⁷ *See, e.g.*, 1 DOBBS, *supra* note 5, § 5.18(3) (“Because equity created the substantive rights against fiduciaries, equity has always taken jurisdiction in claims against them without regard to the adequacy test.”); 1 PALMER, *supra* note 20, § 1.6 (“[E]quity jurisdiction over accounting by a trustee or other fiduciary usually has been continued even where an adequate remedy at law in quasi contract has become available.”); 1 JOHN N. POMEROY & SPENCER W. SYMONS, A TREATISE ON EQUITY JURISPRUDENCE § 181, at 257 (5th ed. 1941); STORY, *supra* note 6, § 29 (“Thus, what are technically called Trusts, that is, estates vested in persons upon particular trusts and confidences, are wholly without any cognizance at the common law; and the abuses of such trusts and confidences are beyond the reach of any legal process. But they are cognizable in courts of equity; and hence they are called equitable estates; and an ample remedy is therefore given in favor of the *cestuis que trust* (the parties beneficially interested) for all wrongs and injuries, whether arising from negligence or positive misconduct.”).

¹¹⁸ *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 197 (1959) (“Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable.”); RESTATEMENT (FIRST) OF RESTITUTION § 160 cmt. e (1936) (“Even though what is transferred is money . . . the payor or transferor is entitled to maintain a proceeding in equity for specific restitution if the payment or transfer was procured by an abuse of a fiduciary or confidential relation.”).

¹¹⁹ *See, e.g.*, *Cigna Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011) (“The case before us concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust). It is the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law.” (citations omitted)); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 571 n.8 (1990) (“Such damages were available only in courts of equity because those courts had exclusive jurisdiction over actions involving a trustee’s breach of his fiduciary duties.”); *Duvall v. Craig*, 15 U.S. 45, 56 (1817) (a trustee was “only suable in equity”); *Martino v. Weisman (In re Elegant Equine, Inc.)*, 155 B.R. 189, 192 (Bankr. N.D. Ill. 1993) (“Indeed, every court to consider this issue in the context of bankruptcy proceedings has held that breach of fiduciary duty actions are equitable”); *Sertich v. Moorman*, 783 P.2d 1199, 1201 (Ariz. 1989).

¹²⁰ *Cigna*, 131 S. Ct. at 1880; Colleen Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1602–03 (2002).

Restatement (Second) of Trusts explains that trustee effectively waives his right to jurisdiction at law for breach of contract.¹²¹

B. Equity Jurisprudence After Merger

One of the hallmarks of courts in equity is judicial discretion. According to Justice Story, in the early years of the Chancery Court, the chancellors regarded themselves as royalty who were little educated in the law but sure of the King's conscience.¹²² In modern times, judges in equity remain equally assured of their prerogative to judicial discretion.¹²³ The covert process in which jurisdiction is resolved¹²⁴ and the sometimes vague standard of remedying unconscionability or enforcing public policy tend to sustain the broad discretion enjoyed by a judge sitting in equity.¹²⁵

¹²¹ RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b (1959) ("The trustee by accepting the trust and agreeing to perform his duties as trustee does not make a contract to perform the trust enforceable in an action at law. The trustee may by contract undertake other duties than those which he undertakes as trustee, and if he does so he will be liable in an action at law for failure to perform such duties."); *see also infra* notes 245 and 246 and accompanying text (noting the similarities between the rule promulgated in *Peckham* and Section 197 of the Restatement (Second) of Trusts).

¹²² 1 STORY, *supra* note 6, § 21 ("In the early history of English equity jurisprudence there might have been, and probably was, much to justify And as the chancellors were for many ages almost universally either ecclesiastics or statesmen, neither of whom are supposed to be very scrupulous in the exercise of power; and as they exercised a delegated authority from the crown, as the fountain of administrative justice, whose rights, prerogatives, and duties on this subject were not well defined, and whose decrees were not capable of being resisted, it would not be unnatural, that they should arrogate to themselves the general attributes of royalty, and interpose in many cases, which seemed to them to require a remedy, more wide or more summary than was adopted by the common courts of law.").

¹²³ Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 68 (2007) ("Courts make extravagant statements about their discretion in administering equitable substantive standards."); 1 DOBBS, *supra* note 5, § 4.3(1), at 587.

¹²⁴ *See, e.g.,* BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1095–96 (7th Cir. 1994); 1 DOBBS, § 2.4(7), at 115 ("Few American citizens, however, would think of themselves in court as humble petitioners, on their knees before the judge who may deny relief on grounds that cannot be stated as principles or applied even-handedly to all suitors."); Laycock, *supra* note 8, at 726–27 (finding that courts often decide the issue of jurisdiction in equity according to criteria that often go unmentioned).

¹²⁵ 1 DOBBS, *supra* note 5, § 4.1(3), at 569. ("Judges may be willing to expand substantive liabilities when they are limited to mild forms of restitution, but may desire to constrict those liabilities when large damages might result."); Note, *Discretionary Power of Courts of Equity*, 16 HARV. L. REV. 444, 444 (1903) ("Equitable remedies being extraordinary, they may, at the

The dilemma of modern law in equity is that the safety net role of equity is still key but the merger of courts has complicated when and how judges, sitting in equity, should preside in relation to the common law.¹²⁶ As long as the substantive law in equity remains unmerged with the common law, the Doctrine or some substitute standard is still needed to define the jurisdiction for the law in equity.¹²⁷

Merger of the two court systems has brought three related problems that challenge the integrity of the law in equity. First, judgments based on the law in equity now have consequences for the common law; the law in equity no longer acts outside the system by issuing orders or decrees.¹²⁸ Second, how are legal principles derived in part from the law in equity to be applied as precedent? If the law in equity caters to case facts, then shouldn't the principle be limited to comparable case facts? In an aside, Laycock observed that such careful checking for factual comparability is not always evident.¹²⁹ Third, after merger, who are the keepers or guardians of the law in equity? There are currently four states that maintain courts in equity,¹³⁰ most notably Delaware. Are the Delaware courts and the American Law Institute¹³¹ now the principal guardians or keepers of the law in equity?¹³²

chancellor's discretion, be refused or given in order to do equity. And equity is viewed in this connection in a large sense; it is not only what is just and right as between plaintiff and defendant, but also what, according to a sound public policy, is just and right as regards the interests of the public.").

¹²⁶ See Laycock, *supra* note 8, at 696–97.

¹²⁷ See *infra* note 109.

¹²⁸ *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994) (“The decrees of the Court of Equity were then rather in the nature of awards, formed on the sudden, pro re nata, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used, as precedents.” (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 18 (Melville M. Bigelow ed., 13th ed. 1886))).

¹²⁹ Laycock, *supra* note 8, at 767 (“Judicial citations to irreparable injury opinions sometimes emphasize other factually similar cases, so that the cases cited are actually on point. More often, the citation is simply to the catchphrase, and the case itself is wholly irrelevant.”).

¹³⁰ Tennessee, Mississippi and Delaware maintain separate courts and New Jersey maintains a separate equity division within trial courts of general jurisdiction. See Russell Fowler, *A History of Chancery and Its Equity: From Medieval England to Today's Tennessee*, 48 TENN. B.J. 20, 28 (2012).

¹³¹ The American Law Institute constitutes projects to write and update restatements of the law, including restatements on agency, trusts, and restitution. See *Institute Projects*, THE AMERICAN LAW INSTITUTE, <http://www.ali.org/index.cfm?fuseaction=about.instituteprojects>, (last visited Jan. 10, 2012).

Thomas Main presents a strong analysis of the development of the role of equity in promoting change in the common law, tracing many of the substantive and procedural innovations in the common law to changes or experiments in equity.¹³² He makes a strong case that the merger of equity and common law has impaired equity's capacity as an agent for change and improvement.¹³⁴

The law in equity and claims in equity have been criticized for excessive discretion and a potentially unlimited range of jurisdiction.¹³⁵ The term unjust enrichment has also been criticized as too subjective or moralistic. Section 1 of the Restatement Third argues that the first criterion for any claim in equity is that it relate to a non-consensual transfer: "Enrichment is unjust, in legal contemplation, to the extent it is without adequate legal basis; and the law supplies a remedy for unjustified enrichment because such enrichment cannot conscientiously be retained."¹³⁶ The Restatement Third is undoubtedly correct in asserting the strong legal principle, but it would be inaccurate to deny that subjective factors do not sometimes substantially affect jurisdiction.¹³⁷

¹³² Cf. Rounds, *supra* note 43, at 350–51 (noting the declining infrastructure in the modern U.S. for the law in equity as it relates to the anti-netting rule and IP infringement).

¹³³ Main, *supra* note 5, at 505 ("The ability of equity to correct problems stemming from application of strict law modernizes and reforms the legal doctrine while also boosting its societal legitimacy. Equity is a fundamental method by which the law has sought to meet changing conditions. . . . Equity thus plays an important role in the growth of the law, and without that engine, our law will be moribund, or worse." (quotations omitted)).

¹³⁴ *Id.* at 478 ("Yet the legacy of equity is unfulfilled in a unified procedural system if the procedural apparatus administering jointly the substantive principles of law and equity is not itself subject to the moderation and correction of the jurisdiction of equity."); see also Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 25 (1905) ("The very thing that made equity a system must in the end prove fatal to it. In the very act of becoming a system, it becomes legalized, and in becoming merely a competing system of law insures its ultimate downfall.").

¹³⁵ *State v. Morales*, 869 S.W.2d 941, 944 (Tex. 1994) ("A court of equity is a happy invention to remedy the errors of common law: but this remedy must stop somewhere" (quoting HENRY HOME, PRINCIPLES OF EQUITY 46 (2d ed. 1767))).

¹³⁶ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (2011) ("This is because—withstanding the potential reach of the words, and Lord Mansfield's confident reference to "natural justice"—the circumstances in which American law has in fact identified an *unjust enrichment* resulting in legal liability have been those and only those in which there might also be said to be *unjustified enrichment*, meaning the transfer of a benefit without adequate legal ground.").

¹³⁷ See George P. Roach, *Rescission in Texas: A Suspect Remedy*, 31 REV. LITIG. 493, 525–29 (2012).

C. Burdens of Proof and Counter-Restitution

Whether or not the underlying claim for unjust enrichment relates to fiduciary issues, the defendant is essentially treated as similar to a trustee accused of breaching her duty of loyalty.¹³⁸ Courts in equity assume that the defendant enjoys a substantial advantage in information and potential case evidence vis-à-vis the beneficiary.¹³⁹ The law in equity generally assesses the defendant with liability for uncertainty in the amount of damages or unjust enrichment unless the defendant disproves the assumed advantage or duty to account.¹⁴⁰ The result is a process that shifts the burden of proof on measuring enrichment and provides a source of motivation for the defendant to produce relevant evidence.¹⁴¹

For example, to establish a claim for a constructive trust, the plaintiff only needs to identify the applicable res, traditionally an asset but sometimes related revenues.¹⁴² The claimant's burden thus having been met,

¹³⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. i (Supp. 2012) ("From a trustee charged with liability for breach of duty it is a short conceptual step to a defendant charged as a constructive trustee, thence to anyone who is required to account (whether or not via the remedy of constructive trust) for profits realized in consequence of a wrong to the claimant. Thus in the context of intellectual property, the notion of treating the infringer as a trustee under a duty to account has been codified in the remedial provisions of the Copyright Act . . ."); see also *Root v. Ry. Co.*, 105 U.S. 189, 214–15 (1881).

¹³⁹ *United States v. Carter*, 217 U.S. 286, 305–06 (1910) ("It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency."); *Shannon v. Marmaduke*, 14 Tex. 217, 220 (Tex. 1855) ("Although the fact is not proved by positive evidence that the purchase in this instance was made directly or indirectly by the defendant, yet the relationship subsisting between himself and the nominal purchaser, the inadequacy of price, and more especially the reconveyance to the defendant unexplained, afford strong circumstantial evidence tending to that conclusion. Positive evidence of such secret understandings between parties can rarely be obtained.").

¹⁴⁰ *Am. Honda Motor Co. v. Two Wheel Corp.*, 918 F.2d 1060, 1063–64 (2d Cir. 1990) (noting that Plaintiff's claim for damage award based on gross sales, because of lack of proof of deductions, was properly rejected because plaintiff received wholesale price of goods sold to defendant, who was former dealer of plaintiff).

¹⁴¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 5(d), 51 (2011) ("(d) A claimant who seeks disgorgement of profit has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain. Residual risk of uncertainty in calculating net profit is assigned to the defendant.").

¹⁴² *Wilz v. Flournoy*, 228 S.W.3d 674, 676 (Tex. 2007) ("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,

the burden of proving the net assets or profits applicable shifts to the defendant. To avoid liability for the entire asset or all of the revenue, the defendant must introduce sufficient evidence to show that the assets or revenues need to be apportioned or adjusted for expenditures that benefitted the disputed property.¹⁴³

While the recent trend seems to be that courts try to moderate the severity of the consequences for the good-faith defendant that fails to satisfy her burden, the potential liability for revenues rather than profits is real.¹⁴⁴ An earlier review of 116 modern intellectual property cases reveals that in about half of the cases, when the defendant fails to offer sufficient evidence of any counter-restitution, the court actually awards revenues.¹⁴⁵ The Second¹⁴⁶ and Federal¹⁴⁷ Circuits now hold that the trial court must try

except in so far as the trustee may be able to distinguish and separate that which is his own.” (emphasis in original) (quoting *Eaton v. Husted*, 172 S.W.2d 493, 498 (Tex. 1943))).

¹⁴³ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. g (2011) (“The general question of attribution may include issues of *apportionment* at one or more levels. If the defendant’s business is complex, and the underlying wrong to the claimant affects only one of its various components, threshold apportionment issues may involve (i) the proportion of the firm’s overall results properly attributable to the particular business in which the wrong has been committed, and (ii) the proportion of overhead or other common expenses properly charged against these results in determining the net profits of the business in question.” (emphasis in original)).

¹⁴⁴ See *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. Mfg. Co.*, 225 U.S. 604, 620 (1912) (stating that a guilty trustee’s wrongdoing justifies the risk of offsets being lost); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514 (9th Cir. 1985) (“Any doubt as to the computation of costs or profits is to be resolved in favor of the plaintiff. . . . If the infringing defendant does not meet its burden of proving costs, the gross figure stands as the defendant’s profits.” (internal citations omitted)); *Gordon Form Lathe Co. v. Ford Motor Co.*, 133 F.2d 487, 494 (6th Cir. 1943) (stating that the defendant’s inadequate recordkeeping would be held against it).

¹⁴⁵ See George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 FORDHAM J. CORP. & FIN. L. 1, 61 (2007) (“Out of approximately 116 opinions, the court held the defendant in default and ordered her to disgorge her revenues in 73 opinions. In the remaining 43 opinions the court acknowledged the default rule but approved an alternative estimate or rule of thumb to establish the defendant’s benefit, generally measured by an estimate of the defendant’s gross profit.”) (footnotes omitted)).

¹⁴⁶ *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 103 (2d Cir. 1989) (“Even if Zarcone does not offer evidence of his costs (as he has not heretofore), the court should estimate them based on the evidence before it.”).

¹⁴⁷ *Dayva Int’l v. Award Prods. Corp.*, No. 97-CV-1397, 1998 U.S. App. LEXIS 4386, at *10–11 (Fed. Cir. Mar. 11, 1998) (“Thus, a trial court only has an independent duty to apportion

to estimate the defendant's applicable expenses for the revenues proven by the plaintiff in intellectual property cases.

An experienced defense counsel understands that the costs and risks of "stonewalling" discovery requests can be high in this area of the law. If the defendant firmly asserts that certain operating data do not exist or are impossible to collect, she may be estopped from subsequently entering evidence to apportion or offset the revenues established by the claimant. Occasionally, courts also impose milder sanctions for the defendant's failure to cooperate.¹⁴⁸

The plaintiff's burden to prove damages in fact, that the plaintiff suffered at least some damage,¹⁴⁹ is less applicable for such causes of action as breach of fiduciary duty,¹⁵⁰ misappropriation of trademarks,¹⁵¹ conversion,¹⁵² or misrepresentation.¹⁵³

profits, even where the defendant fails to present evidence, if it is clear from the record that not all the profits claimed are attributable to the infringement.").

¹⁴⁸See, e.g., *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) (maintaining that the plaintiff is held to a lower burden of proof in ascertaining the exact amount of damages because "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created"); *Intel Corp. v. Terabyte Int'l*, 6 F.3d 614, 621 (9th Cir. 1993); *Deering, Milliken & Co. v. Gilbert*, 269 F.2d 191, 193-94 (2d Cir. 1959) (advocating a more flexible standard for plaintiff's burden of showing defendant's revenues are appropriate when defendant "prevented proof by direct evidence of the true facts essential to an accurate determination of the royalties due under the [Copyright] Act" (quotation omitted)); *Phillip Morris USA Inc. v. Otamedia Ltd.*, No. 02 Civ. 7575 (GEL)(KNF), 2005 U.S. Dist. LEXIS 1259, at *16 (S.D.N.Y. Jan. 28, 2005); *A & M Records v. Abdallah*, 948 F. Supp. 1449, 1459 (C.D. Cal. 1996); *Aris Isotoner Inc. v. Dong Jin Trading Co.*, No. 87 Civ. 8904 (RO), 1989 U.S. Dist. LEXIS 18447, at *18 (S.D.N.Y. May 16, 1989) ("Thus, when the defendant fails to provide satisfactory evidence of its actual sales, the court may rely on indirect or circumstantial evidence.").

¹⁴⁹See *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 877 (Tex. 2010) ("[U]ncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery." (alteration in original) (quoting *Sw. Battery Corp. v. Owen*, 115 S.W.2d 1097, 1098-99 (Tex. 1938))).

¹⁵⁰See *Bos. Children's Heart Found., Inc. v. Nadal-Ginard*, 73 F.3d 429, 435 (1st Cir. 1996); *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 8 (Del. Ch. 1949); *Ex rel. Plugger v. Twp. Bd. of Overijssel*, 11 Mich. 222, 225-26 (1863); *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969) ("It is true that the complaint before us does not contain any allegation of damages to the corporation but this has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty."); *RESTATEMENT (FIRST) OF RESTITUTION* § 128 cmt. f (1937).

¹⁵¹*Estate of Bishop v. Equinox Int'l Corp.*, 256 F.3d 1050, 1055 (10th Cir. 2001) ("In short, we have acknowledged that a showing of actual damages is not required to recover a portion of an

Total equity¹⁵⁴ and the related commitment to avoid issuing court orders that themselves result in unjust enrichment¹⁵⁵ are the driving forces behind

infringing defendant's profits in trademark action, and that plaintiffs in such cases may recover the defendants' profits based upon the alternative theories of the prevention of unjust enrichment and the deterrence of willful infringement."); *ISP.NET.LLC v. Qwest Commc'ns Int'l*, No. IP 01-0480-C-B/S, 2004 U.S. Dist. LEXIS 20237, at *7 (S.D. Ind. Sept. 24, 2004); *Monsanto Co. v. Campuzano*, 206 F. Supp. 2d 1239, 1249 (S.D. Fl. 2002); *Riggs Inv. Mgmt. Corp. v. Columbia Partners, L.L.C.*, 966 F. Supp. 1250, 1271 (D.D.C. 1997); *Laskowitz v. Marie Designer, Inc.*, 119 F. Supp. 541, 555 (S.D. Cal. 1954). *But see Intel Corp. v. Terabyte Int'l*, 6 F.3d 614, 621 (9th Cir. 1993) (holding the trial court did not abuse its discretion in calculating damages "somewhat crudely" because the infringer offered no evidence in rebuttal to the calculation); *Pure Oil Co. v. Paragon Oil Co.*, No. 33755, 1958 WL 6076, at *325-26 (N.D. Ohio, Jan. 9 & Feb. 17, 1958) (holding that plaintiff needed to prove a loss of profits as a result of the infringement to recover defendant's profits).

¹⁵² RESTATEMENT OF RESTITUTION § 128 cmt. f (1937) ("Although it is essential to an action of restitution that the defendant should have had possession or should have disposed of the chattel, restitution is granted even though the conversion was innocent and the entire transaction resulted in no net benefit to the defendant.").

¹⁵³ *Peine v. Murphy*, 377 P.2d 708, 712 (1962) ("Plaintiff's suit in the trial court was clearly based on a constructive trust-unjust enrichment theory in equity where rescission and other relief may be given even though plaintiff did not prove any pecuniary damage."); 2 DOBBS, *supra* note 5, § 9.3(2) ("Most courts seem to have rejected any pecuniary damages requirement as a precondition to restitution where the misrepresentation was clearly material even though it did not bear on economic value and even where the misrepresentation understated the value of goods involved." (citing *Ind. & Mich. Elec. Co. v. Harlan*, 504 N.E.2d 301 (Ind. Ct. App. 1987))).

¹⁵⁴ *See Stoffela v. Nugent*, 217 U.S. 499, 501 (1910) ("It is true that the defendant acted fraudulently and knew what he was about. But a man by committing a fraud does not become an outlaw and *caput lupinum*. He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so the courts will endeavor to do substantial justice so far as is consistent with adherence to law." (citations omitted)); *Stanley v. Gadsby*, 35 U.S. 521, 522 (1836) (holding that to be entitled to injunctive relief against a usurious creditor, the debtor must offer to pay interest and principal); *Ehrlich v. United States*, 252 F.2d 772, 776 (5th Cir. 1958) ("The harm should be undone but there is no reason to reward the victim."); *Cardiac Thoracic & Vascular Surgery, P.A. v. Bond*, 840 S.W.2d 188, 193 (Ark. 1992) ("The equitable objective of a return to the status quo as the result of a rescission is consistent with the equitable maxim 'he who seeks equity must do equity.'"); *O'SULLIVAN ET AL.*, *supra* note 92, at § 18.10 ("Though the defendant has been fraudulent, he must not be robbed." (quoting *Spence v. Crawford* [1939] 3 All E.R. 271 (H.L.) 288)).

¹⁵⁵ 1 PALMER, *supra* note 20, § 3.12, at 303 ("The requirement that a party who obtains restitution must return or other-wise account for benefits received in an exchange transaction does not rest on a principle of mechanics: that since the transaction is being rescinded it necessarily follows that there must be a re-exchange of benefits transferred on each side. Instead, the true basis of the requirement is to prevent the unjust enrichment of the plaintiff, who is himself seeking restitution based on the defendant's unjust enrichment.").

the defendant's right to seek counter-restitution when the plaintiff pleads for disgorgement or proprietary relief like specific restitution or rescission.¹⁵⁶ When a court in equity orders the specific restitution of an asset, the order is generally conditioned on the plaintiff compensating the defendant for reasonable expenses of maintaining the asset.¹⁵⁷ The buyer of an asset is not entitled to rescission of the purchase price unless she returns the asset and compensates the defendant for any net interim benefits, including attributed rent.¹⁵⁸

In the law of trusts, the trustee must be compensated for all reasonable expenses that benefitted the trust. Even a trustee in breach of her duty of loyalty, absent extreme circumstances, is entitled to a lien on the trust for the amount of the indemnity.¹⁵⁹ But reimbursement for expenses does not

¹⁵⁶ See 1 STORY, *supra* note 6, § 437 ("The relief . . . is more complete, adequate, and perfect, inasmuch as it adapts itself to the special circumstances of each particular case; adjusting all cross equities; and bringing all the parties in interest before the court, so as to prevent multiplicity of suits and interminable litigation." (footnote omitted)).

¹⁵⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(5)(c) (2011) ("A conscious wrongdoer or a defaulting fiduciary may be allowed a credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement.").

¹⁵⁸ *Id.* § 53(1) ("A person who is liable to make restitution of property or its value is liable for supplemental enrichment in the form of interest, rent, or other measure of use value, to the extent that such further enrichment is either realized in fact or appropriately presumed. Enrichment of this kind may be presumed in the case of a recipient who is enriched by misconduct (§ 51(1)) or who is otherwise responsible for the enrichment in question (§ 52).").

¹⁵⁹ RESTATEMENT (SECOND) OF AGENCY § 439 cmt. a (1958) ("Indemnity is allowed, even though in the transaction the agent committed a breach of trust. Thus where an agent, who is authorized to buy property, makes a secret profit, the principal must indemnify the agent for his proper expenditures, although entitled to any improper profit made by the agent. Likewise an agent who violated his fiduciary duty in refusing to convey property bought for the principal is entitled to be reimbursed for the purchase price, as a condition to recovery by the principal." (citations omitted)); RESTATEMENT (SECOND) OF TRUSTS § 244 cmt. c (1959) ("To the extent to which the trustee is entitled to indemnity, he has a security interest in the trust property. He will not be compelled to transfer the trust property to the beneficiary or to a transferee of the interest of the beneficiary or to a successor trustee until he is paid or secured for the amount of expenses properly incurred by him in the administration of the trust."); RESTATEMENT (SECOND) OF TRUSTS § 245(2) ("Although an expense is not properly incurred in the administration of the trust, the trustee is entitled to indemnity out of the trust estate for such expense to the extent that he has thereby conferred a benefit upon the trust estate, unless under the circumstances it is inequitable . . ."); RESTATEMENT (SECOND) OF TRUSTS § 244 cmt. e; 4 AUSTIN WAKEMAN SCOTT, ET AL., SCOTT & ASCHER ON TRUSTS § 21.2 (4th ed. 2007) ("Denial of indemnification for expenses properly incurred does not follow from denial or reduction of compensation. Even

necessarily include compensation for the trustee in breach or other infringing expenses. The standard is not absolute and may vary with the nature of the trustee's breaches of behavior¹⁶⁰, the benefits that the trustee can prove he produced for the trust and a large amount of discretion.¹⁶¹

To borrow Andrew Kull's term, are there civil "outlaws" who should not be protected by a court in equity?¹⁶² In individual cases, the defendant is sometimes denied counter-restitution based on individual case facts and frequently then on the base of "unclean hands."¹⁶³ While their authority is only persuasive, British authorities on the issue agree that "wicked" or willful defendants still should be eligible for counter-restitution,¹⁶⁴ except when it would violate public policy based on the nature of the counter-restitution.¹⁶⁵

here, though, the court may offset any liability of the trustee for losses resulting from a breach of trust against any claim of the trustee to indemnity." (footnotes omitted)).

¹⁶⁰ Compare RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. h (2011) ("Because the defendants in all these cases are conscious wrongdoers, it does not seem possible to explain the contrasting outcomes by comparing their relative blameworthiness.") with RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) ("Some cases treat the 'egregiousness' of an agent's breach as relevant.").

¹⁶¹ Rounds, *supra* note 43, at 348–49 ("It is black letter law that if a trustee incurs an expense incident to an unauthorized self dealing transaction, and in so doing confers upon the trust estate a benefit, the trustee is ordinarily entitled to indemnity to the extent of the benefit of the value conferred. He who seeks equity must do equity. The Restatement (Third) of Trusts is generally in accord. Under the Uniform Trust Code, a trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, expenses that were not properly incurred in the administration of the trust to the extent necessary to prevent unjust enrichment of the trust." (citing RESTATEMENT (SECOND) OF TRUSTS § 245 cmts. c–d (1959))); see also 3 SCOTT ET AL., *supra* note 159, § 18.1.2.6 (discussing when a trustee improperly incurs an expense on behalf of the trust); *id.* § 22.2.1 (discussing when a trustee is entitled to indemnity for expenses improperly incurred); JOHN MOWBRAY ET AL., LEWIN ON TRUSTS ¶¶ 21–25 (17th ed. 2000) (discussing "indemnity in respect of unauthorized transactions").

¹⁶² Andrew Kull, *Restitution's Outlaws*, 78 CHI.-KENT L. REV. 17, 18 (2003).

¹⁶³ See *id.* at 31 ("[R]estitution . . . will sometimes treat the claimant's bad behavior as an affirmative defense.").

¹⁶⁴ See ANDREW BURROWS, THE LAW OF RESTITUTION 176 (2d ed. 2005) ("Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return." (citations omitted)).

¹⁶⁵ PETER BIRKS, RESTITUTION—THE FUTURE 128–32 (1992) (stating that even "wicked" defendants receive counter-restitution, except when the defendant's reimbursement would be against public policy).

The strongest pressure that a claimant will experience to prove causation is likely to come from the defendant who will contest the claimant's identification of the relevant assets or revenues and introduce evidence to support a claim for apportionment or to exclude portions of the amounts identified as too remote.¹⁶⁶ To shift her burden of proof, the claimant must reasonably identify what revenues are attributable to the unjust act.¹⁶⁷

D. Unjust Enrichment at Law

The difference between claims at law and in equity has become a significant issue of dispute especially due to a series of modern U.S. Supreme Court opinions.¹⁶⁸ Those opinions caused many courts to change their standards but a reasonable rule of thumb is that unjust enrichment at law seeks a remedy for money¹⁶⁹ (excluding disgorgement and money remedies from fiduciaries) while a claim in equity generally seeks property and often seeks a personal order from the court to the defendant to convey legal title.¹⁷⁰

¹⁶⁶ *Holiday Inns, Inc. v. Alberding*, 683 F.2d 931, 934–35 (5th Cir. 1982).

¹⁶⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. i (Supp. 2012) (“If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors’ corporate income tax return in the record and rest your case for an award of infringer’s profits.” (quoting *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983))).

¹⁶⁸ See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214–15 (2002) (“Admittedly, our cases have not previously drawn this fine distinction between restitution at law and restitution in equity, but neither have they involved an issue to which the distinction was relevant.”); *Grupo Mexicano De Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (“[A]lthough they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages.”); see also *Eichorn v. AT&T Corp.*, Civ. No. 96-3587, 2005 U.S. Dist. LEXIS 29261, at *36 (D. N.J. 2005) (“While plaintiffs disclaim any resort to equitable relief, their purported ‘equitable decree’ is on all fours with the type of ‘legal restitution’ that the Great-West case held was not recoverable under Section 502(a)(3). Thus, plaintiffs’ calling the award of back pay-type damages an equitable decree will not save their claim.”); *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 702 (S.D. Tex. 2002) (“Deciding whether a plaintiff has properly stated a claim for equitable relief requires an examination, in accordance with *Grupo Mexicano*, of the equitable claims historically available.”).

