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# RESTITUTION IN PUBLIC CONCERN CASES

*Candace Saari Kovacic-Fleischer\**

## I. INTRODUCTION

Enron Corporation. Arthur Andersen. Guns. Tobacco. Lead. Asbestos. Water Pollution. All are in the news as allegedly having caused injury. All involve restitution. Plaintiffs are bringing suits claiming that not only have they been injured, but also that the companies involved have been unjustly enriched at the plaintiffs' expense. The plaintiffs use, either explicitly or implicitly, the broad concept of restitution found in section one of the *Restatement of the Law of Restitution*. That section, entitled "Unjust Enrichment," says "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."<sup>1</sup> In this Article, I advocate retention of those broad concepts in the current revision of the *Restatement of Restitution*.

Cases that are brought under the Securities Exchange Act ("Securities Act")<sup>2</sup> routinely use restitution as a remedy. As do traditional restitution cases, the securities cases raise questions of what is a benefit, when is the benefit unjust, who should disgorge it, and to whom. Cases involving dangerous products, where the sellers have misled the public or avoided expenses that would make the product or its disposal safer, have been brought by governments or individuals. Those plaintiffs incurred expenses from the damage

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\* Pauline Ruyle Moore Scholar and Professor of Law, American University, Washington College of Law. This Article arose from the Second Remedies Discussion Forum. I would like to thank the organizers of the forum for inviting me to this and the first forum as well. I would also like to thank Perry Wallace and Walter H. Fleischer for their helpful suggestions on earlier drafts of this Article; Jordan M. Rubinstein, Class of 2003, for his research assistance; Dean Claudio Grossman and the American University, Washington College of Law's Research Fund for their generous support.

1. RESTATEMENT OF THE LAW OF RESTITUTION § 1 (1937).  
2. Securities Exchange Act of 1934, 15 U.S.C. § 78 (2001).

caused by the products.<sup>3</sup> The suits are often brought under restitution as well as other causes of action.<sup>4</sup> Most of those cases are dismissed. Many courts conclude that the companies that produce the products have no duty to pay for the costs and, thus, cannot be required to reimburse them; that the harm to health and the environment caused by the products is too remote to require the companies to pay for those costs or that plaintiffs lack standing.<sup>5</sup> These conclusions all focus on the relationship between the plaintiffs and defendants.

Some courts, however, have denied defendants' motions to dismiss.<sup>6</sup> These cases intrigue me. They remind me of the development of restitution, where suits that could not be brought because of lack of privity could be brought through quasi contract. Restitution was an action that helped limit rigidity in the law. These cases also remind me of older nuisance cases, such as *Boomer v. Atlantic Cement Company*.<sup>7</sup> In that case, the court awarded "permanent damages" instead of an injunction to stop spreading dust and pollutants on plaintiffs' land.<sup>8</sup> Thus, the Atlantic Cement Company had to pay for the use of what it had previously considered to be free resources: The air and surrounding environment. In economic terms, the company had been externalizing costs. When ordered to pay damages for harm to the environment, defendants were internalizing their externalities.

Under restitution theories, plaintiffs claim that the costs of selling dangerous products should include the costs of resulting injuries from the dangerous products where defendants have misled the public or avoided costs that would have made the products safer. When plaintiffs pay because of the defendants' deception or cost avoidance, then the defendants' costs are externalized. By not internalizing these costs, the companies reap excess profits. The excess profits are unjustly retained because of the defendants' deception or cost avoidance. The cause of action is restitution. As with the Securities Act cases, these cases also raise questions about

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3. See discussion *infra* at Part IV.

4. See *id.*

5. See *id.*

6. See Unified Sch. Dist. No. 500 v. U.S. Gypsum Co., 788 F. Supp. 1172, 1176 (D. Kan. 1992); Indep. Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 302-04 (D. Minn. 1990).

7. 257 N.E.2d 870 (N.Y. 1970).

8. See *id.* at 875.

what is a benefit, when is the benefit unjust, who should disgorge it, and to whom.

What drew me to look at the Securities Act cases and the dangerous product cases is an interest in how injuries done to large groups of people can be redressed and whether restitution can be used as one of the tools. This is a time when many shareholders and employees have lost, while executives have gained through illegal or at least “unjust” actions. This is also a time when local governments are short of money while damage to citizens from possibly avoidable dangers from products grows. I advocate that the *Restatement (Third) of Restitution and Unjust Enrichment* (“*Restatement (Third)*”)<sup>9</sup> retain the basic concepts of section one of the first *Restatement*: That defendant has a gain, at plaintiff’s expense, which would be unjust for defendant to retain.<sup>10</sup> Section one,<sup>11</sup> published in the late 1930s, is ingrained by the passage of time. Many courts articulate some variation of these three elements. However, as the cases below demonstrate, these elements leave a number of questions unanswered. I suggest that they be answered, not by restricting basic liability in restitution, but by further clarifying what is a benefit, when is the benefit unjust, who should disgorge it, and to whom. I also suggest the basic framework continue to be one of flexibility for changing times.

## II. RESTITUTION<sup>12</sup> AND THE COMMON LAW

I know that many scholars advocate a narrow and more predictable reach for restitution. There are many good reasons for this approach that I will not attempt to summarize here. One suggested limitation is to restrict disgorgement of gains to those received by the defendant from a wrongful transfer.<sup>13</sup> While this

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9. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Discussion Draft 2002).

10. See RESTATEMENT OF THE LAW OF RESTITUTION § 1 (1937).

11. See *id.*

12. I use restitution and unjust enrichment as approximate synonyms. To the extent that I do not use them as synonyms, I speak of restitution arising from liability in unjust enrichment, or as a remedy for unjust enrichment. Cf. Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1769–70 (2001) (reviewing the use of the terms restitution and unjust enrichment).

