

# UNJUST ENRICHMENT: A SUGGESTED APPROACH FOR INSTRUCTING JURIES IN CLAIMS AT LAW

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*The dispute was submitted to the jury under a sweeping instruction which permitted a verdict for the plaintiff if the jury should find that in equity and good conscience the money ought to be repaid by the defendant. It is not surprising that the jury returned a verdict for the plaintiff, because her unhappy predicament would appeal to anyone's sense of fairness. It is surprising to me, however, that the judgment is being affirmed, for I can discover no legal theory to support the decision.*

Justice George Rose Smith, Dissenting.<sup>1</sup>

Jury instructions in unjust enrichment cases have been an issue since the early days of Arkansas jurisprudence.<sup>2</sup> Recent Arkansas cases have highlighted the types of unjust enrichment claims that may be presented to a jury,<sup>3</sup> but little attention has been given to the elements of jury instructions for such claims. Because parties to a claim at law are entitled to have the jury instructed on the claims and defenses they raise, the determination of the essential elements for unjust enrichment claims is perhaps the most important part of trying such a case. This article discusses such claims and suggests an approach for instructing a jury when unjust enrichment issues are tried at law.

Arkansas cases frequently make the following statements of black letter law about unjust enrichment:

- It is the principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for the property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.<sup>4</sup>
- An action based upon unjust enrichment is maintainable in all cases where a person has received money under such circumstances that, in equity and good conscience, he ought not to retain it.<sup>5</sup>
- To find unjust enrichment, a party must have received something of value, to which he was not entitled and which he must restore.<sup>6</sup>
- One who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contractual right.<sup>7</sup>
- There must be some enrichment or benefit to the party against whom the claim is made.<sup>8</sup>
- There must be some operative act, intent, or situation to make the enrichment unjust and compensable.<sup>9</sup>

While these statements can all be generally appreciated in an abstract way, they are not sufficient for a jury instruction. They are not only overly simplistic, ignoring certain essential elements as discussed below, but they also essentially create a standardless instruction that would permit a jury to simply “do equity” rather than to apply objective standards of law to disputed fact issues. The dissenting opinion of Justice George Rose Smith quoted above illustrates this problem perfectly.<sup>10</sup> “Doing equity” in a case at law is hardly the permitted province of a jury. Moreover, since there are specific issues, defenses, and remedies to be considered in the many types of unjust enrichment claims (as noted, for example, in the forthcoming Restatement (Third) of Restitution and Unjust Enrichment<sup>11</sup>), a jury cannot properly do its job if simple statements of unjust enrichment principles are given in the abstract and are not tied to the specific type of claim. Therefore, a closer look at unjust enrichment cases tried at law is necessary to discern the essential elements required to prove the particular claim at issue.

Arkansas case law is clear that claims sounding in the common law form of action known as assumpsit may be tried at law to a jury.<sup>12</sup> The most common claims sounding in assumpsit are claims for money had and received, quantum meruit, and quantum valebant, all of which are discussed below. While it may be possible to state a general instruction for these three claims, there are at least two problems with such an approach.



First, there is no Arkansas Supreme Court opinion that delineates the elements of any of the claims, and, therefore, any statement of the essential elements of those claims is arguably nothing more than one's opinion. The authors acknowledge that the sample instructions presented below represent their opinion as well, and they do not presume to state the final word on claims involving unjust enrichment at law. Rather, the intent is to highlight the underlying concepts and to begin a discussion that will promote the reasoned development of the claims in Arkansas. Such an approach is preferable to the ad hoc development of unjust enrichment claims as attorneys and trial courts attempt to instruct juries on a case by case basis.

Second, general instructions assume that any case involving, for example, a claim for money had and received will always contain the same essential elements stated in the same way. That assumption is not valid, as evidenced by a number of cases decided in different contexts. Those who favor the generic approach may point to general instructions in other states, but the decision of another state not to address the issues raised in this article is not a reason to settle for inadequate treatment of this important issue.