¹⁶⁹ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (“We have recognized the ‘general rule’ that monetary relief is legal, . . . and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.”); see *Murphy*, *supra* note 120, at 1581.

¹⁷⁰ 1 DOBBS, *supra* note 5, § 4.1(1) (“Remedially and historically speaking, however, restitution might be either a purely legal claim or a purely equitable claim. Restitution claims for

Traditionally, unjust enrichment at law includes assumpsit or quantum meruit and money had and received.¹⁷¹ According to Palmer, there are numerous opinions that confuse quantum meruit with unjust enrichment or that fail to define the role of quantum meruit within unjust enrichment at law.¹⁷²

The remedy of unjust enrichment in equity was emulated by courts at law in the form of assumpsit, including quantum meruit and money had and received.¹⁷³ Lacking the power of in personam authority, courts at law offered damage remedies based in quasi-contract. Famously championed by Lord Mansfield, who presided as Lord Chief Justice of the common law courts,¹⁷⁴ unjust enrichment at law was based on the defendant's returning money that belonged to someone else or paying the defendant for goods or services that the defendant could reasonably have expected to owe. The authority of a court at law was limited to ordering the sheriff to seize the assets of either party and sell them for monetary relief, or, for some claims like ejectment or replevin, to seize the asset and deliver it to an individual who maintained legal title.¹⁷⁵ Typically, as claims for unjust enrichment at

money are usually claims 'at law.' So are claims for replevin and ejectment. On the other hand, restitution claims that may require coercive intervention or some judicial action that is historically 'equitable' may be regarded as equitable claims.").

¹⁷¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 (2011) ("Even these more obvious sources resist a simple characterization, since the 'legal' side of unjust enrichment had been prominently explained in avowedly equitable terms. Causes of action that would be readily classified today as part of restitution came to be accepted in courts of law in the 17th and early 18th centuries, where they were pleaded as 'implied assumpsit' or on the 'common counts' (such as 'money had and received,' 'money paid,' or 'quantum meruit').").

¹⁷² 1 PALMER, *supra* note 20, § 1.1, at 4 ("It is not uncommon for courts to confuse *quantum meruit* and unjust enrichment, probably because *quantum meruit* is awarded in order to avoid unjust enrichment.").

¹⁷³ RESTATEMENT OF RESTITUTION, pt. 1, Introductory Note (1937) ("Gradually the common law judges became conscious of their omissions and jealous of the expanding power of the Court of Chancery, and with the invasion of the action of assumpsit they found a means of expanding their jurisdiction.").

¹⁷⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 (2011) ("It is fair to conclude that even the legal side of unjust enrichment had its origins in equitable principles, whether English or Roman or both. But it is an error to conclude that it originated in 'equity' as opposed to 'law,' since the author of the statement about 'natural justice and equity' (and many more like it) was Lord Chief Justice of the King's Bench.").

¹⁷⁵ See 1 Dobbs, *supra* note 5, § 4.1(1) ("Remedially and historically speaking, however, restitution might be either a purely legal claim or a purely equitable claim. Restitution claims for money are usually claims 'at law.' So are claims for replevin and ejectment. On the other hand,

law, quantum meruit and money had and received, are not subject to the Doctrine nor to the equitable defense of unclean hands.

The claims for unjust enrichment in equity and disgorgement are not based on quasi-contract. The defendant did not agree to disgorge the benefit and the plaintiff may not have even incurred any losses.¹⁷⁶ The remedy of constructive trust is not based on the defendant's implicit agreement to act as trustee. Such remedies in equity are founded on a combination of nonconsensual transfers for the claim and the unconscionability of allowing the defendant to retain the disputed assets or money.¹⁷⁷

E. Equitable Semantics

"The terminology of restitution is abstruse and confusing and is no matter for amateurs."¹⁷⁸

We are all amateurs compared to professionals such as Professors Dobbs, Kull, Laycock, Rendleman, or Murphy. The professionals agree that the law in equity is not understood well by practitioners or jurists¹⁷⁹ but they also acknowledge that prior "professionals" have contributed to the confusion because the key vocabulary of this discipline has not been properly established as you would otherwise find in the discipline of contracts or torts.¹⁸⁰ Kull, the Reporter for the Restatement Third, suggests that the original drafters' intended meaning for "restitution" was obscured by the existing usage that implied compensation or restoration.¹⁸¹

restitution claims that may require coercive intervention or some judicial action that is historically 'equitable,' may be regarded as equitable claims.").

¹⁷⁶ See *infra* Section VI for an example of a claim for fee forfeiture in which the plaintiff is acknowledged to have no actual damages in the discussion of *Burrow v. Arce*.

¹⁷⁷ See *supra* notes 135–137.

¹⁷⁸ 1 Dobbs, *supra* note 5, § 4.1(2).

¹⁷⁹ See Laycock, *supra* note 11, at 1277 ("Despite its importance, restitution is a relatively neglected and underdeveloped part of the law."); Murphy, *supra* note 120, at 1581 ("The general law of restitution is for many an obscure subject, perhaps explaining why so much confusion exists as to when monetary remedies are properly characterized as restitutionary."); Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 892 (1999) ("Restitution is becoming a lost art . . .").

¹⁸⁰ Kull, *supra* note 11, at 1194–95 ("Disagreement at this basic level about the content of the law of torts or the law of contracts would be unthinkable—not because these subjects have an immanent or ideal form (any more than restitution does), but because they have acquired stable conventional definitions (as restitution has yet to do).").

¹⁸¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. h; see also Kull, *supra* note 11, at 1191–92 ("For many lawyers the immediate connotation of the word

The Restatement Third has attempted to resolve the confusion in two ways. First, the title of the restatement was expanded to ‘Restitution and Unjust Enrichment’ with an explanation that the terms are synonymous.¹⁸² Second, the Restatement Third emphasized the fact that restitution, unjust enrichment, and the new term ‘disgorgement’ are all just different names for an accounting in equity for claims of conscious wrongdoing.¹⁸³

Similarly the term ‘equitable’ tends to confuse more than it clarifies.¹⁸⁴ It may refer to fairness or justice; it may refer to the law in equity or it may refer to a general practice or approach.¹⁸⁵ In some cases, it also seems reasonable to infer that ‘equitable’ is used to hedge uncertainty when one is not sure whether the remedy is in equity or at law. Most of the time, it is used harmlessly in a manner suggested by Palmer to describe a general perspective or approach.¹⁸⁶ In Section V.A., the article will show that the Texas Supreme Court fell victim to this confusion when it held that the affirmative defense in equity of unclean hands can apply to claims for quantum meruit.¹⁸⁷

‘restitution’ will be something else entirely: criminal sanctions requiring wrongdoers to make restitution to their victims, a topic having almost nothing to do with the subject at hand. The linguistic confusion that bedevils the law of restitution—necessitating laborious definitions before anyone can understand what you are talking about—affords an early indication that the common name of this neglected body of law was singularly ill-chosen.” (footnote omitted)).

¹⁸²RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. a (“Restitution measured by the defendant’s wrongful gain is frequently called ‘disgorgement.’ Other cases refer to an ‘accounting’ or an ‘accounting for profits.’ Whether or not these terms are employed, the remedial issues in all cases of conscious wrongdoing are the same.”).

¹⁸³ *Id.*

¹⁸⁴ See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2088–89 (2001) (“Equity, of course, is a term with several meanings. It can refer to individuation of justice and overriding of rules; it can refer more generally to what is morally fair; or it can refer to the rules and practice of English and American courts of equity. This leaves uncertain just what it means to say that unjust enrichment is a principle of equity or that restitution is equitable in nature.”).

¹⁸⁵ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(c) (“A statement to the effect that “restitution is equitable” is a harmless platitude so long as “equity” means only “fairness.” The same statement becomes mischievous when it is offered as the basis for defining the jurisdiction of courts or agencies, or the kinds of relief they are authorized to administer.”).

¹⁸⁶ 1 PALMER, *supra* note 20, § 1.2.

¹⁸⁷ See *infra* Section V.A.

Monetary remedies in equity apply the principles of accounting in equity to measure the defendant's net gain from a willful act.¹⁸⁸ The predominant modern term for her gain is net profit as in an accounting of profit or profit disgorgement.¹⁸⁹ As 'profit,' it's important to understand that this term was actively used before the development of accepted accounting principles and generally refers to the result of an accounting in equity. According to Section 51 of the Restatement Third, three of the principal sources of advantage or benefit are an increase in profits, decreased losses, and an increase in value.¹⁹⁰

In a minority of cases, the claimant can also extend her measure of the defendant's benefits to include secondary, consequential, or indirect benefits that have accrued to the defendant under the somewhat vague proviso that the consequential benefits not be unduly remote.¹⁹¹

IV. EQUITY IN TEXAS

We simply do not think recovery would be equitable under the circumstances. That, after all, remains the test. Perhaps this approach lacks analytical rigor, but it was precisely a scrupulous adherence to rigor that resulted in the growth of the courts of equity in the first place. While we do not deprecate the logic of appellant's legal position, there sometimes arise cases where law goes only so far and the chancellor must step in.¹⁹²

As proscribed in the 1835 Constitution, the British common law and law in equity were adopted into Texas law in 1840.¹⁹³ However, Texas's experience with separate courts in equity was limited to five years of the

¹⁸⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4).

¹⁸⁹ *Id.*

¹⁹⁰ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. e. See also 1 DOBBS, *supra* note 5, at § 4.1(4); 1 PALMER, *supra* note 20, § 1.8; and George P. Roach, *Counting the Beans: Unjust Enrichment and the Defendant's Overhead*, 16 TEX. INTELL. PROP. L.J. 483, 544 (2008) for a more detailed explanation of the law of measuring benefits and advantages in equity.

¹⁹¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(5)(a) ("Profit includes any form of use value, proceeds, or consequential gains (§ 53) that is identifiable and measurable and not unduly remote.").

¹⁹² *Lincoln Nat'l Life Ins. Co. v. Rittman*, 790 S.W.2d 791, 794 (Tex. App.—Houston [14th Dist.] 1990, no writ).

¹⁹³ MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS* 248–49 (2011).

Republic¹⁹⁴ after which the Constitutional Congress of 1845 approved the merger of the two courts.¹⁹⁵ Michael Ariens explains that Chief Justice John Hemphill was an advocate of the Spanish civil law and was dissatisfied with both the common law and the law in equity.¹⁹⁶ Ariens suggests that under the adopted Spanish system for pleading civil claims, the distinction between claims in equity and claims at law was not important.¹⁹⁷ Thomas Jefferson Rusk, the former chief justice, spoke in favor of jury trials for claims in equity, and the Convention approved the suggestion over Hemphill's opposition.¹⁹⁸ In the absence of any other explanation, it might be relevant to consider the strong role for juries during the Republic.¹⁹⁹

Thus, the innovations of blending equity and common law courts and adding juries for claims in equity were not the result of the Convention's great insight into future trends or doctrine but were choices to change a system that was not liked or needed. The choices to abolish forms pleading and add community property and homestead law, however, appear to have been more deliberate and far-sighted.²⁰⁰

¹⁹⁴ *Id.* at 250–51 (“The Texas Congress’s act of February 5, 1840, did not abolish the distinction between law and equity. Section 12 explicitly required the district courts to act either as a law court or in equity, depending on the cause. The supreme court criticized this provision: ‘A [sic] hundred judges, in almost any conceivable case, might differ in some degree as to its interpretation and exact function.’” (quoting *Whiting v. Turley*, Dallam 453, 456 (Tex. 1842)).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 23 (quoting Chief Justice Hemphill: “I cannot say that I am very much in favor of either chancery or the common law system. I should much have preferred the civil law to have continued in force for years to come. But inasmuch as the chancery system, together with the common law, has been saddled upon us, the question is now, whether we shall keep up chancery system or blend them together.” (footnote omitted)).

¹⁹⁷ *Id.* at 24 (“In Texas, however, the adoption of the Spanish system of initiating a civil (that is, noncriminal) case eliminated any need for a distinction of law and equity. Granting a right to trial by jury in equity matters was simply part of working out a mixed system of resolving civil disputes, a system traced to both common-law and civil-law origins.”).

¹⁹⁸ *Id.*

¹⁹⁹ *Edwards v. Peoples*, Dallam 359, 360 (Tex. 1840) (“The jury in this case have not thought proper to rescind the sale, but to award to the plaintiff what they considered equitable damages. This court will never interfere with the verdict of a jury unless manifestly contrary to law and evidence.”).

²⁰⁰ ARIENS, *supra* note 193, at 18 (“Two weeks after ‘adopting’ the common law, the Congress of the Republic declared that ‘the adoption of the common law shall not be construed to adopt the common law system of pleading.’ Instead, Texas adopted a version of the Spanish/Mexican system of pleading in civil cases, a system that focused on substance and downplayed the importance of form, a system of pleading unheard of in the common law system.”); *id.* at 24 (explaining that the homestead law, passed in 1839, was constitutionalized in

Almost immediately after 1840, Texas courts began to apply the law in equity. Claims for injunction,²⁰¹ mandamus,²⁰² rescission,²⁰³ and constructive trust²⁰⁴ are all represented in Texas Supreme Court opinions by 1851. The need for counter-restitution in rescission or specific restitution was similarly acknowledged in case opinions no later than 1858.²⁰⁵ Claims for breach of confidence (fiduciary duty) were litigated and some claimants were awarded a form of disgorgement for conflicted transactions in 1848.²⁰⁶

A. *The Doctrine of Irreparable Injury*

Texas courts apply the Doctrine by rejecting the expansive principle of jurisdiction and embracing the limiting principle of jurisdiction vis-à-vis alternative remedies at law. Section V will show that only a minority of Texas case opinions embrace the expansive principle implicit in the positive statement of adequate remedy, i.e. that there is jurisdiction in equity for all remediable claims that would otherwise go without remedy, such as:²⁰⁷

Most restitution cases fall into one of the categories just listed; they provide a return to the plaintiff of benefits conferred in connection with contracts, enforceable or not, in connection with mistakes, and in connection with torts²⁰⁸

Article VII, section 22, and the 1840 act that provided for community property was constitutionalized in Article VII, section 19).

²⁰¹ *Austin v. Andrews*, Dallam 447 (Tex. 1841).

²⁰² *Bd. of Land Comm'rs v. Bell*, Dallam 366 (Tex. 1840) ("It is clear that a *mandamus* will not issue where the party has another legal and specific remedy.").

²⁰³ *McKensie v. Hamilton*, Dallam 461 (Tex. 1842) (upholding rescission of property lease).

²⁰⁴ *James v. Fulcrod*, 5 Tex. 512, 518 (1851).

²⁰⁵ *Patrick v. Roach*, 21 Tex. 251, 256 (1858) ("In suits for rescission, the right to the value of improvements, and the measure of its allowance, depend on principles of equity, and not on the provisions of the statute regulating the actions of trespass to try title.").

²⁰⁶ *Erskine v. De La Baum*, 3 Tex. 406, 414 (1848) ("Indeed, the doctrine may be more broadly stated, that executors and administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate." (internal quotation omitted)).

²⁰⁷ 1 Dobbs, *supra* note 5, § 4.1(1).

²⁰⁸ *Id.* ("One whose money or property is taken by fraud or embezzlement, or by conversion, is entitled to restitution measured by the defendant's gain if the victim prefers that remedy to the damages remedy. Breach of fiduciary duty of any kind, if it yields gains to the fiduciary, is a favorite ground for restitution." (footnotes omitted)).

and wrongs.²⁰⁹ But restitution is open-ended; it is not limited definitionally to such cases.²¹⁰

Outside of Texas, Dobbs' description relates to general practice. In Texas, jurisdiction in equity is narrower than Dobbs describes. Therefore, the description would be aspirational and generally only found in dicta on constructive trusts.²¹¹

The Texas Supreme Court regularly applied the Doctrine to injunction and mandamus actions no later than 1846,²¹² but only gradually applied it to other equitable remedies.²¹³ Over the last 100 years, Texas courts have applied the Doctrine to about twenty to forty percent of cases that address the issue of injunction or mandamus.²¹⁴ A comparable figure for monetary remedies in equity is about five to ten percent.²¹⁵ The data are mere approximations and the result of an unrefined process, but they echo the national pattern that shows a far higher rate for injunctive remedies than monetary remedies.²¹⁶

The active application of the Doctrine is somewhat counter-intuitive in light of the fact that Texas offers courts of general jurisdiction and offers jury trials for claims in equity.²¹⁷ Thus Texas courts do not operate in a

²⁰⁹ *Id.* ("Defendant's gains from tortious interference with the plaintiff's contract, or from commercial or political bribery, from undue influence or duress are all recoverable as restitution in a proper case." (footnotes omitted)).

²¹⁰ *Id.* ("Almost any kind of case in which the defendant gains from the plaintiff and in which it would be unjust or impolitic to permit the defendant to retain the gain is a good candidate for a restitutionary recovery.").

²¹¹ See *infra* Section V.E.

²¹² See, e.g., *Moore v. Torrey*, 1 Tex. 42, 47 (1846) (upholding injunction on principles of equity).

²¹³ See Roach, *supra* note 137, at 531.

²¹⁴ Based on prior investigations using word searches, the author found that the terms "adequate remedy" or "irreparable injury" were found in less than five percent of the Texas cases that used "unjust enrichment" or "constructive trust" as core-terms. In contrast, the corresponding range for injunction or mandamus is from twenty percent to forty percent. Similar searches for U.S. state courts showed comparable distinctions between rescission and injunction or mandamus for the last 110 years. See Roach, *supra* note 137, at 538 n.185; see also *id.* at 610–15 (Appendix).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 490 (5th Cir. 1961) ("the discretion of the trial court is 'very narrowly limited and must, wherever possible, be exercised to preserve jury trial'" (quoting *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959))); *Ochoa v. Am. Oil Co.*, 338 F. Supp. 914, 920 n.4 (S.D. Tex. 1972) ("The Congress was

manner that would normally warrant the restrictive principle of the Doctrine. Some opinions acknowledge that the structure of the Texas court system warrants less need for the Doctrine but only as a justification for applying the Doctrine less rigidly than elsewhere.²¹⁸

The plaintiff that seeks unjust enrichment must plead and prove irreparable injury (that the plaintiff has no adequate remedy at law).²¹⁹ In Texas, the Doctrine is a relative standard: “An adequate remedy at law is one that is as complete, practical, and efficient to the prompt administration of justice as is equitable relief.”²²⁰

Few equitable remedy case opinions offer detailed analyses of how the Doctrine applies to the case facts. Specific reasons for approving the plea of irreparable injury include: that the defendant is insolvent²²¹ or illiquid;²²²

careful to assure that the unification [of the courts] would not dilute the right to jury trial.”); Laycock, *supra* note 8, at 757 (“Perhaps the most plausible defense of the irreparable injury rule is that it protects the right to jury trial.”). *See also* 1 DOBBS, *supra* note 5, § 2.5 (“The main reason today for observing the adequacy test as a limit on equitable relief is that the plaintiff who gets his case into equity has foreclosed the possibility of a jury trial for the defendant.”).

²¹⁸ *See* Story v. Story, 176 S.W.2d 925, 927 (Tex. 1944) (“The rule is generally recognized in this state that the extraordinary writ of injunction will not be granted where there is a plain and adequate remedy at law. This general rule is not rigidly enforced in this state.” (citations omitted)); Bank of Sw. Nat’l Ass’n v. LaGasse, 321 S.W.2d 101, 106 (Tex. Civ. App.—Houston 1959, no writ) (“In courts administering both law and equity, like ours, the rules denying injunction when there is a remedy at law should not be applied as rigidly as at common law, where the issuance of the writ in equity was to a certain extent an invasion of the jurisdiction of another tribunal.” (quoting Sumner v. Crawford, 41 S.W. 994, 995 (Tex. 1897))).

²¹⁹ *See* Rogers v. Daniel Oil & Royalty Co., 110 S.W.2d 891, 893–94 (Tex. 1937); Ryan v. Collins, 496 S.W.2d 205, 209 (Tex. Civ. App.—Tyler 1973, writ ref’d n.r.e.); Chenault v. Cnty. of Shelby, 320 S.W.2d 431, 433 (Tex. Civ. App.—Austin 1959, writ ref’d n.r.e.). *But see* Ferguson v. DRG/Colony N., Ltd., 764 S.W.2d 874, 886–87 (Tex. App.—Austin 1989, writ denied) (holding that claimant’s testimony was sufficient to excuse failure to plead irreparable injury).

²²⁰ Cardinal Health Staffing Network, Inc. v. Bowen, 106 S.W.3d 230, 235 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *see also* Frost Nat’l Bank v. Burge, 29 S.W.3d 580, 596 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (“Equity invokes the ‘court of conscience,’ and it applies only when ‘the legal remedy is not as complete as, less effective than, or less satisfactory than the equitable remedy.’” (quoting First Heights Bank, FSB v. Gutierrez, 852 S.W.2d 596, 605 (Tex. App.—Corpus Christi 1993, writ denied))).

²²¹ *See* Donaho v. Bennett, No. 01-08-00492-CV, 2008 Tex. App. LEXIS 8783, at *10 (Tex. App.—Houston [1st Dist.] Nov. 20, 2008, no pet.) (mem. op.) (awarding injunctive relief for breach of fiduciary duty because defendant would otherwise be insolvent); Loye v. Travelhost, Inc., 156 S.W.3d 615, 621 (Tex. App.—Dallas 2004, no pet.) (“A plaintiff does not have an adequate remedy at law if defendant is insolvent.”); Chevron U.S.A. Inc. v. Stoker, 666 S.W.2d

that the plaintiff's damages cannot be adequately measured;²²³ or that the cause of action relates to a unique asset such as real estate,²²⁴ special personal property,²²⁵ trained animals, or pets.²²⁶

There is a variation of the Doctrine that receives little notice but makes sense for a court in equity. Occasionally, the Texas Supreme Court has denied an equitable remedy on the basis that a less intrusive or disruptive equitable remedy would suffice. As the lesser remedy is also an equitable remedy, the criterion is less one of jurisdiction in equity and more one of which remedy requires the least exertion of the Court's power.²²⁷

379, 382 (Tex. App.—Eastland 1984, writ dismissed) (reversing trial court's grant of injunctive relief in claim for breach of contract due to failure to show that company was insolvent).

²²²Some opinions confuse illiquidity with insolvency. *See, e.g.,* Matteson v. El Paso Cnty., No. 08-00-00095-CV, 2001 WL 898729, at *2 (Tex. App.—El Paso August 10, 2001, pet. denied) (not designated for publication) (“A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent.” (footnote omitted)). While the two conditions frequently cohabit the same company, evidence of the defendant's inability to pay its bills promptly only proves illiquidity, not necessarily insolvency.

²²³*See* Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002) (stating that courts may grant temporary injunction if damages cannot be measured); Ennis v. Interstate Distribs., Inc., 598 S.W.2d 903, 905–07 (Tex. Civ. App.—Dallas 1980, no writ) (granting rescission for breach of contract when damages could not be determined).

²²⁴*See* Butnaru, 84 S.W.3d at 211 (“[A] trial court may grant equitable relief when a dispute involves real property.”); Graham Mortg. Corp. v. Hall, 307 S.W.3d 472, 482 (Tex. App.—Dallas 2010, no pet.) (granting injunctive relief for claim of fraud in a real estate transaction); *see also* Forrest Prop. Mgmt. v. Forrest, No. 10-09-00338-CV, 2010 Tex. App. LEXIS 5863, at *8 (Tex. App.—Waco July 21, 2010, no pet.) (mem. op.) (denying injunctive relief because interest at issue was not one in real estate).

²²⁵*See* Laycock, *supra* note 8, at 705–06.

²²⁶*See* Patrick v. Thomas, No. 2-07-339-CV, 2008 Tex. App. LEXIS 3219, at *8–9 (Tex. App.—Fort Worth May 1, 2008, no pet.) (The nonmonetary value of the subject horses cannot be adequately measured.). *See also* Bueckner v. Hamel, 886 S.W.2d 368, 373 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (mem. op.) (Andell, J., concurring) (affirming equitable relief based on value of domestic animals as companions).

²²⁷*See* Patton v. Nicholas, 279 S.W.2d 848, 857 (Tex. 1955) (“Wisdom would seem to counsel tailoring the remedy to fit the particular case. . . . [E]quity may, by a combination of lesser remedies, including . . . reserving the more severe measures as a final weapon against recalcitrance, accomplish much toward avoiding recurrent mismanagement or oppression on the part of a dominant and perverse majority stockholder or stockholder group.”); W.T. Waggoner Estate v. Sigler Oil Co., 19 S.W.2d 27, 32 (Tex. 1929) (“In *Grubb v. McAfee* . . . we pointed out that the courts could do complete justice without adjudging a lease forfeited or terminated for breach of implied obligations, relative to development, even in cases where redress was impossible under an award of damages.”).

B. Jurisdiction in Equity

There is substantial support in Texas case law for broad jurisdiction in equity from four groups of cases that espouse similar principles. The overarching principle is that “the inadequacies of the remedy at law is both the foundation of and conversely the limitation on equity jurisdiction.”²²⁸ This specific phrase was originally borrowed from *Corpus Juris Secundum* (C.J.S.) on equity in general.²²⁹ This is also the traditional interpretation of the Doctrine as described by Justice Story²³⁰ and Dobbs.²³¹

The second principle is that, as courts of general jurisdiction, Texas district courts enjoy presumptive jurisdiction except as it can be shown that the Constitution or the state legislature have specifically reserved that jurisdiction.²³² Third, Texas courts acknowledge and honor the first maxim

²²⁸Lamar Tex. L.P. v. City of Port Isabel, No. B-08-115, 2010 U.S. Dist. LEXIS 8881, at *23 (S.D. Tex. Feb. 3, 2010); Cardinal Health Staffing Network, Inc. v. Bowen, 106 S.W.3d 230, 235 (Tex. App.—Houston [1st Dist.] 2003, no pet.); Sisco v. Hereford, 694 S.W.2d 3, 7 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.); Sw. Weather Research v. Duncan, 319 S.W.2d 940, 944 (Tex. Civ. App.—El Paso 1958) (“[E]quity was created for the man who had a right without a remedy, and, as later modified, without an adequate remedy.”), *aff’d*, 327 S.W.2d 417 (1959); Burford v. Sun Oil Co., 186 S.W.2d 306, 314 (Tex. Civ. App.—Austin 1944, writ ref’d w.o.m.); *see also* 27A AM. JUR. 2D *Equity* § 21 (2008) (“Subject to certain qualifications, if a judicially cognizable right exists, and no other adequate remedy is available, equity has jurisdiction and will grant appropriate relief, unless prevented by some supervening principle, and subject, of course, to the recognition of all equitable defenses.” (footnotes omitted)).

²²⁹*See Burford*, 186 S.W.2d at 314.

²³⁰*See supra* note 83.

²³¹*See supra* notes 195–208.

²³²Dubai Petrol. Co. v. Kazi, 12 S.W.3d 71, 75–76 (Tex. 2000) (“By statute, district courts have ‘the jurisdiction provided by Article V, Section 8, of the Texas Constitution,’ and ‘may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity.’ For ‘courts of general jurisdiction, . . . the presumption is that they have subject matter jurisdiction unless a showing can be made to the contrary.” (quoting TEX. GOV’T CODE §§ 24.007, 24.008 (West 2004))); *Dean v. State ex rel. Bailey*, 30 S.W. 1047, 1048 (Tex. 1895) (“No other court having jurisdiction over the cause, the district court has the power to determine the right of the case, and to apply the remedy.”); *Assignees of Best Buy, Office Max, & CompUSA v. Combs*, No. 03-10-00648-CV, 2012 Tex. App. LEXIS 5903, at *28–29 (Tex. App.—Austin July 20, 2012 no pet.) (“A district court may hear any case ‘that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity.’ Courts of general jurisdiction are presumed to have subject-matter jurisdiction unless a showing can be made to the contrary.” (quoting TEX. GOV’T CODE § 24.008 (West 2004))).

in equity that “equity will not suffer a right to be without a remedy”²³³ or as it is otherwise known “where there is a right, there is a remedy.”²³⁴ Fourth, two Texas Supreme Court cases have quoted the maxim that “equity is never wanting in power to do complete justice.”²³⁵ This maxim is more often used to justify the concept of total justice, but in these two Supreme Court opinions it was used to justify broad jurisdiction.²³⁶

²³³ *Excess Underwriters at Lloyd’s v. Frank’s Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 62 n.22 (Tex. 2008); *Miers v. Brouse*, 271 S.W.2d 419, 421 (Tex. 1954) (“As Lord Holt early said: ‘If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it. . . . It is a vain thing to imagine a right without a remedy.’” (citation omitted)); *see also* *Chandler v. Welborn*, 294 S.W.2d 801, 807 (Tex. 1956); *Gilmore v. Waples*, 188 S.W. 1037, 1041 (Tex. 1916); *Parvin v. Dean*, 7 S.W.3d 264, 277–78 (Tex. App.—Fort Worth 1999, no pet.) (“According to Sir William Blackstone, the origin of the common law concept of allowing injured citizens access to the courts to redress wrongs done to them is at least as old as *The Magna Carta*, established by King John of England at Runnymede on June 15, 1215.”), *rev’d on other grounds* 148 S.W.3d 94 (Tex. 2004); *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ) (quoting RESTATEMENT (SECOND) OF TORTS (1977) § 774A and then explaining “It is well understood that the law affords a remedy for every invasion of a legal right. Under the maxim where there is a right, there is a remedy, equity will not suffer a right to be without a remedy” (internal quotation omitted)); *Rahmberg v. McLean*, 640 S.W.2d 401, 402 (Tex. App.—San Antonio 1982, writ ref’d) (“Appellant would have us ignore the statement in *Miers* that ‘the first maxim of equity is that it will not suffer a right to be without a remedy’; and this we may not do.”); *First Federal Sav. & Loan Ass’n v. Vandygriff*, 576 S.W.2d 904, 906 (Tex. Civ. App.—Austin 1979, writ granted), *rev’d on other grounds*, 586 S.W.2d 841 (Tex. 1979); *State v. Pounds*, 525 S.W.2d 547, 551 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.); *supra* note 81.