13. Cf. *id.* at 1772–74 (discussing James Edelman’s proposition that recovery should be limited to situations where “the defendant wrongdoer is

limitation would achieve predictability, I think it goes too far. It would eliminate cases where the gain is based on externalizing internalities since those gains do not result from a transfer. For the same reason, the limitation would not coincide with disgorgement of gains in all securities cases. Gains based upon fraudulent trading practices do not always involve a transfer. The limitation would also eliminate classic restitution causes of action brought by breaching plaintiffs,<sup>14</sup> or plaintiffs not in privity with the defendant,<sup>15</sup> unless a “transfer” was defined to include labor done on the defendant’s behalf. Even then, however, the transfer would not be wrongful on the part of the defendant unless the wrongdoing was defined as withholding payment because not to pay would be unjust. But then we are back to restitution without the wrongful transfer limitation. In the “plaintiff in breach” cases, it is the plaintiff, obviously, who breached the contract. In the “plaintiff not in privity” cases, it is usually a nonparty to the case who breached a contract but who cannot profitably be sued.<sup>16</sup>

Restitution historically has filled gaps and been viewed by many as a cause of action with unanticipated potential.<sup>17</sup> One of the

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compelled to reverse a wrongful transfer to himself,” not situations where a wrongdoer defendant must “give up a profit which came to him through the wrong independently of any transfer”).

14. See, e.g., *Britton v. Turner*, 6 N.H. 481 (Super. Ct. 1834) (rejecting the harsh majority rule that would preclude a plaintiff who breached a twelve-month employment contract after having worked for nine months from recovering the value of his work minus plaintiff’s damages); see also LEAVELL, LOVE, NELSON, KOVACIC-FLEISCHER, *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* 456–59 (6th ed. 2000).

15. See, e.g., *Kossian v. Am. Nat’l Ins. Co.*, 254 Cal. App. 2d 647, 62 Cal. Rptr. 225 (1967); see also Candace Saari Kovacic-Fleischer, *Teaching Restitution*, 39 BRANDEIS L.J. 657, 659–60 (2001) (discussing why restitution is a cause of action where the plaintiff and defendant are not in privity). *Teaching Restitution* arose from the First Remedies Discussion Forum, held at the Brandeis School of Law at the University of Louisville.

16. See Candace S. Kovacic[-Fleischer], *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. U. L. REV. 547, 628–41 (1986) (analyzing cases in which restitution is sought from defendants not in privity with the plaintiff).

17. See, e.g., GRAHAM DOUTHWAITE, *ATTORNEY’S GUIDE TO RESTITUTION* § 1.1, at 3 (1977) (Restitution can “arise in a bedazzling variety of situations.”); David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y.U. L. REV. 626, 629 (2001) (“Unjust enrichment originated as a theory of recovery in order to fill gaps left uncovered by traditional legal categories, such as contract, tort, and property law.”); Candace

reasons the discussion forum on restitution was held is because the framework of restitution is not agreed upon by scholars<sup>18</sup> or courts.<sup>19</sup> This Forum served as an opportunity to share our views as to what shape the *Restatement (Third)* might take.

The fact that plaintiffs are bringing claims of unjust enrichment in cases of current public concern, and that not all courts are dismissing them out of hand, indicates an interest in this particular nonstatutory action as a means of addressing modern problems. A quick check of Lexis since the year 2000 revealed that a number of cases still cite the first *Restatement*.<sup>20</sup> The provisions most frequently cited are section one, quoted above, section 160,<sup>21</sup> or their introductory remarks or examples. Section one is the first section of Part I, "The Right to Restitution (Quasi Contractual and Kindred Equitable Relief)," while section 160 is the first section of Part II, "Constructive Trusts and Analogous Equitable Remedies."<sup>22</sup> Both sections discuss broad principles, possibly among the broadest of the statements in the first *Restatement*.

The benefit of the common law judicial system, I believe, is its ability to adapt to changing conditions and, thus, share a role with the legislative and executive branches in creating law. If in using the common law, the courts deviate too far from the expectations of

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S. Kovacic[-Fleisher], *Applying Restitution to Remedy a Discriminatory Denial of Partnership*, 34 SYRACUSE L. REV. 743 (1983).

18. See, e.g., Symposium, *Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763–2197 (2001) (discussing various theories of restitution and unjust enrichment).

19. See Kovacic[-Fleisher], *supra* note 17 (discussing how the courts' misunderstandings of restitution have caused unnecessary litigation).

20. A Lexis search of "Restatement w/2 Restitution" with date restrictions from January 2000 to March 2002 (the Second Remedies Discussion Forum was held in April 2002) found seventy-eight federal and eighty-two state cases citing the *Restatement of the Law of Restitution*. A few courts cited the *Restatement (Second)* and a few cited the *Restatement (Third)*. One court refused to follow the *Restatement (Third)* because it was a draft and relied only on the first *Restatement*.

21. Section 160, entitled "Constructive Trust," provides: "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." RESTATEMENT OF THE LAW OF RESTITUTION § 160 (1937).

22. *Id.* §§ 1, 160.

society, the legislature can correct those deviations or it can react to changes in society without waiting for word from a court.

Courts today are presented with claims of unjust enrichment in many cases of first impression. These cases may, at times, enable courts to do with restitution what earlier courts did with contracts and torts. Promissory estoppel and unconscionability were common law doctrines that arose to meet situations that did not fit comfortably either within or without contract law. Those doctrines may be difficult to apply and may, in some instances, have been supplanted or supplemented by statutes, but they are now established aspects of contract law.<sup>23</sup> Within the law of torts, the doctrines of intentional infliction of emotional distress and even negligent infliction of emotional distress have developed, even though lawyers and judges from decades or centuries before would not have accepted them.<sup>24</sup> Nuisance theory evolved to try to resolve problems with industrial pollution, until supplemented by statutes that try to shift the costs of polluting air and water—resources that previously had been considered free—to the polluters.<sup>25</sup>

These examples from contract and tort law do not indicate that plaintiffs should prevail in every case of first impression with an unjust enrichment claim. However, the framework for restitution should enable today's common law courts to resolve cases involving new societal problems. The framework will need to provide guidelines without completely restricting the ability of courts to make new law.

Perhaps some courts will find new applications for an old cause of action. Over 100 years ago, Learned Hand responded to criticisms

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23. See Eben Colby, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company*, 34 CONN. L. REV. 625, 628 (2002) (stating that the courts "squeezed" relief for bad bargains under the idea of unconscionability into contract law when in reality no such relief existed); Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 117–18 (2000) (stating how promissory estoppel was developed to deal with the non-bargained-for reliance cases, which were anomalous to traditional contract consideration cases).