### **Unjust Enrichment Claims In Common Law Assumpsit**

The Arkansas Supreme Court's opinion in *First Nat'l Bank of DeWitt v. Cruthis* cor-

rectly noted that unjust enrichment claims tried at law are those sounding in assumpsit, a common law form of action which is rarely discussed today. As Professor Dan Dobbs has noted, "[t]he connection to assumpsit is obscure to modern minds."<sup>13</sup> Professor Dobbs' treatise provides an excellent discussion of how the assumpsit cause of action developed into different counts such as quantum meruit and money had and received.<sup>14</sup> However, he is quick to point out that the old terms are not susceptible of practical application today:

Lawyers and judges today refer to restitution in these strange terms for convenience. But the incidents of assumpsit no longer control either the theory or the procedures for recovery of restitution, so words like assumpsit and quantum meruit should be used as reference only and not to suggest that restitution is limited by ghosts of ideas that were never more than fictions to begin with.<sup>15</sup>

While courts and practitioners have heeded Professor Dobbs' admonition and have not limited unjust enrichment claims to the concept of assumpsit or its subsidiary counts, there is a danger that courts may race past a critical analytical stage in the development of such claims. That lack of analysis and, in the case of jury instructions, the failure to identify essential elements for the jury

to consider, can result in a restitution claim being decided on nothing more than a particular jury panel's view of what is "unjust" or what it views as "equity and good conscience." Thus, the need to define the essential elements of an unjust enrichment claim at law is critical to the fair determination of claims for both plaintiffs and defendants.

The failure to analyze a claim for unjust enrichment can result in the waste of resources and reversal on appeal. In *Dickey v. Royal Banks of Missouri*, Judge Morris Sheppard Arnold noted the lack of certainty of claims for money had and received under Missouri law:

The action for money had and received is "a very broad and flexible action," and "the tendency of the courts is to widen rather than restrict its scope." [citations omitted] ...



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Nevertheless, although it is broad and appeals to a court's sense of equity and common right, an action for money had and received must, to be successful, fall within limits that have over the years become reasonably well demarcated.

An action for money had and received will lie when the defendant received money from or for the plaintiff that belongs in good conscience to the plaintiff. For instance, if the plaintiff paid money to the defendant by mistake, [citations omitted], or under duress, [citations omitted], or by reason of fraud, [citations omitted], a claim for money had and received is made out. [citations omitted] Such an action also lies if it appears "that the money in question belonged to [the] plaintiff, [and] that it was secured by [the] defendant without [the] plaintiff's consent, and without giving any consideration." [citations omitted] One reading of these cases is that a court will force a defendant to disgorge a windfall if it is equitable to do so. [citations omitted]

The difficulties in fitting this theory of relief to the facts of this case are so numerous, we believe, as to have made the legal theory upon which relief was sought and granted practically incoherent. The trial court instructed the jury that a case for money had and received would be made out if the "plaintiff's intended purpose in assigning the aforesaid insurance policy and annuity differed from the purpose for which defendant ... accepted and applied the policy and annuity," and if "in accepting and applying the proceeds of the aforesaid insurance policy and annuity, defendant ... knew facts upon which a reasonable person would suspect that the intended purpose of plaintiff in assigning the insurance policy and annuity ... was different from the purpose for which defendant ... applied the proceeds."

With respect, we fail to understand how these facts, if proved, could give rise to a claim for money had and received in Missouri or, indeed, anywhere else.<sup>16</sup>

The learned comments of Judge Arnold illustrate the frustration that practicing attorneys will experience when called upon to prosecute or defend a claim for unjust enrichment through a jury trial with no stated elements. With the foregoing in mind, the following are suggested considerations for properly identifying and stating the essential elements of unjust enrichment claims.