²³⁴ *King*, 725 S.W.2d at 754; *Garza v. Garza*, 209 S.W.2d 1012, 1015 (Tex. Civ. App., 1948, no writ hist.) (“It is well established that a minor child cannot sue his parent for a tort.” (internal quotation omitted)); *see also* *Beliveau v. Beliveau*, 14 N.W.2d 360, 366 (Minn. 1944) (“The judicial creation of a trust to afford an adequate remedy, where there otherwise would be none, for a right is but a manifestation of equity’s capacity to grow and to fit its remedies to the demands of justice in the particular case. It is justified under the maxim that where there is a right there is a remedy.” (citations omitted)); *Banach v. Cannon*, 812 A.2d 435, 446 (N.J. Super. Ct. Ch. Div. 2002) (“This maxim [where there is a right, there is a remedy] is also found in the common law, but is more significant in equity because of the greater ability of equity to suit the remedy to the situation. This characteristic is the very basis of equity jurisdiction. Historically, it was the lack of appropriate remedies for certain rights that gave impetus to the rise of chancery. The interpretation of statutes and the provision of remedies where they do not exist are among the most important functions of equity jurisprudence.” (internal quotation omitted)).

²³⁵ *Pope v. Garrett*, 211 S.W.2d 559, 562 (Tex. 1948) (“Further and in the same trend, it has been said that equity is never wanting in power to do complete justice.”); *Hill v. Stampfli*, 290 S.W. 522, 524 (Tex. Comm’n App. 1927, holding approved).

²³⁶ *Pope*, 211 S.W.2d at 560; *Hill*, 290 S.W. at 524.

There is sufficient precedent to support a broad or expansive jurisdiction for equity, yet Texas courts choose to limit jurisdiction for unjust enrichment. No case law has been found that explains this choice. However, there is at least one case that expresses concern about the power of the law in equity.²³⁷ *State v. Morales*, an opinion relating to criminal law and the balance of power within state government, criticizes the C.J.S. quote for failing to acknowledge the preeminence of the Texas Constitution over the Doctrine.²³⁸ The plaintiff claimed jurisdiction on the basis that adequate remedy was not otherwise possible because the law was not enforced (in this case, a law against sodomy) and could therefore not be otherwise constitutionally challenged in an active case.²³⁹

Justice John Cornyn's opinion expresses concern that a court in equity, limited in jurisdiction only by the Doctrine, is a court potentially out of control. Therefore, a court utilizing the Doctrine should act with restraint to avoid the risks created by abusing equity's power.²⁴⁰ The constitutional challenge seems fairly tame because any such statement is subject to constitutionality and *Morales* specifically related to enjoining a criminal statute.²⁴¹ Even though the holding can be distinguished from civil cases that pose no threat to the balance of government powers, the fear of unbridled jurisdiction in equity seems unmistakable and is consistent with the policy of Texas courts to limit jurisdiction to specific causes of action.²⁴²

²³⁷ See *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994); *State v. Patterson*, 37 S.W. 478, 479 (Tex. Civ. App.—San Antonio 1896, no writ) (“Though a court of equity has the power to interfere in all cases of nuisances, yet circumstances may exist in one case which do not exist in another to induce a court to interfere or refuse its interference by injunction.”).

²³⁸ See *Morales*, 869 S.W.2d at 942 (“Equity jurisdiction does not flow merely from the alleged inadequacy of a remedy at law, nor can it originate solely from a court's good intentions to do what seems ‘just’ or ‘right;’ the jurisdiction of Texas courts—the very authority to decide cases—is conferred solely by the constitution and the statutes of the state.” (citing to *Pope v. Ferguson*, 445 S.W.2d 950, 952 (Tex. 1969))).

²³⁹ *Id.* at 943.

²⁴⁰ *Id.* at 943–44 (“Such unlimited authority, over time, became circumscribed by rules of procedure and limitations on jurisdiction. If an equity court's jurisdiction was limited only by its reach, experience demonstrated that the arbitrary exercise of that power was certain to result.”). See also 1 DOBBS, *supra* note 5, at § 2.5 (“In theory, this is not a rule of discretion but a rule of policy or even a limitation on judicial power.”).

²⁴¹ *Morales*, 869 S.W.2d at 942.

²⁴² *Id.*

There is a second issue relating to jurisdiction in equity in which Texas courts maintain a minority view.²⁴³ Only three appellate courts have held that claims related to trusts or fiduciaries are entitled to presumptive jurisdiction in equity.²⁴⁴ On the other hand, most Texas courts maintain three related principles that are supportive or consistent with such a holding. First is the principle established by the Texas Supreme Court in *Johnson v. Peckham*, similar to Section 197 of the Restatement (Second) of Trusts,²⁴⁵ that when a party acts as a fiduciary, she consents to jurisdiction in equity.²⁴⁶ Second, a number of courts, including both supreme courts, have endorsed the doctrine of springing trusts for granting a constructive

²⁴³ *Hibbs v. Hibbs*, No. 13-97-755-CV, 1998 Tex. App. LEXIS 1876, at *2 (Tex. App.—Corpus Christi Mar. 26, 1998 no pet.) (mem. op.); *Gatlin v. GXG, Inc.*, No. 05-93-01852-CV, 1994 Tex. App. LEXIS 4047, at *18-19 (Tex. App.—Dallas Apr. 19, 1994 no writ) (not designated for publication); *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 903 (Tex. App.—Austin 1989, writ dismissed w.o.j.).

²⁴⁴ *Hibbs*, 1998 Tex. App. LEXIS 1876, at *2 (“Where there is a reasonable likelihood that a trustee will commit a breach of trust, however, the beneficiary can sue in equity to enjoin the breach, with any threat of irreparable harm being immaterial.”); *Gatlin*, 1994 Tex. App. LEXIS 4047, at *18–19 (“In this case, appellees seek to establish equitable title to various properties through the imposition of a constructive trust. Appellees argue that in such cases they are not required to show the absence of an adequate legal remedy because a court of law, by definition, is without power to award them such an equitable remedy. The Austin Court of Appeals has recognized that an applicant for temporary injunctive relief need not show the inadequacy of its remedy at law in a case where the usages of equity require the granting of injunctive relief despite the existence of such a remedy.”); *183/620 Group Joint Venture*, 765 S.W.2d at 903 (“Courts of law do not enforce, because they do not recognize, fiduciary duties and equitable titles; hence, in a proceeding to enforce either, or protect the latter, it is meaningless to require the applicant to demonstrate that his remedy at law is inadequate. Because a court of law *cannot give* a remedy in such cases, the ordinary requirement does not apply.”).

²⁴⁵ RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b. (1959) (“Moreover, questions of the administration of trusts have always been regarded as of a kind which can adequately be dealt with in a suit in equity rather than in an action at law, where questions of fact would be determined by a jury and not by the court.”).

²⁴⁶ *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938) (“When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct toward the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions.”); *see also* *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508–09 (Tex. 1980) (“Nor, we might add, would the mere fact of the bestowing of benefits do so. But to paraphrase the words of this Court in an analogous context in *Johnson v. Peckham*, that fact of a family relationship should not of itself establish an exception to the accepted rule that where trust is reposed and substantial benefits gained equity will recognize that the beneficiary in such transactions is a fiduciary, and as such is under the fiducial obligation of establishing the fairness of the transaction to his principal.” (citation omitted)).

trust.²⁴⁷ Under this approach, the trust is said to spring into existence immediately upon the execution of a breach of fiduciary duty.²⁴⁸ At that point in time, the rightful claimant is said to have equitable title to the property in dispute while the defendant maintains legal title.²⁴⁹ The claimant only has to secure a court in equity's acknowledgement of the trust and the court's order that confirms the trust to the defendant. There is no role for courts at law to enforce equitable title. Third, there are a number of case opinions that hold that a fiduciary claim is sufficient to warrant various remedies in equity sought by the plaintiff.²⁵⁰

²⁴⁷United States v. Carter, 217 U.S. 286, 309 (1910); Omohundro v. Matthews, 341 S.W.2d 401, 408–09 (Tex. 1960).

²⁴⁸Carter, 217 U.S. at 309 (“If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal; and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it.” (internal quotation omitted)); Omohundro, 341 S.W.2d at 408–09 (“This trust arose not because there was any agreement for the title to be taken in the name of petitioner, and the property to be held by him in trust for the respondents—as would be necessary to constitute an express trust—but, because under the facts, equity would raise the trust to protect the rights of the respondents, and to prevent the unjust enrichment of petitioner by his violation of his promise and duty to the respondents to take title in the name of the three of them, and for their mutual profit and advantage.” (internal quotation omitted) (emphasis in original)); Pope v. Garrett, 211 S.W.2d 559, 561 (Tex. 1948) (“The legal title passed to the heirs of Carrie Simons when she died intestate, but equity deals with the holder of the legal title for the wrong done in preventing the execution of the will and impresses a trust on the property in favor of the one who is in good conscience entitled to it.”); Eglin v. Schober, 759 S.W.2d 950, 958 (Tex. App.—Beaumont 1988, writ denied).

²⁴⁹Omohundro, 341 S.W.2d at 416; Pope, 211 S.W.2d at 561.

²⁵⁰Smith v. Bolin, 271 S.W.2d 93, 97 (Tex. 1954) (“While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust, and the courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it.”); Flores v. Flores, No. 04-10-00118-CV, 2011 Tex. App. LEXIS 6501, at *18 (Tex. App.—San Antonio Aug. 17, 2011, pet. denied) (mem. op.) (holding that once a trial court makes a finding that a party breached its fiduciary duty in connection with a partnership, “the court [has] sufficient basis to impose a constructive trust”); Garcia v. Garza, 311 S.W.3d 28, 40 (Tex. App.—San Antonio 2010, pet. denied) (“Actual fraud or breach of a confidential relationship must be present to justify the imposition of a constructive trust.”); Hubbard v. Shankle, 138 S.W.3d 474, 483 (Tex. App.—Fort Worth 2004); T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass’n, 79 S.W.3d 712, 717

Presumptive jurisdiction is therefore largely overlooked. Occasionally, Texas courts either challenge²⁵¹ or reject²⁵² an equitable remedy relating to a trustee or fiduciary.

C. Burdens of Proof and Counter-Restitution

Texas courts take a traditional approach on the parties' shifting burdens of proof for proving the defendant's benefit. In *Pippen v. the City of Fort Worth*, a Fort Worth employee accrued a secret profit from self-dealing in buying and improving city properties.²⁵³ At trial he did not take advantage of his opportunity to prove any reasonable expenses that he incurred out of

(Tex. App.—Houston [14th Dist.] 2002, pet. denied) (“To be entitled to an accounting, a plaintiff usually must have a contractual or fiduciary relationship with the party from which the plaintiff seeks the accounting.”).

²⁵¹ See *Sumner v. Crawford*, 41 S.W. 994, 995 (Tex. 1897); *Fischer v. Rider*, No. 02-10-00294-CV, 2011 Tex. App. LEXIS 385, at *13 (Tex. App.—Fort Worth Jan. 13, 2011, no pet.) (mem. op.) (evaluating irreparable injury for a plea of injunctive relief for breach of fiduciary duty); *Hill v. McLane Co.*, No. 03-10-00293, 2011 Tex. App. LEXIS 169, at *17–18 (Tex. App.—Austin Jan. 5, 2011, no pet.) (mem. op.) (finding that, for purposes of justifying a temporary injunction, the defendants were in possession of trade secret material and that the plaintiff could not otherwise obtain an adequate remedy); *Donaho v. Bennett*, No. 01-08-00492-CV, 2008 Tex. App. LEXIS 8783, at *10–11 (Tex. App.—Houston [1st Dist.] Nov. 20, 2008, no pet.) (mem. op.) (granting injunctive relief for case relating to breach of fiduciary duty because defendant would otherwise be insolvent); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 24 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (evaluating the adequacy of remedies at law for claim of breach of fiduciary duty).

²⁵² *Forrest Prop. Mgmt. v. Forrest*, No. 10-09-00338-CV, 2010 Tex. App. LEXIS 5863, at *8 (Tex. App.—Waco 2010, no pet.) (mem. op.) (denying injunctive relief for partnership claim for failure of plaintiff to establish that money damages would be inadequate or hard to calculate); *Victory Drilling, LLC v. Kaler Energy Corp.*, No. 04-07-00094-CV, 2007 Tex. App. LEXIS 4966, at *5–6 (Tex. App.—San Antonio June 27, 2007, no pet.) (mem. op.) (“Generally, an adequate remedy at law exists and injunctive relief is improper where any potential harm may be adequately cured by monetary damages.” (internal quotation omitted)); *CMNC Healthcare Props., LLC v. Medistar Corp.*, No. 01-06-00182-CV, 2006 Tex. App. LEXIS 10676, at *20 (Tex. App.—Houston [1st Dist.] Dec. 14, 2006, no pet.) (mem. op.) (precluding requested temporary injunctive relief because of absence of proof of irreparable injury in case relating to alleged abuse of trade secrets and confidential information); *Ballenger v. Ballenger*, 694 S.W.2d 72, 77 (Tex. App.—Corpus Christi 1985, no writ) (“We find from the record that any damages that might ensue are capable of exact calculation. The proposed distribution of trust corpus involves a distribution of cash which can be readily replaced with other money (plus statutory interest) should it be determined that appellants, acting as trustees, abused their discretion and made an unwarranted distribution.”).

²⁵³ 439 S.W.2d 660, 662 (Tex. 1969).

pocket expenditures to improve the properties.²⁵⁴ The Supreme Court held that he failed to respond to that opportunity at trial and was not owed a second chance, awarding the amounts initially established by the city without any adjustment for counter-restitution.²⁵⁵

Texas courts have affirmed the defendant's liability for uncertainty in two other scenarios: (1) assets of a trust that are co-mingled with assets of the defendant are presumed to belong to the trust unless proven otherwise;²⁵⁶ and (2) disclosed transactions between the trustee and the trust or between the trustee and the beneficiary are presumed to be unfair or fraudulent unless the trustee can prove the entire fairness of the transactions.²⁵⁷

Generally, Texas opinions reflect the fact that fiduciaries enjoy a substantial advantage in information and expertise over the principal and are under obligation to exercise their knowledge and expertise for the

²⁵⁴ *Id.* at 667.

²⁵⁵ *Id.*

²⁵⁶ *Wilz v. Flournoy*, 228 S.W.3d 674, 676 (Tex. 2007) ("The Flournoys bet the farm (as it were) when they failed to obtain a jury finding on their affirmative claim that part of the purchase money came from personal funds. Therefore, this claim is waived on appeal unless they conclusively established it." (internal quotation omitted)); *Peirce v. Sheldon Petroleum Co.*, 589 S.W.2d 849, 853 (Tex. Civ. App.—Amarillo 1979, no writ) ("When the beneficiary can point to the specific property that was purchased or inherited, or to its mutation, the tracing burden is met. When, however, tracing to specific property is impossible because the trustee has commingled the property, the right is not defeated if the beneficiary can trace to the commingled fund. If the commingling was wrongful, the burden is on the trustee to establish which property is rightfully the trustee's. If the trustee is unable to do so, the entire commingled property is subject to the trust." (citations omitted)).

²⁵⁷ *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) ("The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other."); *Vu v. Rosen*, No. 14-02-00809-CV, 2004 Tex. App. LEXIS 2795, at *12 (Tex. App. Houston [14th Dist.] Mar. 30, 2004, pet. denied) (mem. op.) ("Vu did, however, preserve her claim that Question No. 1 improperly shifted the burden of proof to her. Vu cites the well established law that when an attorney engages in self-dealing or otherwise benefits or profits from a transaction with the client, a presumption of unfairness arises that shifts the burden of proof to the attorney to prove the fairness of the transactions and to establish that the client was informed of all material facts relating to the transactions."); *Tanox v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 264–65 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("A presumption of unfairness or invalidity attaches to a fee agreement and the attorney bears the burden to prove the agreement is fair and reasonable.").

benefit of the principal.²⁵⁸ As a result the defendant is sometimes expected to also bear the burden of proof in regard to liability issues or fact issues that the plaintiff might otherwise bear in a claim for breach of contract.²⁵⁹

The defendant's right to prove counter-restitution is regularly observed as to offsetting expenses or apportionment. Texas courts have maintained a consistent policy of allowing a defendant the right to prove her counter-restitution since 1858.²⁶⁰ There is a substantial body of case discussion that evidences a commitment to total equity and the court's protection of the defendant's interests to avoid unjustly enriching the claimant.²⁶¹

²⁵⁸Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002); Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999); Kinzbach Tool Co. v. The Corbett-Wallace Corp., 160 S.W.2d 509, 514 (1942) ("It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired." (citing United States v. Carter, 217 U.S. 286, (1910))).

²⁵⁹Huffington v. Upchurch, 532 S.W.2d 576, 579 (Tex. 1976) ("The partnership contract obligated Roy Huffington to "give his attendance to, and to the utmost of his skill and power shall exert himself for, the joint interest, benefit and advantage of said partnership business." In a case of this kind, where the partner who has misappropriated a particular opportunity is also the partner who is primarily responsible for finding financial backing, the burden of proving financial incapability should be on him so as to encourage the exertion of his best efforts." (citing Irving Trust Co. v. Deutsch, 73 F.2d 121 (2d Cir. 1934))).

²⁶⁰Patrick v. Roach, 21 Tex. 251, 256 (1858); First Heights Bank, FSB v. Gutierrez, 852 S.W.2d 596, 605 (Tex. App.—Corpus Christi 1993, writ denied.) ("Equity is based upon the avoidance of irreparable injury. Moreover, it seeks to prevent unjust enrichment, and in particular, abhors that unjust enrichment which comes from a double satisfaction of an obligation. Equity seeks to do justice, to strike a balance by reviewing the entire situation. Equity acts in accordance with conscience and good faith and promotes fair dealing; it will not further an improper objective which is likely to cause a detriment to the other party." (citations omitted)); Dearing, Inc. v. Spiller, 824 S.W.2d 728, 731 (Tex. App.—Fort Worth 1992, writ denied) ("The judgment also ordered an accounting with respect to all of the production and expenditures incident to the development of the premises through the Dearing/Royal lease; and after such accounting reduced the claims to a fixed dollar amount, the judgment further apportioned the revenues, less the applicable costs of development, to the appropriate parties."); Southern Lumber Co. v. Kirby Lumber Corp., 181 S.W.2d 859, 863 (Tex. Civ. App.—Beaumont 1944) ("A court of equity will not make Strange a present of the lots because Moroney had intended to defraud him. Therefore, appellee having failed to tender appellants any portion of the purchase price paid by them to John H. Kirby et al., regardless of what the other facts might have shown, it would not, as we view it, be entitled to recover the title thus acquired by appellants." (internal quotations omitted)).

²⁶¹See Johnson v. Cherry, 726 S.W.2d 4, 8 (Tex. 1987) ("The equitable power of the court exists to do fairness and is flexible and adaptable to particular exigencies, 'so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.'" (quoting Warren v. Osborne, 154 S.W.2d 944, 946 (Tex. Civ.

Alternatively, counter-restitution is justified with the well-known maxim that a claimant that seeks equity must act equitably.²⁶²

Texas's commitment to counter-restitution is also strongly evident in claims for rescission. The Court's recent opinion in *Cruz v. Andrews Restoration, Inc.* reaffirms the Court's earlier holding in *Powell v. Rockow*²⁶³ that a claimant will be denied rescission without a jury finding of any interim consideration that the claimant accrued and credited to the defendant.²⁶⁴

App.—Texarkana 1941, writ ref'd)); State v. Snyder, 18 S.W. 106, 108 (Tex. 1886) ("It may be regarded as a universal rule governing the court of equity in the administration of its remedies that, whatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant growing out of or intimately connected with the subject of the controversy in question will be protected; and for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights, if any, the defendant may have, and to that end the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights."); Cas. Reciprocal Exch. v. Bryan, 101 S.W.2d 895, 899 (Tex. Civ. App.—Eastland 1937, no writ) ("It is also true that courts with equity powers will protect the equitable rights of the defendant arising upon his answer, regardless of the nature of the relief sought by the plaintiff, and will make all necessary orders to that end, and may require a tender for that purpose." (quoting Oriental v. Barclay, 41 S.W. 117, 126–27 (Tex. Civ. App.—Dallas 1897, no writ))); Wisdom v. Peek, 220 S.W. 210, 214 (Tex. Civ. App.—San Antonio 1920, writ dismissed) ("When a court of equity has obtained jurisdiction of a bill for rescission . . . it will retain jurisdiction for the purpose of adjusting all the rights and claims of the parties, growing out of the transaction and complained of, so as to do complete equity and leave nothing for future litigation, which it can dispose of in the exercise of its equitable powers upon the parties before it.").

²⁶² See Gaffney v. Kent, 74 S.W.2d 176, 178 (Tex. Civ. App.—San Antonio 1934, no writ) ("A court of equity finds no obstacle in the way of decreeing that which is right and just, though it be in favor of a defendant who is in some particular a wrongdoer. The maxim that he who seeks equity must do equity imposes upon him who invokes the jurisdiction of the court a plain condition that he must have accorded to the defendant and must consent for the court to decree to the defendant the latter's rights in the subject-matter of the suit. It is intended neither as a weapon of offense against nor as a shield of defense for the defendant. It simply requires recognition of the rights, whatever they may be, of the defendant without regard to other considerations. Thus it occurs that, while the plaintiff will have all of his legal and equitable rights decreed and enforced, the defendant may also obtain affirmative relief that he would be precluded from seeking if he were the plaintiff."); Bush v. Gaffney, 84 S.W.2d 759, 764 (Tex. Civ. App.—San Antonio 1935, no writ).

²⁶³ 92 S.W.2d 437, 439 (Tex. 1936).

²⁶⁴ *Cruz v. Andrews Restoration, Inc.*, 346 S.W.3d 817, 826 (Tex. 2012) ("Generally, rescission is an equitable remedy, and Cruz correctly asserts that fault is relevant. A defendant's wrongdoing may factor into whether he should bear an uncompensated loss in those cases in which it is impossible for a claimant to restore the defendant to the status quo ante." But, the court

V. UNJUST ENRICHMENT AND CONSTRUCTIVE TRUSTS

In the process of searching for unjust enrichment in equity as a cause of action, a separate issue emerged of identifying the role of the law in equity in the Texas legal system. Despite the occasional glowing endorsement for constructive trusts from Supreme Court dicta, the actions and policies of Texas courts imply their discomfort with unjust enrichment and equity in general. The next two sections will substantiate this observation with three issues. This section will explore the ongoing dispute of whether unjust enrichment is a cause of action. This is an issue that should not have grown so large for so long in view of traditional doctrine and, more importantly, a consistent line of Supreme Court and Fifth Circuit opinions that have supported this cause of action. Second, Texas courts effectively constrain the safety net role of equity when jurisdiction in equity is limited to specific claims. Without a wide-ranging cause of action for unjust enrichment in equity, the claim has no jurisdiction to establish liability for non-standard claims. Furthermore, in view of the support available for the principles underlying broad jurisdiction in equity, the policy for narrow jurisdiction can be reasonably inferred as a choice by the Texas judiciary.

The third issue, addressed in the next section, is that the Supreme Court's endorsement of fee forfeiture as an appropriate remedy for breach of fiduciary duty is unnecessary when disgorgement would have been adequate and more consistent with prior case law. While forfeiture or disgorgement of a fiduciary's compensation is not unusual, Texas forfeiture now stands apart from other remedies in equity in Texas without any attempt to reconcile fee forfeiture with existing remedies in equity.²⁶⁵

The biggest problem in understanding unjust enrichment is the misperception that it has only one identity. It can be a cause of action, a remedy, or both.²⁶⁶ Similarly, unjust enrichment at law needs to be distinguished from unjust enrichment in equity. Most causes of action for unjust enrichment in Texas resemble unjust enrichment at law, which is based on quasi-contract.²⁶⁷ Unjust enrichment in equity is largely

noted, "it does not excuse the claimant in such cases from counter-restitution when feasible—as it would be here."); *See also* Powell v. Rockow, 92 S.W.2d 437, 439 (Tex. 1936).

²⁶⁵ *See* discussion *infra* Part VI.

²⁶⁶ *See* Pepi v. Galliford, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

²⁶⁷ *See id.*

overlooked or misinterpreted as unjust enrichment at law.²⁶⁸ Most claims for unjust enrichment in equity are pled as claims for constructive trusts, another remedy in equity.²⁶⁹

The dispute over whether unjust enrichment is a cause of action is a recent controversy.²⁷⁰ Despite the ten Texas Supreme Court opinions and four Fifth Circuit opinions that hold or acknowledge unjust enrichment as a cause of action, the dispute keeps growing.²⁷¹ But before that issue is joined the next sub-sections will distinguish quantum meruit, money had and received, and accounting in equity to clarify that unjust enrichment is a cause of action independent of these other causes of action.

A. *Assumpsit Claims: Quantum Meruit and Money Had and Received*

The Supreme Court affirmed quantum meruit and money had and received as causes of action, no later than 1841²⁷² and 1843,²⁷³ respectively. The elements for quantum meruit are not presently in serious dispute.²⁷⁴ The measure of the remedy for quantum meruit is the reasonable value of

²⁶⁸ See *id.* (noting that a claim for unjust enrichment is interpreted as a claim for quantum meruit); *Friberg-Cooper Water Supply Corp. v. Elledge*, 197 S.W.3d 826, 829 n.13, 832 (Tex. App.—Fort Worth 2006) (stating that a claim for unjust enrichment is interpreted as claim for money had and received), *rev'd on other grounds*, 240 S.W.3d 869 (Tex. 2007).

²⁶⁹ See, e.g., *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 263 (Tex. 1951); see also *infra* notes 451–459 and accompanying text.

²⁷⁰ Of the 70 appellate opinions that have been found, an average of 6 per year were handed down from 2007 through 2011, an average of 3.6 in the five years prior to that, and 1.7 in the ten years prior to that. While it is believed that the annual number of similar cases has grown significantly over this period, the absolute growth indicated may be somewhat overstated. This group of cases was not collected in any systematic or comprehensive process and does not necessarily represent either the total population of such cases or a sample that is necessarily representative.

²⁷¹ See *supra* note 270.

²⁷² *O'Connor v. Van Homme*, Dallam 429, 430 (Tex. 1841).

²⁷³ *McGill v. Delaplain*, Dallam 493, 493 (Tex. 1843).

²⁷⁴ *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990) (“‘To recover under quantum meruit a claimant must prove that: 1) valuable services were rendered or materials furnished; 2) for the person sought to be charged; 3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and 4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged.’”(quoting *Bashara v. Baptist Mem’l Hosp. Sys.*, 685 S.W.2d 307, 310 (Tex. 1985)).

the claimant's goods or services.²⁷⁵ In this context, reasonable value means a market value unless the actual or use value to the defendant is less.²⁷⁶ To the extent that an express contract is shown not to exist, the alleged contract price may not be a limit on reasonable value.²⁷⁷ An express contract is an adequate defense but it requires a jury finding to that effect²⁷⁸ and does not apply to void or voidable contracts,²⁷⁹ unconscionable contracts²⁸⁰ or to items or services outside the contract.²⁸¹

In *Truly v. Austin*, the Texas Supreme Court held that quantum meruit is an equitable remedy and subject to the defense in equity of unclean

²⁷⁵ *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988) ("As a general rule, a plaintiff who seeks to recover the reasonable value of services rendered or materials supplied will be permitted to recover in quantum meruit . . .").

²⁷⁶ *PIC Realty Corp. v. Southfield Farms, Inc.*, 832 S.W.2d 610, 614 (Tex. App.—Corpus Christi 1992, no writ) ("There was a question whether PIC benefitted from Easterwood's post-crop cultivation, and unjust enrichment is closely related to its kinsman in equity, quantum meruit. Its submission was not an abuse of discretion.").

²⁷⁷ *Emerson v. Tunnell*, 793 S.W.2d 947, 948 (Tex. 1990) ("Recovery in quantum meruit is not limited to damages alleged for breach of contract when, as in this case, the fact finder has failed to find that a contract existed. Tunnell cannot be limited to recovery of the amount he alleged the Emersons agreed to pay when the jury did not find that such an agreement was ever made.").

²⁷⁸ *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000) ("When the existence of or the terms of a contract are in doubt, and there is a claim for unjust enrichment, it is incumbent on the party disputing that claim to secure findings from the trial court that an express contract exists that covers the subject matter of the dispute.").

²⁷⁹ *Aurora Petroleum, Inc. v. Cholla Petroleum, Inc.*, No. 07–10–0035–CV, 2011 Tex. App. LEXIS 1382, at *9 (Tex. App.—Amarillo Feb. 23, 2011) (mem. op.) ("While it often applies when one person has obtained a benefit from another by fraud, duress, or by taking an undue advantage, it is also available if a contract is unenforceable, impossible, not fully performed, or void for other legal reasons." (citing *Walker v. Cotter Props, Inc.*, 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006))); *City of Harker Heights, Tex. v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313, 319 (Tex. App.—Austin 1992, no writ) ("The Court finds support in Texas law for the County's proposition. Restitution under a theory of unjust enrichment is appropriate in circumstances where the agreement contemplated is unenforceable . . . or void for other legal reasons." (internal quotations omitted)).