24. See, e.g., Charles E. Cantu, *An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying it Does Not Exist*, 33 ST. MARY'S L.J. 455, 459–68 (2002) (detailing the cautious development of the tort of negligent infliction of emotional distress in both Texas and the rest of the country).

25. See *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

that “unjust enrichment” is too vague for courts to apply, saying that the concepts of the “ordinary prudent man” and “enjoyment” of land were also vague, but were used in the common law.<sup>26</sup> He said further, “Surely the standard of what such results are in [cases involving the ordinary person and enjoyment of land] is quite as incapable of precise definition as that of what acts are unjust.”<sup>27</sup> Reporters of the *Restatement of the Law of Restitution*, Warren A. Seavey and Austin W. Scott, said that the development of tort and contract law required “a large number of individual rules to determine when relief will be given . . . . The situation is the same in the case of the fundamental conception of restitution. It requires an extensive set of individual rules to spell out what is meant by ‘unjust’ . . . .”<sup>28</sup>

### III. DISGORGING GAIN IN SECURITIES ACT CASES

Suits involving Enron and Arthur Andersen have been brought under insider trading provisions of the Securities Exchange Act.<sup>29</sup> The SEC or private plaintiffs seek restitution of the profits made by insider traders. The use of restitution as a remedy in Securities Act cases is long standing.<sup>30</sup> The remedy is a judicial creation, not statutory.<sup>31</sup> Perhaps, because of this, courts applying restitution in

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26. See Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 249–50 (1898).

27. *Id.*; see also Kovacic[-Fleischer], *supra* note 18, at 770–73 (1983) (reviewing the discussions of other learned scholars and jurists that the term “unjustness” is not too vague for common law use).

28. Warren A. Seavey & Austin W. Scott, *Restitution*, 54 LAW Q. REV. 29, 36 (1938).

29. 15 U.S.C. § 78j; see 17 C.F.R. § 240.10b-5 (2002). Since the Enron and Arthur Andersen scandals, a number of companies have been found to have committed fraud and/or violated securities laws.

30. See, e.g., *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971) (holding that requiring corporate defendants to make restitution of profits did not constitute penalty assessment). I am grateful to my colleague Professor Perry Wallace from American University, Washington College of Law, for reading a much earlier draft of this Article and alerting me to a misunderstanding I had about securities markets. Any mistakes in this draft about securities matters, a field in which I am not adept, are solely mine.

31. See, e.g., *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965) (“[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment.”); *SEC v. Yun*, 148 F. Supp. 2d 1287, 1289 (M.D. Fla. 2001) (“Disgorgement of the ill-gotten profits from an insider trading scheme is a remedy often granted against those who violate the securities laws. No statute governs the



Securities Act cases have had to answer some of the same questions that arise in common law restitution cases: What is meant by benefit, when is it unjust, who should disgorge it, and to whom.

#### IV. DISGORGING GAIN IN DANGEROUS PRODUCTS CASES

The cases involving guns, tobacco, lead, asbestos, and water pollution use restitution as a common law cause of action. Plaintiffs want the manufacturers or distributors of dangerous products to disgorge what they have saved by not having to pay for the consequences of the dangers. Most, if not all, of these cases are more recent than the early restitution cases under the Securities Act. Many are cases of first impression. Some of the plaintiffs have survived motions to dismiss often with the courts reciting in some form the three elements from section one of the *Restatement of the Law of Restitution*. As with the Securities Act cases, these cases raise the questions of what is a benefit, when is it unjust, who should disgorge it, and to whom.

Most of the cases discussed below are among the minority of cases that permit claims in restitution in cases of public concern. I include long excerpts from these cases so that we can see the courts' reasoning, not my paraphrasing of it. I also discuss a few of the cases with contrary reasoning.

#### V. SPECIFIC RECENT CASES

##### A. *Securities Exchange Act*

Enron Corporation was a major energy brokerage company. Arthur Andersen was its accounting firm. During the latter part of 2001, Enron's stock plummeted suddenly, and Enron was forced into bankruptcy. Many institutions and individuals, including Enron's employees, owned Enron stock. Some of the stock was held in retirement plans. Those holding stock during its plunge lost substantially.<sup>32</sup>

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disgorgement of ill-gotten profits—rather, principles of equity provide the foundation for this penalty.”); see also *Tex. Gulf Sulphur Co.*, 446 F.2d at 1307 (noting that disgorgement of profits arises from the inherent equity power of the district courts).

32. See, e.g., Marisa Rogoway, *Proposed Reforms to the Regulation of 401(k) Plans in the Wake of the Enron Disaster*, 6 J. SMALL & EMERGING BUS.

In *Newby v. Enron Corp.*,<sup>33</sup> a class of investors who purchased Enron stock between October 19, 1998 and November 27, 2001, sued Enron Corporation and its officers and directors. The suit alleges that defendants, in violation of the disclosure requirements of the Securities Exchange Act of 1934, issued falsely favorable information about the company and sold shares of stock between October 1998 and November 2001, before the adverse information that they had concealed was disclosed.<sup>34</sup> Thus, defendants, through unlawful insider trading, were able to take advantage of the favorable price of the Enron stock when they sold it, while others lost most or all of their value in the stock by buying or not selling at that time.<sup>35</sup>

The initial proceeding in *Newby* was not a motion to dismiss by defendants, but rather a motion to freeze assets pending judgment.<sup>36</sup> The court held that it had the authority to grant the motion to freeze assets as plaintiffs were seeking equitable and not legal relief, but found that plaintiffs had not shown the irreparable injury necessary for relief prior to judgment.<sup>37</sup> For substantive relief, plaintiffs asked in part for restitution for:

an accounting of [the proceeds of defendants' alleged insider trading]; disgorgement of these proceeds; and restitution of the money paid for securities by members of the class, as well as compensatory damages [and] rescission or a rescissionary measure of damages as to its section 11 claims [based on untrue statements of material fact in Enron's registration statements], costs and attorney fees.<sup>38</sup>

*SEC v. Yun*<sup>39</sup> is a recent case which analyzes restitution in the context of a Securities Act case brought by the SEC. The issue in *Yun* was whether the defendants could be jointly and severally required to disgorge the gain from insider trading even though only

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L. 423, 424 (2002) (detailing how corruption within Enron caused its stock to drop from \$80 per share in January 2001 to \$0.67 per share in February 2002, resulting in Enron employees' losing both their jobs and approximately \$1 billion in savings).

