316. Scott, H J, "Transforming the South African Law of Unjustified Enrichment" [2017] RLR 29. This article argues that the future development of the South African law of unjustified enrichment is likely to be driven not by forces internal to private law but rather by its interaction with the South African Constitution of 1996, in particular the Bill of Rights. It considers three forms which such constitutionally motivated change might take: first, the development of new constitutionally compliant rules of general application; second, ad hoc departures from existing rules in order to produce outcomes which accord with the objective normative value system of the Bill; and, finally, the wholesale remaking of unjustified enrichment doctrine in light of constitutional rights and values.

317. Seanego, KA, "A just cause falls away: Which enrichment action to apply?—*Shuttleworth v South African Reserve Bank*" (2016) 79 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 690.

BOOK

318. Eiselen, S, and Pienaar, G, *Unjustified Enrichment: A Casebook*, 4th ed (LexisNexis, Durban, 2017).

NOTER UP

Scott, HJ, *Unjust Enrichment in South African Law* (Hart, Oxford, 2013); [2014] RLR §215; reviewed by MacQueen, H L, (2017) 134 SALJ 703.

USA

MARK GERGEN*

ANNUAL SURVEY

The cases from 2016 and 2017 illustrate how the law of restitution or unjust enrichment varies enormously across states. *Volk v Goeser* §339 applies a general three-factor test defining when an action will lie for unjust enrichment in a case where the judges sharply disagree about the equities in the matter, which is the decisive third factor. *Larisa's Home Care v Nichols-Shield* §329 rejects this approach and adopts an incremental approach that requires courts to determine whether enrichment is unjust by examining "the established legal categories of unjust enrichment as reflected in Oregon case law and other authorities." This is the approach recommended by the *Restatement Third, Restitution and Unjust Enrichment* ("R3RUE"). The approach in *Suffolk Construction v Benchmark Mechanical Systems* §336 harkens back to an earlier era when the law of restitution or unjust enrichment was inchoate and claims took the form of old writs or remedies. The most interesting case doctrinally may be *Qwest Communications v Free Conferencing* §333, because of the novelty of the defendant's opportunistic conduct, and the open-ended nature of the legal doctrines invoked by the plaintiff to redress the conduct.

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"R3RUE" is used as the standard abbreviation for The *Restatement Third: Restitution and Unjust Enrichment*.

CASES

319. *Bank of America NA v PTA Realty LLC* (2016) 132 A 3d 689 (RI Sup Ct).
Mistaken payment—bona fide payee.
Receiver mistakenly paid mortgagee $80,000 of the proceeds received on the sale of mortgaged property that should have been used to pay outstanding municipal taxes. The payment was less than the unrecovered balance on the mortgage. Purchaser and its agent, whose error in omitting the taxes from the settlement statement caused the overpayment, filed a claim against mortgagee seeking restitution.

The superior court entered judgment in favour of the mortgagee. Purchaser and its agent appealed.

Decision: Affirmed.

Held: (1) The mortgagee is insulated from a restitution claim as a third-party creditor that received the payment in good faith and without notice of the error.

320. *Bank of Hampton Roads v Powell* (2016) 292 Va 10 (Va Sup Ct).
Fraudulent conveyance—constructive trust.
In 2003, Powell conveyed a house and parcel of land to 3 MAC, a real estate developer, who acquired the land to include in planned subdivision. For her part of the bargain, she was paid $265,000 and "one lot to be mutually agreed upon" in the subdivision. In 2005, Powell and 3 MAC executed an addendum providing she would receive Lot 1. Despite repeated assurances to Powell that Lot 1 would eventually be conveyed to her, in 2012 3 MAC sold the lot to Ashdon Builders for $110,000. Powell sued 3 MAC and Ashdon Builders, seeking to impose a constructive trust on the lot. Later Powell added Bank as a co-defendant. In 2013, Powell agreed to release Ashdon Builders in return for $25,000. Powell continued the claim against 3 MAC and Bank now seeking a constructive trust on another lot in the subdivision, Lot A, that would be superior to Bank's lien on Lot A.

The trial court granted the request, imposing a constructive trust on Lot A. The trial court also entered a conditional judgment of $110,000 against 3 MAC if Powell did not receive Lot A pursuant to the constructive trust. Bank and 3 MAC appealed.

Decision: Reversed and final judgment entered.

Held: The trial court erred in imposing trust on Lot A, because Powell's interest lay with Lot 1, so Powell cannot satisfy the tracing requirement necessary for a constructive trust.

Comment: The brief opinion does not explain any function served by the tracing requirement when a plaintiff is seeking a constructive trust over an asset in the defendant's hand for reasons other than obtaining priority over the defendant's other creditors. By invalidating the constructive trust, the court was able to avoid having to address the bank's arguments that it was a bona fide purchaser.

321. *Blumenthal v Brewer* (2016) 2016 IL 118781l (Ill Sup Ct).
Unmarried cohabitants.
Blumenthal (a physician) and Brewer (a judge), a same sex couple, had a long-term domestic relationship and raised a family together but never married. When they separated Blumenthal brought an action to partition a house they co-owned. Brewer counter-claimed, asserting various common law remedies on the theory that assets they accumulated during their lives together should be equalised.

The circuit court dismissed the claim, ruling it was barred by *Hewitt v Hewitt* (1979) 77 Ill 2d 49; 394 NE 2d 1204, which "held that Illinois public policy, as set forth in this State's statutory prohibition against common-law marriage, precludes unmarried cohabitants from bringing claims against one another to enforce mutual property rights where the rights asserted are rooted

in a marriage-like relationship between the parties." Brewer appealed. The court of appeals reversed, holding the rule in *Hewitt* to be "outmoded and ill-considered". Blumenthal appealed.

Decision: Reversed.

Held: (1) "[W]e reject Brewer's invitation to overrule *Hewitt* and hold that it remains good law." (2) Brewer's restitution claim is precluded by the rule in *Hewitt* because she failed to show that the claim "has an independent economic basis apart from the parties' relationship."

Comment: The Illinois Supreme Court finds it could dismiss the entire case on procedural grounds, and dismisses aspects of the case involving a claim on the value of the house on other procedural grounds, before reaching the question whether *Hewitt* should be overruled, which it declines to do. Two Justices dissented and would have overruled *Hewitt*.

322. *DeCoursey v American General Life Insurance Co* (2016) 822 F 3d 469 (8th Cir) (Missouri law).

Mistaken payment—voluntary payment.

DeCoursey's husband and son died in 1986 in an automobile accident. She submitted a claim on a $250,000 life insurance policy purchased by her husband. American General's predecessor in interest denied the claim on the ground the coverage had lapsed for non-payment of the premium. In 2013, American General paid the $250,000 face value of the policy to DeCoursey after reviewing its records as part of a general programme begun by the company in 2011 to identify and pay uncollected claims. American General was unaware that the claim had previously been denied by its predecessor in interest. DeCoursey filed a lawsuit, seeking to recover 9% interest on $250,000 from 1986. At this point American General investigated and determined the coverage had lapsed. Nevertheless, American General offered to allow Decoursey to keep the $250,000 plus an additional $25,000. When DeCoursey refused this offer, American General filed a counter-claim, seeking to recover the $250,000 on the ground that it had been paid by mistake.

The district court held that DeCoursey's claim was barred by the statute of limitations and that American General's claim was barred because "there was no evidence to suggest that [American General] did not have the opportunity to diligently investigate the Policy before it was paid out." Both parties appealed.

Decision: Affirmed as to DeCoursey's claim; reversed as to American General's claim.

Held: (1) A payor's lack of care will not diminish his right to recover, or somehow justify retention of the windfall by an unintended beneficiary in a case of mistaken payment. (2) The voluntary payment rule does not preclude an insurer's recovery of a claim paid in mistake if the insurer was unaware coverage was doubtful when it paid the claim.