²⁸⁰ *Spector v. Norwegian Cruise Line Ltd.*, No. 01–02–00017–CV, 2004 Tex. App. LEXIS 2941, at *27–28 (Tex. App.—Houston [1st Dist.] Mar. 30, 2004, no pet.) (not designated for publication).

²⁸¹ *Do v. Pilgrim's Pride Corp.*, No. 9:05CV238, 2006 U.S. Dist. LEXIS 55374, at *24 (E.D. Tex. Aug. 9, 2006); *Corp. Link, Inc. v. Fairbanks Cap. Corp.*, No. Civ.A. 3:03–CV–0506, 2005 WL 770564, at *25 (N.D. Tex. Apr. 4, 2005); *Brender v. Sanders Plumbing, Inc.*, No. 02–05–00067–CV, 2006 Tex. App. LEXIS 6354, at *8 (Tex. App.—Fort Worth July 20, 2006, pet. denied) (mem. op.).

hands.²⁸² The assertion was made *ipse dixit* without any supporting citations for the assertion that quantum meruit is a remedy in equity or that unclean hands is an affirmative defense for quantum meruit.²⁸³ Since that opinion, three appellate courts have followed that holding and repeated this misstatement of Texas law.²⁸⁴ This article has already established that in other jurisdictions, quantum meruit is a claim at law as an assumpsit claim.²⁸⁵ There are a number of prior Texas Supreme Court opinions that hold or imply that quantum meruit is a claim at law.²⁸⁶ For example, in

²⁸² *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988).

²⁸³ *Id.* (“Recovery in quantum meruit is based on equity. It is well-settled that a party seeking an equitable remedy must do equity and come to court with clean hands. To justify a recovery in quantum meruit, the plaintiff must not only show that he has rendered a partial performance of value, but must also show that the defendant has been unjustly enriched and the plaintiff would be unjustly penalized if the defendant were permitted to retain the benefits of the partial performance without paying anything in return.” (citing *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 702 (Tex. 1936); *Breaux v. Allied Bank of Tex.*, 699 S.W.2d 599, 604 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.); 5A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1122 (1964))).

²⁸⁴ *Jones v. Whatley*, No. 13–09–00355–CV, 2011 Tex. App. LEXIS 4380, at *10 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op.); *Grant v. Laughlin Envtl., Inc.*, No. 01–07–00227–CV, 2009 Tex. App. LEXIS 2092, at *36 (Tex. App.—Houston [1st Dist.] March 26, 2009, pet. denied) (mem. op.) (“LEI presented ample proof that Grant had engaged in unlawful or inequitable conduct. Accordingly, we hold that the trial court did not abuse its discretion in denying Grant a quantum meruit recovery.”); *Billy Smith Enters., Inc. v. Hutchison Constr., Inc.*, 261 S.W.3d 370, 373 (Tex. App.—Austin 2008, pet. dismissed); *RDG Ltd. P’ship v. Gexa Corp.*, No. 14–04–00679–CV, 2005 Tex. App. LEXIS 3123, at *14–15 (Tex. App.—Houston [14th Dist.] April 26, 2005, no pet.) (mem. op.) (holding that claimant did not seriously injure defendant with unclean hands); *Murphy v. Canion*, 797 S.W.2d 944, 949 (Tex. App.—Houston [14th Dist.] 1990, no writ).

²⁸⁵ See *supra* Section III.E.

²⁸⁶ *Campbell v. Nw. Nat’l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex. 1978) (reversing the trial judge’s take nothing judgment despite the jury’s finding of damages showing that if quantum meruit were a remedy in equity, the trial judge would not need to enter a take nothing judgment); *Griffin v. Holiday Inns of Am.*, 496 S.W.2d 535, 539 (Tex. 1973) (“Since petitioner’s claim in quantum meruit arose out of the transaction or occurrence that was the subject matter of the cross-action, the quantum meruit claim was a compulsory counterclaim to the cross-action under the provisions of Rule 97, T.R.C.P.”); *Upson v. Fitzgerald*, 103 S.W.2d 147, 150 (Tex. 1937) (“Where the consideration has been paid but nothing more done it does not work a fraud to refuse to enforce an oral contract for the sale of land, since the value of the consideration may be recovered in an action at law on a quantum meruit.”); *Colbert v. Dall. Joint Stock Land Bank*, 102 S.W.2d 1031, 1034 (Tex. 1937); *Hillyard v. Crabtree’s Adm’r*, 11 Tex. 264, 267 (1854); *O’Connor v. Van Homme, Dallam* 429, 429 (Tex. 1841); see also *Prophet Capital Mgmt. v. Prophet Equity, LLC*,

Texas²⁸⁷ and most other states,²⁸⁸ the affirmative defense of unclean hands only applies for claims in equity.

No Texas case prior to 1988 was discovered that also rejected a claim for quantum meruit because of unclean hands; only one unrelated case was found that even mentioned both terms in the text of the same opinion.²⁸⁹ A simple word search revealed that prior to 1988, there were 1,035 Texas state opinions that contained the term ‘quantum meruit’ and 323 opinions that contain the term ‘unclean hands’ or ‘clean hands’ but there is only one opinion that contains both terms. Similar searches revealed 143 cases with ‘unclean hands’ or ‘clean hands’ and ‘mandamus’ or ‘injunction’, 32 cases for rescission, and 15 cases for constructive trust.

As was discussed earlier, mistaking assumpsit remedies for remedies in equity is not unusual, especially in light of the common misuse of the term ‘equitable.’²⁹⁰ Consider the following quote from the U.S. Supreme Court that is frequently cited or quoted in part in Texas on the claim for money had and received:

This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and

No. A-09-CA-316 LY, 2009 U.S. Dist. LEXIS 88474, at *7-8 (W.D. Tex. Sept. 25, 2009) (rejecting unjust enrichment claim for violation of trademark).

²⁸⁷ Bagby Elevator Co. v. Schindler Elevator Corp., 609 F.3d 768, 774 (5th Cir. 2010); McMahan v. Greenwood, 108 S.W.3d 467, 494 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160, 165 (Tex. App.—Houston [14th Dist.] 1991, no writ). *But see* Bank of Saipan v. CNG Fin. Corp., 380 F.3d 836, 840-41 n.1 (5th Cir. 2004) (“The Bank argues that the money had and received claim, as an action at law, is not subject to the ‘unclean hands’ equitable doctrine. . . . Recovery for money had and received, though legal in nature, is controlled by equitable principles, and . . . it is axiomatic that the ‘clean hands’ doctrine functions in equitable actions.”).

²⁸⁸ See T. Leigh Anenson, *Treating Equity like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 458 (2008) (“Notwithstanding the merger of law and equity, a majority of courts deny the application of unclean hands in actions at law.”).

²⁸⁹ Cooley v. Buie, 291 S.W. 876, 884 (Tex. 1927) (“The question of quantum meruit is not involved except in so far as it might throw light upon the question whether the contract represented by the instrument in writing was unfair and unconscionable.”).

²⁹⁰ See *supra* Section III.F.

from his day to the present, has been constantly resorted to in all cases coming within its broad principles. *It approaches nearer to a bill in equity than any other common law action.*²⁹¹

According to this quote, money had and received is an equitable remedy but remains a remedy at law.

Texas has adopted the first two sentences from the *Jefferson Electric* quote on the claim for money had and received.²⁹² Most opinions now appear to agree that the key issue in a claim for money had and received is not wrongful behavior of the defendant but rather to balance the relative equities of the money remaining with the defendant or transferring the money to the plaintiff.²⁹³ This is meant to be a fact intensive process guided as much by conscience or fairness as established precedent.²⁹⁴

The claim applies equally against a third party who received payment in error that was owing to the claimant.²⁹⁵ The third party need not have committed any unjust act or mistake; rather only continue to retain funds that rightfully belong to the claimant.²⁹⁶

²⁹¹ *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 402–03 (1933) (emphasis added).

²⁹² *Staats v. Miller*, 243 S.W.2d 686, 687–688 (Tex. 1951) (quoting *Jefferson Elec. Mfg. Co.*, 291 U.S. at 402–03).

²⁹³ *Staats*, 243 S.W.2d at 687 (“The question, in an action for money had and received, is to which party does the money, in equity, justice, and law, belong. All plaintiff need show is that defendant holds money which in equity and good conscience belongs to him.” (quoting 58 C.J.S. *Money Received* § 4a (1948))); *Best Buy Co. v. Barrera*, 214 S.W.3d 66, 74 (Tex. App.—Corpus Christi 2006), (“The individualized showings that Best Buy argues are required, such as showings of fraud, duress, and the taking of undue advantage, are inapplicable here; these elements are not relevant to claims for money had and received because such a claim is not premised on any wrongdoing.”) *rev’d on other grounds*, 248 S.W.3d 160 (Tex. 2007).

²⁹⁴ *Edwards v. Mid-Continent Office Distribs., L.P.*, 252 S.W.3d 833, 837 (Tex. App.—Dallas 2008, pet. denied) (“To prove the claim, a plaintiff must show that a defendant holds money which in equity and good conscience belongs to him. A defendant may present any facts or raise any defenses that would deny a claimant’s right to recover under this theory.” (citations omitted)).

²⁹⁵ See *Barrett v. Ferrell*, 550 S.W.2d 138, 143 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).

²⁹⁶ *Austin v. Duval*, 735 S.W.2d 647, 649 (Tex. App.—Austin 1987, writ denied); *Barrett*, 550 S.W.2d at 143 (“It is fundamental that for a person to be entitled to restitution, he must show not only that there was unjust enrichment, but also that the person sought to be charged had wrongfully secured a benefit or had passively received one which it would be unconscionable for him to retain.”).

Both quantum meruit and money had and received are forms of common law claims for assumpsit, which originally was a claim for debt.²⁹⁷ The remedy for either claim is restitution that seeks compensating damages to restore the plaintiff to her original position.²⁹⁸ In comparison, disgorgement is measured by the defendant's gain, regardless of the claimant's loss (if any), and effectively seeks to restore the *defendant* to her original position.²⁹⁹

B. Accounting in Equity

Joel Eichengrun shows that accountings in equity began to appear in the late fifteenth century to provide property owners a hearing against property managers.³⁰⁰ The American courts, beginning in the nineteenth century, detached the accounting process from its fiduciary moorings and made it available whenever accounts were too difficult for a jury to understand.³⁰¹

The cause of action or remedy for an accounting in equity is sometimes sought by itself and other times in combination with other remedies in equity.³⁰² An accounting is required under some statutes,³⁰³ but some courts

²⁹⁷ *City of Harker Heights, Tex. v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313, 317, 318 (Tex. App.—Austin 1992, no writ).

²⁹⁸ *Id.* at 317–18.

²⁹⁹ *Murphy*, *supra* note 120, at 1625 n.265 (“[R]estitution aims at the defendant’s [rightful position]. Disgorgement is the key concept. By making the defendant disgorge the benefits he cannot justly retain, the law of restitution returns the defendant to the position he should, ‘in equity and good conscience,’ have occupied.”) (quoting DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 727 (3d Ed. 2002))). See also *infra* Section VI.A. and the discussion of *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) in accompanying text for an example of a claimant without damages in fact.

³⁰⁰ Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 IND. L.J. 463, 466–67 (1985).

³⁰¹ *Id.*

³⁰² *Palmetto Lumber Co. v. Gibbs*, 80 S.W.2d 742, 748 (Tex. 1935); *Lewis v. Xium Corp.*, No. 07–08–0219–CV, 2009 Tex. App. LEXIS 5210, at *18 (Tex. App.—Amarillo July 8, 2009, pet. denied) (mem. Op.) (“An accounting may be a particular remedy sought in conjunction with another cause of action or it may be a suit in equity.”); *T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass’n*, 79 S.W.3d 712, 717 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Michael v. Dyke*, 41 S.W.3d 746, 754 (Tex. App.—Corpus Christi 2001, no pet.).

³⁰³ *Simerka v. Brooks*, No. 04–10–00912–CV, 2011 Tex. App. LEXIS 4132, at *5–6 (Tex. App.—San Antonio June 1, 2011, pet. dismissed) (mem. op.) (“Property Code section 113.151 allows a ‘beneficiary by written demand [to] request the trustee to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later.’” (quoting TEX. PROP. CODE ANN. § 113.151(a) (West 2007))). Section 113.151 also allows “[a]n interested person [to] file suit to compel the trustee to

require a specific showing that the plaintiff cannot obtain adequate relief under common law procedures and discovery options.³⁰⁴

C. *Unjust Enrichment*

“The ordinary member of the public would be shocked if the position was that the courts were powerless to prevent [a defendant] profiting from his criminal conduct.”³⁰⁵

In addition to opinions about the other three causes of action described in the immediately preceding sub-sections, the Texas Supreme Court has acknowledged or held that unjust enrichment is a cause of action under Texas law in ten modern cases.³⁰⁶ In addition, in three cases the Court held

account to the interested person.” TEX. PROP. CODE ANN. § 113.151(b) (West 2007). Section 113.152 sets forth the contents of an accounting. *Id.* § 113.152. Only “express trusts” are subject to these provisions. *Id.* § 111.003. “Resulting trusts,” “constructive trusts,” and “business trusts” are not subject to these provisions. *Id.*

³⁰⁴Richardson v. First Nat’l Life Ins. Co., 419 S.W.2d 836, 839 (Tex. 1967) (“The only test recognized by modern decisions is that if the facts and accounts presented relate to so many different transactions and items in such relationship to each other that it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction.”) (quoting 4 JOHN NORTON POMEROY, LL.D., A TREATISE ON EQUITY JURISPRUDENCE § 1421 (5th ed. 1941)); *Palmetto Lumber Co.*, 80 S.W.2d at 748; *Sauceda v. Kerlin*, 164 S.W.3d 892, 927 (Tex. App.—Corpus Christi 2005), *rev’d on other grounds*, 263 S.W.3d 920 (Tex. 2008) (“An equitable accounting is proper when the facts and accounts presented are so complex that adequate relief may not be provided for at law.”); *T.F.W. Mgmt., Inc.*, 79 S.W.3d at 717.

³⁰⁵HM Att’y Gen. v. Blake, [2000] UKHL 45, [2001] 1 A.C. 268 (appeal taken from U.K.) (internal quotations omitted).

³⁰⁶*Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 921 (Tex. 2010) (“Whether proof of reliance is required for unjust enrichment depends on the nature of the allegations.”); *Miga v. Jensen*, 299 S.W.3d 98, 105 (Tex. 2009) (“Prohibiting restitution would penalize Jensen for the court’s mistake and is inimical to the unjust enrichment principles underlying the doctrine. We can no more fault Jensen for his dogged pursuit of an appellate remedy than reward Miga for wagering on an affirmation of the judgment. The trial court and the court of appeals correctly concluded that, as a matter of law, restitution comports with the equities.”); *Excess Underwriters at Lloyd’s v. Frank’s Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 62 (Tex. 2008) (“Texas law recognizes restitution as a remedy for unjust enrichment ‘[w]hen a person has obtained a benefit by taking undue advantage of another.’” (quoting *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992))); *BMG Direct Mktg. v. Peake*, 178 S.W.3d 763, 770 (Tex. 2005) (“Like other equitable claims and defenses, an adequate legal remedy may render equitable claims of unjust enrichment and equitable defenses of voluntary-payment unavailable.”); *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000) (“Conoco therefore failed to establish its affirmative defense with regard to any part of Cox’s claim for unjust enrichment and Hankamer’s claim for unjust enrichment after its 1990 contract expired.”); *HECI Exploration Co.*

that two years is the applicable limitations period.³⁰⁷ In three of the opinions, the Court's analysis of the claim for unjust enrichment was analyzed separately from quantum meruit³⁰⁸ or money had and received.³⁰⁹ The Fifth Circuit has also issued at least four opinions that confirm unjust enrichment as a cause of action under Texas law.³¹⁰

This compelling case for unjust enrichment has eluded many state and federal judges. Opponents to unjust enrichment fail to cite any Texas Supreme Court or Fifth Circuit opinion that rejects unjust enrichment as a matter of law.³¹¹ Many fail to acknowledge the fact that there is a substantial list of case opinions for the claim (federal³¹² and state³¹³) as well

v. Neel, 982 S.W.2d 881, 891 (Tex. 1998) ("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." (citing *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 693 (Tex. 1986))); *Sw. Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467, 471 (Tex. 1998) ("Accordingly, the rates established under the adjustment clauses were the contract rates, and there were no overcharges that would be recoverable under a theory of unjust enrichment."); *Heritage Res., Inc. v. Nationsbank*, 939 S.W.2d 118, 123 (Tex. 1996) ("When an operator prepares a division order that allocates payments among the interest owners in a manner that differs from the lease provisions and the operator retains the benefits, the division order is not binding. The basis of this rule is unjust enrichment." (citing *Gavenda*, 705 S.W.2d at 692)); *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) ("The trial court also held that Heldenfels was entitled to recovery under the theory of unjust enrichment. A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." (citing *Pope v. Garrett*, 211 S.W.2d 559, 560, 562 (Tex. 1948))); *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 692 (Tex. 1986) ("The basis for recovery is unjust enrichment; the overpaid royalty owner is not entitled to the royalties."); *Austin v. Duval*, 735 S.W.2d 647, 649 (Tex. App.—Austin 1987, writ denied).

³⁰⁷ *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007); *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 737 (Tex. 2001); *HECI Exploration Co.*, 982 S.W.2d at 885.

³⁰⁸ *Heldenfels Bros., Inc.*, 832 S.W.2d at 40–41.

³⁰⁹ *Excess Underwriters at Lloyd's*, 246 S.W.3d 42, 62 (Tex. 2008); *Sw. Elec. Power Co.*, 966 S.W.2d at 470–71.

³¹⁰ *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 550 (5th Cir. 2010); *Purselley v. Lockheed Martin Corp.*, 322 Fed. App'x 399, 403 (5th Cir. 2009); *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 410 (5th Cir. 2004); *McNair v. City of Cedar Park*, 993 F.2d 1217, 1220 (5th Cir. 1993).

³¹¹ See *supra* notes 309–313.

³¹² *RPost Holdings, Inc. v. Readnotify.com Pty. Ltd.*, No. 2:11–CV–16–JRG, 2012 U.S. Dist. LEXIS 90503 (E.D. Tex. June 29, 2012); *Chesapeake La., L.P. v. Buffco Prod.*, No. 2:10–CV–359, 2012 U.S. Dist. LEXIS 89760, at *15–16 (E.D. Tex. June 28, 2012) ("Here, the Court finds that Buffco and Freeman have been unjustly enriched by means of Chesapeake's payment to them of the full \$13,600,000 related to the sale of the leasehold rights beneath the Geisler Unit, as 53% of such rights were then owned by Harleton and Freeman Capital."); *Team Healthcare/Diagnostic*

Corp. v. Blue Cross & Blue Shield of Tex., No. 3:10-CV-1441-BH, 2012 U.S. Dist. LEXIS 63760, at *20 (N.D. Tex. May 7, 2012) (“While Defendant is correct that some Texas appellate courts do not recognize unjust enrichment as an independent cause of action, the Texas Supreme Court and the Fifth Circuit have recognized unjust enrichment claims.”); Johnson v. Affiliated Computer Servs., No. 3:10-CV-2333-B, 2011 U.S. Dist. LEXIS 102128, at *23 (N.D. Tex. Sept. 9, 2011); Fisher v. Blue Cross Blue Shield of Tex., Inc., No. 3:10-CV-2652-L-BK, 2011 U.S. Dist. LEXIS 86172, at *25 (N.D. Tex. June 27, 2011) (“Defendant avers Plaintiffs’ unjust enrichment claim should be dismissed because unjust enrichment is not an independent cause of action. However, the Texas Supreme Court, the Court of Appeals for the Fifth Circuit, and federal courts sitting in Texas have specifically recognized claims for unjust enrichment.” (citation omitted)); Technomedia Int’l, Inc. v. Int’l Training Servs. Inc., No. H-09-3013, 2010 U.S. Dist. LEXIS 93981, at *16 (S.D. Tex. Sept. 9, 2010); Prophet Capital Mgmt. v. Prophet Equity, LLC, No. A-09-CA-316 LY, 2009 U.S. Dist. LEXIS 88474, p *5-7 (W.D. Tex. Sept. 25, 2009); Eagle Metal Prods., LLC v. Keymark Enters., LLC, 651 F. Supp. 2d 577, 591 (N.D. Tex. 2009); Breckenridge Enters. v. Avio Alts., LLC, No. 3:08-CV-1782-M, 2009 U.S. Dist. LEXIS 44518, at *34-35 (N.D. Tex. May 27, 2009); Newington Ltd. v. Forrester, No. 3:08-CV-0864-G, 2008 U.S. Dist. LEXIS 92601, at *10-11 (N.D. Tex. Nov. 13, 2008) (“It is true that there are Texas cases drawing a distinction between unjust enrichment as a ‘theory of recovery’ and a ‘cause of action.’ Some Texas courts, however, have ignored any such distinction and held that unjust enrichment is a cause of action.”); Baisden v. I’m Ready Prods., Inc., No. H-08-0451, 2008 U.S. Dist. LEXIS 39949, at *29 (S.D. Tex. May 16, 2008) (“Persuaded that the reasoning expressed by the court in *Isofoton* is sound, the court concludes that plaintiff’s claim for unjust enrichment is not subject to dismissal merely because the subject matter of the claim may be covered by a written agreement but, instead, that pursuant to Rule 8(d)(2), a claim for unjust enrichment may properly be pleaded in addition and/or as an alternative to a breach of contract claim.”); Patino v. Lawyers Title Ins. Corp., No. 3:06-CV-1479-B, 2007 U.S. Dist. LEXIS 8545, at *24-25 (N.D. Tex. Jan. 11, 2007); Drawhorn v. Qwest Commcn’s Int’l, 121 F. Supp. 2d 554, 562-63 (E.D. Tex. 2000); United States v. Blanche, No. SA-95-CA-0419, 1997 U.S. Dist. LEXIS 3122, at *27-29 (W.D. Tex. 1997).

³¹³ *Aurora Petroleum, Inc. v. Cholla Petroleum, Inc.*, No. 07-10-0035-CV, 2011 Tex. App. LEXIS 1382, at *9 (Tex. App.—Amarillo Feb. 23, 2011, no pet.) (mem. op.); *Houston v. Ludwick*, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at *6 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.); *LJ Charter, L.L.C. v. Air Am. Jet Charter, Inc.*, No. 14-08-00534-CV, 2009 Tex. App. LEXIS 9469, at *37 (Tex. App.—Houston [14th Dist.] Dec. 15, 2009, pet. denied) (mem. op.); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied); *SP Midtown, LTD. v. Urban Storage, L.P.*, No. 14-07-00717-CV, 2008 Tex. App. LEXIS 3364, at *22 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.); *Pepi v. Galliford*, 254 S.W.3d 457, 462 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *ADT Sec. Servs., Inc. v. Hawa*, No. 09-04-536 CV, 2005 Tex. App. LEXIS 9163, at *15 (Tex. App.—Beaumont Nov. 3, 2005, no pet.) (mem. op.); *Johnson v. MHSB Enters., L.L.C.*, No. 03-04-00153-CV, 2004 Tex. App. LEXIS 8900, at *10 (Tex. App.—Austin Oct. 7, 2004, pet. denied) (mem. op.); *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied); *Thomason v. Collins & Aikman Floorcoverings, Inc.*, No. 04-02-00870-CV, 2004 Tex. App. LEXIS 2823, at *17 (Tex. App.—San Antonio March 31, 2004, no pet.) (mem. op.); *Gotham Ins. Co. v.*

as against (federal³¹⁴ and state³¹⁵) unjust enrichment as a cause of action.

Petroleum Dev. Corp., No. 04–01–00375–CV, 2003 Tex. App. LEXIS 6297, at *19 (Tex. App.—San Antonio, July 23, 2003, pet. denied) (mem. op.); Pinnacle Data Servs., Inc. v. Gillen, 104 S.W.3d 188, 195–96 (Tex. App.—Texarkana 2003, no pet.); Garza v. Mut. of Omaha Ins. Co., No. 05–98–01093–CV, 2001 Tex. App. LEXIS 5288, at *21–22 (Tex. App.—Dallas Aug. 3, 2001, no pet.) (op. on reh’g) (not designated for publication); Janis v. Assocs. Home Equity Servs., Inc., No. 10–99–217–CV, 2000 Tex. App. LEXIS 6050, at *11–12 (Tex. App.—Waco 2000, pet. denied) (depublished); Intermark Auto. Prods., Inc. v. Feldman, 21 S.W.3d 544, 551 (Tex. App.—Texarkana 2000, no pet.); Harper v. Harper, 8 S.W.3d 782, 783 (Tex. App.—Fort Worth 1999, pet. denied); Holder v. Garner, Lovell, & Stein, P.C., No. 07–98–0175–CV, 1999 Tex. App. LEXIS 6298, at *21 (Tex. App.—Amarillo Aug. 24, 1999, pet. denied) (not designated for publication); Matagorda County v. Tex. Ass’n Cnty. Gov’t Risk Mgmt. Pool, 975 S.W.2d 782, 785 (Tex. App.—Corpus Christi 1998), *aff’d*, 52 S.W.3d 128 (Tex. 2000) (acknowledging that a claim for subrogation is possible); Bransom v. Standard Hardware, Inc., 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied); Cmty. Mut. Ins. Co. v. Owen, 804 S.W.2d 602, 606 (Tex. App.—Houston [1st Dist.] 1991, writ denied); City of Corpus Christi v. S.S. Smith & Sons Masonry, Inc., 736 S.W.2d 247, 250 (Tex. App.—Corpus Christi 1987, writ denied); Pritchett v. Henry, 287 S.W.2d 546, 549 (Tex. Civ. App.—Beaumont 1955, writ dism’d).

³¹⁴Lilani v. Noorali, No. H–09–2617, 2011 U.S. Dist. LEXIS 440, at *37–38 (S.D. Tex. Jan. 3, 2011); ED&F Man Biofuels, Ltd. v. MV Fase, 728 F. Supp. 2d 862, 869 (S.D. Tex. 2010); County of El Paso v. Jones, No. EP–09–CV–00119–KC, 2009 U.S. Dist. LEXIS 113149, at *44 (W.D. Tex. Dec. 4, 2009); Hancock v. Chi. Title Ins. Co., 635 F. Supp. 2d 539, 560–61 (N.D. Tex. 2009); Doctors Hosp. 1997 LP v. Beazley Ins., No. H–08–3340, 2009 U.S. Dist. LEXIS 102081, at *24–25 (S.D. Tex. Nov. 3, 2009); Celanese Corp. v. Coastal Water Auth., 475 F. Supp. 2d 623, 639 (S.D. Tex. 2007).

³¹⁵Sharp v. Mosier, No. 04–11–00449–CV, 2012 Tex. App. LEXIS 4437, at *11–12 (Tex. App.—San Antonio June 6, 2012, no pet. h.) (rule 53.7(f) motion granted Aug. 31, 2012); Braxton v. Chin Tuo Chen, No. 06–10–00134–CV, 2011 Tex. App. LEXIS 7414, at *6 (Tex. App.—Texarkana Sept. 13, 2011, pet. denied) (mem. op.); Foley v. Daniel, 346 S.W.3d 687, 690 (Tex. App.—El Paso 2009, no pet.); Casstevens v. Smith, 269 S.W.3d 222, 227–29 (Tex. App.—Texarkana 2008, pet. denied); R.M. Dudley Constr. Co. v. Dawson, 258 S.W.3d 694, 703–04 (Tex. App.—Waco 2008, pet. denied); Hulen v. Hamilton, No. 2–06–288–CV, 2008 Tex. App. LEXIS 1672, at *9–11 (Tex. App.—Fort Worth Feb. 28, 2008, no pet.) (mem. op.); Argyle Indep. Sch. Dist. v. Wolf, 234 S.W.3d 229, 246–47 (Tex. App.—Fort Worth 2007, no pet.) (“Unjust enrichment, itself, 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 that give rise to an implied or quasi-contractual obligation to repay.’” (quoting Friberg–Cooper Water Supply Corp. v. Elledge, 197 S.W.3d 826, 832 (Tex. App.—Fort Worth 2006), *rev’d on other grounds*, 240 S.W.3d 869 (Tex. 2007))); Doss v. Homecomings Fin. Network, Inc., 210 S.W.3d 706, 709 n.4 (Tex. App.—Corpus Christi 2006, pet. denied); Walker v. Cotter Props., Inc., 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.); RDG Ltd. P’ship v. Gexa Corp., No. 14–04–00679–CV, 2005 Tex. App. LEXIS 3123, at *9–10 (Tex. App.—Houston [14th Dist.] April 26, 2005, no pet.) (mem. op.); Spector v. Norwegian Cruise Line, Ltd., No. 01–02–00017–CV, 2004 Tex. App. LEXIS 2941, at *27–28 (Tex. App.—Houston [1st Dist.] Mar. 30, 2004, no pet.) (mem. op.); Treneer v. Reynolds, No. 13–98–484–CV, 2000 Tex. App. LEXIS 5748, at *15–16

Some courts even “double down” in their denial and claim that case opinions in general deny unjust enrichment as a matter of law.³¹⁶

While federal opinion has no precedential authority, the confident conclusions of some federal opinions add to the confusion and would mock the Erie Doctrine based on their assessment of Texas appellate law without the benefit of adequate legal research.³¹⁷ In light of the fact that federal opinions that mention or discuss unjust enrichment are growing faster than such Texas opinions and that federal opinions in Texas out-numbered state

(Tex. App.—Corpus Christi Aug. 24, 2000, no pet.) (not designated for publication); PIC Realty Corp. v. Southfield Farms, Inc., 832 S.W.2d 610, 614 (Tex. App.—Corpus Christi 1992, no writ); City of Harker Heights, Tex. v. Sun Meadows Land, Ltd., 830 S.W.2d 313, 317 (Tex. App.—Austin 1992, no writ) (“[Restitution] is a measure of damages, not a cause of action.”); Oxford Fin. Co., Inc. v. Velez, 807 S.W.2d 460, 465 (Tex. App.—Austin 1991, writ denied); City of Corpus Christi v. S.S. Smith & Sons Masonry, Inc., 736 S.W.2d 247, 250 (Tex. App.—Corpus Christi 1987, writ denied).

