

THE EARTH IS NOT FLAT, AND “A QUASI CONTRACT IS NOT A CONTRACT, AT ALL”¹ – TENNESSEE RESTITUTION AND UNJUST ENRICHMENT AT LAW

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I. INTRODUCTION

It may surprise some to learn that there is a substantive body of law other than criminal, contracts, torts, property, or constitutional law.² This knowledge gap is attributable to the legal curriculum’s lack of focus on the law of restitution.³ Despite being overlooked, claims under the law of restitution and unjust enrichment continue to flourish as bright and enterprising attorneys find new and novel ways to apply it or make use of traditional uses others either never learned or simply forgot.⁴

¹ *Kozlowski v. Kozlowski*, 395 A.2d 913, 918 (N.J. Super. Ct. Ch. Div. 1978).

² See RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS vii (1936); ELAINE W. SHOBBEN, WILLIAM MURRAY TABB, & RACHEL M. JANUTIS, REMEDIES: CASES AND PROBLEMS 809 (Robert C. Clark et al. eds., 3d ed. 2002). “Examples of actions based on the idea of unjust enrichment, for which there is no direct tort or contract counterpart, include actions for indemnity, subrogation, quasi contract, and rescission.” JAMES M. FISCHER, UNDERSTANDING REMEDIES 330 (2d ed. 2006). Fischer further divides the law of restitution into two categories of parasitic restitution: “restitution for wrongdoing,” which may arise from torts and “restitution for breach of contract.” *Id.* at 331-44. Under this analysis, restitution for unjust enrichment represents a third category of restitution and covers situations where restitution is the only grounds for recovery. *Id.* at 331-55. See also RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT X (Discussion Draft 2000) (The Director of the American Law Institute admits to being ignorant regarding the law of restitution prior to beginning the restatement project and says “[a]lmost no one of my generation, not to mention the vast percentage of lawyers who are younger than I, has had a course in Restitution.”); see generally Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995) (“Significant uncertainty shrouds the modern law of restitution.”); Douglas Laycock, *Essay: The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989) (suggesting that a general lack of knowledge of restitution pervades the legal profession).

³ See FISCHER, *supra* note 2, at 332; Kull, *supra* note 2, at 1195 n.14 (chronicling the decline in the number of teachers who identify themselves as teachers of Restitution since 1964); Laycock, *supra* note 2, at 1277.

⁴ See Beth A. Levine, Comment, *Defending the Public Interest: Citizen Suits for Restitution Against Bribed Officials*, 48 TENN. L. REV. 347 (1981); E. Haarvi Morreim, *High-Deductible Health Plans: New Twists on Old Challenges from Tort and Contract*, 59 VAND. L. REV. 1207, 1244-51 (2006) (discussing use of unjust

The law of restitution and unjust enrichment is “based on the goal of avoiding unjust enrichment.”⁵ Understanding the doctrine is rather simple because most people find “that a party receiving a benefit desired by him, under circumstances rendering it inequitable to retain it without making compensation, must [pay for it]” only natural.⁶

Unjust enrichment’s focus on the “disgorg[ement]” of a benefit received by the defendant rather than compensation for harm to the plaintiff or compensation for the plaintiff’s disappointed expectations makes it a unique claim with a unique remedy.⁷ Because there is quite a bit of dispute about the nomenclature in this area of law, it is important to identify the meaning of the terms as used in this comment.⁸ Here, unjust enrichment refers to a broad cause of action that establishes a right to the remedy of restitution.⁹ To avoid using the same term to refer to different, closely related concepts, the body of law is referred to as “restitution and unjust

enrichment as basis for payment of reasonable medical fees where the contract is too indefinite); Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 718-30 (2006); Katrina Miriam Wyman, *Is There A Moral Justification for Redressing Historical Injustices*, 61 VAND. L. REV. 127, 128-30 (2008) (discussing redress through restitution and reparations pursued for the internment of Japanese Americans during World War II, as well as the Holocaust and the mistreatment of Native Americans). *See also In re Estate of Marks*, 187 S.W.3d 21 (Tenn. Ct. App. 2006) (upholding a claim that the plaintiff should be compensated by her boyfriend’s estate for the reasonable value of financial and business services provided to her boyfriend even though no contract existed); *Freeman Indus. v. Eastman Chem. Co.*, 172 S.W.3d 512 (Tenn. 2005) (an indirect purchaser of goods filed a claim against the manufacturer on the grounds that the manufacturer’s price-fixing unjustly enriched the manufacturer at the plaintiff’s expense.).

⁵ FISCHER, *supra* note 2, at 330.

⁶ *Paschall’s, Inc. v. Dozier*, 407 S.W.2d 150, 154 (Tenn. 1966); *see generally* SHOBEN, *supra* note 2, at 796-97.

⁷ SHOBEN, *supra* note 2, at 796-97, 808 (Note, however, that in this treatise the terms “unjust enrichment” and “restitution” are used interchangeably to refer to the basis for liability.); *see also* FISCHER, *supra* note 2, at 334-35 (providing a discussion with examples).

⁸ FISCHER, *supra* note 2, at 330-32, 334; *see also* Laycock, *supra* note 2, at 1277-78 (the goal of his essay is to “address the definitional dispute in a practical context.”).

⁹ “Courts may treat unjust enrichment as a separate, substantive cause of action, or as a concept applicable to other ca[us]es of action.” FISCHER, *supra* note 2, at 344. “[T]he doctrines of ‘unjust enrichment’ and ‘restitution’ – modern terms – have largely supplanted the designation of ‘quasi-contracts.’” 66 AM. JUR. 2D *Restitution and Implied Contracts* § 6 (2001).

enrichment.”¹⁰ Finally, the term “restitution” refers to the remedy.¹¹

Importantly, restitution sometimes means more than just restoring the plaintiff to its position before it conferred the benefit.¹² Sometimes, it means the defendant must disgorge both the benefit obtained and any additional gains associated with the unjustified benefit.¹³ Because the windfall should go to the innocent party, this disgorgement may leave the plaintiff better off than if she had never conferred the benefit.¹⁴ Ultimately, restitution restores the defendant to its position before it was unjustly enriched.¹⁵

When discussing unjust enrichment at law claims, the term “equitable” is also a term of art. It refers to “broad considerations of right, justice and morality”¹⁶

¹⁰ The term restitution is often used as both the area of law and the remedy. See FISCHER, *supra* note 2, at 330-31, 344; see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Discussion Draft 2000) (suggesting using both terms to “emphasiz[e] that the subject matter encompasses both an independent and coherent body of law, the law of unjust enrichment, and not simply the remedy of restitution”); Stephen A. Smith, *Forum: The Structure of Unjust Enrichment Law: Is Restitution A Right or a Remedy?*, 36 LOY. L.A. L. REV. 1037 (2003) (referring to this area of law as unjust enrichment and focusing on determining whether the term “restitution” should refer to the substantive right or the remedy).

¹¹ “Courts may treat restitution as a substantive right or as a remedy.” FISCHER, *supra* note 2, at 344.

¹² See Laycock, *supra* note 2, at 1279-83.

¹³ See SHOBEN, *supra* note 2, at 796-97.

¹⁴ See *id.*

¹⁵ Absent fraud or other improper conduct, “restitution will be limited to the measure of the defendant’s gains.” *Id.* at 809.

¹⁶ FISCHER, *supra* note 2, §44, at 355 n.10. In *Great-West Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 213-17 (2002), the court offered the following explanation of the difference between restitution at law and restitution in equity:

In cases in which the plaintiff ‘could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,’ the plaintiff had a right to restitution *at law* through an action derived from the common law writ of assumpsit. In such cases, the plaintiff’s claim was considered legal because he sought ‘to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.’ Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied). In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property

Claims for unjust enrichment at law may be understood as hybrids of equity and law because they do incorporate equitable principles.¹⁷ However, such claims are technically actions at law, not actions in equity.¹⁸ An unjust enrichment claim asks

identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Id. (citations omitted).

¹⁷ FISCHER, *supra* note 2, § 44, at 353. A court may "[e]nforce [] [w]hat [g]ood [r]eason and [g]ood [c]onscience [r]equire" by invoking equitable principles and maxims whether it is sitting in equity or in law. HENRY R. GIBSON, GIBSON'S SUITS IN CHANCERY § 2.25 (William H. Inman ed., Matthew Bender 8th ed. 2004) (1891).

¹⁸ FISCHER, *supra* note 2, § 44. The merger of the courts of law and equity resulted in "the extension of equitable defenses, with their moralistic heritage, to actions at law." *Id.* § 20.3.1, at 198. The term "equity" as used in the administration of justice means:

Conscience itself might make too refined or too unstable a standard for the determination of human conduct in the Courts; and reason of itself might give too wide a range for sharp practices in matters of trade, or other dealings. Indeed, conscience without reason might degenerate into fanaticism, or gross eccentricity. On the other hand, reason without conscience might become trickery, or even downright knavery.

In the administration of justice, conscience must be conformed to reason and thus become good conscience, and reason must be conformed to conscience and thus become good reason; and whatever good conscience and good reason unite in approving is the nearest approach to perfect justice man is able to attain. This union of good reason and good conscience is what in a general way is meant by the term Equity in the administration of justice.

GIBSON, *supra* note 17, § 2.25. That use of the term "equity" must be distinguished from the equity body of law since "[c]ourts still recognize equity as a separate, freestanding body of law" with a system of jurisprudence different from that "at law." FISCHER, *supra* note 2, §§ 44, 20.3.1, at 198; SHOBEN, *supra* note 2, at 5. For example, "[t]he Seventh Amendment of the Constitution provides that there is a right to trial by jury for causes 'at law,' but not for causes in equity. SHOBEN, *supra* note 2, at 5.

the court to find that reason and justice require the court to make the defendant do what is right. A court may “[e]nforce[] [w]hat [g]ood [r]eason and [g]ood [c]onscience [r]equire” by invoking equitable principles and maxims whether it is sitting in equity or in law.¹⁹ A court hearing a case at law uses legal fictions like quasi contracts to effectuate equitable outcomes.²⁰ The quasi contract is a fictitious contract between the parties where the court uses the defendant’s social duty to deal justly with others as a substitute for actual consideration and legally obligates him to disgorge the benefit received.

Despite the simplicity of the doctrine of unjust enrichment, it is incredibly easy to get confused by the legal concepts that effectuate the doctrine’s goal. There are three primary sources of confusion. First, implied-in-fact contracts and implied-in-law contracts are intertwined with each other because, when a claim is brought for one, a claim will generally also be brought for the other; however, they are also mutually exclusive.²¹ An implied-in-law contract cannot exist where there is an implied-in-fact contract covering the same subject matter.²² An implied-in-fact

¹⁹ GIBSON, *supra* note 17, § 2.25. Maxims and principles of equity include, but are not limited to the following:

1. He Who Comes Into Equity Must Come With Clean Hands.
2. Equity Imputes an Intention to Fulfill an Obligation.
3. Equity Will Undue What Fraud Has Done.
4. Equity Aids the Vigilant, Not Those Who Sleep Upon Their Rights.
5. No One Can Take Advantage of His Own Wrong.
6. Where One of Two Persons Must Suffer Loss He Should Suffer Whose Act or Negligence Occasioned the Loss.
7. Where There is Equal Equity the Law Must Prevail.
8. Where There Are Equal Equities the First in Order of Time Shall Prevail.
9. Equity Enforces What Good Reason and Conscience Require.

Id. §§ 2.01, 2.09, 2.11, 2.15-2.16, 2.18-2.19, 2.21-2.22, 2.25.

²⁰ See FISCHER, *supra* note 2, § 44, at 354-55.

²¹ See *Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d at 32; FISCHER, *supra*, note 2, §44.

²² *Jaffe v. Bolton*, 817 S.W.2d 19, 26 (Tenn. Ct. App. 1991); 66 AM. JUR. 2D *Restitution and Implied Contracts* § 24; see *Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d at 32-33 (indicating quantum meruit and unjust enrichment are synonymous and then ruling against the unjust enrichment claim because an implied-in-fact contract existed); see also FISCHER, *supra* note 2, at 354-55 (recognizing that sometimes

contract exists if the facts and circumstances support the inference that there was mutual assent and an agreement was formed.²³ Thus, where the conduct of the parties justifies the inference that an enforceable agreement exists, although it was not spoken or written, there is no basis for an unjust enrichment claim.²⁴ However, where the conduct falls short of proving that an actual and enforceable contract exists, and under the circumstances a reasonable recipient should have known that the conveyor expected payment, then the court may imply a contractual relationship in order to render justice.²⁵

Second, while the term “restitution” is often used to refer to the body of law controlling unjust enrichment claims and the remedy for such claims, restitution may also be available in the case of breach of an actual contract as an alternative to compensatory damages.²⁶ The use of the restitution remedy following the breach of an implied-in-fact contract easily leads one to the mistaken belief that an unjust enrichment cause of action was the basis for recovery when the recovery was, in fact, on contract.²⁷ A recovery premised on unjust enrichment may occur after the breach of a contract.²⁸ However, restitution is available after the breach because, under the theory of unjust enrichment, the breach extinguishes the contract.²⁹ So, after the breach, the obligation does not result from the manifestation of the parties assent through their conduct or otherwise; rather, it results from the fact that the defendant

quasi contract is used in reference to contracts implied in fact, which is confusing, and distinguishing between real contracts and quasi contracts).

²³ *Welch Bros. Drilling Co. v. Russell*, 1984 Tenn. App. LEXIS 3012, at *1-2 (July 12, 1984). *Compare* *Castelli v. Lien*, 910 S.W.2d 420 (Tenn. Ct. App. 1995) *with* *V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd.*, 595 S.W.2d 474 (Tenn. 1980).

²⁴ *See* JEFFREY FERRIELL AND MICHAEL NAVEN, UNDERSTANDING CONTRACTS §§ 15.05-15.08 (2004).

²⁵ *Id.*

²⁶ FISCHER, *supra* note 2, at 333-34.