Comment: This is a straightforward and correct application of the relevant rules in R3RUE, which the court applies. Hopefully American General will not pursue the claim to recover the $250,000. If it does pursue the claim, one wonders if costs incurred by DeCoursey in pursuing the interest she believed to be due on the mistaken payment will be deducted since she was lured into incurring these expenses by the mistaken payment.

323. *Deepwater Horizon (In re)* (2017) 845 F 3d 634 (5th Cir).

Bona fide payee—exception for attorney paid a contingent fee out of a judgment that is later reversed.

Burrle filed economic loss claims in connection with the Deepwater Horizon oil disaster. In 2012, defendant Woodbridge Baric loaned Burrle $24,000 under terms that excused Burrle from the obligation to repay the loan if his claims failed, unless Burrle misrepresented his claims to Woodbridge Baric. In 2013, the settlement programme paid Burrle $50,000, of which $20,000 was paid to Woodbridge Baric. Several months later the special master determined Burrle's claim was fraudulent and filed claims against Burrle and third parties who benefitted from the payment to recover the money.

The district court entered judgment against Woodbridge Baric in the amount of $20,000, determining "that it would be unjustly enriched if allowed to retain the funds, reasoning that Woodbridge Baric's right to Burrle's repayment of the loan was contingent upon the success of Burrle's claims, which ultimately failed." Woodbridge Barric appealed.

Decision: Reversed.

Held: (1) "[A] third party who receives funds in good faith from a judgment creditor in satisfaction of a debt is not liable to repay those funds in restitution" when the judgment is later reversed. (2) Under an exception to this rule, "an attorney who receives a share of a judgment pursuant to a contingency-fee agreement does not take the money as a bona fide payee." (3) Even if this exception might cover a non-attorney, it does not apply to Woodbridge Baric in this case because of the further condition requiring Burrle to repay the loan if he misrepresented his claims to Woodbridge Baric.

Comment: The opinion has a good explanation of the general rule protecting a bona fide payee out of the proceeds of a subsequently reversed judgment and an exception to the rule when the payee is an attorney who is paid a contingent fee out of the judgment. The court qualifies the exception to the rule. The qualification to the exception follows if the reason for the exception is that the attorney's right to the fee is conditioned upon success in the litigation. The condition that Burrle not have misrepresented his claim to Woodbridge Baric would then take the payment out of the rule, since Burrle's debt would not be conditioned upon success. The court implicitly acknowledges the risk this qualification to the exception creates. This risk is that an attorney will contract around the exception by conditioning a lawyer's right to a contingent fee on payment being received on a judgment, rather than it being conditioned on success. The court explains in a footnote that an attorney who contracts around the exception might not be considered to be receiving a payment in good faith.

324. *Falconi-Sachs v LPF Senate Square LLC* (2016) 142 A 3d 550 (DC App).

Payment of an illegal penalty—voluntary payment.

Plaintiff, a recent law school graduate, rented an apartment from defendant. The monthly rent was $2,499, which was due on the 5th day of the month. The lease added a 10% late payment charge and in addition gave the lessor the power to terminate the lease if a default was not made up within 5 days after the due date. Eight months into the one-year lease, plaintiff was late in paying the rent. On the 6th day of the month defendant placed a "Final Notice Letter" under her door. Plaintiff paid the late fee and then filed a class action complaint seeking to recover the late payment, alleging violations of a local consumer protection law, fraud, negligent misrepresentation, unconscionability and restitution/unjust enrichment.

The trial court granted a motion to dismiss as to all claims. As to the unjust enrichment claim, the trial court held that it was barred by the voluntary payment rule. The plaintiff appealed.

Decision: Reversed as to unjust enrichment claim; otherwise affirmed.

Held: (1) The plaintiff plausibly alleges facts that would establish the late fee was an illegal penalty. (2) If the late fee is an illegal penalty, then plaintiff may recover the fee on a restitution claim. (3) The plaintiff plausibly alleges facts that would take the payment out of the voluntary payment rule.

Comment: The case is notable, in part, because of the paucity of authority that a party who pays stipulated damages that the court would not enforce as a penalty may recover the damages paid with a restitution claim. Most of the case authority for a right to recover a payment made to satisfy an illegal debt involves claims to recover payments in excess of the legally permitted price, such as a payment of a usurious interest rate. The case also is notable because of the court's explanation that the voluntary payment rule "might be best thought of as a corollary to the general rule about contracts without consideration: while such a contract is not enforceable, once

completed it is generally irrevocable; one cannot take a 'gift' back once given. The voluntary payment doctrine is thus a rule against welshing."

325. ***Farmpro Services Inc v Finneman*** (2017) 897 NW 2d 72 (SD Sup Ct).
Mistaken payment.
The Finnemans owned approximately 16,700 acres of farmland subject to two mortgages held by Rabo (the senior mortgage) and Farmpro (the junior mortgage). Farmpro purchased the property at a foreclosure sale in 2006. Through a series of transactions the final redemption rights ended up in the hand of RCF, which was a partnership formed by the Finnemans and Anderson. In one of these transaction Mahoney (acting on behalf of RCF) deposited $1,219,734.29 with the sheriff when Mahoney acquired the redemption rights from Michael Arnoldy, who was one of the Finnemans' many creditors. This is called the "Mahoney payment," which the sheriff refused to accept for reasons that do not need to be explained. In 2009, Rabo commenced a separate foreclosure proceeding. Ann Arnoldy, who was another one of the Finnemans' many creditors (and Michael's sister), acquired the property. At this point RCF tried to exercise the Finnemans' final right of redemption as owner, but the court held that the Finnemans had waived this right in a loan restructuring agreement. RCF and the Finnemans returned to the Farmpro foreclosure court and sought to recover the Mahoney payment, which the sheriff still held. "RCF argued that because it had not expected to lose the owner's final right of redemption in the Rabo foreclosure, it had mistakenly redeemed in the FarmPro foreclosure. RCF further argued that because it lost title to the land in the Rabo foreclosure, it was entitled to recover the redemption money it paid in the FarmPro foreclosure."

The trial court rejected the claim, reasoning that "RCF's decision to redeem in the FarmPro foreclosure was not the kind of 'invalidating mistake' that permitted equitable relief." The court granted the Mahoney payment to Michael Arnoldy. RCF and the Finnemans appealed, arguing "that it is inequitable to allow Michael Arnoldy to retain the redemption money that RCF paid to redeem in the FarmPro foreclosure *and* allow Ann Arnoldy to retain the land obtained in the Rabo foreclosure."

Decision: Affirmed.

Held: "RCF must be deemed to have assumed the risk that the interest it obtained in the FarmPro foreclosure—an interest in heavily encumbered land—could be lost in a subsequent foreclosure; a foreclosure that was on the horizon at the time it redeemed. It did not need to know the exact circumstances under which the risk of loss would materialise; only that loss was possible."

326. ***Hoffman v L&M Arts*** (2016) 838 F 3d 568 (5th Cir).
Disgorgement as remedy for breach of contract.
Hoffman decided to sale a well-known Rothko painting, "the Red Rothko", after her husband died. She wanted to keep the sale private because of the public association of the painting with her and her husband. She approached L&M Arts, which arranged a private sale, assuring Hoffman that the undisclosed buyer (Martinez) was a "very private" "single individual" and that the painting would "disappear" into the buyer's collection, which was in Europe. The parties agreed to a $17.6 million sales price in February 2007. The sales agreement provided that "[i]t is the specified wish of the seller that the sale and terms of the sale remain confidential," and that "[i]t is requested that confidentiality be maintained indefinitely." Hoffman cancelled the sale when she learned that the transaction had been disclosed to Christie's auction house. On 24 April 2007, a new letter agreement for the sale of the painting was executed. The price remained $17.6m but the buyer promised to donate $500,000 to the Dallas Museum of Art, where the painting was being shown. Hoffman was also allowed to keep the painting for six months after closing, and the buyer agreed to refrain from displaying the painting for an additional six months. The second agreement modified the confidentiality clause to provide: "All parties agree to make maximum

efforts to keep all aspects of this transaction confidential indefinitely." Martinez and L&M attempted to sell the Red Rothko privately for a year. When these attempts proved fruitless, they displayed the painting at L&M's gallery in New York, and eventually auctioned the painting off at Sotheby's on 15 May 2010, for $31 million. The auction of the painting was highly publicised, including the painting being featured on the cover of Sotheby's catalogue. Hoffman sued Martinez and L&M for breach of contract in Texas.