³¹⁶*Lilani*, 2011 U.S. Dist. LEXIS 440, at *37–38 (“The majority of Texas appellate courts hold that unjust enrichment is not an independent cause of action.”); *ED&F Man Biofuels*, 728 F. Supp. 2d at 869 (“Nevertheless, the courts in the Fifth Circuit and a number of Texas courts in examining the case law have concluded that rather than an independent cause of action, it is a ‘theory of liability that a plaintiff can pursue through several equitable causes of action, including money had and received.’” (quoting *Hancock*, 635 F. Supp. 2d at 560)); *Hancock*, 635 F. Supp. 2d at 560 (“Moreover, Texas courts of appeals have consistently held that unjust enrichment is not an independent cause of action, but is instead a theory upon which an action for restitution may rest.”).

³¹⁷*Show Servs., LLC v. Amber Trading Co.*, No. 3:09–CV–2385–D, 2010 U.S. Dist. LEXIS 115512, at *8–9 & n.4 (N.D. Tex. Oct. 29, 2010) (“Moreover, Texas courts of appeals have consistently held that unjust enrichment is not an independent cause of action, but is instead a theory upon which an action for restitution may rest ‘Although an intermediate appellate court decision is not controlling where the highest state court has not spoken on the subject, [the court] ordinarily defer[s] to the holdings of lower appellate courts in the absence of guidance from the highest court.’” (quoting *Holden v. Connex–Metalna Mgmt. Consulting GmbH v. Lexington Ins. Co.*, 302 F.3d 358, 364–65 (5th Cir. 2002))); *Hancock*, 635 F. Supp. 2d at 560. Two other case opinions justify the holding that unjust enrichment is not a cause of action by citing to the appellate opinion in *Heldenfels*, which was affirmed as to the final holding but reversed to hold that unjust enrichment is a cause of action. *City of Corpus Christi v. Heldenfels Bros., Inc.*, 802 S.W.2d 35, 40 (Tex. App.—Corpus Christi 1990), *aff’d*, 832 S.W.2d 39 (Tex. 1992). See *Jones Partners Constr., L.L.C. v. Apopka Plaza Assocs., L.L.C.*, No. 3:04–CV–1294–D, 2006 U.S. Dist. LEXIS 13560, at *20–21 (N.D. Tex. Mar. 27, 2006) (“Unjust enrichment is probably not an independent cause of action but merely characterizes the result whereby one fails to make restitution of benefits under circumstances which give rise to an implied or quasi-contractual obligation to return such benefits.” (citing *Heldenfels Bros., Inc.*, 802 S.W.2d at 40)); *Wood v. Gateway, Inc.*, No. 5:03–CV–007–C, 2003 U.S. Dist. LEXIS 22576, at *37–38 (N.D. Tex. Dec. 12, 2003).

opinions at a rate of almost two to one in the last five years, it is likely that federal opinions on unjust enrichment under Texas law will have an increasing influence (for better or worse) on Texas court opinions on unjust enrichment.³¹⁸

Many courts' rejection of unjust enrichment is overstated because as one federal judge noted,³¹⁹ many courts that hold that unjust enrichment is not a cause of action still consider the claim as based on a theory.³²⁰ However

³¹⁸ From January 1, 2007 to December 31, 2011, there were 572 and 359 case opinions from federal district and state appellate courts in Texas that contained the term 'unjust enrichment' or 'disgorgement.'

³¹⁹ *Newington Ltd. v. Forrester*, No. 3:08-CV-0864-G, 2008 U.S. Dist. LEXIS 92601, at *11 (N.D. Tex. Nov. 13, 2008) ("In other words, Texas courts may waffle about whether unjust enrichment is a theory of recovery or an independent cause of action, but either way, they have provided the plaintiff with relief when the defendant has been unjustly enriched.").

³²⁰ See *Sharp*, 2012 Tex. App. LEXIS 4437, at *12-13 ("Accordingly, we hold a fact issue exists on the Sharps' unjust enrichment claim."); see also *Lilani*, 2011 U.S. Dist. LEXIS 440, at *38-39 ("If a reasonable trier of fact concludes the parties did not enter into a valid loan agreement, the trier of fact could alternatively conclude that the Defendants have been unjustly enriched. The court will therefore deny the Defendants' Summary-Judgment Motion on the restitution (unjust enrichment) claim with respect to the money transfer."); *County of El Paso v. Jones*, No. EP-09-CV-00119-KC, 2009 U.S. Dist. LEXIS 113149, at *44, 47 (W.D. Tex. Dec. 4, 2009); *Baisden v. I'm Ready Productions, Inc.*, No. H-08-0451, 2008 U.S. Dist. LEXIS 39949, at *31 (S.D. Tex. May 16, 2008); *Hulen v. Hamilton*, No. 2-06-288-CV, 2008 Tex. App. LEXIS 1672, at *10-11 (Tex. App.—Fort Worth Feb. 28, 2008, no pet.) (mem. op.); *Spector v. Norwegian Cruise Line Ltd.*, No. 01-02-00017-CV, 2004 Tex. App. LEXIS 2941, at *28-30 (Tex. App.—Houston [1st Dist.] Mar. 30, 2004, no pet.) (mem. op.) (rejecting the class claim because of varying fact pattern needed to establish claim); *PIC Realty Corp. v. Southfield Farms, Inc.*, 832 S.W.2d 610, 614 (Tex. App.—Corpus Christi 1992, no writ); *Oxford Fin. Cos. v. Velez*, 807 S.W.2d 460, 466 (Tex. App.—Austin 1991, writ denied) ("As a matter of law, Oxford's retention of the purchase price under these circumstances would be unconscionable. We conclude that both the evidence and the jury findings were sufficient to support the court's judgment awarding Mid-Tex recovery of the purchase price.").

there are other opinions that reject the claim as a matter of law³²¹ or hold that unjust enrichment is only a remedy.³²²

Most of the adverse case opinions are based on one of two approaches. First is the approach that presumes that unjust enrichment should either be called ‘restitution’ or that unjust enrichment is an element for restitution.³²³ It ignores the equivalency between the two terms as a cause of action against willful defendants.³²⁴ The second group is based on the dubious distinction that while unjust enrichment is not a cause of action, Texas law allows for liability to be found on the basis of the theory of unjust enrichment.³²⁵

³²¹ See, e.g., *Redwood Resort Props., LLC v. Holmes Co.*, No. 3:06-CV-1022-D, 2006 U.S. Dist. LEXIS 85996, at *27 (N.D. Tex. Nov. 27, 2006); *Jones Partners Constr., L.L.C.*, 2006 U.S. Dist. LEXIS 13560, at *20–21; *Wood v. Gateway, Inc.*, No. 5:03-CV-007-C, 2003 U.S. Dist. LEXIS 22576, at *37–38 (N.D. Tex. Dec. 12, 2003); *Doss v. Homecomings Fin. Network, Inc.*, 210 S.W.3d 706, 710–111 (Tex. App.—Corpus Christi 2006, pet. denied); *Spector*, 2004 Tex. App. LEXIS 2941, at *27 (denying class for overbilling); *Treeneer v. Reynolds*, No. 13–98–484–CV, 2000 Tex. App. LEXIS 5748, at *15 (Tex. App.—Corpus Christi Aug. 24, 2000, no pet.) (not designated for publication) (stating that unjust enrichment is the same as quantum meruit); *Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 164 (Tex. App.—El Paso 1997, no pet.).

³²² E.g., *Target Strike, Inc. v. Marston & Marston, Inc.*, No. SA–10–CV–0188 OLG (NN), 2010 U.S. Dist. LEXIS 115222, at *15 (W.D. Tex. Oct. 27, 2010); *ED&F Man Biofuels, Ltd. v. MV Fase*, 728 F. Supp. 2d 862, 870 (S.D. Tex. 2010); *Eagle Metal Prods., LLC v. Keymark Enters., LLC*, 651 F. Supp. 2d 577, 591 (N.D. Tex. 2009); *First Union Nat’l Bank v. Richmond Capital Partners I, L.P.*, 168 S.W.3d 917, 931 (Tex. App.—Dallas 2005, no pet.).

³²³ *Walker v. Cotter Props., Inc.*, 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.); *Oxford Fin. Cos. v. Velez*, 807 S.W.2d 460, 465 (Tex. App.—Austin 1991, writ denied) (“Unjust enrichment is not an independent cause of action; however, an action for restitution based on unjust enrichment will lie ‘to recover money received on a consideration that has failed in whole or in part.’” (quoting *Barrett v. Ferrell*, 550 S.W.2d 138, 143 (Tex. Civ. App. 1977—Tyler, writ ref’d n.r.e.))).

³²⁴ See *supra* III.E.

³²⁵ E.g., *Hancock v. Chi. Title Ins. Co.*, 635 F. Supp. 2d 539, 560 (N.D. Tex. 2009) (“Moreover, Texas courts of appeals have consistently held that unjust enrichment is not an independent cause of action, but is instead a theory upon which an action for restitution may rest.”); *Doctors Hosp. 1997 LP v. Beazley Ins.*, No. H–08–3340, 2009 U.S. Dist. LEXIS 102081, at *24 (S.D. Tex. Nov. 3, 2009); *Sharp v. Mosier*, No. 04–11–00449–CV, 2012 Tex. App. LEXIS 4437, at *12 (Tex. App.—San Antonio June 6, 2012) (mem. op.); *RDG Ltd. P’ship v. Gexa Corp.*, No. 14–04–00679–CV, 2005 Tex. App. LEXIS 3123, at *9–10 (Tex. App.—Houston [14th Dist.] April 26, 2005, no pet.) (mem. op.) (“Unjust enrichment is not a distinct independent cause of action, but a theory of recovery.” (citing *Mowbray v. Avery*, 76 S.W.3d 663, 679 (Tex. App.—Corpus Christi 2002, pet. denied))).

In a semantic analysis that should fail in Moot Court, the holding in *HECI* is dismissed as unclear or contradictory.³²⁶ Frequently cited or emulated, the Thirteenth District's opinion in *Mowbray* argues that the *HECI* opinion does not really state that unjust enrichment is a cause of action because it sometimes refers to unjust enrichment as a 'basis of recovery' or 'remedy.'³²⁷ *Mowbray* fails to mention that *HECI* does refer to unjust enrichment as a cause of action at least six times and as a claim four times.³²⁸ The subject matter of the case related to the applicable limitations period for unjust enrichment, which only applies to causes of action, not remedies or theories.³²⁹ *HECI* also refers to the Court's prior opinion in *Gavenda* as based in liability for unjust enrichment.³³⁰ Seemingly insubstantial, the *Mowbray* analysis has been favorably cited in six federal and two state opinions.³³¹

In *Elledge*, the Second District held that unjust enrichment was not a cause of action but that claims based on such a theory warrant a limitations period of four years, explaining that the Supreme Court's holding in two prior cases for two years were mere *obiter dictum* and not necessarily controlling.³³² The Supreme Court opinion put down the Second District's

³²⁶ *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 885 (Tex. 1998).

³²⁷ *Mowbray*, 76 S.W.3d at n.25 ("Although the court in *HECI* refers to 'the cause of action' of unjust enrichment, it also refers to unjust enrichment as a 'remedy,' 'basis for recovery' and speaks of a 'cause of action based on unjust enrichment.' We do not see these statements as recognition of unjust enrichment as an independent cause of action but simply as a reiteration of the well established principle that a suit for restitution may be raised against a party based on the theory of unjust enrichment." (quoting *HECI Exploration Co.*, 982 S.W.2d at 891)).

³²⁸ *HECI Exploration Co.*, 982 S.W.2d at 891.

³²⁹ See TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West Supp. 2012) (setting two-year limitations period for actions for taking or detaining the personal property of another).

³³⁰ *HECI Exploration Co.*, 982 S.W.2d at 891.

³³¹ *Lilani v. Noorali*, No. H-09-2617, 2011 U.S. Dist. LEXIS 440, at *38 (S.D. Tex. Jan. 3, 2011); *ED&F Man Biofuels, Ltd. v. MV Fase*, 728 F. Supp. 2d 862, 869 n.3 (S.D. Tex. 2010); *Doctors Hosp. 1997 LP v. Beazley Ins.*, No. H-08-3340, 2009 U.S. Dist. LEXIS 102081, at *25 (S.D. Tex. Nov. 3, 2009); *Hancock v. Chi. Title Ins. Co.*, 635 F. Supp. 2d 539, 561 (N.D. Tex. 2009); *Baisden v. I'm Ready Prods.*, No. H-08-0451, 2008 U.S. Dist. LEXIS 39949, at *31 (S.D. Tex. May 16, 2008); *Wood v. Gateway, Inc.*, No. 5:03-CV-007-C, 2003 U.S. Dist. LEXIS 22576, at *37-38 (N.D. Tex. Dec. 12, 2003); *Casstevens v. Smith*, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied); *Sw. Bell Tel. Co. v. Mktg. on Hold, Inc.*, 170 S.W.3d 814, 828 (Tex. App.—Corpus Christi 2005), *rev'd on other grounds*, 308 S.W.3d 909 (Tex. 2010).

³³² *Friberg-Cooper Water Supply Corp. v. Elledge*, 197 S.W.3d 826, 829 n.13 (Tex. App.—Fort Worth 2006), *rev'd on other grounds*, 240 S.W.3d 869 (Tex. 2007) (describing two prior

attempted ‘coup,’ reaffirming a limitations period of two years.³³³ Even after the Second District’s opinion was reversed, it has been cited for its opinion that unjust enrichment is not a cause of action.³³⁴ Some courts seem to search pretty hard to find a basis to reject unjust enrichment.³³⁵

Even though *Heldenfels*’ language is vaguer than that of *HECI*, the substance of the former is not criticized as often as *HECI* for its indefinite semantics. *Heldenfels* refers to unjust enrichment as a theory, doctrine or remedy (‘cause of action’ is absent) but it refers to quantum meruit and negligence as theories also.³³⁶ The *Mowbray* and *Elledge* analysis would reverse the traditional maxim and emphasize form over substance.

The Supreme Court opinion in *Heldenfels* relied on two prior opinions directly and one opinion indirectly.³³⁷ Without any quotation from the case or explanation of how the case directly applies, the key *Heldenfels* holding cites the landmark opinion of *Pope v. Garrett*.³³⁸ As was noted in the previous section, the *Pope* opinion is a strong supporter of expansive

Supreme Court opinions limitations as non-binding “obiter dictum” which did not resemble more authoritative “judicial dictum” that is articulated “very deliberately after mature consideration.”).

³³³ *Elledge*, 240 S.W.3d at 870 (“Our statements that the two-year statute applies to unjust enrichment claims, though not essential to the outcomes in *HECI* and *Wagner & Brown*, should have been followed.”).

³³⁴ *Hoffman v. L&M Arts*, 774 F. Supp. 2d 826, 848 n.18 (N.D. Tex. 2011); *Show Servs., LLC v. Amber Trading Co. LLC*, No. 3:09-CV-2385-D, 2010 U.S. Dist. LEXIS 115512, at *9 (N.D. Tex. Oct. 29, 2010); *Packard v. OCA, Inc.*, No. 4:05CV273, 2009 U.S. Dist. LEXIS 130009, at *3 (E.D. Tex. Aug. 24, 2009); *Hancock*, 635 F. Supp. 2d at 560 (“Moreover, Texas courts of appeals have consistently held that unjust enrichment is not an independent cause of action, but is instead a theory upon which an action for restitution may rest.”); *Casstevens*, 269 S.W.3d at 227–28; *R.M. Dudley Constr. Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App.—Waco 2008, pet. denied); *Hulen v. Hamilton*, No. 2–06–288–CV, 2008 Tex. App. LEXIS 1672, at *9–10 (Tex. App.—Fort Worth Feb. 28, 2008, no pet.) (mem. op.).

³³⁵ The court insists that unjust enrichment is just another name for money had and received and that unjust enrichment is just another form of assumpsit as originated by Lord Mansfield. The analysis of money had and received as debt is sound but should not include unjust enrichment in equity. See *Friberg-Cooper Water Supply Corp.*, 197 S.W.3d at 832, n.13.

³³⁶ *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 40 (Tex. 1992).

³³⁷ *Id.* at 41 (“The trial court also held that *Heldenfels* was entitled to recovery under the theory of unjust enrichment. A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.” (citing *Pope v. Garrett*, 211 S.W.2d 559, 560, 562 (Tex. 1948); *Austin v. Duval*, 735 S.W.2d 647, 649 (Tex. App.—Austin 1987, writ denied))).

³³⁸ See *Heldenfels Bros., Inc.*, 832 S.W.2d at 41 (citing *Pope*, 211 S.W.2d at 560, 562).

jurisdiction for equity, or at least for constructive trusts, and is a model for applying equity's safety net.³³⁹

If the *Heldenfels* opinion relies on *Pope* for inspirational support, it leans on the Third District's opinion in *Austin v. Duval* for mechanics.³⁴⁰ Drilling down further is *Barrett v. Ferrell*,³⁴¹ which is the foundation for *Austin* and has otherwise been frequently cited in related cases.³⁴² Unfortunately, the *Barrett* mechanics are based on secondary references that focus on assumpsit or unjust enrichment at law.³⁴³ For example, *Barrett* quotes a standard definition of unjust enrichment from American Jurisprudence on implied contracts:

The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another, the courts imposing a duty to refund the

³³⁹ *Pope*, 211 S.W.2d at 560 (“The specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.” (quoting 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 1045 (5th Ed.))).

³⁴⁰ See *Heldenfels Bros., Inc.*, 832 S.W.2d at 41.

³⁴¹ 550 S.W.2d 138, 143 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

³⁴² *McNair v. City of Cedar Park*, 993 F.2d 1217, 1221 n.18 (5th Cir. 1993); *United Water Servs., L.L.C. v. Zaffirini*, No. 04–08–00211–CV, 2009 Tex. App. LEXIS 328, at *18 n.4 (Tex. App.—San Antonio Jan. 21, 2009, pet. denied) (mem. op.) (“The party seeking restitution based on unjust enrichment must establish both that there was unjust enrichment and that the person sought to be charged either ‘wrongfully secured a benefit or had passively received one which it would be unconscionable for him to retain.’” (quoting *Villareal v. Grant Geophysical, Inc.* 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied))); *Burlington N. R.R. Co. v. Sw. Elec. Power Co.*, 925 S.W.2d 92, 97 (Tex. App.—Texarkana 1996), *aff'd*, 966 S.W.2d 467 (Tex. 1998); *Oxford Fin. Co. v. Velez*, 807 S.W.2d 460, 465 (Tex. App.—Austin 1991, writ denied); *City of Corpus Christi v. Heldenfels Bros., Inc.*, 802 S.W.2d 35, 40 (Tex. App.—Corpus Christi 1990), *aff'd on other grounds*, 832 S.W.2d 339 (Tex. 1992); *City of Corpus Christi v. S.S. Smith & Sons Masonry, Inc.*, 736 S.W.2d 247, 250 (Tex. App.—Corpus Christi 1987, writ denied).

³⁴³ *Friberg-Cooper Water Supply Corp. v. Elledge*, 197 S.W.3d 826, 829 n.13, 832 (Tex. App.—Fort Worth 2006), *rev'd on other grounds*, 240 S.W.3d 869 (Tex. 2007); *Mitsuba Tex., Inc. v. Brownsville Indep. Sch. Dist.*, No. 05–97–01271–CV, 2000 Tex. App. LEXIS 772, at *12–13 (Tex. App.—Dallas Feb. 2, 2000, no pet.) (not designated for publication); *Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 164 (Tex. App.—El Paso 1997, no pet.).

same to the person to whom in good conscience it ought to belong.³⁴⁴

Barrett also relies on the assumpsit section of Texas Jurisprudence to define unjust enrichment in combination with money had and received:

An action for restitution based on unjust enrichment or for money had and received will lie where one person has obtained money from another by fraud, duress or taking an undue advantage; or when money is paid by one person in consideration of an act to be done by another and the act is not performed; or to recover money received on a consideration that has failed in whole or in part.³⁴⁵

The *Heldenfels* opinion reduces this to “[a] party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage” (the “*Heldenfels* Standard”).³⁴⁶ This is also sometimes referred to as the active standard because the *Barrett* discussion distinguished between unjust enrichment that was actively gained from enrichment that was passively gained.³⁴⁷ Passive enrichment is also subject to an additional test for unconscionability.³⁴⁸

From the Texas Jurisprudence quote, claims for a cause in action for unjust enrichment include “fraud, duress or taking an undue advantage.”³⁴⁹ The *Barrett* opinion restates this standard as it explains why it denied the plaintiff’s claim: “Appellee does not aver fraud, accident, mistake, duress or bad faith on the part of appellant. Appellee is in no position to seek restitution on the theory that there was a partial failure of consideration since appellant fulfilled his obligation under the agreement.”³⁵⁰

³⁴⁴ *Barrett*, 550 S.W.2d at 143 (quoting 66 AM. JUR. 2D *Restitution and Implied Contracts* § 11 (1973)).

³⁴⁵ *Id.* (quoting 6 TEX. JUR. 2d *Assumpsit* § 6 (1959)).

³⁴⁶ *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

³⁴⁷ *Barrett*, 550 S.W.2d at 143.

³⁴⁸ *Id.* (“It is fundamental that for a person to be entitled to restitution, he must show not only that there was unjust enrichment, but also that the person sought to be charged had wrongfully secured a benefit or had passively received one which it would be unconscionable for him to retain.” (citing 66 AM. JUR. 2D *Restitution and Implied Contracts*, § 4 (1973))).

³⁴⁹ 6 TEX. JUR. 2d *Assumpsit* § 6 (1959).

³⁵⁰ *Id.*; accord *Burlington N. R.R. v. S.W. Elec.*, 925 S.W.2d 92, 98 n.6 (Tex. App.—Texarkana 1996, writ granted), *aff’d*, 966 S.W.2d 467 (Tex. 1998).

The case of *Austin v. Duval* related mainly to a claim for money had and received.³⁵¹ It quoted the expansive language from *Staats v. Miller* on the elements for money had and received³⁵² but then anchored the elements with the quote from Texas Jurisprudence on assumpsit that was quoted in *Barrett*.³⁵³ The result was further limited by a caution borrowed from Corpus Juris Secundum that the “Plaintiff cannot recover merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss.”³⁵⁴

The *Heldenfels* case related to a subcontractor’s claim for negligence, quantum meruit and unjust enrichment relating to the liability of the City of Corpus Christi for the failure of a contractor to pay the subcontractor for supplying structural metal beams.³⁵⁵ According to the dissenting opinion, the majority should have stuck to the issue of negligence as the discussion of unjust enrichment is gratuitous.³⁵⁶ Perhaps the holding in the appellate opinion, that unjust enrichment may not be a cause of action, prompted a correction.³⁵⁷

To satisfy most courts on the *Heldenfels* standard the plaintiff should expect to establish a separate claim either for fraud, duress or taking advantage.³⁵⁸ One key issue remains as to the meaning of the term ‘taking

³⁵¹ 735 S.W.2d 647, 649 (Tex. App.—Austin 1987, writ denied).

³⁵² *Staats v. Miller*, 243 S.W.2d 686, 687–88 (Tex. 1951) (“It is generally recognized that any surplus arising on the sale of a security for a debt may be recovered by the person entitled thereto. So, the same authority says, ‘The question, in an action for money had and received, is to which party does the money, in equity, justice and law, belong. All plaintiff need show is that defendant holds money which in equity and good conscience belongs to him.’ Again, it has been declared that a cause of action for money had and received is ‘less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry whether the defendant holds money, which . . . belongs to the plaintiff.’” (quoting *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 404 (1934))).

³⁵³ *Austin*, 735 S.W.2d at 649.

³⁵⁴ *Id.* (quoting 58 C.J.S. *Money Received* § 41 (1948)).

³⁵⁵ *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) (citing *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990)).

³⁵⁶ *Id.* at 42 (Gammage, J., dissenting).

³⁵⁷ See *City of Corpus Christi v. Heldenfels Bros., Inc.*, 802 S.W.2d 35, 40 (Tex. App.—Corpus Christi 1990), *aff’d on other grounds*, 832 S.W.2d 339 (Tex. 1992) (“Unjust enrichment is probably not an independent cause of action but merely characterizes the result whereby one fails to make restitution of benefits under circumstances which give rise to an implied or quasi-contractual obligation to return such benefits.”).

³⁵⁸ *Breckenridge Enters. v. Avio Alternatives, LLC*, No. 3:08-cv-1782-M, 2009 U.S. Dist. LEXIS 44518, at *35 (N.D. Tex. May 27, 2009) (“However, as against Alan and Nancy Gagleard,

undue advantage.’ It was probably intended to relate to breach of a confidential or fiduciary relationship as the term ‘breach of fiduciary duty’ is of relative modern usage.³⁵⁹ The specific applicability of the undue advantage clause has only been examined in a modest number of cases largely relating to summary judgment standards.³⁶⁰ Thus, one claim relating to breach of fiduciary duty was successful³⁶¹ as were two that asserted non-payment for goods or services.³⁶² Plaintiffs’ claims for undue advantage have been made in relation to claims under state law for the misappropriation of intellectual property with mixed success and much concern about preemption issues: claims related to trade secrets³⁶³ and copyrights³⁶⁴ were approved but a trademark claim was denied.³⁶⁵ The claim

the unjust enrichment theory mirrors the Plaintiff’s fraud claims, which were dismissed for failing the particularity requirements of Rule 9(b). If Plaintiff successfully pleads its fraud claims against Alan and Nancy Gagleard, it may also replead its unjust enrichment theory against them, but it would be nonsensical to allow what is essentially a fraud claim to evade the particularity requirements through pleading under an equitable, rather than legal, theory. As against Alan and Nancy Gagleard, this theory is dismissed.” (citing FED. R. CIV P. 9(b)); *see also* Allstate Ins. Co. v. Donovan, No. H-12-0432 2012, U.S. Dist. LEXIS 92401, at *50–51 (S.D. Tex. July 3, 2012); Wu v. Tang, No. 3:10-CV-0218-O, 2011 U.S. Dist. LEXIS 4489, at *26–27 (N.D. Tex. Jan. 14, 2011); Lone Star Partners v. Nationsbank Corp., No. 05-98-02049-CV, 2001 Tex. App. LEXIS 4785, at *14 (Tex. App.—Dallas July 18, 2001, writ denied) (not designated for publication).

³⁵⁹ 2 STORY, *supra* note 6, § 259 (“Other [cases] again, rather grow out of some special confidential or fiduciary relation between all the parties or between some of them, which is watched with especial jealousy and solicitude, because it affords the power and the means of taking undue advantage, or of exercising undue influence over others.”).

³⁶⁰ *See infra* notes 359–367.

³⁶¹ Chesapeake Louisiana, L.P. v. Buffco Prod., Inc., No. 2:10-CV-359 (JRG), 2012 U.S. Dist. LEXIS 89760, at *15–16 (E.D. Tex. June 28, 2012).

³⁶² Team Healthcare/Diagnostic Corp. v. Blue Cross & Blue Shield of Tex., No. 3:10-CV-1441-BH, 2012 U.S. Dist. LEXIS 63760, at *21 (N.D. Tex. May 7, 2012); RDG Ltd. P’ship v. Gexa Corp., No. 14-04-00679-CV, 2005 Tex. App. LEXIS 3123, at *10–13 (Tex. App.—Houston [14th Dist.] April 26, 2005, no pet.) (mem. op.).

³⁶³ SP Midtown, Ltd. v. Urban Storage, L.P., No. 14-07-00717-CV, 2008 Tex. App. LEXIS 3364, at *23 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.).

³⁶⁴ Baisden v. I’m Ready Productions, Inc., No. H-08-0451, 2008 U.S. Dist. LEXIS 39949, at *28 (S.D. Tex. May 16, 2008) (“Thus, IRP’s subsequent actions are not covered by the Agreement. As a result, [plaintiff] may seek recovery for this period under a theory of unjust enrichment. In addition, citing Federal Rule of Civil Procedure 8(d)(2), plaintiff argues that his claim for unjust enrichment is permissible and appropriate at this stage of the case as an alternative to his claims for breach of contract and copyright infringement.” (internal quotations omitted)).

³⁶⁵ Prophet Capital Mgmt. Ltd. v. Prophet Equity, LLC, A-09-CA-316 LY, 2009 U.S. Dist. LEXIS 88474, at *6–7 (W.D. Tex. Sept. 25, 2009).

for the misappropriation of seismic data was denied but only on the basis that the alleged taking was not contrary to law.³⁶⁶ In a blend of federal statute and contract law, a federal court allowed a claim to continue on whether the defendant took undue advantage by installing optic cable on a railway easement.³⁶⁷

A review of a large number of cases in state and federal courts in Texas indicates that a substantial number of cases relate to claims more associated with unjust enrichment at law:³⁶⁸ claims for reimbursement³⁶⁹, claims for overpayments,³⁷⁰ claims for non-payment or underpayment³⁷¹ (including

³⁶⁶ *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied).

