IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID JACOBS and GARY HINDES, on behalf of themselves and all others similarly situated, and derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, and THE UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants,

and

THE FEDERAL NATIONAL MORTGAGE ASSOCIATION and THE FEDERAL HOME LOAN MORTGAGE CORPORATION,

Nominal Defendants.

Civil Action No.: 15-708-GMS

CLASS ACTION

JURY TRIAL DEMANDED

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO AMEND THE CLASS ACTION AND DERIVATIVE COMPLAINT TO DISMISS COUNTS III THROUGH X AND ADD AMENDED COUNTS III AND IV

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Dated: October 6, 2016
1235327/42717

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Plaintiffs David Jacobs and Gary Hindes, by and through their undersigned counsel, hereby submit this reply in support of their Motion for Leave to Amend (the "Motion") the Class Action and Derivative Complaint (the "Complaint").

Plaintiffs' Motion is an ordinary motion for leave to amend, and therefore should be freely granted by the Court. Indeed, it should not have been opposed by Defendants Federal Housing Finance Agency ("FHFA") and United States Department of the Treasury ("Treasury", together with FHFA, "Defendants") in the first place. The proposed amendments to the Complaint will not delay the adjudication of this matter nor will they prejudice Defendants. Defendants' arguments to the contrary are meritless. In opposition to the proposed new Counts III and IV, Treasury simply rehashes many of the same arguments already presented in its motion to dismiss and subsequent briefing (D.I. 19, with D.I. 17, "Motions to Dismiss"). Those arguments fail for the same reasons already explained in Plaintiffs' opposition to the Motions to Dismiss (D.I. 23). Recognizing that its arguments have already been addressed, Treasury adds a new argument, never presented during the meet-and-confer among counsel, that Plaintiffs unduly delayed in seeking to add new Counts III and IV in the proposed Amended Complaint. But there has been no delay: this case is still in its earliest stages; no discovery has been taken; and the Complaint has not been answered. On the contrary, to the extent there has been any delay, it is the result of Defendants' insistence on extending briefing schedules and unsuccessfully moving to transfer this case to a multidistrict litigation court.

FHFA similarly rehashes its motion-to-dismiss arguments in opposition to the Motion, contending, among other things, that notice to stockholders of the dismissal of certain counts is not required because only it could have brought the derivative claims on behalf of nominal defendants Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan

Mortgage Corporation ("Freddie Mac," and, together with Fannie Mae, the "Companies"). But those arguments fail for the reasons stated in Plaintiffs' opposition to the Motions to Dismiss. D.I. 23 at 48-53. Further, although FHFA protests notice being given to stockholders by SEC Form 8-K filings, that method has been recognized by multiple courts as a cost-effective, efficient method of notice.

I. Amended Counts III and IV are Not Jurisdictionally Barred by Sovereign Immunity or HERA[1]

Treasury's opposition to Amended Counts III and IV only rehashes the arguments already presented its briefing on the Motions to Dismiss. D.I. 52, "Treasury Opposition," at 5-10. For the reasons explained in Plaintiffs' brief in opposition to the motions to dismiss, those arguments fail to show that amended Counts III and IV are jurisdictionally barred. Neither Section 702 of the Administrative Procedure Act ("APA") (5 U.S.C. § 702) nor the Housing and Economic Recovery Act ("HERA") itself bars amended Counts III and IV.

First, the limitation of Section 702 of the APA to "relief other than money damages" does not foreclose the relief Plaintiffs seek—including restitution—because Section 702 does not restrict all forms of monetary relief, just damages. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) ("Congress employed this language to distinguish between specific relief and compensatory, or substitute, relief."). As used in Section 702, "[t]he term 'money damages' . . . refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but

[1] Plaintiffs believe the issues raised by Treasury regarding the futility of amended Counts III through IV are, for the most part, the same issues raised with respect to Counts I and II in Defendants' Motions to Dismiss. Accordingly, Plaintiffs believe that Treasury's arguments in opposition to this Motion are most efficiently addressed in conjunction with Defendants' Motions to Dismiss. Plaintiffs suggested that the parties agree to a briefing schedule that would allow both this Motion and the Motions to Dismiss to be presented to the Court together. Defendants rejected that offer and insisted on two separate rounds of briefing. Ex. E.

attempt to give the plaintiff the very thing to which he was entitled." *Id*. at 262 (internal quotation marks omitted). Accordingly, "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988); *see also Treasurer of New Jersey v. U.S. Dept. of Treasury*, 684 F.3d 382, 400 n.20 (3d Cir. 2012); D.I. 23 at 28-30.

Restitution operates to restore one party the benefit unjustly conferred upon another in a transaction; restitution requires a defendant to disgorge unjust gain, whereas a damages award is a substitutionary remedy measured in terms of a plaintiff's loss. D. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.1(1), at 551, 555 (2d. ed. 1993) (Ex. F). Despite Treasury's arguments to attempt to distinguish *Bowen* on the basis that *Bowen* involved a federal statutory entitlement to grant-in-aid money and thus the holding is limited to situations where an unjust enrichment claim is predicated on federal statutory entitlement, federal courts of appeal have held that money unjustly taken from plaintiffs seeking restitution is a specific remedy and thus, here, jurisdiction under Section 702 is proper. *See Wileman Bros. & Elliott, Inc. v. Espy,* 58 F.3d 1367, 1385 (9th Cir. 1995), *rev'd on other grounds* 521 U.S. 457 (1997), (citing *Bowen* and holding that "[t]he fact that the property taken from the handlers was money does not alter its character as a specific remedy in this case."); *Zellous v. Broadhead Assoc.*, 906 F.2d 94, 99 (3d Cir. 1990) (holding that jurisdiction under Section 702 was proper because restitution for rent overcharges was not "money damages").[2]

[2] Treasury argues that *Zellous* can be distinguished because plaintiffs in that case sought funds to which they were entitled under a federal statute. Treasury Opposition at 7. In *Zellous*, the court recognized that there is a distinction between damages and specific remedy. 906 F.2d at 98 ("We do not believe that this scheme of indirect support for tenants transforms the character of the relief they seek into a substitute remedy."). Here, Plaintiffs do not seek a substitute remedy for the harm incurred. Rather, Plaintiffs seek exactly what Treasury took from them, the proceeds of the Net Worth Sweep, much as the Plaintiffs in *Zellous* sought return of monies improperly paid to defendants in that case.