The defendants were found to have breached the confidentiality agreement. The jury was asked three different damage questions. The first question asked the jury to measure damages based on the difference between the $17.6m private sale price and what the jury found would have been the price at a public auction on the same date. The jury answered $500,000. The second question asked the jury to measure damages based on "[t]he difference, if any, between the value of the benefits Hoffman conveyed under the contract to the defendant in question and the value of the benefits she received in exchange." The jury answered $0 to this question. The third question asked the jury to measure damages based on "[t]he value of the benefits that the defendant in question received in connection with the transaction." The jury answered $450,000 as to L&M and $750,000 as to Martinez. The district court held that damages under the third measure were disgorgement damages, which were not permitted under Texas law. It entered judgment for Hoffman for $500,000 damages under the first measure. Both parties appealed.

Decision: Reversed, take nothing verdict entered.

Held: (1) The confidentiality agreement only prevented the defendants from disclosing the terms of sale, it did not prevent disclosure of the fact of the sale itself, so there was no breach of the agreement. (2) In any event, damages based on the first measure are not available under Texas law because they do not represent lost benefit of the bargain. (3) Disgorgement damages for breach of contract are not available under Texas law.

Comment: The court's conclusion as to the first measure of damages—which it calls "the auction-theory" measure—is debatable. These could be described as reliance damages, which are available for breach of contract under Texas law, if one is willing to accept the counter-factual that Hoffman would have sold the painting at a public auction, if she had not been promised secrecy. As for the disgorgement claim, the court cites two decisions by intermediate courts of appeal in Texas in predicting the Texas Supreme Court would not allow disgorgement damages for breach of contract.

327. *Knope v Green Tree Servicing LLC* (2016) 161 A 3d 696 (Me Sup Ct).

Payment to protect claimant's interest.

Green Tree acquired from GMAC the Knopes' promissory note, which the Knopes had given to GMAC to purchase a rental house. The Knopes also executed a mortgage deed on the house to Mortgage Electronic Systems Inc ("MERS") for the benefit of GMAC. GMAC attempted to assign the mortgage to Green Tree when it purchased the note. Green Tree acquired the note, and tried to acquire the mortgage, in a transaction to acquire a large bundle of notes and mortgages. This transaction occurred in April 2013. Had Green Tree investigated the quality of the Maine mortgages it was acquiring, Green Tree could easily have discovered that it did not actually acquire much in the way of rights because a 2010 decision of the Maine Supreme Court held that the language in the MERS deed created only the right to record the mortgage, and not the right to foreclose, or other rights under the mortgage. The Knopes stopped payment on the note shortly before it was acquired by Green Tree, after a pipe in the second floor of the house burst, causing severe water damage and rendering the house inhabitable. Green Tree did not respond to the Knopes when they sought to determine their liability under the note. Green Tree also did not respond when the Knopes filed a lawsuit seeking a declaratory judgment as to the amount owed on the note as well as equitable relief. This led to a default judgment being entered against Green Tree. Meanwhile Green Tree commenced a separate action for foreclosure (a power it did not

have). At this point Green Tree discovered that a default judgment had been entered against it, and it sought to set aside the default judgment. The trial court refused to set aside the default judgment and ordered a hearing to determine the relief available to the Knopes. Meanwhile the Knopes repaired and sold the house. The Knopes used the proceeds to pay the balance due on the note and other amounts they conceded they owed Green Tree. The issue in this case is Green Tree's right to be reimbursed for property taxes and insurance it had paid on the house, property preservation fees, and foreclosure expenses. Green Tree would have been entitled to recover these expenses under the mortgage. But recall that Green Tree did not hold much in the way of rights under the mortgage as the assignment only gave it the right to record the mortgage.

The trial court held that, while Green Tree did not have "contractual authority to enforce rights created by the mortgage", to "avoid unjust enrichment" Green Tree had a right to be reimbursed for the disputed expenses "because Green Tree had paid expenses that were the Knopes' responsibility under the mortgage to protect Green Tree's 'security interest,' and to keep the property saleable while the Knopes were in default." The Knopes appealed.

Decision: Affirmed.

Held: (1) The fact that the Knopes and Green Tree were in a contractual relationship by dint of the promissory note does not preclude Green Tree recovering expenses it paid to preserve the property, because the promissory note does not address these matters. (2) Green Tree is not precluded from recovering these expenses as a volunteer because it paid the expenses under "under the mistaken belief that it had the right to do so to protect a security interest that it thought it had acquired." (3) The expenses benefitted the Knopes because they "had a legally enforceable obligation to pay the taxes and insurance on their property and to keep the property in good repair."

Comment: Doctrinally the case is of interest because of the clear statement by the majority of the principle that the existence of a contract between a plaintiff and defendant precludes an unjust enrichment claim only when the contract addresses the subject matter of the claim. The decision seems so straightforward on the merits that it raises the question why Hijelm J dissented. The dissent does add an important point of clarification that Green Tree should not be reimbursed for foreclosure expenses as these did not benefit the Knopes. One gets the impression that the dissenter was incensed at Green Tree's apparent disregard for the individuals whose notes it purchased and for Maine courts and Maine law. The dissent concludes with this ringing statement: "Regardless of whether or to what entity the Knopes may bear liability for the charges for which Green Tree seeks recovery, that liability cannot properly be predicated on notions of equity when Green Tree chose to act in disregard of existing law that defined its rights."

328. *Kokesh v Securities and Exchange Commission* (2017) 137 S Ct 1635 (US Sup Ct).

Disgorgement for violation of regulatory statute.

The Securities and Exchange Commission (SEC) brought enforcement action against owner of two investment-adviser firms for misappropriation of $34.9 million from four business development companies from 1995 to 2009 in violation of federal securities laws. The district court held the five-year statute of limitations in 28 USC §2462 for any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" did not apply to a claim of disgorgement as disgorgement was not a "penalty" within the meaning of the statute. Thus, it ordered the defendants to disgorge the entire $34.9 million. The tenth circuit affirmed. The Supreme Court granted cert to resolve split between the circuit courts on whether the five–year statute of limitations for any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" applies to disgorgement as a sanction for violating federal securities law.

Decision: Reversed.

Held: Disgorgement is a penalty within the meaning §2462 and so the five year statute of limitations applies.

Comment: The opinion of Sotomayor J finds disgorgement to be a penalty because the remedy is imposed for violating a public law, it is imposed for purposes of deterrence, and funds are paid to the court, which may distribute the funds for purposes other than compensation of victims of the wrong. She also observes that disgorgement does not always return the defendant to the status quo because, as in this case, the defendant's expenses are not deducted in determining the profit attributable to the wrong.

329. *Larisa's Home Care LLC v Nichols-Shields* (2017) 404 P 3d 912 (Or Sup Ct).
Payment induced by fraud.
Prichard, who suffered from dementia, was a patient at plaintiff's residential care facility from June 2007 until her death in November 2008. Because she was receiving Medicaid benefits, plaintiff charged her the Medicaid rate of $2,000 per month ($1,200 of which was paid by Medicaid) rather than $4,000 and $5,700 per month, saving her $48,000. Prichard's son, Gardner, committed fraud in qualifying her for Medicaid benefits by failing to disclose that in the 60 months before she applied for benefits he had stolen over $150,000 of her assets. Prichard's daughter, who is the named defendant in this case, discovered the fraud and recovered the money from Gardner. The residential care facility sued to recover from the estate the difference between the amount Prichard would have paid as a private patient and the amount that Prichard actually paid.