²⁷ *See Castelli*, 910 S.W.2d at 427 (citing *V.L. Nicholson Co.*, 595 S.W.2d at 482); *see also V.L. Nicholson Co.*, 494 S.W.2d at 482 (relying on an implied-in-fact contract as its basis for an element of a type of implied-in-law contract: quantum meruit).

²⁸ *See* FERRIELL, *supra* note 24, §§ 15.05-15.06.

²⁹ *See* *Newton v. Cox*, 954 S.W.2d 746, 748 (Tenn. Ct. App. 1997); *accord* FERRIELL, *supra* note 24, § 15.05, at 669; *SHOBEN*, *supra* note 2, at 810-14.

no longer has a legal justification to retain the benefit.³⁰

Finally, there are two types of restitution based upon unjust enrichment: restitution at law and restitution in equity.³¹ Restitution in equity refers to claims for equitable remedies such as equitable liens and constructive trusts. Restitution at law refers to claims for the return of a benefit or the disgorgement of profits. This comment focuses on the traditional causes of action for unjust enrichment at law: quantum meruit, quantum valebant, and money had and received, which represent specific characterizations of the more general unjust enrichment claim often referred to as a “quasi contract” or “contract implied in law.”³²

These causes of action describe types of benefits conferred by the plaintiff. Quantum meruit refers to services rendered by the plaintiff and any materials auxiliary to those services.³³ Quantum valebant refers to the defendant becoming unjustly enriched from the receipt of goods without compensating the plaintiff for the value of those goods.³⁴ Money had and received refers to a mistaken monetary payment by the plaintiff which the defendant ought in good conscience to return, but has not.³⁵ As a result, the defendant has been unjustly enriched in an amount equal to the mistaken payment.³⁶ However, an action for money had and received also exists if the payment at issue was made by a transfer of property rather than money.³⁷

Although very little scholarly time and attention is paid to these claims, they

³⁰ See *Grissim & Assocs. v. Blue Cross & Blue Shield of Tenn.*, 114 S.W.3d 531, 537 (Tenn. Ct. App. 2002); *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 154 (Tenn. 1996); see also *City of Rockwood v. IMCO Recycling Inc.*, 415 F. Supp. 2d 853 (E.D. Tenn. 2006) (Plaintiff argued that the prior contract and course of performance established an implied in fact contract, but the court found that there was not an enforceable contract covering the subject matter, as a result unjust enrichment claim was viable.)

³¹ 66 AM. JUR. 2D *Restitution and Implied Contracts* § 1 (2001); see *supra* note 14 and accompanying text.

³² See *Paschall's, Inc.*, 407 S.W.2d at 153-54; *Shelter Ins. Cos. v. Hann*, 921 S.W.2d 194 (Tenn. Ct. App. 1995).

³³ See BLACK'S LAW DICTIONARY 1276 (8th ed. 2004).

³⁴ *Id.*

³⁵ *Id.* at 31.

³⁶ *Id.*

³⁷ See *Boyd v. Logan*, 3 Tenn. 394 (1883).

are essential tools for any litigator and are quite useful if properly pled. They create safety valves for a client who has been wronged, but who has no contract or whose contract is voidable, where the defendant's action falls short of a tort, where the tort recovery would be too small to be worth the plaintiff's time and energy, and where the tort statute of limitations bars the tort suit.³⁸

For example, while the statute of frauds prevents recovery based upon some oral contracts, it does not prevent recovery based upon unjust enrichment.³⁹ So, even though the plaintiff cannot recover on the actual contract, he may still be able to recover restitution through a claim based upon unjust enrichment.⁴⁰ In some circumstances, an unjust enrichment claim may result in a greater monetary judgment for the plaintiff than a tort claim.⁴¹ For example, the defendant, Clepto, steals her friend Plaintiff's new gold ring, and wears the ring only when plaintiff is not around. A couple of years go by, and gold becomes really valuable, so Clepto sells Plaintiff's ring. Plaintiff finally learns that Clepto stole her ring and sues Clepto. Of course,

³⁸ See *Steelman v. Ford*, 911 S.W.2d 720, 723-24 (Tenn. Ct. App. 1995); see also Tenn. Code Ann. §§ 28-3-104 to -106 (2009); *McCombs v. Guild, Church & Co.*, 77 Tenn. 81, 89 (1882); 18 TENN. JUR. *Limitations on Actions* §§ 11, 13 (2005); 7 TENN. JUR. *Contracts* §§ 97-106 (2005 & Supp. 2009). In *Vance v. Schulder*, the court explained:

An individual induced by fraud to enter into a contract may elect between two remedies. He may treat the contract as voidable and sue for the equitable remedy of rescission or he may treat the contract as existing and sue for damages at law under the theory of 'deceit.' The latter is grounded in tort. "Thus, a person who has been injured by the fraud of another or others, by either a party or parties to a transaction or a third party or third parties committing fraudulent acts involving or bringing about the negotiation of a transaction, such transaction usually but not necessarily involving business or commercial dealings, may maintain an action at law in tort or recover damages for the injury received from the fraud and deceit perpetrated by such other or others. The foundation of the action is not contract, but tort."

Vance v. Schulder, 547 S.W.2d 927, 931 (Tenn. 1977) (quoting 37 AM. JUR. 2D *Fraud and Deceit* §332). But see *Scandlyn v. McDill Columbus Corp.*, 895 S.W.2d 342, 349 (Tenn. Ct. App. 1994) (In this state, no right exists in law or equity which allows a party to abandon an express contract and seek recovery in quantum meruit or under an implied contract theory).

³⁹ FISCHER, *supra* note 2, at 333; see *Steelman*, 911 S.W.2d at 723-24.

⁴⁰ 73 AM.JUR.2D, *Statute of Frauds* § 447.

⁴¹ See Robert B. Thompson, *The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Damages*, 37 VAND. L. REV. 349, 352, 370-72 (1984).

Plaintiff could recover under the tort of conversion, where she would likely recover the market value of the ring at the time of the theft, and Clepto would retain the profits she made on the sale. However, Plaintiff could also elect to recover based on a claim for unjust enrichment, which would entitle her to the amount the buyer paid Clepto for the ring, leaving Clepto with no benefit from her unjustifiable act. Finally, if Plaintiff knew Clepto stole her ring, but did not file suit because she assumed that Clepto would eventually return it, the tort statute of limitations may prevent her from making her tort claim. Plaintiff could still recover, though, by filing an unjust enrichment claim which would not be time-barred because it would fall under the contract statute of limitations.

Tennessee courts often say that quantum meruit, unjust enrichment, implied in law contracts, and quasi contracts are synonymous.⁴² The problem with that statement is that it glosses over the differences between the general unjust enrichment claim and the more specific quantum meruit claim. If the terms were synonymous, then there would be no need for separate definitions. In the last decade, Tennessee courts have not spent considerable time and effort trying to articulate exactly what constitutes an unjust enrichment claim and what constitutes a quantum meruit claim.⁴³ As a result, this area of the law remains difficult to

⁴² See e.g., *Paschall's, Inc.*, 407 S.W.2d 150 (Tenn. 1966); *Rocky Top Realty v. Young*, No. E2009-00338-COA-R3-CV, 2010 Tenn. App. LEXIS 37 (Tenn. Ct. App. Sept. 14, 2009); *In re Sadler*, No. M2003-00414-COA-R3-CV, 2004 Tenn. App. LEXIS 514 (Tenn. Ct. App. Aug. 11, 2004); *Crye Leike, Inc. v. Ouer*, No. W2003-02590-COA-R3-CV, 2004 Tenn. App. LEXIS 752 (Tenn. Ct. App. Nov. 16, 2004).

⁴³ See *supra* note 42 for a few of the recent appellate cases where the courts fail to distinguish between quantum meruit and unjust enrichment. See generally 21 TENN. PRAC., CONTRACT LAW & PRACTICE, §1:14:

First, unjust enrichment is not a theory of recovery, but is an effect; it refers to the result of a failure of a party to make restitution when it is equitable to do so. Second, quantum meruit describes the extent of liability under a quasi-contractual theory; it is not a cause of action and is not the same as unjust enrichment. Lastly, one authority correctly distinguishes quantum meruit and unjust enrichment as follows:

The measure of recovery for services furnished or goods received depends on whether the claim is for unjust enrichment or quantum meruit. The reasonable value of work and material provided by a contractor is the issue in a quantum meruit case, whereas in an unjust enrichment case, the inquiry focuses on the benefit realized and retained by the defendant as a result of the improvement provided by a contractor. Additionally, the amount recoverable in quantum meruit

comprehend and rife with contradictory statements that effectively and detrimentally obscure the rule of law in this area.⁴⁴ For example, the current definition for quantum meruit could easily be interpreted to include implied-in-fact contracts.

Although unjust enrichment causes of action fill coverage gaps in the law, the rule of law that governs these claims remains mired in a frustrating quagmire.⁴⁵ Recently, however, the drafters of the *Restatement (Third) of Restitution and Unjust Enrichment* have catalyzed the debate about how to best make sense of all the claims that fall under “the central substantive notion that one must not (unjustifiably) enrich oneself at the expense of another.”⁴⁶ As courts continue to work on improving the understanding of these claims, a clearer rule of law may emerge from these efforts by judges who truly understand the nature of unjust enrichment and its more specific causes of action: quantum meruit, money had and received, and quantum valebant. Until then, hopefully this comment provides a simple, useful, and up-to-date explanation of the law of unjust enrichment and restitution in Tennessee.

II. BACKGROUND

A. The Origin and Development of Restitution at Law

The concept of equity existed long before the concept of tort or contract, which is attributed to the first Dean of Harvard Law School, Christopher Columbus Langdell.⁴⁷ Actually, it was not until the 16th century that courts imposed liability for

will not include profits, and may be capped at an amount no higher than the contract price, where there is one for reference.

The Tennessee Supreme Court should clarify these related concepts at its next opportunity.

⁴⁴ Courts all over the country misstate and misapply the law of restitution and unjust enrichment. See Kull, *supra* note 2, at 1194-96 n.15-16.

⁴⁵ FISCHER, *supra* note 2, at 344; Laycock, *supra* note 2, at 1278.

⁴⁶ James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 57 (2007). In this article, Rogers also identifies the substantive notions behind torts and contracts. “Tort. The central substantive notion is that one must not (unjustifiably) harm another.” *Id.* “Contract. The central substantive notion is that one must not (unjustifiably) fail to perform one’s promise to another.” *Id.*

⁴⁷ As far back as Aristotle’s time, equity and justice were recognized as intertwined. See GEORGE S. GROSSMAN, *THE SPIRIT OF AMERICAN LAW* 25 (Westview Press 2000). Aristotle recognized judicial justice as corrective justice, which was concerned with “putting right something that has gone wrong, restoring an equilibrium where the just balance has been disturbed . . . [t]his corrective justice,

breaking a promise to do something, under a writ called *assumpsit*.⁴⁸ The writ of *assumpsit* is the common predecessor of both contract and unjust enrichment.⁴⁹ This common foundation provides the best explanation for the continued placement of unjust enrichment causes of action under the contract area of law, and more specifically, their continued classification as implied contracts.⁵⁰

The famous 18th century jurist Lord Mansfield developed the concept of the

moreover, comes in two forms: where it intervenes in situations which are ‘voluntary,’ and where it does so in situation[s] which are ‘involuntary.’ . . . The distinction between ‘voluntary’ and ‘involuntary’ transactions corresponds superficially with the distinction which we would recognize between contract, on the one hand, and tortious or criminal wrongs, on the other . . .” *Id.* Aristotle recognized the concept of equity as “a correction of legal justice, because a law speaks in general terms, and, because of the natural irregularity and variety of the material it tries to regulate, it cannot provide a perfectly just treatment for every possible case . . .” *Id.* at 25-26. The Romans also recognized the value of equity in a legal system. During the last century of the Roman Republic, a special defense based on the plea that the plaintiff’s behavior had been or was now unconscionable emerged and sufficed to frustrate a plaintiff who might have the strict letter of the law on his side. *Id.* at 28-29.

⁴⁸ RESTATEMENT OF THE LAW, RESTITUTION Introductory Note (1937).

⁴⁹ SHOEN, *supra* note 2, at 796.

⁵⁰ See 66 AM. JUR. 2D *Restitution and Implied Contracts* § 2 (2001).

Contracts implied in law are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied. A contract will be presumed or implied in law wherever necessary to account for a relation found to exist between the parties where no contract in fact exists. An agreement “implied in law” is a fiction of law where a promise is imputed to perform a legal duty, such as to repay money obtained by fraud or duress.

Id.

In the case of contracts implied by law or quasi-contracts, the promise is purely fictitious and is implied in order to fit the actual cause of action to the remedy. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. “Quasi contracts” or “constructive contracts” do not arise because of the manifestation of an intention to create them. The intention of the parties in such case is entirely disregarded, while in cases of express contracts and contracts implied in fact the intention is of the essence of the transaction. A quasi-contract has no reference to the intentions or expressions of the parties. The obligation is imposed despite, and frequently in frustration of, their intention, where justice so requires. Otherwise stated, contracts implied in law do not arise from the traditional bargaining process, but rather rest on a legal fiction arising from considerations of justice and the equitable principles of unjust enrichment.