Treasury's contention that amended Counts III and IV are barred by the Appropriations Clause of the Constitution likewise fails because the amended counts are not based on a statutory entitlement. *OPM v. Richmond*, cited by Treasury, is limited to "claim[s] for the payment of money from the Public Treasury *contrary to a statutory appropriation*." *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1581 (Fed. Cir. 1993) (emphasis in original) (holding that *OPM* was not applicable because the claim for equitable adjustment seeking reimbursement of increased costs, *i.e.* a payment from Treasury, was not based upon a statutory entitlement); (citing *OPM v. Richmond*, 496 U.S. 414, 424 (1990)); *see also U.S. ex rel. Jordan v. Northrop Grumman Corp.*, No. CV 95-2985 ABC EX, 2002 WL 35454612, at *11 (C.D. Cal. Aug. 5, 2002) (adopting the reasoning of *Burnside-Ott* that *OPM* is limited to claims of entitlement contrary to statutory appropriations).[3, 4]

Nor are Plaintiffs' claims against Treasury barred by HERA's prohibition on judicial actions that would "restrain or *affect* the exercise of powers or functions of [FHFA] as conservator or receiver." 12 U.S.C. § 4617(f) (emphasis added). As the Supreme Court has explained in an analogous context, the word "affect" reaches only "collateral attacks attempting to restrain the receiver from carrying out its basic functions." *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 575 (1989). Relieving Treasury from its contractual and common law duties as the Companies' dominant shareholder is not among those basic functions, and the word "affect" in Section 4617(f) cannot be used to bootstrap that or any

[3] Treasury argues that money damages cannot be awarded without an act of Congress. Treasury Opposition at 8. As already explained, the restitution Plaintiffs seek is not damages. Further, the restitution sought is money that was never properly the government's property in the first place.
[4] Treasury's claims that HERA and the senior preferred stock preempt the state corporate laws at issue here are meritless. Treasury Opposition at n.4. Neither Delaware nor Virginia law conflicts with HERA and those state laws continue to apply to the Companies' corporate governance. *See* D.I. 23 at 15-20.

other power onto the carefully circumscribed list of conservatorship powers found elsewhere in HERA. *See id.* at 574; *see also* D.I. 23 at 42-43.

Here, Plaintiffs' claims against Treasury are not just claims that intend to collaterally attack FHFA's actions as conservator, but instead allege that Treasury's own conduct, and the Net Worth Sweep itself, were unlawful. If Treasury's reading of Section 4617(f) were correct, FHFA could effectively suspend any law (state or federal) simply by entering into a contract obligating a third party to violate the law. That is exactly the crux of Plaintiffs' argument here. Moreover, Treasury, and FHFA, cannot claim that FHFA's violation of the state laws under which the Companies agreed to be governed can shield Treasury from judicial scrutiny of its own actions. Amended Counts III and IV focus on Treasury's actions, not FHFA's actions.[5, 6]

Finally, for the reasons stated in Plaintiffs' brief in opposition to Defendants' motions to dismiss, 12 U.S.C. § 4617(b)(2)(A)(i) does not bar the direct and derivative claims of amended Counts III and IV. Plaintiffs have standing to bring their direct claims because 12 U.S.C. § 4617(b)(2)(A)(i) does nothing to divest stockholders of their own, personal, economic rights in the Companies and, therefore, does nothing to prevent stockholders from bringing direct claims *on behalf of themselves* to protect *their own rights.* Straining to read HERA as transferring all shareholder rights to the conservator also raises grave constitutional concerns, because even a

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[5] *See Stommel v. LNV Corp.*, 2014 WL 1340676, at *5 (D. Utah Apr. 4, 2014) (Section 1821(j) did not preclude claims against third party that "focus[ed] on [the third party's] actions not the actions of the FDIC."); *LNV Corp. v. Outsource Serv. Mgmt., LLC*, 2014 WL 834977, at *4 (D. Minn. Mar. 4, 2014) ("OSM seeks to recover from LNV, and such relief simply would not 'restrain or affect' the FDIC[ ] in any way.").

[6] Treasury's reliance on *Hanson v. FDIC* is misplaced. The Eight Circuit was quoting *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995) for the "sweeping ouster of courts' power" language. The D.C. Circuit's statement in *Freeman,* however, was made in the course of holding that Section 1821(j) (from which Section 4617(f) borrows its language) applies not only to injunctions but also to the remedies of rescission and declaratory relief. *See id*. The fact that the set of *remedies* that Section 1821(j) forecloses is "sweeping" does not mean that a conservator may violate or exceed its statutory authority with impunity.

temporary governmental appropriation of private property is a taking that requires just compensation to the displaced owner.[7] *See Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014); D.I. 23 at 48-50. HERA also permits Plaintiffs to bring derivative claims in this circumstance. *See* D.I. 23 at 50-53.

II. Plaintiffs Did Not Unduly Delay In Bringing Amended Counts III and IV

Despite Treasury's claim that Defendants are prejudiced by alleged undue delay in bringing amended Counts III and IV, Treasury can point to no prejudice that could not have been avoided except for Defendants' own attempts to delay this litigation. In fact, Defendants never raised undue delay as a basis of opposition during the meet-and-confer on Plaintiffs' Motion, either during the parties' telephone call or in writing. Ex. C at 1. In light of the early stage of this case—there is no scheduling order nor has any discovery been taken—and the low bar set for amending a complaint (*See* D.I. 48 at 5-6), Plaintiffs' Motion should not be denied on this basis.

Indeed, this case is at its earliest stage because of Defendants' own delay tactics. Defendants requested an extended briefing schedule on the Motions to Dismiss (D.I. 14) and then, just as the Court was ready to address the Motions to Dismiss by scheduling oral argument (D.I. 42 at 4:11-23), Defendants' unsuccessful attempt to transfer the case through the Judicial Panel for Multidistrict Litigation ("JPML") forced the case to be stayed (D.I. 39 and 44). Treasury's claims of Plaintiffs' alleged delay thus ring hollow in comparison and this Motion should be granted.[8]

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[7] *See, e.g., Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012) ("Ordinarily, . . . if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking.").

[8] In any event, any scheduling order will have a date by which the pleadings may be amended. *See* SCHEDULING ORDER [NON-PATENT] at paragraph 2, http://www.ded.uscourts.gov/

The addition of new Counts III and IV were necessary as a result of the dismissal of original Counts III through X. The Complaint originally contained counts that allowed for recovery from Treasury under multiple theories. Counts I and II of the Complaint, which remain in the proposed Amended Complaint may not provide for complete recovery from Treasury. Upon dismissal of Counts III through X, to maintain a basis for recovery against Treasury in the event Plaintiffs are successful in showing breach of state corporation law as pled in Counts I and II, Plaintiffs had to add the unjust enrichment claims against Treasury.[9]

Further, there is no undue prejudice here. "To demonstrate prejudice, the nonmoving party must show that the amendment would: (1) require it to expend significant additional resources to conduct discovery and prepare for trial; (2) significantly delay the resolution of the dispute; or (3) prevent a party from bringing a timely action in another jurisdiction." *See Comba Telecom, Inc. v. Andrew, L.L.C.*, C.A. No. 12-311-GMS, Order at n.2 (D. Del. Mar. 7, 2013). In fact, Treasury has not even attempted to show any of these factors.