The trial court ruled for the residential care facility, explaining the result as "equitable" and a matter of "fundamental fairness." The court of appeals reversed, finding that the plaintiff could establish none of the three elements of an unjust enrichment under its prior case law. These were: "'(1) the plaintiff had a reasonable expectation of payment; (2) the defendant should reasonably have expected to pay; or (3) society's reasonable expectations of security of person and property would be defeated by non-payment." The plaintiff appealed.

Decision: Reversed, unjust enrichment found established, and claim remanded so court of appeals may address whether Medicaid law prohibits recovery.

Held: (1) The presence or absence of unjust enrichment is not to be determined by applying the general tests that were applied by the trial court and the court of appeals. (2) In determining whether enrichment is unjust, "Oregon courts should examine the established legal categories of unjust enrichment as reflected in Oregon case law and other authorities." (3) This claim is covered by the rule that "A transfer induced by fraud or material misrepresentation is subject to rescission and restitution."

Comment: The decision is important because the opinion includes a long and thoughtful discussion of the history of restitution and unjust enrichment in the US and in Oregon. The Court explains the flaws in general tests that try to reduce analysis to a few factors, using as an example the three-factor test applied by the court of appeals. And the Court resoundingly endorses the approach taken by R3RUE, while drawing on leading scholarship in the field, including the work of Andrew Kull and Peter Birks.

330. *Lincoln Land Co LLC v LP Broadband Inc* (2017) 163 Idaho 105 (Idaho Sup Ct).
Indirect enrichment—privity.
LP Broadband placed and used antenna equipment on the rooftop of a grain silo leased to General Mills under a sublease with General Mills, paying $50 per month rent. Lincoln Land purchased the silos in 2006 and in 2010 it executed a lease with General Mills that prohibited a sublease without Lincoln Land's prior written consent. When Lincoln Land discovered LP Broadband was using the rooftop space, it filed a complaint against LP Broadband for unjust enrichment. Apparently the $50 per month rent charged by General Mills was substantially below the market value.

The district court dismissed the "complaint after concluding that Lincoln Land failed to establish that it—not General Mills—had conferred the benefit to LP Broadband." Lincoln Land appealed.

Decision: Affirmed.

Held: (1) "To establish a claim for unjust enrichment, a plaintiff must prove: (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof." (2) Lincoln Land has failed to establish the first element. (3) "Lincoln Land cannot cut out the middleman—General Mills—and recover from LP Broadband. While Lincoln Land may have suffered a wrongdoing on its property, the proper avenue for relief is simply not a claim for unjust enrichment."

Comment: The last point is the heart of the matter. If Lincoln Land has a claim, then it is against General Mills for breach of contract.

331. ***Mandell v Ward*** (2016) 384 Mont 387; 377 P 3d 1228 (Mont Sup Ct).

Benefit conferred pursuant to unenforceable contract.

Ward performed services as architect and general contractor to construct a vacation home for Mandell. The house was originally projected to cost approximately $300,000. The ultimate cost was significantly greater because of numerous change orders that Mandell approved. Mandell paid $394,198.65 as the work progressed. But Mandell refused to pay plaintiff's final invoice, which prompted Ward to file a construction lien on the house in the amount of $138,241.35. Mandell initiated the litigation seeking to remove the lien and damages for breach of contract. Ward counter-claimed seeking to foreclose the lien, quantum meruit and breach of contract. Mandell sought summary judgment, arguing that the parties had not reduced the construction agreement to writing, in violation of MCA (Montana Code Annotated), § 28-2-2201(2), and so there was no basis for the lien, nor any basis for the contract claim.

The district court agreed that the failure to reduce the construction agreement to writing invalidated the lien for construction services, and precluded a contract claim for those services, while leaving the lien and the contractual claim for architectural services, which the district court valued at $29,250, the amount charged by Ward. As for the construction work, the district court awarded Ward $75,409.53 quantum meruit damages, which was based on invoices submitted by Ward as still owing for materials and subcontractors. The district court dismissed Mandell's claim for breach of contract. The district court granted the entirety of Ward's attorney's fees and costs, finding that expenses related to the construction claim were inseparable from the expenses related to claim for architectural services. Mandell appealed.

Decision: Affirmed except with respect to the award of attorney's fees and costs on the quantum meruit claim.

Held: The policies behind the statute requiring that a construction agreement be reduced to writing are adequately served by denying a contractor the protection of a lien and the right to attorney's fees and costs, and so equitable remedies (quantum meruit) remain under the statute.

Comment: In earlier cases, the Montana Supreme Court held that a statute requiring that a real estate brokerage agreement be reduced to writing precludes a quantum meruit claim by a broker. The Court distinguished construction services from real estate brokerage services by the evidentiary value of construction in corroborating the existence of the alleged agreement.

332. ***Quality Auto Painting Center of Roselle Inc v State Farm Indemnity Co*** (2017) 870 F 3d 1262 (11th Cir).

Benefit conferred under duress—quantum meruit.

Automobile body shops were aggrieved by a campaign pursued by insurance companies to suppress the shops' rates for repairs by setting a "market rate" and steering insureds away from

shops that charged above market rates. None of the shops involved in this appeal have a direct contractual relationship with the insurance company defendants because they are not parties to a direct repair program (DRP) agreement, by which a shop agrees to charge no more than the going rate in exchange for being listed as a preferred provider. Individual shops filed separate actions in multiple states asserting federal antitrust claims and several state law claims, including unjust enrichment and quantum meruit. These actions were consolidated in the Middle District of Florida, using the Multi District Litigation mechanism.

This appeal involves claims by body shops in four states (Kentucky, Missouri, New Jersey, and Virginia) from a decision granting a motion to dismiss all claims. The district court dismissed the unjust enrichment claim "based on the argument that, because the body shops knew how much they were going to be paid before repairing cars, these claims for unjust enrichment are based on buyer's remorse—based on unsatisfactory bargaining by the shops—and that the claims are for post hoc judicial determination of a reasonable rate for the repairs."

Decision: Reversed.

Held: (1) The body shops pled sufficient facts to plausibly establish their contracts with insureds to do work at the suppressed price were involuntary and therefore invalid, which would lay the basis for an unjust enrichment claim against the insurers. (2) The body shops pled sufficient facts to plausibly establish that the services they rendered in repairing the insureds' autos were in fact for the insurance company, which would lay the basis for a quantum meruit claim.

Comment: The analysis in the majority opinion of the unjust enrichment and quantum meruit claims is quite cursory. The dissent of Anderson J has a lengthy and cogent analysis of both claims. His main point is that the fact the shops agreed to do the work at the suppressed price precludes recovery on both theories. Neither the majority nor the dissent address the merits of what would have to be a duress claim by the shops to avoid their contracts with the insureds.

333. ***Qwest Communications Corp v Free Conferencing Corp*** (2016) 837 F 3d 889 (8th Cir) (South Dakota law).

Restitution for wrongs.

Defendant FC, a national conference call company, colluded with Sancom, a small local exchange carrier that served Mitchell, South Dakota, to profit at plaintiff Qwest's expense by a business strategy that exploited an ambiguity in federal telecommunication regulations. The gist of the strategy is that FC nominally subscribed to Sancom's services to enable Sancom to charge Qwest 3 cents per minute for each call that terminated at the conference call bridges at FC's facility in Mitchell, South Dakota. Sancom pocketed .5 cents per minute while FC pocketed 2.5 cents by dint of a "marketing fee" paid by Sancom to FC. The scheme was cooked up by FC and it began in late 2004 or early 2005. "In 2007 and the first half of 2008, FC traffic accounted for 98% of Sancom's overall traffic. During this time period, Sancom terminated roughly 686 million minutes of FC traffic and only 14 million minutes of traffic for all other customers. The FC traffic never interfered with Sancom's service to the other customers." In 2007, the FCC ruled the practice to be unlawful. Qwest filed a lawsuit against FC and Sancom, claiming intentional interference with a business relationship, unfair competition, and unjust enrichment.