### **Does The Claim Fall Within One Of The Recognized Groups Of Unjust Enrichment Cases?**

Professor Dobbs has noted that unjust enrichment claims often fall into one of four categories: (1) cases in which title remains in the plaintiff but the defendant benefits by conduct such as taking the plaintiff's property; (2) cases in which title passes to the defendant through misconduct; (3) cases in which the defendant is unjustly enriched as a result of a breach of contract; and (4) cases in which the defendant unjustly receives a benefit by mistake or other circumstance, regardless of his wrongdoing.<sup>17</sup> It is in this last category that courts and attorneys have the most difficult task in creating jury instructions. That difficulty must be balanced with recognized limits on unjust enrichment, which Professor Dobbs generally categorizes as follows: (1) protection of autonomy under volunteer rules (e.g., the plaintiff performing an unsolicited service such as house painting and attempting to force payment by an unjust enrichment claim); (2) protection of innocent purchasers; (3) protection of persons who have changed their positions after the enrichment; and (4) protection of public policy.<sup>18</sup> Finally, consideration must be given to the interrelationship of the substantive claim for unjust enrichment, the benefit received, and the requested remedy.<sup>19</sup> A simple instruction that merely repeats traditional and generic statements about unjust enrichment does not adequately address these issues.

### **Is The Claim A Pure Common Law Claim of Unjust Enrichment Or Does It Also Involve Considerations of Other Law?**

As courts have focused on unjust enrichment claims at law, attention has been given to the interplay of statutory claims and claims for unjust enrichment. For example, in *Ninth Dist. Prod. Credit Ass'n v. Ed Duggan, Inc.*, the court noted the effect of the Uniform Commercial Code on a claim for unjust enrichment.<sup>20</sup> Other cases reviewing that case have held that the UCC's priority system cannot be avoided by an unjust enrichment claim unless there is a showing of fraud by a secured creditor.<sup>21</sup> Thus, cases involving the UCC or a similar statutory framework of priorities will have to consider whether the statutory scheme can be altered by the application of the doctrine of unjust enrichment.

### **Is There "Enrichment"?**

Enrichment itself is subject to varying considerations. The first is whether there is any enrichment: "Yet, it is clear from our decisions that in order for the legal theory

of unjust enrichment to pertain, there must be some enrichment or benefit to the party against whom the claim is made."<sup>22</sup> In addition, as noted in the current draft of the Restatement (Third), enrichment may involve third parties.<sup>23</sup>

Enrichment appears to contemplate both a detriment to the plaintiff and a benefit to the defendant. As phrased in *Frigillana v. Frigillana*, the complete concept of enrichment is captured by this question: "Did he, to the detriment of someone else, obtain something of value to which he was not entitled?"<sup>24</sup> The conclusion that detriment to the plaintiff is an important consideration and likely an essential element of an unjust enrichment claim is reinforced by *Duckworth v. Poland* in which the Arkansas Court of Appeals made the following statement: "Under the circumstances of this case, we cannot agree that any detriment sustained by appellee was sufficient, in and of itself, to justify a determination of unjust enrichment."<sup>25</sup>

### **Is The Retention Of The Benefit By The Defendant "Unjust"?**

Enrichment by itself does not create a cause of action. There must be "unjust" enrichment or, stated another way, the enrichment must be "unjustified." Scholars have debated this issue for a long time without reaching a consensus. In his article, "When Is Enrichment Unjust? Restitution Visits An Onyx Bathroom,"<sup>26</sup> Professor Doug Rendleman discusses this issue in detail and first notes that there is a difference between unjust enrichment claims made after a breach of either a tort or a contract duty, where this claim is made as an alternative remedy, and claims for "freestanding restitution" in which there is no breach of a "non-restitution substantive standard."<sup>27</sup> He notes that it is much easier to identify the standard for "unjust" retention of a benefit when there is a breach of a legal duty.<sup>28</sup> In contrast, he asks rhetorically what the standards are for "freestanding restitution"?<sup>29</sup> While it may be easy to identify types of conduct which are clearly within the realm of "freestanding restitution," (e.g., mistake, duress, undue influence, lack of capacity, unenforceable contract), Professor Rendleman notes that there are more difficult areas.<sup>30</sup> He then makes the statement: "Whether a restitution plaintiff may recover freestanding restitution will often depend on which of two competing approaches to

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unjustness the court chooses,” which he identifies as “broad restitution” and “narrow restitution.”<sup>31</sup> The article raises two pertinent issues for Arkansas courts and the lawyers who litigate claims for unjust enrichment. First, is Arkansas a “broad restitution” jurisdiction or a “narrow restitution” jurisdiction? Second, if leading scholars cannot decide on the proper approach to ascertain what is “unjust” in “freestanding restitution,” how can trial courts and attorneys be expected to make that decision?