First, discovery has not yet begun and, as Treasury apparently concedes, there are no new factual allegations in the Complaint. Treasury Opposition at 11. Accordingly, there is no change in the time or effort necessary to complete discovery in this case. Second, resolution of this dispute will not be substantially delayed. Although Treasury implies that additional briefing will be required in light of Defendants' Motions to Dismiss, this motion addresses substantially the

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sites/default/files/Chambers/GMS/Forms/Sched_Order_Non-Patent_Rev02-25-14.pdf (last visited October 6, 2016). It is a fair presumption that no prejudice will occur where a party amends its pleadings before that date. *See Lifeport Sciences LLC v. Endologix, Inc.*, C.A. No. 12-1791-GMS, Order at 2 (D. Del. July 29, 2015) ("Even assuming the plaintiff is correct that the defendant *could* have filed it[s] motion sooner, the court cannot say the delay was undue or that the plaintiff will be prejudiced when this was explicitly contemplated as a possibility.").

[9] This is not a case where the new claims were relevant and could have been added at the time the Complaint was filed. Instead, these claims reflect Plaintiffs' decision to dismiss original Counts III through X. Importantly, amended Counts III and IV are added at the nascent stages of this litigation.

same standard as would be heard on a motion to dismiss. *See Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington*, 646 F. Supp. 118, 120 (D. Del. 1986) (holding that amendments to a complaint are not futile if they state a claim sufficient to survive a motion to dismiss). Accordingly, if the Court grants Plaintiffs' Motion, a motion to dismiss concerning amended Counts III and IV would be moot. Instead, the only issues remaining would be a motion to dismiss Counts I and II which have already been fully briefed. *See* D.I. 17 and 19, *et seq*. Any clarification of those briefs in light of dismissed original Counts III through X could be completed expeditiously. Finally, neither party alleges that it is being prevented from bringing an action in another jurisdiction. Plaintiffs' Motion should be granted.

III. Efficient and Effective Notice Under Fed. R. Civ. P. 23.1(c) Should Be Made by an SEC Form 8-K

Defendants argue that notice to stockholders of the dismissed derivative claims is not required here, observing that the whole case is not being dismissed. D.I. 51, "FHFA Opposition," at 2. But courts only excuse the required notice under Fed. R. Civ. P. 23.1(c) "in very limited circumstances," *Bushansky v. Armacost*, No. 12-CV-01597-JST, 2014 WL 2905143, at *5-7 (N.D. Cal. June 25, 2014) (collecting cases), and this case does not present such circumstances. Federal Rule of Civil Procedure 23.1(c) requires that "[n]otice of a proposed settlement, voluntary dismissal, or compromise *must be given to shareholders or members* in the manner that the court orders." Fed. R. Civ. P. 23.1(c) (emphasis added). The plain language of the rule is that "notice…must be given to shareholders." *Id*. The same plain language only leaves within the court's discretion the manner in which such notice is given.

The limited circumstances recognized in *Bushansky* and the cases cited therein excused notice to stockholders where there was no statute of limitations issue, where there was no public knowledge of the suit, where dismissal was based solely on the conclusion that the action was

without merit and where there was no other potential for prejudice. 2014 WL 2905143 at *5. Here, these limited circumstances do not exist. Most relevant, Plaintiffs did not choose to dismiss Counts III through X because the claims lacked merit but rather because similar claims were pending in other jurisdictions and, in light of Defendants' attempt to consolidate the cases in a multidistrict litigation, it made strategic sense to dismiss them.[10] Further, this case and the related cases pending in other jurisdictions, have been the subject of many stories in the press and there are websites dedicated to the litigations involving the Net Worth Sweep.

FHFA's argument that Rule 23.1(c) does not apply here because FHFA, as conservator, has succeeded to "all rights, titles, powers and privileges of the [the Companies], and of any stockholder" (12 U.S.C. § 4617(b)(2)(A)(i)) is misplaced. One of the substantial bases for Plaintiffs' arguments that this Court has jurisdiction and Plaintiffs have standing is that HERA does not extinguish stockholders' rights in their stock. Plaintiffs have standing to prosecute Counts III and IV derivatively because FHFA has a manifest conflict of interest. *See* D.I. 23 at 50-53; *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999) (holding that 12 U.S.C. § 1821(d)(2)(A)(i), an analogous section to 12 U.S.C. § 4617(b)(2)(A)(i), does not bar a shareholder derivative suit where the conservator has a manifest conflict of interest). Here, Plaintiffs challenge the Net Worth Sweep—an agreement between FHFA, the conservator, and the Department of Treasury, a sister federal agency which has acquired a direct and controlling interest in the Companies and with which FHFA has obediently coordinated its actions. FHFA plainly has a manifest conflict of interest. *See First Hartford*, 194 F.3d at 1295.

[10] Plaintiffs do not agree that their claims are "identical" (FHFA Opposition at 2) to those raised in other jurisdictions. Rather, Plaintiffs stated in their Motion that *Defendants* argued that Plaintiffs' claims are duplicative. Motion at 4.

FHFA's complaints regarding the cost of providing the stockholders notice via Form 8-K ignore the reason for such a method as explained in the very cases cited in FHFA's brief.[11] Rule 23.1(c) permits notice to be given "in the manner that the court orders." Indeed, in *Bushansky*, the Court found that notice by Form 8-K filing and posting a link on the company's investor relations website would be more cost effective than the traditional mailing and publication methods of providing notice. *Bushansky*, 2014 WL 2905143, at *6. Regardless of the merits of FHFA's argument, providing notice by Form 8-K filings minimizes expense for the parties. Where FHFA first complains that notice is not required, it should not also be allowed to drive up the cost of notice if the Court finds that notice is, in fact, required here. Although FHFA attempts to distinguish several cases where Form 8-K filings provided notice to stockholders, none of those cases say that a Form 8-K cannot be used in this circumstance. In light of the efficiencies to be gained by Plaintiffs' proposed method of notice, the Court should reject Defendants' attempt to increase the costs of a requirement that Defendants do not believe has to be complied with anyway.