After a bench trial, the district court found Qwest failed to prove all of these claims.

Decision: Affirmed with respect to intentional interference and unfair competition claims, reversed and remanded with respect to unjust enrichment claim so the district court could decide if FC was unjustly enriched.

Held: (1) FC's conduct was not improper, as required for tortious interference, because it "reasonably believed it was complying with the law as it existed at the time it contracted with Sancom." (2) No claim lies for unfair competition "because an essential component for a claim of unfair competition under South Dakota law is lacking: direct competition." (3) Since the FCC's decision closing the loophole was retroactive, FC's retention of the benefit may be unjust

and so a basis for recovery on a theory of unjust enrichment. (4) Amounts recovered by Qwest from Sancom in the settlement should not reduce Qwest's recovery from FC on a theory of unjust enrichment because damages are based on the benefit to FC, not Qwest's loss.

Comment: The split between the three judges on the panel suggests the difficulty of the legal issues presented by the tortious interference and unjust enrichment claims. Shepherd J would have rejected both the tortious interference claim and the unjust enrichment claim. The gist of Shepherd's argument is that FC was "not a party to an illegal agreement and [had] no legal obligation to ensure that Sancom complied with its tariff." Murphy J would have allowed both claims. Bright J, who wrote the opinion for the court, rejected the tortious interference claim while allowing the unjust enrichment claim. His analysis does not bear close scrutiny. Under South Dakota law the tortious interference and unjust enrichment claims both involve an open-ended inquiry. As for tortious interference, the issue is whether FC's conduct was improper, which requires the court to balance six factors, including "the social interests in protecting the freedom of action of the actor and the contractual interests of the other": *Gruhlke v Sioux Empire Fed Credit Union* (2008) 756 NW 2d 399 (SD), 408. Meanwhile, the unjust enrichment claim turns on "whether the circumstances are such that equitably the beneficiary should restore to the benefactor the benefit or its value": *Hohfeldt v Mehling* (2003) 658 NW 2d 783 (SD), 788. Given the open-ended nature of both questions, it is not apparent why the two questions should yield different answers. From a more practical perspective, it is not clear why the decision that FC's conduct did not warrant liability for compensatory damages should leave open the possibility of liability for disgorgement damages, in a case in which the latter figure may well be greater than the former.

334. *Roadepot LLC v Home Depot USA Inc* (2017) 163 A 3d 513 (RI Sup Ct).
Mistaken payment—performance of disputed obligation—voluntary payment.
Lessor Roadepot and lessee Home Depot had a long-running dispute about whose obligation it was under the lease to pay town's sewer assessment charge. Home Depot paid the charge without question from 2005 to 2009. In 2009, Home Depot demanded that Roadepot pay the charge. Home Depot continued to pay when Roadepot refused. Home Depot incurred occasional late charges, which it also paid. In 2010, Roadepot sought a declaratory judgment that Home Depot was obliged to pay the charge. The parties battled over this issue for several years in trial court.

In 2014, the trial court ruled that Roadepot was obliged to pay the charge. The trial court also ruled that Roadepot was obligated to reimburse Home Depot for $388,657.21 charges Home Depot paid between 2005 and 2014. The trial court characterised the repayment obligation with respect to 2005–2009 as equitable in nature, and sounding in unjust enrichment, while it characterised the repayment obligation with respect to 2009-2014 as a contractual obligation. The trial court denied the lessor's argument that the voluntary payment doctrine precluded recovery of the charges. However, the trial court rejected Home Depot's request to be reimbursed for late fees it incurred on the charges. Finally, the trial court ruled that interest accrued from 2009 and only on monies paid after 2009, when Home Depot first demanded that Roadepot pay the charges. Both parties appealed.

Decision: Affirmed in part; reversed and remanded in part.

Held: (1) Lessor was obliged to pay the charge under the lease. (2) Trial court erred in ordering reimbursement of charges for 2005–2009 because this was an equitable claim that was raised sua sponte by the trial court, which the trial court should have given an opportunity to brief and argue. (3) The voluntary payment doctrine does not preclude recovery of 2005–2009 payments because Home Depot made the payments in the mistaken belief it was their obligation under the lease. (4) The voluntary payment doctrine does not preclude recover of 2009–2014 payments because the payments were made to a third party to avoid the adverse consequences of nonpayment. (5) Home Depot is not entitled to recover late fees it paid for these were due to its own lack of diligence.

Comment: Nothing surprising here except for the insistence of both courts that the claim for reimbursement of the mistaken payments was equitable in character.

335. *Sands v Menard* (2017) 379 Wis 2d 1 (Wisc Sup Ct).
Unmarried cohabitants.
Sands and Menard were involved in a romantic relationship from late 1997 to April 2006. When the relationship began Menard was a multi-millionaire and founder, president and CEO of Menard Inc, a privately owned company that owned a chain of home improvement stores. Sands was a recent law school graduate. They became engaged. Sands alleged and Menard denied that they two lived together beginning in 1998. Sands alleged that "[s]he was Menard's life partner, social companion, and manager and hostess of his households. Sands protected Menard from unwanted approaches by serving as a 'gate-keeper'. She supervised his health care and medical needs; managed the remodelling of three residences; and advised on the acquisition of airplanes and their design and décor." She also alleged that she assisted in the management of Menard Inc, in numerous respects, and that she assisted Menard in other new ventures, including auto and thoroughbred racing and a private equity company. Sands also did some legal work for Menard's ventures. The nature and extent of the work was disputed, but it was undisputed that beginning in 2003 Menard Inc paid Sands for legal services evidenced by seven invoices that totalled $152,105. When the relationship ended in 2006, Menard asked Sands to provide itemised invoices for all legal services for which she had not been paid. She submitted 190 invoices that totalled $1,085,629.50 for 7,487.10 hours at $145 per hour. Menard offered to pay Sands $961,518 if she would sign a release that included a waiver of any "quasi-marital claims". When Sands rejected the offer, Menard increased it by $100,000. Sands rejected this offer also and filed a lawsuit alleging numerous claims. These claims included what is called a *Watts* unjust enrichment claim in Wisconsin, which is a claim by an unmarried cohabitant for contributions to a household's wealth during the period of a relationship. Menard counter-claimed for breach of fiduciary duty and argued that Sand's violation of disciplinary rule SCR 20:1.8(a), which regulates business transactions between attorneys and their clients, precluded recovery of any portion of Menard's assets or against his businesses.

The trial court granted Sand's motion for partial summary judgment on the last ground. Sands then added a claim for non-legal services, which the trial court dismissed because Sands had stated in an affidavit that she did not expect compensation for those services. The trial court granted summary judgment on Sands' quantum meruit claim seeking compensation for legal services, finding this claim also to be barred by SCR 20:1.8(a). Finally, the trial court denied Menard's counter-claim for breach of fiduciary duty. Both parties appealed.

Decision: Affirmed.

Held: (1) "Unjust enrichment requires proof of three elements: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable to do so." (2) When unmarried cohabitants separate, "unjust enrichment must be demonstrated by showing: (1) an accumulation of assets; (2) acquired through the efforts of the claimant and the other party; and (3) retained by the other party in an unreasonable amount." (3) "Stated otherwise, Sands' unjust enrichment claim must demonstrate that, viewed in their entirety, the contributions she made to a joint enterprise in which she and Menard were mutually engaged resulted in an accumulation of wealth that Menard unfairly retained." (4) Sands' contributions to Menard's wealth are not comparable to the contributions of plaintiffs who have recovered under *Watts* because "[i]n each of those cases, the parties had very little, and it was only through their joint efforts that their assets or property increased. Sands, however, did not support Menard as he built his empire; he already had it when they met." (5) Nor were Sands and Menard engaged in a "joint enterprise", as they did not commingle finances, file joint tax returns, or make joint

purchases of property. (6) Sands has "alleged no facts from which we could conclude that her contributions caused an increase in Menard's assets or property." (7) Sands has failed to demonstrate the benefits she conferred to Menard are not offset by the benefits she derived from him", which included "an expansive lifestyle as the companion of a wealthy man." (8) "SCR 20:1.8(a) may guide courts in determining required standards of care generally; however, it may not be employed as an absolute defence to a civil claim involving an attorney."

