Because it can provide an aggrieved party with both a claim and a remedy when more traditional recourse is unavailable, restitution is an important arrow in the quiver of a litigating attorney.

THE GREAT BODY of Anglo-American civil common law is often thought of as being derived principally from two concepts — tort and contract. Tort law provides a remedy for injury or harm proximately caused when a duty is breached or a right is violated by a perpetrator acting without consent. Recoverable damages are measured by the extent of the foreseeable loss or injury. Contract law, which rests upon a consensual arrangement between two or more parties, provides a remedy in the case of a party’s failure to perform as agreed. Once again, the focus is on the loss. Contract damages may be imposed at law (compensatory, incidental, and consequential) or by agreement of the parties (liquidated). But beyond these two fault- and damages-based doctrines lies a vast neverland — where benefits are conferred in situations that involve neither tortious conduct or compensable contract damage nor, often, even fault. Here lies the law of restitution. Its focus is not on loss, but on benefit; on result, not blame.

THE LAW OF RESTITUTION • But what is the law of restitution? It is not, as sometimes believed, a disconnected
series of ad hoc cases in which courts provide some sort of restoration on the basis of fairness under the circumstances, but instead a long-established, coherent body of law concerned with benefits received under circumstances that do not justify them. The concept seems to have arisen from Lord Mansfield’s statement in *Moses v. Macferlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K. B. 1760): “In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.” Consider the following:

- Your client is induced to pay an obligation she does not owe as the result of threatened criminal prosecution against a relative. As the payment was made under duress, restitution provides a remedy. See *Meylink v. Minnehaha Co-Op Oil Co*, 283 N.W. 161 (S.D. 1938);
- Your client, a physician, performs emergency surgery on an accident victim who is lying unconscious. Your client bills the victim his usual and customary charge for the services rendered, and the victim refuses to pay. Your client may recover in restitution. See *Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907);
- Your client, who believes she owns a home, is dispossessed following an ejectment action. An appellate court reverses the judgment. Restitution would provide a remedy. Your client is entitled in restitution to recover both the home and the value of her opponent’s interim use and occupancy. See *Lytle v. Payette-Oregon Slope Irr. Dist.*, 152 P2d 934 (Or. 1944);

The foregoing examples present relatively simple fact patterns. But two United States Supreme Court cases that validate the use of restitution to justify recovery from the federal government, involve more extraordinary circumstances. In one of them, *United States v. Winstar Corp.*, 518 U.S. 839 (1996), enactment of a statute resulted in a cognizable restitution claim and in the other, *Mobil Oil Exploration & Producing Southeast, Inc. v United States*, 530 U.S. 604 (2000), repudiated claims by the government warranted the same result. Can restitution be a two-edged sword? Perhaps. Consider restitution in the context of a failed Ponzi scheme. Victims who “lost everything” may have a claim in restitution against the estate of the perpetrator, voluntary though their entry into the scheme may have been, so long as they were unaware of its nature. On the other hand, the very estate from which restitution is sought may itself be subject to enlargement through a restitution claim against those who profited, albeit unknowingly, from the illegal scheme. See generally S. Levmore, *Rethinking Ponzi-Scheme Remedies In and Out of Bankruptcy*, Conference on Restitution and Unjust Enrichment (Boston University/American Law Institute, September 16-17, 2011).

Thus, restitution is a flexible but predictable doctrine whose application may be simple or complex. A typical formulation is along these general lines: “To establish a claim for unjust enrichment, the plaintiff must prove three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value.” See *Buckett v. Jante*, 767 N.W.2d 376, 380 (Wis. Ct. App. 2009); *Hegel v. Brunswick Corp.*, No. 09-C-882, 2010 U.S. Dist. LEXIS 82257, at *12-13 (E.D. Wis. July 20,
2010); and Schira v. Sit, No. 09-cv-447-wmc, 2010 U.S. Dist. LEXIS 56783, at *11 (W.D. Wis. June 9, 2010). But such formulations have been said to lend a “specious precision” to the analysis that can lead to “serious errors.” Restatement Third, Restitution and Unjust Enrichment (hereinafter the “Restatement”) §1 at p. 8.