IV. Conclusion

Plaintiffs respectfully request that the Court grant leave for Plaintiffs to amend the Complaint as proposed in Exhibit A to the Motion, order that Counts III through X of the Complaint are dismissed without prejudice as to Plaintiffs, Fannie Mae, Freddie Mac, and the Companies' other stockholders and order that notice to stockholders pursuant to Fed. R. Civ. P. 23.1(c) be provided by Form 8-K filings.

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[11] "Other courts have been willing to implement combinations of cost-saving methods of notice, such as a press release by the company, a link on the company's investor website to a webpage that will be displayed for at least 30 days, and an 8–K filing with the SEC. *See Bushansky*, 2014 WL 2905143, at *6–7 (collecting cases). Although there is no sense in requiring more expensive methods when other methods will suffice, these less expensive methods require the company's cooperation." *Cannon ex rel. Bridgepoint Educ., Inc. v. Clark*, C.A. No. 13CV2645 JM NLS, 2015 WL 4624069, at *5 (S.D. Cal. Aug. 3, 2015).

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By: */s/ Myron T. Steele*

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Dated: October 6, 2016
1235327/42717

EXHIBIT E

Silverstein, Alan R.

From: Zimpleman, Thomas D. (CIV) <Thomas.D.Zimpleman@usdoj.gov>
Sent: Thursday, September 01, 2016 6:03 PM
To: Silverstein, Alan R.; 'Stearn, Bob'; Kishore, Deepthy C. (CIV)
Cc: Maddox, Robert C.; Cayne, Howard N.; Bergman, David B.; 'JKilduff@OMM.com'; 'mwalsh@omm.com'; MCiatti@kslaw.com; 'gmrodriguez@KSLAW.com'; Steele, Myron T.; Kelly, Christopher N.; Varma, Asim; Pittenger, Michael A.
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Counsel,

Subsequent to our meet and confer telephone conference, we have further considered your proposal to amend your complaint, but continue to oppose the filing of an amended complaint which adds counts and allegations rather than simply dismissing counts III-X of the existing complaint. As previously stated, we believe that amendment would be futile for reasons already set forth in the briefing on the motion to dismiss. We suggest that the best way to proceed is to stipulate to a briefing schedule on the motion to amend; we propose to file our oppositions 30 days from the date that the amended complaint is filed, and will agree to a commensurate amount of time for plaintiffs to reply.

Finally, defendants disagree with plaintiffs that an SEC 8-K filing is an appropriate mechanism to provide notice under Rule 23.1 of plaintiffs' filing an amended complaint resulting in the dismissal without prejudice of some but not all counts of a shareholder derivative lawsuit.

Please let me know if you wish to discuss further.

Best wishes,

Tom

From: Silverstein, Alan R. [mailto:asilverstein@potteranderson.com]
Sent: Thursday, August 25, 2016 4:23 PM
To: 'Stearn, Bob' <Stearn@RLF.com>; Kishore, Deepthy C. (CIV) <dkishore@CIV.USDOJ.GOV>
Cc: Maddox, Robert C. <Maddox@RLF.com>; Cayne, Howard N. <Howard.Cayne@APORTER.COM>; Bergman, David B. <David.Bergman@APORTER.COM>; 'JKilduff@OMM.com' <JKilduff@OMM.com>; 'mwalsh@omm.com' <mwalsh@omm.com>; MCiatti@kslaw.com; 'gmrodriguez@KSLAW.com' <gmrodriguez@KSLAW.com>; Steele, Myron T. <msteele@potteranderson.com>; Kelly, Christopher N. <ckelly@potteranderson.com>; Varma, Asim <Asim.Varma@APORTER.COM>; Zimpleman, Thomas D. (CIV) <tzimplem@CIV.USDOJ.GOV>; Pittenger, Michael A. <mpittenger@potteranderson.com>
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Counsel:

I write to follow-up on the meet and confer held on August 18. At the conclusion of that call, Defendants indicated they would discuss amongst themselves possible briefing schemes for addressing Plaintiffs' motion to amend the complaint and Defendants' motions to dismiss. Please let us know Defendants' position so we can get this case moving again.

On a related note, as Defendants have agreed that they do not object to the dismissal of original Counts III-X of the Complaint, we would like to reach agreement regarding the form of notice required under Rule 23.1. Plaintiffs propose an SEC 8-K filing. Please let us know if Defendants agree.

Best regards,

Alan

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Sent: Tuesday, August 16, 2016 6:16 PM
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Cc: Maddox, Robert C. <Maddox@RLF.com>; Cayne, Howard N. <Howard.Cayne@APORTER.COM>; Bergman, David B. <David.Bergman@APORTER.COM>; 'JKilduff@OMM.com' <JKilduff@OMM.com>; 'mwalsh@omm.com' <mwalsh@omm.com>; MCiatti@kslaw.com; 'gmrodriguez@KSLAW.com' <gmrodriguez@KSLAW.com>; Steele, Myron T. <msteele@potteranderson.com>; Kelly, Christopher N. <ckelly@potteranderson.com>; Varma, Asim <Asim.Varma@APORTER.COM>; Zimpleman, Thomas D. (CIV) <Thomas.D.Zimpleman@usdoj.gov>; Pittenger, Michael A. <mpittenger@potteranderson.com>
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Thanks Alan. I expect to be on the call as well.

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From: Silverstein, Alan R. [mailto:asilverstein@potteranderson.com]
Sent: Tuesday, August 16, 2016 6:13 PM
To: 'Kishore, Deepthy C. (CIV)'
Cc: Maddox, Robert C.; Cayne, Howard N.; Bergman, David B.; 'JKilduff@OMM.com'; 'mwalsh@omm.com'; MCiatti@kslaw.com; 'gmrodriguez@KSLAW.com'; Steele, Myron T.; Kelly, Christopher N.; Varma, Asim; Zimpleman, Thomas D. (CIV); Pittenger, Michael A.; Stearn, Bob
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

We can use the following dial-in information on Thursday:

Dial In: 1-800-525-8644
International Dial In: +1 719-234-0240
Passcode: 302 984 6096

Best regards,

Alan

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From: Kishore, Deepthy C. (CIV) [mailto:Deepthy.C.Kishore@usdoj.gov]
Sent: Tuesday, August 16, 2016 6:03 PM
To: Silverstein, Alan R. <asilverstein@potteranderson.com>
Cc: 'maddox@rlf.com' <maddox@rlf.com>; Cayne, Howard N. <Howard.Cayne@APORTER.COM>; Bergman, David B. <David.Bergman@APORTER.COM>; 'JKilduff@OMM.com' <JKilduff@OMM.com>; 'mwalsh@omm.com' <mwalsh@omm.com>; MCiatti@kslaw.com; 'gmrodriguez@KSLAW.com' <gmrodriguez@KSLAW.com>; Steele, Myron T. <msteele@potteranderson.com>; Kelly, Christopher N. <ckelly@potteranderson.com>; Varma, Asim <Asim.Varma@APORTER.COM>; Zimpleman, Thomas D. (CIV) <Thomas.D.Zimpleman@usdoj.gov>; Pittenger, Michael A. <mpittenger@potteranderson.com>; 'Stearn@RLF.com' <Stearn@RLF.com>
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Alan,

Will you be circulating a dial-in number for Thursday morning's conference? We intend to participate by phone.