Comment: Abrahamson J dissented, arguing that Sands pleaded sufficient facts to establish an unjust enrichment claim. She argues that the fact Menard was already successful should not preclude the claim, if Menard's assets became more valuable as a result of the parties' joint efforts.

336. ***Suffolk Construction Co Inc v Benchmark Mechanical Systems Inc*** (2016) 475 Mass 150; 56 NE 3d 138 (Mass Sup Jud Ct).

Implied subrogation—implied indemnification—money had an received—mistaken payment.

Suffolk, a general contractor, agreed to assign to Bank all payments due to Benchmark under a subcontract to secure a debt owed by Benchmark to Bank. The assignment obligation was not limited to the amount of the debt owed to Bank. Suffolk mistakenly sent twelve cheques totalling $3,822.500.49 to Benchmark between June and December 2004, breaching the assignment obligation. Benchmark ceased operations in July 2005 and turned over its assets to Bank. At the time, Benchmark owed Bank $1,499,149.42. Bank applied $430,402.38 recovered in liquidation of Benchmark's assets to reduce the debt. Bank sued Suffolk for the full value of the assignment obligation, $3,822.500.49. In *Reading Co-Operative Bank v Suffolk Constr Co* (2013) 464 Mass 543; 984 NE 2d 776, the court held that Mass General Law ch 106, UCC §9-405 "displaced the common law, that the bank was entitled to recover the full value of the assigned collateral ($3,822,500.49) under §9-405 rather than its actual damages, and that the common-law doctrine of mitigation did not apply." Suffolk paid a judgment of $7,640,907.45, which included interests and costs, and it then filed a lawsuit against Bank and Benchmark seeking to recover the surplus remaining after Bank applied the judgment to Benchmark's outstanding debt and its collection costs. The theories pled included implied subrogation, implied indemnity, money had and received, mistaken payment and unjust enrichment.

The trial court dismissed the implied subrogation and implied indemnity claims on the ground that they sought to recover funds for which Suffolk had been primarily, rather than secondarily, responsible. The trial court found the claims of money had and received, mistaken payment and unjust enrichment to be barred by the statute of limitations.

Decision: Reversed as to implied subrogation and implied indemnity claims; affirmed as to other claims.

Held: (1) While we held in our earlier decision that Suffolk was "directly liable" to Bank under the assignment agreement, the primary obligor in the transaction was Benchmark, so recovery on the theories of implied subrogation and implied indemnity is not precluded. (2) "Basic fairness requires that Benchmark not enjoy any of the surplus derived from Suffolk's judgment payment to the bank, where Benchmark had wrongfully retained the monies mistakenly sent by Suffolk." (3) UCC Art 9 does not displace equitable principles. (4) While the unjust enrichment claims are time-barred, these are not because the "claims did not ripen until a surplus materialised from the bank's application of Suffolk's judgment payment to Benchmark's indebtedness." (5) Because Suffolk will stand in Benchmark's shoes with respect to these claims, it will stand behind other subordinate lien creditors of Benchmark.

Comment: The last point is the bottom line. The 2013 decision provides funds in the Bank's hand that may be used to pay off Benchmark's other creditors. This decision allows Suffolk to recover any funds that remain.

337. ***Superior Steel Inc v Ascent at Roebling's Bridge LLC*** (2017) 540 SW 3d 770 (Ky Sup Ct).
Uncompensated performance under contract with third person.
Superior and Ben Hur fabricated and erected structural steel for D&M as subcontractor and sub-subcontractor on a project to construct a residential condominium for Ascent/Corporex. Superior and Ben Hur performed extra work found to be worth $124,017.26 and $284,295.53, respectively. The work was requested by D&M and approved by Ascent/Corporex. Ascent/Corporex refused to pay for the work, arguing that the work was within the scope of the original contract, that the amounts requested were excessive, and that the claims were due to D&M's mismanagement of the contract. Superior also was not paid $195,143.40 owed in retainage on the base contract work. Superior and Ben Hur filed mechanics liens on the property. Ascent purchased lien discharge bonds from Winchester to remove the liens to enable it to begin to sell units. Superior and Ben Hur filed a lawsuit naming D&M, Ascent, Corporex and Winchester as defendants, asserting breach of contract and unjust enrichment, among other theories. D&M filed a cross-claim against Ascent/Corporex for breach of contract and indemnification of amounts owed to Superior and Ben Hur. Ascent/Corporex filed a cross claim against D&M alleging breach of contract, among other theories.

The trial court granted a partial verdict in favour of Superior on the retainage. The trial court also found there was an implied contract between Ben Hur and D&M to pay for extra work. The trial court submitted the remaining claims to the jury, which found a contract between Superior, Ben Hur and D&M to pay for extra work in the amounts stated above. The jury also found that D&M did not fail to exercise ordinary care in its performance of its contract with Corporex. The trial court also held that Ascent/Corporex were liable to D&M for all amounts D&M paid to Superior and Ben Hur for the excess work. Finally, the trial court held that Superior and Ben Hur had an unjust enrichment claim against Ascent/Corporex to be paid for the extra work, in the event that Ascent/Corporex did not pay D&M. All parties appealed.

The court of appeals vacated the judgment of the trial court in its entirety and remanded the case for a new trial. The court of appeals vacated the trial court's unjust enrichment award, reasoning that the existence of contractual remedies barred an equitable remedy. The court of appeals remanded Superior and Ben Hur's breach of contract claim against D&M, reasoning that the jury should be asked to decide whether a "pay when paid clause" in D&M's contracts with Superior and Ben Hur shielded D&M from contract liability. The court of appeals also held there was no legal basis for holding Ascent/Corporex responsible to D&M for amounts D&M paid for extra work on an indemnification theory. All parties sought and were granted discretionary review.

Decision: Affirmed in part and reversed in part.

Held: (1) Superior and Ben Hur have an unjust enrichment claim against Ascent/Corporex for the additional work because the "pay when paid" clauses in their contracts with D&M prevent them from recovering for the work on a contract claim against D&M, if Ascent/Corporex do not pay D&M for the work. (2) Superior and Ben Hur do not have a breach of contract claim against D&M to be paid for the extra work because of the pay when paid clause.

Comment: In the typical case in which a subcontractor recovers on unjust enrichment claim against an owner for work done pursuant to a general contract, it is because the general contractor is insolvent. The court explains that the reasons for allowing recovery through an unjust enrichment claim are that the owner otherwise would not pay for work that it had requested and that the sub cannot collect from the general. Those reasons are present in this case because of the pay when paid clause.

338. ***Ventura v Kyle*** (2016) 825 F 3d 876 (8th Cir).
Disgorgement—defamation.
The District Court decision in this case was reported in [2015] RLR §224. The defendant appeals from a jury verdict in favour of the plaintiff, Jesse Ventura, awarding $500,000 damages on a defamation claim and approximately $1.35 million on an unjust enrichment claim.

Decision: Reversed and remanded for retrial of defamation claim.

Held: (1) Defamation verdict reversed because improper closing remarks by plaintiff's counsel combined with improper cross-examination of two witnesses denied defendant a fair trial. (2) Ventura has no unjust enrichment claim because he has an adequate remedy at law through damages for defamation.