Id. § 4.

quasi contract and was also the first to invoke it.⁵¹ An advocate of the natural law theory, Lord Mansfield proposed that there should be liability under the law based on moral obligations.⁵² At that time, law and equity remained two separate courts; at law, the plea had to fit the writ to succeed.⁵³ To make his theory of moral obligation amenable to the writ system, Lord Mansfield suggested that justice and equity allowed the court to imply that the defendant made a promise, and the benefit bestowed by the plaintiff constituted the consideration for the promise.⁵⁴ In that way, the fiction of the implied-in-law contract was attached to the moral obligation for the sole purpose of fitting it in the writ of assumpsit.⁵⁵

Mansfield's implied assumpsit allowed the return of a benefit conferred upon a person "if fairness and natural justice required the defendant to disgorge the unjust enrichment received, as when a benefit passed under a failed contract or by mistake or due to misconduct like coercion."⁵⁶ Despite the mixed reaction of the English courts to this concept of implied assumpsit, the courts of the American colonies, where natural law theory was popular, looked upon the quasi contract with favor.⁵⁷ The merging of the courts of law and equity further bolstered the legitimacy of the quasi contract, which was itself invented to allow the courts of law to effectuate an equitable outcome through a monetary remedy.⁵⁸

The writs of assumpsit and trespass existed before either tort or contract was recognized as an area of law.⁵⁹ Before Langdell's law-is-a-science theory appeared in

⁵¹ See SHOBEN, *supra* note 2, at 804.

⁵² KEVIN M. TEEVEN, PROMISES ON PRIOR OBLIGATIONS AT COMMON LAW 84-85, n.26 (1998). Lord Mansfield's notion that legal liability should exist for breach of a moral obligation was derived from his knowledge of Roman civil law and the English chancery courts' acceptance of moral obligation as a basis for equitable relief. *Id.*

⁵³ See SHOBEN, *supra* note 2, at 796.

⁵⁴ TEEVEN, *supra* note 52, at 84-85.

⁵⁵ SHOBEN, *supra* note 2, at 796.

⁵⁶ TEEVEN, *supra* note 52, at 84-85.

⁵⁷ *Id.* at 84-85, 91-94, 106-09.

⁵⁸ See *id.* at 7-8.

⁵⁹ Although, the tort area of law arose after the assumpsit cause of action, the consensus seems to be that both tort and assumpsit are offshoots of the original trespass cause of action. See, e.g., GRANT GILMORE, THE AGES OF AMERICAN LAW 44 (1977).

the 1870's, "no one thought of developing a theory of contract."⁶⁰ In fact, "no one saw any reason why all [the many different] types of contracts should be subjected to a unitary set of rules."⁶¹ Further, although "[e]very legal system tries to redress harm done by one person to another," the concept of creating an area of law like torts did not emerge until the late 1800s.⁶² The very word *tort* was a label invented so that a single word could "cover all sorts of liability imposed for non-contractual loss, damage, or personal injury suffered by a plaintiff as the result of a defendant's wrongful acts."⁶³

The Langdellian scholars who constructed the areas of law and organized the causes of action favored rigid black-letter rules, wanted to pare down the number of legal doctrines, and left the implied-in-law contract fiction undisturbed.⁶⁴ However, it soon became apparent that unjust enrichment had been poorly categorized, and it

⁶⁰ *Id.* at 45. By the time Langdell proposed the theory that law is a science, the contracts claim had become much more popular than the traditional assumpsit claim because it complemented the new free market ideology of the Industrial Revolution. *Id.* at 43-45; see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 244 (1973). The goal of Langdell's law-as-a-science approach was to develop "a unitary set of rules . . . to cover all possible situations" by applying doctrine to cases to test whether or not the cases were correctly decided. GILMORE, *supra* note 59, at 46-47. Langdell believed that one should only study correctly decided cases, and those that did not conform to the doctrinal ideals deemed correct by the Langdellian scholars should be discarded entirely. *Id.*

⁶¹ GILMORE, *supra* note 59, at 45.

⁶² FRIEDMAN, *supra* note 60, at 409.

⁶³ GILMORE, *supra* note 59, at 46.

⁶⁴ FRIEDMAN, *supra* note 60, at 22-23; GROSSMAN, *supra* note 47, at 25-29; CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 280 (1980). At that time, their decision to leave the duty to return a benefit which you have no right to keep under the contracts area of law made sense because the radical suggestion that writ pleading should be abolished in favor of just pleading the facts was only just being made. The Field Code, the first procedural code, was first published during Langdell's lifetime. Dudley Field first suggested that the courts of law and equity should be combined, and that the common law writs should be replaced by fact pleading. *Id.* at 236-39. That suggestion was unprecedented at that time, and no one could predict it would prevail. See GROSSMAN, *supra* note 47, at 120-21, 132-33.⁶⁵ See RESTATEMENT OF RESTITUTION, Ch. 7 Introductory Note (1937) (The Restatement's reporters, Warren Seavey and Austin Scott, recognized that the causes of action used to obtain restitution usually operated independent of tort or contract.). The American Law Institute was formed in 1923 to compile of the common law, which seemed to follow Langdell's law-as-a-science premise. See also FISCHER, *supra* note 2, at 331; GROSSMAN, *supra* note 47, at 184 (The reporters for the Restatement of Restitution are attributed with first suggesting "the treatment of Restitution as a distinct body of substantive law.").

made more sense to combine the claims used to effectuate the doctrine of unjust enrichment under a separate and distinct area of law on par with tort and contract. To fix problems that resulted from the division of restitution and unjust enrichment claims across other areas of law, the American Law Institute published the *Restatement of Restitution* in 1937.⁶⁵

Perhaps bad timing is to blame for the First Restatement's failure to really establish restitution and unjust enrichment as an area of the law on par with tort or contract. By 1937, law as a science had long since been displaced by legal realism, which eschewed rigid doctrines along with the black-letter law in favor of studying all cases with a focus on "operative facts."⁶⁶ There was so little interest in the *Restatement (Second) of Restitution* that the project was terminated after the first two drafts.⁶⁷ In 2000, the American Law Institute released its first tentative draft of the *Restatement (Third) of Restitution and Unjust Enrichment*, which reasserts its stance that restitution and unjust enrichment should be recognized as an area of law unto itself.⁶⁸ This Restatement continues to generate much more scholarly attention and interest than its predecessor, and there is little doubt a final version will be completed and published.⁶⁹

B. *Restitution and Unjust Enrichment at Law*

Despite unjust enrichment's continued classification under the contract area of law, restitution and unjust enrichment are a "separate basis of civil liability, wholly

⁶⁵ See RESTATEMENT OF RESTITUTION, Ch. 7 Introductory Note (1937) (The Restatement's reporters, Warren Seavey and Austin Scott, recognized that the causes of action used to obtain restitution usually operated independent of tort or contract). The American Law Institute was formed in 1923 to compile of the common law, which seemed to follow Langdell's law-as-a-science premise. See also FISCHER, *supra* note 2, at 331; GROSSMAN, *supra* note 47, at 184 (The reporters for the Restatement of Restitution are attributed with first suggesting "the treatment of Restitution as a distinct body of substantive law.").

⁶⁶ GILMORE, *supra* note 59, at 48-49.

⁶⁷ American Legal Institute, http://www.ali.org/ali_old/Restit.htm.

⁶⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2000).

⁶⁹ See Doug Rendleman, *Restating Restitution: The Restatement Process and its Critics*, 65 WASH. & LEE L. REV. 933 (2008) (Doug Rendleman, an advisor to the RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT project, discusses the scholarly debate going on within the American Law Institute and critics from scholars outside the project.).

independent of tort or contract.”⁷⁰ To establish an unjust enrichment cause of action, the plaintiff must show that (1) the defendant has been enriched at the plaintiff’s expense, and (2) the defendant’s retention of the benefit is unjustified (i.e., the defendant has no legal justification for retaining the benefit).⁷¹ If the plaintiff’s claim succeeds, then the court grants restitution, which requires the defendant to return the benefit, pay the plaintiff for the value of the benefit, or disgorge both the value of the benefit and any profits made by the defendant that are attributable to that benefit.⁷²

People commonly refer to the terms “restitution” and “unjust enrichment” synonymously when referring to the plaintiff’s claim.⁷³ However, the terms may properly be understood to refer to the cause of action and the remedy.⁷⁴ Using “unjust enrichment” to refer to the cause of action and “restitution” to refer to the remedy distinguishes between the law’s two separate, complementary functions: establishing an entitlement and establishing the remedy.⁷⁵

The first inquiry is whether the defendant has been unjustly enriched by the plaintiff.⁷⁶ To establish the entitlement, that is all the plaintiff must prove.⁷⁷ The

⁷⁰ FISCHER, *supra* note 2, at 330.

⁷¹ *Id.*; see *Friedman Indus. v. Eastman Chem. Co.*, 172 S.W.3d 512, 525 (Tenn. 2005); *B & L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 217 (Tenn. Ct. App. 2003). *But see* FISCHER *supra* note 2, at 312 (a prima facie case of unjust enrichment requires the following elements:

1. A benefit conferred upon the defendant by the plaintiff with the expectation of payment;
2. Awareness, appreciation or knowledge by the defendant of the benefit; and
3. Acceptance or retention of the benefit by the defendant under circumstances as to make it inequitable for the defendant to retain the benefit without payment to the plaintiff.)

⁷² See *Thompson*, *supra* note 41, at 366-73; see generally FISCHER, *supra* note 2, at 322-25.

⁷³ See *Paschall’s, Inc. v. Dozier*, 407 S.W.2d 150, 154 (Tenn. 1996). *But see* *Shelter Ins. Cos. v. Hann*, 921 S.W.2d 194, 202 (Tenn. Ct. App. 1995) (specifying that an action for money had and received is *not* the same as an action for unjust enrichment).

⁷⁴ FISCHER, *supra* note 2, at 330-31; SHOBEN, *supra* note 2, at 4.

⁷⁵ See SHOBEN, *supra* note 2, at 4 (identifying need to distinguish between substantive restitution, which concerns entitlement to remedy, and remedial restitution, which concerns the measurement of the remedy.)

⁷⁶ See *Freeman Indus.*, 172 S.W.3d at 525.

plaintiff does not have to prove any wrongdoing by the defendant or that the plaintiff was harmed in order to recover under his or her substantive right to restitution based on the defendant's unjust enrichment.⁷⁸

Enrichment "is an economic benefit."⁷⁹ This concept of economic benefit includes enrichment by property, money, increase in the value of property, or avoidance of a cost such as not paying for goods consumed or intangible services received.⁸⁰ However, the fact that the defendant received the benefit does not mean that she has been enriched.⁸¹ For example, the defendant may have compensated someone other than the plaintiff for the benefit.⁸² If the defendant paid a reasonable amount for the benefit, then she exchanged value for value, and therefore has not been enriched.⁸³ In addition, usually the defendant must be the person the plaintiff intended to charge.⁸⁴ If the plaintiff intended to charge another person who relayed the benefit as a gift to the defendant, then the defendant has not been unjustly enriched.⁸⁵

Even after the plaintiff proves that he or she provided a benefit to the defendant, the plaintiff will not be able to establish a right to restitution unless the defendant's retention of the benefit is unjust.⁸⁶ To determine whether or not the defendant's retention of the benefit is unjust, the nature of the conferral must be evaluated.⁸⁷ For example, it would be unjust to require restitution from the

⁷⁷ *Jaffe v. Bolton*, 817 S.W.2d 19, 26 (Tenn. Ct. App. 1991); FISCHER, *supra* note 2, at 330.

⁷⁸ FISCHER, *supra* note 2, at 330 ("The essence of restitution is the recovery of the benefit realized by the defendant not compensation for the harm or injury sustained by the plaintiff.").

⁷⁹ *Freeman Indus.*, 172 S.W.3d at 525.

⁸⁰ SHOBEN, *supra* note 2, at 804-09.

⁸¹ *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 154-55 (Tenn. 1996); *accord* *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592 (Tenn. 1998).

⁸² *Paschall's, Inc.*, 407 S.W.2d at 154-55.

⁸³ *Id.*

⁸⁴ FISCHER, *supra* note 2, at 330. *But see* *Paschall's, Inc.*, 407 S.W.2d at 154-55.

⁸⁵ FISCHER, *supra* note 2, at 330.

⁸⁶ *E.g.*, *Paschall's, Inc.*, 407 S.W.2d at 155; *Jaffe v. Bolton*, 817 S.W.2d 19, 26 (Tenn. 1991); *see* SHOBEN, *supra* note 2, at 244.

⁸⁷ *Id.*

defendant if the benefit was gratuitously bestowed or conveyed without offering the defendant the opportunity to reject it.⁸⁸ In unjust enrichment terminology, the term “volunteer” describes people who convey benefits without expecting compensation.⁸⁹ The trier of fact must determine whether or not the conveyor expected compensation through objective inferences from the circumstances surrounding the conveyance and the parties’ conduct.⁹⁰

This objective standpoint from which intent is measured results in presumptions that family members and rescuers are volunteers.⁹¹ Of course, presumptions are rebuttable. For example, when the work done to rescue a person is the type of work the rescuer does in their profession, this rebuts the presumption that the services rendered in the rescue were gratuitous.⁹² As a result, a lawyer who performed CPR acted voluntarily and did not unjustly enrich anyone, but the court may find that an off-duty doctor who performed CPR had an expectation of compensation because he is paid to perform those types of services as part of his profession.⁹³

No one wants someone bestowing a “benefit” on them without their consent then charging for it. Even if it is something the recipient wants, she may not want it at the time. Perhaps she wants to wait until she saves more money to cover the expense. Even worse, perhaps she does not want the benefit at all and finds no value in owning it. The law of unjust enrichment cannot be used to force others to pay for things they did not want. In fact, the law uses a very funny label to refer to people who impose unwanted benefits on others, “officious intermeddlers.”⁹⁴ Fairness requires that the defendant be given an opportunity to reject or return the

⁸⁸ See 66 AM. JUR. 2D *Restitution and Implied Contracts* § 15 (2001); see *Welch Bros. Drilling Co. v. Russell*, 1984 Tenn. App. LEXIS 3012 (July 12, 1984).

⁸⁹ *In re Estate of Cleveland v. Gordon*, 837 S.W.2d 68, 70-71 (Tenn. Ct. App. 1992).

⁹⁰ See *Paschall's, Inc.*, 407 S.W.2d at 155; *V.L. Nicholson Co. v. Transcon Inv. & Fin., Ltd.*, 595 S.W.2d 474, 481-84 (Tenn. Ct. App. 1980); *Weatherly v. Am. Agric. Chem. Co.*, 65 S.W.2d 592, 598 (Tenn. Ct. App. 1933).