Thank you,

Deepthy Kishore
Trial Attorney
U.S. Department of Justice
Civil Division | Federal Programs Branch
20 Massachusetts Ave. NW | Washington, DC 20530
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deepthy.c.kishore@usdoj.gov

From: Kishore, Deepthy C. (CIV)
Sent: Tuesday, August 16, 2016 5:08 PM
To: 'Varma, Asim'; 'asilverstein@potteranderson.com'; Zimpleman, Thomas D. (CIV); 'mpittenger@potteranderson.com'; 'Stearn@RLF.com'
Cc: 'maddox@rlf.com'; Cayne, Howard N.; Bergman, David B.; 'JKilduff@OMM.com'; 'mwalsh@omm.com'; MCiatti@kslaw.com; 'gmrodriguez@KSLAW.com'; 'msteele@potteranderson.com'; 'ckelly@potteranderson.com'
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Counsel for Treasury will be available at 10 a.m. on Thursday, as well.

From: Varma, Asim [mailto:Asim.Varma@APORTER.COM]
Sent: Tuesday, August 16, 2016 5:05 PM
To: 'asilverstein@potteranderson.com'; Zimpleman, Thomas D. (CIV); 'mpittenger@potteranderson.com'; 'Stearn@RLF.com'
Cc: 'maddox@rlf.com'; Kishore, Deepthy C. (CIV); Cayne, Howard N.; Bergman, David B.; 'JKilduff@OMM.com'; 'mwalsh@omm.com'; MCiatti@kslaw.com; 'gmrodriguez@KSLAW.com'; 'msteele@potteranderson.com'; 'ckelly@potteranderson.com'
Subject: Re: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

I'm available at 10:00 am Thursday.

From: Silverstein, Alan R. [mailto:asilverstein@potteranderson.com]
Sent: Tuesday, August 16, 2016 11:00 AM Eastern Standard Time
To: 'Zimpleman, Thomas D. (CIV)' <Thomas.D.Zimpleman@usdoj.gov>; Pittenger, Michael A. <mpittenger@potteranderson.com>; Varma, Asim; 'stearn@rlf.com' <stearn@rlf.com>
Cc: 'maddox@rlf.com' <maddox@rlf.com>; Kishore, Deepthy C. (CIV) <Deepthy.C.Kishore@usdoj.gov>; Cayne, Howard N.; Bergman, David B.; 'jkilduff@omm.com' <jkilduff@omm.com>; 'mwalsh@omm.com' <mwalsh@omm.com>; zzz.External.MCiatti@kslaw.com; 'gmrodriguez@kslaw.com' <gmrodriguez@kslaw.com>; Steele, Myron T. <msteele@potteranderson.com>; Kelly, Christopher N. <ckelly@potteranderson.com>
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Counsel:

The District of Delaware Local Rules, revised August 1, 2016, require an oral meet and confer (LR 7.1.1). Please let us know if Delaware counsel and any co-counsel who wish to attend are available for a meet and confer at 10:00 a.m. ET on Thursday, August 18, 2016.

Best regards,

Alan

Alan R. Silverstein
Associate
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From: Zimpleman, Thomas D. (CIV) [mailto:Thomas.D.Zimpleman@usdoj.gov]
Sent: Thursday, August 11, 2016 4:30 PM
To: Pittenger, Michael A. <mpittenger@potteranderson.com>; 'Varma, Asim' <Asim.Varma@APORTER.COM>; 'stearn@rlf.com' <stearn@rlf.com>
Cc: 'maddox@rlf.com' <maddox@rlf.com>; Kishore, Deepthy C. (CIV) <Deepthy.C.Kishore@usdoj.gov>; Cayne, Howard N. <Howard.Cayne@APORTER.COM>; Bergman, David B. <David.Bergman@APORTER.COM>; 'jkilduff@omm.com' <jkilduff@omm.com>; 'mwalsh@omm.com' <mwalsh@omm.com>; MCiatti@kslaw.com; 'gmrodriguez@kslaw.com' <gmrodriguez@kslaw.com>; Steele, Myron T. <msteele@potteranderson.com>; Silverstein, Alan R. <asilverstein@potteranderson.com>; Kelly, Christopher N. <ckelly@potteranderson.com>
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Counsel:

I write on behalf of Treasury and FHFA in response to your August 3 email. While we have no objection to plaintiffs effectively dismissing counts III-X of the original complaint by means of an amended complaint, we oppose the filing of an amended complaint which adds new counts and allegations, as we maintain that the new counts would be subject to dismissal for the reasons set forth in the current motions to dismiss, and that the additional allegations do not affect the legal arguments for dismissal presented in those motions.

Best wishes,

Tom

From: Pittenger, Michael A. [mailto:mpittenger@potteranderson.com]
Sent: Wednesday, August 03, 2016 6:12 PM
To: 'Varma, Asim'; 'stearn@rlf.com'
Cc: 'maddox@rlf.com'; Kishore, Deepthy C. (CIV); Zimpleman, Thomas D. (CIV); Cayne, Howard N.; Bergman, David B.; 'jkilduff@omm.com'; 'mwalsh@omm.com'; MCiatti@kslaw.com; 'gmrodriguez@kslaw.com'; Steele, Myron T.; Silverstein, Alan R.; Kelly, Christopher N.
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Counsel:

In response to your correspondence dated June 29, 2016 (copied below), Plaintiffs propose the attached Amended Complaint to effectively dismiss Counts III through X of the Complaint (D.I. 1, "Original Complaint"). Plaintiffs have made further amendments consistent with the facts and allegations made in the Original Complaint, including a new count for unjust enrichment against the Department of the Treasury. For your convenience, attached is a redline comparison of the Amended Complaint and the Original Complaint.

Please let us know if Defendants will consent to the filing of the attached Amended Complaint. Plaintiffs are available to meet and confer on this issue at a mutually agreeable time pursuant to Local Rule 7.1.1.

Thank you.