Recognizing that a standard of “broad restitution” could create inconsistency, the American Law Institute’s discussion draft of the Restatement (Third) attempts to bring more certainty to many of the fundamental theories of unjust enrichment. This raises two other significant questions. First, given the willingness of Arkansas courts to view the Restatements favorably in general, will Arkansas courts take a position that is consistent with the future official draft of the Restatement (Third)? Second, assuming Arkansas will follow the future official draft, how should trial courts instruct juries in the interim?

The authors suggest a cautious approach until more guidance is given. Such an approach will require not only consideration of previous Arkansas precedent but also more focus on the type of unjust enrichment claim presented by the facts, as discussed below. Because the most common unjust enrichment claims are for money had and received, quantum meruit, and quantum valebant, a brief analysis of each of those claims is discussed below with the suggestion that those traditional terms be abandoned going forward, focusing instead on the elements and defenses applicable to specific types of modern unjust enrichment claims as organized and articulated in the drafts of the Restatement (Third).

### Is The Claim One For Money Had And Received?

Professor Dobbs describes a claim for money had and received as follows:

When the defendant himself received money that belonged in good conscience to the plaintiff, for instance, if the plaintiff paid money to the defendant by mistake, or under duress, or by reason of fraud, the plaintiff was entitled to restitution of the money, which is said to have been received by the defendant for the use of the

plaintiff. The count includes money paid by a third person, so long as the money in good conscience belongs to the plaintiff.<sup>32</sup>

Arkansas cases are consistent with that description of the claim.<sup>33</sup>

As illustrated by the Restatement (Third), this claim has been defined in a number of situations that carry specific rules (i.e., elements) and defenses. When one reviews the Restatement (Third), it is clear that unjust enrichment claims have been carefully considered and organized into categories that are easy to understand and practical to use. These categories are not burdened by the starting point of the common law principles of unjust enrichment that could burden Arkansas case law. Rather, the Restatement (Third) is organized into clearly defined areas of unjust enrichment that focus on the underlying conduct and the context in which the conduct occurred. For example, if the conduct which entitles the plaintiff to seek restitution is based upon mistake, the Restatement (Third) offers a series of scenarios grouped together in one chapter that deal with that issue and that also point to other applicable issues and defenses.<sup>34</sup> There are also sections that deal with other common claims in unjust enrichment, such as fraud, duress, undue influence, incapacity, and the various issues arising under the general concept of unjust retention of a benefit.<sup>35</sup> These are much more practical to both plaintiffs and defendants than the types of generalized instructions quoted in footnote 10 at the outset of this article. They are preferable to plaintiffs because they eliminate concern that a favorable verdict will be overturned on appeal due to an instruction that was too general and vague. They are preferable to defendants because they require the jury to find the facts in light of specific legal elements as opposed to a general admonition to determine whether a benefit was retained unjustly, *viz*: to “do right.”

### Is The Claim One For Quantum Meruit or Quantum Valebant?

A claim for quantum meruit or quantum valebant is classified as a “value count.”<sup>36</sup> These claims permit recovery for unjust enrichment by one who has “in good faith rendered a service, not illegal or contrary to public policy” to another “party [who] has accepted and used the service[.]”<sup>37</sup> Arkansas case law supports this concept and has acknowledged the basis of claims for quantum valebant and quantum meruit in the

common law cause of action for assumpsit since some of Arkansas’s earliest cases.<sup>38</sup> While these two unjust enrichment claims are familiar to many Arkansas practitioners, as Professor Dobbs notes, they are really short-hand ways of referring simply to common fact patterns.<sup>39</sup> Therefore, care should be taken not to view them solely through an historical lens, because they too may be modified by the modern principles of restitution.