³⁶⁷ *Drawhorn v. Qwest Commc'ns. Int'l, Inc.*, 121 F. Supp. 2d 554, 563 (E.D. Tex. 2000).

³⁶⁸ A group of 245 cases were selected on the basis that the cases contained the term “unjust enrichment” and either “HECT” or “Heldenfels” for the last 15 years. This does not include all unjust enrichment cases and the cases cited in the remainder of this subsection are listed merely as examples.

³⁶⁹ See *Leal v. Weightman*, No. 01–03–01006–CV, 2004 Tex. App. LEXIS 8991, at *12 (Tex. App.—Houston [1st Dist.] Oct. 7, 2004, no pet.) (mem. op.) (rejecting reimbursement as basis for unjust enrichment.); *Gotham Ins. Co. v. Petroleum Dev. Corp.*, No. 04–01–00375–CV, 2003 Tex. App. LEXIS 6297, at *19 (Tex. App.—San Antonio, July 23, 2003, pet. denied) (mem. op.) (denying summary judgment for claim for reimbursement of insured’s unnecessary payments).

³⁷⁰ *Mid-Town Surgical Ctr., LLP v. Blue Cross Blue Shield of Tex.*, No. H–11–2086, 2012 U.S. Dist. LEXIS 102789, at *11 (S.D. Tex. July 24, 2012) (holding that plaintiff states a claim for defendant’s overbilling); *Chesapeake Louisiana, L.P. v. Buffco Prod., Inc.*, No. 2:10–CV–359 (JRG), 2012 U.S. Dist. LEXIS 89760, at *15–16 (E.D. Tex. June 28, 2012) (affirming judgment for overpayment to partial owners for 100% of acquisition price); *UNUM Life Ins. Co. of Am. v. Munoz*, No. 3:06–CV–1052–G ECF, 2007 U.S. Dist. LEXIS 14019, at *12 (N.D. Tex. Feb. 27, 2007) (granting summary judgment to plaintiff on claim for overpayment under contract); *Patino v. Lawyers Title Ins. Corp.*, No. 3:06–CV–1479–B, 2007 U.S. Dist. LEXIS 85457, at *23–24 (N.D. Tex. Jan. 11, 2007) (denying summary judgment against claim for wrongfully retaining pricing discounts); *Johnson v. MHSB Enters., L.L.C.*, No. 03–04–00153–CV, 2004 Tex. App. LEXIS 8900, at *11–12 (Tex. App.—Austin Oct. 7, 2004, no pet.) (mem. op.) (denying class for overcharges due to lack of nonconsensual transfer).

³⁷¹ *Team Healthcare/Diagnostic Corp. v. Blue Cross & Blue Shield of Tex.*, No. 3:10–CV–1441–BH, 2012 U.S. Dist. LEXIS 63760, at *21 (N.D. Tex. May 7, 2012); *Peak Technical Servs., Inc. v. Land & Sea Eng'g, LLC*, No. H–10–1568, 2011 U.S. Dist. LEXIS 99795, at *22–23 (S.D. Tex. Sept. 6, 2011); *Fisher v. Blue Cross Blue Shield of Tex., Inc.*, No. 3:10–CV–2652–L–BK, 2011 U.S. Dist. LEXIS 86172, at *25–26 (N.D. Tex. June 27, 2011); *RDG Ltd. P'ship v. Gexa Corp.*, No. 14–04–00679–CV, 2005 Tex. App. LEXIS 3123, at *12 (Tex. App.—Houston [14th Dist.] April 26, 2005, no pet.) (mem. op.); *Ariz. Premium Fin. Co. v. CSI Agency Servs., Inc.*, No. 05–00–01030–CV, 2001 Tex. App. LEXIS 5437, at *15 (Tex. App.—Dallas Aug. 13, 2001, no pet.) (not designated for publication).

underpayment of mineral royalties).³⁷² Claims relate more to disputed ancillary issues to consensual transactions; therefore, proof of an express contract³⁷³ or the plaintiff's failure to establish a nonconsensual transaction are frequently cited as adequate defenses.³⁷⁴ As some courts hold in claims for rescission, some plaintiffs for unjust enrichment are held to be trying to maneuver to avoid the consequences of their own bad bargains.³⁷⁵ Class actions for unjust enrichment are feasible, but unlikely, as the uniformity of key elements seems to be a recurring problem.³⁷⁶

³⁷²Shell Oil Co. v. Ross, 356 S.W.3d 924, 928–29 (Tex. 2011) (rejecting claim for underpayment of royalties based on limitations); Union Pac. Res. Grp., Inc. v. Hankins, 51 S.W.3d 741, 754 (Tex. App.—El Paso 2001), *rev'd on other grounds*, 111 S.W.3d 69 (Tex. 2003) (certifying class for underpayment of royalties).

³⁷³Khatib v. Cathay Bank, No. 4:11–CV–540–A, 2012 U.S. Dist. LEXIS 105047, at *10–11 (N.D. Tex. July 26, 2012); Vanhauen v. Am. Home Mortg. Servicing, Inc., No. 4:11–CV–461, 2012 U.S. Dist. LEXIS 34138, at *23 (E.D. Tex. Feb. 17, 2012); Baker v. Deutsche Bank Nat'l Trust Co., No. 4:11–CV–61, 2011 U.S. Dist. LEXIS 132586, at *9–10 (E.D. Tex. Oct. 19, 2011); Kiggundu v. Mortg. Elec. Registration Sys., No. 4:11–1068 ECF, 2011 U.S. Dist. LEXIS 70889, at *29 (S.D. Tex. June 30, 2011); Anderson v. CitiMortgage, Inc., No. 4:10–CV–398, 2011 U.S. Dist. LEXIS 31191, at *17–18 (E.D. Tex. Mar. 23, 2011); Merry Homes, Inc. v. Dao, 359 S.W.3d 881, 884 (Tex. App.—Houston [14th Dist.] 2012, no pet.); R.M. Dudley Constr. Co. v. Dawson, 258 S.W.3d 694, 704 (Tex. App.—Waco 2008, pet. denied).

³⁷⁴United States v. Medica Rents Co., No. 03–111297, 2008 U.S. App. LEXIS 17946, at *12–13 (5th Cir. Aug. 19, 2008); McNair v. City of Cedar Park, 993 F.2d 1217, 1221 (5th Cir. 1993) (denying claim for lack of nonconsensual transfer); Trammell Crow Residential Co. v. Am. Prot. Ins. Co., No. 3:10–CV–2163–B, 2012 U.S. Dist. LEXIS 134620, at *36 (N.D. Tex. Sept. 20, 2012); Vought Aircraft Indus. v. Falvey Cargo Underwriting, Ltd., 729 F. Supp. 2d 814, 843–44 (N.D. Tex. 2010); Cristobal v. Allen, No. 01–09–00126–CV, 2010 Tex. App. LEXIS 5829, at *16–17 (Tex. App.—Houston [1st Dist.] July 22, 2010, no pet.) (mem. op.); Argyle Indep. Sch. Dist. *ex rel.* Bd. of Trs. v. Wolf, 234 S.W.3d 229, 246–47 (Tex. App.—Fort Worth 2007, no pet.); Walker v. Cotter Props., Inc., 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.).

³⁷⁵Hern Family Ltd. P'ship v. Compass Bank, 863 F. Supp. 2d 613, 628 (S.D. Tex. 2012); Williams v. Glash, 789 S.W.2d 261, 265 (Tex. 1990) (“The doctrine of mutual mistake must not routinely be available to avoid the results of an unhappy bargain. Parties should be able to rely on the finality of freely bargained agreements. However, in narrow circumstances a party may raise a fact issue for the trier of fact to set aside a release under the doctrine of mutual mistake.”); Burlington N. R.R. Co. v. Sw. Elec. Power Co., 925 S.W.2d 92, 97 (Tex. App.—Texarkana 1996), (“The doctrine does not operate to rescue a party from the consequences of a bad bargain, and the enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract.”) *aff'd*, 966 S.W.2d 467 (Tex. 1998).

³⁷⁶Bridgewater v. Double Diamond-Del., Inc., No. 3:09–CV–1758–B ECF, 2011 U.S. Dist. LEXIS 47248, at *60 (N.D. Tex. Apr. 29, 2011) (rejecting class for non-uniformity of waiver case facts); Sw. Bell Tel. Co. v. Mktg. on Hold Inc., 308 S.W.3d 909, 923 (Tex. 2010) (rejecting class for overbilling); Spector v. Norwegian Cruise Line Ltd., No. 01–02–00017–CV, 2004 Tex. App.

The boundaries between unjust enrichment and quantum meruit or money had and received are not clearly established: some cases accept claims for unjust enrichment that might be better deemed claims for quantum meruit or money had and received and occasionally courts will misinterpret claims for unjust enrichment in equity as claims for quantum meruit³⁷⁷ or money had and received.³⁷⁸ Other courts hold that there is no difference between the unjust enrichment and quantum meruit³⁷⁹ or money had and received.³⁸⁰

So far, few claims for unjust enrichment that involve intellectual property have survived the defense of federal preemption. Even when the claim is not dismissed as a matter of law,³⁸¹ the plaintiff is required to amend the claim to explain to a skeptical court how misappropriation of intellectual property satisfies the *Heldenfels* standard.³⁸² Claims relating to trade secrets have more success but can still be problematic.³⁸³

LEXIS 2941, at *29–30 (Tex. App.—Houston [1st Dist.] Mar. 30, 2004, no pet.) (mem. op.) (denying class for overbilling); *Union Pac. Res. Grp., Inc. v. Hankins*, 51 S.W.3d 741, 754 (Tex. App.—El Paso 2001), *rev'd on other grounds*, 111 S.W.3d 69 (Tex. 2003) (certifying class for underpayment of royalties).

³⁷⁷ *Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (interpreting claim for unjust enrichment as a claim for quantum meruit).

³⁷⁸ *Friberg-Cooper Water Supply Corp. v. Elledge*, 197 S.W.3d 826, 832, 829 n.13 (Tex. App.—Fort Worth 2006), *rev'd on other grounds*, 240 S.W.3d 869 (Tex. 2007) (holding claim for unjust enrichment is interpreted as claim for money had and received).

³⁷⁹ *Treeneer v. Reynolds*, No. 13–98–484–CV, 2000 Tex. App., LEXIS 5748, at *15 (Tex. App.—Corpus Christi Aug. 24, 2000, no pet.) (not designated for publication) (stating that unjust enrichment is the same as quantum meruit).

³⁸⁰ *Hancock v. Chi. Title Ins. Co.*, 635 F. Supp. 2d 539, 561 (N.D. Tex. 2009).

³⁸¹ *Aguirre v. Powerchute Sports, LLC*, No. SA–10–CV–702–XR, 2011 U.S. Dist. LEXIS 86207, at *32 (W.D. Tex. Aug. 4, 2011) (approving FED. R. CIV. P. 12(b)(6) motion for claim of fraud for patent violation); *Mary Kay, Inc. v. Weber*, 601 F. Supp. 2d 839, 864 (N.D. Tex. 2009) (rejecting claim for unjust enrichment when a trademark claim would be more specific); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 768–69 (N.D. Tex. 2006) (holding claim for unjust enrichment is preempted by copyright statute); *Novell, Inc. v. CPU Distrib., Inc.*, No. H–97–2326, 2000 U.S. Dist. LEXIS 9975, at *33 (S.D. Tex. May 4, 2000) (permitting claim for unjust enrichment to include fraud for misrepresenting itself as an authorized Novell reseller and through the unauthorized use of Novell trademarks).

³⁸² *Prophet Capital Mgmt., Ltd. v. Prophet Equity, LLC*, A–09–CA–316 LY, 2009 U.S. Dist. LEXIS 88474, at *7–8 (W.D. Tex. Sept. 25, 2009) (rejecting unjust enrichment claim for violation of trademark).

³⁸³ *Target Strike, Inc. v. Marston & Marston, Inc.*, No. SA–10–CV–0188 OLG (NN), 2010 U.S. Dist. LEXIS 115222, at *14–15 (W.D. Tex. Oct. 27, 2010) (adopting magistrate's decision) (denying claim for conversion or unjust enrichment related to trade secrets); *Tex. Integrated*

While there have been a few case opinions for unjust enrichment that assert claims or seek remedies that resemble traditional claims for unjust enrichment in equity, they appear to be a minority of the total claims.³⁸⁴ At present, there is no large group of cases in which a claim for unjust enrichment in equity is overtly rejected for want of jurisdiction in equity.³⁸⁵

D. Unconscionability

Occasionally an appellate court has approved a claim for unjust enrichment on the basis that jurisdiction in equity is broader than the *Heldenfels* standard, asserting jurisdiction based on the unconscionability of the defendant retaining the disputed property or money.³⁸⁶ The more conservative side of this group points out that *Heldenfels* was silent on passive unjust enrichment, which has been a basis for jurisdiction of a group of cases before and after *Heldenfels*.³⁸⁷ They focus on the statement

Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc., 300 S.W.3d 348, 380–81 (Tex. App.—Dallas 2009, pet. denied) (reversing summary judgment for unjust enrichment based on misuse of trade secrets and confidential information); SP Midtown, LTD. v. Urban Storage, L.P., No. 14–07–00717–CV, 2008 Tex. App. LEXIS 3364, at *23 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.) (finding that undue advantage includes misappropriation of trade secrets).

³⁸⁴Mayo v. Hartford Life Ins. Co., 354 F.3d 400, 410 (5th Cir. 2004) (holding that unjust enrichment is viable alternative claim for employer's wrongful holding of life insurance policy on employee); Kirkpatrick v. Jasmine Inc., No. 3:06–CV–0793–BH, 2012 U.S. Dist. LEXIS 46839, at *16 (N.D. Tex. Apr. 2, 2012) (denying summary judgment for claim for disgorgement); Renwick v. Bonnema, No. 2:08–CV–337 (TJW), 2009 U.S. Dist. LEXIS 11862, at *9–10 (E.D. Tex. Feb. 13, 2009); Newington Ltd. v. Forrester, No. 3:08–CV–0864–G, 2008 U.S. Dist. LEXIS 92601, *10–12 (N.D. Tex. Nov. 13, 2008) (denying FED. R. Civ. P. 12(b)(6) motion for unjust enrichment against escrow agent for waste of assets); SkillMaster Staffing Servs. v. J.M. Clipper Corp., No. H–04–3619, 2006 U.S. Dist. LEXIS 57969, at *23 (S.D. Tex. Aug. 17, 2006) (denying summary judgment for fraud in which the remedy is measured as the defendant's savings); Sharp v. Mosier, No. 04–11–00449–CV, 2012 Tex. App. LEXIS 4437, at *11–12 (Tex. App.—San Antonio June 6, 2012, no pet.) (mem. op.); LJ Charter, L.L.C. v. Air Am. Jet Charter, Inc., No. 14–08–00534–CV, 2009 Tex. App. LEXIS 9469, at *37–38 (Tex. App.—Houston [14th Dist.] Dec. 15, 2009, pet. denied) (mem. op.); Mowbray v. Avery, 76 S.W.3d 663, 679–80 (Tex. App.—Corpus Christi 2002, pet. denied).

³⁸⁵But see Angelo Broad., Inc. v. Satellite Music Network, Inc., 836 S.W.2d 726, 731 (Tex. App.—Dallas 1992, writ denied), (denying unjust enrichment when the contract was fully performed and remaining debt was liquidated) *overruled on other grounds by*, Hines v. Hash, 843 S.W.2d 464, 467 (Tex. 1992).

³⁸⁶See *infra* notes 387, 392.

³⁸⁷County of El Paso v. Jones, EP–09–CV–00119–KC, 2009 U.S. Dist. LEXIS 113149, at *45–46 (W.D. Tex. Dec. 4, 2009); RDG Ltd. P'ship v. Gexa Corp., No. 14–04–00679–CV, 2005

in *Barrett*, which distinguishes unjust enrichment between the defendant's active and passive behavior in obtaining the disputed property.³⁸⁸ The key trait to this sub-group is their emphasis on the passive nature of how the defendant gained the property.³⁸⁹ The facts for a few cases do relate to passive receipt³⁹⁰ but other cases blur the boundary between active and passive, alleging unconscionable receipt that is related to the defendant's actions.³⁹¹

Tex. App. LEXIS 3123, at *13 (Tex. App.—Houston [14th Dist.] April 26, 2005, no pet.) (mem. op.) (“We fail to see any contradiction between the two doctrines, but, instead, find they are fully compatible, and any determination on unjust enrichment will necessarily depend upon the evidence presented in the case. In any event, several courts of appeals have relied on the ‘passively received’ language even after the Texas Supreme Court decided *Heldenfels Brothers*. Moreover, the [S]upreme [C]ourt in *Heldenfels Brothers* did not address the ‘passively retained’ language or otherwise disapprove or overrule any case law applying that language in unjust enrichment analysis. Therefore, we conclude the ‘passively retained’ language is still viable. RDG’s third issue is overruled.” (footnote omitted) (citing *Heldenfels Bros., Inc. v. City of Corpus Christi* 832 S.W.2d 39, 40–42 (Tex. 1992); *Gotham Ins. Co. v. Petroleum Dev. Corp.*, No. 04–01–00375–CV, 2003 Tex. App. LEXIS 6297, at *19 (Tex. App.—San Antonio, July 23, 2003, pet. denied) (mem. op.))).

³⁸⁸ *Barrett v. Ferrell*, 550 S.W.2d 138, 143 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.) (“It is fundamental that for a person to be entitled to restitution, he must show not only that there was unjust enrichment, but also that the person sought to be charged had wrongfully secured a benefit or had passively received one which it would be unconscionable for him to retain.”).

³⁸⁹ *Jones*, 2009 U.S. Dist. LEXIS 113149, at *45–46 (“Texas law also reveals that unjust enrichment can touch ‘passively received’ benefits, where the nexus is some related third party’s acts against a plaintiff, when it would be ‘unconscionable for the receiving party to retain’ them.” (quoting *Mowbray*, 76 S.W.3d at 679))).

³⁹⁰ *Gotham Ins. Co.*, 2003 Tex. App. LEXIS 6297, at *19 (“Therefore, under the JOA, WRI was liable for 12.5% and the Fund was liable for 75% of ‘all costs and liabilities incurred in operations’ under the JOA. However, as noted above, \$ 1,823,156.25 in blow out costs were paid by Gotham via the Rush Johnson escrow fund. To this extent, the debts of WRI and the Fund under the JOA for operational costs was extinguished. Thus, WRI and the Fund passively benefitted from and were unjustly enriched by Gotham’s payment of the insurance proceeds under the mistaken belief that there was coverage.”); *Cnty. Mut. Ins. Co. v. Owen*, 804 S.W.2d 602, 606 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (“For a party to be entitled to restitution, it must show the person sought to be charged wrongfully secured a benefit or passively received one which it was unconscionable to retain. If the insurance company has grounds for either, it is that Owen passively accepted a benefit he should not have retained.” (citation omitted)).

³⁹¹ *Patino v. Lawyers Title Ins. Corp.*, No. 3: 06–CV–1479–B, 2007 U.S. Dist. LEXIS 85457, at *22–24 (N.D. Tex. Jan. 11, 2007) (“Lawyers Title next argues that Patina’s mere allegation that Lawyers Title failed to apply the required reissue discount to the premium for Patina’s new mortgage title policy fails to state a claim for unjust enrichment under Texas law . . . Here, Patino has alleged that he qualified for a reissue discount for lender title insurance under Texas law, that Lawyers Title failed to give it to him, and that, in so doing, Lawyers Title wrongfully

The less conservative part of this sub-group of cases asserts a cause of action based on unconscionability, seemingly regardless of whether the defendant's holding of the asset or money in dispute was from active or passive unjust enrichment.³⁹² This group of cases most closely approximates traditional unjust enrichment in equity.³⁹³ Some of these proscribe broad jurisdiction, but others resemble actions for money had and received which already enjoys broad jurisdiction.³⁹⁴

and/or passively received a benefit which would be unconscionable for it to retain. Patino further alleges that Lawyers Title lacked good faith in accepting the allegedly illegal overcharges and obtained a benefit by taking undue advantage of him and the class he seeks to represent. The Court finds that these allegations are sufficient to state an unjust enrichment claim under Texas law." (citations omitted)); *RDG Ltd. P'ship*, 2005 Tex. App. LEXIS 3123, at *10–11 ("We find the evidence shows that RDG obtained the benefit of the electricity by the taking of undue advantage of Gexa's mistake when it refused to pay for the electricity. Gexa mailed six invoices to the address at 3633 Shaver (although addressed to Jesus Fornadeo) for the period from June 18, 2002, through October 18, 2002, which were never returned [sic] Gexa. When Gexa had not received payment for any of the invoices, Gexa's collections manager contacted RDG about the unpaid invoices. An RDG employee admitted to Gexa that RDG had not been billed for electricity by its usual provider—Reliant Energy. While initially agreeing to pay Gexa for the electricity, RDG ultimately refused to pay any of the invoices for the electricity it had received and made use of, thus obtaining a benefit by the taking of an undue advantage.").

³⁹² *United States v. Blanche*, No. SA-95-CA-0419, 1997 U.S. Dist. LEXIS 3122, at *27–28 (W.D. Tex. 1997) ("Finally, this Court finds that the doctrine of unjust enrichment should be applied in this case. It would be unconscionable to allow Hewitt to keep his interest in the property as well as the substantial benefits conferred to him by the Blanches. The purpose of restitution under this remedy is to do what justice demands."); *Drawhorn v. Qwest Commc'ns Int'l*, 121 F. Supp. 2d 554, 562–63 (E.D. Tex. 2000); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied); *SP Midtown, LTD v. Urban Storage, L.P.*, No. 14–07–00717–CV, 2008 Tex. App. LEXIS 3364, at *22 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.); *Spector v. Norwegian Cruise Line Ltd.*, No. 01–02–00017–CV, 2004 Tex. App. LEXIS 2941, at *27–28 (Tex. App.—Houston [1st Dist.] Mar. 30, 2004, no pet.) (mem. op.); *Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied) ("Recovery is based on fundamental principles of justice or equity and good conscience which give rise to an implied or quasi-contract to repay. A right of recovery under unjust enrichment is essentially equitable and does not depend upon the existence of a wrong." (citation omitted)).

³⁹³ See, e.g., *Blanche*, 1997 U.S. Dist. LEXIS 3122, at *27–28.

³⁹⁴ *Chesapeake Louisiana, L.P. v. Buffco Prod., Inc.*, No. 2:10-CV-359 (JRG), 2012 U.S. Dist. LEXIS 89760, at *14–15 (E.D. Tex. June 28, 2012) ("In this circumstance, the Court looks to the 'simple justice of the case' and inquires whether Buffco and Freeman have received money which rightfully belongs to Harleton and Freeman Capital." (quoting *Greer v. White Oak State Bank*, 673 S.W.2d 326, 329 (Tex. App.—Texarkana, no writ))); *Oxford Fin. Cos. v. Velez*, 807 S.W.2d 460, 466 (Tex. App.—Austin 1991, writ denied) ("If Oxford is not compelled to restore the purchase price to Mid-Tex, Oxford will have gained almost \$ 15,000 although it gave Mid-Tex

E. Constructive Trusts

The remedy³⁹⁵ of constructive trust grants specific restitution³⁹⁶ of identified assets by hypothecating equitable title to the successful claimant.³⁹⁷ In cases in which the defendant is shown to unjustly hold legal title to property, the law in equity asserts that the defendant's legal title is superseded by the plaintiff's equitable title.³⁹⁸ The doctrine is based on the principle that the trust forms when the defendant unjustly obtains legal

nothing of value in return. As a matter of law, Oxford's retention of the purchase price under these circumstances would be unconscionable.").

³⁹⁵ Most courts and authorities reject constructive trust as a cause of action. *See, e.g.*, *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010); *Beverly Found. v. Lynch*, 301 S.W.3d 734, 736 (Tex. App.—Amarillo 2009, no pet.); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. f (2010). *But see* *Mowbray v. Avery*, 76 S.W.3d 663, 681 (Tex. App.—Corpus Christi 2002, pet. denied) ("We first note that while it is true that a constructive trust is an equitable remedy, it would be overly simplistic to state that therefore a suit for a constructive trust cannot lie as a distinct action." (citation omitted)).

³⁹⁶ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. c (2010) ("Whatever the defendant's assets, specific restitution will be more attractive than a money judgment when the property in question has special value for the claimant; when it has appreciated in value; when its value might be difficult to establish; or when recovery of a specific thing is merely less costly than proof and recovery of its value. Constructive trust is available in all these cases, though only if the claimant can satisfy the requirements of specific identification (tracing).").

³⁹⁷ The hypothecation process is sometimes referred to as a legal fiction. *See* *Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377, 381 (Tex. App.—Tyler 2000, pet. denied) (citing *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984)).

³⁹⁸ *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 259 (Tex. 1951); *Edwards v. Strong*, 213 S.W.2d 979, 981 (Tex. 1948) ("The purpose of this suit is not to enforce a trust against any interest in the land created by the option, but to impose a trust upon the legal title which passed to Edwards by the deed executed to him by Griffin with all the legal formalities."); *Talley v. Howsley*, 176 S.W.2d 158, 160 (Tex. 1943) ("A constructive trust is a relationship with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another, on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property."); *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied) ("The constructive trust may be defined as a device used by chancery to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." (quoting *GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUST AND TRUSTEES* § 471 (rev. 2d ed. 1983))); *In re Marriage of Nolder*, 48 S.W.3d 432, 434 (Tex. App.—Texarkana 2001, pet. denied) ("When a party in such a situation retains title to property and is unjustly enriched by his actions with that property, the creation of a constructive trust is an appropriate remedy."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (2010).

title;³⁹⁹ the trust appears or springs into existence.⁴⁰⁰ The role of the court in equity is only to acknowledge the trust with the defendant as trustee, confirming plaintiff's claim as superior to that of the defendant and his creditors.⁴⁰¹ This doctrine of the 'springing trust' also simplifies determining the starting date for the plaintiff's claim to all revenues or benefits that are produced from the assets in the trust.⁴⁰²

The remedy of constructive trust can also be an optional enhancement to protect the priority of the beneficiary's equitable interest.⁴⁰³ Typically, the

³⁹⁹RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt e (2010) ("The answer to the question posed, therefore, is that the constructive trust 'exists' from the moment of the transaction on which restitution is based; or (if the court prefers) that the constructive trust arises on the date of judgment, but that the state of title it describes 'relates back' to the transaction between the parties. The practical consequence is that the ownership rights of the constructive trust beneficiary, once recognized, are protected from the moment the trustee acquires legal title.").

⁴⁰⁰United States v. Carter, 217 U.S. 286, 309 (1910) ("If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it."); Omohundro v. Matthews, 341 S.W.2d 401, 408–09 (Tex. 1960) ("This trust arose not because there was any agreement for the title to be taken in the name of petitioner, and the property to be held by him in trust for the respondents—as would be necessary to constitute an express trust—but, because under the facts, equity would raise the trust to protect the rights of the respondents, and to prevent the unjust enrichment of petitioner by his violation of his promise and duty to the respondents to take title in the name of the three of them, and for their mutual profit and advantage."); Pope v. Garrett, 211 S.W.2d 559, 561 (Tex. 1948) ("The legal title passed to the heirs of Carrie Simons when she died intestate, but equity deals with the holder of the legal title for the wrong done in preventing the execution of the will and impresses a trust on the property in favor of the one who is in good conscience entitled to it."); Eglin v. Schober, 759 S.W.2d 950, 953 (Tex. App.—Beaumont 1988, writ denied).

⁴⁰¹RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. e (2010); Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 297–98 ("[I]f the state court would impose a constructive trust on certain property in an action between the claimant and the debtor, the bankruptcy court treats the claimant as the equitable owner of the property and allows her to recover it in bankruptcy, to the exclusion of other creditors").

⁴⁰²RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. e ("For example, income from constructive trust property is for the account of the claimant from the date the property was acquired by the defendant, not from the date of a subsequent decree recognizing the existence of a constructive trust.").

⁴⁰³Sw. Livestock & Trucking Co. v. Dooley, 884 S.W.2d 805, 811 (Tex. App.—San Antonio 1994, writ denied) ("The judgment is therefore reversed and this cause remanded to the trial court

remedy of constructive trust by itself does not resolve all of the plaintiff's claims especially when the property to be included in the trust, the res, has generated or will generate revenue or use value.⁴⁰⁴ Either as a part of the trial that awards the constructive trust or in subsequent motion practice, the applicable benefits and expenses need to be resolved in a manner that is consistent with the principles of an accounting in equity.⁴⁰⁵

The constructive trust can be an important addition to rescission⁴⁰⁶ or an accounting in equity.⁴⁰⁷ The trust establishes the plaintiff's security interest in the assets while it enables the claimant to trace and securitize proceeds of the assets or operations⁴⁰⁸ and the accounting allocates cash flow generated since the inception of the trust.⁴⁰⁹

for an accounting of the corporate assets of Southwest Livestock Exchange, Inc. If the trial court deems it necessary to protect the assets of the corporation, a constructive trust may also be imposed.").

⁴⁰⁴ *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. 1 ("A determination that the defendant holds particular property in constructive trust for the claimant does not necessarily resolve all questions relating to the extent of the defendant's unjust enrichment at the expense of the claimant. The defendant may have used the claimant's property to earn a profit.").

⁴⁰⁵ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. 1.

⁴⁰⁶ *Meadows*, 516 S.W.2d at 129.

⁴⁰⁷ See *supra* note 297.

⁴⁰⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. f (2010) ("By contrast, constructive trust supplies the remedy by which the original owner can reach the traceable product of stolen property, whether in the hands of a thief or anyone else not qualifying as a bona fide purchaser.").