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From: Varma, Asim [mailto:Asim.Varma@APORTER.COM]
Sent: Wednesday, June 29, 2016 12:24 PM
To: Kelly, Christopher N. <ckelly@potteranderson.com>; 'stearn@rlf.com' <stearn@rlf.com>
Cc: 'maddox@rlf.com' <maddox@rlf.com>; 'Deepthy.c.kishore@usdoj.gov' <Deepthy.c.kishore@usdoj.gov>; 'Thomas.d.zimpleman@usdoj.gov' <Thomas.d.zimpleman@usdoj.gov>; Cayne, Howard N. <Howard.Cayne@APORTER.COM>; Bergman, David B. <David.Bergman@APORTER.COM>; 'jkilduff@omm.com' <jkilduff@omm.com>; 'mwalsh@omm.com' <mwalsh@omm.com>; MCiatti@kslaw.com; 'gmrodriguez@kslaw.com' <gmrodriguez@kslaw.com>; Steele, Myron T. <msteele@potteranderson.com>; Pittenger, Michael A. <mpittenger@potteranderson.com>; Silverstein, Alan R. <asilverstein@potteranderson.com>
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Mr. Kelly

Thank you for sending the draft notice of voluntary dismissal of counts III through VIII and the draft motion for dismissal of counts IX and X. However, Federal Rule of Civil Procedure 41(a), which "applies to dismissals of entire actions and not to individual claims,[illegible] is not the appropriate procedural vehicle for dismissing those specific claims. *New W. Urban Renewal Co. v. Viacom, Inc.*, 230 F. Supp. 2d 568, 571 n.4 (D.N.J. 2002); *see also Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 720 (5th Cir. 2010) ("Rule 41(a) dismissal only applies to the dismissal of an entire action—not particular claims.[illegible]). Because Plaintiffs want to dismiss less than all of their claims against Defendants, we believe a motion to amend pursuant to Rule 15 is the proper mechanism for dismissing counts III through X from this action. *See Chan v. Cty. of* Lancaster, 2013 WL 2412168, at *15-16 (E.D. Pa. 2013) ("The proper procedural mechanism for dismissing less than all of the claims in an action is a motion to amend under Federal Rule of Civil Procedure 15(a).[illegible]); Wright & Miller, Fed. Prac. & P. § 2362 ("A plaintiff who wishes to drop some claims but not others should do so by amending his complaint pursuant to Rule 15.[illegible]). Accordingly, because Rule 41 is not the appropriate procedural vehicle for partial dismissal, Defendants do not consent to Plaintiffs' proposed motion and submit that Plaintiffs cannot dismiss counts III-VIII by notice.

Thanks, Asim

From: Kelly, Christopher N. [mailto:ckelly@potteranderson.com]
Sent: Friday, June 24, 2016 2:29 PM
To: 'stearn@rlf.com'
Cc: 'maddox@rlf.com'; 'Deepthy.c.kishore@usdoj.gov'; 'Thomas.d.zimpleman@usdoj.gov'; Cayne, Howard N.; Varma, Asim; Bergman, David B.; 'jkilduff@omm.com'; 'mwalsh@omm.com'; zzz.External.MCiatti@kslaw.com; 'gmrodriguez@kslaw.com'; Steele, Myron T.; Pittenger, Michael A.; Silverstein, Alan R.
Subject: RE: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Counsel,

Further to Michael Pittenger's correspondence dated May 19, 2016, attached please find a draft notice of voluntary dismissal of Counts III-VIII of the Class Action and Derivative Complaint and a draft unopposed motion for voluntary dismissal of Counts IX and X (with Exhibit A and proposed order).

We plan to file these documents promptly and would like to represent that the motion is unopposed. Please let us know if you have any comments or edits to the motion, Exhibit A, or proposed order, and whether we can represent to the Court that the motion is unopposed. Thanks.

Best,
Chris

From: Houghton, Melissa A.
Sent: Thursday, May 19, 2016 2:24 PM
To: 'stearn@rlf.com' <stearn@rlf.com>
Cc: 'maddox@rlf.com' <maddox@rlf.com>; 'Deepthy.c.kishore@usdoj.gov' <Deepthy.c.kishore@usdoj.gov>; 'Thomas.d.zimpleman@usdoj.gov' <Thomas.d.zimpleman@usdoj.gov>; 'Howard.cayne@aporter.com' <Howard.cayne@aporter.com>; 'Asim.varma@aporter.com' <Asim.varma@aporter.com>; 'David.bergman@aporter.com' <David.bergman@aporter.com>; 'jkilduff@omm.com' <jkilduff@omm.com>; 'mwalsh@omm.com' <mwalsh@omm.com>; 'mciatti@kslaw.com' <mciatti@kslaw.com>; 'gmrodriguez@kslaw.com' <gmrodriguez@kslaw.com>; Steele, Myron T. <msteele@potteranderson.com>; Pittenger, Michael A. <mpittenger@potteranderson.com>; Kelly, Christopher N. <ckelly@potteranderson.com>; Silverstein, Alan R. <asilverstein@potteranderson.com>
Subject: Jacobs v. Federal Housing Finance Agency, C.A. No. 15-708 (D. Del.)

Mr. Stearn, please find attached a letter from Michael A. Pittenger, Esq. regarding the above matter.

Thank you,
Missy

Melissa A. Houghton
Secretary to Philip A. Rovner
Alan R. Silverstein
John E. James

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EXHIBIT F

DOBBS
LAW OF REMEDIES

DAMAGES–EQUITY–RESTITUTION

Second Edition

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Dan B. Dobbs

Professor of Law
University of Arizona

Volume 1

Chapters 1–5

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Chapter 4

RESTITUTION

Analysis

A. THE NATURE OF RESTITUTION

§ 4.1 Restitution and Unjust Enrichment

§ 4.1(1) Core Ideas of Restitution

Definitions and Goals

Defendant's gains, not plaintiff's losses. Restitution is a large, diverse and important topic with a significant literature of its own.[1]

§ 4.1(1)

1. The leading contemporary work is Professor George Palmer's four-volume treatise. G. Palmer, Law of Restitution (4 vols. 1978 & Supps.). The Restatement of Restitution (1937) is still in use by the courts and writers. See also J. Dawson, Unjust Enrichment (1951); G. Douthwaite, Attorney's Guide to Restitution (1977); R. Goff and G. Jones, The Law of Restitution 60 (2d ed. 1978) (English); G. Fridman & J. McLeod, Restitution (1982) (Canadian, with some references to other North American authorities); International Encyclopedia of Comparative Law, Restitution—Unjust Enrichment and Negotiorum Gestio (Vol. X), including Palmer, History of Restitution in Anglo–American Law (Chapter 3) (1989); Englard, Restitution of Benefits Conferred without Obligation (Chapter 5) (1991); and Stoljar, Negotiorum Gestio (Chapter 1984). Other works are listed in Wade, The Literature of the Law of Restitution, 19 Hast. L.J. 1087 (1968).