### The Measure of Unjust Enrichment

As with other issues, the measure of unjust enrichment is also subject to a number of considerations. For example, in *Woodhaven Homes, Inc. v. Kennedy Sheet Metal Co.*, the Arkansas Supreme Court held it was not error to base an award of restitution on a contract price or the amount already paid pursuant to a contract when the party against whom unjust enrichment was asserted did not prove that the value of the benefit received was less than the contract payment.<sup>40</sup> Similarly, in *City of Damascus v. Bivens*, the Court held that “the award is measured by the value of the benefit conferred upon the party unjustly enriched.”<sup>41</sup> Thus, the evidence presented as to the amount and type of the benefit may well control the articulation of the jury instruction for the measure of unjust enrichment. As noted in draft sections 49-53 of the Restatement (Third),<sup>42</sup> the measure of unjust enrichment depends upon the type of recipient, whether the recipient is innocent or a wrongdoer, and whether the enrichment is primary or secondary.

There may be disagreements as to the value of a benefit alleged to constitute unjust enrichment. For example, in one case for recovery under the theory of quantum valebant, even a seemingly simple determination of the fair and reasonable value of parts and labor furnished by the plaintiff was strongly disputed because the defendant contended the repairs exceeded the value of the bulldozer being repaired.<sup>43</sup> Evidence of the cost of similar repairs as well as the industry standard was cited by the Arkansas Supreme Court in its discussion of reasonableness.<sup>44</sup>

### Sample Instructions

Using the approach of the Restatement (Third) as a template, the following are examples of the types of instructions that might be prepared:

#### UNJUST ENRICHMENT

**Mistake - Payment of Money Not Due**  
Plaintiff claims damages from defendant



“This is an important time in the development of the principles that must be considered when claims for unjust enrichment are presented to juries. This article is intended to initiate a discussion that will lead to the delineation of elements of particular claims which juries will be instructed to decide. Without such specification, the jury will not be provided sufficient direction and the system will not be adequately served.”

for payment by mistake of money not due and has the burden of proving each of five essential propositions:

First, that plaintiff has suffered a detriment;

Second, that defendant has received a benefit;

Third, that plaintiff paid money to defendant [but defendant was not the intended recipient][when no payment was intended];

Fourth, that retention of the benefit by the defendant would be unjust under the circumstances; and

Fifth, the value of the benefit received by the defendant.

SOURCE: Section 6 of the Restatement (Third) of Restitution & Unjust Enrichment (Tentative Draft No. 1, 2001).

### UNJUST ENRICHMENT

#### Mistake - Performance or Discharge of Another's Obligation

Plaintiff claims damages from defendant for [performance][discharge] of Defendant's obligation by mistake and has the burden of proving each of five essential propositions:

First, that plaintiff has suffered a detriment;

Second, that defendant has received a benefit;

Third, that plaintiff [mistakenly performed defendant's obligation][mistakenly discharged (defendant's obligation)(the security for defendant's obligation)];

Fourth, that retention of the benefit by the defendant would be unjust under the circumstances; and

Fifth, the value of the benefit received by the defendant.

SOURCE: Section 7 of the Restatement (Third) of Restitution & Unjust Enrichment (Tentative Draft No. 1, 2001).

**COMMENT:** If the benefit conferred by mistake is other than money, an instruction should be prepared consistent with draft Section 9 of the Restatement (Third).

### UNJUST ENRICHMENT

#### Mistake - Inter Vivos Gift Greater Or Different Than Intended

Plaintiff claims damages from defendant for making a gift to defendant [greater][different] than intended by mistake and has the burden of proving each of six essential propositions:

First, that plaintiff has suffered a detriment;

Second, that defendant has received a benefit;

Third, that plaintiff intended to make a gift of (specify gift) to defendant;

Fourth, that plaintiff actually transferred something [greater in value than][different from] the property intended to be transferred as a gift;

Fifth, that it would be unjust for defendant to retain the benefit under the circumstances; and

Sixth, the difference between the value of the gift made and the gift intended.

SOURCE: Section 11(1) of the Restatement (Third) of Restitution & Unjust Enrichment (Tentative Draft No. 1, 2001).