33. 18 F. Supp. 2d 684, 691 (S.D. Tex. 2002).

34. *See id.* (alleging violations of 15 U.S.C. §§ 77k, 77o, 78j, 78t).

35. *See id.*

36. *See id.*

37. *See id.* at 709 (The court issued a temporary injunction requiring Andersen to obtain the court's permission before disposing of assets).

38. *Id.* at 692-93.

39. 148 F. Supp. 2d 1287 (M.D. Fla. 2001).

the tippee, and not the tipper, had profited from the trading.<sup>40</sup> The court noted that in SEC cases “disgorgement [of profits] is usually considered rather routine.”<sup>41</sup> The court identified the purpose of disgorgement as:

the prevention of unjust enrichment—that is, that those who have violated the securities laws are not allowed to gain by their illegal conduct. Accordingly, disgorgement is a powerful deterrent against misuse of material, non-public information. Moreover, because disgorgement is an equitable remedy, it does not serve to punish or fine the wrongdoer, but simply serves to prevent the unjust enrichment.<sup>42</sup>

The court then analyzed the difficulty of ordering disgorgement of gain from a “tipper” when the gain is held by the “tippee.” The court quoted the rationale of the Second Circuit’s *Texas Gulf Sulphur*<sup>43</sup> case:

[W]ithout such a remedy [disgorgement of profits from tippers regardless of gain], insiders could easily evade their duty to refrain from trading on the basis of inside information. Either the transactions so traded could be concluded by a relative or an acquaintance of the insider, or implied understandings could arise under which reciprocal tips between insiders in different corporations could be given.<sup>44</sup>

The court did note that there was inconsistency in ordering disgorgement in Securities Act cases:

[I]t has become well-established that joint liability between a tipper and tippee is appropriate, even if the tipper received few or none of the profits realized by the tippee.

Such authority, however, does not establish an ironclad rule. Courts also frequently note that disgorgement, as an equitable remedy, should not operate as a fine. Applying the maxim that disgorgement seeks only to prevent unjust

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40. *See id.* at 1289.

41. *Id.* at 1290.

42. *Id.* (citations omitted).

43. SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971).

44. *Yun*, 148 F. Supp. 2d at 1290 (quoting *Texas Gulf Sulphur*, 446 F.2d at 1308).

enrichment, courts have ordered defendants to disgorge only the profits they received in the insider trading scheme. At least one court has reduced the disgorgement remedy by the amount a defendant paid to his broker, in recognition of the fact that money paid for broker fees cannot be unjust enrichment or an ill-gotten gain.<sup>45</sup>

Despite the inconsistent cases, the court in *Yun* followed the reasoning of *Texas Gulf Sulphur* and held the tipper and tippee jointly liable for disgorging profits although only the tippee had received them. The judge said:

[T]his Court concludes that Yun received some intangible unjust enrichment from the insider trading scheme; moreover, this Court cannot categorically conclude that Yun and Burch did not plan that Yun might receive some other, tangible benefit.

More importantly, the justification for the imposition of joint liability for non-profiting tippers neatly fit the facts of this case. As the Second Circuit notes:

A tippee's gains are attributable to the tipper, regardless whether benefit accrues to the tipper. The value of the rule in preventing misuse of insider information would be virtually nullified if those in possession of such information, although prohibited from trading in their own accounts, were free to use the inside information on trades to benefit their families, friends, and business associates.

... [T]his Court concludes that the deterrent effect of disgorgement would be compromised in this case, given the highly facile, and easily concealable manner in which Burch and Yun could have exchanged compensation.

Finally, ... the clear congressional intent that joint liability for a non-profiting tipper was specifically endorsed by the House of Representatives in the passage of the bill establishing civil penalties for insider trading. Such a congressional endorsement is understandable given the long-held view in Anglo-American jurisprudence that members of a conspiracy are held criminally liable for the

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45. *Id.* at 1291 (citations omitted).

reasonably foreseeable actions of their co-conspirators. Consequently, in this civil conspiracy, attributing the ill-gotten gain to Yun presents a symmetrical analogy; Burch's realization of profits from this insider trading scheme was unquestionably a reasonably foreseeable consequence of Yun's actions.<sup>46</sup>

*Yun* appears to combine restitution with policies of deterrence and criminal law. It appears that the Securities Act cases have not resolved what type of benefit—actual or potential—should be disgorged. Making someone liable for disgorging gain when that person does not hold the gain is not a typical restitutionary recovery.<sup>47</sup> Perhaps restitutionary gain does not need to be limited to tangible gain. It could include potential gain because of a presumption that the tipper could benefit or might have benefited by the trades of the tippers, thus making potential gain appear to be actual gain. Perhaps it could be identified as “presumptive gain.”

There are other differences between the Securities Act and common law restitution besides the question whether actual or potential gain is disgorged. The court in *Yun* refers to disgorgement as an equitable remedy.<sup>48</sup> That would seem contrary to the often-stated requirement of tracing in suits in equity when seeking disgorgement of gain.<sup>49</sup> Tracing, of course, would not be possible if the relief were the disgorging of potential rather than actual gain. The lack of tracing, however, would not preclude an action in legal restitution for the value of the potential gain, rather than an equitable

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46. *Id.* at 1292 (citations omitted).

47. “Ordinarily, the measure of restitution is the amount of benefit received . . . , but . . . , if the loss suffered differs from the amount of benefit received the measure of restitution may be more or less than the loss suffered or more or less than the enrichment.” *Id.* at 1290 (quoting RESTATEMENT OF THE LAW OF RESTITUTION § 150 (1937)). Section 150 offers a variety of approaches for defining gain. The *Restatement* is in the process of being revised. How section 150 should be incorporated into the revised *Restatement (Third)* is beyond the scope of this Article.