How, then, can a litigator properly analyze the prospects of a claim in restitution? What resources are available to assist? There are several:

- Goff & Jones, Law of Restitution (7th ed. 2007);
- Maddaugh & McCamus, Law of Restitution (Loose-leaf ed. 2008);
- Gergen, What Renders Enrichment Unjust?, 79 Tex. L. Rev. 1927 (2001);
- S. Levmore, Explaining Restitution, 71 Va. L. Rev. 65 (1985);
- Sherwin, Restitution and Equity, An Analysis of the Principle of Unjust Enrichment, 79 Tex. L. Rev. 2083 (2001);
- Perhaps the most useful is the American Law Institute’s Restatement. This two-volume set contains a wealth of both legalistic and practical information — ranging from the development of the doctrine to its application, complete with a cogent explanation of each principle.

Professor Kull begins this definitive work with a comprehensive, albeit somewhat academic, introduction to the concept of restitution. He carefully explains the basis for liability in restitution: “the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant.” Restatement §1 at p. 3. He notes that the emphasis is on the unjustness of the benefit — what Professor Kull characterizes as “unjustified enrichment.” Restatement §1 at p. 5. Application of the doctrine is objective because, unlike the thought that it is somewhat based on fairness in the abstract, “the justification in question is not moral, but legal.” Id.

The Restatement, which is an excellent reference source for practitioners and academicians alike, presents the subject matter in a manner conducive to research. Rather than dividing it up by jurisdiction, forms of action or methods of pleading, Professor Kull chose to organize the text by “basis of liability.” Andrew Kull, explaining the organization of the Restatement during presentation to American Law Institute on May 17, 2011. By doing so, he enables the reader to easily locate and review the particular liability theory that may apply to the facts presented or alternatively, to permit an easy scan of the various liability theories in hopes one can be found that will apply.

Consider a sample provision. Section 7 of the Restatement, Mistaken Performance of Another’s Obligation, provides: “Mistaken performance of another’s obligation gives the performing party a claim in restitution against the obligor to the extent of the benefit mistakenly conferred on the obligor.” This black letter statement is followed by a four-part comment, including 13 “fact pattern” examples, and a five-part reporter’s note that includes citations to approximately 40 cases and secondary sources. The explanation, sample fact patterns, and cases cited will be of particular value to the researcher.

In its entirety, the Restatement contains four parts. Part I, Chapter 1, sets forth the general principles of restitution and unjust enrichment, introducing the topic and noting the limitations that exist to its application. Part I also defines wrongful gain and notes that recovery in restitution may be at law or in equity.

Part II, Liability In Restitution, contains five chapters. Chapter 2 addresses transfers subject to avoidance, such as benefits conferred by mistake, payment of money not due, mistaken performance, restitution that may be available on account of things like fraud and misrepresentation, duress, un-
due influence, incapacity and lack of authority, and transfers under legal compulsion.

Chapter 3 of Part II pertains to unrequested intervention, such as emergency intervention, indemnity and contribution, equitable subrogation, and self-interested intervention, including protection of one’s own property, unmarried cohabitants, and common funds. Chapter 4 pertains to restitution in contract and considers, among other topics, unenforceable contracts, illegal contracts, incapacity, and, interestingly, restitution to a party in default. Chapter 4 also considers the circumstances of a strategic or opportunistic breach. For a detailed explanation of Chapter 4, see A. Kull, *Rescission and Restitution*, 6 (Bus. Law. 569 [2005-2006]).