### UNJUST ENRICHMENT

#### Mistake - Donor's Death In Belief That Inter Vivos Gift Has Been Perfected

Plaintiff claims damages from defendant for defendant's unintended receipt of a gift made by mistake of [name of the donor]

and has the burden of proving each of six essential propositions:

First, that plaintiff was the intended [donee][beneficiary] of a gift from (specify name of donor);

Second, that defendant has received a benefit by reason of the gift intended for plaintiff;

Third, that (specify name of donor) died with the belief that the gift to plaintiff was completed;

Fourth, that, as a result of mistake, the gift [was (wholly)(partially) ineffective][transferred something other than the property (specify name of donor) intended to transfer][transferred property to defendant who was not the intended donee];

Fifth, that it would be unjust for defendant to retain the [property][benefit] under the circumstances; and

Sixth, the value of the [property][benefit].

SOURCE: Section 11(3) of the Restatement (Third) of Restitution & Unjust Enrichment (Tentative Draft No. 1, 2001).

### UNJUST ENRICHMENT

#### Transfer By Agent, Trustee, Or Other Fiduciary Without Authority

Plaintiff claims damages from defendant for receipt of a transfer made by plaintiff's [agent][trustee][specify other type of fiduciary] without authority and has the burden of proving each of six essential propositions:

First, that plaintiff has suffered a detriment;

Second, that defendant has received a benefit;

Third, that (name of agent, trustee, or other fiduciary) was the [agent][trustee][specify other type of fiduciary] of plaintiff;

Fourth, that (name of agent, trustee, or other fiduciary) transferred property of

plaintiff [outside the scope of his authority] [in breach of his duty to plaintiff];

Fifth, that it would be unjust for defendant to retain the benefit under the circumstances of the transfer; and

Sixth, the value of the benefit.

SOURCE: Section 17 of the Restatement (Third) of Restitution & Unjust Enrichment (Tentative Draft No. 2, 2002).

## UNJUST ENRICHMENT

### Protection of Another's Property or Economic Interest

Plaintiff claims damages from defendant for protection of defendant's [property][or] [economic interest] and has the burden of proving each of seven essential propositions:

First, that plaintiff has suffered a detriment;

Second, that defendant has received a benefit;

Third, that plaintiff took effective action to protect [the property][or][the economic interest] of defendant;

Fourth, that the circumstances justified plaintiff's decision to intervene without a prior agreement for payment or reimbursement;

Fifth, that it was reasonable for plaintiff to assume defendant would pay for the action performed by plaintiff;

Sixth, that retention of the benefit by defendant without payment would be unjust under the circumstances; and

Seventh, the value of the benefit.

SOURCE: Section 21 of the Restatement (Third) of Restitution & Unjust Enrichment (Tentative Draft No. 2, 2002).

## UNJUST ENRICHMENT

### Performance of Another's Duty

Plaintiff claims damages from defendant for performance of defendant's duty and has the burden of proving each of seven essential propositions:

First, that plaintiff has suffered a detriment;

Second, that defendant has received a benefit;

[Third, that plaintiff paid the debt of defendant for necessities;]

[Third, that plaintiff (performed) (obtained performance of) defendant's duty to supply necessities to a third person;]

[Third, that plaintiff (performed) (obtained

performance of) defendant's duty to the public;]

Fourth, that the circumstances justified plaintiff's decision to intervene without a prior agreement for payment or reimbursement;

Fifth, that [there is no prejudice to defendant in substituting a liability to plaintiff for the original obligation][the performance was urgently required for the health or welfare of the third person][the performance was urgently required for the protection of public health, safety, or general welfare];

Sixth, that retention of the benefit by defendant without payment would be unjust under the circumstances; and

Seventh, the value of the benefit.

SOURCE: Section 22 of the Restatement (Third) of Restitution & Unjust Enrichment (Tentative Draft No. 2, 2002).

Each of these sample instructions should be evaluated for accuracy under existing Arkansas cases on the same issues. However, they illustrate that a single generic instruction is neither sufficient nor appropriate for all jury cases involving claims of unjust enrichment.