48. See *Yun*, 148 F. Supp. 2d at 1290.

49. Tracing is a shorthand term for equitable restitution's requirement that the plaintiff be able to trace what was taken from him or her to that which the plaintiff wants conveyed back. A plaintiff is permitted to seek a constructive trust or other equitable restitution even if the property has changed form, so long as the plaintiff's property can be traced to that which will be conveyed. See LEAVELL ET AL., *supra* note 14, at 397–405.

order to convey the gain.<sup>50</sup> In addition, because the securities cases can involve either a governmental or a private plaintiff, the courts do not always focus on the “at plaintiff’s expense” element. The government would not be materially detrimented by the defendant’s violation of insider trading prohibitions. Thus, the courts do not always require that the benefit be disgorged to an individual who has been detrimented. The differences between Securities Act and common law restitution raise questions whether or how restitution in the common law should incorporate restitution in Securities Act cases. Should the restitution used in Securities Act cases be deemed *sui generis*, or else not “real” restitution, or should the *Restatement (Third)* expand to include at least some of the uses of restitution in Securities Act cases?

### B. *Dangerous Products*

The cases discussed in this Section have similar factual bases despite involving different products. All seek disgorgement of what the defendant has gained or saved by not reimbursing harm caused by the products put into commerce. All involve an arguably unjust act, such as deceiving the public or avoiding costs that could make the product safer. Some of the cases refer to restitution’s ability to require the defendants to internalize their externalities.<sup>51</sup> The cases, however, are not similar in result. Most of the cases discussed below involve plaintiffs surviving motions to dismiss. It must be noted, as cited in the cases discussed below, that plaintiffs do not survive motions to dismiss in the majority of dangerous products restitution cases.

#### 1. Guns

A number of suits in unjust enrichment (along with other counts) have been filed against gun manufacturers by plaintiff cities or victims of gun violence. Most have not survived motions to dismiss.

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50. A number of cases discussed in this Article refer to restitution as equitable. However, it can be either legal or equitable. For a brief discussion of the difference between legal and equitable restitution, see *id.* at 665–67. Otherwise, the difference between legal and equitable restitution is not within the scope of this Article.

51. See discussion *supra* at Part II.

A few have. *City of Boston v. Smith & Wesson Corp.*<sup>52</sup> was one. The City claimed that the manufacturers and distributors of guns knew or should have known of the unreasonable dangers of the guns; could have used safety devices to decrease the dangers; knew that their products could be made to prevent firing by unauthorized users and knew that the City would be forced to bear substantial expenses.<sup>53</sup> Those expenses include:

costs . . . for prevention, amelioration and abatement of the ongoing public nuisance caused by Defendants . . . increased spending on . . . law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability benefits, unemployment benefits, higher prison costs, and youth intervention programs . . . [and] lower tax revenues and lower property values.<sup>54</sup>

The judge said, “[p]laintiff’s harm is in essence the type of harm typically suffered by municipalities due to public nuisances”<sup>55</sup> and cited *White v. Smith & Wesson Corp.*,<sup>56</sup> a gun case described below.

In *City of Boston*, the defenses included remoteness, the economic loss rule, and improper regulation of interstate commerce.<sup>57</sup> While the court reviewed many cases which had dismissed similar complaints based on similar defenses, it concluded that the defenses did not justify dismissing the complaint. The court added a statement about the potentiality of using law to solve current problems, saying:

It is settled law that a complaint should not be dismissed “simply because it asserts a new or extreme theory of liability or improbable facts.” A motion to dismiss is not an appropriate vehicle for “resolving undecided points of substantive law[.]” . . . Even if Plaintiffs’ allegations

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52. No. 1999-02590, 2000 Mass. Super. LEXIS 352, at \*1 (Mass. Super. Ct. July 13, 2000).

53. *See id.*

54. *Id.* at \*23.

55. *Id.* at \*24–25.

56. 97 F. Supp. 2d 816 (N.D. Ohio 2000).

57. *See City of Boston*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at \*1.

present an extreme theory of liability, a motion to dismiss is not the proper vehicle to challenge the theory.<sup>58</sup>

The court described and answered the defendants' concern as to the ramifications of not dismissing the claim in a footnote. Defendants claimed:

a veritable Pandora's box would be opened, because cities would be allowed to sue automobile manufacturers on the theory that vehicles are made so as to be able to violate speed laws and sue liquor manufacturers on the theory that Scotch bottles are capable of being opened and the contents consumed by underage drinkers. These examples misconstrue Plaintiffs' allegations. Plaintiffs allege that Defendants' misconduct (i.e., allegedly fueling and exploiting an illegal firearms market and allegedly manufacturing defective and unreasonably dangerous products) caused Plaintiffs to suffer the harm discussed in the text. An apt analogy, to use Defendants' illustration, would be allegations that the alcohol industry exploited and relied upon an illegal, secondary market of underage drinkers and sold defective products, causing harm. In other words, it is not the mere manufacture and sale of a lawful product of which Plaintiffs complain, but rather the tortious manufacture and sale.<sup>59</sup>

In deciding not to dismiss the unjust enrichment claim, the court said:

Plaintiffs allege that they have conferred a benefit upon Defendants by paying for the costs of the harm caused by Defendants' conduct ("externalities"). Plaintiffs further allege that Defendants undertook the alleged wrongful conduct for the purpose of increasing their profits. Thus, Plaintiffs state a claim for unjust enrichment.<sup>60</sup>

*White v. Smith & Wesson Corp.*<sup>61</sup> involved the same defendant and similar facts, but in Ohio, not Massachusetts. As in *City of*

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58. *Id.* at \*27 (citations omitted) (alteration in original).

59. *Id.* at \*28 n.32 (citations omitted).

60. *Id.* at \*78–79 (citations omitted).

61. 97 F. Supp. 2d 816.



*Boston*, plaintiffs, the Mayor, and the City of Cleveland, survived a motion to dismiss.<sup>62</sup> There the court said:

In order to maintain a cause of action for unjust enrichment under Ohio law, a plaintiff must allege: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and, (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. Unjust enrichment arises [under Ohio law] not only where an expenditure by one party adds to the property of another, but also where the expenditure saves the other from expense or loss.