Among recent articles dealing with broader issues in restitution are Dawson, The Self-Serving Intermeddler, 87 Harv. L.Rev. 1409 (1974); Dawson, Judicial Revision of Frustrated Contracts: The United States, 64 B.U.L.Rev. 1 (1984); Dawson, Restitution without Enrichment, 61 B.U.L.Rev. 563 (1981); Farnsworth, Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Con-

Most generalizations about restitution are trustworthy only so long as they are not very meaningful, and meaningful only so long as they are not very trustworthy. There are, however, some core ideas.

Although the term restitution is used in criminal as well as civil cases, this chapter deals with restitution only in the civil sense.[2] The word restitution means restoration. Restitution is a return or restoration of what the defendant has gained in a transaction. It may be a return of a specific thing or it may be a "return" of a money substitute for that thing. For example, if the defendant fraudulently obtains title to Blackacre from the plaintiff, the plaintiff may be entitled to specific restitution of Blackacre itself. If the defendant has in the meantime sold Blackacre to an innocent purchaser, the plaintiff may be entitled to restitution in money.

Money restitution in excess of damages. Sometimes a restitutionary recovery is more desirable for the plaintiff than a recovery of damages. Suppose the defendant steals the plaintiff's watch, the value of which was admittedly only $10. The defendant is able to sell the watch for more than its value, say $20. The plaintiff's *loss* is a watch valued at $10 and his *damages* recovery measured by loss is $10. But the defendant's *gain* is $20 and the plaintiff's *restitutionary* recovery measured by that gain is $20. In this example, the plaintiff is entitled to restitution.[3] Not all restitution is in money as it is in the watch example. The watch example shows, however, that when restitution is made in money, the restitution remedy can yield results quite different from the money remedy called damages.

Unjust enrichment basis of restitution claims. Restitution is a simple word but a difficult subject, partly because restitutionary ideas appear in many guises.[4] In spite of their diversity, restitution claims

tract, 94 Yale L.J. 1339 (1985); Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum.L.Rev. 504 (1980); Kovacic, A Proposal to Simplify Quantum Meruit Litigation, 35 Am. U.L.Rev. 547 (1986); Laycock, The Scope and Significance of Restitution, 65 Tex. L.Rev. 1277 (1989); Levmore, Explaining Restitution, 71 Va.L.Rev. 65 (1985) (economic analysis of restitution issues); Litman, The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust, 26 Alberta L.Rev. 407 (1988).

A number of other articles deal with particular issues or settings in restitution, sometimes with useful observations about restitution in general. E.g., Galligan, Extra Work in Construction Cases: Restitution, Relationship, and Revision, 63 Tulane L.Rev. 799 (1989). Substantive aspects of restitution are often involved in articles on contracts and sometimes torts.

2. Judges and lawyers sometimes speak of a convicted criminal's duty to make restitution to his victim as a condition of probation or other leniency in the sentence. Restitution in this sense often only means compensation for actual losses suffered by the criminal's victim, not necessarily a restoration of gains received, although the two may come to the same thing in many instances. Restitution in criminal cases has little relationship to restitution in civil cases as covered in this chapter.

3. See § 5.18 below.

4. For example, a restitution claim may be familiar under another name. The claims for contribution and indemnity, which are restitutionary claims, are like this. See II G. Palmer, Law of Restitution § 10.6 (1978 & Supps.). Courts may allow

are bound by a major unifying thread. Their purpose is to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction.[5]

Substantive and remedial sides of unjust enrichment. Unjust enrichment has both a substantive and a remedial aspect. The substantive question is whether the plaintiff has a right at all, that is, whether the defendant is unjustly enriched by legal standards. Sometimes unjust enrichment is so obvious that it is not important in the analysis: if the defendant steals the plaintiff's watch, he must restore it. The defendant in such a case is a wrongdoer and the plaintiff has title to the goods. Tort and title make the unjust enrichment clear.

When the defendant gains advantages without tort or breach of contract, the substantive question of unjust enrichment is often not so easy to answer. I might save your house by putting out a fire, thus giving you an advantage or benefit, but in the absence of additional facts it is not clear that you are unjustly enriched. The question raised by such cases is mainly substantive and only slightly remedial. The purely remedial questions are different. The remedial question is concerned first with whether, among the remedies possible, restitution is an appropriate or the most appropriate choice. Second, because the defendant's gains can often be measured in different ways, the remedial question is concerned with the appropriate measure or form of restitution.[6]

Applications

Contract breach; unenforceable contracts. Restitution is often an appropriate remedy for breach of an enforceable contract, whether or not there is a "rescission" of that contract.[7] Suppose the plaintiff partly performs a contract before the defendant breaches. Restitution for the value of the plaintiff's performance is an alternative to the ordinary damages remedy. When the contract itself is unenforceable, restitution is usually the *only* remedy available for benefits the plaintiff has conferred upon a defendant in part performance. For instance, if the plaintiff partly performs an agreement that is unenforceable because of the statute of frauds, the plaintiff may have restitution for the value of his performance.[8] The same is true when the contract is unenforceable because one party is a minor,[9] or because the contract has become impracticable of performance.[10] Sometimes restitution is available, too, when the contract is illegal.[11]

a restitutionary recovery without mentioning restitution or any of the words associated with it. E.g., Popp v. Gountanis, 221 Mont. 267, 718 P.2d 340 (1986). See § 4.1(2) below, classifying and illustrating a range of restitution cases.

5. Restatement of Restitution § 1 (1937).

6. The distinctions observed in this paragraph are developed in more detail in § 4.1(2) below.

7. See generally § 12.7 below.

8. See § 13.2 below.

9. See § 13.4 below.

10. See § 13.3 below.

11. See § 13.6 below.

Mistake. Benefits conferred by mistake often provide grounds for restitution of the benefits. A plaintiff who enters into a contract with the defendant under an important mutual mistake may be able to avoid the contract altogether and recover back any benefits he has conferred in performing.[12] For example, the plaintiff might recover any prepayments he has made on the purchase price.

Quite aside from such mutual mistake, the plaintiff may transfer money or property under a unilateral mistake, as where he mistakenly overpays money due under a contract or mistakenly delivers a package to the wrong person. Restitution of the money overpaid or the package delivered is the normal rule in such cases.[13] A very similar rule is that the plaintiff is entitled to restitution of money paid to satisfy a judgment that is subsequently reversed or vacated.[14]

Torts and subtortious wrongs. One whose money or property is taken by fraud [15] or embezzlement,[16] or by conversion,[17] is entitled to restitution measured by the defendant's gain if the victim prefers that remedy to the damages remedy. Breach of fiduciary duty of any kind, if it yields gains to the fiduciary, is a favorite ground for restitution.[18] The plaintiff whose copyright [19] or trademark [20] is infringed is likewise commonly awarded restitution based on the gains to the infringer in the form of profits from the infringement.