### Conclusion

This is an important time in the development of the principles that must be considered when claims for unjust enrichment are presented to juries. This article is intended to initiate a discussion that will lead to the delineation of elements of particular claims which juries will be instructed to decide. Without such specification, the jury will not be provided sufficient direction and the system will not be adequately served.

### Endnotes:

1. *Fite v. Fite*, 233 Ark. 469, 476-77, 345 S.W.2d 362, 367 (1961) (Smith, J., dissenting).

2. *Hutchinson v. Phillips*, 11 Ark. 270, 278-79 (1850).

3. *See, e.g.*, *First Nat'l Bank of DeWitt v. Cruthis*, 360 Ark. 528, 535, 203 S.W.3d 88, 93 (2005); *DeWitt Bank & Trust Co. v. Simpson*, 2006 Ark. App. LEXIS 572, at \*14-15, No. CA06-102 (September 20, 2006).

4. *Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 612, 210 S.W.3d 101, 112 (2005); *Adkinson v. Kilgore*, 62 Ark. App. 247, 254, 970 S.W.2d 327, 330-31 (1998).

5. *Hatchell v. Wren*, 363 Ark. 107, 117, 211 S.W.3d 516, 522 (2005); *Merchants & Planters Bank v. Massey*, 302 Ark. 421, 424, 790 S.W.2d

889, 891 (1990); *Frigillana v. Frigillana*, 266 Ark. 296, 307, 584 S.W.2d 30, 35 (1979); *Patton v. Brown-Moore Lumber Co.*, 173 Ark. 128, 133, 292 S.W. 383, 385 (1927).

6. *Hatchell*, 363 Ark. at 117, 211 S.W.3d at 522; *Rigsby v. Rigsby*, 356 Ark. 311, 317-18, 149 S.W.3d 318, 323 (2004); *Guaranty Nat'l Ins. Co. v. Denver Roller, Inc.*, 313 Ark. 128, 138, 854 S.W.2d 312, 317 (1993); *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 536, 708 S.W.2d 67, 69 (1986).

7. *Hatchell*, 363 Ark. at 117, 211 S.W.3d at 522; *Rigsby*, 356 Ark. at 318, 149 S.W.3d at 323; *Guaranty Nat'l Ins. Co.*, 313 Ark. at 138, 854 S.W.2d at 317.

8. *Sanders v. Bradley County Human Servs. Pub. Facilities Bd.*, 330 Ark. 675, 683, 956 S.W.2d 187, 191 (1997).

9. *Guaranty Nat'l Ins. Co.*, 313 Ark. at 138, 854 S.W.2d at 317; *Dews*, 288 Ark. at 536, 708 S.W.2d at 69.

10. The problem is also illustrated by the following jury instruction given by the trial court in *Cruthis*:

*First National Bank of DeWitt claims actual damages ... for restitution, and has the burden of proving each of the following:*

*First, that [defendants] obtained something of value to which they were not entitled, and in doing so unjustly enriched themselves at the expense of First National Bank of DeWitt. There must also be some operative act, intent or situation to make enrichment unjust and compensable.*

*Second, First National Bank of DeWitt suffered a loss or damage because it did not receive the property or proceeds to which it was entitled.*

*One who is free from fault cannot be unjustly enriched merely because he has chosen to exercise a legal or contract right.*

Trial Record at 1483-84, *Cruthis*, 360 Ark. 528 (2005) (No. 04-448). See also the instruction quoted in the recent case of *DeWitt Bank & Trust Co.*:

[The Bank has the burden of proving that Simpson] obtained something of value to which [she was] not entitled, and in doing so unjustly enriched [herself] at the expense of [the Bank]. There must also be some operative act, intent or situation ... to make the enrichment unjust and compensable.

2006 Ark. App. LEXIS 572, at \*14. This case also discussed an instruction given for the separate restitution claim of officious benefit. *Id.*

11. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Drafts Nos. 1-6, 2000-2008) ("Restatement (Third)"). Drafts of the Restatement (Third) can be obtained from the American Law Institute at [http://www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=46](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=46). For a discussion of unjust enrichment that includes a conceptual analysis of the Restatement (Third), see Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL L.