Plaintiffs allege that they have conferred a benefit upon Defendants, *i.e.*, that the City has paid for what may be called the Defendants' externalities—the costs of the harm caused by Defendants' failure to incorporate safety devices into their handguns and negligent marketing practices. Plaintiffs further allege that Defendants are aware of this obvious benefit, and that retention of this benefit is unjust. Plaintiffs have stated a claim and thus . . . their claim survives.<sup>63</sup>

Both of the *Smith & Wesson* cases relied on the three standard elements of restitution. However, *White* added an element of the defendant's knowledge, an element that was not necessary and sometimes caused confusion.<sup>64</sup>

In *Ileto v. Glock*,<sup>65</sup> a federal district judge dismissed plaintiffs' claims of negligent distribution and nuisance against a gun manufacturer. The plaintiffs were victims of gun violence.<sup>66</sup> The judge cited many cases granting similar motions to dismiss.<sup>67</sup> Although *Ileto* did not indicate that the plaintiffs raised an unjust enrichment claim, the judge cited *City of Boston*, described above, as

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62. *See id.* at 819.

63. *Id.* at 829 (citations omitted).

64. *See, e.g.*, DCB Constr. Co. v. Cent. City Dev. Co., 965 P.2d 115, 119–20 (Colo. 1998) (discussing rejection of the “acceptance of benefit element” and citing Candace S. Kovacic[-Fleischer], *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. U. L. REV. 547, 554–60 (1986)).

65. 194 F. Supp. 2d 1040, 1056–61 (C.D. Cal. 2002).

66. *See id.* at 1043–46.

67. *See id.* at 1049.

“persuasive authority.”<sup>68</sup> He said he “reluctantly” had to grant the motion to dismiss because, as a federal judge deciding state matters, he “[wa]s at all times bound by the precedent established by California court decisions in anticipating how the California Supreme Court would decide [the] motion.”<sup>69</sup> Presumably, an additional claim in unjust enrichment would not have changed his conclusion.

## 2. Tobacco

In *City of St. Louis v. American Tobacco Co.*,<sup>70</sup> the United States District Court for the Eastern District of Missouri held that “reasonable basis exists” for plaintiffs having stated a claim under section 115 of the first *Restatement* for reimbursement of health care costs caused by tobacco use to those who could not afford the care themselves.<sup>71</sup> Section 115 provides:

A person who has performed the duty of another by supplying things or services, although acting without the other’s knowledge or consent, is entitled to restitution from the other if

- (a) he acted unofficiously and with intent to charge therefor, and
- (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.<sup>72</sup>

The court elaborated that plaintiffs claim “in discharging their governmental public benefit functions, [defendants] were required to provide unreimbursed healthcare to Medicaid and medically indigent patients for these tobacco related illnesses caused by defendants’ addictive tobacco products.”<sup>73</sup> The issue was whether the case had been properly removed to federal court.<sup>74</sup> The court granted plaintiffs’ motion to remand the case to state court because the plaintiff had shown that it had stated a claim against another

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68. *Id.*

69. *Id.*

70. 70 F. Supp. 2d 1008 (E.D. Mo. 1999).

71. *Id.* at 1014.

72. RESTATEMENT OF THE LAW OF RESTITUTION § 115 (1937).

73. *See Am. Tobacco Co.*, 70 F. Supp. 2d at 1011.

74. *Id.* at 1019.

defendant in Missouri, thus destroying federal diversity jurisdiction.<sup>75</sup> The Missouri defendants were distributors of tobacco products and the potentially viable claim against them was under section 115 of the first *Restatement*.<sup>76</sup> The court refused to follow two prior Missouri precedents which suggested that the plaintiffs' claims were too indirect and remote because "a substantial period of 'radical change in society, its institutions, and tort and criminal law' has passed since the early years of [the twentieth century]."<sup>77</sup>

The Third Circuit, in *Allegheny General Hospital v. Philip Morris*,<sup>78</sup> reached the opposite result with respect to the viability of charitable hospitals' unjust enrichment claims.<sup>79</sup> The court described the factual basis of the claim, saying:

The Hospitals' allegations encompass two theories—an indirect injury theory and a direct injury theory. Under the indirect injury theory, the Hospitals allege that, through deception, the Tobacco Companies caused nonpaying patients to smoke, inducing significant tobacco-related diseases. The law required the Hospitals to provide treatment . . . [and therefore] . . . the Tobacco Companies' wrongful acts increased the unreimbursed costs the Hospitals incurred.

Under the direct injury theory, the Hospitals allege that the Tobacco Companies' conspiracy to conceal information about the risks of tobacco, and to prevent the development of safer cigarettes . . . hampered the Hospitals' efforts to reduce tobacco consumption among nonpaying patients . . . [and] the Hospitals could have more effectively counseled

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75. *See id.* at 1020.

76. *See id.* at 1014.

77. *Id.* at 1013 (quoting *Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 581 (E.D.N.Y. 1999)).

78. 228 F.3d 429 (3d Cir. 2000).

79. The hospitals sought recovery under a variety of causes of action: "under federal antitrust laws, 15 U.S.C. §§ 1-37a, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and state common law claims for fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation and omission, breach of special duty, public nuisance, aiding and abetting, indemnity based on intentional conduct, *restitution*, *unjust enrichment*, *quantum meruit*, and civil conspiracy." *Id.* at 434 (emphasis added).

patients to quit smoking or use safer products, reducing the health care costs of treating tobacco-related disease.<sup>80</sup>

The *Allegheny Hospital* court analyzed the dismissal of the unjust enrichment claim by looking at another case, *Steamfitters Local 420 v. Philip Morris, Inc.*<sup>81</sup>, stating:

[i]n the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim. . . . [There is] no justification for permitting plaintiffs to proceed on their unjust enrichment claim once [it is] determined that the District Court properly dismissed the traditional tort claims . . .<sup>82</sup>

The court further noted:

The Hospitals now argue that their unjust enrichment . . . claim is not based in tort, but rather in an implied contract for the benefit they conferred on the Tobacco Companies by providing care to nonpaying patients. . . . The Hospitals' quantum meruit claim is based on the theory that by paying for the medical services required by nonpaying patients, the Hospitals discharged the Tobacco Companies' legal duties and saved them from bearing costs caused by their fraudulent and wrongful conduct. The District Court found this claim to be without merit.