⁹¹ See *Estate of Cleveland*, 837 S.W.2d at 71.

⁹² *Id.*

⁹³ See SHOBEN, *supra* note 2, at 245.

⁹⁴ *Id.* at 246; 66 AM. JUR. 2D *Restitution and Implied Contracts* § 14 (2001).

benefit, if possible.⁹⁵ However, if the defendant neither approves of the benefit nor takes advantage of an opportunity to reject it, then she acquiesces to it, and acquiescence is legally effective acceptance.⁹⁶ One exception to this occurs in emergency situations.⁹⁷ There, the requirement that the benefit not be imposed on the defendant does not apply if the defendant is unconscious, because the law presumes that if a person could accept life-saving help, he would.⁹⁸

So, the general rule is that for uncompensated retention to be unjust, the plaintiff must have expected to be compensated for the benefit when the defendant conveyed it, and the defendant must have knowingly received or knowingly kept the benefit. If the defendant was enriched by a benefit conferred by the plaintiff with the expectation of payment, and the defendant knowingly received that benefit or kept it when they could have easily returned it, the plaintiff has a right to restitution. However, if there has been a change of position or circumstances making restitution inequitable, then the court may deny the plaintiff recovery.⁹⁹

The second inquiry the court must make after the plaintiff establishes a claim for unjust enrichment is to determine the appropriate measure of recovery.¹⁰⁰ The restitution remedy measures the defendant's enrichment from the defendant's perspective, not the plaintiff's perspective.¹⁰¹ The plaintiff's remedy of restitution differs from other remedies because the harm to the plaintiff, costs incurred by the plaintiff, or the amount the plaintiff expected to receive is irrelevant to the amount that the defendant owes.¹⁰² In that way, the restitution remedy operates opposite of tort compensatory damages or contract expectation damages.¹⁰³ Because restitution focuses on the effect of the conveyance on the defendant rather than the effect of the conveyance on the plaintiff, sometimes the plaintiff's remedy under an unjust

⁹⁵ See 66 AM. JUR. 2D *Restitution and Implied Contracts* § 15.

⁹⁶ See *Scandlyn v. McDill Columbus Corp.*, 895 S.W.2d 342, 345. (Tenn. Ct. App. 1995).

⁹⁷ See SHOBEN, *supra* note 2, at 245.

⁹⁸ See *id.*

⁹⁹ SHOBEN, *supra* note 2, at 880-94; see *Ass'n Life Ins. Co. v. Jenkins*, 793 F. Supp. 161, 163-64 (M.D. Tenn. 1992).

¹⁰⁰ FISCHER, *supra* note 2, at 322.

¹⁰¹ FISCHER, *supra* note 2, at 303.

¹⁰² *Id.*

¹⁰³ See SHOBEN, *supra* note 2, at 247.

enrichment claim is greater than it would be under a tort or contract claim, and sometimes it is less.¹⁰⁴

In addition, that plaintiff's restitution equals the defendant's enrichment, which might be the market value of the benefit or the market value of the avoided expenditure.¹⁰⁵ Alternately, it could be the defendant's net economic gain from either an objective, market-based standard or a subjective standard based on the defendant's situation.¹⁰⁶ The court will choose a valuation method that reflects the culpability of the parties.¹⁰⁷ If there is some fault in the plaintiff's conduct, then the court chooses a lower valuation.¹⁰⁸ For example, if the parties reached an agreement as to the value of the plaintiff's services and the plaintiff breached the contract, the restitution award would likely be limited to the value the plaintiff gave to the contract when he entered into it, rather than its market value if the market value is greater. If the defendant took advantage of the plaintiff, the court chooses the higher valuation.¹⁰⁹ So, if the defendant defrauds the plaintiff and invests the proceeds, earning a significant return, the court is likely to find that the defendant must disgorge those profits. That effectively leaves the plaintiff better off, but restores the defendant to his pre-conveyance position. All things equal, the court chooses a valuation that balances the concerns of both parties but restores the plaintiff as closely as possible, without imposing undue hardship on the defendant, to its pre-conveyance position.¹¹⁰

Failing to distinguish between restitution as an equitable form of relief and restitution as a legal form of relief also causes problems. In *Great-West Life & Annuity Ins. v. Knudson*, the Court specifically held that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but

¹⁰⁴ See THOMPSON, *supra* note 41, at 370-73.

¹⁰⁵ SHOBEN, *supra* note 2, at 249-51. ¹⁰⁶ *Id.* at 249.

¹⁰⁶ *Id.* at 249.

¹⁰⁷ "In deciding which measure to use to value the benefit, the particular circumstances of the case control and the trial court is generally given substantial discretion. There is a tendency to calibrate the harshness of the remedy with the seriousness of the culpability." FISCHER, *supra* note 2, at 324, 326-32.

¹⁰⁸ *Id.* at 324-25.

¹⁰⁹ See THOMPSON, *supra* note 41, at 370-73.

¹¹⁰ See FISCHER, *supra* note 2, at 328.

to restore to the plaintiff particular funds or property in the defendant's possession."¹¹¹ Since claims of unjust enrichment, quantum meruit, quantum valebant, and money had and received are all claims for restitution at law, this explanation aids in understanding that equity might call for a return of property, even where the law will not require monetary compensation.

The claim for restitution in *Knudson* was based on a statute that only allowed for equitable remedies.¹¹² There, the Court found that the plaintiffs' claim failed because they were seeking a monetary remedy, which was legal restitution and was therefore precluded by the statute.¹¹³ Had the plaintiffs made a claim for a lien against property or repossession of property in the defendant's possession, then their claim would have been for equitable restitution, which would have been valid under that statute.¹¹⁴ Essentially, the Court refused to award equitable restitution to the plaintiffs because their claim asked for legal restitution.¹¹⁵

Currently, if a plaintiff seeks restitution at law, then the unjust enrichment claim is based on a quasi contract. The quasi contract is not the only concept that falls under the law of restitution and unjust enrichment; other fictitious causes of action exist by which courts use their equity jurisdiction to prevent unjust enrichment.¹¹⁶ Furthermore, the court will not form the legal fiction that is the quasi contract if its creation would effectively extinguish or alter the parties' rights established by a real contract.¹¹⁷ If there is an actual and valid contract, there is no need for a legal fiction based on social ideals; the parties' private agreement establishes their standard of conduct towards each other and they are held to their agreement.

¹¹¹ *Great-West Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 214 (2002).

¹¹² *Id.*; *see also* *Hauck Mfg. Co. v. Astec Indus.*, 375 F. Supp. 2d 649, 662 (E.D. Tenn. 2004) (The statute governing misappropriation of trade secrets preempted plaintiff's claim for restitution at law based on Astec's "unjustly receiv[ing] proprietary and confidential information belonging to [Plaintiff] and benefiting therefrom without compensating Plaintiff.").

¹¹³ *Id.* at 212-13.

¹¹⁴ *Id.* at 213.

¹¹⁵ *Id.* at 214.

¹¹⁶ *See* SHOBEN, *supra* note 2, at 4, 796, 804, 843, 860 (discussing constructive trusts and equitable liens).

¹¹⁷ *Jaffe v. Bolton*, 817 S.W.2d 19, 26 (Tenn. Ct. App. 1991).

The court only creates a quasi contract if an actual contract covering the subject matter at issue does not exist, is invalid, or ceased to exist because the contract was materially breached.¹¹⁸ This tends to be confusing, because in the present state of the law, the quasi contract legal fiction is no longer necessary. There are no strict writs, and a quasi contract is not really a contract at all. In addition, people like to shorten the awkward “implied-in-law contract” and “implied-in-fact contract” labels to just “implied contract,” thus encouraging failure to distinguish between those two legal concepts.¹¹⁹

A contract implied-in-fact is no less a contract than an express contract, because both are based on “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹²⁰ Moreover, because a promise is a voluntary commitment to do something in the future, the only difference between the express contract and the contract implied-in-fact is that the parties to an express contract manifest their assent through words, written or oral, whereas the parties to an implied in fact contract manifest assent through conduct (i.e., an undertaking).¹²¹

The decision to categorize the restitution and unjust enrichment at law claims within the contracts area of law resulted in an unexpected advantage for tort claimants who lost their right to make the claim to the tort statute of limitations. Certain tort claims can be re-characterized as claims based on unjust enrichment to provide some recovery for that plaintiff because, as a quasi contract, they are subject to the longer contract statute of limitations. Characterization of a claim as unjust enrichment provides a handy way around the tort statute of limitations’ bar on recovery. In addition, the fictitious quasi contract is usually seen in situations where (1) parties plan to enter a contract but the transaction fails to produce a valid contract; (2) a valid contract has been rescinded following a breach and recovering the defendant’s enrichment is more attractive than recovering contract damages; (3) plaintiff conferred a benefit because of a promise by the defendant, but without any

¹¹⁸ FISCHER, *supra* note 2, at 319. For a Tennessee case expressly following that general rule, see *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998).

¹¹⁹ *Nashville v. Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d 28, 32-33 (Tenn. Ct. App. 2005). Compare *Jaffe*, 817 S.W.2d at 24 with *V.L. Nicholson Co. v. Transcon Inv. & Fin, Ltd.*, 595 S.W.2d 474, 481 (Tenn. 1980).

¹²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

¹²¹ See 42 C.J.S. *Implied and Constructive Contracts* § 7 (2007); FERRIELL, *supra* note 24, §§ 1.01-.02.

consideration; or (4) where there were no words or conduct by the parties which would amount to contractual interaction with each other.¹²²

Quasi contracts may be referred to by a specific cause of action created to refer to the type of unjust enrichment that occurred.¹²³ The chart below summarizes the types of unjust enrichment and their corresponding causes of action.

<u>Action</u>	<u>Cause of Action</u>
Benefits Conferred by Mistake	Money Had and Received or Unjust Enrichment
Benefits Derived from the Commission of a Tort	Money Had and Received or Unjust Enrichment
Benefit of Rendition of Services	Quantum Meruit or Unjust Enrichment
Benefit of Receipt of Goods	Quantum Valebant or Unjust Enrichment

An action for money had and received is often brought by an insurance company that either accidentally overpaid a claimant or mistakenly paid a claimant who does not have a right to the payment due to some provision in the policy.¹²⁴ Money had and received was extended to torts by the creation of the fiction that the defendant recipient acted as the agent of the plaintiff conveyor.¹²⁵ Courts may allow money had and received claims as substitutes for the torts of fraud, conversion, and misappropriation, and occasionally for trespass claims.¹²⁶

In researching the use of unjust enrichment as a vehicle for recovery where there is also a tort, one is likely to run into language indicating that the plaintiff

¹²² See *City of Rockwood v. IMCO Recycling*, 415 F. Supp. 2d 853 (E.D. Tenn. 2006); *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150 (Tenn. 1966); *In re Estate of Marks*, 187 S.W.3d 21 (Tenn. Ct. App. 2005).

¹²³ See 42 C.J.S. *Implied and Constructive Contracts* §§ 8-9, 12-17, 26-28 (2007).

¹²⁴ See *Ass'n Life Ins. Co. v. Jenkins*, 793 F. Supp. 161 (M.D. Tenn. 1992); *Shelter Ins. Cos. v. Hann*, 921 S.W.2d 194 (Tenn. Ct. App. 1995).

¹²⁵ SHOBEN, *supra* note 2, at 834.

¹²⁶ FISCHER, *supra* note 2, at 335-37; see also SHOBEN, *supra* note 2, at 828-43 (providing an in-depth discussion with examples and explanations).

waived the tort and sued in *assumpsit*.¹²⁷ This is “antiquated” language which should not be taken literally.¹²⁸ As one would expect, the plaintiff can make both the tort claim and the unjust enrichment claim in her pleading, but if she establishes both causes of action, then at some point she must elect either the tort remedy or the restitution remedy.¹²⁹

Although less common than *quantum meruit*, “*quantum valebant* . . . is still used today as an equitable remedy to provide restitution for another’s unjust enrichment.”¹³⁰ Specifically, it provides restitution for “[t]he reasonable value of goods and materials.”¹³¹ However, it is difficult to find examples of this cause of action, which can only be taken to mean that other causes of action are preferred in these situations.¹³² Perhaps this is because services and goods are often linked, and in those instances the *quantum meruit* claim is made. Alternatively, it may be that implied-in-fact contracts based on course of dealings more often than not cover these types of situations. Finally, because most people are unfamiliar with the term “*quantum valebant*,” which has steadily slipped out of usage, these claims are probably brought under the general claim of unjust enrichment.¹³³ In fact, the sparse reference to it in the law virtually ensures that a plea of *quantum valebant* will, at least temporarily, confound the other party. However, it might also confound the judge. At any rate, given its unfamiliar nature and historical non-usage, this

¹²⁷ FISCHER, *supra* note 2, at 337.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ BLACK'S LAW DICTIONARY, *supra* note 33, at 1276.

¹³¹ *Id.*

¹³² Traditionally, the *quantum meruit* claim allowed a plaintiff to recover the reasonable value of services provided; the *quantum valebant* claim was primarily for goods, but also included the “concomitant services” attached to the provision of the goods or supplies. *Barrett Ref. Corp. v. United States*, 242 F.3d 1055, 1062 (D.C. Cir. 2001); *accord* *Urban Date Sys., Inc. v. United States*, 699 F.2d 1147, 1150 (D.C. Cir. 1998). Significantly, all four of the instances in which the Supreme Court considered claims for recovery under *quantum valebant* involved the delivery of goods by the plaintiff because of a reasonable expectation of payment. *See, e.g.,* *Frederic L. Grant Shoe Co. v. W.M. Laird Co.*, 212 U.S. 445 (1909); *Emerson v. Slater*, 63 U.S. 28 (1859); *Sheehy v. Mandeville*, 10 U.S. 253 (1810); *Clark v. Young & Co.*, 5 U.S. 181 (1803). Moreover, *American Jurisprudence*, *Corpus Juris Secundum*, and *Tennessee Jurisprudence* all omit any mention of *quantum valebant*.