⁴⁰⁹ *Geo-Goldenrod #2 #3 & #4 Joint Venture v. Rose (In re Thuringia, LLC)*, No. 09-34555, 2010 Bankr. LEXIS 2820, at *6-7 (Bankr. N.D. Tex. Aug. 25, 2010) ("A constructive should be imposed on the Defendants and the property in question in order for the Joint Venture to receive, collect and distribute all monies received from Cypress pursuant to the Lease."); *Bright v. Addison*, 171 S.W.3d 588, 601 (Tex. App.—Dallas 2005, pet. denied); *Bristol v. Placid Oil Co.*, 74 S.W.3d 156, 158 (Tex. App.—Amarillo 2002, no pet.) ("Fourth, given the foregoing definition of a constructive trust, Bristol effectively demanded the conveyance of both the mineral leasehold at issue and revenue produced therefrom to himself."); see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. 1 ("If the defendant has had possession of the constructive trust property for any length of time, the defendant may be liable for rent or another measure of use value, subject to credits for taxes or similar expenses paid by the defendant. In these and other cases, a judicial order stating that B holds X in constructive trust for A is easily combined with an order requiring B (as constructive trustee) to account to A, in the same manner as a trustee's accounting under an express trust, for the purpose of determining B's net liability in restitution.").

Texas courts require three elements for a constructive trust: (1) the breach of a special trust, fiduciary relationship, or actual fraud; (2) unjust enrichment of the wrongdoer; and (3) tracing to an identifiable res.⁴¹⁰ Texas requires liability for fraud or breach of fiduciary duty⁴¹¹ even though the Restatement Third is not restricted to specific claims: only that the res must have been acquired non-consensually.⁴¹² However, there is some indication that a constructive trust in Texas may also be justified upon proof of quantum meruit,⁴¹³ conversion,⁴¹⁴ and the general allowance for mistake or accident.⁴¹⁵

There is an important contrast to draw between the function of constructive trusts in Texas law and the regard in which they are held by

⁴¹⁰ Estate of Wallis, No. 12-07-00022-CV, 2010 Tex. App. LEXIS 3710, at *11 (Tex. App.—Tyler 2010, no pet.) (mem. op.) (citing Troxel v. Bishop, 201 S.W.3d 290, 297 (Tex. App.—Dallas 2006, no pet.)).

⁴¹¹ Talley v. Howsley, 176 S.W.2d 158, 160 (Tex. 1943); III Forks Real Estate, L.P. v. Cohen, 228 S.W.3d 810, 817 (Tex. App.—Dallas 2007, no pet.); Troxel v. Bishop, 201 S.W.3d 290, 297 (Tex. App.—Dallas 2006, no pet.); Mangione v. Jaffe, 61 S.W.3d 591, 593 (Tex. App.—San Antonio 2001, pet. dismissed) (“Mangione’s pleadings asserted a single cause of action—breach of contract. Mangione did not allege actual or constructive fraud, which is an essential element in the creation of a constructive trust.”).

⁴¹² RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. a (“A transaction in which the defendant (i) has been unjustly enriched (ii) by acquiring legal title to specifically identifiable property (iii) at the expense of the claimant or in violation of the claimant’s rights is one in which—by the traditional formula—the defendant’s title to the property is subject to the claimant’s equitable interest.”).

⁴¹³ Thomason v. Collins & Aikman Floorcoverings, Inc., No. 04-02-00870-CV, 2004 Tex. App. LEXIS 2823, at *16 (Tex. App.—San Antonio March 31, 2004, pet. denied) (mem. op.) (“Therefore, if Thomason established his claim for either unjust enrichment or quantum meruit, he may have been entitled to a constructive trust for the difference between the prices C&A quoted to him and the prices C&A actually charged Gomez.”).

⁴¹⁴ Amarillo Oil Co. v. Energy-Agri Prods., Inc., 32 Tex. Sup. Ct. J. 252, 1989 Tex. LEXIS 15, at *21–22 (Tex. March 8, 1989) *withdrawn and superseded on other grounds*, 794 S.W.2d 20 (Tex. 1990); Countrywide Home Loans, Inc. v. Howard, 240 S.W.3d 1, 6 (Tex. App.—Austin 2007, pet. denied) (“Typically, in a conversion suit, the claimant alleges that the proceeds of the converted property were used to purchase real estate and then seeks a constructive trust on that real property.”); Paschal v. Great W. Drilling, Ltd., 215 S.W.3d 437, 443, 457 (Tex. App.—Eastland 2006, pet. denied).

⁴¹⁵ Simmons v. Wilson, 216 S.W.2d 847, 853 (Tex. Civ. App.—Waco 1949, no writ) (“Having thereafter discovered the mistake in the designation of the leased premises and having in practical effect corrected the same so as to conform with the true intention of the parties in so far as he and the Rawlinsons were concerned, we think appellant, in all good conscience, ought to have reinstated the equitable overriding royalty interests held by appellees on Survey No. 43, rather than to have offered them a reinstatement thereof on Survey No. 44.”).

our Supreme Court. The particulars of constructive trusts would suggest a remedy that improves the claimant's ability to realize and protect her equity interest in assets and their proceeds.⁴¹⁶ Yet the Court extols the constructive trust not for its protection of equitable interests, but for its ability to reach assets wrongly retained by the defendant and thereby realize justice or equity that would otherwise been denied under the common law, i.e. the safety net.⁴¹⁷

It is interesting that such statements of law are generally used to praise constructive trusts and not the law in equity in general or the application of restitution or unjust enrichment as causes of action.⁴¹⁸ Consider the following statement in a 1980 Supreme Court opinion:

A similar loosely defined but useful equitable doctrine is the constructive trust. It is unlike other trusts, but equity raised it up in the name of good conscience, fair dealing, honesty, and good morals. "A constructive trust is the formula through which the conscience of equity finds expression." Equity provides the idea of constructive trusts as a tool to "frustrate skullduggery," even though that kind of a trust is also grounded upon elusive principles. Such a trust is purely a creature of equity. Its form is practically without limit, and its existence depends upon the circumstances.⁴¹⁹

⁴¹⁶Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. INST. L. REV. 265, 290 (1998) ("The truth about constructive trust and bankruptcy is that only in bankruptcy does constructive trust really matter.").

⁴¹⁷*Fitz-Gerald v. Hull*, 237 S.W.2d 256, 263 (Tex. 1951) ("[E]quity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust." (quoting 4 POMEROY, *supra* note 117 § 1053)); *Schneider v. Sellers*, 84 S.W. 417, 421 (Tex. 1905).

⁴¹⁸*Compare Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 851 (Tex. 1980) (stating that a constructive trust is "practically without limit"), *with Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) (stating that recovery through unjust enrichment is allowed for fraud, duress, or the taking of an undue advantage).

⁴¹⁹*Bocanegra*, 605 S.W.2d at 851 (Tex. 1980) (footnote and citations omitted) (quoting *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919)).

There are many other eloquent quotes from the Court about constructive trusts that are consistent with an expansive view of jurisdiction in equity but the context of this quote is the point of interest.⁴²⁰ In *Bocanegra*, the Court was discussing the election doctrine and described constructive trust as an analogous doctrine in equity.⁴²¹ The terms ‘law in equity’ or unjust enrichment would have been used by other authorities in a generalization about the purpose of the law in equity but our Court considers constructive trust to be the better paradigm.⁴²² The Court’s opinion in *Burrow* again relies on constructive trust as an analogy to justify forfeiture of fiduciary fees as a similar remedy in equity.⁴²³ The features of security interest and trust administration in a constructive trust are not of major interest to fee forfeiture, but mainly the ability to remedy otherwise irreparable injustice.⁴²⁴

⁴²⁰ *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999) (“Constructive 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. . . . Moreover, 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.”); *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984) (“[C]onstructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with the basic principles of equity and justice. In *Meadows* we further stated that a transaction may, depending on the circumstances, provide the basis for a constructive trust where one party to that transaction holds funds which in equity and good conscience should be possessed by another.” (citing *Meadows*, 516 S.W.2d at 131)); *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948) (“It has been said that ‘The specific instances in which equity impresses a constructive trust are numberless,—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.’” (quoting 4 POMEROY, *supra* note 117, § 1045)); *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.—Fort Worth 2005, no pet.) (“The purpose of a constructive trust is to right wrongs that cannot be addressed under other legal theories.”).

⁴²¹ *Bocanegra*, 605 S.W.2d at 851.

⁴²² *Compare CML V, LLC v. Bax*, 28 A.3d 1037, 1044 (Del. 2011), *as corrected* (Sept. 6, 2011) (“[J]udicially-created equitable doctrines may be extended so long as the extension is consistent with the principles of equity. To that end, courts may extend, in equity, the judicially created equitable doctrine of corporate derivative standing to address new circumstances.” (footnote omitted)), *with Bocanegra*, 605 S.W.2d at 851.

⁴²³ *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999) (“Constructive 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. . . . Moreover, 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.” (quoting *Meadows*, 516 S.W.2d at 131)).

⁴²⁴ *See Burrow*, 997 S.W.2d at 241.

As a constructive trust is a remedy and not a cause in action, it is difficult to understand how the remedy by itself rights irreparable injuries.⁴²⁵ The key to the safety net lies in the jurisdiction for a cause of action such as unjust enrichment. If the jurisdiction for unjust enrichment is limited to established claims like breach of fiduciary duty and fraud, then the safety net will only operate to save claims that would otherwise be procedurally precluded, not rights without remedies.

The single most influential authority on constructive trusts in Texas for more than 100 years has been Pomeroy's Equity Jurisprudence.⁴²⁶ He shows that credit for the safety net is due to the fact that equity has sufficient jurisdiction to impress a constructive trust:

In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of

⁴²⁵ See *supra* note 361.

⁴²⁶ Some of the more significant cases to directly cite 4 POMEROY, *supra* note 117, § 1053 are *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 262–63 (Tex. 1951); *Hill v. Preston*, 34 S.W.2d 780, 786 (Tex. 1931); *Schneider v. Sellers*, 84 S.W. 417, 421 (Tex. 1905); *Leach v. Conner*, No. 13–01–468–CV, 2003 Tex. App. LEXIS 10173, at *24–25 (Tex. App.—Corpus Christi Dec. 4, 2003, no pet.) (mem. op.); *Wheeler v. Blacklands Prod. Credit Ass'n*, 627 S.W.2d 846, 849 (Tex. App.—Fort Worth 1982, no writ); *Hill v. Stampfli*, 290 S.W. 522, 524 (Tex. Comm'n App. 1927, holding approved) (“This text has often been quoted and the principle applied in this state.”).

complete justice, although the law may also give the remedy of damages against the wrong-doer.⁴²⁷

Pomeroy's influence on Texas case opinions starts no later than 1889⁴²⁸ and continues through today.⁴²⁹ For example, *Pope* relies on two prior Supreme Court opinions: *Hill v. Stampfli* and *Binford v. Snyder*.⁴³⁰ The *Hill v. Stampfli* opinion relies heavily on Pomeroy and a paraphrase of the maxims discussed earlier,⁴³¹ which is repeated in *Pope*.⁴³² *Binford* has also been cited for expansive jurisdiction,⁴³³ but it relies on a quote from Ruling Case

⁴²⁷ 4 POMEROY, *supra* note 117, § 1053.

⁴²⁸ *Zundell v. Gess*, 10 S.W. 693, 694 (Tex. 1889) ("It may be conceded that 'whenever one party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it,' a constructive trust will arise, whether the money came to the possession of such person by accident, mistake of fact, or fraud." (quoting 2 POMEROY, *supra* note 117, § 1047)).

⁴²⁹ *Leach v. Conner*, No. 13-01-468-CV, 2003 Tex. App. LEXIS 10173, at *24-25 (Tex. App.—Corpus Christi 2003, no pet.) (mem. op.) ("The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer." (citing *Fitz-Gerald*, 237 S.W.2d at 262-63 (quoting 4 POMEROY, *supra* note 117, § 1053))).

⁴³⁰ *Binford v. Snyder*, 189 S.W.2d 471, 473 (Tex. 1945); *Hill*, 290 S.W. at 524 ("This text has often been quoted and the principle applied in this state. It is indeed true that the forms and varieties of these trusts are practically without limit. They are as varied as human ingenuity can make them, each case depending upon the circumstances surrounding the acquisition of the legal title. Equity is never wanting in power to do complete justice between the parties or even as to third parties dealing with the property where no superior rights have supervened upon the principle of innocent purchaser." (citations omitted)).

⁴³¹ *Hill*, 290 S.W. at 524.

⁴³² *Pope v. Garrett*, 211 S.W.2d 559, 562 Tex. 1948).

⁴³³ *Sullivan v. Barnett*, 471 S.W.2d 39, 47 (Tex. 1971); *Pope*, 211 S.W.2d at 560; *Warner v. Winn*, 197 S.W.2d 338, 341 (Tex. 1946); *Lesikar v. Rappeport*, 33 S.W.3d 282, 303 (Tex. App.—Texarkana 2000, pet. denied); *Stodder v. Evans*, 860 S.W.2d 651, 654 (Tex. App.—Waco 1993, writ denied); *Consolidated Bearing & Supply Co. v. First Nat'l Bank*, 720 S.W.2d 647, 649 (Tex. App.—Amarillo 1986, no writ); *Batten v. Batten*, 497 S.W.2d 394, 398 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.); *Consolidated Gas & Equipment Co. v. Thompson*, 397 S.W.2d 260, 262-63 (Tex. Civ. App.—Amarillo 1965) *rev'd on other grounds*, 405 S.W.2d 333 (Tex. 1966); *Purcell v. Snowden*, 387 S.W.2d 138, 141 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.); *Gathright v. Western Alliance Ins. Co.*, 324 S.W.2d 894, 897 (Tex. Civ. App.—Austin 1959); *Cadmus v. Evans*, 320 S.W.2d 176, 183 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.); *Mathews v. Mathews*, 310 S.W.2d 629, 633 (Tex. Civ. App.—Houston [1st Dist.] 1958, no writ); *Burgess v. Burgess*, 282 S.W.2d 118, 120-21 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.); *Dennis v. Dennis*, 256 S.W.2d 964, 965 (Tex. Civ. App.—Amarillo 1952, no writ); *Simmons v. Wilson*, 216 S.W.2d 847, 853 (Tex. Civ. App.—Waco 1949, no writ).

Law, which is almost identical to section 1053 of Pomeroy.⁴³⁴ Together, Pomeroy's section 1053 and *Binford* have been directly quoted or cited by seven Supreme Court opinions and dozens of appellate opinions, including early influential case opinions that influenced third generation opinions.⁴³⁵ For example, *Fitzgerald* and *Pope*, which both advocate broad jurisdiction in equity based on the unconscionability of the defendant retaining the disputed asset, are favorably cited by the principal Supreme Court opinions on constructive trusts.⁴³⁶

The landmark case of *Pope v. Garrett* is a good example of how a constructive trust can fulfill equity's role as a safety net.⁴³⁷ The case related to the estate of an elderly woman, Carrie Simons, who died intestate.⁴³⁸ She died intestate because two of her natural heirs restrained her from executing a will that bequeathed her assets to someone outside her family, Claytonia Garrett.⁴³⁹ The will went unexecuted and the estate assets were distributed to her natural heirs, some of whom had no knowledge of the duress.⁴⁴⁰ The key issue was whether the innocent heirs should have been allowed to retain their share of the estate or whether their share of the assets should have also been included in a constructive trust for Garrett.⁴⁴¹ The court found that the

⁴³⁴ *Binford*, 189 S.W.2d at 472 (“It is a well settled general rule that if one person obtains the legal title to property, not only by fraud, or by violation of confidence of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.” (quoting 26 RULING CASE LAW § 83 (William M. McKinney & Burdett A. Rich eds., 1920))).

⁴³⁵ *Sullivan*, 471 S.W.2d at 47; *Omohundro v. Matthews*, 341 S.W.2d 401, 416 (Tex. 1960); *Barker v. Coastal Builders, Inc.*, 271 S.W.2d 798, 807 (Tex. 1954); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 262–63 (Tex. 1951); *Sevine v. Heissner*, 224 S.W.2d 184, 186 (Tex. 1949); *Pope*, 211 S.W.2d at 560; *Warner*, 197 S.W.2d at 341.

⁴³⁶ *Fitz-Gerald*, 237 S.W.2d at 262–63 is cited by *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); and *Omohundro*, 341 S.W.2d at 405. *Pope*, 211 S.W.2d at 560, 562, is cited by *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992); *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984); *Bounds v. Caudle*, 560 S.W.2d 925, 928 (Tex. 1977); and *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974).

⁴³⁷ *Pope*, 211 S.W.2d at 560, 562.

⁴³⁸ *Id.* at 559.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 560.

⁴⁴¹ *Id.*

trust sprung into existence immediately upon the wrongful passing of the property from the estate to all of the natural heirs:

In this case Claytonia Garrett does not acquire title through the will. The trust does not owe its validity to the will. The statute of descent and distribution is untouched. The legal title passed to the heirs of Carrie Simons when she died intestate, but equity deals with the holder of the legal title for the wrong done in preventing the execution of the will and impresses a trust on the property in favor of the one who is in good conscience entitled to it.⁴⁴²

The opinion mentions no cause of action.⁴⁴³ In the absence of a cause of action for unjust enrichment or constructive trust, Garrett has no jurisdiction in a court that can recognize her equitable rights.⁴⁴⁴

A subsequent opinion similarly ordered a constructive trust, also without substantial specific precedent or visible jurisdiction.⁴⁴⁵ The defendant was a spouse who had plea bargained a charge for murder.⁴⁴⁶ The relevant statute authorized a constructive trust for the assets only of a murder victim to deprive the murderer of unjust enrichment.⁴⁴⁷ The Supreme Court opinion on that case again quickly defended the order for such a constructive trust in general terms.⁴⁴⁸

Other than a cause of action for constructive trust (for which there is little support in Texas or elsewhere)⁴⁴⁹ or unjust enrichment, no other cause

⁴⁴² *Id.* at 564.

⁴⁴³ *Id.* at 560–62.

⁴⁴⁴ *See id.* at 561–62.

⁴⁴⁵ *See* *Bounds v. Caudle*, 560 S.W.2d 925, 928 (Tex. 1977).

⁴⁴⁶ *Id.* at 926.

⁴⁴⁷ *Id.* at 928.

⁴⁴⁸ *Id.* (“We therefore conclude that the imposition of a common law constructive trust in a situation such as presented here is not inconsistent with the legislative intent behind Sec. 41(d) which requires an outright forfeiture in the case of a convicted killer.” (citing TEX. PROB. CODE ANN. § 41(d) (West Supp. 1973))).

⁴⁴⁹ *Mowbray v. Avery*, 76 S.W.3d 663, 681 (Tex. App.—Corpus Christi 2002, pet. denied) (“We first note that while it is true that a constructive trust is an equitable remedy, it would be overly simplistic to state that therefore a suit for a constructive trust cannot lie as a distinct action.” (citation omitted)). *But see* *Garcia v. Garza*, 311 S.W.3d 28, 40 (Tex. App.—San Antonio 2010, pet. denied); *Beverly Found. v. Lynch*, 301 S.W.3d 734, 736 (Tex. App.—Amarillo 2009, no pet.) (stating that a constructive trust is actually an equitable remedy, not an independent cause of action).

of action would warrant the award of a constructive trust in either case.⁴⁵⁰ The right to award a constructive trust against a murderer was based on statute that did not include felons who plead to a lesser charge.⁴⁵¹ The Court stepped outside of standard norms to award the trust on the basis of a civil jury finding that the spouse committed murder.⁴⁵² In what elsewhere would be considered a standard application of equity, the Court found an unconscionable but small gap in the rails and filled the gap with discretion to allow good conscience to be realized.⁴⁵³

Similarly, the Court applied discretion to fill the gap such that a constructive trust was awarded against the inheritance of the innocent heirs of Carrie Simons.⁴⁵⁴ She was the victim of duress or the breach of her guilty heir's fiduciary duty but the innocent heirs did not assist in the duress in any manner.⁴⁵⁵ They were passive recipients of assets, which were unconscionable for them to retain and therefore subject to a claim for unjust enrichment.⁴⁵⁶

If this were just a problem of semantics,⁴⁵⁷ that Texas lawyers need to plead for constructive trust instead of unjust enrichment in equity, this difference would be a minor distinction in Texas law. The real problem is availability as constructive trust is not a cause of action.⁴⁵⁸ Even as a remedy, constructive trusts are limited to breach of fiduciary duty, fraud, mistake and conversion.⁴⁵⁹ Alternatively, Texas courts enforce the similar limitations on the range for unjust enrichment as a cause of action.⁴⁶⁰

⁴⁵⁰ *Beverly Found.*, 301 S.W.3d at 736.

⁴⁵¹ *Bounds*, 560 S.W.2d at 928.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Pope v. Garrett*, 211 S.W.2d 559, 562 (Tex. 1948).

⁴⁵⁵ *Id.* at 560.

⁴⁵⁶ *See id.*

⁴⁵⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 note b (2010) (“To call the infringer an agent or trustee [of the profits realized through trademark infringement] is not to state a fact but merely to indicate a mode of approach and an imperfect analogy by which the wrongdoer will be made to hand over the proceeds of his wrong. (quoting *L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.*, 277 U.S. 97, 99–100 (1928) (Holmes, J.))).

⁴⁵⁸ *Beverly Found v. Lynch*, 301 S.W.3d 734, 736 (Tex. App.—Amarillo 2009, no pet.).

⁴⁵⁹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(a), (f) (“The first step is to establish that the defendant is liable in restitution by one of the substantive provisions of this Restatement. The underlying transaction is ordinarily one that is subject to avoidance for fraud, mistake, or comparable grounds of invalidity, or one in which the defendant has acquired property by wrongful interference with the claimant’s legally protected interests.”);

Even though Texas courts recognize unjust enrichment as a cause of action, there is no Texas cause of action that resembles traditional unjust enrichment in equity.⁴⁶¹ Unjust enrichment is currently considered similar to assumpsit and is limited to specific claims.⁴⁶² Only occasionally does it escape its constraints to undertake its role as a remedial safety net.⁴⁶³ The positive attributes of unjust enrichment are confused with constructive trust. Seemingly, Texas courts endorse sufficient supporting principles to justify broad jurisdiction for unjust enrichment.⁴⁶⁴ The Supreme Court's opinions laud constructive trusts and endorse the importance of the safety net role of equity yet jurisdiction in equity is constrained by choice.⁴⁶⁵

VI. FORFEITURE: IT TASTES JUST LIKE CHICKEN

"Equity abhors forfeiture."⁴⁶⁶

Both of the recent Supreme Court opinions on forfeiture support it as an established and equitable remedy but differ in tone. Justice Hecht's opinion maintains the importance of deterring breach of fiduciary duty but is willing to compromise that priority in the name of reasonableness.⁴⁶⁷ Thus it holds that fees need not be forfeited in whole and that the share of the fees to

1 DOBBS, *supra* note 5, at 597 ("Sometimes it is still said that the constructive trust applies only to misdealings by fiduciaries or in cases of fraud. But this is a misconception. The constructive trust is based on property, not wrongs. It proceeds on the notion that the defendant has legal title but that the plaintiff has the superior moral or equitable claim At any rate, the constructive trust is no longer limited to misconduct cases; it redresses unjust enrichment, not wrongdoing.").

⁴⁶⁰ *Morris v. Morris*, 642 S.W.2d 448, 450 (Tex. 1982); *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974); *Mangione v. Jaffe*, 61 S.W.3d 591, 593 (Tex. App.—San Antonio 2001, writ dismissed); *Jackson v. Houston Indep. Sch. Dist.*, 994 S.W.2d 396, 401 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("Second, a court will impose a constructive trust *only* where either actual or constructive fraud exists."); *see Exploration Co. v. Vega Oil & Gas Co.*, 843 S.W.2d 123, 127 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

⁴⁶¹ *See Mowbray v. Avery*, 76 S.W.3d 663, 681 (Tex. App.—Corpus Christi 2002, pet. denied).

⁴⁶² *Barrett v. Ferrell*, 550 S.W.2d 138, 143 (Tex. Civ. App.—Tyler 1977, writ refused n.r.e.).

⁴⁶³ *Mowbray*, 76 S.W.3d at 681.

⁴⁶⁴ *Id.*

⁴⁶⁵ *See Hill v. Stampfli*, 290 S.W. 522, 524 (Tex. Comm'n App. 1927, holding approved).

⁴⁶⁶ *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 429 (Tex. 2008) ("Further, it is well-settled that '[e]quity abhors forfeiture [sic].'" (quoting *Jones v. N.Y. Guar. & Indem. Co.*, 101 U.S. 622, 628 (1879))).

⁴⁶⁷ *Burrow v. Arce*, 997 S.W.2d 229, 239–45 (Tex. 1999).

forfeit, if any, should be determined by a number of factors.⁴⁶⁸ Justice Green's opinion in *Swinnea*, twelve years later, stresses the sole priority of deterrence and would reinforce that priority with an additional tranche of punitive damages.⁴⁶⁹ Seemingly, *Swinnea* would argue against partial fee forfeiture for fear of inadequate deterrence.⁴⁷⁰

A. *Burrow v. Arce*⁴⁷¹

Burrow relates to an industrial accident at a chemical plant in which 23 employees were killed and hundreds more were seriously injured.⁴⁷² The victims and their families retained a group of law firms to represent them in their action, which was settled for \$ 190 million, including a contingency fee of \$ 60 million.⁴⁷³ Thereafter, 49 of the original group of 126 plaintiffs filed a second suit against their legal team for claims that included professional malpractice and breach of fiduciary duty.⁴⁷⁴ The clients sought forfeiture of fees that accrued in a case in which the breach was not directly related to the receipt of the compensation (as opposed to bribes or secret profits).⁴⁷⁵

The trial court granted summary judgment on the grounds that the plaintiffs suffered no actual damages because the settlement was fair and reasonable.⁴⁷⁶ The 14th District reversed the summary motion only on the claim of breach of fiduciary duty and held that fees could be forfeited in whole or in part as determined only by the trial judge without proof of

⁴⁶⁸ *Id.* at 245.

⁴⁶⁹ *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 874–75 (Tex. 2010).

⁴⁷⁰ Justice Green does, however, state that asset forfeitures should be determined by the same factors as for fee forfeitures. *See id.*

⁴⁷¹ 997 S.W.2d at 229.

⁴⁷² *Id.* at 232.

⁴⁷³ *Id.* (stating that there were 126 plaintiffs in the underlying litigation that was settled for \$190 million and that provided \$60 million of contingent fees.).

⁴⁷⁴ *Id.*

⁴⁷⁵ *Burrow*, 997 S.W.2d at 233 (The clients' complaints against the lawyers: "In many instances the contingent fee percentage in the contract was left blank and 33-1/3% was later inserted despite oral promises that a fee of only 25% would be charged. The attorneys settled all the claims in the aggregate and allocated dollar figures to the plaintiffs without regard to individual conditions and damages. No plaintiff was allowed to meet with an attorney for more than about twenty minutes, and any plaintiff who expressed reservations about the settlement was threatened by the attorney with being afforded no recovery at all.")

⁴⁷⁶ *Id.* at 233.

actual damages.⁴⁷⁷ The Supreme Court's most important holding was to reject the defendant's proof that the plaintiffs suffered no actual damages; the defendants' expert testimony was found to be conclusory and without adequate support.⁴⁷⁸ The plaintiffs' claims for malpractice and breach of fiduciary duty were both remanded.⁴⁷⁹

Justice Hecht's opinion could have been drawn narrowly but he chose to discuss forfeiture. He also could have confirmed that professional fees are within the normal definition of the fiduciary's profit, benefit, or advantage for disgorgement⁴⁸⁰ and limited his opinion to the procedural issues raised for remedies in equity. The plaintiffs appealed a holding for summary judgment at the trial level which was reversed by the 14th District on the issue of whether evidence of damages in fact is required in a claim of fee forfeiture for breach of fiduciary duty,⁴⁸¹ an issue not subject to serious debate.⁴⁸² Additional procedural issues included whether fees can be forfeited in part or must be forfeited in whole and whether the jury or the judge should determine whether a remedy in equity should be ordered and what amount, if any, of fees to be forfeited.⁴⁸³

⁴⁷⁷ *Id.* at 233–34.

⁴⁷⁸ *Id.* at 236–37.

⁴⁷⁹ *Id.* at 232–33, 236–37.

⁴⁸⁰ *Snepp v. United States*, 444 U.S. 507, 515–16 (1980); *Armstrong v. O'Brien*, 19 S.W. 268, 273 (Tex. 1892); *Anderson v. Griffith*, 501 S.W.2d 695, 702 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (ordering the fiduciary in breach to disgorge both his profit and his compensation); *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (holding that plaintiffs were entitled to recovery of agency fees as a matter of law if the breach of fiduciary duty was proved without regard as to whether the breach caused any harm).

⁴⁸¹ *Burrow*, 997 S.W.2d at 233; *Anderson v. Griffith*, 501 S.W.2d 695, 702 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (ordering the fiduciary in breach to disgorge both his profit and his compensation); *Burleson v. Earnest*, 153 S.W.2d 869, 875 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.) (holding that the disgorgement for the fiduciary's secret profit should include the real estate commission).

⁴⁸² *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) (“It is beside the point for either Turner or Corbett to say that Kinzbach suffered no damages because it received full value for what it has paid and agreed to pay.”); *Slay v. Burnett Trust*, 187 S.W.2d 377, 389 (Tex. 1945) (stating that self-dealing transactions may be attacked by the beneficiary even though he has suffered no damages and even though the trustee has acted in good faith); *Armstrong v. O'Brien*, 19 S.W. 268, 274 (Tex. 1892) (“It makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith.”).

⁴⁸³ *Burrow*, 997 S.W.2d at 234.