We agree. "Unjust enrichment is . . . an equitable doctrine [with the following elements:] benefits conferred on one party by another, appreciation of such benefits by the recipient, and acceptance and retention of these benefits under such circumstances that it would be inequitable [or unjust] for the recipient to retain the benefits without payment of value." In the present case, the Tobacco Companies had no legal obligation to pay the medical expenses of smokers, and thus the Hospitals' provision of medical services did not "benefit" the Tobacco Companies by removing their obligation. In addition, since the Hospitals had an independent obligation to provide health care to nonpaying patients, incidental benefit to the

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80. *Id.*

81. 171 F.3d 912 (3d Cir. 1999).

82. *Allegheny Gen. Hosp.*, 228 F.3d at 446–447 (quoting *Steamfitters Local 420*, 171 F.3d at 936–37).

Tobacco Companies is not enough to maintain an action; the nonpaying patients got the main benefit, not the Tobacco Companies.

Even if some benefit went to the Tobacco Companies, it is unclear that allowing them to retain it is unjust. First, the benefit was incidental to the Hospitals' performance of its duty, and second, the Hospitals did not have a reasonable expectation of payment from the Tobacco Companies. Lastly, the distance between the Hospitals' provision of medical care and the Tobacco Companies' alleged benefit show that the benefit was not unjust.<sup>83</sup>

In *Allegheny Hospital* the court ruled for the tobacco companies because they did not have a "legal duty" to provide health care to those who used tobacco.<sup>84</sup> Reaching the opposite result, the court in the *City of St. Louis* cited section 115, which refers to defendant's having a duty that has been discharged by the plaintiff.<sup>85</sup> The court did not discuss whether the defendant tobacco companies had a duty toward the plaintiffs, but held that the claim was not too remote at the removal stage, particularly in light of the "radical change in . . . law."<sup>86</sup> Apart from lack of duty, the court in *Allegheny Hospital* said that the plaintiff did not have "a reasonable expectation of payment from the Tobacco Companies"<sup>87</sup> while the court in *City of St. Louis* relied on section 115, which requires that the plaintiff have an "intent to charge."<sup>88</sup> In contrast, both of the *Smith & Wesson* cases, the plaintiffs relied on more general restitutionary principles and referred to the unjustness of a company's failure to "internalize externalities."

### C. Lead

Using a broader definition of benefit than that used by the Third Circuit in *Allegheny Hospital*, discussed above, a Rhode Island Superior Court did not dismiss plaintiffs' claims that had factual allegations similar to those in *Allegheny Hospital*, although relating

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83. *Id.* at 446–48 (citations omitted).

84. *See id.* at 447.

85. *See City of St. Louis*, 70 F. Supp. 2d at 1014.

86. *Id.* at 1013 (quoting *Blue Cross & Blue Shield*, 36 F. Supp. 2d at 581).

87. *Allegheny Gen. Hosp.*, 228 F.3d at 447.

88. *City of St. Louis*, 70 F. Supp. 2d at 1016.

to lead rather than tobacco (or guns).<sup>89</sup> The court, in *State v. Lead Industries Ass'n*,<sup>90</sup> discussed the issues at some length, including some standard restitutionary principles:

The complaint alleges that the defendants have been and continue to be unjustly enriched because the State's paying of lead-related costs resulting from the harms caused by the defendant's conduct has conferred a benefit on the defendants by allowing them to derive substantial economic benefit. The defendants counter that the alleged "conferred benefit" is not legally cognizable.

The doctrine of unjust enrichment "permits the recovery in certain instances where a person has received from another a benefit, the retention of which, would be unjust under some legal principle, a situation which equity has established or recognized." "The unjust enrichment doctrine has for its basis that in a given situation it is contrary to equity and good conscience for one to retain a benefit that has come to him [or her] at the expense of another and that it is not necessary in order to create the obligation to make restitution or to compensate that the party unjustly enriched be guilty of a tortious or fraudulent act." In Rhode Island, "actions brought upon theories of unjust enrichment and quasi contract are essentially the same." It is well-settled that

"in order to recover under quasi contract for unjust enrichment, a plaintiff is required to prove three elements: (1) a benefit must be conferred upon the defendant by the plaintiff, (2) there must be appreciation by the defendant of such benefit, and (3) there must be an acceptance of such benefit in such circumstances that it would be inequitable for a defendant to retain the benefit without paying the value thereof."

Under the doctrine of unjust enrichment, the concept of benefit is construed broadly:

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89. See *State v. Lead Indus. Ass'n*, No. 99-5226, 2001 R.I. Super. Ct. LEXIS at 37 (Apr. 2, 2001).

90. *Id.*

“a person confers a benefit upon another if he [or she] . . . satisfies a debt or a duty of the other, or in any way adds to the other’s security or advantage. He [or she] confers a benefit not only where he [or she] adds to the property of another, but also where he [or she] saves the other from expense or loss. The word ‘benefit,’ therefore, denotes any form of advantage.”

Here, the Attorney General alleges that the State’s payment of Lead-related costs has allowed and continues to allow the defendants to derive economic gain from their promotion and sale of lead while, at the State’s expense, avoiding responsibility for the damages it has caused. Further the State alleges that the defendants have appreciated this benefit and that retention of the benefit is inequitable. In order for the defendants to succeed on their motion to dismiss, they are required to show that the State would not be entitled to relief under any of its alleged facts. It is impossible for the Court to determine at this stage that the State’s lead-related expenditures have not added to the defendants’, including the LIA’s, advantage or saved them from loss.<sup>91</sup>

In *City of New York v. Lead Industries Ass’n*,<sup>92</sup> the court reached a similar result. The Appellate Division reversed a dismissal of the plaintiffs’ suit to recover the cost of abating lead paint hazards.<sup>93</sup> The court said “that in undertaking such expenditures plaintiffs discharged a duty which, although imposed upon plaintiffs by statute and regulation, should properly have been borne by defendants who were responsible for having created this danger to public health and safety . . . .”<sup>94</sup> The court also said that denying plaintiffs the right to recover their expenditures “would be to permit the alleged defendant-wrongdoers to be ‘unjustly enriched’ by insulating them, at plaintiffs’ expense, from potential tort and indemnity liability that would otherwise have arisen.”<sup>95</sup>

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91. *Id.* at \*48–52 (citations omitted) (alterations in original).

92. 644 N.Y.S.2d 919 (1996).

93. *See id.*

94. *Id.* at 922.

95. *Id.* at 925.