¹³³ *See* *City of Rockwood v. IMCO Recycling*, 415 F.Supp.2d 853 (E.D. Tenn. 2006).

effectively ends the discussion of quantum valebant.

Quantum meruit, on the other hand, remains a popular cause of action. Law students are more often exposed to quantum meruit than any other action based upon an implied-in-law contract. Most contracts professors will at least mention it since it arises quite often in construction contracts, while most of the other quasi contracts may, fairly, be considered too un-contract-like to merit mention. A typical quantum meruit claim involves the rendition of services and the provision of materials related to those services. Every litigator should be aware that if the statute of frauds makes a contract void, quantum meruit may provide recovery.¹³⁴ In which case, the plaintiff might bring a claim based upon the defendant not paying her what her services were worth or not paying her at all. Although calling it an unjust enrichment action is correct, referring to it as a quantum meruit action is more specifically correct.

C. Tennessee Case Summaries

If the restitution and unjust enrichment area of law seems muddled, that is because its concepts are divided and strewn across other fields of law. Tennessee has never adopted the *Restatement of Restitution: Quasi Contracts and Constructive Trusts*.¹³⁵ In order to learn about the unjust enrichment at law subsection of the law of restitution and unjust enrichment, one must know to research under the following possible categorizations: “implied contracts,” “contracts,” or “restitution.”¹³⁶ While there is some consistency in the categorization, there is no category that provides a centralized source of information about the restitution area of law. Furthermore, most of the legal encyclopedia indexes do not have entries for the terms “quantum meruit,” “quasi contract,” or “unjust enrichment.”¹³⁷

In short, a person unfamiliar with these claims and their legal status as contracts would find it very difficult to find information on the unjust enrichment claim because the parties may have never entered into any contracts. Moreover, it is

¹³⁴ FISCHER, *supra* note 2, at 330.

¹³⁵ See RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (1936).

¹³⁶ See 17A AM. JUR. 2D *Contracts* (2004); 66 AM. JUR. 2D *Restitution and Implied Contracts* (2001); 42 C.J.S. *Implied and Constructive Contracts* § 7 (2007); *Implied Contracts*, 2002 TENN. DIGEST 2D; 7 TENN. JUR. *Contracts* (2005); 22 TENN. JUR. *Restitution and Implied Contracts* (2007).

¹³⁷ See 42 C.J.S. *Implied and Constructive Contracts* (2007).

common to be unfamiliar with unjust enrichment at law because there has been a general lack of awareness regarding the law of restitution in the United States for quite some time.¹³⁸ The following case illustrations demonstrate how Tennessee courts apply the law of restitution.

1. Express and Implied-in-Fact Contracts

Tennessee law recognizes “two distinct types of implied contracts: contracts implied in fact and contracts implied in law.”¹³⁹ Differentiating between the concepts of contract implied-in-law and contract implied in fact is not difficult. In practice, however, whether or not the trier of fact will find that the conduct of the parties amounts to a manifestation of mutual assent or shared intent is often unpredictable. A contract implied-in-fact occurs when “according to the ordinary course of dealing and common understanding of men” the parties “show a mutual intention to contract.”¹⁴⁰ Therefore, a contract implied in fact still requires evidence of a mutual intention; a contract implied in law does not.¹⁴¹

Weatherly v. Am. Agric. Chemical Co. shows that the court will not create an implied contract that contradicts an express contract.¹⁴² There, the plaintiff argued that an implied agreement “to mine or pay for all of the phosphate rock” of a specified quality on the leased property existed within the express contract governing the defendant’s lease rights in the plaintiffs’ land.¹⁴³ The plaintiff and defendant had entered into a lease for a period of 20 years.¹⁴⁴ The defendant needed the plaintiff’s land to access water supplies and wanted to use it to transport mined minerals from the defendant’s adjoining properties.¹⁴⁵

In entering into the lease, the defendant also secured the right to mine

¹³⁸ See Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 488-89 (2007).

¹³⁹ *Overstreet v. TRW Com. Steering Div.*, 256 S.W.3d 626, 632 (Tenn. 2008).

¹⁴⁰ *Welch Bros. Drilling Co. v. Russell*, 1984 Tenn. App. LEXIS 3012, at *1-2 (July 12, 1984).

¹⁴¹ *See id.*

¹⁴² *See Weatherly v. Am. Agric. Chem. Co.*, 65 S.W.2d 592 (Tenn. Ct. App. 1933).

¹⁴³ *Id.* at 595.

¹⁴⁴ *Id.* at 594.

¹⁴⁵ *Id.* at 595.

phosphate from the land leased from the plaintiff.¹⁴⁶ In return, the defendant promised to pay the plaintiff at least \$2,500 a month so that when the defendant was not actively mining the land, the plaintiff would continue to profit from the lease.¹⁴⁷ The rate of pay when the defendant was actively mining the land was based on the amount of phosphate mined.¹⁴⁸ When the defendant began mining the plaintiff's land, it turned out that the quality of the phosphate from the plaintiff's property was poor.¹⁴⁹ As a result, the defendant ceased mining the phosphate and resumed paying the plaintiff the minimum monthly rate established in the contract.¹⁵⁰

In its analysis, the court said:

Contracts implied in fact arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract. Such an agreement may result as a legal inference from the facts and circumstances of the case.¹⁵¹

The court also explained that:

Evidence of the situation of the parties and their surroundings, of the motives which induced the agreement, and the object and purpose designated to be effected by it, may be considered in order to ascertain the intention of the parties, if it does not tend to contradict the language of the written instrument.¹⁵²

The court then considered case precedent, industry customs, and the written lease agreement.¹⁵³ Finally, the court found that the express term providing for a minimum payment from the defendant when the property was not being mined contradicted the existence of an implied-in-law agreement that the defendant would

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 595, 599.

¹⁴⁸ *Id.* at 595.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 598. ¹⁵² *Id.* at 597.

¹⁵² *Id.* at 597.

¹⁵³ *Id.* at 597-601.

continue mining until all the phosphate had been removed.¹⁵⁴

V.L. Nicholson Co. v. Transcon Investment and Financial Ltd. provides a good example of an implied-in-fact contract.¹⁵⁵ There, the Johnson City Housing Authority hired Transcon Investment and Financial Ltd., Inc. (“Developer”) to develop a housing project.¹⁵⁶ Developer set up another corporation, Johnson City Leased Housing Corporation (“Owner”), “to finance, construct and own the property [,] [with a charter] characteriz[ing] it as an agency and instrumentality of the Johnson City Housing Authority.”¹⁵⁷ Developer also selected and hired the architectural firm and the general contractor, V.L. Nicholson (“Contractor”) for the project.¹⁵⁸

Contractor’s initial written contract was between Owner and Contractor only, but Contractor’s agreement was subject to additional conditions which were agreed to by Developer.¹⁵⁹ The contract contemplated change orders, and subsequently the architect and Contractor agreed that the original plans needed revision to bring them up to the U.S. Department of Housing and Urban Development’s standards.¹⁶⁰ Under the contract, change orders were to be approved by both Contractor and the architect, or by Owner’s written consent to the architect.¹⁶¹ After the work commenced, the architect told Contractor to submit his change orders directly to Owner. Eight of those change orders were received but never approved or rejected.¹⁶² The change orders resulted in increased costs which Developer consistently marked as “subject to review” on the Contractor’s progress

¹⁵⁴ *Id.* at 600-01. Similarly, in *Jaffe*, the court refused to create a quasi contract to compensate a lessee for the large sum it spent on improvements to the plaintiff’s commercial building. *Jaffe v. Bolton*, 817 S.W.2d 19, 26 (Tenn. Ct. App. 1991). The court found that the plaintiff voluntarily made the improvements with full knowledge that by the terms of his lease, the landlord had the right to retain the benefit of all improvements. *Id.*

¹⁵⁵ *V.L. Nicholson Co. v. Transcon Inv. & Fin., Ltd.*, 595 S.W.2d 474 (Tenn. 1980).

¹⁵⁶ *Id.* at 477.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 478.

¹⁶¹ *Id.*

¹⁶² *Id.* at 479.

payment statements.¹⁶³ After the contract was complete, Developer refused to approve payment for the additional work done under those change orders, prompting the Contractor to file suit.¹⁶⁴

First, the court denied recovery under the express contract.¹⁶⁵ It then considered whether an implied-in-fact contract existed between Contractor, Owner, and Developer.¹⁶⁶ The Tennessee Supreme Court explained:

Generally, an implied contract is one which is inferred from the conduct of the parties; it is not necessarily expressed in words. A promise will not arise by implication, however, when the circumstances and facts from which the promise would be drawn are contrary or completely inconsistent with the contract to be implied. Nor may a contract be implied in fact in the face of a declaration to the contrary by the party to be charged. If a contract may be implied, then a commitment to pay reasonable compensation is also implied. This promise to pay is implied where a person works for another, with the latter's knowledge, and the work is useful and normally would be compensated and where the person for whom the work is being done does not object or accepts the services rendered. Thus a promise to pay will only be implied when the work was performed under circumstances in which a person could reasonably expect to be compensated by the party benefited. The conduct or words of the person who receives the benefit of this work must be such that one could fairly infer a promise to pay.¹⁶⁷

The court then determined that Developer's "conduct [was] consistent with an implied promise to pay . . . Nicholson."¹⁶⁸ The court found that Developer's actions manifested approval of the change orders.¹⁶⁹ Those actions were that

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 482.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (citations omitted).

¹⁶⁸ *Id.* at 482-83.

¹⁶⁹ *Id.*

Developer telegraphed the approval and acceptance of Contractor's conditions, its vice-president was at the meeting where the parties decided change orders were necessary, and Developer had the detailed written change orders and never disapproved them or tried to stop the work associated with them.¹⁷⁰ In addition, Developer's actions cloaked the architect with apparent authority, and the architect had orally approved the change orders.¹⁷¹ All of the above conduct convinced the court that the parties *did* understand that V.L. Nicholson Co. was doing the work for compensation.¹⁷² As a result, the court awarded the plaintiff recovery against the defendants under an implied-in-fact contract.¹⁷³

2. Implied-in-Law Contracts, a.k.a. Quasi Contracts

Tennessee courts also use the law to create obligations when "a party receiv[es] a benefit desired by him, under the circumstances rendering it inequitable to retain it without making compensation" ¹⁷⁴ Contracts implied by law "are imposed or created by law without the assent of the party bound, on the ground that they are dictated by reason and justice."¹⁷⁵ In Tennessee:

any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for the requested act, amounts to an offer, and that such a request might be implied when the facts and circumstances are such that the person receiving the benefit of such work or services know, or reasonably should have known, that the person doing the work expected to be compensated.¹⁷⁶

Contracts implied in law are also referred to as quasi contracts, and under Tennessee law, a claimant seeking recovery under the theory of quasi contract must prove the following elements:

¹⁷⁰ *Id.* at 483.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 485.

¹⁷⁴ *B & L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 217 (Tenn. Ct. App. 2004).

¹⁷⁵ *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 154 (Tenn. 1966).

¹⁷⁶ *In re Estate of Holding*, 457 S.W.2d 545, 549 (Tenn. 1969).

- (1) A benefit conferred upon the defendant by the plaintiff;
- (2) Appreciation by the defendant of such benefit; and
- (3) Acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof.¹⁷⁷

a. Recovery based on quantum meruit

In *Paschall's Inc. v. Dozier*, Mary Best hired the plaintiff to install another bathroom in her parents' home where she was also living.¹⁷⁸ Her parents assented to the installation of the bathroom, and knew that the contractor was performing the work.¹⁷⁹ Mary Best went bankrupt and refused to pay the contractor for his work.¹⁸⁰ He sued the parents for the value of his work, and they defended on the grounds that they had not entered into a contract with him, and therefore could not be held liable.¹⁸¹

The court acknowledged the general rule that if there was recovery under an actual contract then the retention of the benefit by an incidental third-party recipient would not be unjust.¹⁸² However, the court rejected the parents' argument that the plaintiff could not recover from them the value of his work and materials because

¹⁷⁷ *Welch Bros. Drilling Co. v. Russell*, 1984 Tenn. App. LEXIS 3012, at*2 (July 12, 1984).

¹⁷⁸ *Paschall's, Inc.*, 407 S.W.2d at 151.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 152.

¹⁸¹ *Id.* at 154.

¹⁸² *Id.*; *see also Weakley County Hosp. v. Kentucky-Tennessee Light & Power Co.*, 171 Tenn. 662, 666 (1937) (finding an employer liable to the hospital for an employee's hospital bill because employer was legally obligated to pay for work-related injuries).

At common law, when a party secures services to be rendered, whether himself or to another, there is an implied contract to pay for such services. For reasons of humanity an exception is made generally in favor of someone calling a doctor for another. Otherwise a neighbor or stranger might hesitate to call for a physician to attend a stricken man unable to make such a call himself. This exception, however, does not apply to someone under a legal obligation to supply medical services to another.

Id.

the parties had no privity of contract.¹⁸³ The court invoked “the principle that a party receiving a benefit desired by him, under circumstances rendering it inequitable to retain it without making compensation, must do so.”¹⁸⁴ It also introduced the following statement into Tennessee case law:

Actions brought upon theories of unjust enrichment, quasi contract, contracts implied in law, and quantum meruit are essentially the same. Courts frequently employ the various terminology interchangeably to describe that class of implied obligations where, on the basis of justice and equity, the law will impose a contractual relationship between parties, regardless of their assent thereto.¹⁸⁵

The court referred to defendant’s claim brought on the theory of unjust enrichment for the value of materials and services furnished as “an action on quantum meruit.”¹⁸⁶ Remanding the case, the court provided the following instruction:

[The] case must be decided according to the essential elements of quasi contract, to-wit: A benefit conferred upon the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof.¹⁸⁷

The court also instructed that if the parents had given consideration to any one else at all for the work done by the contractor, then they would not have been unjustly enriched and therefore could not be held liable under quasi contract.¹⁸⁸

Paschall’s, Inc. demonstrates that a claim for quantum meruit is simply a version of the unjust enrichment cause of action – a version that applies when a plaintiff performs valuable services for the defendant and justice requires the defendant to compensate the plaintiff for the reasonable value of those services even

¹⁸³ *Paschall’s, Inc.*, 407 S.W.2d at 154-55.