Comment: The decision could become important if other courts follow its lead to hold that disgorgement damages are not available in an action for defamation or libel. Unfortunately, many of the reasons given by the court do not stand scrutiny. For example, the court reasons that an unjust enrichment claim is not available in the absence of a "pre-existing contractual or quasi-contractual relationship" between the plaintiff and the defendant.

339. ***Volk v Goeser*** (2016) 116 A 3d 204 (Mont Sup Ct).

Constructive trust—unjust enrichment.

Roy and Pamela married in 1996 and had a son in 2000. Roy filed a petition for dissolution of marriage in June 2010. While the petition was pending, Roy changed the beneficiaries of two term life insurance policies, Policy 799 with a benefit of $1.5 million and Policy 936 with a benefit of $1 million. Pamela was aware of the smaller policy, on which she and Roy's business were joint beneficiaries, after a collateral assignment of $200,000 to a bank. Pamela was unaware of the larger policy, on which she was the sole beneficiary. On 15 July 2010, Roy changed the beneficiary of both policies to his sister, Valerie Goeser. This violated a statutorily-mandated restraining order that commanded Roy not to change the beneficiary of any insurance policy, which had his spouse or a child as a beneficiary, until the dissolution proceeding was resolved. Roy and Pamela entered into a Marital Settlement Agreement ("MSA") on 20 December 2011, when their divorce was finalised. As part of the MSA, Roy promised to "execute a will naming his son as beneficiary of his estate, giving all of his assets to his son." The MSA also provided that, if a party failed to disclose an asset, then a court would award the undisclosed asset to the other party. Roy died unexpectedly at the age of 45 on 30 April 2012, four months after the divorce was finalised. He died without a will. Roy also had a daughter, Saraya Roberson, whose mother was Serena Roberson. In June 2005, Roy and Serena entered into a court-approved child support agreement that required Roy to purchase a life insurance policy of $100,000, naming Saraya as the sole owner and beneficiary. Roy never did this. The insurance company paid out policy benefits of $2,306,103.13 on the two policies, to Valerie, who "was shocked to learn upon Roy's death that she was the recipient of the two life insurance policies. Valerie invested the proceeds in a home and real property in Newport Beach, California." Some time later Pamela learned that Valerie had been paid the benefits on Policy 936. She also learned of the existence of policy 799, and she eventually learned during discovery that she had been beneficiary on the policy before Roy changed the beneficiary, in violation of the restraining order.

Pamela filed a lawsuit against Roy's estate and Valerie, seeking to impose a constructive trust on the insurance proceeds on behalf of her son. Saraya also filed a claim seeking to impose a constructive trust on the insurance proceeds to fulfill the $100,000 liability. The claims were joined with the action to probate Roy's estate before the same district court judge who had presided over Roy and Pamela's divorce.

The district court granted summary judgment for Valerie, Roy's sister, on the constructive trust claims. The district court concluded that the equities did not require imposing a constructive trust on the policy proceeds because Roy could have made his sister beneficiary of both policies legally, after the divorce was finalised. The district court further concluded that Roy's promise to leave his estate to his son in the MSA did not cover the proceeds of the term insurance policies, because the proceeds of a term insurance policy are not considered an asset of the estate. As for the failure to disclose Policy 799, the trial court ruled that, while this was a breach of the disclosure obligation under the MSA, "marital property is valued at the time of the divorce proceedings, and thus the

court could not take into account the policy's $1.5 million proceeds because they materialised only after Roy died, months after the divorce was finalised." Pamela appealed. While the appeal was pending, Saraya assigned her claim for $100,000 to Pamela and Roy's son, who promised to satisfy Roy's obligation out of the constructive trust, if they prevailed on appeal.

Decision: Reversed and remanded.

Held: (1) The policy behind the statute prohibiting a spouse during a dissolution proceeding from changing the beneficiaries of an insurance policy held for the benefit of the other spouse or a child "supports a conclusion that transfers of property in violation of an injunction . . . are invalid and should be set aside . . . and the designations returned to the status quo, as they were prior to the dissolution." (2) A constructive trust may be imposed on assets acquired by Valerie with the policy proceeds if she has been unjustly enriched. (3) "A claim for unjust enrichment, in the context of a constructive trust, requires proof of three elements: [i] a benefit conferred upon a defendant by another; [ii] an appreciation or knowledge of the benefit by the defendant; and [iii] the acceptance or retention of the benefit by the defendant under such circumstances that would make it inequitable for the defendant to retain the benefit without payment of its value." (4) The District Court correctly found the first two elements met in this case. (5) "The central dispute in this case surrounds the third element, where the district court was required to weigh the facts and evidence to determine whether the retention of the benefit Valerie incurred created an inequitable and unjust result." (6) "Because the improper change must be set aside, we view the subsequent circumstances created by the change—Valerie's receipt of the insurance proceeds—to be similarly improper because the benefits went to Valerie as a result of Roy's mistakes." (7) The imposition of a constructive trust does not require that Valerie have done anything wrong, it is sufficient that she has gained something she should not be permitted to retain. (8) Since Valerie has spent or invested the proceeds in real property, the district court should "fashion an equitable result that will work complete justice."

Comment: The case is noteworthy because the three-part definition of unjust enrichment under Montana law made the result turn on moral questions on which reasonable people could disagree. One question is whether a court should respect Roy's intent concerning the beneficiary of his life insurance policies, since he had the legal power to make his sister the beneficiary (except with regards to the $100,000 he promised his daughter). A related question is whether a court should disregard Roy's intent because he violated a court order when he changed the beneficiary. McKinnon J dissented in the Montana Supreme Court, and sided with the trial court in answering these questions. She also argued that an appellate court should defer to a court in resolving questions of this nature, since the trial court better understood the equities in the case. There were also two concurring opinions in the Montana Supreme Court, each of which was joined by another justice. Rice J argued that the trial court had the power to consider the needs of Roy's son in fashioning a remedy, making it clear that the trial judge could allow the sister to retain some of the proceeds of the policies. Shea J took the opposite position, arguing that everything should go to Roy's estate (and so his son), since the changes in beneficiary were ineffective, and that the sister should be allowed to keep nothing, unless she was unable to recoup the full amount of the proceeds on sale of the property.

340. ***Wall Systems Inc v Pompa*** (2017) 324 Conn 718 (Conn Sup Ct).

Breach of duty of duty of loyalty—disgorgement and forfeiture.

Pompa worked for Wall Systems, a building contractor, from 1995 to the events giving rises to this lawsuit. He eventually became part of the company's management team. His services included preparing contractor and subcontractor bids. In 2005, a new owner took over control of the company, and Pompa came to feel he was being underpaid. He began to work for a competitor on the side during evenings and weekends, helping the competitor estimate the cost of jobs. He earned a total of $89,782 compensation from the competitor between 2005 and 2010. Some of

the jobs that Pompa estimated for the competitor were jobs on which Wall Systems also submitted bids. Wall System's owner became suspicious, believing that Pompa was working against the interests of the company in 2010. When the owner was told Pompa was taking kickbacks from the company's subcontractors, he fired Pompa and brought an action against him. He sought, among other remedies, forfeiture of all compensation paid by the company to Pompa from 2005 to 2010 and disgorgement of compensation paid Pompa by the competitor during this period.

After a bench trial, the trial court held that Pompa had violated the duty of loyalty he owed to Wall Systems, and that his actions were "deliberate, wrongful and intentional". The trial court further concluded that Wall Systems had failed to prove that it suffered any financial harm, and specifically that it failed to prove that it had lost any bids as a result of Pompa's disloyal conduct. The trial court found that Pompa had taken kickbacks from one subcontractor in the amount of $14,400, which the court awarded as damages, and trebled on the basis of statutory theft. The court imposed a constructive trust on a joint account of Pompa and his wife. The court declined to order forfeiture of Pompa's compensation or disgorgement of compensation paid to Pompa by the competitor. Both parties appealed.

Decision: Affirmed except with respect to imposition of constructive trust on joint account.