Justice Hecht, however, wrote a broad opinion about fee forfeiture.⁴⁸⁴ In the process, the opinion contradicts Texas law in equity on the defendant's burden of proof, the defendant's right to counter-restitution, the jury's role of determining the amount of the monetary remedy in equity (as opposed to whether a remedy in equity should be ordered) and introduces an unexplained new role for adequate remedy.⁴⁸⁵ More importantly, the opinion does not address how a trial judge should determine whether disgorgement or fee forfeiture is more appropriate nor whether the principles announced for fee forfeiture also apply to other claims for breach of fiduciary duty such as secret profits and bribes.⁴⁸⁶

The 14th District limited its opinion to claims for forfeiture of fees from lawyers.⁴⁸⁷ Justice Hecht's opinion, however, addresses the issue as fee forfeiture from fiduciaries in breach without limitation to lawyers.⁴⁸⁸ The justice largely relied on the Third Restatement of the Law Governing Lawyers (Restatement Governing Lawyers) with occasional references to the restatements of agency and trusts.⁴⁸⁹ No reference is made to the First Restatement of Restitution or to any treatise on equity or remedies.⁴⁹⁰

The opinion correctly asserted that there is substantial precedent for the judge to decide in her discretion whether a remedy in equity is appropriate.⁴⁹¹ However, Justice Hecht neglected to acknowledge that existing practice in Texas is for the jury to make a finding of fact on the amount of appropriate disgorgement in unjust enrichment claims⁴⁹² or

⁴⁸⁴ *Id.* at 239–45.

⁴⁸⁵ *Id.*

⁴⁸⁶ See notes infra 512–518 and accompanying text for a brief discussion of some clarification of these issues in subsequent opinions.

⁴⁸⁷ *Burrow*, 997 S.W.2d at 234.

⁴⁸⁸ *Id.* at 242–43 (“The rule is not dependent on the nature of the attorney-client relationship, as the court of appeals thought, but applies generally in agency relationships.”).

⁴⁸⁹ *Id.* at 241 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996)).

⁴⁹⁰ *Id.* at 242–43.

⁴⁹¹ *Burrow*, 997 S.W.2d at 245; see also *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974).

⁴⁹² *Wilz v. Flournoy*, 228 S.W.3d 674, 676–77 (Tex. 2007) (finding that no personal funds were used to purchase the farm which justified the award of a constructive trust on the farm); *International Bankers Life Ins. Co. v. Holloway*, 368 SW 2d 567, 571 (Tex. 1963) (Based, in part, on special issues submitted to the jury on real estate profit and commissions that accrued to the defendants, the trial court entered judgment in favor claimants for disgorgement and exemplary damages); *Houston v. Ludwick*, No. 14-09-00600-CV, 2010 WL 4132215, at *6 (Tex. App.—

forfeiture.⁴⁹³ In fact, the Supreme Court has consistently held that a claimant is not entitled to the remedy of rescission should she fail to secure a jury finding on the amount of the claimant's interim benefits, if any.⁴⁹⁴

Justice Hecht's opinion effectively recognized that the traditional approach to total forfeiture is not well suited for the modern era. The traditional hard and fast rule, allowing all or none, is increasingly being ignored such as was described earlier about the defendant's burden of proof on apportionment and related expenses.⁴⁹⁵ He effectively compromised the central priority of deterrence in a small way to make the approach seem more reasonable or modern. In the process, however, his explanation contradicted a couple of longstanding principles in equity. Moreover, his opinion failed to distinguish between disgorgement of compensation when that compensation is the source of liability for breach of fiduciary duty and forfeiture of compensation that follows a breach of duty.⁴⁹⁶

In the process of revising forfeiture, *Burrow* overlooked a couple of longstanding principles for remedies in equity. In disgorgement, the defendant is subject to the tension that revenues rather than profits will be

Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.); *Harper v. Harper*, 8 S.W.3d 782, 783 (Tex. App.—Fort Worth 1999, pet. denied).

⁴⁹³*Russell v. Truitt*, 554 S.W.2d 948, 954 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) ("However, there is no dispute that an \$8,000.00 management fee was paid to Defendant Russell Company, the agent for the joint venturers. The jury's finding that defendants received no monetary advantage does not render the \$8,000.00 award improper here. Nor was any special issue necessary to support the award because there was no dispute as to the amount of the agency fees.").

⁴⁹⁴*See Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 826 (Tex. 2012) (holding that claimant "was obliged to prove and obtain a finding that he had surrendered or offered to surrender to Protech and Martinez the value of the services they provided at his house as a prerequisite for [rescission]."); *Powell v. Rockow*, 92 S.W.2d 437, 439 (Tex. 1936).

⁴⁹⁵*See supra* Section III.D.

⁴⁹⁶*ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010) ("For instance, courts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal; *see, e.g., Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (stating the rule that courts may disgorge any profit where "an agent diverted an opportunity from the principal or engaged in competition with the principal, [and] the agent or an entity controlled by the agent profited or benefitted in some way"). Similarly, even if a fiduciary does not obtain a benefit from a third party by violating his duty, a fiduciary may be required to forfeit the right to compensation for the fiduciary's work. *See, e.g., Burrow*, 997 S.W.2d at 237 ("[A] person who renders service to another in a relationship of trust may be denied compensation for his service if he breaches that trust."). For further discussion see *infra* notes 512 to 518 and accompanying text.

disgorged if she fails to adequately prove which revenues should be apportioned and which expenses should be offset because of the shifting burdens of proof.⁴⁹⁷ The *Burrow* opinion relieves the defendant of that tension such that the plaintiff is now required to show why disgorgement of all fees is appropriate according to the multiple factors, including those identified in Section 49 of the Restatement Governing Lawyers⁴⁹⁸ and section 243 of the Second Restatement of Trusts.⁴⁹⁹ To maintain the tension and the traditional burdens of proof, the Court should make it clear that the burden of proof is on the defendant to show why no fees or only some fees should be liable for disgorgement.⁵⁰⁰

Second, the process of establishing counter-restitution has been replaced by multiple factors that are already somewhat vague and subject to expansion.⁵⁰¹ Two of the factors are related to the issue of apportionment (the timing of the violation and the value of the work provided to the client).⁵⁰² Nothing else is mentioned about counter-restitution for fees

⁴⁹⁷ See *supra* note 496 and accompanying text.

⁴⁹⁸ *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999) (citing the factors from § 49 [renumbered as section 37 in the final version of the Restatement] of the Restatement Governing Lawyers to be considered in determining forfeiture of attorney fees, including the following: (a) The gravity and timing of the violation; (b) The willfulness of the violation; (c) The effect of the violation on the value of the lawyer's work for the client; (d) Any other threatened or actual harm to the client; and (e) The adequacy of other remedies).

⁴⁹⁹ *Id.* at 243 (“It is within the discretion of the court whether the trustee who has committed a breach of trust shall receive full compensation or whether his compensation shall be reduced or denied. In the exercise of the court's discretion the following factors are considered: (1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee's services were of value to the trust.” (quoting RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. c (1959))).

⁵⁰⁰ For an example of an opinion that reverses the traditional burden shifting on remedies, see *Jones v. Whatley*, No. 13-09-00355-CV, 2011 Tex. App. LEXIS 4380, at *28–29 n.7 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op.) (“Independently evaluating this conclusion of law de novo to determine its correctness, even were we to conclude that the facts support a conclusion that there was a ‘clear and serious breach of duty’ to Whatley, we cannot conclude that Jones is not entitled to any additional fees—that he must forfeit additional fees. There are simply no facts in the record supporting a conclusion that partial fee forfeiture was necessary to satisfy the public's interest in protecting the attorney client relationship.” (citation omitted)).

⁵⁰¹ *Burrow*, 997 S.W.2d at 241.

⁵⁰² See *supra* note 498 and the discussion of factors a and c.

shared with other attorneys or reasonable expenses like court costs, expert fees, and possibly even expenses for support personnel or the lawyers themselves. The Restatement for Lawyers makes a brief statement that indemnity should apply,⁵⁰³ but the *Burrow* opinion makes no mention of counter-restitution or indemnity.⁵⁰⁴

Both the *Burrow* opinion and Section 49 of the Restatement Governing Lawyers refer to a concept of adequate remedy without any explanation.⁵⁰⁵ Presumably this refers to the doctrine of irreparable injury. Justice Hecht's opinion would assign the Doctrine a new role beyond its traditional function relating to jurisdiction in equity (which should not apply to a claim for breach of fiduciary duty due to presumptive jurisdiction).⁵⁰⁶ Presumably a judge would need to consider the other damages that can or would be awarded in a case when determining how much, if any, fees need to be forfeited.⁵⁰⁷ Unfortunately, his language is confusing and may lead trial judges to preclude forfeiture if the claimant has a claim for damages.⁵⁰⁸

Finally, the opinion's appeal to reasonability sounds appropriate but it offers no specific help on how to implement the concepts.⁵⁰⁹ In the modern era, a 'digital' approach to remedies in equity sounds appropriate and

⁵⁰³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37(e) (2000) ("Forfeiture does not extend to a disbursement made by the lawyer to the extent it has conferred a benefit on the client (see § 40, Comment d).").

⁵⁰⁴ See *infra* Section VI.B (discussing the lack of counter-restitution for asset forfeiture).

⁵⁰⁵ See *infra* Section VI.B (discussing the lack of counter-restitution for asset forfeiture).

⁵⁰⁶ See *supra* notes 117–121, 244 and accompanying text.

⁵⁰⁷ *Burrow v. Arce*, 997 S.W.2d at 243–44 (Tex. 1999) ("The adequacy-of-other-remedies factor does not preclude forfeiture when a client can be fully compensated by damages. Even though the main purpose of the remedy is not to compensate the client, if other remedies do not afford the client full compensation for his damages, forfeiture may be considered for that purpose.").

⁵⁰⁸ Jeffrey A. Webb & Blake W. Stribling, *Ten Years After Burrow v. Arce: The Current State of Attorney Fee Forfeiture*, 40 ST. MARY'S L.J. 967, 1003–04 (2009) ("It seems courts have taken a view that almost relegates forfeiture to an alternative to actual damages. That is, where actual damages are present, the likelihood of forfeiture also being granted appears to be low. Such a reality stems from the notion that any other outcome results in a windfall to the client."). *But see* *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201, 1213 (10th Cir. 2007) ("Finally, Rash contends that forfeiture is not an available remedy since JVIC sought actual damages and was adequately compensated. *Burrow* specifically forecloses this line of reasoning.").

⁵⁰⁹ See *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 938 (7th Cir. 1984) (Posner, J.) ("A standard that asks the district judge to consider a large number of factors . . . in no particular order and with no particular weighting of each factor is nondirective; it is effectively no standard." (citations omitted)).

reasonable except when you experience the struggle that courts now have in trying to render an amount. Under the traditional opinions that advocated all or nothing, the ‘analog’ approach, the fiduciary’s benefit cannot be accurately measured or quantified.⁵¹⁰ Justice Hecht does not refute that assertion.⁵¹¹

The Supreme Court has clarified some of the fee forfeiture issues in opinions subsequent to *Burrow*. That opinion’s enthusiasm for variable forfeiture leads to the mistaken implication that Texas law might not order the disgorgement or forfeiture of the entire amount of a bribe or secret profit.⁵¹² In fact, disgorging the entire bribe was central to the holding in *Kinzbach*.⁵¹³ *Brewer & Pritchard* interprets *Kinzbach* as a bribe or secret profit case, not forfeiture,⁵¹⁴ and states that all of the bribe or profit must be disgorged.⁵¹⁵

In a brief statement, *Swinnea* draws the essential distinction between *Burrow* and *Brewer & Pritchard* or *Kinzbach* and therefore between forfeiture and disgorgement. *Swinnea* states that disgorgement and

⁵¹⁰ *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 416–17 (1944); *United States v. Carter*, 217 U.S. 286, 306–07 (1909) (“It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust*, which it was possible to obtain.”).

⁵¹¹ See *Burrow* 997 S.W.2d at 239–45.

⁵¹² *Burrow* 997 S.W.2d at 241 (“But *Kinzbach* did not involve issues of whether forfeiture should be limited by circumstances or in amount. The agent there intentionally breached his fiduciary duty in a single, narrow transaction, and his only compensation was a commission. Our holding that his entire compensation was subject to forfeiture cannot fairly be said to require automatic, complete forfeiture of all compensation for any misconduct of an agent.”).

⁵¹³ *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942). In *Kinzbach*, the Court held that the employer was entitled to offset from the installment payment the ratable portion of the bribe. *Id.* (“It appears that when the first installment of \$ 2,500.00 became due on this contract, Kinzbach tendered to Corbett, in payment thereof, the sum of \$ 1,500.00. This was all that was due, because Kinzbach had a right to deduct therefrom the \$ 500.00 Turner had received on the \$ 2,500.00 cash payment it had made and the \$ 500.00 Turner was to receive out of the proceeds of such installment.”)

⁵¹⁴ *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (“In virtually all of the cases that we have found in which an agent diverted an opportunity from the principal or engaged in competition with the principal, the agent or an entity controlled by the agent profited or benefitted in some way. That was the situation in *Kinzbach Tool*.”)

⁵¹⁵ *Id.* at 203 (“However, an associate owes a fiduciary duty not to accept or agree to accept profit, gain, or any benefit from referring or participating in the referral of a client or potential client to a lawyer or firm other than the associate’s employer. With these premises in mind, we turn to the summary judgment record.”).

forfeiture are alternative remedies: the plaintiff can plead for disgorgement of the fiduciary's profit or, in the absence of a profitable fiduciary, plead for forfeiture of the fiduciary's compensation.⁵¹⁶ *Swinnea* distinguishes between Texas law that requires disgorgement of all of the fiduciary's compensation when that compensation is itself the breach of fiduciary duty (such as for bribes and secret profits) or provides for the digital remedy of fee forfeiture when the compensation is not source of liability.⁵¹⁷ This distinction would appear to contradict *Burrow*'s attempt to justify the forfeiture in *Burrow* with the disgorgement in *Kinzbach*.⁵¹⁸

*B. ERI Consulting Eng'rs, Inc. v. Swinnea*⁵¹⁹

Justice Green's opinion represents a long step away from traditional remedies in equity in Texas or elsewhere. The opinion is based on the unfounded assumption that forfeiture of assets is similar to forfeiture of revenues.⁵²⁰ His opinion cites no support for this assumption and relies on precedents based on forfeiture of fees to justify his opinion.⁵²¹ Other than limit his opinion to the specific circumstance in which breach of fiduciary duty is compounded by fraudulent inducement, the opinion offers no explanation of how this new remedy of asset forfeiture relates to other remedies in equity.⁵²² More importantly, he offers no support to dissuade critics who will allege that this remedy is so intentionally punitive as to find it a remedy at law rather than a remedy in equity.⁵²³

⁵¹⁶ See *supra* note 496.

⁵¹⁷ See *supra* note 496.

⁵¹⁸ See *supra* note 512.

⁵¹⁹ *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. 2010).

⁵²⁰ *Id.* at 872–73.

⁵²¹ *Id.* at 873 (“The situation in this case is akin in many respects to the fee forfeiture scenario between a principal and agent, which we discussed at length in *Burrow*, 997 S.W.2d at 237–45.”).

⁵²² *Id.* at 870 (“We hold that when a partner in a business breached his fiduciary duty by fraudulently inducing another partner to buy out his interest, the consideration received by the breaching party for his interest in the business is subject to forfeiture as a remedy for the breach, in addition to other damages that result from the tortious conduct.”).

⁵²³ *Id.* at 873 (“The situation arises because here the contracting party, *Swinnea*, was a fiduciary, such that we must consider whether under the circumstances an equitable remedy may cross the line from actual damages for breach of contract or fraud (redressing specific harm) to further, equitable return of contractual consideration.”).

This opinion may be an example of how bad case facts can make bad law.⁵²⁴ The defendant's actions were indefensible.⁵²⁵ He was an equal partner who agreed to sell his interest to the other partner.⁵²⁶ He misled his partner into believing that he would continue as an employee and would not violate the non-compete agreement that was a key component of the sale agreement.⁵²⁷ Even before that agreement was signed, however, his wife formed a company that violated that agreement and that impaired the business prospects of the former partner.⁵²⁸ There was evidence that the defendant intended to weaken the company after he sold his interest so that he could later repurchase the entire company at a distressed price.⁵²⁹ The trial court awarded lost profits of \$ 300,000, punitive damages of \$ 1,000,000 and forfeiture of the defendant's partnership interests (which were sold for \$ 570,700).⁵³⁰

The practical impact of the forfeiture was to require the selling partner to return the purchase price of the partnership interest without receiving that interest in return, a form of specific restitution without counter-restitution.⁵³¹ The Twelfth District rejected the remedy of asset forfeiture⁵³²

⁵²⁴ It is interesting to speculate on the unspoken dynamic between the Twelfth District's opinion and that of Justice Green. Both opinions agreed on the prejudicial nature of the defendant's behavior but the Twelfth District basically awarded little to no damages because of errors and holes in the plaintiff's case on damages. The upshot of the Supreme Court opinion will be to award the plaintiff about \$1.5 million in total damages. Would Justice Green's opinion have been so supportive of asset forfeiture if the alternative would have awarded substantial damages to the plaintiff? Compare *supra* note 493, with 494.

⁵²⁵ For a case with more prejudicial case facts but a similar outcome, see *Acevedo v. Stiles*, No. 04-02-0077-CV, 2003 Tex. App. LEXIS 3854, at *1 (Tex. App.—San Antonio May 7, 2003, pet. denied) (“She sought [Ricardo Acevedo’s] legal services to transfer title to her home to a healthcare worker in exchange for services. Instead [of the transfer Stiles planned, Acevedo] had [Stiles] sign a power of attorney and title to [Stiles’] home was transferred to [Ricardo’s] wife [and legal assistant, Janet Acevedo]. [Stiles] did not receive the care she needed [from Janet] and was forced to leave her home.”).

⁵²⁶ *ERI Consulting Eng’rs, Inc.*, 318 S.W.3d at 870.

⁵²⁷ *Id.*

⁵²⁸ *Id.* at 871.

⁵²⁹ *Id.* (“In fact, because Swinnea believed Snodgrass would ‘run [ERI] into the ground,’ Swinnea told Power to ‘[b]e patient because we can buy this company back 50 cents on the dollar.’”).

⁵³⁰ *Id.* at 871–72.

⁵³¹ *Watson v. Ltd. Partners of WCKT, Ltd.*, 570 S.W.2d 179, 182 (Tex. Civ. App.—Austin, 1978, writ ref’d n.r.e.).

and remanded the case on the issue of lost profits and punitive damages.⁵³³ The Supreme Court reversed the Twelfth District, approving asset forfeiture, although it also held that the lost profits and punitive damages needed to be adjusted.⁵³⁴

The key fact is that the defendant did not gain his partnership interest in a non-consensual or unconscionable manner.⁵³⁵ Under *Swinnea*, if a fiduciary fraudulently betrayed her principal by purchasing an asset that should have been purchased for the principal, that asset could be subject to forfeiture to the principal without any compensation to the breaching fiduciary for the initial purchase price that was paid by the fiduciary: no counter-restitution for asset purchases.⁵³⁶ That holding would represent a reversal of a long string of opinions in Texas and elsewhere that requires the principal to reimburse the fiduciary.⁵³⁷

Disgorgement of revenues is different from disgorgement of assets because the revenues were accrued in an unjust manner, yet Justice Green does not acknowledge the distinction nor answer the Twelfth District's

⁵³² *Swinnea v. ERI Consulting Eng'rs, Inc.*, 236 S.W.3d 825, 841 (Tex. App.—Tyler 2007) (“We acknowledge that fees collected by a fiduciary may be forfeited as a result of a breach of fiduciary duty. However, to the extent Appellees assert that the trial court’s awards are valid based on the equitable remedy of fee forfeiture, we disagree. Here, there is no such fee involved and therefore that line of cases is inapposite.” (citations omitted)), *rev’d*, 318 S.W.3d 867 (Tex. 2010).

⁵³³ *Id.* at 843 (“Because Appellees presented no evidence of actual damages arising out of the buyout, the trial court erred in awarding them \$437,500.00 as a portion of the up front cash paid, \$150,000.00 as one half the value of Malmbea, and \$300,000.00 for loss of income from their business relationship with Merico. It follows that the awards for exemplary damages, prejudgment and postjudgment interest, and attorneys’ fees cannot stand. We *reverse* the trial court’s judgment as to these awards and *render* judgment that Appellees take nothing on their claims against Appellants.” (citations omitted)).

⁵³⁴ *Swinnea v. ERI Consulting Eng'rs, Inc.*, 364 S.W.3d 421, 425 (Tex. App.—Tyler 2012, pet. filed) (On remand, the Twelfth District reduced lost profits from \$300,000 to \$178,601.05, the punitives of \$1,000,000 were affirmed and the asset forfeiture was remanded to the trial court for consideration of the factors enumerated in the Supreme Court opinion. The asset forfeiture was valued at about \$570,700.).

⁵³⁵ *ERI Consulting Eng'rs, Inc.*, 318 S.W.3d at 870.

⁵³⁶ *ERI Consulting Eng'rs, Inc.*, 364 S.W.3d at 425.

⁵³⁷ *S. Lumber Co. v. Kirby Lumber Corp.*, 181 S.W.2d 859, 863 (Tex. Civ. App.—Beaumont 1944) (“‘A court of equity will not make Strange a present of the lots because Moroney had intended to defraud him.’ Therefore, appellee having failed to tender appellants any portion of the purchase price paid by them to John H. Kirby et al., regardless of what the other facts might have shown, it would not, as we view it, be entitled to recover the title thus acquired by appellants.” (quoting *Homes Inv. Co. v. Strange*, 195 S.W. 849, 853 (Tex. 1918))); *see also supra* notes 132–44 and accompanying text.

holding that forfeiture only relates to fees and revenues.⁵³⁸ Justice Green recognizes the distinction of forfeiture of assets as “further equitable return of contractual consideration.”⁵³⁹

The sole justification for asset forfeiture is deterrence, which was also the central purpose of *Burrow* according to *Swinnea* and is a traditional argument for disgorgement.⁵⁴⁰ If deterrence were the only appropriate purpose, the reasonableness of allowing partial forfeiture in lieu of total forfeiture would be moot. If the Court is solely concerned with a remedy that will ‘encourage the others’ it must not take half measures.⁵⁴¹

The language in *Swinnea* makes it clear that disgorgement is not being ordered to compensate the plaintiff.⁵⁴² The opinion tries to minimize the punitive appearance of the remedy but not very hard.⁵⁴³ The notion of stacking lost profits, punitive damages and asset disgorgement seems confiscatory and should at least be supported by specific jury findings especially when a jury already participates in the trial, without depriving the trial judge of her discretion to approve or deny the remedy in equity.

This form of asset forfeiture may not be unconstitutional, but it certainly isn’t a remedy in equity⁵⁴⁴ and better resembles a remedy at law.⁵⁴⁵ The

⁵³⁸ See *supra* note 470.

⁵³⁹ *ERI Consulting Eng’rs, Inc.*, 318 S.W.3d at 873.

⁵⁴⁰ *Id.* at 874–75.

⁵⁴¹ VOLTAIRE, *CANDIDE* (Stanley Appelbaum ed., Dover Publ’ns 1991) In the French novel of 1759, a French admiral is blindfolded and executed on the deck of his own ship, merely “Pour encourager les autres” or “to encourage the others.” The term is also loosely associated with a wave of French Army trials for cowardice or treason in 1917 that led to dozens of executions of French soldiers. See generally *id.*

⁵⁴² *ERI Consulting Eng’rs, Inc.*, 318 S.W.3d at 873 (“The situation arises because here the contracting party, *Swinnea*, was a fiduciary, such that we must consider whether under the circumstances an equitable remedy may cross the line from actual damages for breach of contract or fraud (redressing specific harm) to further, equitable return of contractual consideration.”).

⁵⁴³ *Id.*

⁵⁴⁴ *Kull*, *supra* note 162, at 18 (“Restitution does not generally impose forfeitures. Even within the context of restitution for wrongs—where the defendants are malefactors by definition—standard remedies in restitution devote considerable effort to measuring the extent of the defendant’s enrichment at the claimant’s expense.”).

⁵⁴⁵ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) (“We have recognized the ‘general rule’ that monetary relief is legal, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment. (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990)); *Tull v. United States*, 481 U.S. 412, 422 (1987) (“Remedies intended to punish culpable individuals . . . were issued by courts of law, not courts of equity.”).

remedy in *Swinnea* exceeds the standard suggested in *Snepp*, that the remedy disgorge “only funds attributable to the breach.”⁵⁴⁶ It exceeds the rationale laid out in *Holloway* to justify punitive damages for actions in equity, that a claim based in tort should not receive a materially different remedy whether the claim is filed in equity or at law.⁵⁴⁷ There is also no attempt to consider the total equity or to protect the defendant from over-reaching as the forfeiture is not related to the amount of plaintiff’s damages.⁵⁴⁸

Finally, jury instructions in cases that include a plea for exemplary damages as well as asset forfeiture would seem to offer an opportunity for some interesting motion practice. Does the jury need to know that the trial court might add asset forfeiture to an award of exemplary damages? Would such notice prejudice the jury in either direction?

VII. CONCLUSIONS

Unjust enrichment is accepted as a cause of action and/or a remedy under Texas law. Just like the figurative Shimmer: it can be both!⁵⁴⁹ Unjust enrichment is growing in importance in business litigation in Texas and federal courts. The importance of our medical, electronic and entertainment business sectors, among others, should be kept in mind lest we forget that Texas is not immune to the needs of the American data economy for flexible alternative remedies to protect new and emerging forms of intangible property.

In Texas, we protect what is important to us. It is a felony of the third degree to steal one head of cattle or more than ten goats,⁵⁵⁰ yet if someone misappropriates a gigabyte of data files in electronic form, there may even be no civil liability presently under Texas law.⁵⁵¹ Unless the files are merged into paper form, they fail to qualify as property under Texas law.⁵⁵²

⁵⁴⁶ Compare *ERI Consulting Eng’rs, Inc.*, 318 S.W.3d at 873–75, with *Snepp v. United States*, 444 U.S. 507, 515–16 (1980).

⁵⁴⁷ See *Int’l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 583 (Tex. 1963).

⁵⁴⁸ See *ERI Consulting Eng’rs, Inc.*, 318 S.W.3d at 873–75.

⁵⁴⁹ See *supra* note 1.

⁵⁵⁰ TEX. PENAL CODE ANN. § 31.03(d)(5) (West 2011).

⁵⁵¹ See *Robin Singh Educ. Servs., Inc. v. Test Masters Educ. Servs.*, No. 14-09-00974-CV, 2011 Tex. App. LEXIS 1624, at*4–5 (Tex. App.—Houston [14th Dist.] March 8, 2011, no pet.) (mem. op.).

⁵⁵² *Quantlab Techs. Ltd. (BVI) v. Godlevsky*, 719 F. Supp. 2d 766, 778 (S.D. Tex. 2010) (“Texas law has never recognized a cause of action for conversion of intangible property except in

In the 2003 case of *Kremen v. Cohen*, the Ninth Circuit referred a question to the California Supreme Court, asking whether conversion of a website qualified as conversion under California law.⁵⁵³ On the basis of the affirmative response, the Ninth Circuit reversed a district court opinion that held that the plaintiff's claim needed to wait until the California legislature could fashion new statutes that covered the claim.⁵⁵⁴ As a result, the plaintiff was awarded specific restitution of the website plus disgorgement of \$ 40 million of profits and \$ 25 million of punitive damages.⁵⁵⁵

Texas has a cause of action for unjust enrichment but it does not resemble traditional unjust enrichment in equity and therefore Texas has a weak safety net. Would the claim for misappropriation of data files or a web site be granted jurisdiction in equity in the absence of an applicable statute? There may be a claim for fraud, depending on how intangible property was obtained, but most of the acceptable causes for unjust enrichment would not apply.

Providing broader jurisdiction in equity would not require substantial change in Texas legal principles underlying jurisdiction in equity, only how those principles are administered. Our courts need to make a different choice than before and allow for a form of flexible jurisdiction in equity to reinforce the weak safety net.

'Uncomfortable' is not a term generally applied in a legal setting; it is more appropriate for psychotherapy or women's shoes. In retrospect, the discomfort of Texas Courts with unjust enrichment in equity may be due to

cases where an underlying intangible right has been merged into a document and that document has been converted." (quoting *Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d 895, 901 (Tex. App.—Dallas 2001, no pet.)); *Robin Singh Educ. Servs., Inc.*, 2011 Tex. App. LEXIS 1624, at *4-5 ("Appellant's claim is based solely on the alleged conversion of intangible electronic communications which appellant alleges were mistakenly sent to appellee by potential customers of appellant. However, under Texas law, a tort action for conversion is limited to tangible property. Because the allegedly misdirected emails are intangible, they cannot support a conversion claim. Therefore, we overrule appellant's first issue." (citation omitted)).

⁵⁵³ *Kremen v. Cohen*, 337 F.3d 1024, 1036 (9th Cir. 2003) ("The district court thought there were methods better suited to regulate the vagaries of domain names' and left it 'to the legislature to fashion an appropriate statutory scheme. The legislature, of course, is always free (within constitutional bounds) to refashion the system that courts come up with. But that doesn't mean we should throw up our hands and let private relations degenerate into a free-for-all in the meantime. We apply the common law until the legislature tells us otherwise. And the common law does not stand idle while people give away the property of others." (internal quotations omitted)).

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.* at 1027.

the fact that Texas merged its courts without gaining sufficient experience with a separate court in equity to appreciate the advantages of the law in equity and the safety net. Whatever choices Texas courts make in the future, they will not be able to continue to overlook the law in equity without possibly impairing key business sectors that are essential to the growth and vitality of our economy.