¹⁸⁴ *Id.* at 154.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 155.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

if there is no privity of contract between the plaintiff and the defendant.¹⁸⁹ Note that, under quantum meruit, unlike the general unjust enrichment claim, the claimant's recovery will be:

[L]imited to the actual value of goods or services, not their contract price. Courts will not award quantum meruit recoveries without some proof of the reasonable value of the goods or services, but the required proof may be an estimation of the value of the goods and services.¹⁹⁰

However, "Tennessee law is clear that an award in *quantum meruit* is not to be determined by the value of the services to the one who performs the services, but instead, should be based on the *value of the benefit conferred*."¹⁹¹

In *Castelli*, the plaintiff provided extensive interior decorating services for the plaintiffs, wealthy clients who wanted help completely renovating an old home they purchased.¹⁹² Being friends, the parties discussed orally what the plaintiff's job would be and the defendant's rate of pay and billing method.¹⁹³ The plaintiffs were husband and wife; the husband was a doctor, and the wife was not employed.¹⁹⁴

The wife's frivolous spending soon exceeded the initial budget, but since she was personally selecting the items, the interior decorator did not advise her that she had blown the budget, though he did warn the husband that her spending was excessive.¹⁹⁵ In the end, the defendants refused to pay their final bill to the interior decorator.¹⁹⁶ In an effort to settle the matter, he offered an alternative fee

¹⁸⁹ *Id.* at 154.

¹⁹⁰ *Parris Roofing & Sheetmetal Co. v. SCR Elec., Inc.*, No. E2006-0263-COA-R3-CV, 2007 Tenn. App. LEXIS 104, at *19 (Feb. 27, 2007) (quoting *Castelli v. Lien*, 910 S.W.2d 420, 427-28 (Tenn. Ct. App. 1995)); *Castelli*, 910 S.W.2d at 427-28.

¹⁹¹ *Parris Roofing & Sheetmetal Co.*, 2007 Tenn. App. LEXIS 104, at *19 (quoting *Johnson v. Hunter*, No. M2000-03099-COA-R3-CV, 2001 Tenn. App. LEXIS 795, at *18-19 (Oct. 25, 2001)).

¹⁹² *Castelli*, 910 S.W.2d at 423.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 424.

¹⁹⁶ *Id.* at 425.

arrangement to the one they initially agreed upon, which they rejected.¹⁹⁷ He then filed suit, claiming the defendants breached an oral contract or alternatively, that the defendant's owed him quantum meruit for the value of the services and materials he provided.¹⁹⁸

The court found the terms of the oral agreement too indefinite to enforce as an actual contract since the testimony of the parties indicated that "they did not have a meeting of the minds concerning the essential terms of their agreement."¹⁹⁹ However, reason and justice required the plaintiffs to pay the defendant for the reasonable value of his services because they accepted those services and both parties understood he expected to be compensated.²⁰⁰ As a result, the court used the legal fiction of the quasi contract as his basis for recovery.²⁰¹

In *Swafford v. Harris*, the Tennessee Supreme Court adopted a specific list of elements for quantum meruit from *Castelli*.²⁰² With no compelling evidence of actual contract, the court turned to the plaintiff's claim based on quantum meruit.²⁰³ Relying on seven previously decided cases, the court determined that for recovery based on quantum meruit, the following circumstances must exist:

- (1) There must be no existing, enforceable contract between the parties covering the same subject matter;
- (2) The party seeking recovery must prove that it provided valuable goods and services;
- (3) The party to be charged must have received the goods and services;
- (4) The circumstances must indicate that the parties involved in the transaction should have reasonably understood that the person providing the goods or services expected to be compensated; and

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 427.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 431.

²⁰² *Swafford v. Harris*, 967 S.W.2d 319, 324 (Tenn. 1998).

²⁰³ *Id.*

(5) The circumstances must also demonstrate that it would be unjust for the party benefitting from the goods or services to retain them without paying for them.²⁰⁴

Under element one, quantum meruit claims do not apply to express contracts.²⁰⁵ Element two requires the plaintiff to prove he conferred a benefit on the defendant.²⁰⁶ Element three nicely merges the antiquated quantum valebant cause of action into quantum meruit because it covers the defendant's enrichment by receipt of either goods *or* services.²⁰⁷ Element four indicates that quantum meruit claims apply to implied contracts.²⁰⁸ Finally, element five represents the fact that the defendant's enrichment must be unjust.²⁰⁹ All elements must exist, so a defendant need only show the court that one of the elements is not present to defeat the quantum meruit claim.²¹⁰

In *Castelli*, the facts supported the existence of the first four elements, but “[the plaintiff] could still be denied recovery if he acted unethically, improperly, or in bad faith with regard to the transaction at issue.”²¹¹ Based on testimony from other interior designers, the court decided the plaintiff's business practices were usual to the interior design industry and therefore not improper, unethical, or in bad faith.²¹² Although the plaintiff prevailed, his recovery was limited to the actual value of the goods or services, rather than the amount he charged based on his billing methods.²¹³ The court explained:

Liability under quantum meruit is based on a legally implied promise to pay a reasonable amount for goods or services received. Thus,

²⁰⁴ *Castelli*, 910 S.W.2d at 427 (citations omitted).

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ *See id.*

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ *Id.* at 429.

²¹² *Id.* at 428.

²¹³ *Id.* at 427.

quantum meruit recoveries are limited to the actual value of the goods or services, not their contract price. Courts will not award quantum meruit recoveries without some proof of the reasonable value of the goods or services, but the required proof may be an estimation of the value of the goods and services.²¹⁴

In *Castelli*, the court found that the actual value was somewhere between the defendant's actual material and labor costs and the amount of his bill.²¹⁵

Conversely, in *Swafford*, the court based its rejection of Dr. Swafford's quantum meruit claim on the fifth element.²¹⁶ There, Dr. Swafford sued Harris for payments based on contingency contracts that made payment for the doctor's medical services and expert testimony contingent on the outcome of Harris' personal injury suit.²¹⁷ Harris prevailed in his personal injury suit, but he did not pay Swafford as agreed in the contracts.²¹⁸ Swafford based his claims for recovery on breach of contract or, alternatively, quantum meruit.²¹⁹ The court first found the contracts void as against public policy based upon professional codes of conduct.²²⁰ Then, the court held that there could be no recovery under quantum meruit because quantum meruit was not available "where the underlying contract [was found] void as against public policy."²²¹

The Tennessee Supreme Court has addressed quantum meruit claims four times since *Swafford*.²²² Only in *Doe v. HCA Health Servs. of Tenn.* has it formerly

²¹⁴ *Id.* at 428 (citations omitted).

²¹⁵ *Id.* at 430.

²¹⁶ *Swafford v. Harris*, 967 S.W.2d 319, 320-21 (Tenn. 1998).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 323.

²²¹ *Id.* at 324.

²²² *See Cohn v. Bd. of Prof'l Responsibility*, 151 S.W.3d 473, 487 (Tenn. 2004) (A bankruptcy lawyer was ordered to disgorge fees valid because, based on his own testimony, he did not expect to be paid the full amount charged, and the amounts charged were unjustifiable); *Kyle v. Williams*, 98 S.W.3d 661, 665 (Tenn. 2003) (The court concluded that an unlicensed contractor may not recover under either the contract he entered into or quantum meruit. Allowing recovery under quantum meruit would undermine the public policy and purpose behind the statute requiring licensing.); *Doe v. HCA*

reiterated the *Castelli* elements.²²³ In *Doe*, after the court found that the hospital's contract with the patient for payment for services was invalid or unenforceable, it considered whether or not to allow recovery under quantum meruit.²²⁴ Applying the *Castelli* elements for quantum meruit, the court found:

All five circumstances listed in *Swafford* apply to the pending case. First, for the reasons stated earlier in this opinion, there is no existing, *enforceable* contract between the Jane Doe and HCA Donelson Hospital. Second, the record clearly shows that the hospital provided valuable goods or services to Jane Doe. Third, it is undisputed that Jane Doe received the goods or services provided by the hospital. Fourth, the circumstances indicate that the parties reasonably understood that the hospital providing the goods or services expected to be compensated. Fifth, the circumstances demonstrate that it would be unjust for Jane Doe to retain the goods or services without payment to HCA Donelson Hospital. Accordingly, we conclude that the hospital is entitled to be paid the reasonable value of the medical goods and services provided to Jane Doe.²²⁵

In a case involving the family service presumption of voluntary conferral, *In re Estate of Marks*, the plaintiff filed suit against her dead fiancé's estate for "lost wages, the reasonable value of the services she rendered to the decedent, and the income she expected to earn as a trustee of a trust established by the decedent."²²⁶

Health Servs. of Tenn., 46 S.W.3d 191, 198 (Tenn. 2001) (A contract requiring a patient to pay a percentage of hospital fees not covered by insurance was too indefinite as to the amount of fees. Thus, the hospital could not recover on that contract; however, it could recover on a quantum meruit basis for the reasonable value of goods and services.); *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000) (The court denied "intervenor's claim to attorney's fees on equitable grounds, such as quantum meruit, implied contract, and other theories[, because if it allowed them] . . . to claim fees under the theories being asserted, then any lawyer who has been involved in litigation against a tobacco company could do the same by merely claiming that their efforts have benefitted the State. Obviously, such a situation cannot be sanctioned.").

²²³ See *Doe v. HCA Health Servs. of Tenn.*, 46 S.W.3d 191, 197-98 (Tenn. 2001).

²²⁴ *Id.* at 197.

²²⁵ *Id.* at 198 (emphasis in original).

²²⁶ *In re Estate of Moss*, 187 S.W.3d 21, 25 (Tenn. Ct. App. 2006).

Following the deaths of their spouses, the testator and the plaintiff started dating, and a year later they got engaged.²²⁷ The testator asked the plaintiff to help him with his finances because he was not in good health.²²⁸ Eventually, the plaintiff had complete access to his finances and retired from her job at the bank to spend more time managing the testator's business and finances.²²⁹ After the testator learned he had prostate cancer, he had an attorney draft a prenuptial agreement, created a trust which named the plaintiff as co-trustee, and drafted a new will including her as a beneficiary.²³⁰ At that point, the plaintiff lived with and took care of the testator; however, he passed away before executing any of the documents he drafted.²³¹

The court appointed the testator's son as executor of his estate.²³² When the son no longer needed the plaintiff's help sorting through his father's financial affairs, he terminated her trusteeship.²³³ She responded by filing a lawsuit for lost compensation and benefits from her employment at the bank.²³⁴ She claimed that she would have worked there for four more years had she not relied upon the testator's assurance that he would take care of her, and that she only retired because he asked her to assist him with his business and personal matters.²³⁵

The estate argued that her beliefs did not matter when there was no evidence of the purported agreement.²³⁶ The court agreed that the plaintiff "ha[d] no contract claim against [the testator's] estate that would entitle her to receive lost compensation and benefits"²³⁷ The estate then attempted to persuade the court to dismiss the plaintiff's quantum meruit claim.²³⁸ Characterizing the plaintiff as a

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 25-26.

²³⁰ *Id.* at 26.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 27.

²³⁶ *Id.*

²³⁷ *Id.* at 28.

²³⁸ *Id.*

family member, the estate argued “she failed to overcome the presumption that her services to [the testator] were gratuitous and that she failed to prove that under the circumstances, [the testator] should have understood that she expected compensation for her services.”²³⁹

Under the family service rule, persons living together may be considered family.²⁴⁰ “The types of services covered by the family service rule include the personal, domestic, and household services that family members customarily render to each other without expectation of payment.”²⁴¹ The court recognized, however, that many of the services performed by the plaintiff “were more business than personal,” and that the plaintiff expected to be rewarded for those services after she retired from the bank.²⁴² The court decided that even though the plaintiff was “family” for the purposes of the family service rule, a jury could still find that the estate had a duty to compensate her for the business-related services she provided to the testator.²⁴³

b. Recovery based on Money Had and Received

Steelman v. Ford Motor Credit Co. provides a good example of a payment made in reliance on an invalid contract and failure of consideration with a refusal to return a payment.²⁴⁴ Steelman purchased a failing Ford dealership with a suspended line of credit.²⁴⁵ He paid Ford \$90,000 for 50% ownership of the dealership, and repaid the amounts outstanding to Ford on vehicles sold by the dealership.²⁴⁶ He also established the threshold operating funds required by Ford.²⁴⁷ Steelman was under the mistaken understanding that if he took those steps, then Ford would reinstate the

²³⁹ *Id.*

²⁴⁰ *Id.* at 30.

²⁴¹ *Id.*

²⁴² *Id.* at 31.

²⁴³ *Id.*

²⁴⁴ *Steelman v. Ford Motor Credit Co.*, 911 S.W.2d 720, 723-24 (Tenn. Ct. App. 1995).