### D. Asbestos

In *Independent School District No. 197 v. W.R. Grace & Co.*<sup>96</sup> and *Unified School District No. 500 v. U.S. Gypsum Co.*,<sup>97</sup> school districts sued asbestos manufacturers for the costs the schools incurred in removing and replacing material containing asbestos. The suits raised a number of claims including Section 115 of the *Restatement of Restitution*.<sup>98</sup> Both courts denied the defendants' motion for summary judgment.<sup>99</sup> In denying that motion, the court in *U.S. Gypsum* said:

[R]estitution is applied in two distinct senses. It sometimes means restoration . . . a general description of the relief afforded by a cause of action, rather than a cause of action itself . . . . [R]estitution may be a cause of action based on unjust enrichment or a theory of quasi contract.

The substance of a cause of action for restitution or unjust enrichment resides in a "promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to him." . . .

Plaintiff argues that because defendants put defective and unreasonably dangerous products into the stream of commerce, which products were installed in public buildings, defendants should be made, in equity and good conscience, to pay for the removal and replacement of those products.<sup>100</sup>

### E. Water Pollution

In 1991, in *Branch v. Mobil Oil Corp.*,<sup>101</sup> plaintiff homeowners claimed that the defendants "saved" the costs of pollution abatement when their oil wells and salt pits polluted plaintiffs' land and water.<sup>102</sup> The plaintiffs sought the value of the savings.<sup>103</sup> A federal

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96. 752 F. Supp. 286 (D. Minn. 1990).

97. 788 F. Supp. 1173 (D. Kan. 1992).

98. See *U.S. Gypsum*, 788 F. Supp. at 1175-76; *W.R. Grace*, 752 F. Supp. at 302-04.

99. See *U.S. Gypsum*, 788 F. Supp. at 1176; *W.R. Grace*, 752 F. Supp. at 304.

100. 788 F. Supp. at 1175 (citations omitted).

101. 778 F. Supp. 35 (W.D. Okla. 1991).

102. See *id.* at 36.



district court in Oklahoma denied defendant's motion to dismiss.<sup>104</sup> Citing *Olwell v. Nye & Nissen Co.*,<sup>105</sup> the famous egg washing case, the court said that "Oklahoma recognizes a claim for negative unjust enrichment."<sup>106</sup> The court also cited *Tilghman v. Proctor*.<sup>107</sup> In *Tilghman*, the Court said that "[i]f, for example, the unauthorized use by the defendant of a patented process produced a definite saving in the cost of manufacture, he must account to the patentee for the amount so saved."<sup>108</sup>

In 1985, in *United States v. P/B STCO 213*,<sup>109</sup> the Fifth Circuit consolidated three cases in which the United States sought water pollution clean up costs under the Federal Water Pollution Control Act.<sup>110</sup> The Fifth Circuit affirmed one decision that had awarded the United States its clean up costs.<sup>111</sup> The court reversed two cases that had been dismissed as untimely.<sup>112</sup> The court held that a six-year statute of limitations applying to "contract[s] express or implied in law or fact" governed rather than a three-year statute for torts.<sup>113</sup> The court reasoned that while pollution might be analogized to a tort, the action was in quasi contract, contract implied in law, because "unjust enrichment may consist . . . of one's avoidance and consequent shifting to another of the cost of performing a duty that one is primarily obligated to perform."<sup>114</sup> Unlike the other dangerous products cases described above, *P/B STCO* had a statutory cause of action, making it easier for the court to grant the United

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103. *See id.* at 35-36.

104. *See id.* at 36.

105. 173 P.2d 652, 653-54 (1946) (holding that the plaintiff could "waive the tort" and [sue the defendant] . . . in assumpsit for restitution" because the defendant had misappropriated plaintiff's egg washing machine and the plaintiff could choose to recover what the defendant saved by not having to hire workers to clean the eggs rather than the value of the loss of use of the machine).

106. *Branch*, 778 F. Supp. at 36.

107. 125 U.S. 136 (1888).

108. *See id.* at 146 (with respect to patent law, but not unjust enrichment, this case was superseded by statute as announced in *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983)).

109. 756 F.2d 364 (5th Cir. 1985).

110. *See id.* at 365-66.

111. *See id.* at 377.

112. *See id.*

113. *Id.* at 366.

114. *Id.* at 371.

States' claim because the statute imposed a duty of clean up upon the defendants.<sup>115</sup> However, the court reached into unjust enrichment common law in order to apply a longer statute of limitations.<sup>116</sup>

## VI. CONCLUSION

The three basic elements of restitution: defendant's gain, plaintiff's expense, and unjustness are threads running through all of the cases discussed above.<sup>117</sup> Questions remain, however. The dangerous products cases that did not dismiss claims also did not need to reach some of the harder questions. The courts were not deciding the final outcome. One of the questions is whether defendants had a duty to plaintiffs and whether, therefore, any gain is unjust. As seen above, the courts define duty in a variety of ways, enabling them to reach contrary conclusions.

Perhaps it is time to borrow some of the analysis of unjust enrichment from the Securities Act cases. Corporations have a fiduciary duty to shareholders. Perhaps it could be argued that it is unjust for producers of dangerous products to have no duty toward consumers but to achieve gain at the expense of those who pay for the harm when the producers have deceived the public or saved the costs of making a product or its disposal safer.

The securities cases also have a new application of restitution, by awarding potential gain in some circumstances. This leads to the possibility that restitution could develop a greater range of "gains," including "potential gains" or "future gains." The latter would avoid problems from lack of notice of the unjustness of not internalizing externalities when such accounting had not previously been required. Thus, this Article comes full circle. The future gains look something like the damages awarded in lieu of an injunction to stop polluting, thus requiring the company to internalize externalities. There, the common law played an expansive role. Following its historical origins of finding liability outside typical causes of action, restitution can do the same, but not if it is rigidly circumscribed. The classic elements of (1) defendant had a gain (2) at plaintiff's expense, (3) that would be unjust for defendant to retain, and measuring the relief by the amount of defendant's gain, even if it is greater than the

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115. *See id.* at 375.

116. *See id.* at 376.

117. *See infra* at Part II.

plaintiff's loss, have worked well in adjusting the law to societal change. They should continue to do so.