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- REV. 487 (2007).  
12. *Cruthis*, 360 Ark. at 537, 203 S.W.3d at 94.  
13. DAN B. DOBBS, LAW OF REMEDIES § 4.2(1), at 383 (2d Ed. 1993).  
14. *Id.* § 4.2(3), at 390-91.  
15. *Id.* § 4.2(1), at 384.  
16. 111 F.3d 580, 583-84 (8th Cir. 1997).  
17. DOBBS, *supra* note 13, § 4.1(2), at 372-74.  
18. *Id.* § 4.1(3), at 376-77.  
19. *Id.* § 4.1(4), at 381-82.  
20. 821 P.2d 788, 795 (Colo. 1991).  
21. *Commerce Bank, N.A. v. Tifton Aluminum Co., Inc.*, 217 B.R. 798, 802 (W.D. Mo. 1997).  
22. *Sanders v. Bradley County Human Servs. Pub. Facilities Bd.*, 330 Ark. 675, 683, 956 S.W.2d 187, 191 (1997).  
23. RESTATEMENT (THIRD), § 46A-48 (Tentative Draft No. 5, 2007).  
24. 266 Ark. at 306, 584 S.W.2d at 34.  
25. 30 Ark. App. 281, 284, 785 S.W.2d 472, 474 (1990). The Court of Appeals went on to state: "That detriment was not brought on under any circumstances that would authorize him to entertain a reasonable expectation that the work for which he contracted with Hamelin would be paid for by the appellant." *Id.* This statement suggests that the concept of detriment also has nuances that should be considered and may require a separate jury instruction if warranted by the circumstances. See *Van Zanen v. Qwest Wireless, L.L.C.*, 522 F.3d 1127, 1130 (10th Cir. 2008) for the statement of the detriment element under Colorado law.  
26. 36 LOY L.A. L. REV. 991 (Winter 2003).  
27. *Id.* at 993.  
28. *Id.*  
29. *Id.*  
30. *Id.* at 993-94.  
31. *Id.* at 994.  
32. DOBBS, *supra* note 13, § 4.2(3), at 387.  
33. See, e.g., *Import Motors, Inc. v. Luker*, 268 Ark. 1045, 1052-53, 599 S.W.2d 398, 401-02 (1980); *Arkansas Nat'l Bank of Hot Springs v. Martin*, 110 Ark. 578, 585, 163 S.W. 795, 797 (1914); *Hutchinson*, 11 Ark. at 276-77.  
34. See RESTATEMENT (THIRD), § 5-12 (Tentative Draft No. 1, 2001).  
35. See *id.*, § 13-17.  
36. DOBBS, *supra* note 13, § 4.2(3), at 388.  
37. *Dews*, 288 Ark. at 537, 708 S.W.2d at 69.  
38. See, e.g., *Ball v. Fulton County*, 31 Ark. 379, 382 (1876); *Guthrie v. Morris*, 22 Ark. 411, 412 (1860); *Bertrand v. Byrd*, 5 Ark. 651, 658 (1844); *Fagan v. Faulkner*, 5 Ark. 161, 166 (1843).  
39. DOBBS, *supra* note 13, § 4.2(3), at 388.  
40. 304 Ark. 415, 419-420, 803 S.W.2d 508, 511 (1991).  
41. 291 Ark. 600, 603, 726 S.W.2d 677, 679 (1987).  
42. (Tentative Draft No. 5, 2007).  
43. *Leonards*, 321 Ark. at 247-48, 900 S.W.2d at 551-52.  
44. *Id.* at 248, 900 S.W.2d at 552. Compare *Hawkins v. Delta Spindle of Blytheville, Inc.*, 245 Ark. 830, 835, 434 S.W.2d 825,

828 (1968)(a case cited in *Leonards* in which the Arkansas Supreme Court ruled there was *insufficient* evidence that charges were fair, just and reasonable for the work done). ■