²⁴⁵ *Id.* at 721-22.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 722.

dealership's floor plan financing agreement.²⁴⁸ He based this expectation on his communications with a representative from Ford, who later denied ever saying that Ford would reinstate the financing agreement.²⁴⁹ Steelman was unaware that a cross-agreement between the seller and Ford conditioned the reinstatement of the financing agreement at the dealership purchased by Steelman on the correction of problems at the seller's other dealerships.²⁵⁰

Stelman never sought enforcement of the alleged oral contract, which would have been voidable by the Statute of Frauds.²⁵¹ Instead, he asked simply that the court return the money he had paid to Ford under the mistaken belief that it was consideration for the reinstatement of the floor plan financing agreement.²⁵² This characterization of his claim was "of utmost significance," because "money paid under the contract for the benefit of the repudiating party may be recovered" when the following circumstances exist:

- (1) [T]he payment made be a part or all of the purchase price;
- (2) The payment inured to the benefit of the defendant;
- (3) There was a failure of consideration;
- (4) Plaintiff did not receive the value of the payments from use and occupation or other benefits; and
- (5) Defendant refused to perform.²⁵³

Similarly, the defendant in *Hann* was required to return the benefits she received from Shelter, which exceeded those agreed upon in a subsequent oral settlement agreement.²⁵⁴ Mrs. Hann, the defendant, and her children were in a car accident, and Shelter was their insurance carrier.²⁵⁵ The coverage paying for their

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 723.

²⁵² *Id.*

²⁵³ *Id.* at 723-24.

²⁵⁴ *Shelter Ins. Cos. v. Hann*, 921 S.W.2d 194, 195 (Tenn. Ct. App. 1995).

²⁵⁵ *Id.*

injury was Mrs. Hann's uninsured motorist coverage.²⁵⁶ Initially, Shelter forwarded a check for \$5,000 with a letter requesting that Mrs. Hann sign a document releasing Shelter from further liability.²⁵⁷ She cashed the check, but filed suit against Shelter rather than signing the release.²⁵⁸ The parties eventually settled.²⁵⁹

After paying Hann the amount agreed upon in the settlement agreement, Shelter realized it had previously paid her \$5,000 and promptly filed suit to recoup that money.²⁶⁰ Shelter's position was that it had agreed to pay the amount in the settlement agreement without knowledge of the previous \$5,000 payment, and that allowing the defendant to keep it would be unjust because she had been paid more than her policy limits.²⁶¹ Unlike the defendant in *Jenkins*, Hann directly benefited from the overpayment, and she was aware or should have been aware that she had been paid more than her policy limits.²⁶² As a result, the court required Hann to repay the \$5,000 she received from Shelter prior to the oral settlement agreement.²⁶³

c. Defenses

In *Association Life Ins. Co. v. Jenkins*, Jenkins was the president of Murfreesboro Truck Sales ("MTS"), where he employed his grandson.²⁶⁴ Jenkins purchased group insurance coverage for his employees through Association Life Insurance Company ("Insurer").²⁶⁵ The grandson stopped working when he was diagnosed with cancer.²⁶⁶ After his treatment ended, he resumed working at MTS,

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 197.

²⁶¹ *Id.*

²⁶² See *Ass'n Life Ins. Co. v. Jenkins*, 793 F. Supp. 161 (M.D. Tenn. 1992); *Shelter Ins. Cos.*, 921 S.W.2d at 202.

²⁶³ *Shelter Ins. Cos.*, 921 S.W.2d at 201.

²⁶⁴ *Jenkins*, 793 F. Supp. at 161.

²⁶⁵ *Id.* at 162.

²⁶⁶ *Id.*

performing light cleanup.²⁶⁷ Jenkins then decided to go out of business, which involved ceasing operations, but keeping his corporate entity alive while selling off his inventory.²⁶⁸ After operations ceased, the grandson filed a disability claim with Insurer.²⁶⁹ A call to the business's location by Insurer revealed that MTS was out of business.²⁷⁰ As a result, per the conditions of the policy, Insurer canceled the coverage retroactive to the date that business ceased.²⁷¹

Insurer then sued Jenkins for the disability payments paid to his grandson.²⁷² Insurer made its claim under the theory of unjust enrichment.²⁷³ The court characterized the claim as an action for money had and received, and noted that “in Tennessee, as elsewhere, insurance companies may sue to recover benefit payments made due to mistake or fraud.”²⁷⁴

The court found that whether the mistake was one of fact or one of law would determine who bears the burden of proving that the retention or transfer of the benefits would be inequitable.²⁷⁵ Where mistaken payments are made due to a mistake of fact, the defendant bears the burden of proving that the return of the benefits would be inequitable.²⁷⁶ Conversely, where a mistaken payments result from a mistake of law, the plaintiff bears the burden of showing that it would not be inequitable for the defendant to return the benefits erroneously conferred.²⁷⁷

The court determined that the mistaken payments on the void policy were a mistake of fact, rather than a mistake of law.²⁷⁸ As a result, the defendants bore the

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 164.

²⁷⁴ *Id.* at 163.

²⁷⁵ *Id.* at 164-65.

²⁷⁶ *Id.* (citing *Guild v. Baldrige*, 32 Tenn. 210, 216 (1852)).

²⁷⁷ *Id.* at 165 (citing *Leach v. Cowan*, 140 S.W. 1070 (Tenn. 1911)).

²⁷⁸ *Id.* at 164-65.

burden of proving that it would be unfair for the court to force them to pay back Insurer.²⁷⁹ The court considered the relative positions of the parties: Insurer only made the payments because it had no knowledge that the business had ceased to exist; Jenkins made premium payments and personally received no payments from Insurer; and the recipient of the benefits was an innocent third party who put those benefits towards the use intended – payment for medical bills.²⁸⁰ The court concluded that, in this case, requiring the defendants to return the benefits paid under a mistake of fact would cause the defendants great injury and injustice because the defendants relied on payments for medical treatments and the benefits were paid to the physicians directly.²⁸¹ Under those circumstances, the court held the defendant could “retain the advantage in good conscience.”²⁸²

In *B & L Corp. v. Thomas & Thorngren, Inc.*, the court held that a “[q]uasi-contractual theory of recovery involves the willing conferring of a benefit by one party to the other and is contraindicated when the benefit alleged is involuntarily conferred.”²⁸³ Note that the choice of words here is a bit confusing considering the general rule that *volunteers* cannot recover benefits voluntarily conferred. That rule was essentially irrelevant to the facts of this case, which involved a plaintiff who suffered losses when two employees entered into a joint venture to establish a competing business, solicited the plaintiffs’ employees, and took a major client with them when they left.²⁸⁴ Here, the court’s reference to the involuntary conferral by the plaintiff as negating the claim for unjust enrichment simply recognizes that the plaintiff must intend to charge the defendants, and to intend to charge, she must voluntarily enter into the transaction.²⁸⁵ When the facts show that the plaintiff intended to charge and the benefit conferred to the plaintiff was valuable to the defendant, the burden shifts to the defendant to prove the “absence of usefulness.”²⁸⁶

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 162-64.

²⁸¹ *Id.* at 165.

²⁸² *Id.* at 164-65 (quoting *Leach v. Cowan*, 140 S.W. 1070, 1077 (Tenn. 1911)) (emphasis omitted).

²⁸³ *B & L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 215-18 (Tenn. Ct. App. 2004).

²⁸⁴ *Id.* at 195.

²⁸⁵ *Id.* at 217.

²⁸⁶ *Lawler v. Zapletal*, 679 S.W.2d 950, 954 (Tenn. Ct. App. 1984).

Welch Bros. Drilling Co. v. Russell provides a good example of a defense which negated an essential element of the plaintiff's substantive claim.²⁸⁷ There, the plaintiff drilling company drilled a well on property owned by the defendant, Bank of Tennessee, without the bank's knowledge, previous transactions with the bank, or any intent by the bank to contract for the installation of a well.²⁸⁸ The bank benefited from the work done by Welch Bros. Drilling Company because the value of the property appreciated as a result of the well.²⁸⁹ Despite the benefit to the defendant, the court found that the plaintiff could not recover the value of the benefit since there was neither a contract implied in fact nor a contract implied by law.²⁹⁰ In that decision the court explained:

The proof shows that the bank clearly has benefited from plaintiff's labor and materials. Unfortunately, the questions of appreciation and acceptance are less clear in this case because the property is unoccupied. Therefore, it is impossible to appreciate and accept the benefit of the well in the usual way. However, we believe that the appreciation and acceptance requirements are designed to guarantee that the property owner be given a choice to accept or reject the benefit bestowed by a mistaken improver. In this case the Bank has had no such choice. Therefore we hold that there has been no acceptance by the defendant and there can be no quasi contract.²⁹¹

The court further explained that, while it sympathized with the plaintiff drilling company, "as between two innocent litigants, the loss must lie with the mistaken party."²⁹²

In *Weatherly*, the mining case discussed in the previous section, the court also considered whether absent the express term, the circumstances justified the creation of an implied in law contract.²⁹³ Contrasting implied-in-fact contracts and implied-

²⁸⁷ *Welch Bros. Drilling Co. v. Russell*, 1984 Tenn. App. LEXIS 3012, at *1-3 (July 12, 1984).

²⁸⁸ *Id.* at *1-2.

²⁸⁹ *Id.* at *2.

²⁹⁰ *Id.* at *3.

²⁹¹ *Id.* at *2-3.

²⁹² *Id.* at *3.

²⁹³ *Weatherly v. Am. Agric. Chem. Co.*, 65 S.W.2d 592, 597-601 (Tenn. Ct. App. 1933).

in-law contracts, the court said “[c]ontracts implied in law, or more properly quasi or constructive contracts, are a class of obligations which are imposed or created by law without the assent of the party bound, on the ground that they are dictated by reason and justice”²⁹⁴

Generally, if a lease to mine is silent, the law imposes a duty on the lessees of mineral rights to continue to develop and work mines with due diligence.²⁹⁵ The court reasoned, however, that in this case such a contract would bind the defendant to mine all phosphate, “whether or not it [was] mineable, merchantable, or profitable.”²⁹⁶ The court determined that even without that express provision, it would not have created an implied-in-law contract with such a harsh, one-sided effect, especially since the facts showed that the defendant suffered significant losses from the venture.²⁹⁷ Thus, even if there had been no express provision covering the disputed term, a defense based on undue hardship could have succeeded.²⁹⁸

Importantly, a plaintiff seeking recovery under a claim for unjust enrichment must exhaust all other remedies unless they prove that “the pursuit of the remedies would be futile.”²⁹⁹ *Whitehaven Cmty. Baptist Church v. Holloway* illustrates the use of the affirmative defense of election of remedies.³⁰⁰ In *Whitehaven*, a building contractor entered into an agreement with a landowner to build a church.³⁰¹ Subsequently, the landowner defaulted on his construction loan payments to a lender.³⁰² The lender foreclosed on the building, and the contractor sued the lender for the value of the improvements under the theory of unjust enrichment.³⁰³ The court dismissed the contractor’s claim of unjust enrichment of the lender because the

²⁹⁴ *Id.* at 598.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 601.

²⁹⁷ *Id.*

²⁹⁸ *See id.*

²⁹⁹ *Freeman Indus. v. Eastman Chem. Co.*, 172 S.W.3d 512, 515, 525-26 (Tenn. 2005); *see Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998).

³⁰⁰ *Whitehaven*, 973 S.W.2d at 592.

³⁰¹ *Id.* at 593.

³⁰² *Id.* at 595.

³⁰³ *Id.* at 596.

contractor, whose contract was with the debtor, had retained funds from the loan as compensation and had not exhausted remedies against the debtor for any deficiencies.³⁰⁴ Similarly, a statute may preempt an unjust enrichment claim.³⁰⁵

In *Metro Gov't of Nashville v. Cigna Healthcare of Tenn., Inc.*, Cigna failed to purchase a bond securing its obligation to Metro Nashville employees.³⁰⁶ In seeking bids for a contract to provide healthcare coverage to its employees, Nashville required the successful bidder to purchase a performance bond as a condition subsequent to acceptance of their bid.³⁰⁷ Cigna was the successful bidder.³⁰⁸ During the contract term, Cigna performed all conditions except purchasing the bond.³⁰⁹ In addition, the parties failed to put their agreement in writing; therefore there was no written contract.³¹⁰ When Nashville discovered that Cigna had not purchased the bond and the parties had no formal written agreement, it asked Cigna to purchase a bond for the remainder of the contract, but Cigna declined to do so.³¹¹ Nashville sued Cigna under theories of unjust enrichment, or, alternatively, breach of an implied contract.³¹² Cigna admitted it agreed to purchase the bond and then failed to do so but contended that Nashville suffered no harm as a result.³¹³ Cigna demonstrated that its bid did not include the cost of a performance bond, but that the amount of its bid would have been the same whether or not a performance bond was required.³¹⁴

The court decided that Nashville's claim for unjust enrichment failed because the facts showed an implied-in-fact contract existed.³¹⁵ However, it also found that

³⁰⁴ *Id.* at 596-97.

³⁰⁵ *Hauck Mfg. Co. v. Astec Indus.*, 375 F. Supp.2d 649, 662 (E.D. Tenn. 2004).

³⁰⁶ *Nashville v. Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d 28, 30 (Tenn. Ct. App. 2006).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 28.

³⁰⁹ *Id.* at 30.

³¹⁰ *Id.*

³¹¹ *Id.* at 30-31.

³¹² *Id.* at 31.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 33.

Nashville's claim would fail even without an implied-in-fact contract because Nashville did not confer a benefit on Cigna due to the fact that it did not pay any additional amount to cover the cost of a bond which was not purchased.³¹⁶ The court recognized that Cigna would have incurred an additional expense, but found Cigna's avoidance of that expense immaterial to the decision of whether or not Cigna was unjustly enriched.³¹⁷

Subsequently, in *Freeman Indus. v. Eastman Chem. Co.*, the court held that "a benefit is any form of advantage that has measurable value including the advantage of being saved from an expense or loss."³¹⁸ Moreover, "to recover for unjust enrichment, a plaintiff need not establish that the defendant received a direct benefit from the plaintiff. Rather, a plaintiff may recover for unjust enrichment against any defendant who receives *any* benefit from the plaintiff if the defendant's retention of the benefit would be unjust."³¹⁹ This contradicts *Cigna*, where the court determined that Cigna's savings as a result of not incurring the expense of the bond did not amount to enrichment.³²⁰ If *Cigna* was heard now, a good argument could be made that Cigna unjustly shifted the risk of its non-performance to Nashville and that the expense it saved resulted in enrichment.³²¹ After all, the plaintiff in an unjust enrichment claim does not have to be harmed by the defendant's conduct for the claim to succeed.³²²

III. DISCUSSION

According to the rules cited above, it appears that Tennessee adheres to the traditional understanding of unjust enrichment, quantum meruit, and money had and received.³²³ A specific definition for quantum meruit helps differentiate it from the

³¹⁶ *Id.* at 33-34.