Almost any kind of case in which the defendant gains from the plaintiff and in which it would be unjust or impolitic to permit the defendant to retain the gain is a good candidate for a restitutionary recovery. Defendant's gains from tortious interference with the plaintiff's contract,[21] or from commercial or political bribery,[22] from undue influence or duress [23] are all recoverable as restitution in a proper case.

Other cases. Most restitution cases fall into one of the categories just listed; they provide a return to the plaintiff of benefits conferred in connection with contracts, enforceable or not, in connection with mistakes, and in connection with torts and wrongs. But restitution is open-ended; it is not limited definitionally to such cases. The plaintiff may confer a benefit upon the defendant without mistake and without wrongdoing or breach of an agreement by the defendant. In many such cases the plaintiff will be denied restitution in spite of the defendant's unjust enrichment because it will be important to protect the defen-

12. See §§ 11.3–11.5 below.

13. E.g., Blue Cross Health Servs., Inc. v. Sauer, 800 S.W.2d 72, 75 (Mo.App.1990); § 11.7 below (mistake in performance).

14. E.g., Mathison v. Clearwater County Welfare Dept., 412 N.W.2d 812 (Minn. App.1987).

15. See § 9.3 below.

16. See § 6.1 below.

17. See § 5.18 below.

18. See Douthwaite, Profits and Their Recovery, 15 Vill.L.Rev. 346 (1970).

19. See § 6.3(4) below.

20. See § 6.4(4) below.

21. See § 6.6(3) below.

22. See § 10.6 below.

23. See § 10.2 below.

dant's right to choose for himself what benefits he wants.[24] But if the defendant's right of choice is not in issue, the plaintiff may be entitled to restitution even when he has intentionally conferred a benefit, without mistake, tort or contract breach. For instance, the doctor who provides medical attention to an unconscious person she has never seen before is entitled to recover for the benefit conferred.[25]

Measuring Benefits for Restitution

Different measures. As with damages, restitution can be measured in different ways. Some of the different ways in which benefits to a defendant can be measured come in for discussion later in this chapter.[26] The most obvious benefit measure is the objective or market value of some asset which the defendant has but which in some relevant sense belongs to the plaintiff. However, restitution may be measured in some other ways. One of those ways must be explained here to show the basic scope and meaning of restitution.

Identifying benefits with the gains they produce. Suppose a thief takes the plaintiff's $10 watch and sells it for $20. The thief is liable for $20, as "restitution." One possible justification for this result is that we think the thief's sale price is good evidence of the actual value of the watch, in which case $20 would represent *damages* for the plaintiff's loss. But even if the plaintiff concedes that the watch was only worth $10, he can recover the $20 as restitution. Why is such a recovery considered to be restitution or "restoration"? How can the plaintiff be "restored" to $20 when what he had in the first place was a $10 watch? If the thief still had the watch, restoration might be in specie through the action of replevin which would give the watch itself back to the plaintiff. Since the thief no longer has the watch, one might think of restoration in terms of its money value, but that is only $10.

The defendant is liable for the $20 because the fund of $20 is perceived as a gain produced by the plaintiff's property. By identifying the $20 as a product of the plaintiff's property, we can think of it as a replacement or substitute for the property. The plaintiff entitled to recover the watch is equally entitled to recover whatever is produced by or substituted for the watch.

This is a potent principle of great value and wide application. It does not mean that the plaintiff will invariably be entitled to restitution or that restitution will always be measured so favorably. But when restitution is appropriate at all, this principle by which the plaintiff's entitlements are identified with the defendant's gains may provide the plaintiff with a remedy far superior to any other.[27]

24. See § 4.9 below.

25. See § 4.1(2) below, analyzing this kind of case and giving further examples.

26. See §§ 4.1(4) & 4.5 below.

27. As the example in the text indicates, to recover the defendant's gains may be to recover a greater sum of money. Other advantages include the possibility of making a monetary recovery when the

Relation of Restitution to Damages

Remedial differences. Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss.[28] As the watch example shows, in some cases the defendant gains more than the plaintiff loses, so that the two remedies may differ in practice as well as in principle. The plaintiff may be able to claim whichever remedy is more advantageous.

Remedial similarities. Although restitution differs from damages, the two remedies can produce exactly the same result in some situations. In the watch example, damages and restitution would be exactly the same if the defendant's gain and the plaintiff's loss matched exactly. If the defendant sold the watch for its market value or if he did not sell it at all but merely kept it,[29] the plaintiff's claim can be seen as *either* restitution *or* as damages because it will perform both the compensatory purposes of damages law and the disgorgement purposes of restitution law. In such cases the claim is not "really" restitution or "really" damages.

Characterizing the award as restitution or damages. When restitution and damages would produce the same award, it is often unimportant to characterize the claim at all. But sometimes the claim must be characterized as one or the other. For example, if the statute of limitations has run on damages claims but not on claims for restitution, the plaintiff will assert unjust enrichment and claim restitution to take advantage of the statute. If a liability insurance company must pay "damages" for which its insured is legally liable, the insurer may argue that its coverage does not protect the insured against liability for "restitution."[30] How is the claim to be characterized when the damages recovery and the restitutionary recovery would be identical in amount and the recovery would serve both the purposes of compensation and disgorgement?

The watch example presents this question. The plaintiff in that example has a good substantive claim grounded in the defendant's tort, so a remedy that provides compensation to the plaintiff can be viewed

plaintiff cannot prove the amount of actual damages, the possibility of making a recovery of specific property, and the possibility of gaining priorities over other creditors of the defendant. These possibilities are illustrated in many different places in this treatise. Some of them can be seen in § 6.1 below.

28. Courts sometimes speak of "damages" measured by "restitution" or a "restitutionary measure of damages," but such locutions ignore that difference in principle between the two remedies. This treatise attempts to avoid such usages.

29. Some authority, based on the old forms of action, might refuse restitution in the absence of a sale.

30. E.g., Boeing Co. v. Aetna Casualty and Surety Co., 113 Wash.2d 869, 784 P.2d 507 (1990). *Boeing* reflects judicial differences of opinion as to whether response costs for which an insured entity is liable under CERCLA, 42 U.S.C.A. § 9601 et seq. count as damages covered under a liability policy or whether the insured's liability for response costs is a liability for "restitution."