Held: (1) "The remedies of forfeiture of compensation paid by an employer, and disgorgement of amounts received from third parties, are available when an employer proves that its employee has breached his or her duty of loyalty, regardless of whether the employer has proven damages as a result of that breach." (2) "[F]orfeiture and disgorgement are not legal remedies, but rather, are equitable ones." (2) "[T]he remedies are not mandatory upon the finding of a breach of the duty of loyalty, intentional or otherwise, but rather, are discretionary . . . [and] harm to the employer . . . nevertheless may be considered in the fashioning of a remedy." (3) "The trial court has broad discretion in determining whether damages are appropriate .... Its decision will not be disturbed on appeal absent a clear abuse of discretion." (4) "There is no abuse of discretion where the trial court perceives the issue in question as discretionary, acts within the outer limits of its discretion and consistently with the legal standards available ... and reaches its own decision through an exercise of reason." (5) The trial court erred in imposing a constructive trust on the joint bank account because there was no evidence Pompa deposited the cash he was paid into the account.

341. ***Welu v Twin Hearts Smiling Horses Inc*** (2016) 386 P 3d 937 (Mont Sup Ct).

Improvement to another's land to benefit oneself.

Welu, the Helds and the Platts purchased an approximately 6,000 acre ranch that they divided into three 2,000 acre parcels. The Helds transferred their parcel to Twin Hearts, who is the named defendant. Welu acquired the land to hunt game animals. Thus, the Helds and the Platts granted Welu exclusive rights to hunt on the entire ranch during his lifetime. The Platts were granted exclusive recreational use of the entire ranch during their lifetimes, which was their purpose for investing in the ranch. The Helds were granted an exclusive privilege to use the ranch for livestock grazing, which was their purpose for investing in the ranch. Welu decided to install a pivot irrigation system in the Helds' part of the ranch to grow alfalfa fields, which would attract and support game animals. In December 2010, Welu and Held agreed through a brief exchange of emails that Welu would pay "the primary costs associated with set up and installation", while Held would "be responsible for all on going maintenance and operational costs." The system was installed after some delays. Welu blamed Held, who was responsible for operating the system, when a pivot caught on a fence and was damaged, a motor burned out, and a supply pipe burst. Welu told Held that he had instructed the company that installed the system "not do any more work on the pivots until I give them further directions." This prevented Held from operating the system. At this point Welu told Held that he had decided to remove the above ground parts of the system and sell some of the parts. When workers began to remove above ground parts of the

system, Held ordered them to leave. Welu filed a lawsuit claiming ownership of the system, conversion, and unjust enrichment. The Helds filed a counterclaim of trespass and breach of contract (on the theory the system was never fully installed).

The trial court held that the pivot system was a fixture, and so was the Helds' property, and that neither party was liable to the other on any of the claims and counter-claims. Welu appealed.

Decision: Affirmed.

Held: (1) The pivot irrigation system is a fixture. (2) Held did not breach the contract because Welu prevented him from fulfilling his part of the agreement. (3) Montana has not recognised an unjust enrichment claim "stemming from an implied contract . . . absent some element of fault or misconduct on the part of the defendant."

Comment: MacKinnon J dissented, arguing that an unjust enrichment claim should be available with respect to the pivot irrigation system because there was no agreement and contract with respect to the ownership of the system. Instead, the system became Held's property by operation of law. She analogises Welu's position to the position of a plaintiff who confers a benefit on a defendant pursuant to a contract with the defendant that is unenforceable under the Statute of Frauds or on ground of indefiniteness. A difficulty with this analogy is that the defendant in such a case has repudiated or disavowed the alleged contract, and sought to avoid an obligation in contract to pay for the benefit received by asserting a Statute of Frauds defence or by arguing that the alleged agreement is too indefinite to be enforced as a contract. Held never repudiated or disavowed the contract with Welu. A better analogy might be to mistaken improvement. Welu could ask for specific restitution of the removable parts of the system, which eliminates the difficulty of assessing the value of the improvements to Held, and the concern for imposing a forced exchange. But a claim for specific restitution runs afoul of the reasons for holding the entire system to be a fixture, which is the inefficiency and waste in destroying a working system to recover the removable parts. The fundamental problem with Welu's unjust enrichment claim is that it is premature. Welu should complete the installation of the system and give Held whatever support he needs to operate and maintain the system. Then, if Held does not keep his part of the bargain, Welu can sue for breach and seek restitutionary damages for the cost of installing the system.

ARTICLES

342. French, C, "The Insurability of Claims for Restitution" (2016) 19 U Pa J Bus L 599.

The issue of the insurability of claims for disgorgement damages often arises in intellectual property infringement suits, when the defendant has a Commercial General Liability policy, and in shareholder fraud claims, when the defendant has a Directors and Officers liability insurance policy. Insurers often argue that disgorgement damages should not be indemnified on public policy grounds, and occasionally these arguments have succeeded. The author argues that courts should reject these arguments and require insurers to include specific carve outs of disgorgement damages.

343. Huang, B, "The Equipoise Effect" (2016) 116 Col L Rev 1595.

This article makes the nice point that the remedy of disgorgement perhaps ought not be thought of as punitive, or as exceptional, because the effect of requiring a wrongdoer to disgorge his profit from a wrong is make the choice to commit the wrong a break-even proposition. The author labels this "the equipoise effect". The author goes on to argue that this effect reinforces the argument for substituting disgorgement for harm-based damages when harm is difficult to assess.

344. Kaye, T, "A Sound Taxonomy of Remedies" (2017) 36 Quinnipiac L Rev 79.

This article observes that judges and lawyers in the US are appallingly ignorant about the law of remedies, beginning with the observation about their ignorance of the action of debt. The author

proposes that remedies might be classified according to three schemes—the type of wrong for which a remedy lies; the type of goal a remedy is meant to achieve; and the type of right that a remedy is meant to vindicate—and argues that the third scheme is the only sound basis for a taxonomy of remedies. The author continues this Trinitarian approach by dividing rights into three categories—primary, secondary and tertiary (court orders)—and remedies into three categories—replicative, substitutionary and transformative.

345. Keele, L, "Copyright Infringement's Blurred Lines: Allocating Overhead in the Disgorgement of Profits" (2017) 2017 BYU L Rev 1059.
This article addresses the question whether the overhead expense of copyright infringer should be deducted in determining the profits derived from infringement. US Courts of Appeals are split on this issue. The author advocates the correct approach (assuming the problem is one of causation), which is not to deduct overhead expense as such, but to allow an infringer to establish foregone opportunities, which are deducted.

346. Markell, B, "The Dysfunction of Ponzi Presumptions" (2016) 36 No 11 Bankruptcy Law Letter NL 1.
This article addresses *Finn v Alliance Bank* (2015) 860 NW 2d 638 (Minn), which rejects for purposes of the state fraudulent conveyance act several presumptions that have been developed by federal courts that make it easier for a bankruptcy trustee to claw back to the estate of a debtor who ran a Ponzi scheme funds paid by the debtor to investors in the scheme. The author concludes "[h]istory is on *Finn*'s side in these matters . . . [and] that is how it should be."

347. Rendleman, D, "Commercial Bribery: Choice and Measurement Within a Remedies Smorgasbord" (2017) 74 Wash & Lee L Rev 369.
This long article by a leading US remedies scholar thoroughly covers the civil remedies for commercial bribery when the employer sues the employee and the employer sues the briber. This includes the legal and equitable restitution claims against both the employee and the briber. The article also has a thorough discussion of scholarship on the topic, including scholarship from common law systems outside the US.

348. Roberts, C "Supreme Disgorgement" (2016) 68 Fla L Rev 413.
This article recapitulates the Supreme Court decision in *Kansas v Nebraska* (2015) 135 S Ct 1032, affirming an award of disgorgement damages by a special master in a case involving a breach of an interstate compact, allocating water rights.