³¹⁷ *Id.*

³¹⁸ *Freeman Indus. v. Eastman Chem. Co.*, 172 S.W.3d 512, 525 (Tenn. 2005).

³¹⁹ *Id.* at 525.

³²⁰ *See Nashville v. Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d 28, 33-34 (Tenn. Ct. App. 2006).

³²¹ *See id.*

³²² *Freeman Indus.*, 172 S.W.3d at 525.

³²³ Like Tennessee law, the original quasi-contract action included the descriptive claims of quantum meruit and quantum valebant based upon "reoccurring situations" known as "common counts." FISCHER, *supra* note 2, § 44.1, at 353-55.

general unjust enrichment claim. Unfortunately, the choice of language and precedent for element four creates an additional opportunity for confusion.³²⁴ This is confusing because both implied-in-fact and implied-in-law contracts are based upon inferences by the trier of fact that are derived from the parties' conduct.³²⁵

First, element four appears to refer to an implied-in-law contract, because it only requires that the parties' conduct prove that they *should have* understood payment would be due for the services provided, not that they actually *did* understand payment would be due. However, element four's underlying precedent is *V.L. Nicholson Co.*, a case where recovery was granted based on an implied-in-fact contract, not an implied-in-law contract.³²⁶ In fact, *V.L. Nicholson Co.* never discusses implied-in-law contracts. As a result, it is unclear to those unfamiliar with quasi contracts what types of claims the definition of quantum meruit should be understood to cover and how those claims differ from the general unjust enrichment claim.³²⁷

The case from which element four was extracted did involve a contract implied in fact, so subsequent cases must be analyzed to ascertain which interpretation is correct. In *Doe*, the charges for medical services were never specifically relayed to Jane Doe, so she never had an opportunity to agree or disagree to the hospitals charges.³²⁸ Based on those facts, her conduct could not be construed as forming an actual contract.³²⁹ As a result, her liability to the hospital for the reasonable value of its goods and services was imposed by law on the basis of equity.³³⁰ It follows then that element four is meant to refer to implied-in-law contracts, but not implied-in-fact contracts, despite the precedent upon which it is based.³³¹

³²⁴ See *supra* pgs. 17-18.

³²⁵ *Id.*

³²⁶ *V.L. Nicholson Co. v. Transcon Inv. & Fin., Ltd.*, 595 S.W.2d 474 (Tenn. 1980).

³²⁷ See 66 AM. JUR. 2D *Restitution and Implied Contracts* § 38 (2001) (for alternative elements for quantum meruit).

³²⁸ *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 194-95 (Tenn. 2001).

³²⁹ *Id.* at 197-99.

³³⁰ *Id.*

³³¹ *Id.*

Yet, beyond their shared origin, it is difficult to comprehend why a claim for unjust enrichment is grouped under the contract area of law. After all, where there is a valid claim under the theory of unjust enrichment, there is no valid contract. In this way, they are the antithesis of each other. Unjust enrichment claims are based upon “duties imposed by law,” which “are themselves equitable in nature, resting on the moral obligation to do what is right.”³³² A contract only arises after the court hears the case and decides the defendant should repay the plaintiff.³³³ In unjust enrichment cases, the duty gives rise to an “agreement,” which the defendant probably does not agree with at all.³³⁴ Conversely, in a contract, the parties’ agreement results in their duties to each other.³³⁵

Conceptually, unjust enrichment is akin to both tort and contract, though not really belonging in either. Where there is no actual contract, fact pleading alerts neither the claimant nor the defendant to the possibility that a viable claim may exist under the contract area of law or under the theory of implied-in-law contracts. In short, the continued characterization of unjust enrichment as an implied contract creates problems for both attorneys and judges, including how to effectively plead the facts, how to effectively answer these pleas, and perhaps most importantly, what instructions to give a jury.³³⁶

Tennessee’s definition of quantum meruit provides just one example of the confusion perpetuated by the continued use of the quasi contract fiction.³³⁷

³³² FISCHER, *supra* note 2, § 44, at 355-56.

³³³ “Real contracts may be distinguished from quasi contracts by recognizing that, in cases of the former, the agreement defines the parties’ duties, while in cases of the latter, the duties define the parties’ ‘agreement.’” FISCHER, *supra* note 2, § 44, 355.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ John C. Calhoun, Jr. & William A. Wadell, Jr., *Unjust Enrichment: A Suggested Approach for Instructing Juries in Claims at Law*, 43 ARK. LAW. 10 (2008); see also 21B AM. JUR. PLEADING AND PRACTICE FORMS *Restitution and Implied Contracts* §§ 4, 74-76, 79, 81 (2001) (providing formats for pleadings, answers, jury instructions, and orders).

³³⁷ The category “quasi contract” “depend[s] in part on the separation of law and equity, and even more on a categorization of claims rooted in the forms of action and dependent on fictional pleadings. Yet the Federal Rules merged law and equity, put[ting] the last [n]ail in the coffin of the forms of action, and embodied both the realist emphasis on substantial justice and a modern distaste for legal fiction.” Laycock, *supra* note 2, at 1278.

Tennessee adopted a definition of quantum meruit which provides an element that accurately describes an implied-in-law contract, but would with the change of one word describe an implied-in-fact contract:

(1) Current, implied-in-law version of element four: “the circumstances must indicate that the parties involved in the transaction *should have reasonably* understood that the person providing the goods or services expected to be compensated.”³³⁸

(2) Implied-in-fact contract version of element four: the circumstances must indicate that the parties involved in the transaction *did* understand that the person providing the goods or services expected to be compensated.³³⁹

Still, both types of implied contracts depend upon an inference based on conduct or course of conduct. Though wholly different from a conceptual standpoint, the same fact patterns create the basis for both claims: where there is no written or express agreement but the facts show that the parties either did know or should have known that the defendant had to pay the plaintiff. In these cases, the trier of fact determines whether or not the facts and circumstances indicate there was mutual assent. If so, then a true contract existed. If not, then the trier of fact moves to the next step – deciding whether or not to create a quasi contract. Therefore, the key to differentiating between implied-in-fact and implied-in-law contracts is the difference between “*did know or did assent*” and “*reasonably should have known*,” or put another way, the difference between *did* and *should*.

Although the Tennessee Supreme Court recently supplied much needed

³³⁸ Castelli v. Lien, 910 S.W.2d 420, 427 (Tenn. Ct. App. 1995).

³³⁹ See generally 21 TENN. PRAC., CONTRACT LAW AND PRACTICE, §1:14.

Courts frequently employ the various terminology interchangeably. Each is based upon an implied obligation where, on the basis of justice and equity, we impose a contractual relationship between parties, regardless of their assent. *Id.* at 154. Unfortunately, the phrase “implied contract” has been erroneously used to connote both true contracts (those which are implied “in fact”) and quasi contracts (those which are implied “in law”). See *Ridgelake Apartments v. Harpeth Valley Util. Dist. of Davidson & Williamson Counties*, 2005 Tenn. App. LEXIS 210, No. M2003-02485-COA-R3-CV, 2005 WL 831594, at *8 (Tenn. Ct. App. April 8, 2005). This error has led to much confusion.

Cigna Healthcare, 195 S.W.3d 28, 32.

explanations for both the unjust enrichment and the quantum meruit claims, these actions are unlikely to clear up this quagmire. In the past, the Supreme Court's definition was expanded, contracted, and inter-mixed as the courts saw fit. Additional explanations by the courts usually turn out to be a string of the old quotes put together like puzzle pieces which add little clarity or guidance. It is not a lack of explanation that is the problem; rather, the problem is that this particular legal fiction ceased to have any basis in reality when the pleading system changed from writ-based to fact-based.

Still, the law is full of fictions, most of which we accept without question. The quasi contract, however, is a particularly difficult fiction, lacks actual utility, and tends to confuse, which raises the question of whether or not we should continue to use it or relegate it to history. Conceptually, the simplest and most logical solution is for the courts to relegate the quasi contract to history, to remove "quasi contract" and "implied-in-law contract" from their vocabulary, and instead to refer to the doctrine of unjust enrichment as the basis for restitution.³⁴⁰ After all, changing vocabulary requires no change of precedent; it requires a change of perspective. After a while, the legal encyclopedias and digests will follow suit. Unfortunately, while that solution is conceptually attractive, it is practically impossible. For the most part, the reported cases decided on the basis of quasi contract were correctly decided, and so they are good precedent. As long as they are good precedent, attorneys will rely on them and invoke that contractual fiction.

IV. CONCLUSION

As this comment demonstrates, Tennessee follows the traditional common law approach to claims for restitution and unjust enrichment at law. This approach can be confusing. Moreover, at least in the case of unjust enrichment at law, "there is little call for insistence that the quasi contract format be used rather than the more general form of unjust enrichment."³⁴¹ Still, removing the quasi-contract fiction

³⁴⁰ See Chaim Saiman, *Restating Restitution: A Case of Contemporary Conceptualism*, 52 VILL. L. REV. 487, 488 (2007) (advocating a systematic approach to restitution theory and practice where "numerous lower-level rules (the individual rules of law used to decide cases) are connected to each other through a legal concept [here, the Doctrine of Unjust Enrichment] that is more general and abstract than the rules themselves . . . [as] serv[ing] the values of legal determinacy, the rule of law and judicial restraint."

³⁴¹ FISCHER, *supra* note 2, § 44.1, at 353.

might also cause confusion because Tennessee's common law is replete with references to it.³⁴²

However, the split of the legal concepts that together effectuate the doctrine of unjust enrichment across different areas of the law, particularly those areas to which the doctrine is linked via legal fictions, obscures the doctrine. The doctrine's purpose is further hindered by the scotoma in the legal curriculum, which causes a knowledge vacuum and general unfamiliarity with the doctrine.³⁴³ This general unfamiliarity, combined with the lack of a centralized source of information, reduces attorneys' ability to effectively invoke the doctrine of unjust enrichment.³⁴⁴

For these reasons, bringing together the causes of action which effectuate the doctrine of unjust enrichment and recognizing restitution and unjust enrichment as an area of law is not only conceptually attractive, it is also practical.³⁴⁵ However, the more conservative of the two Restatements, the *Restatement of Restitution: Quasi Contracts and Constructive Trusts*, also relies on references to the quasi contract.³⁴⁶ Moreover, controversy continues to surround positions taken by the *Restatement (Third) of Restitution and Unjust Enrichment* and it has not even been finalized.³⁴⁷ Finally, reconfiguring the Tennessee common law that governs Restitution and Unjust Enrichment into its own area of law without a wholesale adoption of one of the Restatements presents a worthwhile but burdensome challenge.

³⁴² *See id.*

³⁴³ Kull, *supra* note 2, at 1195-96.

³⁴⁴ *Id.*; *see also* Laycock, *supra* note 2, at 1279 (A definition based on a common law writ "is little help to modern lawyers. It is also misleading: restitution is both broader and narrower than the historic scope of quasi-contract and constructive trust.").

³⁴⁵ "At their base, restitution doctrines are laws for common people because these variations on the overarching principle of preventing defendants' unjust enrichment override more specific rules. Progress and a better quality of justice for the law's consumers will follow a restatement of restitution that articulates and publicizes these unjust enrichment principles and makes the law of restitution available and more accessible to the legal profession." Rendleman, *supra* note 69, at 943; *see generally* Kull, *supra* note 2.

³⁴⁶ RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (1936).

³⁴⁷ *See id.* at n.9 (referencing number of index entries in the *Restatement of Quasi Contract and Assumpsit*); Rendleman, *supra* note 69, at 164 (discussing some of the criticisms); *see also* Rogers, *supra* note 46 (criticizing the proposed Restatement (Third)'s dependency on other areas of law to determine whether or not the defendant's enrichment is "wrong," which transforms restitution into a "parasitic" rather than independent basis for liability).

Currently, there is no quick and easy solution that can be applied to simplify this area of law. Being unfamiliar with restitution and unjust enrichment is the norm, and in that sense it is not really a disadvantage. Still, a person unfamiliar with this area of law is unlikely to recognize the availability of recovery in instances where contract and tort are not available, but restitution based on unjust enrichment would be available.³⁴⁸ However, attorneys who familiarize themselves with this area of the law will be able to take advantage of opportunities for recovery that most miss.³⁴⁹ One way to do this is to conceptually recognize restitution and unjust enrichment as its own area of law, where the real basis of the claim is the defendant's unjust enrichment, and to accept the quasi contract as an illusion perpetuated for the sole purpose of effectuating an equitable remedy at law; namely, restitution.³⁵⁰

³⁴⁸ See FISCHER, *supra* note 2, at 329-330.

³⁴⁹ Specifically, an understanding of restitution and unjust enrichment provides a distinct advantage under the following circumstances:

1. “[W]hen unjust enrichment is the only source of liability;
2. [W]hen plaintiff prefers to measure recovery by defendant’s gain, either because it exceeds plaintiff’s loss or because it is easier to measure; and”
3. [W]hen plaintiff prefers specific restitution, either because the defendant is insolvent, because the thing the plaintiff lost has changed in value, or because plaintiff values the thing he lost for nonmarket reasons.”

Laycock, *supra* note 2, at 1284.

³⁵⁰ I am thankful that Attorney Chris Ralls exposed me to this area of law, and that Professor Carol Mutter shared her knowledge with me, adding clarity and precision to this comment.