Chapter 5 of Part II deals with restitution for wrongs, such as benefits acquired by tort or other breach of duty, as well as the slayer rule and wrongful interference with a donative transfer. Chapter 6 of Part II deals with benefits incurred by a third person, payment to a person in respect of a claimant’s property, and payment to a person as to which the claimant has a better right.

Part III, Chapter 7, sets forth various remedies, among them, restitution via money judgment and restitution via rights in identifiable property — rescission and restitution, constructive trusts, equitable liens, and tracing into or through a commingled fund.

Part IV, Chapter 8, sets forth the various defenses to restitution. These include a recipient who is not unjustly enriched (not all enrichment is unjustified and not all enrichment will lead to restitution), equitable disqualification (unclean hands), bona fide purchasers, bona fide payees, value, notice and limitations of actions, and laches. The text also includes a table of cases, a table of statutes and an index.

Future supplements will set forth citations to the cases citing or adopting the position of the Restatement on one or more topics. (ALI Restatements have been cited in myriad cases in myriad courts throughout the United States and beyond in the nearly 90 years since the inception of the American Law Institute. As might be expected with any major work addressing a complicated and evolving body of law, not every position taken by Professor Kull in the Restatement is free from controversy. For example, the “slayer” rule set forth in section 45, which provides essentially that a person who kills another and as a result becomes entitled to a benefit will not be allowed to retain that benefit, is somewhat different than that set forth in the Uniform Probate Code (“UPC”). The UPC rule, in fact, may result in the slayer retaining some of the benefit. Hence, a judge in a state that has adopted the Uniform Probate Code may be unable to adopt the principle set forth in section 45 of the Restatement. See D. Rendleman, *Restating Restitution: The Restatement Process and Its Critics*, 65 Washington & Lee Law Review, Issue 3 (Summer 2008).

Likewise, section 28 of the Restatement seems to adopt the rule of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), in which a couple that was not formally married but cohabited ultimately split up. The plaintiff claimed that she agreed to “give up her lucrative career as an entertainer [and] singer” in order to “devote her full time to defendant…as a companion, homemaker, housekeeper and cook,” and in return, that the defendant agreed to “provide for all of plaintiff’s financial support and needs for the rest of her life,” was awarded a substantial portion of her former partner’s assets. The ALI Principles of the Law of Family Dissolution Project would treat such a breakup as if the parties were in fact married to one another. The Restatement approach may result in a “less generous” result than would be called for by the principles of family dissolution. Professor Emily Sherwin, in her article *Love, Money and Justice: Restitution Between Cohabitants*, 77 U. Colo. L. Rev. 711, 718 (2006), argues that Section 28 violates the principles set forth in section 2 of the Restatement — restitution should not be available to one who could have made a contract and elected
not to. In this regard, see Featherstone v. Sternhoff, 226 Mich. App. 584; 575 N.W.2d 6 (1997).

Professor Emily Sherwin is disappointed with the provisions of Section 60 of the Restatement, which pertain to priorities in bankruptcy. She believes that here the Restatement “should have engaged more aggressively in law reform” and that in insolvency cases, claimants under a constructive trust should not be afforded priority, but are instead “just a species of creditors, with no special ‘equity’ on their side.” E. Sherwin, Why “Omegas Group” Was Right: An Essay on the Legal Status of Equitable Rights, Conference on Restitution and Unjust Enrichment (Boston University/American Law Institute, September 16-17, 2011).

In the main, however, these quarrels are pica-yune compared to the magnitude and value of the Restatement.

CONCLUSION • Restitution is an important weapon for lawyers whose clients have suffered an uncompensated wrong. The Restatement fills the void that exists when unjustified enrichment is compensable under neither tort nor contract law. It sets forth an elusive doctrine with clarity and exposes the doctrine’s eccentricities. The Restatement enhances a lawyer’s ability to discern and assert a restitution claim and then prevail on it. These volumes belong on the bookshelf of any lawyer who has or may in the future have a client needing an equitable remedy in the face of an unjustified wrong. They are certainly on mine.

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